



Newsletter

President: Robert W. Monaghan

Editor-in-Chief: Armen Shahinian

Seaview Resort And Spa To Host 30th Annual Meeting Of Surety Claims Institute June 22-24, 2005



The 30th Annual Meeting of the Surety Claims Institute will be held at the Seaview Resort and Spa in Absecon, New Jersey, outside of Atlantic City, on June 22-24, 2005. As reported in Jim Morelewicz’ article in the last edition of the Newsletter, as an added incentive for company personnel attending this year’s meeting, the Board of Directors has approved a reduction in Wednesday and Thursday night’s meal costs. Company representatives will pay only \$50 each night, and the reduced price includes a spouse or significant other at no extra charge.

In addition, for company employees in fidelity and surety claims departments with less than five years’

experience, a special half-day program will be held on Wednesday, June 23, 2005 covering a variety of practical tips in the handling of fidelity and surety claims. The focus will be on fundamentals and there will be no charge for the attendees of this program, who also will be invited to the Thursday and Friday seminar programs at no charge.

As usual, this year’s Annual Meeting will feature a reception and buffet dinner on Wednesday evening (informal), golf and tennis tournaments on Thursday afternoon, a children’s party on Thursday evening, and more formal reception and banquet dinner on Thursday night. Thursday night’s band will be “Liverpool,” a tribute to the

Beatles. Those who have seen this group give it two thumbs up.

Gil Schroeder has once again put together an outstanding program. The schedule and program topics are reproduced later in this Newsletter. We look forward to seeing all of you at the Seaview Resort and Spa.

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SURETY CLAIMS INSTITUTE

www.scinst.org

Officers

President

Robert W. Monaghan
Hermes Netburn
111 Devonshire St., 8th Fl.
Boston, MA 02109
Ph: (617) 210-7760
Fax: (617) 728-0052
email: rmonaghan@hns.org

Vice President

Keith Witten, *Kansas City, MO*
David Pharis, *Wayne, PA*

Secretary

James Morelewicz, *Palm Coast, FL*

Treasurer

John Tomaine, *Warren, NJ*

Newsletter Staff

Editor-In-Chief

Armen Shahinian
Wolff & Samson PC
One Boland Drive
West Orange, New Jersey 07052
Ph: (973) 530-2002
Fax: (973) 530-2202
email: ashahinian@wolffsamson.com

Articles Editor:

William S. Piper, *Chicago, IL*

Surety Casenote Editor:

Ira Sussman, *Hoffman Estates, IL*

Fidelity Casenote Editor:

John J. Tomaine, *Warren, NJ*

Legislative Activities Editor:

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Comments From The Editor

Well, they seem to be dropping like flies. Since the last edition of this Newsletter, XL Specialty Insurance Co., Crum & Forster Insurance Group, and Harleysville Insurance Company have all announced that they will be withdrawing from the surety market. Nervous anyone? Perhaps it is healthy for the surety industry to go through these periods of high losses and upheaval in order to create the conditions for a restructuring of the manner in which surety bonds are issued and priced, but for those whose livelihoods depend upon the surety industry, it is mighty uncomfortable. Friends suddenly find themselves with less job security and sometimes the need to relocate in order to stay in the industry to which they have devoted great efforts. Other friends find that there are simply less jobs of the stature they once enjoyed and seek alternative employment outside the surety industry.

Underwriting standards must continue to evolve and pricing will presumably continue to be adjusted so as to justify the capital allocated by insurance companies to support surety exposures. I suppose that the underwriting cycle is inevitable; that is, when the surety product

makes money and outperforms the insurance market, insurance executives tend to put pressure on surety departments to expand their business. Because the demand for the surety product generally is not capable of being increased dramatically on a macro level, the result has inevitably been to drive down underwriting standards to increase production, with an inevitable increase in losses. With the surety industry, these loss cycles tend to wipe out decades of profits and sour senior management in the insurance industry on the surety market. I wish I had an easy solution which might break the cycle in order to diminish the impact on the lives of friends in the industry who are dislocated by the cyclical process described above, but I suppose it is all an unavoidable part of market cycles. Unfortunately, the human toll can be substantial. Let me convey my best wishes and hopes to all members of the Surety Claims Institute that these market cycles do not unduly impact you and your families, and I look forward to calmer waters.

Armen Shahinian
Editor-in-Chief

**IMPORTANT NOTICE RE
ELECTRONIC DELIVERY OF NEWSLETTER**

Based upon the survey conducted in connection with the last edition of this Newsletter, the overwhelming majority of readers would prefer that the Newsletter be transmitted electronically. This issue will be addressed by the Board of Directors of the Surety Claims Institute at the Annual Meeting in June 2005. If you have not received this Newsletter electronically, you are not on our electronic delivery list. Therefore, you should provide your e-mail address to Armen Shahinian at ashahinian@wolffsamson.com so that you may be assured of electronic delivery of the Newsletter in the future.

Cost Control in Dispute Resolution

**By: George W. Thomas, Esq., Delta Consulting Group, Inc., Occaquan, VA
Richard S. Bayer, Esq., The Realignment Group, Ltd., LaJolla, CA**

Construction controversies are as much a part of a construction project as a skip loader or a jack hammer. Differences of interpretation in plans, specs, means and methods abound amongst contractors, owners and design professionals. It is no wonder--the act of construction is the practice of solving problems. But when a "claim" or "dispute" arises on a construction site, the parties' pre-agreed methods for problem solving are rarely very efficient in resolving the underlying problems.

Large construction projects almost always use construction documents derived from base AIA agreements. These agreements are largely "rights" driven, rather than interest driven. The claims section of AIA 201 is instructive.

Although the title of Section 4.3 is "Claims and Disputes," the term "disputes" appears only once in the following 11 paragraphs. The same is true of Section 4.4, entitled "Resolution of Claims and Disputes"—only "Claims" get resolved in the following 8 paragraphs. This same construction continues in Sections 4.5 "Mediation" and Section 4.6 "Arbitration."

Webster's defines a "dispute" as "an assertion of opposing views or claims: a disagreement as to rights."¹ It defines a "claim" as a demand for something due or believed to be due.² Although Webster's does make reference to a claim within the definition of dispute, it seems clear that a "dispute" is both broader and

less formal than a "claim." Yet the AIA pre-selected process available for "resolution" of claims is formal and blame-assessing with one party winning the argument every time. Is this the most efficient "dispute" resolution process for all "claims"?

Efficiency requires analysis of the cost effectiveness of any resolution process. Expenses can derail the path of a very promising case and force a "nuisance value" or undesirable settlement. Expenses are like the pebble in a pond; the effect of each expense multiplies and expands outward affecting the value, size and effect of later expenses. If the pebble is large enough, the "waves" cause derailment. Thus, the ultimate goal of any dispute resolution process is to cut the direct expenses of resolving a "claim."

Direct expenses have two components: the battle costs and the settlement costs. The whole point of the "battle" is to minimize or eliminate "settlement" costs. That means that battles need to be fought wisely in order to have the desired settlement effect. Choosing the battle site is especially important in strategic warfare; choosing the battle site is what pre-selected resolution clauses are all about.

Because of dissatisfaction with court resolutions, the AIA long ago adopted the American Arbitration Association arbitration paradigm as the chosen forum for the battle. The reasons for this choice included the perception that arbitration was less expensive and less protracted (thus, "more efficient") than traditional litigation. In addition, construction professionals and experts could act as

1. Merriam-Webster's Dictionary of Law©1996.

2. *Id.*

arbitrators, thus giving the parties the comfort that they were arguing before peers and not lay juries. A recent AAA study indicated that parties are most concerned with expense, predictability and time in choosing “battle” forums.³ However, the experience of the arbitration bar is very instructive. While 56% of trial attorneys find arbitration less expensive than lawsuits, 44% find it equally or more expensive than a lawsuit.⁴

In addition, many who choose arbitration either fail to understand or down-play that the arbitrators are the unassailable judges of the law and the facts and thus, an arbitration award based on a flat out wrong legal conclusion cannot be overturned in court. As the Illinois Court of Appeals pointed out recently in *Sloan Elec. v. Prof'l Realty and Dev. Corp.* 353 Ill.App.3d 614, 620, 819 N.E.2d 37, 43 (2004):

The purpose of arbitration is to resolve a dispute in less time and with less expense than litigating in court. *Edward Electric Co. v. Automation, Inc.*, 229 Ill.App.3d 89, 96, 171 Ill.Dec. 13, 593 N.E.2d 833 (1992). Parties who agree to arbitration have chosen the means to resolve their dispute, and judicial modification of an arbitrator's decision deprives the parties of that choice. *Hawrelak*, 316 Ill.App.3d at 179, 249 Ill.Dec. 241, 735 N.E.2d 1066. As such, an appellate court's review of an arbitrator's award is much more limited than review of a trial court's decision, and, whenever possible, a court must construe an award so as to uphold its validity. *Hawrelak*, 316 Ill.App.3d at 178-79, 249 Ill.Dec. 241, 735 N.E.2d 1066. A court has no power to determine the merits of the award simply because it strongly disagrees with the arbitrator's contract interpretation. *Canteen Corp. v. Former Foods, Inc.*, 238 Ill.App.3d 167, 179, 179 Ill.Dec. 342, 606 N.E.2d 174 (1992). Also, a court cannot overturn an award on the ground that it is illogical or

inconsistent. *Perkins Restaurants Operating Co., L.P. v. Van Den Bergh Foods Co.*, 276 Ill.App.3d 305, 309, 212 Ill.Dec. 740, 657 N.E.2d 1085 (1995). In fact, an arbitrator's award will not be set aside even for errors in judgment or mistakes of law or fact. *Roubik v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 181 Ill.2d 373, 381, 230 Ill.Dec. 1, 692 N.E.2d 1167 (1998).

In 1992, the California Supreme Court held that an arbitrator's decision is not generally reviewable for errors of fact or law, even when errors appear on the face of the award and cause substantial injustice.⁵ Thus, despite carefully choosing your arbitrator, an arbitration is often much less “predictable” than a court of law.⁶

The concerns with the battlefield have given rise to many more options than just litigation or arbitration including Dispute Resolution Board, mini-trials, med-arb (mediation that if unsuccessful is immediately followed by arbitration), mediation, etc.⁷ Interestingly, almost all of the forums, with the exception of mediation, are processes that are designed to assign blame or responsibility dealing with rights over interests. The problem is that these are pre-selected processes chosen before the dispute arises. Although these processes will eventually end the “dispute,” they are not designed to avoid further disputes by solving the underlying problems.

A pre-selected battlefield allows no option for deciding how or where or when or what will be decided on the battlefield. In fact,

5. *Moncharsh v. Heily & Blase*, 3 Cal.4th 1, 6, 832 P.2d 899 (1992).

6. Federal courts have judicially created an exception where an arbitration award exhibits a manifest disregard of the law but the courts have shown great reluctance to disturb an arbitration award: "Our review under the doctrine of manifest disregard is 'severely limited' ... It is highly deferential to the arbitral award and obtaining judicial relief for the arbitrator's manifest disregard of the law is rare." *Postlewaite v. McGraw-Hill*, 333 F.3d 42, 49 (2d Cir. 2003).

7. For a good summary and definition of the choices, see Steve Nelson, Esq., EVP & General Counsel, Suretec Insurance Company, *Glossary of Alternative Dispute Avoidance and Resolution Terms* at www.suretec.com/glossaries-dispute.htm.

3. *Dispute-Wise™ Business Management*, American Arbitration Association, 2003.

4. ABA Section of Litigation Task Force on ADR Effectiveness, *American Bar Association*, August, 2003.

when the issue is given over to the lawyers, the preconceived notion of the lawyer is that all disputes must be raised in the resolution process or risk being barred in future proceedings. If all claims are brought in one action, limited disputes almost always grow into nuclear controversies. Efficient battlefield design to avoid nuclear conflagration should be one goal of alternative dispute resolution.

How can one select a process that allows for battlefield design? Because no square peg can ever fit snugly in a round hole, efficient design of the hole requires knowledge of the shape of the peg. The CEO of a major construction company would never purchase a health care plan where the only solution to every diagnosis is penicillin. Why should that executive sign a contract where the only solution to every problem is arbitration?

The emerging concepts of Intervention Partnering™ and Project Realignment™ in fact respond to this conundrum. Because generally no specific construction problem can be anticipated, no specific system can be designed in advance that adequately addresses the specific problem. Consequently, the best approach is to define the problem (with the assistance of the participants), then design a system to resolve that problem. In order to define the problem, the parties should have a mechanism to recognize a problem before it completely stalls the project.

There are several “usual suspects” that indicate a problem project, including:

- Poor or unapproved CPM schedules
- Change Requests are not processed
- RFI turn-around times are slow
- Major unforeseen conditions
- Stops and starts
- Nitpicking contract provisions
- Attitudes shift to adversarial or CYA
- Written-vs.-Verbal communication
- A party has claims consultant
- Time extensions are not processed
- Submittal approvals are behind
- Submittals are late or incomplete
- Out of Sequence Work
- Mobs or de-Mobs
- Posturing & unreasonableness
- Finger-pointing or blame shifting
- Party wants indemnity
- Party has attorney involved

- Bonding Company is notified or involved
- Subs have cash flow problems
- Answer shopping

When direct negotiation on some or all of these issues has failed, the parties normally call in the lawyers and the claims experts. The project grinds to a halt as the parties arm themselves for battle as outlined in Sections 4.3, 4.4 and 4.5 of the AIA contract.

All of these processes are “rights” based—analyzing the strength of a party’s position based on contractual provisions that have little to do with building the project and everything to do with defining rights and assessing blame, ultimately leading to increased litigation and arbitration.

To halt this process, the parties have to step outside the “claims” specification in the contract and move back to the “change order” specification because something on the project must change in order to move the project forward. The change order specification is designed to recognize all the usual suspects of a troubled project and to treat them appropriately.

In the change order specification, parties routinely define the problem and negotiate directly over a solution. Merely because the problem is large and complicated does not mean it is necessarily less susceptible to resolution. The larger the problem, the more important its resolution is to the very companies fighting over it because appropriate resolution can preserve the parties’ individual integrity and their working relationships (often lost or severely damaged in an imposed, fault-based resolution). As addressing the problem becomes a higher priority (and thus grabs the attention of the highest levels of all companies), executives often take the wrong turn—turning to the lawyers, rather than turning to their project partners.

Turning to one’s project partners is not easy because the relationship has often soured over the very problem that begs for resolution. What is necessary is a reality check amongst these project partners—a time out to review and analyze the problem and what tomorrow looks like without this problem resolved. What is also necessary is a way to preserve the rights of the parties under the contract so they can address the interests of the parties (get the project moving

again). A contractual time out, allowing the executives and the various companies involved to get their arms around the problem and design a system to resolve it, makes ultimate sense at this stage.

Here, processes like Project Realignment™ (“PR”) can assist. PR assembles the companies, at all important levels, for a facilitated discussion of the extent of the problem and what processes may be available to assist in its resolution.⁸ The ultimate length of the process is dependent upon the depth and breadth of the issues, but, it is designed to be a short-term affair, 10-90 days, as a slow, cumbersome process will never meet the needs of a project.

This is not a traditional mediation session where the mediator explores ways to settle the case. This is a facilitated discussion designed to allow the parties to understand the extent of the problem and internalize the effects on their various companies of a protracted battle on the issues. However, it is a mediative process in the sense that it provides a confidential setting for such a discussion.⁹

The concept of “realignment” means realigning the parties’ conceptions of the issues and breaking the parties into the most effective working groups for resolution. Once the companies define the nature and extent of the problem through breakout sessions (e.g. if things do not change, the project will be delayed 18 months and will cost (with battle costs) the parties over \$20 million), the parties are “realigned”. The realignment results in project executives, project managers, subcontractors, etc., being grouped together (even to the level that they sit together during various parts of the process). This allows people with similar problems and concerns to interact, to concentrate and focus. It removes the burden of company protective thinking from the project managers so that they can focus on project level thinking that can lead to issue resolution.

8. “Companies” includes all the parties necessary to resolve the dispute: the owner, the general contractor, the design professionals and any important subcontractors.

9. Almost all state and federal courts recognize the confidentiality of mediations, either through statute or common law rule.

The task of the parties, once the extent and nature of the problem is defined, is to devise a recovery plan. The recovery plan is designed by the Project Managers, the people with the most experience on this specific job and with the greatest knowledge of the strengths and obstacles available. This plan is then proposed to the Executive Team in a follow-up session for their comment, concurrence, amendment or rejection. In proposing the plan, the PM Team is responsible to all the executives, not just their own superiors. Consequently, the plan must be candid, articulate, defensible and do-able.

Part of the realignment process involves assessing barriers to recovery: what could keep the group from getting the project back on track. One typical barrier is the cluster of unresolved disputes between the parties. The laundry list or “slate” of delays, cash flow interruptions and general bad feelings that have accumulated during the festering of the disputes must be corrected quickly and efficiently. Here, the parties have available to them all the tools of traditional alternative dispute resolution—not just arbitration or mediation. Available tools include independent experts (scheduling, quantification, legal) employed by the project to facilitate and collaborate on the extent of the problem and the possible remedies. This gives the parties independent and neutral verification of entitlement and quantification.

The costs for these services are split among the warring parties: typically the owner, the general contractor, and possibly several subcontractors. Questions involving confidentiality are addressed in the PR agreement by adopting both statutory and contractual mediation confidentiality. This allows broad and deep data gathering without fear that party input will be used against them in a subsequent court action or arbitration.

In the PR experience, the experts meet with the Executive Team and PM Team for a preliminary assessment (“PA”), usually within two weeks of their retention. The PA is a quick look at the facts of the case and the likely outcome. The experts provide independent analysis to allow the team to move away from entrenched positions. The parties still have their own legal counsel and often have their own forensic or scheduling experts, but the parties

work from the factually neutral report and analysis by the project's neutral expert team.

Because the parties are working under the change order process, this "Preliminary Analysis" becomes industrial strength change order backup. Through it, parties approach settlement with greater confidence in the neutrality of both the data and, more importantly, the interpretations (two things that tend to keep parties at bay in any dispute). The "industrial strength" back-up also supports the parties' decisions upon review by third parties.

Contemporaneously with negotiations on the slate of past issues, the parties have directly negotiated or, through the facilitation group, hired an independent neutral to assist the parties with scheduling and getting the project back on track. This begins to get the project going again. The scheduling person is not a retired judge or professional arbitrator who holds "hearings" on schedules, but is a skilled, CPM scheduler that has the respect, and thus the buy-in, of the parties.

The Project Realignment™ method has worked on very large projects with strongly adversarial parties deeply entrenched in their positions. The process has historically generated a number of benefits:

- Realigning the parties into separate teams avoids ties to past positions and allows a fresh look at the issues from the perspective proper to each team.
- Providing resources, such as neutral experts, allows completion of an analysis within a short time period and prevents unrealistic legal posturing by informing the parties about the 'facts of life' in construction law.
- The team building effort with the executives from each of the organizations is the key to success. It reduces the influence of any single obstructive party, so that the Executive Team can move forward together. It brings the decision-makers to the decision-making table.
- If new problems are encountered during later phases, the Executive Team has the skill set to maintain the project momentum by preventing the project managers or field supervisors from derailing the process.

- The contractor and subcontractors are paid as the process goes forward, eliminating financial pressure on the subcontractors and preventing further delay or poisoning of relationships.
- The process allows the parties to quickly resolve the historical issues that have stymied progress and resume working together as a team to complete the project without the animosity of unresolved conflict.
- Coaching is available to assist those parties with dysfunctional attitudes or work habits in correcting their behavior and improving their performance and contribution to the team effort.
- The cost to the parties is a fraction of the cost to carry the claims through to final adjudication.
- Only one set of experts is retained, eliminating the disorder caused by the hiring of individual experts for each party. In addition, the cost of experts is shared by multiple parties.
- The most important savings are clear-cut: a troubled project is back on track within 45 to 60 days with continuing delays and cost impacts replaced by timely, economical progress.
- Using the Change Order process instead of the Claims procedure simplifies contract administration and reduces the possibility of unfavorable publicity. This point cannot be over-emphasized because the Change Order process allows the complete flexibility that the pre-selected or default legal process hinders.

As all of us "stumble towards the light" of effective construction problem resolution, we should use all of the tools at our disposal. A process like Project Realignment™ that incorporates all of the tools in the ADR toolbox, while reducing fault based issues, gets us closer to that objective and ensures that the light at the end of the tunnel is not an oncoming train wreck.

The foregoing discussion focuses on cost control through claims avoidance. It does not deal directly with nor does it define a surety's options when a project goes sideways, largely because the surety does not become involved

until the “claims” process begins (remember earlier we spoke about the parties “stepping outside” the claims process). However, a surety can certainly choose to respond to a claim by trying to initiate a time-out and considering the Project Realingment™ or similar process, especially where completion of the project remains the first goal.

Once the claim process has been activated, the surety’s consent to settlement will probably be required. In the PR process, consent to the change order that resolves the problem and gets the project moving will likely be required (depending on the bond form, nature of the change order, etc.).

Since the process is non-binding and is protected by available statutory and contractual mediation confidentiality, there appears to be very little downside to active participation by sureties. A resolution is always an upside. Ultimately, we suggest that any process that reduces a principal’s costs, resolves current disputes/claims and avoids future claims (and

the resultant reserves, loss and costs) offers the surety a much needed option.

Dick Bayer has practiced law for the past 29 years in Colorado and California and his experience includes substantial construction defect litigation, arbitration and mediation on behalf of owners, design professionals, contractors and subcontractors. He is president of the California Dispute Resolution Council, Treasurer of San Diego-ADR and is president of The Realignment Group, Ltd. He may be reached at rbayer@projectrealign.com.

George Thomas has been practicing law for 31 years and has been involved with construction and surety since 1976. He has been a member of firms in Chicago and the District of Columbia. He has been involved with surety claims as outside counsel, claims handler, consultant and as an Assistant Vice President of Contract Surety claims for Fireman’s Fund Insurance Company. He may be reached at gthomas@delta-cgi.com.

Prevailing Wages Claims: Timeliness and Scope of Damages?

By: Steven L. Weinberg, Esq., Gottesman Wolgel, New York, NY

This article addresses some of the different remedies available to a prevailing wage claimant under various applicable statutory schemes and strategies that the surety can use to limit its potential exposure for extra contractual claims.

Introduction

Prevailing wage claims, as part of a class action lawsuit and/or by a private or public representative agency such as a union trustee, benefit fund or government agency, often include as part of a payment bond lawsuit against a surety, alternative causes of action under multiple theories of recovery, including multiple statutory schemes.

The primary cause of action seeks damages for breach of contractual obligations to pay prevailing wages and/or supplements pursuant to the applicable wage schedule collective bargaining agreement. The plaintiff’s

bar commonly pleads alternative causes of action based upon a statutory violation, fraud, unjust enrichment and *quantum meruit*. Frequently, plaintiffs also allege willful and intentional misconduct while seeking penalties and/or punitive damages.

These tactics gives rise to multiple issues which the surety and/or its counsel must evaluate.

1. Does the statute upon which plaintiff relies provide for a private right of action?
2. If the applicable statute permits a private right of action, does the doctrine of exhaustion of administrative remedies apply?
3. What is the scope of damages permitted pursuant to the prevailing wage statute compared with the payment bond or the Miller Act or any “Little Miller Act” Statute?

By way of example, in New York, the applicable statutes include the prevailing wage statute set forth under Labor Law §220; the private remedy provision set forth in Labor Law §220-g and New York State's "Little Miller Act" set forth in State Finance Law §137.

A. Private Cause of Action and Exhaustion of Administrative Remedies

New York State law requires that a claimant seeking recovery of damages for failure to pay prevailing wages pursuant to Labor Law §§220 and 220-g, must exhaust all administrative remedies. There must be a "final" determination. The exhaustion of administrative remedies is a condition precedent to any lawsuit. As with all other conditions precedent, e.g. a notice provision in the bond, any payment bond lawsuit under Labor Law §§220 and 220-g should also allege that there has been a final administrative determination that is final, thereby permitting a private cause of action. As stated in *Samborski v. Linear Abatement Corp.*, 1998 WL 474069 (S.D.N.Y. Aug. 10, 1998):

Plaintiffs would be required to exhaust administrative remedies if the bond at issue falls within the meaning of Labor Law § 220-g. Labor Law § 220-g allows an "affected employee" to "recover from the bond which is required by section one hundred thirty-seven of the state finance law, of the contractor, subcontractor, or both, unpaid wages and supplements ... due to persons furnishing labor to either contractor or subcontractor."

Similarly, in *Maldonado v. Olympia Mechanical Piping & Heating Corp.*, Index No. 38454101 (Sup. Ct. Kings Cty. March 31, 2003), *rev'd on the grounds*, 8 A.D.3d 348, 777 N.Y.S. 2d 730 (2d Dept. 2004) (where the plaintiff employees alleged a failure to pay prevailing wages, etc., and were represented by the same law firm) the lower court noted at its footnote 1:

Plaintiffs concede that there is no private right of action under the Labor Law until there has been an administrative determination (*see Pesantez v. Boyle Environmental*

Services, Inc., 251 AD2d 11; *Majstrovik v R. Maric Piping, Inc.*, 171 Misc 2d 429), and that they have either not sought the required administrative remedy or that there has been no final determination in an administrative proceeding.

Later, the *Maldonado* lower court also stated at its footnote 5 to the decision, that the same result would apply if the bonds were statutory rather than common-law bonds:

In that event, plaintiffs would be required to exhaust their administrative remedies if the bonds at issue fall within the meaning of Labor Law § 220-g (*see Atlantic Coast Fireproofing, Inc. v. J. Greaney Construction Corp.*, 245 AD2d 119,120, citing *Scaccia Concrete Corp. v Hartford Fire Insurance Co.*, 212 AD2d 225). Moreover, the amended complaint does not plead with adequate specificity the provisions of the bond agreement and/or agreements or allege plaintiffs' compliance regarding time and subject matter provisions therein.

A recent unreported decision of the New York State Supreme Court granted a surety's motion for summary judgment and dismissed those portions of the complaint which were based upon Labor Law § 220-g due to the plaintiff's failure to exhaust administrative remedies to the point of a final administrative determination as required by Labor Law § 220-(8). That decision is *Brandy v. Canea Mare Contracting, Inc.*, Index No. 16405/03 (Sup. Ct. Queens Cty. Nov. 22, 2004) and it is currently on appeal.

The court in *Brandy* permitted the payment bond lawsuit to continue to the extent of the claim for breach of contract for failure to pay prevailing wages, but dismissed the fraud, unjust enrichment and *quantum meruit* causes of action as well as all claims for extra-contractual liability. The claims for extra-contractual liability were dismissed for failure to exhaust the administrative remedies. The *quantum meruit* and unjust enrichment claims were dismissed because the plaintiffs' claims for breach of a "specific contract provision governing the very subject of matter" of their claims precluded

recovery in quasi-contract. The fraud claim was dismissed because fraud will not lie when the only alleged fraud relates to a breach of contract. *See also Melissakis v. Proto Const. & Dev. Corp.*, 294 A.D.2d 342, 343, 741 N.Y.S.2d 731 (2d Dept. 2003).

B. What is the Limitations period for a payment bond prevailing wage claim?

In New York, the prevailing wage statutes set forth in Labor Law §§220 and 220-g were amended to permit a private cause of action for non payment of prevailing wages as long as the lawsuit is commenced within one year of the Commissioner or Fiscal Officer’s Final Determination that prevailing wages and/or supplements were not paid as required. This amendment effectively extends the payment bond limitations period embodied in State Finance Law §137 beyond the expiration of one year from the date on which the last prevailing wages were not paid.

New York State Labor Law §220-b provides a three year limitations period from the time the work is performed until a Labor Law prevailing wage complaint is filed. A combined reading of Labor Law §220-g and 220-b results in at least a four year statute of limitations for laborers or workers to commence a payment bond lawsuit.

The 2002 amendment to Labor Law §220-g, which was effective November 1, 2002, does not have retroactive effect for lawsuits that were pending at that time. *Rochez v. Traveler’s Cas. & Sur. Co.*, 8 A.D.3d 121, 779 N.Y.S.2d 36 (1st Dept. 2004).

C. The Difference May Be In The Exposure To Damages

New York State’s Little Miller Act is very specific as to the damages that may be claimed against the surety in a payment bond lawsuit for non payment of prevailing wages or supplements. State Finance Law §137 (5)(b) provides in relevant part:

The expression “moneys due to person furnishing labor to the contractor or his subcontractors” includes all sums payable to or on behalf of persons furnishing labor to the contractor or his subcontractors, for wages, health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay, life insurance or other benefits, payment of which is required pursuant to the labor law or by the contract in connection with which the bond is furnished or by a collective bargaining agreement between organized labor and the contractor or subcontractor, and which are computed upon labor performed in the prosecution of the contract. A trustee or other person authorized to collect such payments shall have the right to sue on the payment bond in his own name and subject to the same conditions as if he were the person performing the labor upon which such sums are computed.

Interest is limited to commencement as of the date of demand from the surety and based upon the surety’s non-payment. In addition, as a cautionary note, a surety may be held liable to a successful payment bond litigant for attorneys fees if the Court determines, after reviewing the entire record, “that either the original claim or the defense interposed to such claim is without substantial basis in fact or law”. See State Finance Law §137(4)(c). Sureties will be better served to promptly investigate prevailing wage claims since due diligence and, if warranted, prompt payment of the wages or supplements, may result in substantial savings with respect to interest as well as limit exposure to an award of legal fees under §137(4)(c).

Legislative Updates

By: Kimberly Rennie Moore, Senior Counsel, American Insurance Association, Washington, DC

Pending Legislation to Increase Threshold Requirements for Bonding

Over the past few years legislation has been introduced in numerous states to raise the threshold contract amount (“threshold”) on a public project which will trigger the requirement that a payment and performance bond be posted. Be on the look out for these bills to make sure your respective lobbyists are addressing the increase to the extent necessary and possible. Federal threshold requirements fall under the Miller Act pursuant to 40 U.S.C.A. §§ 3131 and 3132. Each state, and Puerto Rico, has its own threshold requirements under what is often referred to as their Little Miller Act. The Miller Act has set its threshold bond requirement at \$100,000, with a requirement that the government require some form of payment security (payment bond being the preferred security) for the benefit of subcontractors and suppliers on projects between \$25,000 and \$100,000. As of last November, 35 states have a threshold below \$100,000, 15 at \$100,000, and one, North Carolina at \$300,000, exceeding \$100,000.

The arguments for the threshold increase include: 1) the increase will help “small” contractors get bigger jobs; 2) a lot of time has lapsed since the last threshold increase so “its time;” and (the best yet) 3) we need to keep up with the other states. The first argument can be the most persuasive to the novice in construction and business operations. A small contractor will say that because sureties base their decision whether to write a bond or not on financial strength and construction experience, small and start-up contractors won’t qualify. What is forgotten is that qualifying for a bond is similar to qualifying for a bank loan. If a small contractor does not have its financials in order, up to date, and reflecting that the contractor can carry the load for which it is attempting to gain credit, then the bank won’t give the contractor the loan. The surety underwriter will look at much of the same information to determine a contractor’s bonding capacity. The surety’s considerations will include whether the

contractor has the financial capacity, managerial expertise and work program ability to support the project on which it is looking for a bond. To bond a contractor which does not qualify under these standards will most likely result in failure of the contractor not only on that project, but also on other projects on which it is trying to perform while also trying to complete the project on which it is not qualified.

The answer is not to raise the threshold so unqualified small, minority or start-up contractors can gain bigger projects, but instead to guide these contractors to programs which will educate them on how to organize their company so they will be ready when a bond is required. The insurance industry generally does not oppose increases which would not increase the threshold above \$50,000, but in any threshold increase case (above or below the \$50,000 figure) the industry does like to make sure its lobbyists and threshold bill drafters are aware of their concerns. See IA H.B. 449, KY S.B. 109, LA S.B. 46, MD S.B. 324, NV S.B. 467, NM H.B. 857, NM S.B. 814, and OK S.B. 558 for the 2005 threshold bills with the most recent legislative movement. Also look to New York’s April 14, 2005, Public Hearing results, held to learn about barriers bond requirements pose to small and minority contractors seeking to gain state contracts, and state bonding assistance and bond waiver program effectiveness.

Wrap-up/Controlled Insurance Program (CIP also referred to as OCIP and CCIP)

A wrap-up or controlled insurance program is one in which the owner of a construction project or the general contractor, or, more recently, the construction manager, purchases the insurance for those parties working in the contracting chain underneath the owner, general contractor or construction manager, and then charges those underneath in accordance with their required insurance. The thought behind these programs is that with the bundling of the insurance coverage everyone involved will gain a better rate and higher

coverage limits through mass buying power and reduced commissions. The program will also serve to centralize cost control and claims processing and to centralize and improve safety programs.

CIP programs typically include general liability, workers' compensation, and builders' risk insurance coverage on each particular project. The insurance industry generally looks favorably toward these programs as long as they do not include surety. The problem with including surety is that a special relationship between a contractor and its agent and surety and a particularized underwriting analysis is required to determine effectively a contractor's bonding capacity.

The special relationship built between a contractor and its surety and agent includes a trust built to enable the contractor to openly provide its agent and surety with personal and corporate confidential information. The importance behind gaining this information cannot be understated. With this information, both the contractor and its agent and surety can work together to determine if the contractor should really be taking on the project for which it is looking to gain a bond. The information provided by the contractor is used to determine whether: 1) the contractor's current work program can handle the additional project; and, 2) the contractor's familiarity with the region where the project is located and specific work expertise required from the contract coincides with the contractor's knowledge and ability. Included in this formula is learning the

contractor's financial and management capacity to handle the project. The contractor most likely has also built a comfort level on how its surety handles claims as even a good contractor may have claims asserted under its bonds.

An agent involved in a wrap-up program does not have the luxury to gain the special relationship required to accumulate the information necessary to understand and evaluate whether the contractor's current financial and technical abilities match the project's needs. Not only is the expertise of the agent and surety lost when considering the contractor's qualifications, but also many times a contractor does not itself thoroughly consider the issues which it would otherwise be compelled to analyze in order to review such issues with its agent and surety to determine its capabilities to complete the project. Consequently, there is a much greater chance that non-qualified contractors will be contracted to work on a project including surety in the wrap-up.

By including surety in these programs, qualified contractors may refuse to bid on projects on which they cannot gain bonds through their own agents and surety, and contractors may acquire projects on which they are not qualified. Either option could result in higher costs to the owner. See CA S.B. 548, CT S.B. 1251, HI H.B. 644, HI S.B. 753, WA H.B. 1127, WA S.B. 5384, and WA S.B. 6022 for the 2005 wrap-up bills with the most recent legislative movement.

Surety Casenotes

By: Ira Sussman, Safeco, Hoffman Estates, IL

Supreme Court In Pennsylvania Declares Contractor Can Bring Action Against Design Professional For Negligent Misrepresentation.

Bilt-Rite Contractors v. The Architectural Studio, 866 A.2d 270 (Pa. 2005).

This is a very significant case that has received a great deal of attention in the construction and surety industries. The Pennsylvania Supreme Court has issued a decision holding for the first time in that state that a contractor may sue a

design professional directly for economic damages resulting from defective plans and specification even where there is no contract between the contractor and the design professional. The Court concluded that it was reasonable for a design professional to expect that contractors would rely on information contained in project design documents, and it was reasonably foreseeable that contractors could incur economic loss if their design information was not correct. With this reasoning the Court sustained the negligent

misrepresentation complaint filed by the contractor and the case is now pending on remand in the lower state court.

NY District Court Upholds Surety's Actions Pursuant To Indemnity Agreement

First Nat'l Ins. Co. of America v. Joseph R. Wunderlich, Inc., 358 F.Supp.2d 44 (N.D.N.Y. 2004). A town terminated a contractor and declared the contractor to be in default under various contracts with the town. Pursuant to the towns demand the Surety assumed the remaining work hiring a new contractor and engineer to oversee the completion. Principal argued among other things, that: (a) Surety paid a sub-contractor on a payment bond claim but did not allocate the cost among the projects that it worked on; (b) Surety did not properly investigate nor attempt to defend its Principal after termination; and (c) the District court lacked subject matter jurisdiction because the job was in a different county. The District Court granted summary judgment in favor of Surety and declared that the focus of subject matter jurisdiction is where the indemnity agreement was negotiated not where the projects were located. Additionally "as long as the Surety acts in good faith in assuming the remaining contractual obligations and pays construction expenses accordingly, whether the contractor actually defaulted will neither affect the Surety's right to be indemnified for expenses paid nor defeat the Surety's motion for summary judgment.

(Note: The author of this note handled this matter which is now on Appeal.)

Surety Permitted To Step Into The Shoes Of Claimant It Paid Regarding Objections To Principal's Discharge In Bankruptcy

Travelers Cas. & Sur. Co. of America vs. Haight, 2005 WL 643345 (N.D.Ill. Mar. 16, 2005). Debtor in bankruptcy was appointed administrator in a probate estate in Cook County Illinois. A Probate bond was provided. The sole heir objected to the final accounting. Subsequently before the probate case came to judgment the administrator filed for bankruptcy. The sole heir obtained relief from the automatic stay and obtained a judgment from the probate

court in the amount of \$32,000. The heir then filed an objection to the discharge and later petitioned for an extra 60 days in which to file her challenge. Subsequently, the Surety paid the amount of the judgment to the heir and argued that it was subrogated to her right to the 60 day extension. The District court disagreed and dismissed the Surety's petition. On Appeal the Court ruled that the extension for an extra 60 days in which to argue whether the claim is nondischargeable also applied to the Surety as subrogee.

Texas Court Holds Due Process Applies To Surety That Was Not Given Notice Of The Imposition Of Statutory Penalties.

Hartford Cas. Ins. Co. v. Texas, 2005 WL 366867 (Tex.App.-Austin Feb. 17, 2005). The State of Texas brought action against Surety to collect administrative penalty and attorney's fees that were assessed against its Principal on the bond. Since the imposition of the penalty was discretionary the issued raised by the Surety was whether it was obligated to pay the penalty and attorney's fees imposed by statute without ever having received notice of a hearing on the matter. The District Court upheld the award of the penalty and attorney's fees. On appeal Court held that the Surety had procedural due process right to notice and opportunity for hearing on Banking Commissioners' discretionary decision to collect penalty from bond proceeds, and, thus, due process guarantees were implied in statute stating that the penalty may be paid and collected from the proceeds of the bond. The effect of the reversal by the Appellate Court was that the State was prevented from collecting the administrative penalty and attorney's fees from the Surety.

Minnesota Court Rejects Indemnitors' Argument That They Did Not Agree To Indemnify Surety

Old Republic Sur. Co. v. H.E.A.T., Inc., 2005 WL 288790 (Minn. App. Feb. 1, 2005). Surety filed action to recover payments made under a performance bond. Indemnitors argued they never agreed to indemnify Surety because the indemnity agreement was never delivered to them even though they testified at

trial that they did not read the application or the agreements supplied but rather just signed it. Because this issue was apparently raised for the first time on appeal the Court rejected it. Indemnitors further argued Surety did not provide a “good-faith basis for payment” which prejudiced the rights of the indemnitors so that their obligation to the Surety was released. The Court rejected that argument holding that under the indemnity agreement at issue the Surety had the exclusive right to determine whether to settle or defend a claim under the bond and would not be liable to the Principal except for “deliberate and willful malfeasance.” Bad faith does not mean negligence but something willful or deliberate. The court also rejected two additional arguments: (a) that the Obligee was in default of its obligations so that payment under the performance bond was improper and (b) that the indemnitors were not proper parties in their individual capacities because the performance bonds were not issued in their names but in the name of the corporation.

Federal Appellate Court Releases Indemnitors Who Signed Only First GIA After Surety Asked For And Received Subsequent GIA

Utica Mut. Ins. Co. v. Vigo Coal Co., 393 F.3d 707 (7th Cir. 2004). Utica issued a mine reclamation bond on behalf of Buck Creek Coal. Buck Creek was purchased by Vigo in 1991, and Utica required that the GIA to be signed by Vigo, Atlas Minerals and their respective individual owners, the Koesters and Piepers. Subsequently, in 1992 Vigo sold its interest in the mine. In 1992 Utica presented another GIA for execution, which was signed by the Schulties, the Piepers, and presumably Atlas. The 1992 GIA was not signed by Vigo or the Koesters. The bonded project was not completed and Utica was required to fulfill the bonded obligations. Utica brought suit against all of the signatories of both the 1991 and 1992 GIAs. The District Court, after trial, found that the 1991 indemnitors who did not sign the 1992 GIA, Vigo and the Koesters, were not liable to Utica for indemnification as the 1992 GIA constituted a novation. The Seventh Circuit affirmed.

Apparently the second GIA did not contain language stating that it did not release any prior GIAs and the GIAs did not contain an integration clause. One of the issues on appeal was whether the GIAs were ambiguous or not. Typically the parol evidence rule precludes a court from looking outside the four corners of the document in making its decision whether the contract is ambiguous. The 7th Circuit noted that it is customary for parties to insert "integration" clauses into contracts that provide that the contract is the final expression of the intent of the parties which would have precluded the ambiguity argument. In this case there was no integration clause so the trial court took testimony on the issue in reaching its conclusion. The 7th Circuit, in affirming, held that, based on the execution of the 1992 GIA and the testimony at trial, the parties "understood" that the 1992 GIA replaced the 1991 GIA.

California Supreme Court Rules That Contractor Cannot Recover Lost Profits Suffered As A Result Of Impairment To Its Bonding Capacity.

Lewis Jorge Const. Mang., Inc. v. Pomona Unified Sch. Dist., 102 P.3d 257 (Cal. 2004). The California Supreme Court ruled that a contractor cannot recover lost profits suffered as a result of impairment to its bonding capacity after a project owner wrongfully default terminated the contractor.

The Court considered whether lost profit damages were recoverable under two theories: general (direct) damages or special (consequential) damages. As to general damages, the Court noted that, if the purpose of contractual damages is to give the non-breaching party the benefit of its contractual bargain, the threshold question is: What performance did the parties bargain for? In answering that question, the Court stated "we cannot say that the parties' bargain included [the contractor's] potential profits on future construction projects it had not bid on and been awarded."

In denying the recovery of lost profits as special or consequential damages, the Court found that a breaching party is not required to compensate an injured party for injuries that it

had no reason to foresee as the probable result of its breach when it made the contract. In conclusion, the court stated: "It is indisputable that the [owner's] termination of the...contract was the first event in a series of misfortunes that culminated in [the contractor's] closing down its construction business. Such disastrous consequences, however, are not the natural and necessary result of the breach of every construction contract involving bonding. Therefore, as we concluded earlier, lost profits are not general damages here. Nor were they actually foreseen or foreseeable as reasonably probable to result from the [owner's] breach. Thus, they are not special damages in this case."

Note: The Court distinguished *Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.* 47 Cal.App.4th 464, 489 (1996), by noting that, in that case, the contractor's recovery of lost profits on future contracts was not based on the fact that its bonding capacity was impaired but from the Surety's renegeing on its commitment of future bonding. As the Court stated with respect to *Arntz*: "Because the contract was one for future bonding, it was entirely within the contemplation of the Surety that its breach of the contract-resulting in the contractor's loss of actual bonding-would preclude the contractor from bidding on and being awarded major projects."

DC District Court Refuses To Enforce Arbitration Provision In Subcontract At Request Of Surety

U.S ex rel. Walker Seal Companies v. Liberty Mut. Ins. Co., 356 F.Supp.2d 1 (D.D.C. 2005). A sub-contractor on a government project brought a Miller Act suit to recover on payment bond issued by Surety for prime contractor. Surety moved to dismiss or to stay case pending arbitration. Surety contended that prior to filing suit sub-contractor was required under the terms of its sub-contract with the Principal to exhaust its contractual remedies, including submitting this nonpayment claim to arbitration. However, an addendum to the contract contained language which stated "[n]othing herein shall limit the Subcontractor's rights under [Principal's] payment bond or the Miller Act." As a result the sub-contractor argued that it was not required to pursue

arbitration of its non-payment claim before bringing suit under the Miller Act. The sub-contractor filed an affidavit from its president in which he stated that the company's intention behind the addendum language was to nullify the subcontract's general arbitration provision with respect to a payment bond claim. The Surety argued that other provisions of the subcontract and other language in the addendum countered the addendum language cited by the sub-contractor and that the addendum did nothing to alter the sub-contractors obligations under the subcontract to submit this dispute to arbitration. Because the Surety brought a motion to dismiss the District Court found that the parties were relying on matters outside the complaint. Consequently, the Court found that there were genuine issues of material fact at issue in the case and denied the Surety's request to submit to arbitration.

District Court In PA Enforces Indemnity Agreement Even Though Obligee Does Not Formally Declare A Default

Col. Sur. Co. v. MedTek, Inc., 2005 WL 459642 (E.D.Pa. Feb. 25, 2005). General Contractor on a Veterans' Administration Hospital (Obligee) project stopped construction work leaving mostly punch list and several payment obligations owed to several subcontractors. Eventually, Obligee threatened to declare Principal in default and requested that Surety complete the outstanding contract requirements. Several of the sub-contractors filed complaints against Surety seeking judgment on payment bonds. As a result Surety made a dollar demand for collateral security. After receiving no response, Surety filed suit against Principal under the General Indemnity Agreement seeking indemnification for payment obligations and specific performance of the general indemnity agreement. Principal argued that a question of fact remained as to whether it, under the terms of its contract with the VA, has been declared to be in default.

The court found that according to the General Indemnity Agreement, "[i]f a claim is made against Surety, or if Surety deems it necessary to establish a reserve for potential claims, then upon demand from Surety, Indemnitor shall immediately deposit with

Surety cash or other property acceptable to Surety, as collateral security, to protect Surety with respect to such claims or potential claims and any anticipated expenses or attorneys' fees."

The Principal contended that it provided Surety with adequate collateral security by allowing it to take control over the funds paid by the owner of the project. However the court held the only conditions precedent to Principal's obligation to provide collateral security are: (1) a claim is made against a bond issued by Surety, and (2) that Surety makes a demand for collateral. Here there was no dispute of material fact as to whether Surety satisfied these conditions. In addition Principal agreed in the GIA to indemnify Surety "from and against any and all (i) demands, liabilities, losses, costs,

damages or expenses of whatever nature or kind, including fees of attorneys and all other expenses..." Finally Defendants are in default of the GIA if they "breach[] any provision of the GIA. Or if they "breach[], abandon[] or repudiate[] any Contract." The court reasoned that failing to post adequate security was sufficient to declare a breach of the GIA and thus it is immaterial whether the Obligee formally declared Principal in default of the construction contract. The court further held that since no further work had been performed by the Principal, the Principal was in default as a matter of law.

The court entered summary judgment for the Surety and ordered a hearing on damages.

Fidelity Casenotes

By: John J. Tomaine, Chubb, Warren, NJ

Bell Gardens Bicycle Casino v. Great American Ins. Co., 2005 WL 513520 (9th Cir. Mar. 4, 2005) (Unpublished). Summary judgment for insurer affirmed in action based on claim for "forgery" and "theft". Withdrawal receipts used to defraud casino and signed by customer in his own name were "genuine" and, therefore, not forged under policy where forgery was not defined. The exclusion applicable to "theft" coverage for "being induced by any dishonest act to voluntarily part with" property precluded coverage for customer's dishonesty when he "induced" casino to part with gambling chips.

Argo v. Greater New York Mut. Ins. Co., 2005 WL 756613 (N.Y. Apr. 5, 2005) (Uncorrected and subject to revision before publication). The Court of Appeals of New York affirms the state's "no-prejudice" rule in sustaining late notice defense in action brought under a commercial liability policy. Insured notified insurer fourteen months after it learned of claim against it. The insurer's interest in taking action on claim against insured and setting adequate reserves is analogous to the interest of first-party, including fidelity, insurers.

Watson Quality Ford v. Great River Ins. Co., 2005 WL 147734 (Miss. App. Jan. 25,

2005) (Unreleased for publication, and until released it is subject to revision or withdrawal). The court ruled there was coverage for claim based upon action by third party alleging the insured wrongfully permitted others to lease cars in his name based on altered power of attorney. The distinction between first-party and third-party coverage was highlighted by the court. There was no allegation by the third party that an employee of the insured was involved in the fraud and the insured did not otherwise prove claim fell within employee dishonesty coverage. The power of attorney did not fall within the type of instrument covered under the forgery/alteration coverage of policy.

Reliance v. IRPC, Inc., 142 M.C.L.R. 85 (Pa.Com.Pl., Jan. 20, 2005). The court rejected the insured's arguments that it was entitled to the limit of liability for each year the policy was in effect and during which the loss occurred, and that the definition of "occurrence" was ambiguous because it did state whether it applied to loss incurred over more than one policy period.

Century Business Services, Inc. v. Utica Mutual Ins. Co., 2005 WL 96839 (6th Cir. Jan. 18, 2005). Where termination of coverage for an employee occurs when there is discovery of the

person's dishonesty by "you", the provision so stating was held ambiguous because the word "you" was used in policy issued to a corporation.

SEC v. Capital Consultants, LLC, 397 F.3d 733 (9th Cir. 2005). A receiver's distribution plan in receivership of investment management firm calling for pro-rata reduction of distribution to claimants based upon their

recoveries from third parties was upheld. This could have implications for insurers providing coverage for dishonesty of plan fiduciaries in the determination of amounts owed to insureds.

Readers interested in obtaining copies of unreported decisions can email John Tomaine at jtomaine@chubb.com.

30th Annual Meeting – Surety Claims Institute TENTATIVE AGENDA
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SEAVIEW MARRIOTT Resort & Spa
Absecon, New Jersey
June 22 - 24, 2005

Tuesday, June 21

2:00 – 6:00 p.m. - Registration Open

Wednesday, June 22

8:00 a.m. - Board of Directors, Continental Breakfast

9:00 a.m. - Board of Directors Meeting

Noon - Registration Desk opens

6:30 p.m. - Get Acquainted Reception and Buffet Dinner

8:30 p.m. - Hospitality Event

Thursday, June 23

7:00 a.m. - Continental Breakfast

8:00 a.m. - Seminar Program

9:30 a.m. - Special Event for Spouses & Adult Guests – Continental Breakfast and Program by Dennis Duez, Handwriting Analyst

Noon - Buffet Lunch

1:00 p.m. - Golf Tournament

1:00 p.m. - Tennis Tournament

6:30 p.m. - Children's Party

6:30 p.m. - Reception

7:30 p.m. - Banquet Dinner, Entertainment and Dancing

Friday, June 25

7:00 a.m. - Continental Breakfast

8:00 a.m. - Seminar Program

Noon - Adjourn

30th Annual Meeting – Surety Claims Institute
TENTATIVE
SEMINAR PROGRAM SCHEDULE

SURETY PROGRAM

Thursday, June 23, 2005:

- 8:00 - 8:15 a.m. - Opening Remarks – Robert Monaghan
Introductory Program Remarks – Gilbert Schroeder
Speaker Introductions – Marilyn Klinger
- 8:15 - 8:35 a.m. - *Surety Law Update* – Edward Gallagher
- 8:35 - 8:55 a.m. - *Arbitration and the Performance Bond Surety* – Gregory Veal
- 8:55 - 9:15 a.m. - *L&A Contracting and its Progeny* – William Piper
- 9:15 - 9:35 a.m. - *Letters of Credit as Collateral: Drafting Them and Enforcing Them* – Audrey Berish
- 9:35 - 9:55 a.m. - *The Rights and Liabilities of the Surety Under Dual Obligee Bonds* – Martha Perkins
- 9:55 - 10:15 a.m. - Break
- 10:15 - 10:35 a.m. - *Dealing with the Federal Government in Contract Bond Defaults* – Gerard Sunderland
- 10:35 - 10:55 a.m. - *The Legal and Practical Aspects of Handling Claims Involving Fraudulently Issued Bonds* – James Case
- 10:55 - 11:15 a.m. - *The Liability of the Principal's Accountant to the Surety* – Christopher Ward
- 11:15 - 11:35 a.m. - *Can a Principal Recover on its Own Performance or Payment Bond? The Effect of the Principal's Proprietary Interest in the Claimant on the Surety's Bond Liability and Indemnity Rights?* – Keith Flanagan
- 11:35 - 11:45 a.m. - Closing Remarks

30th Annual Meeting – Surety Claims Institute
TENTATIVE
SEMINAR PROGRAM SCHEDULE (continued)

FIDELITY PROGRAM

Friday, June 24, 2005:

- 8:00 - 8:15 a.m. - Opening Remarks – Robert Monaghan
Introductory Program Remarks – Gilbert Schroeder
Speaker Introductions – Marilyn Klinger
- 8:15 - 8:35 a.m. - *Fidelity Law Up-Date* – John Tomaine
- 8:35 - 8:55 a.m. - *Common Riders, Their Purpose, and the Case Law Interpreting Them: Fraudulent Mortgage Rider, Authorized Representative Rider, Servicing Contractor Rider, and Others* – Gregory Faulkner
- 8:55 - 9:15 a.m. - *The Effect of Settling One Claim on Analogous Subsequent Claims* – Richard Mills
- 9:15 - 9:35 a.m. - *Fidelity Carrier’s Right to Recover from Third Parties who Colluded with the Principal to Cause a Loss* – Elizabeth Staruck
- 9:35 - 9:55 a.m. - *A Practical Guide to Dealing with the Attorney/Client Privilege and Work Product Doctrine in Connection With Expert Witnesses* – Lee Brewer
- 9:55 - 10:15 a.m. - Break
- 10:15 - 10:35 a.m. - *Bond Coverage for Claims Involving Computer Fraud* – CharCretia DiBartolo
- 10:35 - 10:55 a.m. - *Legal Propriety of Using Expert Witnesses with Respect to Bond Coverage* – Keith Witten
- 10:55 - 11:15a.m. - *Issues Arising in Connection with Claims Involving Co-Sureties, Primary and Excess Carriers, and the Use of Joint Defense Agreements* – Matthew Horowitz
- 11:15 - 11:35 a.m. - *Coverage for Acquired Entities: General Agreement "B" and the Republic Case* – William Woods
- 11:35-11:45 a.m. - Closing Remarks

SUGGESTIONS & COMMENTS??

As to program suggestions:

*Gilbert J. Schroeder
Clausen Miller, PC
10 S. LaSalle St , 15th Floor
Chicago, IL 60603-1098
Ph.: (312) 606-7492
Fax: (312) 606-7777
e-mail: gschroeder@clausen.com*

As to Newsletter Contents:

*Armen Shahinian
Wolff & Samson PC
One Boland Drive
West Orange, NJ 07052
Ph.: (973) 530-2002
Fax: (973) 530-2202
e-mail: ashahinian@wolffsamson.com*

As to SCI Activities Generally:

*Robert W. Monaghan
Hermes, Netburn, O'Connor &
Spearing, P.C.
111 Devonshire Street. 8th Fl.
Boston, MA 02109
Ph.: (617) 210-7760
Fax: (617) 728-0052
e-mail: rmonaghan@hnso.org*

As to Address Changes:

*Adella C. LaRue
Gilliland & Hayes, PC
3100 Broadway, Suite 1200
Kansas City, MO 64111
Ph: (816)753-3100
Fax: (816)753-2271
e-mail: adella@msn.com*

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