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***ATTORNEY'S FEES AS A MEASURE OF RECOVERY FOR
PERFORMANCE AND PAYMENT BOND CLAIMANTS***

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I. Introduction

This paper addresses the surety's liability for the counsel fees incurred by claimants under payment and performance bond claims. The significance of this issue is at least threefold. First, an understanding of the applicable legal criteria is necessary in order to accurately evaluate the value of a claim and effectively negotiate a settlement. Second, in the event that the surety is disposed to deny a claim, an understanding of the pertinent legal criteria is critical to the surety being able to accurately assess its financial exposure in the event that the claim is subject to litigation. Third, should a claim be litigated, a surety should understand the defenses that can be asserted against a claim for fees so that it can adopt a litigation strategy which best minimizes its exposure.

The availability of attorney's fees awards in civil litigation is governed by the so-called "American Rule". Under this doctrine, each party to litigation is generally responsible for its own attorney's fees.¹ This rule is intended to obviate the possibility that parties, particularly those with limited financial means, may be deterred from pursuing good faith, meritorious claims due to possible exposure to a large fee award in the event of an unfavorable outcome.²

There are a number of generally recognized exceptions to this rule, three of which are pertinent to the subject matter of this paper. First, an award of attorney's fees is available where authorized by statute.³ Second, an award of attorney's fees is available where authorized by contract.⁴ Third, a court may order compensation for attorney's fees as one element of consequential damages where, as a result of a principal's wrongful conduct, a bond claimant incurs attorney's fees in dealing with parties other than the surety or its principal.⁵

This paper is in three parts. The first part explores these principles in the context of performance bond claims. The second part explores these principles in the context of payment bond claims. The third part addresses the defenses that may be available to a surety in the

¹ See, e.g., F.D. Rich Co., Inc. v. United States For Industrial Lumber Co., Inc., 417 U.S. 116, 126 (1974) ("F.D. Rich"); Cincinnati Insurance Co. v. City of Talladega, 342 So.2d 331 (Ala. 1977); Roberts v. Lawrence, 243 S.C. 158, 133 S.E.2d 74, 75 (1963).

² See F.D. Rich, supra, 417 U.S. at 129.

³ F.D. Rich, supra, 417 U.S. at 126.

⁴ Id.

⁵ See cases cited at footnote , infra.

This paper will not address a court's inherent equitable power to order an award of fees where a litigant has acted in bad faith, vexatiously, or for oppressive reasons. See F.D. Rich, supra, at 129.

event that there is a basis for a claimant asserting an entitlement to an attorney's fees award. II.

Performance Bond Claims

The first step in any "attorney's fees" analysis is to determine whether there is a controlling "fees shifting" statute. Most jurisdictions do not impose fee shifting by statute in the context of performance bond claims.

More commonly, two issues arise in the course of evaluating an obligee's demand that a surety pay its counsel fees as one element of a recovery under a performance bond. First, to the extent that an obligee claims fees incurred in the course of dealing with the bonded principal or its surety, the reference points are the bonded contract and the text of the performance bond. Second, to the extent that an obligee claims fees incurred in the course of dealing with parties other than the principal or the surety, the reference points are the text of the performance bond and common law principles relating to the scope of an award of consequential damages.

A. Contract Based Claims

There are two kinds of attorney's fees claims predicated on alleged contractual fee shifting clauses. One such claim is predicated solely on the text of the performance bond. The second such claim is predicated on the text of the bonded contract read together with the text of the performance bond.

1. Claims Based Solely on the Performance Bond

A party who has successfully litigated a performance bond claim may recover its attorney's fees against the surety if such a recovery is explicitly authorized by the text of the performance bond.⁶

More often, a claim for attorney's fees predicated solely on the text of the performance bond is based on bond language which specifies a broad measure of recovery but does not explicitly reference attorney's fees. For instance, claims for attorney's fees have been litigated in reliance on broad indemnity language such as the following:

The surety shall "fully indemnify and save harmless" the obligee from "all cost and damage" incurred as a consequence of a default and "fully reimburse and repay... all outlay and expense" incurred by the obligee in making good a default;⁷

The surety shall "indemnify" for "cost and damage" caused by the

⁶ See Roberts v. Lawrence, *supra*, 133 S.E.2d 74.

⁷ See Tomlinson v. Sentry Engineering & Construction Co., 777 F.2d 918 (4th Cir. 1985); Robbins v. Melbrook Realty Co., 28 Misc.2d 1076, 213 N.Y.S. 2d 403 (Sup.Ct. 1961); Wm. Cameron & Co. v. American Surety Co., 55 S.W.2d 1032 (Tex. Civ. App. 1932).

principal's failure to perform,⁸

The surety shall reimburse the obligee for "all loss and damage" caused by a default⁹; and

The surety shall indemnify the obligee against "any and all damages directly arising" from the principal's default.¹⁰

The surety shall be liable for "other costs and damages" in addition to completion costs.¹¹

The courts have repeatedly held that such broad indemnity language does not evidence an intent on the part of the contracting parties to bind the surety to compensate the obligee for its counsel fees.¹² As an explicit rationale, the courts state that a surety's exposure should be no greater than that of its principal and that, in the absence of explicit language in the bonded contract obligating the principal to reimburse the owner for its attorney's fees, no such obligation should be imposed on the surety.¹³ The courts have also suggested that terms such as "costs" and "damages" commonly are not intended to reference an entitlement to an attorney's fees award.¹⁴ Though not stated explicitly, the holdings in these cases evidence a strong commitment to the American Rule, with its emphasis on minimizing financial barriers to the institution of meritorious, good faith litigation. For this reason, the courts are reluctant to acknowledge contractual fee shifting in the absence of explicit language evidencing a clear intent on the part of the contracting parties.

Based on this caselaw, it is highly unlikely that a court would assess the surety with the obligee's counsel fees incurred in dealing with its principal or the surety in the absence of explicit language in either the performance bond or the bonded contract.

2. Text of Bonded Contract and Performance Bond

Where the bonded contract obligates the principal to reimburse the owner for attorney's

⁸ See Todd Shipyards Corp. v. Jasper Electric Service Co., 414 F.2d 8, 18 (5th Cir. 1969).

⁹ See Fausett Builders, Inc. v. Globe Indemnity Co., 220 Ark. 301, 247 S.W.2d 469 (1952).

¹⁰ See Federal Surety Co. v. Basin Construction Co., 91 Mont. 114, 5 P.2d 775 (1931).

¹¹ See Ranger Construction Co. v. Prince William County, 605 F.2d 1288 (4th Cir. 1979) (hereafter "Ranger").

¹² See cases cited at footnotes 7 through 11, supra.

¹³ Id.

¹⁴ See Ranger, supra, 605 F.2d 1298.

fees under certain conditions, it is necessary to apply a two part analysis to determine whether a surety is obligated to pay the owner's attorney's fees as one measure of recovery under a performance bond claim.

First, it is necessary to determine whether the facts surrounding the bonded contract warrant the invocation of the contractual attorney's fees clause.

In Turner Construction v. First Indemnity of America¹⁵, the contractor terminated a subcontractor and completed the subcontractor's work after the subcontractor's surety refused to perform. The contractor sued the surety for, inter alia, the overrun in construction costs caused by the subcontractor's alleged default and its attorney's fees incurred in bringing suit against the surety. As to the fee claim, the contractor relied on a provision of the bonded subcontract which obligated the subcontractor to reimburse the contractor for all "losses, damages, costs, and expense, including legal fees and disbursements, sustained, incurred, or suffered by reason of or resulting from [the subcontractor's] default." However, the court denied the claim for fees, holding the contract clause inapposite because the contractor's litigation costs had been incurred in the first instance as a consequence of the surety's refusal to acknowledge liability under the bond and not as a direct result of the contractor's default.¹⁶

There are also cases in which the courts appear to assume, sub silentio, that fee shifting clauses such as that in Turner apply to fees incurred by obligees in litigating performance claims with sureties.¹⁷

Assuming that a fee shifting clause in a bonded contract is deemed apposite, it is necessary to determine whether the language of the performance bond obligates the surety to assume the responsibility for this aspect of the principal's obligation.

Consider the following:

Bonded Contract

The contractor shall be responsible for all costs incurred by the owner as a consequence of the contractor's default, including the payment of the owner's reasonable attorney's fees.

Performance Bond

The surety shall fully indemnify and save harmless the owner from all costs and damages which it may suffer by reason of a default and shall reimburse and repay the owner all outlay and expense which the owner may incur in making good any default.

¹⁵ 829 F. Supp. 752 (E.D.Pa.), aff'd mem., 22 F.3d 303 (3rd Cir. 1994).

¹⁶ Id.

¹⁷ See Dale Benz, Inc. v. American Casualty Co., 303 F.2d 80 (9th Cir. 1962); Jen-Mar Construction Co. v. Brown, 247 Ca.2d 564, 55 Cal. Rptr. 832 (1967).

Confronted with an explicit attorneys' fees clause in the bonded contract and such expansive bond language, the courts generally hold that the surety is obligated for the payment of the owner's attorney's fees to the same extent as is its principal.¹⁸

The surety's exposure to a fee shifting clause in a bonded contract is less certain, however, in the context of performance bonds of narrower scope. It should be a truism that the scope of a surety's liability for its principal's default may not be co-extensive with the scope of its principal's liability depending upon the measure of recovery provided for in the performance bond. Unfortunately, the case law reflects a tendency on the part of certain courts to hold the surety liable for the obligee's fees under a fee shifting clause of a bonded contract irrespective of the surety's exposure as defined in the performance bond.¹⁹ It is not uncommon for a court to reach this conclusion by referencing the portions of the performance bond which state that the bonded contract is incorporated therein or that the bond remains operative until such time as all of the principal's obligations under the bonded contract have been discharged.²⁰

The surety's most critical task in evaluating its exposure to a fee shifting clause in a bonded contract is to accurately assess the extent of its exposure under the terms of the particular performance bond and communicate its findings to the obligee and the court. It is critical to recognize that a performance bond typically "incorporates" the terms of a bonded contract, not to establish the scope of the surety's exposure, but rather to establish the circumstances under which a surety's performance obligation becomes actualized, as of the default of its principal.²¹ Similarly, the performance bond indicates that it will remain operative until the bonded contract is performed in order to set a temporal limit to the surety's obligations.²² The scope of the surety's financial exposure is addressed by separate language in the bond and it is this language which must be the focus of an analysis of the surety's exposure for the obligee's counsel fees.

¹⁸ See Town of Melville v. Safeco Insurance Co., 651 So.2d 404 (La. App. 1995); C.N. Mason v. City of Albertville, 276 Ala. 68, 158 So.2d 924 (1963).

¹⁹ See Austin v. Parker, 672 F.2d 508 (5th Cir. 1982); Dale Benz, Inc. v. American Casualty Co., 303 F.2d 80 (9th Cir. 1980); Jen-Mar Construction Co. v. Brown, *supra*, 55 Cal Rptr. at 838-39.

There is a line of California cases which seemingly hold that a fee shifting clause in a bonded contract will impose liability on the surety irrespective of the language of the bond. See T.R. Paving v. St. Paul Fire & Marine Inc., 23 Cal.App.4th 747, 29 Cal. Rptr. 2d 199 (1994); Boliver v. Surety Co., 72 Cal.App.3d 22, 140 Cal. Rptr. 259 (1977). These cases may not have persuasive effect beyond California as they seem to rely on California Civil Code §2808 which states that a surety's liability must be commensurate with that of its principal.

²⁰ *Id.*

²¹ See Downingtown School District v. International Fidelity Insurance Co., 671 A.2d 782 (Pa.Comwlth. 1996).

²² *Id.*

The text of the AIA Document A311 performance bond provides fertile ground for evaluating a surety's exposure to a fee shifting clause in a bonded contract in the context of a carefully defined performance bond. A311 states, in pertinent part:

Whenever Contractor shall be, and declared by the Owner to be in default under the Contract, the Owner having performed the Owner's obligations thereunder, the Surety may promptly remedy the default, or shall promptly

(1) Complete the Contract in accordance with its terms and conditions, or

(2) Obtain a bid or bids for completing the Contract in accordance with its terms and conditions, and upon determination by the Surety of the lowest responsible bidder, or, if the Owner elects, upon determination by the Owner and the Surety jointly of the lowest responsible bidder, arrange for a contract between such bidder and Owner, and make available as Work progresses ... sufficient funds to pay the cost of completion less the balance of the contract price, but not exceeding, **including other costs and damages for which the Surety may be liable hereunder, the amount set forth in the first paragraph hereof.** (emphasis added)

There is a split in the case law regarding the proper construction of this bond language.²³ Certain courts have held that bonds incorporating variants of the "A311 language" limit the surety's financial obligation solely to the net cost of completing construction.²⁴ Based on this logic, the courts in American Home Assurance Co. v. Larkin and Marshall Contractors Inc. v. Peerless Insurance Co. have held that variants of the A311 bond do not expose the surety to liability for the owner's delay damages.²⁵ By the same logic, a surety may not be

²³ Compare Marshall Contractors Inc. v. Peerless Insurance Co., 827 F.Supp. 91 (D.R.I. 1993) ("Marshall") and American Home Assurance Co. v. Larkin General Hospital, 593 So.2d 195 (Fla. 1992) ("Larkin") with Downingtown School Dist. v. International Fidelity Insurance Co., *supra*, 671 A.2d 782 ("Downington").

²⁴ See Marshall, *supra*, 827 F.Supp. 91; Larkin, *supra*, 593 So.2d 195.

²⁵ Id. Accord L & A Contracting v. Southern Concrete Services, 17 F.3d 106 (5th Cir. 1994). See also Kiva Construction and Engineering v. International Fidelity Insurance Co., 749 F. Supp. 753 (W.D. La. 1990) (suggesting in dicta that the "A311" bond language does not expose a surety to a claim for breach of warranty).

The holding in Marshall may not be as persuasive precedent as that in Larkin since the operative bond in Marshall omitted that portion of A311 which obligates the surety for "the other costs and damages for which the Surety may

responsible for the owner's attorney's fees under this kind of bond, irrespective of a fee shifting clause in the bonded contract.²⁶

The scope of the A311 bond language was recently addressed in the context of a claim for attorney's fees in Downington Area School Dist. v. International Fidelity Insurance Co.²⁷ The owner in Downington had completed its construction project following the termination of the bonded principal. In reliance on an "A311" bond, the owner sued the surety for the construction costs exceeding the undisbursed contract funds, liquidated damages, delay damages and attorney's fees. Based on the aforementioned bond language, the surety conceded its obligation for the net construction costs and moved for summary judgment to dismiss the claims for delay damages, liquidated damages, and attorney's fees. The trial court denied the surety's motion based on the superficial logic that the performance bond incorporated the bonded contract, including provisions of the bonded contract holding the principal obligated to the owner for costs associated with delay and the owner's attorney's fees. On appeal, the panel recognized that the trial court's logic was faulty, acknowledging that the "incorporation" language in the bond did not address the scope of the surety's obligation. However, the court nonetheless sustained the denial of the surety's summary judgment motion; holding that the bond language obligating the surety for "other costs and damages for which the Surety may be liable hereunder...", created the possibility that the surety could be obligated for all express obligations of the principal under the bonded contract.

The seeming split in the case law regarding the surety's exposure under A311 may be reconcilable. As the A311 bond "incorporates" the bonded contract, the reference to "other costs & damages for which the surety may be liable hereunder" may refer to all obligations of the principal that are explicit on the face of the bonded contract. Larkin may stand for the proposition that the "A311" bond does not subject the surety to "costs and damages", other than excess construction costs, that are not specifically referenced in the bonded contract as assessable against the principal. Downington may stand for the observe of this proposition; namely, that the "A311" bond subjects the surety to liability for all costs and damages, in addition to excess construction costs, which are specifically provided for against the principal in the bonded contract.

This attempt to reconcile the case law is, ultimately, not persuasive. If the intent underlying A311 was to hold the surety liable for all obligations of the principal, the text would more likely have read "other costs & damages for which the principal may be liable". The entire text of the bond reflects that the "costs and damages" language was intended to limit and not expand the scope of the surety's obligations; limiting the surety's obligation to the net additional costs of construction caused by the principal's default and any other damages and

be liable hereunder".

²⁶ As a separate but related proposition, it has been held that the A311 reference to "costs & damages" does not contemplate awards of attorney's fees. See Ranger, *supra*, 605 F.2d 1288. See, p. 17-19, *infra*.

²⁷ 671 A.2d 782.

costs specifically referenced in the text of the bond as being the surety's responsibility.²⁸

Putting aside the uncertainty regarding the scope of liability under the "A311" bond, it is critical, as a general proposition, that the courts carefully evaluate the text of a performance bond to determine a surety's exposure to a fee shifting clause in the bonded contract rather than dogmatically holding a surety liable for all of its principal's financial exposure including the payment of the obligee's attorney's fees.

**B. Consequential Damages- Attorney's Fees Incurred
In Contacts With Third Parties**

Most jurisdictions recognize an entitlement to attorney's fees in the absence of a contractual fee clause where the plaintiff has incurred fees in dealing with third parties as a consequence of the wrongful acts of the defendant.²⁹ Such fees are deemed recoverable as a form of consequential damages to the extent that the need to incur this expense is reasonably foreseeable from the wrongful act of the defendant. These costs are not subject to the prohibition of the "American Rule" since an assessment of fees incurred against third parties does not create a disincentive or penalty to litigation.³⁰

It is possible to imagine numerous fact situations under which an obligee pursuing a performance bond claim against a surety could claim attorney's fees incurred in dealings with third parties as a consequence of the principal's alleged default. For instance, if the owner completes a bonded contract after terminating the principal, it may incur attorney's costs in negotiating a construction contract with a completion contractor.³¹ Alternatively, where a contractor is sued for breach of contract by the owner and the contractor claims that a contract breach, if any, was caused by its subcontractor's breaches of its subcontract, the surety guaranteeing the subcontract could be found liable for the attorney's fees incurred by the contractor in litigating with the owner.

Though an award of "third party" fees presumes the absence of an explicit contractual fees clause, it would be erroneous to assume that fees based on this doctrine should be awarded against a surety irrespective of the scope of the surety's liability under the

²⁸ Larkin, supra.

²⁹ See, e.g., Ranger Construction Co. v. Prince William County, 605 F.2d 1298 (4th Cir. 1979); Bagby v. Merrill, Lynch, Pierce, Fenner, & Smith, Inc., 491 F.2d 192, 198, n. 9 (8th Cir. 1974); Baja Energy, Inc. v. Ball, 669 S.W.2d 836 (Tex. App. 1984); City of Cedarburg L. & W. Commission v. Glens Falls Insurance Co., 42 Wis.2d 120, 166 N.W.2d 165 (1969). Contra Martin v. Hartford Accident and Indemnity Co., 68 N.C. App. 534, 316 S.E.2d 126 (1984).

³⁰ Such fees will be referred to, *infra*, as "third party fees".

³¹ See Ranger Construction Co. v. Prince William County, *supra*, 605 F.2d 1304-5; Turner Construction v. First Indemnity of America, *supra*, 829 F.Supp. 752.

performance bond. To the contrary, to the extent that the performance bond explicitly limits the surety's liability to the net costs of construction and excludes consequential damages, fees incurred by the obligee in the course of contacts with third parties should not be assessable against the surety.

The need to carefully evaluate the text of the performance bond in response to a claim for "third party fees" is illustrated by the decision in Ranger Construction Co. v. Prince William County.³² The bonded contractor brought suit against the owner for an alleged wrongful termination. The owner counterclaimed for its losses as a consequence of the termination and brought a third party action to recover these costs against the contractor's surety. The court found that the termination was valid and entered judgment for the owner. The owner claimed its attorney's fees against the surety in the absence of an explicit fee clause in the bonded contract or the performance bond. The appeals court properly focused its analysis on the text of the performance bond which closely approximated AIA 311; the surety being responsible for the net costs of construction "including other costs and damages for which the Surety may be liable hereunder...." The court indicated that the reference to "costs and damages" would not be construed as contemplating attorney's fees. The court explained that in common legal parlance, the terms "costs" and "damages" are different from and generally do not include an assessment of attorney's fees.³³ On this basis, the court held that the surety was not obligated to compensate the owner for its costs in litigating the wrongful termination issue with the surety and the bonded contractor.

However, the Ranger Court reached a different decision in regard to attorney's fees incurred by the owner in negotiating a contract with a completion contractor. Based on the "third party exception", the court ordered the surety to reimburse the owner for these attorney's fees. There was no discussion as to whether the bond language required such a payment. To the contrary, the court's interpretation of the surety's exposure for "costs" and "damages" would seem to have precluded reliance on those terms as the source of the surety's liability. However, there is a suggestion in Ranger and certain other cases that while the courts are unwilling to construe the term "damages" in an A311 bond or an indemnity bond as obligating the surety to pay the obligee's counsel fees incurred against the surety or its principal, the courts will construe this term to include those attorney's fees claimed by the owner as "consequential damages" due to its dealings with third parties.³⁴

In light of these uncertainties, sureties faced with claims for "third party" fees should contest these fees to the extent that the obligee's claim is predicated on language in the bond obligating the surety for the obligee's "damages and costs".

In sum, a surety may be liable under its performance bond for attorney's fees as a consequence of explicit "fees" language in the bonded contract, explicit "fees" language in the

³² 605 F.2d 1298 (4th Cir. 1979).

³³ Id. at 1303. See cases cited at footnotes 7-11, supra.

³⁴ Id. See Key Savings and Loan Assoc. v. Travelers Indemnity Co., 513 P.2d 737 (Colo.App. 1973); National Union Fire Insurance Co. v. Denver Brick & Pipe Co., 427 P.2d 861 (Colo. 1967).

performance bond, or the third party exception. However, each theory of liability ultimately requires a careful examination of the text of the performance bond and the failure to do so may subject the surety to unnecessary liability.

II. Payment Bond Claims

The analysis of attorney's fees demands in the context of payment bond claims differs from that in the context of performance bond claims in that bonds written on public works projects are governed by statute. If the particular payment bond statute provides for fee shifting, the analysis need go no further. If the statute is silent as to the availability of fees, the analysis of such a demand requires consideration of the statute, the payment bond, and the contract which is being enforced by the claimant.

A. Miller Act

The Miller Act defines the scope of a payment bond claimant's cause of action against the surety as follows:

Every person who has furnished labor or material and who has not been paid in full ... shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid ... and to prosecute said action to final execution and judgment for the sums or sums justly due him³⁵

This language does not, on face, provide statutory authority for an award of fees. The courts have rejected arguments that a claimant's entitlement to fees under the Miller Act should be determined by the provisions of analogous state law.³⁶ Moreover, to the extent that parties have attempted to find a statutory basis for a fee award in Miller Act cases by suing Miller Act sureties under state causes of action which allow for such fees, the courts have held that such state law causes of action are either preempted by the Miller Act or do not fall within a federal court's pendant jurisdiction.³⁷

In applying the "American Rule" in Miller Act cases, the courts will order an attorney's fees award against a surety where the contract between the bonded contractor and its

³⁵ 40 U.S.C. §270b.

³⁶ See F.D. Rich Co., *supra*, 417 U.S. 116.

³⁷ See United States for Howell Crane Service v. United States Fidelity & Guaranty Co., 861 F.2d 110 (5th Cir. 1988) (no pendant jurisdiction); Tacon Mechanical Contractors, Inc. v. Aetna Casualty & Surety Co., 860 F. Supp. 385 (S.D. Tex. 1994) (preemption); United States for Pensacola Construction Co. v. St. Paul Fire and Marine Insurance Co., 710 F. Supp. 638 (W.D. La. 1989) (preemption).

subcontractor or material furnisher incorporates a fee shifting clause.³⁸ Referencing the text of the Miller Act, the courts have held that if a contract between the bonded contractor and its supplier includes a fee shifting clause, the amount of the supplier's fees incurred in enforcing the contract are "sums justly due" under the statute and must be reimbursed by the surety if the supplier is to be "paid in full".³⁹

The availability of a fee award is less clear where the contractual predicate for such relief is found in a contract between a subcontractor and a vendor to which the bonded principal is not a party. Relying on the spirit of the American Rule, there is support for the proposition that the surety should not be bound by an attorney's fees clause that was not agreed to by its principal.⁴⁰ Other courts see no logic to this distinction and have held that a payment bond surety is bound by an attorney's fees clause in the contract being enforced regardless whether its principal was a party to the contract.⁴¹ As the Eleventh Circuit subsequently repudiated the strongest precedent in favor of the narrower construction, it is likely that the more expansive view will ultimately prevail.⁴²

B. Little Miller Act and Private Projects

Assuming the absence of a statute or payment bond incorporating an explicit fee shifting provision, an attorney's fees demand by a payment bond claimant under a Little Miller Act or a private bond must be predicated on an attorney's fees clause in the claimant's contract. Such demands require a close analysis of the terms of the payment bond and any relevant statute.

Assuming a fee shifting clause in a claimant's contract, the cases are widely inconsistent as to whether particular language in a payment bond or a payment bond statute obligates a surety to assume its bonded contractor's obligation to pay the attorney's fees

³⁸ F.R. Rich, supra, 417 U.S. at 129-30; United States for Sherman v. Carter, 353 U.S. 210 (1957); United States for Howell Crane Service, supra, 861 F.2d at 114; United States for Carter Equipment Co. Inc. v. H.R. Morgan, Inc., 554 F.2d 164 (5th Cir. 1977).

³⁹ Id. See 40 U.S.C. §270b.

⁴⁰ See United States for Krupp Steel Products v. Aetna Insurance Co., 831 F.2d 978 (11th Cir. 1987); United States for L.K.L. Associates v. Crockett & Wells Construction, Inc., 730 F. Supp. 1066 (D. Utah 1990).

⁴¹ See United States for Southeastern Municipal Supply Co., Inc. v. National Union Fire Insurance Co., 876 F.2d 92 (11th Cir. 1989); United States for Carter Equipment Co., Inc. v. H.R. Morgan, Inc., 554 F.2d 164 (5th Cir. 1977); Travelers Indemnity Co. v. United States for Western Steel Co., 362 F.2d 896, 899 (9th Cir. 1966); United States for Trustees v. Expert Environmental Control, Inc., 787 F. Supp. 895 (D. Colo. 1992).

⁴² Compare United States for Krupp Steel Products v. Aetna Insurance Co., 831 F.2d 978 (11th Cir. 1987) with United States for Southeastern Municipal Supply Co., Inc. v. National Union Fire Insurance Co., 876 F.2d 92 (11th Cir. 1989).

incurred by a subcontractor or vendor in pursuing payment. In some jurisdictions, the reference in a payment bond or a payment bond statute to the recovery of "sums justly due" has been construed to include the payment by the surety of attorney's fees owed by the principal pursuant to a contractual fees clause.⁴³ Courts in other jurisdictions have reached a diametrically opposite conclusion.⁴⁴

Cases addressing the availability of recoveries of finance charges or delay damages under payment bonds may be persuasive by analogy.⁴⁵

Assuming bond language that is construed as obligating the surety in the face of a contractual fee clause, courts construing Little Miller Act and private bonds face a similar problem as that confronting a Miller Act court where the contractual fees provision is found in a contract other than one executed by the bonded contractor. In these contexts, a court may determine that the contractual fee shifting clause does not bind the surety since its principal was not a party to the contract which provides for fees.⁴⁶

⁴³ See State ex rel Nichols v. Safeco Insurance Co., 100 N.M. 440, 671 P.2d 1151 (1983).

⁴⁴ See Ragan v. Tri-County Excavating, 62 F.3d 501 (3d Cir. 1995); Knecht, Inc. v. United Pacific Insurance Co., 860 F.2d 74 (3d Cir. 1988); J.C. Snively & Sons v. Web M & E, Inc., 406 Pa.S. 271 594 A.2d 333 (1991); Dean v. Seco Electric Co., 35 Ohio St.3d 203, 519 N.E.2d 837 (1988). See also, Furlow-Laughlin Equipment, Inc. v. Maddox Paint Contracting Co., 578 F.Supp. 160 (M.D. La. 1983) (Bond does not contemplate an award of fees where it guarantees "payment for any purchase").

⁴⁵ As to a payment bond claimant's entitlement to finance charges from the surety, compare Can-Tex Industries v. Safeco Insurance Co., 460 F. Supp. 1022 (W.D. Pa. 1978) (finance charges are not an available remedy under a payment bond) and Lite-Air Products, Inc. v. Fidelity and Deposit Co., 437 F. Supp. 801 (E.D. Pa. 1977) (same) with Price Brothers Co. v. Olin Construction Co., 528 F. Supp. 716 (W.D.N.Y. 1981) (finance charges are an available remedy under a payment bond) and Price Brothers Co. v. Charles J. Rogers Construction Co., 104 Mich. App. 369, 304 N.W.2d 584 (1981) (same).

As to a payment bond claimant's entitlement to delay damages from the surety, see W.S.A., Inc. v. Stratton, 680 F.Supp. 375 (S.D. Fla. 1988) (payment bond claimant not entitled to recover delay damages from surety); Savino Steel & Iron Works, Inc. v. Fletcher & Sons, Inc., 398 Pa.S. 86, 580 A.2d 853 (1990); D.I.C. Commercial Construction Corp. v. Knight Erection & Fabrication Inc., 547 So.2d 977 (Fla. App. 1989) (same).

⁴⁶ Compare Chadwick-BaRoss, Inc. v. T. Buck Construction, Inc., 627 A.2d 532 (Me. 1993). (Surety not liable for counsel fees mandated in contract among third parties) with Gerora v. R.L. Lapp Forming, Inc., 619 F.2d 387, 391 (5th Cir. 1980) (Surety liable for counsel fees required under contract among third parties).

III. Defenses to a Demand for Fees

Where attorney's fees are provided for by contract, a trial court retains the discretion to reduce the amount of fees demanded or deny the award of fees in its entirety if it determines that an award of fees would be "inequitable and unreasonable".⁴⁷

Contractually mandated fee awards have been denied to prevailing parties under the following circumstances:

- (1) the court determines that both parties engaged in breaches of contract⁴⁸;
- (2) the moving party prevailed on some claims but not on others⁴⁹;
- (3) the moving party unreasonably pursued its claims in the face of settlement offers that were equal to or in excess of what was properly owing⁵⁰; and
- (4) the claimant was properly owed only a small portion of the amount which it claimed⁵¹.

These holdings suggest that a court is empowered and may be inclined to deny a contractual award of fees either where it perceives that both parties bear responsibility for a contract dispute or where it determines that the prevailing party unnecessarily took the case to judgment in lieu of accepting a settlement offer that provided all the relief to which the party was ultimately deemed to be entitled.

Though such defenses are available against a claim for fees, the cases also suggest that fees are normally granted to a prevailing party entitled to such fees under a contractual fee shifting clause. The success of such equitable defenses is the exception rather than the rule.

IV. Conclusion

In order to determine the advisability of settling a performance or payment bond claim, it is critical that a surety make a reasoned judgment as to the claimant's eligibility for an award of attorney's fees. Assuming a claim for fees based on either a contractual fee shifting clause

⁴⁷ See United States for C.J.C., Inc. v. Western States Mechanical Contractors, 834 F.2d 1533, 1548-49 (10th Cir. 1987); Cable Marine, Inc. v. M/V Trust Me II, 632 F.2d 1344 (5th Cir. 1980).

⁴⁸ See United States for A.V. DeBlasio Construction, Inc., 588 F.2d 259 (9th Cir. 1978); McClain Co., Inc. v. Page & Wirtz Construction Co., 102 N.M. 284, 694 P.2d 1349 (1985).

⁴⁹ See United States for Suburban Tree service, Inc. v. Hankins Construction Co., 510 F. Supp. 933 (E.D. Mo. 1981).

⁵⁰ See Cable Marine, Inc. v. M/V Trust Me II, *supra*, 632 F.2d at 1345-46; Gorman Publishing Co. v. Stillman, 516 F.Supp. 98 (N.D. Ill. 1981).

⁵¹ See United States for Rent It Company v. Aetna Casualty and Surety Co., 988 F.2d 88 (10th Cir. 1993).

in the bonded contract or a claim for "third party fees", the key element in the analysis is to identify whether the text of the payment or performance bond obligates the surety to pay the claimant's fees.

Once a surety denies a claim and the claimant files suit, the claimant's entitlement to a fee award, should it prevail, may provide a significant source of financial exposure for the surety, particularly if the controversy involves a complicated claim under the performance bond. Under these circumstances, the possibility of a fee award may provide significant leverage to the claimant should settlement discussions proceed in the course of litigation, particularly if the claimant concludes that it will ultimately shift its counsel fees to its adversary should the case go to judgment.

Under these circumstances, it is critical that the surety consider a litigation strategy designed to minimize its exposure to a fee award. To this end, a surety should carefully assess whether to make settlement offers or offers of judgment to the claimant of a sufficient magnitude so that the claimant risks a denial of an award of fees should it decline the surety's settlement offers, irrespective whether it ultimately prevails.

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