50 State Survey of Laws and Cases Governing Performance Bonds and Surety Obligations

The following pages provide a basic survey of the law governing performance bonds and surety performance in the various states. I make no representations that the information in this survey is comprehensive. There may well be additional statutes and cases governing surety law in each state discussed herein. However, this survey does provide a good basis for understanding the basic principles of surety law in the fifty states.[1]

The format for each state roughly follows the numbered items and categories as follows:

1) **What damages are covered?**
   - When is the surety obligated to perform?
   - Limitation on damages
   - Which obligations of the principal contract must the surety perform?

2) **Penal sum variations.**
   - Statutory limitations on the penal sum amount
   - Effect of changes in work upon penal sum, if at all

3) **Notice or filing requirement**
   - Statutory provisions
   - Case law rules concerning condition precedent notice

4) **Special state provisions**

4) **Cases**
   - Cases discussing AIA forms of bonds A311 and A312
   - Cases in which the surety steps into shoes of oblige

If specific statures, cases, or other points of law listed in the outline were undiscovered or do not exist, the list for an individual state has that item omitted. However, the vast majority of states have existing law that covers each of these issues. To the extent research uncovered responsive law to these points, it is included herein. This research should provide a good starting point for anyone needing more information about a specific state's law governing performance bonds and surety performance.

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ALABAMA

1) Damages covered?

When is the surety obligated to perform?

ALDOT 103.05(a) – In case of default on the part of the Contractor, all expense incident to ascertaining and collecting losses suffered by the state under the bond, including engineering, direct administration, and legal services, shall be charged against the contract bond for performance of work

ALDOT 108.10 – Should the contractor, or in case of default, the surety, fail to complete the work within the time stipulated in the contract or the adjusted time as granted under the provisions of Article 108.09, a deduction for each calendar day or work day that any work shall remain uncompleted, an amount indicated by the Liquidated Damages Schedule shown in Article 108.11 or provided in the contract documents shall be deducted from any monies due to the contract on monthly estimates. Any adjustments due to approved time extensions or overruns in the contract amount will be made on the monthly, semi-final or final estimate as may be appropriate.

Limitation on damages; for example, no delay damages.

Generally the liability of a surety is the same as that of its principal. Federal Ins. Co. v. I. Kruger, Inc., 829 So.2d 732 (Ala. 2002).

The principal's liability is the limit the surety's liability American Cas. Co. of Reading, Pa. V. Divine, 157 So.2d 661 (Ala. 1963).

A surety cannot be held liable for an amount greater than the penal amount of the bond. Victore Ins. Co. v. Ross Neely Systems, Inc., 757 So.2d 473 (Ala. Civ. App. 2000)

Incorporation of specific contract terms by reference

Where the bond references and incorporates the terms of the bonded contract, those terms will typically be read into the bond. Pacific Ins. Co. v. Wilbanks, 214 So.2d 279 (Ala. 1968).

2) Penal sum variations

Statutory limitations on the penal sum amount

Any person entering into a contract with an awarding authority in this state for the prosecution of any public work shall, before commencing the work, execute a performance bond, with penalty equal to 100 percent of the amount of the contract price." Ala. Code Section 39-1-1(a) 1975.

<u>Effect of changes in work upon penal sum, if at all</u>

It is the well recognized rule that an alteration or change in the contract or obligation must be material in order for a compensated or corporate surety to be discharged from liability thereby." Maryland Cas. Co. v. First Nat'l Bank of Eufaula, 165 So. 2d 359, 360 (Ala. 1964).

The appellate courts of Alabama have not addressed or recognized a tort claim for bad faith against performance bond sureties.

3) Notice or filing requirement

<u>Case law rules concerning condition precedent notice</u>

"A declaration of default sufficient to invoke the surety's obligations under the bond must be made in clear, direct, and unequivocal language. The declaration must inform the surety that the principal has committed a material breach or series of material breaches of the subcontract, that the oblige regards the subcontract as terminated, and that the surety must immediately commence performing under the terms of its bond. Bank of Brewton, inc. v. international Fid. Ins. Co., 827 So. 2d 747, 754 (Ala. 2002).

4) Special state provisions

The Alabama Public Works Act is modeled after the federal Miller Act. Therefore, the construction given to the Miller Act is applicable to any performance bond issue which arises under the Alabama Public Works Act. (Price v. H.L. Cobble Const. Co., 317 F.2d 312 (5th Cir. 1963).

5) Cases

<u>Cases in which the surety steps into shoes of obligee</u>

If the contractor defaults and the surety completes the performance of obligations, all money due under the contract, up to the amount spent by the surety, are owed to the surety and not to the contractor. The contractor has no right to the contract funds and no tax lien can attach. *See Alabama ex rel. Gallion v. Bessemer materials, Inc.*, 224 F. Supp. 182 (N.D. Ala. 1963).

ALASKA

1) Damages covered?

Which obligations of the principal contract must the surety perform?

The Alaska Supreme Court recognized an expressed incorporation in the bond of an arbitration clause in the underlying construction contract. Loyal Order of Moose Lodge v. international Fidelity Ins. Co., 797 P.2d 622, 629 (Alaska 1990).

2) Penal sum variations

3) Notice or filing requirement

4) Special state provisions

An implied covenant of good faith and fair dealing exists between a surety and its oblige on performance bonds. Failure by a surety to minimally investigate its principal's alleged default may constitute bad faith if that investigation would confirm the obligee's allegations in material part. The surety may satisfy its duty of good faith to an obligee by acting reasonably in response to a claim by its obligee. Loyal Order of Moose Lodge v. international Fidelity Ins. Co., 797 P.2d 622 (Alaska 1990).

Surety cannot be held liable beyond the scope of the principal's duty. SKW/Eskimos v. Sentry Auto. Sprinkler, 723 P.2d 1293

5) Cases

Cases in which the surety steps into shoes of obligee

A surety which completes a bonded job has the right by equitable subrogation to apply any earned payments against its costs. Equitable subrogation trumps the rights of a secured creditor to contract proceeds. Alaska State Bank v. General insurance Company, 579 P.2d 1362 (Alaska 1978).

ARIZONA

1) Damages covered?¶

When is the surety obligated to perform?

Limitation on damages; for example, no delay damages.

The governing municipal public improvement district may prescribe liquidated damages, but not as a forfeit or penalty, to be paid by the contractor if the contractor fails to complete the work within the time fixed by the contract. A.R.S. Section 45-586

The liability of the surety is limited to that assumed by its terms . Cushman v. National Sur. Corp. of New York, 417 P.wd 537 (1966)

Surety is not liable to oblige when a contract is performed by a joint venture involving a party other than the surety's principal. Mead, Samuel & Co. v. U.S. Fid. & Guar. Co., 611 P.2d 112, 115 (Ct. App. 1980).

Bad Faith Damages. Surety will incur tort liability "if it either knows that its position is groundless or when it fails to undertake an investigation adequate to determine whether its position is tenable." In other words, the surety must purposely make an act or omission while lacking a "founded belief that such conduct [is] permitted." Dodge Fidelity & Deposit Co. of Md., 778 P.2d 1240, 1243 (1989).

A surety will not risk bad faith tort damages if it acts reasonably in response to the obligee's claim. Dodge Fidelity & Deposit Co. of Md., 778 P.2d 1240, 1243 (1989) ("the tort of bad faith arises when the insurance company intentionally denies, fails to process or pay a claim without a reasonable basis for such claim").

2) Penal sum variations

Statutory limitations on the penal sum amount

Many statutes limit the demand made upon a surety to the penal sum of the performance bond. ARS Statutes 48-924(E), 48-586(F), 48-2054(E)

Effect of changes in work upon penal sum, if at all

A performance bond allows for changes in work if the performance bond incorporates the construction contract, and the construction contract allows for additions and or deductions to be made from the contract amount. Massachusetts Bonding & Ins. Co. v. Lentz, 9 P.2d 408 (1932).

3) Notice or filing requirement

Case law rules concerning condition precedent notice

A provision will only be construed as a condition precedent when such interpretation is plainly and unambiguously required by the language of the contract. Watson Constr. Co. v. Reppel Stell & Supply Co., 598 P.2d 116, 118 (Ct. App. 1979).

4) Special state provisions

5) Cases

Cases in which the surety steps into shoes of obligee

Unless the contract limits otherwise, the liability of a surety on a performance bond is co-extensive with that of its principal. Paul Schoonover, Inc. v. Ram Constr., Inc., 630 P.2d 27 (1981).

Subrogation – A surety becomes equitably subrogated both the contractor's rights to receive the retained contract funds and to the government's right to use those funds to complete the contract. Hartford Accident & Indem. Co. v. Arizona Dep't of Transp., 838 P.2d 1325, 1328 (Ct. App. 1992).

<u>ARKANSAS</u>

1) Damages covered?

<u>When is the surety obligated to perform?</u>

The language of the performance bond establishes the duty of the insurer. Angelo Iafrate construction, LLC v. Potashnick Construction, inc., 370 F.3d 715 (8th Cir. 2004) (interpreting Arkansas law).

A performance bond surety may have to indemnify the Arkansas Highway and Transportation Commission for claims of personal injury and property damage caused by the work performed under its principal's contract pursuant to section 107.14 of the Standard Specifications for Highway Construction. *See* Angelo Iafrate construction, LLC v. Potashnick Construction, inc., 370 F.3d 715 (8th Cir. 2004) (interpreting Arkansas law).

<u>Limitation on damages; for example, no delay damages</u>

The liability of a surety ordinarily does not exceed that of the principal. Travelers Casualty & Surety Co. Of America v. Arkansas State Highway Commission, 120 S.W.3d 50 (2003).

A bond obligee may not increase the surety's risk or undermine the surety's subrogation rights. A surety bond embodies the principle that any material change in the bonded contract that increases the surety's risk or obligation without the surety's consent affects the surety relationship (Pennsylvania National Mutual Casualty insurance Co. v. City of Pine Bluff, 354 F.3d 945 (8th Cir. 2004) (interpreting Arkansas law).

A material alteration exists if the surety is placed in the position of doing more than the undertaking contained in the performance bonds because of an alteration to the performance bond contract. Carroll-Boone Water District v. M& P Equipment Co. 280 Ark. 560, 661 S.W.2d 345 (1983).

<u>Whether failure of contractor to provide insurance transfers burden to surety</u>

A breach of contract occurs if the contractor fails to obtain a builders risk policy. If the owner sustains a loss of an insurable interest then the owner is entitled to recover from the surety. Carroll-Boone water District v. M& P Equipment Co. 280 Ark. 560, 661 S.W.2d 345 (1983).

2) Penal sum variations

<u>Statutory limitations on the penal sum amount</u>
Some statutes require that the penal sum of the performance bond equal the amount of the contract. A.C.A. Sections 18-44-503, 18-44-504, 18-44-505.

3) Notice or filing requirement

Statutory provisions

Must file the bond with the clerk of the circuit court of the county in which work is to be performed, before work is performed. A.C.A. Section 18-44-507.

If the bond is not filed as provided, any person performing labor or furnishing material, except the prime contractor, shall have a lien upon the property for eth unpaid amount of the claim. A.C.A. Section 18-44-504(b)(3).

Case law rules concerning condition precedent notice

An oblige might lose its claim against a performance bond surety for completion costs and liquidated damages if the oblige fails to give notice to the surety as required by the express terms of the bond, thereby failing "to afford the surety the opportunity to complete any remaining work under the contract." City of Whitehall v. Southern Mechanical Contracting, Inc., 269 Ark. 563, 571 (Ark. Ct. App. 1980).

If surety has knowledge or was chargeable with knowledge of principal's default, failure to give notice in form required by construction bond would not relieve surety from liability. Jack v. Craighead Rice Mill Co., 167 F.2d 96 (8th Cir. 1948).

4) Special state provisions

5) Cases

Cases in which the surety steps into shoes of obligee

If a surety takes over a project, the surety becomes equitably subrogated to the contractor's rights to receive contract funds that are retained by the owner. Exchange Bank & Trust Co. v. Texarkana School District No. 7, Miller County, 227 Ark. 759 (1957).

CALIFORNIA

1) Damages covered?

When is the surety obligated to perform?

"Upon breach by the principal, the surety is, unless otherwise specifically provided in the contract, free to rest upon the contract of surety-ship and if it does it cannot be held beyond the limit of its bond and it may invoke any defense open to it as surety. If, however, upon breach by the principal it elects to and is permitted under the contract or by permission obtained after breach to step into the place of its principal and perform the principal's contract, it then makes itself subject to the principal's liabilities." Caron v. Andrew, 133 Cal. App. 2d 402, 411 (1955).

Limitation on damages; for example, no delay damages.

"Where a surety bond is given pursuant to the requirements of a particular statute, the statutory provisions are incorporated into the bond." Bank of America v. Dowdy, 186 Cal. App. 2d 690, 692-693 (1960); Krebs v. Travelers Indem. Co., 192 Cal. App. 2d 83, 85.

If a construction contract contains an enforceable liquidated damage clause and the construction contract is incorporated into the performance bond, then the general rule is that the surety of the performance bond will be liable for liquidated damages if the principal delays the completion of the project. Cates Construction, Inc. v. Talbot Partners, 21 Cal. 4th 28 (1999); *See* California Civil Code 1671 (provides guidelines for determining if a contract's liquidated damages clause is enforceable).

Where contractor's bond referred to contract and was by its terms executed to comply with statute relating to mechanic's liens, and condition of bond was that work contracted or be faithfully performed and claims paid in full, bond incorporated contract by reference, and contract provisions became provisions of bond as a performance bond." Culbertsons v. Cizek, 225 Cal. App. 2d 451, 467 (1964).

"Obligee of a construction performance bond may not recover punitive damages for the surety's breach of the implied covenant of good faith and fair dealing." Cates Construction, Inc. v. Talbot Partners, 21 Cal. 4th 28 (1999).

Which obligations of the principal contract must the surety perform?

"A bond which is given for the faithful performance of a contract, to which it refers, binds the surety for labor performed and materials furnished thereunder as completely as though the surety were a party to the contract." Continental Cas. Co. v. Hartford Acc. & Indem. Co., 2423 Cal. App. 2d 565 (1966).

2) Penal sum variations

Statutory limitations on the penal sum amount
California does not have statutory limitation on performance bond penal sums.

3) Notice or filing requirement

__**Statutory provisions**__

California statutes do not provide for any unusual notice requirements for suit under a performance bond.

4) Special state provisions

5) Cases

COLORADO

1) Damages covered?

When is the surety obligated to perform?

Limitation on damages; for example, no delay damages.

The surety's liability is co-extensive with the principal except the surety's liability is capped by the penal sum of its bond. General Ins. Co. v. Colorado Springs. 638 P.2d 752, 757 (Colo. 1981); Riva Ridge Apartments v. Robert G. Fisher Co., 745 P.2d 1034 (Colo Ct. App. 1987).

A performance bond surety is subject to bad faith liability to the oblige. The standard is whether the surety's conduct was knowingly unreasonable or whether the surety acted with reckless disregard of the fact that tits conduct was unreasonable. *See* Transamerica Premier insurance Co. v. Brighton Sch. Dist., 27J, 940 P.2d 348 (Colo. 1997).

The obligee may recover interest from the surety. The interest accrues from the date of demand until payment and may exceed the penal sum of the bond. Autocon Industries, inc. v. Western States Constr. Co., 728 P.2d 374 (Colo. Ct. App. 1986).

The contract may limit the recovery of damages unless the result would be unconscionable. Jefferson County Bank v. Armored Motors Service, 366 P.2d 134 (Colo. 1961); University Hills Beauty Academy v. mountain States tel. & Tel. Co 554 P.2d 723, 726 (Colo. Ct. App. 1976).

Extra damages are available for the surety's bad-faith breach of its obligations. *See* Transamerica Premier insurance Co. v. Brighton Sch. Dist., 27J, 940 P.wd 348 (Colo. 1997). The amount awarded is generally limited to the amount of actual damages except in special circumstances the court may increase the award to three times actual damages C.R.S. Section 13-21-102.

2) Penal sum variations

Statutory limitations on the penal sum amount

Performance bond amount must be at least one-half of the contract price C.R.S. Section 38-26-106(1) and section 24-105-202(1)(a). CDOT requires that the bond penal sum be equal to the sum of the contract price plus all force account allowance items in the bid. Colorado Department of Transportation, Standard Specifications of Road and Bridge Construction, section 103.03 (2005 Ed). Private projects have no limitations.

Effect of changes in work upon penal sum, if at all

In United States ex rel. B7M Roofing v. AKM assoc., Inc., 961 F. Supp. 1441, 1444 (D. Colo. 1997) (applying the federal common law) the court considered the effect of changes in work upon the penal sum in an open ended supply contract and concluded that the surety's liability for both payment and performance bonds is calculated "by adding the total valued of the delivery orders that have been placed." Commentators have opined that "there are certainly good reasons as to why B&M should be limited to its facts. It must be acknowledged that this is an open question as to whether Colorado courts would interpret bond penal sums as increasing with change orders." Performance Bond Manual pg 73 Dennis J. Bartlett (2004).

3) Notice or filing requirement

4) Special state provisions

An unpaid subcontractor's lien against funds earmarked to the contractor is prior and superior to the surety's interest in either earned and unpaid or unearned and unpaid contract balances. C.R.S. section 24-91-104.

Any person who knowingly files an overstated verified statement of claim or asserts a claim against a principal or surety for an amount greater than due forfeits all rights to the amount claimed and is liable to the contractor and/or surety for reasonable attorney's fees incurred in responding to that overstated claim. C.R.S. section 38-26-110.

5) Cases

<u>Cases in which the surety steps into shoes of obligee</u>

No cases found discussing surety stepping into shoes of obligee, although in Colorado indemnity agreements are valid and enforceable as written. Wilson & Co. v. Walsenburg Sand & Gravel Co., 779 P.2d 1386 (Colo. Ct. App. 1989).

CONNECTICUT

1) Damages covered?

When is the surety obligated to perform?

"A performance bond guarantees that the contractor will perform the contract, and usually provides that, if the contractor defaults and fails to complete the contract, the surety can itself complete the contract or pay damages up to the limit of the bond." Groton Development Association v. International Fidelity Insurance Company, No. 517864, 1995 WL 645921 (Conn. Super., Oct. 27, 1995).

"Under a performance and completion bond, a surety generally has two options upon its principal's default. First, the surety may undertake to complete the principal's work itself; this obligation may be satisfied by the surety funding the principal to complete its work. Second, the surety has the option of paying the obligee's under the bond its damages essentially, the obligee's cost of completion." Balfour Beatty Construction v. Colonial Ornamental ironworks, 986 F. Supp. 82, 87 (D. Conn. 1997).

Limitation on damages; for example, no delay damages.

Surety will only be liable if the principle is liable. In the absence of limitations in the surety bond, the surety's obligation to the obligee is the same as the principal's obligation to the obligee. Star Contracting Corp. v. Manway Construction Corp., 337 A.2d 669, 670, 671 (Conn. Super. 1973).

In the case of performance bonds, it has been established that the measure of damages is limited to the cost of completion of the improvements. Brookfield v. Greenridge, Inc., 177 Conn. 527, 537, 418 A.2d 907 (1979).

Liability of a surety is limited to the penalty of the bond plus interest. Connecticut General Statutes Section 52-238; Brookfield v. Greenridge, Inc., 177 Conn. 527, 537, 418 A.2d 907 (1979).

Obligee is not required to accept the lowest bid for completion work. Obligee is entitled to take factors other than price into account when weighing the bids. Town of Newington v. General Sanitation Service Company, 491 A.2d 363, 364 (Conn. 1985).

Which obligations of the principal contract must the surety perform?

A surety's liability under a performance bond is to bed determined by the specified conditions of the bond. If a bond is required by a statute, a court will read the statute into the contract between principal, surety and oblige. "A contractor's bond, given for the full and faithful performance of a contract for a public improvement, will e construed with reference to the statute pursuant to which it is given, and such statutory provisions will be read into the bond." Town of Southington v. Commercial union Insurance Company, 757 A.2d 549, 556 (Conn. 2000).

2) Penal sum variations

Statutory limitations on the penal sum amount

CO does not have any statutory limitations on performance bond penal sums.

Effect of changes in work upon penal sum, if at all

In dealing with contract clauses allowing alterations or modifications, an appropriate standard for substantiality is whether such changes unreasonably alter the character of the work or unduly increase its costs, or effect such a material change as to constitute a radical departure from the original contract. Naek Constr. Co., Inc. v. PAG Charles St. Ltd. P-ship, CV 02-0080135S, 2004 Conn. Super. LEXIS 3185 (J.D. Tolland, Nov. 3 2004) citing Randolph Constr. Co. v. Kings East Corp., 165 Conn. 269, 274, 334 A.2d 464 (1973).

3) Notice or filing requirement

Statutory provisions

Connecticut does not provide for any unusual notice requirements for suit under a performance bond.

Case law rules concerning condition precedent notice

For the surety to be liable under the performance bond two conditions must be met: 1) the principal must be "in default" under the contract; and 2.) the oblige must declare to the surety that the principal is in default under the contract. The declaration of default must be made in precise terms. Elm Haven Construction limited Partnership v. Neri Construction, LLC, 376 F.3d 96, 100 (2d Cir. 2004) affirming 281 F. Supp. 2d 406, 2003 U.S. Dist. LEXIS 15956 (D. Conn., 2003).

There is a difference between material breach and default. A legal default requires a material breach or series of material breaches for the oblige to be justified to terminate the contract. A material breach by itself is not enough to shift liability onto the surety, it only justifies the obligee's action in the next step of the process which is a declaration of default. Crystal lake Condominium Association v. Colonial Surety Company, 2005 Conn. Super LEXIS 1062 (2005).

4) Special state provisions

N/A

5) Cases

Cases discussing AIA forms of bonds A311 and A312
N/A.

<u>Cases in which the surety steps into shoes of obligee</u>

The doctrine of equitable subrogation allows the surety—once the surety has completed its obligations pursuant to the terms of the bond—to step into the shoes of the obligee and make a claim for reimbursement from a defaulting party. Once standing in the shoes of the obligee, the surety has the same rights as the obligee against the defaulting party. Balboa Insurance Co. v. Bank of Boston Connecticut, 702 F. Sup. 34, 36 (D. Conn. 1988).

DELAWARE

1) Damages covered?

When is the surety obligated to perform?

The liability of the surety is coextensive with the liability of the general contractor. Quality Elec. Co., Inc. v. Eastern States Constr. Serv., Inc., 663 A.2d 488 (Del. Super. Ct. 1995).

Limitation on damages; for example, no delay damages.

Generally, damages for breach of a performance bond are limited to the obligee's expectation interest. Int'l Fidelity Ins. Co. v. Delmarva Systems Corp., No. 99C-10-065 WCC, 2001 WL 54146, *2 (Del. Super. Ct. 2001, May 9, 2001).

Bad Faith Damages

Delaware recognizes claims of bad faith against a surety. Int'l Fidelity Ins. Co. v. Delmarva Systems Corp., No. 99C-10-065 WCC, 2001 WL 54146, *2 (Del. Super. Ct. 2001, May 9, 2001).

2) Penal sum variations

Statutory limitations on the penal sum amount

Bonds executed to be in conformance with the Public Works Law will be construed to provide at least the minimum coverage required by the statute. However, parties executing a performance bond may contract for broader coverage than required by statute. Certain-Teed Prod. Corp. v. United Pac. Ins. Co. , 389 A.2d 777, 779 (Del. Super. Ct. 1978).

Effect of changes in work upon penal sum, if at all

3) Notice or filing requirement

4) Special state provisions

5) Cases

FLORIDA

1) Damages covered?

When is the surety obligated to perform?

The surety's obligation to perform is strictly limited to those specified in the bond. School Board of Broward County, Florida v. The Great American ins. Co., 807 So. 2d 750, 751-52 (Fla. Dist. Ct. App. 2002)

Limitation on damages; for example, no delay damages.

"A surety on a bond does not undertake to do more than that expressed in the bond, and has the right to stand upon the strict terms of the obligation as to his liability hereon." American Home Assurance Co. v. Larkin Gen. Hosp., Ltd., 593 So. 2d 195, 198 (FLa. 1992) *citing* Crabtree v. Aetna Cas. & Sur. Co., 438 So. 2d 102, 105 (Fla. Dist. Ct. App. 1983).

A surety may be liable for consequential damages caused by its own failure to complete. Unless the surety assumed the obligation under the bond, it will not be liable for consequential damages arising solely from the principal's default. American home Assurance Co. v. Larkin Gen. Hosp. Ltd., 593 So. 2d 195 (Fla. 1992).

If an obligee is solely responsible for delays it cannot recover liquidated damages. Mid-State hauling Co. v. Watson, 172 So. 2d 262 (Fla. Dist. Ct. App. 1965). When both the obligee and principal contributed to the delay, then the obligee cannot recover liquidated damages, but has the right to recover actual delay damages. *Id.*

Surety may be liable for claims of latent defects up to five years after acceptance of the project. Federal ins. Co. v. Southwest Retirement Ctr., Inc., 707 So. 2d 1129 (Fla. 1998).

Bad faith is not a cognizable cause of action against surety. Fla. Stat. 624.155(9).

Whether failure of contractor to provide insurance transfers burden to surety
Which obligations of the principal contract must the surety perform?

The liability of the surety is ordinarily measured by the liability of the principal . . . and generally the surety is not liable if the principal is not liable." Cincinnati ins. Co. v. Putnam, 335 So. 2d 855, 856 (Fla. 4th DCA 1976).

A liquidated damages for delay provision will not be read into the bond. American home Assurance Co. V. Larkin Gen. Hosp. , Ltd., 593 So. 2d 195 (Fla. 1992).

Work warranties are incorporated by reference. Federal ins. Co. v. Southwest Fla. Retirement Ct., Inc., 707 So. 2d 1119 (Fla. 1992).

Arbitration provisions included in the underlying contract are incorporated by reference. St. Paul Fire & Marine Ins. Co. v. Woolley/Sweeney hotel No. 5 545 So. 2d 958 (Fla. Dist. Ct. App. 1989).

Attorney's fees provision may be deemed incorporated into the bond. Merchants Bonding Co. v. City of Melbourne, 832 So. 2d 184, 186 (Fla. Dist. Ct. App. 2002).

2) Penal sum variations

Statutory limitations on the penal sum amount

Generally, a surety's liability is limited to may not exceed the penal sum contained in the bond. However, a penalty sum may be increased if a bond is issued pursuant to a statute and the statute contains language extending liability beyond the penal sum. Travelers Indem. Co. v. Askew, 280 So. 2d 469 (Fla. Dist. Ct. App. 1973).

If a surety's own misconduct causes damages in excess of the bond amount, the surety may be liable for such excess amounts. Nichols v. Preferred Nat'l Ins. Co., 704 So. 2d 1371 (Fla. 1997).

A surety may be liable for attorney fees in excess of the penal sum, even without a showing a misconduct. David Boland, Inc. v. Trans Coastal Roofing Co., 851 So. 2d 724 (Fla. 2003).

Effect of changes in work upon penal sum, if at all

The surety's liability is discharged proportionately to the extend that its security in the contract (i.e. its right to retained contract funds) is compromised. Gibbs. V. Hartford Acc. & Indem. Co., 62 So. 2d 599 (Fla. 1953).

3) Notice or filing requirement

Statutory provisions

Case law rules concerning condition precedent notice

The surety is not relieved from liability due to the obligee's failure to provide notice unless actual damage is sustained from the failure to provide notice. Carnival Cruise Lines, Inc. v. Financial Indem. Co., 347 So. 2d 825 (Fla. Dist. Ct. App. 1977).

A failure to provide notice may harm the surety by failing to provide the surety an opportunity to investigate and possibly cure the default. Insurance Co. of North America v. Metropolitan Dade County, Florida, 705 So. 2d 33 (Fla Dist. Ct. App. 1998); School Board of Escambia County, Inc. v. TIG Premier Ins. Co., 110 F. Supp. 2d 1351 (N.D. Fla. 2000).

The obligation to terminate the contractor is not a condition precedent to the surety's obligation to perform unless this condition is set forth as a condition in the bond. DCC Constructors, Inc. v. Randall Mech., Inc., 791 So. 2d 575 (Fla. Dist. Ct. App. 2001).

4) Special state provisions

5) Cases

Cases discussing AIA forms of bonds A311 and A312

A311 requires that suit be brought within two years after cause of action accrues. Florida law nullifies the provision. Any provision that shortens the applicable statute of limitations is void. Fla. Stat Section 95.03; National Fire Ins. V. L.J. Clark Constr. Co., Inc., 579 So. 2d 743 (Fla. Dist. Ct. App. 1991).

Cases in which the surety steps into shoes of obligee

A surety is subrogated to all the rights of its principal under principles of equitable subrogation. TransAmerica Ins. Co. v. Barnett Bank of Marion Co., 540 So. 2d 113 (Fla. 1989).

The liability of a surety is the same as its principal. A.M. Crabtree v. Aetna Casualty & Surety Co., 438 So. 2d 102 (Fla. Dist. Ct. App. 1983). However, a "surety on a bond does not undertake to do more than that expressed in the bond, and has the right to stand upon the strict terms of the obligation as to his liability hereon." American Home Assurance Co. v. Larkin Gen. Hosp., Ltd., 593 So. 2d 195, 198 (Fla. 1992).

A surety can assert any defense available to the principal. C.A. Oakes Const. Co., Inc. v. Ajax Paving Indust., Inc., 652 So. 2d 914, 916 (Fla. Dist. Ct. App. 1995).

GEORGIA

1) Damages covered?

When is the surety obligated to perform?

If a corporate surety does not pay a performance claim made upon a bond with 60 days after demand is made, the obligee may file a bad faith claim against the surety. If the obligee shows that the surety's non-payment was out of bad faith, the obligee shall be entitled to recover an additional 25% and attorney's fees. There is no independent tort for bad faith. O.C.G.A. Section 10-7-30; Ayers Enterprises, Ltd. V. Exterior Designing, Inc., 829 F. Supp. 1330 (N.D. Ga. 1993).

If a surety becomes liable for a debt, it may give notice to the debtor to proceed to collect the debt from its principal, and if the debtor does not commence the action within three months, the surety is discharged. O.C.G.A. section 10-7-04.

The obligations of the surety is strictly construed in the surety's favor. Commercial Cas. Ins. Co. of Georgia v. Maritime Trade Center Builders, 257 Ga. App. 779 (2002), reconsideration denied, (Oct. 9, 2002).

Limitation on damages;

The surety's maximum liability is the penal limit of the bond. *Long v. City of Midway,* 169 Ga. App. 72 (1983).

A cause of action may not be brought against a surety by anyone except an obligee. O.C.G.A. section 13-10-42.

Which obligations of the principal contract must the surety perform?

The obligations of the surety is strictly construed in the surety's favor. Commercial Cas. Ins. Co. of Georgia v. Maritime Trade Center Builders, 257 Ga. App. 779 (2002), reconsideration denied, (Oct. 9, 2002).

When construing the principle contract with the surety bond, the obligation of a surety is construed strictly in the surety's favor. Tucker Materials v. Devito Contracting & Co., 245 Ga. App. 309, 310 (2000).

2) Penal sum variations

Statutory limitations on the penal sum amount

A performance bond on public projects over $100,000 must be equal to the contract amount. O.C.G.A. section 13-10-10.

Effect of changes in work upon penal sum, if at all

The performance bond must be increased if the contract is increased. O.C.G.A. Section 13-10-40. However, a surety on a bond will not be held liable on bond for a sum greater than the penal limit of the bond. Long v. City of Midway, 169 Ga. App. 72 (1983).

3) Notice or filing requirement

Statutory provisions

Obligee must wait 60 days after surety's receipt of notice of default or demand to make a claim for bad faith refusal of surety to perform surety-ship contract. If obligee does not wait 60 days the obligee will be barred from recovering penalties, including attorney's fees and/or a bad faith penalty. O.C.G.A. section 10-7-30; Ayers Enterprises, Ltd. V. Exterior Designing, Inc., 829 F. Supp. 1330 (N.D. Ga. 1993); Columbus Fire & Safety Equip. Co., Inc. v. American Druggist insurance co., Inc., 166 Ga. App. 509, 510-511 (1983).

Case law rules concerning condition precedent notice

Notice of default provisions in an A312 bond were held to be inapplicable in the event of supplementation of contractor's work by obligee to prevent default. Commercial Cas. Ins. Co. of Georgia v. Maritime Trade Center Builders, 257 Ga. App. 779 (2002).

4) Special state provisions

The state of Georgia, in any contract for less than $300,000, at its discretion may accept an irrevocable letter of credit from a bank or savings and loan association in lieu of a performance bond. O.C.G.A. section 13-10-41.

Sureties are allowed to seek contribution from co-sureties. If a co-surety is insolvent then the solvent sureties must equally bear the deficiency. O.C.G.A. 10-7-50.

5) Cases

Cases in which the surety steps into shoes of obligee

Any change to the underlying contract, whether to the surety's benefit or detriment, is a novation which discharges the surety. Upshaw v. First State Bank, 244 Ga. 433 (1979); O.C.G.A. section 10-7-21. However, if a surety consents in advance to change in the contract the surety will not be released from its obligations. Griswold v. Whetsell, 157 Ga. App. 800 (1981).

A surety who steps into the shoes of the principal is subrogated to all the rights of the creditor. If in a controversy with other creditors, the debt is ranks as if it still belongs to the creditor. Royal Indem. Co. v. Mayor & etc. of City of Savannah, 209 Ga. 383 (1952).

HAWAII

1) Damages covered?

When is the surety obligated to perform?

Surety owes a duty of good faith and fair dealing. Bd. Of Dir. Of AOAO Discovery Bay v. United Pacific Ins. Co. 884 P.2d 1134 (Haw. 1994).

Limitation on damages; for example, no delay damages.

Surety is not liable for delay damages if the bond does not provide for delay damages. Mayer v. Alexander & Baldwin, Inc., 532 P.2d 1007 (Haw. 1975).

Which obligations of the principal contract must the surety perform?

2) Penal sum variations

Statutory limitations on the penal sum amount

All public works for projects are governed by section 103D of the Hawaii Revised Statutes (the Procurement Code). Contracts over $25,000 require a performance bond with a penal sum equal to the contract amount.

3) Notice or filing requirement

Statutory provisions
No statutory procedure for notice.

Case law rules concerning condition precedent notice
N/A

4) Special state provisions

5) Cases

Cases in which the surety steps into shoes of obligee

A surety is not entitled to set off profits from completion of one bonded job against losses on another bonded job if the bond provisions do not allow such set off. U.S. v. MidPac Lumber Co., Ltd., 976 F. Supp. 1310 (D. Haw. 1997).

A performance bond surety is subrogated to the rights of both the obligee and the principal. The surety may apply remaining contract funds to the completion of the work to the same extent obligee could have notwithstanding claims of third parties to the contract funds. Mayer v. Alexander & Baldwin, Inc., 532 P.2d 1007 (Haw. 1975).

IDAHO

1) Damages covered?

When is the surety obligated to perform?

"[I]f the contractor fails to perform the work contracted . . . then the surety, under the obligations of the required bond, must provide performance of the contracted work. The surety in such a case is required to step into the shoes of the contractor; the surety to perform as the contractor originally agreed to do." Minidoka County for Use and Benefit of Deweiler, 88 Idaho 395, 419 (1965).

Which obligations of the principal contract must the surety perform?

"A secondary document becomes part of a contract as though recited verbatim when it is incorporated into the contract by reference provided that the terms of the incorporated document are readily available to the other party." *Loomis, Inc. v. Cudahy*, 104 Idaho 106, 118-19, 656 P.2d 1359, 1371-72 (1982) (emphasis in original).

2) Penal sum variations

Statutory limitations on the penal sum amount

No statutory limitation on the penal sum amount. Idaho Code section 54-1926.

"Any diminution of value of the security caused by the creditor, whether by negligence or not, results in pro tanto discharge. The reason for the pro tanto discharge of the surety is the impairment of the surety's right of subrogation to enforce the security." Bank of Idaho v. Nesseth, 104 Idaho 842, 845, 664 P.2d 270, 273 (1983).

Effect of changes in work upon penal sum, if at all

Courts deter to the language of the bond in determining the effects of changes in the work. *See e.g., Minidoka County for Use and Benefit of Deweiler*, 88 Idaho 395, 419 & n.2, 399 P.2d 962, 977 & n.2 (1965).

3) Notice or filing requirement

Case law rules concerning condition precedent notice

A surety is not entitled to notice of a contractor's default unless the bond specifically provides for it. Minidoka County for Use and Benefit of Deweiler, 88 Idaho 395, 419 (1965).

4) Special state provisions

5) Cases

"[I]f the contractor fails to perform the work contracted . . . then the surety, under the obligations of the required bond, must provide performance of the contracted work. The surety in such a case is required to step into the shoes of the contractor; the surety to perform as the contractor originally agreed to do." Minidoka County for Use and Benefit of Deweiler, 88 Idaho 395, 419 (1965).

ILLINOIS

1) Damages covered?

Surety contracts are treated as contracts of insurance. Insurers have a duty of good faith and fair dealing in handling claims. The common law action for recovery of punitive damages for refusal to pay is preempted by the legislature in 215 ILCS 5/155. Fisher v. Fidelity and Deposit Co. of Maryland, 125 Ill. App. 3d 632, 641, 42 (Ill. App. 1984).

When is the surety obligated to perform?

"The liability of a surety is measured by that of its principal . . . no suit on the bond can be maintained against the surety unless it could have been maintained against the principal." Village of Rosemont v. Lentin Lumber Company, 144 Ill. App. 3d 651, 668 (Ill. App. 1986).

"Where a bond guarantees performance the obligations of the contractor in legal effect becomes the obligation of the surety and the obligee need not actually incur expenses or correct deficient performance of the contract in order to be entitled to recovery against the surety." Fisher v. Fidelity and Deposit Co. of Maryland, 125 Ill. App. 3d 632, 641, 42 (Ill. App. 1984).

Limitation on damages; for example, no delay damages.

The surety's liability is the same as the liability of the principal. Turk v. United States Fidelity & Guaranty Co., 361 Ill. 206 (Ill. 1935).

The surety is discharged as to additional expenses caused by the obligee's failure to provide notice of default if the surety could have remedied the delays and additional costs. Blackhawk Heating & Plumbing Co., Inc. v. Seaboard Surety Company, 534 F. Supp. 309, 316 (N.D. Ill. 1982).

Whether failure of contractor to provide insurance transfers burden to surety

"[I]ndemnitee agreements in construction bonds and agreements to provide liability insurance for another party to the contract, even though that party is an indemnitee, are valid." GTE North, Incorporated v. Henkels & McCoy, Inc., 245 Ill. App. 3d 322, 329 (Ill. App. 3d 322, 329 (Ill. App. 1993).

If the contract did not require the contractor to provide liability insurance and the contractor agreed to indemnify the obligee for some claims for damages to real or personal property. The liability of the surety under the performance bond guaranteeing performance of the contractor's obligations included the obligation to indemnify. Sanitary District of Chicago v. United States Fidelity & Guaranty Company, 392 Ill. 602, 610-11 (Ill. 1946).

Which obligations of the principal contract must the surety perform?

A construction bond and the principle contract must be read as one document. If the bond incorporates the contract by reference, the provisions of the contract become the provisions of the bond. Lake View Trust & Savings Bank v. Filmore Construction Company, 74 Ill. App. 3d 755, 758 (Ill. App. 1979).

"A statute requiring a bond constitutes a part of the bond, and it must be assumed that the bond is executed with reference to the provisions of the statute." Chicago Housing Authority for Use of General Bronze Corporation v. United States Fidelity and Guaranty Company, 49 Ill. App. 2d 407, 410 (Ill. App. 1964).

"If a contract that a surety has guaranteed is altered without the surety's consent, he is discharged, on the theory that he insured only the original contract. As a corollary to this rule, he is discharged if the obligee under the surety-ship contract makes advance payments to the principal beyond those provided for in the contract." Argonaut Insurance Company v. Town of Cloverdale, Indiana, 699 F.2d 417, 420 (7th Cir. 1983).

The public construction bond act requires that the bond incorporate the terms and conditions of the construction contract by reference. 30 ILCS 550/1.

2) Penal sum variations

<u>Statutory limitations on the penal sum amount</u>

Surety's liability is contractual and cannot exceed the amount of liability expressly assumed in the surety contract. Simmons, Inc. v. Pinkerton's, Inc., 762 F.2d 591, 609 (7th Cir. 1985).

<u>Effect of changes in work upon penal sum, if at all</u>

The surety's liability is limited to the terms of its undertaking. The extent of the surety's liability is limited to the penal sum of the bond even when the principal's liability is greater. *Fisher v. Fidelity and Deposit Co. of Maryland*, 125 Ill. App. 3d 632, 643 (Ill. App. 1984).

3) Notice or filing requirement

<u>Case law rules concerning condition precedent notice</u>

If a performance bond states "Whenever Contractor shall be, and declared by Owner to be in default under the Contract, the Owner having performed Owners" obligations thereunder, the Surety may promptly remedy the default" the obligee must declare the contractor in default before the surety's obligations under the performance bond are triggered. Liberty Mutual insurance Company v. Construction Management Services, Inc., 2004 WL 2271811 (N.D. Ill. October 6, 2004).

If the construction contract requires the obligee to give the contractor and its surety advanced written notice before terminating the contractor and the performance bond incorporated the contract by reference, the obligee's failure to provide notice before hiring a completion contractor is a material breach of the contract and renders the surety bond null and void. Dragon Construction, Inc. v. Parkway Bank & Trust, 287 Ill. App. 3d 29, 34 (Ill. Ap. 1997).

4) Special state provisions

5) Cases

<u>Cases in which the surety steps into shoes of obligee</u>

No reported Illinois cases specifically affirming *Pearlman v. Reliance Insurance Company*, 371 U.S. 132 (1962).

The surety is subrogated to the rights of to recover amounts paid for completion of a construction contract. However, "sureties who have not performed the contract or paid the laborers and material suppliers are not entitled to receive any of the withheld contract proceeds." In re Pyramid Industries, Inc., 170 B.R. 974 (N.D. Ill. 1994).

If a performance bond states "Whenever Contractor shall be, and declared by Owner to be in default under the Contract, the owner having performed Owner's obligations thereunder, the Surety may promptly remedy the default" the obligee must declare the contractor in default before the surety can "step into the shoes [the contractor] and become entitled to the proceeds under the construction contract." Liberty Mutual Insurance Company v. Construction Management Services, Inc., 2004 WL 2271811 (N.D. Ill. October 6, 2004).

INDIANA

1) Damages covered?

When is the surety obligated to perform?

If a contractor fails to commence or carry forward, improperly performs, has abandoned, fails or refused to complete its contract, the commissioner may relet the work or may complete the work. The commissioner shall deduct the cost of completion from any amount due the contractor and, if that is not sufficient, the commissioner shall require the surety to pay the balance. Indiana Code section 8-23-9-25

Limitation on damages; for example, no delay damages.

A surety's obligation under its performance bond is no greater than that of its principal's obligation to the obligee. State ex rel. Lawson v. Warren Bros. Roads, Co., 59 N.E.2d 912 (Ind. App. 1945).

The surety's liability for the failure of the contractor to comply with the contract documents is limited to the extent of the obligation of the surety's bond. State ex rel. Lawson v. Warren Bros. Roads, Co., 59 N.E.2d 912 (Ind. App. 1945).

The surety's liability is determined by the language of the bond (and any applicable statutes) and the liability cannot be enlarged beyond the bond's terms. State ex rel. Lawson v. Warren Bros. Roads, Co., 59 N.E.2d 912 (Ind. App. 1945).

2) Penal sum variations

Statutory limitations on the penal sum amount

Several Indiana Code sections state that a performance bond must be obtained for projects when the contract price meets a statutory minimum amount. The penal sum of the bond must be at least 100% of the contract price. Indiana Code Section 4-13.6-7-7(a); 5-16-5.5-4; 36-1-12-14(e).

3) Notice or filing requirement

Statutory provisions

For Title 4 projects, in order to proceed against the surety of the contractor the claimant must file a verified claim with the division within 60 days from the last labor performed, last material furnished, or last service rendered. The claim must state the amount due and owing to the person and shall give as much detail explaining the claim as possible. In addition, the claimant must notify the surety of the contractor by sending a company of the claim required by subsection (a) to the surety company. The claimant also must inform the division that the surety has been notified. The division must supply the claimant with any information the claimant requires to notify the surety. The claimant may not file suit against the surety until

30 days after the claim is filed with the division. If the claim is not paid in full, then the claimant may bring an action in court. Indiana Code Section 4-13.6-7-10(a) – (c).

For Title 8 projects, any party that is owed money for labor or materials must furnish the surety with a statement of the amount owed within one year after the acceptance of said labor and materials. Suit may not be brought against a surety on a bond until 60 days after the furnishing of the statement. An action must be commenced within 18 months from the final acceptance of the project. Indiana Code Section 8-23-9-10 – 11.

4) Special state provisions

5) Cases

<u>Cases in which the surety steps into shoes of obligee</u>

The surety's rights of subrogation date back to when the bond was issued and entitle the surety priority in payment over all subsequent lien holders and general creditors. Southern Surety Co. v. Merchants' and Farmers' Bank of Avilla, 176 N.E. 146 (Ind. 1931); Southern Railroad Co. v. Bertz, 104 N.E. 19 (Ind. 1914); Fidelity & Casualty Co. of New York v. Indiana National Bank, 216 N.E.2d 857 (Ind. Ct. App. 1966).

IOWA

1) Damages covered?

When is the surety obligated to perform?

"Under a performance bond, a surety generally has two options if the principal defaults: (1) undertake the completion of the principal's work itself; or (2) pay the obligee the amount of the bond." Employers Mut. Cas. Co. v. United Fire & Cas. Co., 682 N.W.2d 452, 456 (Iowa App. 2004).

Limitation on damages; for example, no delay damages.

The aggregate amount of damages paid by a surety may not exceed the principal amount of the bond. I.C.A. Section 9D.3.

"Up to the face of a private bond the surety is liable for interest the same as the principal. For any other interest in excess of the face of the bond the surety can be held liable only for its own default." Mechanicsville Trust & Sav. Bank v. Hawkeye-Security Ins. Co., 158 N.W.2d 89, 93 (Iowa 1968).

Whether failure of contractor to provide insurance transfers burden to surety

Surety is not liable for damages caused by negligent acts caused by contractor's employees when the contractor failed to obtain insurance and the obligee permitted the contract to go into effect without it. Schisel v. Marvill, 198 Iowa 725, 197 N.W. 662 (1924).

Which obligations of the principal contract must the surety perform?

If the surety bounds itself to the performance of the contract and the bond references the principal contract, then the surety must perform all the agreements of the contract. Streator Clay Mfg. Co. v. Henning-Vineyard Co., 176 Iowa 644, 658, 158 N.W. 597, 602 (1916).

2) Penal sum variations

Statutory or case law limitations on the penal sum amount

A bond is open to successive claims but the aggregate amount of damages paid may not exceed the principal amount of the bond. I.C.A. Section 9D.3

"When a surety takes over performance of a contract, the surety's liability is no longer limited by the amount of the bond. We note: ordinarily, a surety on a bond is not liable beyond the penalty named therein. However, this limitation may be varied by the contract, by bad faith on the part of the surety, or by statute; and where a surety assumes the role of the principal and completes the contract, the surety is liable to pay sums in excess of the penal sum." Employers Mut. Cas. Co. v. United Fire & Cas. Co., 682 N.W.2d 452, 457 (Iowa App. 2004) (citations omitted).

3) Notice or filing requirement

Statutory provisions

For the reclamation of coal mines, if the administrator has a reasonable belief that the coal mine operator is unable to complete reclamation , then the administrator must issue an order to the operator to show cause as to why all or a portion of the performance bond required by section 207.10 should not be revoked. I.C.A. 207.10.

Case law rules concerning condition precedent notice

"[f]ailure to give a paid surety any notice of the contractor's default in failing to complete the building in the time agreed upon is no defense to an action on the bond based upon default arising from unpaid claims for labor and materials." Rowe v. Stufflebeam, 249 Iowa 985, 988-989, 89 N.W.2d 875, 877 (1958).

4) Special state provisions

Statutory provisions are read into a bond obtained to meet statutory requirements and the statutory provisions prevail over contrary bond provisions. United Fire & Cas. Co. v. Acker, 541 N.W.2d 517 (Iowa) 1995.

5) Cases

Cases in which the surety steps into shoes of obligee

"In the case of a surety, the essential prerequisite to subrogation is the payment of the obligation by the surety. When he has done this, a court of equity man , and generally should, grant subrogation, by letting the surety step into the shoes of the creditor, as to any lien or equity the creditor may have against the obligor. The right to subrogation is not a contractual right. It is on e established and recognized by equity as within its plenary power to effectuate justice. The very basis and foundation the right rests upon performance of the obligation on the part of the surety. There can be no subrogation until the surety has performed. Then and not until then, does any right to subrogation come into being." Leach v. Com. Sav. Bank, 205 Iowa 1154, 1161, 213 N.W. 517, 520 (1928).

KANSAS

1) Damages covered?

When is the surety obligated to perform?

Surety may be responsible for prejudgment interest in action against performance bond by subcontractor. Blinne Contracting Co., Inc. v. Bobby Goins, 715 F.Supp 1044 (D. Kan. 1989).

Limitation on damages; for example, no delay damages.

A surety will be held liable for attorney's fees if an action is brought against a surety to pay for a loss, however, if the surety pays for the loss before action is brought, and amount recovered is not in excess of the final judgment, then the surety will not be liable for attorney's fees. K.S.A. 40-256.

Damages for breach of contract are generally limited to pecuniary loss sustained. Exemplary and punitive damages are not recoverable unless an independent tort or wrong caused additional injury. Mabery v. Wester Cas. & Sur. Co., 173 Kan. 586, 250 0P.2d 824 (1952).

It is permissible for damages to be awarded that are larger than the penal sum of the bond, if the increased damages over the penal sum are caused from interest, costs and/or attorney's fees. In re Conservatorship of Huerta, 273 Kan. 97, 41 P.3d 814 (2002).

Which obligations of the principal contract must the surety perform?

The obligation of a bond is to be measured by the bond itself and may not be extended by implication or enlarged by construction beyond the terms of the executed contract. In re Conservatorship of Huerta, 273 Kan. 97, 41 P.3d 814 (2002).

Surety's obligations are fixed by the bond. If the bond shows an intention to guaranty compliance with the terms of the contract pursuant to which the bond is given, the surety signing the bond becomes the surety for the full performance of all the terms of the contract. Thompson Transport Co. v. Middlestates Construction Co., 194 Kan. 52, 397 P.2d 368 (1964).

2) Penal sum variations

Effect of changes in work upon penal sum, if at all

The obligation of a bond is to be measured by the bond itself and may not be extended by implication or enlarged by construction beyond the terms of the executed contract. In re Conservatorship of Huerta, 273 Kan. 97, 41 P.3d 814 (2002).

3) Notice or filing requirement

<u>Case law rules concerning condition precedent notice</u>

The breach of a condition precedent in bond will not relieve the surety from liability for any loss for which it would otherwise be liable, unless such breach contributed to the loss. School District No. 1 of Clark County v. Massachusetts Bonding & Ins., 92 Kan. 53, 143 P. 1077 (1914).

4) Special state provisions

5) Cases

To effectuate a surety bond's purpose it is construed in the light of the circumstances that it is given, so as. Kendall v. Black, 99 Kan. 101, 102, 160 P. 1015 (1916); City of Wichita v. Home Cab Co., 151 Kan. 679, 687, 101 P.2d 219 (1940).

<u>Cases in which the surety steps into shoes of obligee</u>

Where a surety stands in the shoes of the contractor, the right of legal or equitable subrogation arises by operation of law, it does not depend on privity of contract. Western Sur. Co. v. Loy, 3 Kan. App 2d 310, 594 P.2d 257 (1979).

KENTUCKY

1) Damages covered?

When is the surety obligated to perform?

The surety will be discharged from liability if a material variance to the contract between the principal and the obligee results in injury, loss or prejudice to the surety. Ferguson Contracting Co. v. Story Const. Co., 417 S.W.2d 228 (Ky. 1967).

Limitation on damages; for example, no delay damages.

Parties to a contract can agree to liquidated damages, limitations in a reasonable amount, but such remedy is optional unless expressly stated to be the exclusive sole remedy . A party cannot recover both actual and liquidated damages. Island Creek Corp v. Ankeer Energy Corp., No. 91-5968, 1992 WL 159789 (6th Cir. (ky.), July 10, 1992)

"No damage for delay" clauses are enforceable. Apex Contracting, Inc. v. City of Paris, 2004 WL 758276, Ky. App. April 29, 2004.

The addition of interest cannot increase the surety's liability beyond the penal sum of its bond. Polk v. American Casualty Co., 816 S.W.2d 178 (Ky. 1991).

Which obligations of the principal contract must the surety perform?

The liability of a surety is coextensive with that of the principal. Kentucky Ins. Guaranty Ass'n v. Dooley Const. Co., 732 S.W.2d 887 (Ky. App. 1987).

If the bond incorporates the principal contract then the bond and underlying contract will be read together to determine the parties intention as to what is covered by the bond. ABCO-Bramer, Inc. v. Markel Ins. 55 S.W.3d 841 (2000).

2) Penal sum variations

Effect of changes in work upon penal sum, if at all

A performance bond on a public contract will be issued in an amount equal to 100 percent of the contract price even if it is price is increased. KRS 45A.190.

3) Notice or filing requirement

Case law rules concerning condition precedent notice

If the bond requires that a notice of default must be given within a specified time period, then the obligee is required to do so within that time period. However, if no time period is provided then the obligee must provide notice within a reasonable time. The harm caused by delaying the notice is a question of material fact. United Bonding Ins. Co. v. Sperry & Hutchinson Co., 465 S.W.2d 291 (Ky. 1971).

4) Special state provisions

5) Cases

Cases in which the surety steps into shoes of obligee

The doctrine of equitable subrogation "arises when a contractor defaults on its obligations and a surety completes the work called for by the contract and pays all of the related bills. The law is clear that a surety under these circumstances has a right to the payments due the contractor to the extent of full reimbursement." Kentucky Cent. Ins. Co. v. Brown (In re Larbar Corp.), 177 F.3d 439, 443 (6th Cir. Ky. 1999).

LOUISIANA

1) Damages covered?

When is the surety obligated to perform?

"The derivative liability of a surety cannot exist unless the principal is first liable." Pacific Lining Co. v. Algernon-Blair Construction Co., 812 F.2d 237 (5th Cir. 1987).

"Under La. R.S. 48:255.2, the surety must strictly comply with the statutory obligation of presenting the DOTD with a plan to assume performance and procure completion of the project or a response for the contractor's default within 45 days of notice of contractor's default from DOTD. Failure to do so subjects the surety to statutory damages, including cost to complete the project and stipulated damages up to the amount of total amount of the bond." United Rentals Highway Techs., Inc. v. St. Paul Sur., 852 So. 2d 1200, 1204 (La. App. 2d Cir. 2003).

Limitation on damages; for example, no delay damages.

The surety may be liable to the obligee for indirect or consequential damages including lost rentals depending on the language of the performance bond. *See* Bossier Medical Props. V. Abbott and Williams Constr. Co. of La., Inc., 557 So. 2d 1131, 1134 (La. App. 2d Cir. 1990).

"[T]he language of the bond indicates the surety contemplated potential liability for other costs and damages in addition to costs of completion. We construe the language strictly in favor of protecting the obligee. Although the surety could have limited its liability under the provisions of the surety agreement to costs of repairs or replacement, it did not do so in the instant case. Accordingly, we find that it was error to have limited the surety's liability to the . . . cost of repairs. The judgment is amended to reflect that [surety] is liable, in solid with [the contractor] for the full amount of pecuniary damages assessed against [the contractor]." Stonecipher v. Mitchell, 655 So. 2d 1381, 1390 (La. App. 2d Cir. 1995).

Which obligations of the principal contract must the surety perform?

"The surety promises to satisfy the entire obligation, unless the agreement is otherwise limited." Stonecipher v. Mitchell, 655 SO. 2d 1381, 1389 (La. App. 2d Cir. 1995).

2) Penal sum variations

Statutory or case law limitations on the penal sum amount

Public – L.A. R.S. 38:2216(A)(1) requires a contractor awarded a contract on a public project to "furnish good and solvent bond in an amount not less than one-half of the amount of the contract, for the faithful performance of his duties."

DOTD – La. R.S. 48:255(D) provides that "the party to whom the contract is awarded shall furnish good and solvent bond in an amount equal to the contract bid cost for the faithful performance of his duties."

Liability of a surety can exceed the penal sum of the bond. A "surety that obligates itself to fulfill all the obligations of its principal is thereby bound to pay all sums adjudged, even if they are found to be in excess of the actual bond amount." L & A Contracting Co. v. Ram Industrial Coatings, Inc., 762 So.2d 1223, 1238 (La. App. 1st Cir. 2000).

Effect of changes in work upon penal sum, if at all

The penal sum of a performance bond does not automatically increase due to change orders. *See* U.S. Pollution Control, Inc. v. Nat'l Am. Ins. Co., 663 So.2d 119, 120-21 (La. App. 3d Cir. 1995).

3) Notice or filing requirement

Statutory provisions

"The liability of the surety is not extinguished by a deficiency in the amount of the bond, the failure to attach the bond to the notice of contract, or the failure to file the notice as required in R.S. 9:4811." La. R.S. 9:4813(C).

Case law rules concerning condition precedent notice

"Given the consequences that follow a declaration of default, it is vital that the declaration be made in terms sufficiently clear, direct and unequivocal to inform the breaching party that it has defaulted on its obligations." Central La. Elec. Co. v. Dolet Hills Mining Venture, 116 F. Supp. 2d 726, 738 (W.D. La. 2000).

4) Special state provisions

The surety's obligation is not extinguished due to material changes to the bonded contract, extensions of time for performance or premature payments by the owner to the contractor. But, the surety has the right to be indemnified for any loss caused to the surety because of such actions, and it relieves the surety of any liability to the owner for overpayments or material modifications to the bonded contract. La. R.S. 9:4812(E).

5) Cases

Cases in which the surety steps into shoes of obligee

"The surety who pays the principal obligation is subrogated by operation of law to the rights of the creditor." La. C.C. art. 3048.

MAINE

1) Damages covered?

When is the surety obligated to perform?

A surety is not discharged of its liability under a performance bond if the owner advances payment to the contractor. Maine Central R. Co. v. National Surety Co., 113 Me. 465, 94 A. 929 (Me. 1915).

Which obligations of the principal contract must the surety perform?

If the surety bond incorporates the general contract, then the surety will be bound to provisions found within the general contract. Cianbro Corp. v. Empressa Nacional De Ingenieria, 697 F. Supp. 15 (D. Me. 1988).

2) Penal sum variations

Statutory limitations on the penal sum amount

Maine's Public Works Surety Bond Law of 1971 requires that the penal sum of performance bonds equal to the contract price for contracts over $100,000. 14 M.R.S. § 871.

Effect of changes in work upon penal sum, if at all

"[A]ny material alteration in the terms of a contract for the performance of which a surety is bound, if made without the surety's consent, releases him from liability." Maine Cent. R. Co. v. National Surety Co., 94 A. 929, 113 Me. 465 (Me. 1915).

3) Notice or filing requirement

Statutory provisions

The requirements and deadlines for filing suit for payment bond claimants is set forth in Maine's Public Works Surety Bond Law of 1971. 14 M.R.S. § 871.

Case law rules concerning condition precedent notice

If obligee notifies contractor of its claim against a subcontractor, there is adequate compliance with the surety bond law even without separate notice to the surety. Chadwick-BaRoss, Inc. v. T. Buck Const., Inc., 627 A.2d 532 (Me. 1993).

4) Special state provisions

5) Cases

Cases in which the surety steps into shoes of obligee

The condition contained with a surety bond that the contractor as principal, shall faithfully perform contract and shall satisfy all claims and demands shall be liberally construed. Newport Trust Co. v. Susi, 153 Me. 51 (Me. 1957).

If the surety pays obligee for default of principal, the surety shall become subrogated to the obligee's rights against principal and third parities obligated to obligee. Unity Telephone Co. v. Design Service Co., Inc., 201 A.2d 177 (Me. 1964).

MARYLAND

1) Damages covered?

When is the surety obligated to perform?

"The liability of a surety is coextensive with that of the principal, and it is clear that the liability of the surety is measured by the contract of the principal." General Builders Supply Co., Inc. v. MacArther, 228 Md. 320, 326, 179 A.2d 868, 871-72 (Md. 1962)

The surety's liability for damages becomes fixed when obligee accepts the work, not when the principal defaults. Republic Ins. Co. v. Prince George's County, 92 Md. App. 528, 533, 608 A.2d 1301 (Md. App. 1992).

"[I]t is clear that the liability of a surety is not to be extended, by implication, beyond the terms of its contract, but the nature of the duty of the obligor and the character of the obligee must be regarded as explanatory of their intent." State Highway Admin. V. Transamerica Insur. Co., 278 Md. 690, 700-01, 367 A.2d 509 (1976).

Limitation on damages; for example, no delay damages.

"The cardinal rule in the interpretation of bonds, as well as of other contracts, is to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles." Lange v. Board of Education, 183 Md. 255, 260, 37 A.2d 317 (1944).

The penal sum of the bond is the limit of a surety's liability. Republic Ins. Co. v. Board of County Comm'rs of St Mary's County, 68 Md. App. 428, 431-32, 511 A.2d 1136 (Md. App. 1986): Institute of Mission Helpers v. Reliance insurance Company, 812 F. Supp. 72 (D. Md. 1992).

Maryland does not recognize the surety's failure to perform a contract as giving rise to a tort action for "bad faith" or breach of a duty of good faith or fair dealing. Republic Ins. Co. v. Board of County Comm'rs of St Mary's County, 68 Md. App. 428, 431-32, 511 A.2d 1136 (Md. App. 1986): Institute of Mission Helpers v. Reliance insurance Company, 812 F. Supp. 72 (D. Md. 1992).

Obligee cannot recover consequential damages based on the surety's refusal to perform if damages are in excess of the penal sum of the bond. Bell BCI Co. v. HRGM Corp., 276 F. Supp. 2d 462, 463, n.1 (D. Md. 2004).

Which obligations of the principal contract must the surety perform?

"Where the contract incorporates as part of itself the specifications, and the contract is, by reference, incorporated as part of the bond, the contract, the specification s and the bond must all be construed together." Lange v. Board of Education, 183 Md., 255, 261, 37 A.2d 317 (Md. 1944).

2) Penal sum variations

3) Notice or filing requirement

4) Special state provisions

5) Cases

<u>Cases in which the surety steps into shoes of obligee</u>

A performance bond surety that completes the contract is entitled to be subrogated to the rights that the obligee had to, or could assert against the contractor to the extent necessary to reimburse itself for the completion of the contract. Finance Co. of America v. U.S. Fidelity & Guaranty Co., 277 Md. 177, 182-183, 353 A.2d 249 (Md. 1976).

MASSACHUSETTS

1) Damages covered?

When is the surety obligated to perform?

"[I]t is well established that a bond and the contract which it makes written to guarantee should be read together when the bond makes appropriate reference to the contract. . . . a surety's obligation should be construed by reading together all instruments, statutes, and regulations underlying the transaction." In re Sinking of M/V Ukola, 806 F.2d 1, 4 (1st. Cir. 1986).

Limitation on damages; for example, no delay damages.

"The substantial correspondence of the obligations of principal and surety extends to the obligation to pay interest." John W. Egan Co., Inc. v. Major Const. Management Corp., 46 Mass. App. Ct. 643, 647, 709 N.E.2d 66, 70 (1999) (construing statutory payment bond).

The surety will be relieved of its liability under the performance bond if the principle contract is modified without its knowledge or consent. The surety ahs the burden of showing that the modification materially increased its risk or that some of the liability for which it is answerable resulted from modification. Town of Hingham v. B. J. Pentabone, Inc., 354 Mass. 537, 238 N.E.2d 534 (1968).

Which obligations of the principal contract must the surety perform?

The rights and obligations of parties under a surety bond are determined by the language of the bond and construed according to usual rules of contract interpretation. In re Sinking of M/V Ukola, 806 F.2d 1, 4 (1st. Cir. 1986); Miller v. Perry, 333 Mass. 155, 158, 129 N.E.2d 143, 144-45 (1955).

2) Penal sum variations

Statutory or case law limitations on the penal sum amount

"The liability of [a] surety [is] to make good any default of the principal in regard to payments, within the amount stated as the penal sum of the bond." Yanofsky v. Marinucci Bros & Co., 351 Mass. 698, 699, 218 N.E.2d 405, 406 (1966).

The general rule is that the amount of recovery against a surety is limited to the penal amount of the bond. Peerless Ins. Co. v. South Boston Storage & Warehouse, Inc., 397 Mass. 325, 491 N.E.2d 253 (1986); Hartford Accident & Indem. Co. v. Casassa, 301 Mass. 246, 255, 256, 16 N.E.2d 860, 866 (1938).

"Where a surety company assumes the role of the principal and completes the contract, it is liable to pay sums in excess of the penal sum." International Fidelity Ins. Co. v. Wilson, 387 Mass. 841, 851, 443 N.E.2d 1308, 1314 (1983).

3) Notice or filing requirement

Case law rules concerning condition precedent notice

"While it is true that Massachusetts courts have held that lack of prompt notice to the compensated surety of a contractor's default (as required by a Performance Bond) does not discharge the surety if it is not harmed, notice requirements exist precisely to provide the surety an opportunity to protect itself against loss by participating in the selection of the successor contractor to ensure that the lowest bidder is hired and damages mitigated." Seaboard Sur. Co. v. Town of Greenfield, 370 F.3d 215, 220 (1st Cir. 2004), *quoting* Enterprise Capital, Inc. v. San-Gra Corp., 284 F. Supp. 2d 166, 177 (D. Mass. 2003).

A surety will be discharged from liability if an owner materially breaches the incorporated construction contract by failing to give proper notice of contractor default. Enterprise Capital, Inc. v. San-Gra Corp., 284 F. Supp. 2d 166, 177 (D. Mass. 2003).

The failure to comply with default and termination provision in an AIA A312 bond results in the complete discharge of the surety. *See Seaboard Surety Co. v. Greenfield*, 266 F. Supp. 2d. 189, 196 (D. Mass. 2003), aff'd 370 F.3d 215, 219 (1st Cir. 2004)

The performance bond becomes null and void if the obligee refuses to allow the surety to complete the project. Enterprise Capital, Inc. v. San-Gra Corp., 284 F. Supp. 2d 166, 177 (D. Mass. 2003).

"[C]lear, direct, and unequivocal" notice must be provided to the surety if the performance bond requires notice. Enterprise Capital, Inc. v. San-Gra Corp., 284 F. Supp. 2d 166, 177 (D. Mass. 2003).

4) Special state provisions

5) Cases

Cases discussing AIA forms of bonds A311 and A312

The failure to comply with default and termination provision in an AIA A312 bond results in the complete discharge of the surety. *See Seaboard Surety Co. v. Greenfield*, 266 F. Supp. 2d. 189, 196 (D. Mass. 2003), aff'd 370 F.3d 215, 219 (1st Cir. 2004)

Cases in which the surety steps into shoes of obligee

If a surety "pays all the bills of the job to date and completes the job, it stands in the shoes of the contractor insofar as there are receivables due it; in the shoes of laborers and materialmen who have been paid by the surety – who may have had liens; and, not least, in the shoes of the government, for whom the job was completed." National Shawmut Bk. Of Boston v. new Amsterdam gas Co., 411 F.2d 843, 845 (1st Cir. 1969).

MICHIGAN

1) Damages covered?

When is the surety obligated to perform?

The performance bond surety is also responsible for latent defects that appear within the contract's warranty period. Hunters Pointe Partners Ltd Partnership v. Hoffman Const. Co., 194 Mich. App. 294, 486 N.W.2d 136 (1992).

Performance bonds are "conditioned upon the faithful performance of the contract in accordance with the plans, specification sand terms thereof." MCL 129.202

If an obligee overpays the principal, the surety should be discharged to the extent it was prejudiced by the overpayments. Ramada Development Co. v. USF&G, 626 F.2d 517 (6th Cir. 1980).

Limitation on damages; for example, no delay damages.

The surety's liability is coextensive with that of the principal. Ackron Contracting Co. v. Oakland County, 108 Mich. App. 767, 310 N.W.2d 874 (1981).

Whether failure of contractor to provide insurance transfers burden to surety

A performance bond covers all obligations of the principal, including the contractor's obligation to assume liability to third parties that results from property damage. Hardware Dealers Mutual ins. Co. v. R. H. Hidey, Inc., 349 Mich. 490, 84 N.W.2d 795 (1957).

Which obligations of the principal contract must the surety perform?

"[W]here one writing references another instrument for additional contract terms, the two writing should be read together." Forge v. Smith, 458 Mich. 198, 580 N.W.2d 876 (1998).

2) Penal sum variations

Statutory limitations on the penal sum amount

Performance bonds are required for non-MDOT public projects in excess of %50,000. The performance bond must be at least 25 percent of the contract price. MCL 129.202.

Effect of changes in work upon penal sum, if at all

A surety can be relieved from its liability if there is a material change in the underlying contract that results in harm to the surety. Grinnell Realty Co. v. General Casualty & Surety Co., 253 Mich. 16, 234 N.W. 125 (1931).

3) Notice or filing requirement

4) Special state provisions

Prima facie evidence against the surety occurs if a judgment is made against a principle, even if the surety was not a party to the action and had no notice. P.R. Post Corp. v. Maryland Casualty Co., 403 Mich. 543, 271 N.W.2d 521 (1978).

5) Cases

<u>Cases in which the surety steps into shoes of obligee</u>

If an obligee overpays the principal, the surety should be discharged to the extent it was prejudiced by the overpayments. Ramada Development Co. v. USF&G, 626 F.2d 517 (6th Cir. 1980).

A performing surety is subrogated to all rights and remedies of the principal under the contract. Sentry Ins. v. Lardner Elevator Co., 152 Mich. App. 317, 395 N.W.2d 31 (1986).

A surety that completes the obligations of the contract becomes subrogated to the rights of the owner in retained funds. Earl Dubey & Sons, Inc. v. Macomb Contracting Corp., 97 Mich. App. 553, 296 N.W.2d 582 (1980).

"Equitable subrogation allowed the surety, who had completed the contractor's performance under the contract, to step into the shoes of the government and assert any rights that the government had to withhold or retain funds upon default of the general contractor." In re RAH Dev. Co., 184 B.R. 525, 529 (Bankr. D. Mich. 1995).

MINNESOTA

1) Damages covered?

Limitation on damages; for example, no delay damages.

No punitive damages are allowed, even if the surety maliciously or willfully breaches the bond terms, unless such breach is accompanied by an independent tort. Barr/Nelson, Inc. v. Tonto's, Inc., 336 N.W.2d 46, 52 (Minn. 1983).

Generally, the extent of a surety's liability is the penal sum, plus interest. Although some cases obligate the surety to pay attorney's fees even if above penal sum. Iowa Concrete Breaking Corp. v. Jewat Trucking, Inc., 444 N.W.2d 872 (Minn. Ct. App. 1989).

Which obligations of the principal contract must the surety perform?

Third parties subcontractors and suppliers may benefit from a performance bond if the bond expressly demonstrates an intent to incorporate the principal contract. Sere Cretex Cos. V. Constr. Leaders, 342 N.W.2d 135, 139-41 (Minn. 1984).

2) Penal sum variations

Statutory limitations on the penal sum amount

Generally, the penal sum of the performance bond must be at least equal to the contract price. Minn. Stat. Section 574.26 subd. 3.

Effect of changes in work upon penal sum, if at all

3) Notice or filing requirement

Case law rules concerning condition precedent notice

"For a claim against a bond, it is reasonable that the claimant not be held to the notice requirement unless the bond discloses the address at which the surety can be served. If the bond contains no address for service on the surety, it is a reasonable conclusion that the legislature intended that the surety is not entitled to the benefit of the statutory notice requirement." Edward Kraemer & Sons, Inc. v. Ashbach Const. Co., 608 N.W.2d 559 (Minn. Ct. App. 2000).

Sometimes a surety may be liable for a judgment against its principal even without notice. "[W]here a surety has undertaken to pay any judgment rendered in an action, the surety has neither a right to notice of such an action or a right to reopen judgment entered against its principal, even though it was obtained by consent or default." R & L Lumber Co. v. Summit Fidelity & Sur. Co., 284 Minn. 489, 494, 170 N.W.2d 594, 598 (Minn. 1969).

4) Special state provisions

5) Cases

<u>Cases discussing AIA forms of bonds A311 and A312</u>

Barr/Nelson, 336 N.W.2d at 53. (the bond at issue was an AIA standard performance bond.)

<u>Cases in which the surety steps into shoes of obligee</u>

A surety's "right of subrogation out of funds taken in completion of the projects in no event existed beyond the extent necessary to reimburse itself for expenditures made in fulfilling its obligations under the bonds." Anderson v. U.S., 561 F.2d 162, 167 (8th Cir. 1977).

"[T]he surety's equity of subrogation attaches to the contract and the prospective earnings of the contractor thereunder at the very moment he becomes surety. The right of subrogation and its automatic equitable assignment relate to the date of the surety-ship, as against the principal and those claiming under him. That equitable assignment to the surety of the principal's rights and remedies when completed by the surety's performance of his principal's obligation relates back to that earlier time when the surety first obligated himself as such.

In this case the contracts and bonds took effect at the same time. In consequence and from that moment, the rights of the contracting parties, the builder and the county, were qualified insofar as they became subject to the surety's equity of subrogation. It follows that there was no part of the prospective earnings, whether reserved or unreserved, which the contractor could assign to a mere stranger, such as plaintiff, having no independent equity, and thereby given to the assignee a right superior to that of the surety. That is the precise holding, as we understand the decision, in Henningsen v. U.S.F. & G. Co. 208 U.S. 404, 28 Sup. Ct. 389, 52 L. ed. 547, where the surety of a government building contractor was held entitled to all of the earnings of a contractor as against the latter's assignment to a creditor. True, the effect of the "reserved percentage" provision, if any, of the controlling contract was not considered. But is it not clear that any other holding, based upon such a provision, subjects the surety's highly valuable and obviously moral right of subrogation to easy destruction by the mere omission of any provision for a reserved percentage? Where nothing is agreed to be reserved, the surety as a subrogee has no recourse, if it is to be held that his right can attach only to earnings which are reserved or subject to reservation by the contract." Barrett Bros. Co. v. St. Louis County, 165 Minn. 158, 161-162 (Minn. 1925) (punctuation and citations omitted).

MISSISSIPPI

1) Damages covered?

When is the surety obligated to perform?

The surety's liability is measured by the express terms of its under taking. Metropolitan Cas. Ins. Co. New York v. Koelling, 57 So. 2d 562 (Miss. 1952).

Limitation on damages; for example, no delay damages.

A surety is only liable for punitive damages if its own conduct justifies punitive damages. U.S.F.&G., 218 So. 2d 1 (Miss. 1969).

Depending upon the terms of the contract, a surety may be held liable for such items as home office overhead and loss of labor productivity. Aetna Cas. & Surety Co. v. Doleac Electric Co., Inc., 471 So. 2d 325 (Miss. 1985).

If no agreement as to interest rate, the surety will be liable at the "legal rate". If there is an agreement then the surety will be liable at the rate agreed upon. Faulkner Concrete Prods. Co. v. U.S.F.&G., 218 So. 2d 1 (Miss. 1969).

Which obligations of the principal contract must the surety perform?

The surety will not be liable, if the bond principal is not liable. Mohundro v. Alcorn County, 675 So. 2d 848 (Miss. 1996).

2) Penal sum variations

Statutory limitations on the penal sum amount

For public works exceeding $25,000 a performance bond must be obtained with a penal sum equal to the contract price. Miss. Code Ann. Section 31-5-51.

Effect of changes in work upon penal sum, if at all

3) Notice or filing requirement

Case law rules concerning condition precedent notice

If bond language requires a notice, the notice is a condition precedent to recovery on the bond. Western Cas. And Sur. Co. v. Honeywell, Inc., 380 So. 2d 1385 (Miss. 1980).

4) Special state provisions

A surety is entitled to recover against an architect if the architect improperly releases retained contract funds to the bond principal. State for the Use of National Surety Corp. v. Malvaney, 72 So. 2d 424 (Miss. 1954).

"[A] default judgment against a principal is conclusive against his surety, unless it is shown that the default judgment was obtained through consent of the debtor, or collusion so as to be a fraud upon the rights of the surety." First Mobile Home Corp. v. Little, 298 So. 2d 676 (Miss. 1974).

An assignee holding a perfected security agreement is entitled to earned but unpaid "progress payments" and the surety is entitled to earned but unpaid retainage. Reliance Ins. Co. v. First Miss. National Bank, 263 So. 2d 555 (Miss. 1972).

5) Cases

<u>Cases in which the surety steps into shoes of obligee</u>

A surety who satisfies a principals obligations is subrogated to the principals position. Coahoma County, Miss. V. Mississippi Fire ins. Co., 68 F.2d 489 (5th Cir. 1934).

MISSOURI

1) Damages covered?

When is the surety obligated to perform?

"In the case of a performance bond, the surety has the option of completing performance or of assuming the liability for the obligee's costs in completing the contract, which are in excess of the contract." Miller-Stauch Construction v. Williams-Bungart Electric, Inc., 959 S.W.2d 490, 494 (W.D. Mo. 1998).

"[I]f it appears from the evidence that [the surety] has refused to pay such loss without reasonable cause or excuse , the court or jury may, in addition to the amount thereof and interest, allow the plaintiff damages not to exceed 20 percent of the first $1,500 of the loss, and 10 percent of the amount of the loss in excess of $1,500 and a reasonable attorney's fee." R.S.Mo. 375.420.
Limitation on damages; for example, no delay damages.

"[A]s a general rule, a surety's liability for contract damages is coextensive with that of the principal." Sheffield Assembly of God Church, Inc. v. American Ins. Co., 870 S.W.2d 926, 932 (Mo. App. 1994).

Without an agreement to the contrary, the rights and liabilities of a surety are measured by those of the principal. City of Kansas City ex rel. Jennings v. Integon Indem. Corp., 857 S.W.2d 233, 236 (Mo. App. 1993). City of Independence for use of Briggs v. Kerr Construction Paving Company, Inc., 957 S.W.2d 315, 319 (Mo. App. W.D. 1997).

"Creditors shall be allowed to receive interest at the rate of nine percent per annum, when no other rate is agreed upon, for all moneys after they become due and payable on written contracts, and on accounts after they become due and demand of payment is mad." See also Howard Construction Company v. Teddy Woods Construction Co., 817 S.W.2d 556, 564 (Mo. App. W.D. 1991).

Generally, the surety is not liable for the principal's tortuous acts. J. Louis Crum Corp. V. Alfred Lindgren, Inc., 564 S.W.2d 544, 549-50 (M.O. App. W.D. 1978).

Whether failure of contractor to provide insurance transfers burden to surety
Which obligations of the principal contract must the surety perform?

"A separate document may be incorporated in the contract by reference: however, when the reference is made only for specific purposes, the separate document becomes a part of the contract only for such purposes." Lusk v. Lyon Metal Products, Inc., 247 S.W.2d 617, 618 (1952)(citation and punctuation omitted).

"The obligation for the bond may not in the guise of construction be enlarged beyond the plain terms and stipulations, and with respect to contracts generally." Executive Hills Home Builders v. Whitley, 770 S.W.2d 507, 508 (Mo. App. 1989).

2) **Penal sum variations**

<u>Effect of changes in work upon penal sum, if at all</u>

"[I]f the original parties to the contract make changes or alterations which go to vary and alter its terms through substituting other matters for those called for in the contract, so as to destroy its identity in the matter of performance, without the consent of the surety, he is thereby relieved and discharged from the secondary obligation undertaken on the ground that the identity of the contract on which he assumed to respond has been destroyed through the act of the original parties without consulting him." Neuwirth v. Moydell, 188 Mo. App. 467, 174 S.W. 206, 207-08 (1915).

3) **Notice or filing requirement**

<u>Case law rules concerning condition precedent notice</u>

In the absence of a provision in the bond agreements requiring notice to the surety upon the principal's default, the surety is not discharged by the obligee's failure to communicate such notice. Restatement of Security Section 136 (1941). Nevertheless, the obligee may not delay before notifying the surety and then insist that the measure of the surety's liability includes escalated costs arising in the interim between default and demand." Continental Bank & Trust Co. v. American Bonding Co., 605 F.2d 1049, 1059 (Mo. App. 1979).

4) **Special state provisions**

5) **Cases**

<u>Cases in which the surety steps into shoes of obligee</u>

"[A] surety who makes good under his contract of surety-ship upon default of the principal contractor, acquires an equitable lien against the unpaid balance in the hands of the person in whose favor the bond runs, and that such equitable lien upon payment by the surety relates back to the date of the contract and is superior to a claim of the United States for unpaid taxes for periods subsequent to the date of the contract of surety-ship, although prior to the date of payment by the surety." Home Indem. Co. v. United States, 313 F. Supp. 212, 215-216 (W.D. Mo. 1970) (citing Glenn v. American Surety Co., 160 F.2d 977, 982 (C.A. 6 1947)).

"The general rule is that a surety which executes a performance bond on a construction contract, and is thereafter required to pay unpaid labor and materials claims, or to complete the contract upon default by the contractor, has an equitable right of subrogation and an equitable lien upon funds retained by the owner or obligee; this right of subrogation or equitable lien is superior to the right of one who takes by assignment from the contractor after the execution of the bond, and relates back the date of the surety's bond." First State Bank v. Reorganized School Dist. R-3, 495 S.W.2d 471, 480 (Mo. App. 1973).

MONTANA

1) Damages covered?

When is the surety obligated to perform or discharged from its duties to perform?

"A surety is exonerated: (1) in like manner with a guarantor; (2) to the extent to which he is prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety or inconsistent with his rights or which lessens his security; or (3) to the extent to which he is prejudiced by an omission of the creditor, when required by the surety, to do anything which it is the creditor's duty to do." M.C.A. Section 28-11-412.

"Performance of the principal obligation or an offer of such performance, duly made as provided in this code, exonerates a surety." M.C.A. Section 28-11-413.

Generally, a surety contract liability is limited to the express terms of the bond. However, a surety may be "held liable in tor t of r its independent violation of statutory or common law duties in the handling of a claim under the bond. Under common law, an insurer who breaches the duty of good faith and fair dealing may be held liable in tort beyond the limits of the policy." K-W Indus. V. Nat'l Surety Corp., 231 Mont. 461, 467 (1988).

Limitation on damages; for example, no delay damages.

"[I]n an action against a surety company upon a bond issued by that company, interest may be awarded even if that interest, in addition to the amount of damages awarded, exceeds the amount of liability stated in the bond." Lapke v. Hunt, 151 Mont. 450 (1968).

"The universal rule is that in construing the bond of a surety company, acting for compensation, the contract is construed most strongly against the surety, and in favor of the indemnity which the obligee has reasonable grounds to expect. Such contracts are generally regarded as contracts of insurance, and are construed most strictly against the surety." However, "the liability of a surety cannot be extended beyond that which the law has required it to assume and to discharge." Kohles v. St. Paul Fire & Marine ins. Co., 144 Mont. 395, 397-400 (1964).

"A surety cannot be held beyond the express terms of his contract, and if such contract prescribes a penalty for its breach, he cannot in any case be liable for more than the penalty." M.C.A. Section 28-11-411.

Which obligations of the principal contract must the surety perform?

"[A]lthough the surety bond and the underlying contract must be read together to ascertain the parties' intentions, the surety's obligations are not coextensive with obligations of the underlying contract. . . . [T]he mere fact the underlying subcontract . . . contained a promise to pay all materialmen in no way creates an obligation on the part of Aetna, the surety, unless the bond itself contains a similar promise to pay the materialmen." Treasure St. Indus. Inc., v. Welch, 173 Mont. 403, 407-08 (1977).

NEBRASKA

1) Damages covered?

When is the surety obligated to perform?

If the contractor fails in completing its obligations the surety can either complete the contract or pay damages up to the limit of the bond. Cagle, Inc. v. Sammons, 198 Neb. 595 (1997).

Unless the surety is notified and the contractor is demanded, the surety is not liable for repairs made by the obligee to the project. Twin Cities Plaza v. Central Surety and insurance Corp., 409 F.2d 1195 (8th Cir. 1969) (analyzing Nebraska law).

Limitation on damages; for example, no delay damages.

The recovery of punitive damages is not allowed. Scurlocke v. Hansen, 268 Neb. 548 (2004); Abel v. Conover, 170 Neb. 926 (1960).

The surety is not liable for damages, unless they were proximately caused by the acts covered by the bond at the time it was issued. Adams Bank & Trust v. Empire Fire and Marine Insurance Co., 244 Neb. 962 (1993).

The surety is only liable for damages that were contemplated by the parties at the time the bond was issued. O'Shea v. North American Hotel Co., 109 Neb. 317, 191 N.W. 321 (1922).

The liability of the surety to the obligee is coextensive with that of the principal. Sawyer v. State Surety Company, 251 Neb. 440 (1997).

Surety is released pro tanto for the wrongful loss or release of security. Adams Bank & Trust v. Empire Fire and Marine Insurance Co., 244 Neb. 962 (1993).

"There are numerous cases in which the law does not enforce contracts according to their literal interpretation. This is true generally of bonds, other than penal ones, which usually provide for a fixed liability upon condition, but upon condition broken the law enforces, not the contract according to its literal interpretation, but for the amount of actual damages." Northwestern Terra Cotta Co. v. Caldwell, 234 F. 491, 496 (8th Cir. 1916 (refusing to enforce $50 per day late fee).

Which obligations of the principal contract must the surety perform?

The terms of the general contract control the obligations between surety and owner, if the general contract is incorporated within the bond by reference. School District No. 65R of Lincoln County v. Universal Surety Company, 178 Neb. 746, 135 N.W.2d 232 (1965).

2) Penal sum variations

Statutory or case law limitations on the penal sum amount

The surety's liability is limited to the penal sum of the bond. Hsuth v. Sambo, 100 Neb. 160, 158 N.W. 1036 (1916).

Effect of changes in work upon penal sum, if at all

A surety will be released from its obligation if there is a material and substantial change in the character or nature of the obligation. State v. Smith, 135 Neb. 423 (1938).

3) Notice or filing requirement

Case law rules concerning condition precedent notice

A failure to provide notice prevents recovery if notice of loss within a prescribed time was a condition to liability. Dockendorf v. Orner, 206 Neb. 456, 293 N.W.2d 395 (1980).

Unless the surety is notified and the contractor is demanded, the surety is not liable for repairs made by the obligee to the project. Twin Cities Plaza v. Central Surety and insurance Corp., 409 F.2d 1195 (8th Cir. 1969) (analyzing Nebraska law).

4) Special state provisions

5) Cases

Cases in which the surety steps into shoes of obligee.

When the surety fulfills the obligations of the principal, the surety becomes subrogated to the rights of the creditor against the principal. Barnes v. Hampton, 198 Neb. 151, 152, 252 N.W.2d 138, 139 (1977).

NEVADA

1) Damages covered?

When is the surety obligated to perform?

Public works, except Nevada Department of Transportation projects, require a performance bond conditioned upon the faithful performance of the contract in accordance with the plans, specifications and conditions of the contract. The bond must be solely for the protection of the contracting body which awarded the contract. NRS 339.025(1)(a).

Limitation on damages; for example, no delay damages.

No action for bad faith between a commercial principal and the surety. Great American Ins. v. General Builders, 113 Nev. 346, 934 P.2d 257 (1997).

If there are two reasonable interpretations of a bond, the one that favors the obligee should be adopted, as long as it's consistent with the purpose to be accomplished. Gill v. Paysee, 48 Nev. 12, 226 P. 302 (1924).

Nevada Department of Transportation jobs require that the performance bond guaranty the faithful performance of the construction contract in accordance with plans, specifications, terms of the contract, and be maintained for one year after the date of completion. NRS 408.357(1).

An obligation in the bond to pay "all damages" does not include punitive damages. New Hampshire Insurance Co. v. Gruhn, 99 Nev. 771, 670 P.2d 941 (1983).

Delay damages may not b e assessed against a surety if the contract is terminated or the work stopped for a reasonable basis in law or pursuant to NRS 624. NRS 625.610(9); NRS 624.626(9).

Contracts that require a contractor or subcontract to waive a right for damages or extension of time may be void as against public policy. NRS 624.622(2); NRS 624.628(3).

As long as the minimum statutory requirements are satisfied, the express language of the bond controls and liability may not be imposed beyond the express contractual terms. Carson Opera house Association v. Miller, 16 Nev. 327, 334 (1881); Adelson v. Wilson & Co., 81 Nev. 15, 21, 398 P.2d 106, 109 (1965).

A bond should be interpreted liberally in the interest of the promisee and beneficiaries, rather than strictly in favor of the surety. Acoustics Inc. v. American Surety Company of New York, 74 Nev. 6, 320 P.2d 626 (1958).

<u>Which obligations of the principal contract must the surety perform?</u>

If the bond references "plans and specifications" such reference becomes part of the contract for all purposes. Lincoln Welding Works, Inc. v. Ramirez, 98 Nev. 342, 647 P.2d 381 (1982).

If a bond incorporates the principle contract by reference, "[t]he surety, then, has by the terms of its bond expressly undertaken the obligations of the general contractor in all respects. Acoustics, Inc. v. American Sur. Co., 74 Nev. 6, 9 (Nev. 1958).

2) Penal sum variations

<u>Statutory limitations on the penal sum amount</u>

If a pool performance bond is required, it must be at least 50 percent of the price of the amount of the contract. NRS 624.270(8)(a).

<u>Effect of changes in work upon penal sum, if at all</u>

If a contract is materially changed and the contract amount is increased, the surety remains responsible only for the original amount of the contract. Zuni Construction Co. v. Great American ins. Co., 86 Nev. 364, 468 P.2d 980 (1970).

If through novation the principal is discharged, then the surety is also discharged. Zuni Construction Co. v. Great American ins. Co., 86 Nev. 364, 468 P.2d 980 (1970).

A surety can only be discharged by a modification or alteration if it is prejudiced or injured by the variance. Zuni Construction Co. v. Great American ins. Co., 86 Nev. 364, 468 P.2d 980 (1970).

3) Notice or filing requirement

<u>Statutory provisions</u>

Every contract wit the Nevada Department of Transportation must provide for the filing and furnishing of bonds. NRS 408.357

Public work bonds, other than those with the Nevada Department of Transportation "must be filed in the office of the contracting body which awarded the contract for which the bonds were given." NRS 339.025(4).

4) Special state provisions

5) Cases

<u>Cases in which the surety steps into shoes of obligee</u>

The surety's liability is coextensive with that of the principal. Trustees of Bricklayers Local No. 3 v. REECO, 747 F. Supp. 606, 614 (D. Nev 1990).

If the surety is compelled to complete performance under a contract, the surety's subrogation is not limited to the rights of the contractor. The surety is also subrogated to the right of the state to apply the retent against the cost of completing performance. The surety's right to the retent is free from any claim, which might be asserted by the subcontractor. Globe Indem. Co. v. Peterson-McCaslin Lumber Co., 72 Nev. 282 (Nev. 1956).

In an action by an obligee against the principal and surety, the court held that the liquidated damages clause was valid as to delay damages and did not preclude actual damages for defective workmanship. Spinella v. B-Neva, Inc., 94 Nev. 373, 580 P.2d 945, 947 (1978).

A surety that completes the obligations of a contract establishes a subrogation right to all funds, progress payments, or retained percentages, which are in the hands of the obligee. Bennett v. Fidelity & Deposit Company of Maryland, 98 Nev. 449, 652 P.2d 1178, 1180 (1982).

A default judgment against the principal does not bind the surety. Gearhart v. Pierce Enterprises, 105 Nev. 517, 779 P.2d 93 (1989).

Surety not liable for punitive damages assessed against the principal. The new Hampshire ins. Co. v. Gruhn, 99 Nev. 771, 670 P.2d 941 (1983).

NEW HAMPSHIRE

1) Damages covered?

Limitation on damages; for example, no delay damages.

Punitive damages are not allowed. RSA 507:16. However, enhanced compensatory damages are allowed if the defendant's conduct is "wanton, malicious or oppressive." Figlioli v. R.J. Moreau Companies, Inc., 866 A.2d 962, 967 (N.H. 2005) (citations omitted).

2) Penal sum variations

Statutory limitations on the penal sum amount

The penal sum for a bond on a public project must at least be equal to the contract price. RSA 447:16.

3) Notice or filing requirement

Statutory provisions

"To obtain the benefit of the bond, any person, firm or corporation having any claim for labor performed, materials, machinery, tools, or equipment furnished as aforesaid shall, within 90 days after the completion and acceptance of the project by the contracting party, file in the office of the secretary of state, if the state is a contracting party, or with the department of transportation, if the state is a party to said contract by or through said department, or with the department of administrative services, if the state is a party to said contract by or through said department, or in the office of the clerk of the superior court for the county within which the contract shall be principally performed, if any political subdivision of the state is a contracting party, a statement of the claim, a copy of which shall forthwith be sent by mail by the office where it is filed to the principal and surety." RSA 447:17.

Case law rules concerning condition precedent notice

"Failure to comply with the statutory requirement that a statement of claim shall be filed with a designated party is usually fatal." Crushing Services Inc. v. Abatemetn Internation/Advantex Associates, Inc., 827 A.2d 1019, 1023 (N.H. 2003) (citing American Fidelity Co. v. Cray, 194 A.2d 763 (N.H. 1963).

4) Special state provisions

5) Cases

NEW JERSEY

1) Damages covered?

When is the surety obligated to perform?

Following the principal's default, the surety is at liberty to choose a contractor to complete the work. Central Sur. & Ins. Corp. v. Martin Infante Co., 272 F.2d 231 (3rd 1959).

Limitation on damages; for example, no delay damages.

A surety's obligations are limited to the terms of its contract and should not be extended by implication or construction beyond the confines of its contract. The liability of the surety is capped at the penal sum of the bond. Monmouth Lumber Company v. indemnity insurance Co. of North America, 21 N.J. 439, 122 A.2d 604 (1956).

The scope of the surety's liability is limited by the New Jersey legislature: "A surety's obligation shall not extend to any claim for damages based upon alleged negligence that resulted in personal injury, wrongful death, or damage to real or personal property, and no bond shall in any way be construed as a liability insurance policy. Nothing herein shall relieve the surety's obligation to guarantee the contractor's performance of all conditions of the contract including the maintenance of liability insurance if and as required by the contract. Only the obligee named on the bond and any subcontractor performing labor or any subcontractor or materialman providing materials for the construction, erection, alteration or repair of the public building, work or improvement for which the bond is required pursuant to this section, shall have any claim against the surety under the bond." N.J.S.A. 2A:44-143(b).

"It has long been settled law that a surety is chargeable only according to the strict terms of its undertaking and its obligations cannot and should not be extended either by implication or by construction beyond the confines of its contract." Eagle Fire Protection Corp. v. First Indemnity of America Insurance Company, 145 N.J. 345, 356, 678 A.2d 699 (1996).

Whether failure of contractor to provide insurance transfers burden to surety

If the contractor fails to provide the contractually required insurance, it is covered under eh bond. N.J.S.A. 2A:44-143; see also Harford Fire Ins. Co. v. Riefolo Const. Co., Inc., 81 N.J. 514, 410 A.2d 658 (1980).

Which obligations of the principal contract must the surety perform?

The surety's obligation is to "guarantee the contractor's performance of all conditions of the contract." Therefore, the surety's liability is co-extensive with that of its principal. N.J.S.A. 2A:44-143(b).

2) Penal sum variations

Statutory limitations on the penal sum amount

The penal sum may be set by the public contracting unit or agency. However, the penal sum may not exceed 100 percent of the contract price. N.J.S.A. 2A: 44-143(a)(2) and (3).

3) Notice or filing requirement

Case law rules concerning condition precedent notice

A declaration of the contractor's default is not required as a precondition of a surety's liability. Gloucester City Bd. Of Educ. v. American Arbitration Association, 333 N.J. Super. 511, 755 A.2d 1256 (2000).

4) Special state provisions

5) Cases

Cases in which the surety steps into shoes of obligee

The surety on a construction surety bond guarantees to the owner that the contractor will finish the job. If the contractor defaults, the surety performs the work, mitigates loss by its performance, and pays the subcontractors and suppliers. In performing this function, the surety stands in the shoes of other parties to the construction project through use of the equitable doctrine of subrogation. First Indem. of Am. Ins. Co. v. Modular Structures (In re Modular Structures), 27 F.3d 72, 74 (3d Cir. N.J. 1994).

NEW MEXICO

1) Damages covered?

When is the surety obligated to perform?

"If the contractor fails to complete the job, the government can apply the retained funds and any remaining money to costs completing the job. The surety is liable under the performance bond for any damage incurred by the government in completing the job. On the other hand, the surety may undertake to complete the job itself. In so doing, it performs a benefit for the government, and has a right to the retained funds and remaining progress money to defray its costs." Employment Security Commission v. Big 4 Paving, Inc., 81 N.M. 26, 462 P.2d 611 (1969).

Limitation on damages; for example, no delay damages.

The general rule is that the liability of a surety cannot be extended beyond the fair import of the undertaking in the bond. This general rule has certain exceptions: (1) Where bonds are given pursuant to statute for a public or quasi public purpose; or (2) when by special provision of statute the conditions and obligations prescribed in the statute requiring the bond must be read into the bond, whether contained therein or not. In such cases, the liability of a surety will be determined by the conditions and obligations prescribed in the statute, in the first instance, on principles of public policy, and the second, by force of the statutory provision. Employment Sec. Comm'n v. C. R. Davis Contracting Co., 81 N.M. 23, 25 (N.M. 1969) (citations omitted).

Which obligations of the principal contract must the surety perform?

The contract and the bond are to be read together. Normally, the surety's liability is coextensive with the principal's. Southwestern Sash & Door v. American Employers' Ins. Co., 37 N.M. 212, 20 P.2d 928 (1933).

2) Penal sum variations

Statutory limitations on the penal sum amount

The performance bond must be executed in an amount equal to 100 percent of the contract price. N.M. Stat. Ann. Section 13-4-18(A)(1).

3) Notice or filing requirement

4) Special state provisions

5) Cases

Cases in which the surety steps into shoes of obligee

"A surety that issues performance and payment bonds, and then satisfies the claims against the contractor by paying laborers and materialmen, has superior rights as against the contractor's secured creditors to final progress payments and retainage funds held by the project owner." New Mexico State Highway & Transp. Dep't v. Gulf Ins. Co., 128 N.M. 634 (1999).

NEW YORK

1) Damages covered?

When is the surety obligated to perform?

The surety has the option of either paying or performing. N.Y. General Obligations Law Section 7-301.

The accrual of interest for damages begins when the surety receives actual notice of the principal's default. Town of Clarkstown v. North River ins. Co., 803 F. Supp. 827 (S.D. N.Y. 1992).

Limitation on damages; for example, no delay damages.

The liability of a surety is limited to the penal sum if the surety elects payment over performance. Interest may also be recovered. N.Y. General Obligations Law Section 7-301.

The New York state highway law requires that a performance bond protect the owner from any "direct or indirect damage." N.Y. Highway Law Section 38(6).

If the surety refuses to complete the project upon the contractor's default, the failure to do so may make the surety liable for the costs to complete and for damages caused by the surety's refusal to perform. The limit of damages is the penal sum of the bond. Hunt v. Bankers & Shippers Ins. Co. of New York, 73 A.D.2d 797, 423 N.Y.S.2d 718 (4th Dep't 1979).

Generally, a surety's obligations are limited to the strict terms of its undertaking. Venus Mechanical, Inc. v. Insurance Company of North America, 245 A.D.2d 559, 667 N.Y.S.2d 60 (2nd Dep't 1997).

The surety's liability on a performance bond is "the difference between the contract price and what it would cost the plaintiff to complete the contract." Juell v. New Amsterdam Casualty Co., 223 A.D. 612, 229 N.Y.S. 190 (1st Dep't 1928).

The surety's liability cannot be extended beyond the plain terms of its bond. Mendel-Mesick-Cohen Architects v. Peerless Ins. Co., 74 A.D.2d 712, 426 N.Y.S.2d 124 (1st Dep't 1980).

Which obligations of the principal contract must the surety perform?

Generally, "the surety bond attaches to the principal contract and must be construed with it." Carrols Equities Corp. v. Villnave, 57 A.D.2d 1044, 1045, 395 N.Y.S.2d 800 (4th Dept 1977), app. Denied, 42 N.Y.2d 810, 399 N.Y.S.2d 1026, 369 N.E.2d 775 (1977).

The contract incorporated into the bond only with respect to "the scope, quality, character and manner of the work to be performed." Bussanich v. 310 East 55th Street Tenants, 282 A.D.2d 243, 244, 723 N.Y.S.2d 444, 445 (1st Dep't 2001), citing S. Leo Harmonay Inc. v. Binks Mfg. Co, 597 F. Supp. 1014, 1023-24, aff'd 762 F.2d 990 (citing Guerini Stone Co. v.

P.J. Carlin Constr. Co., 240 U.S. 264, 277; U.S. Steel Corp. v. Turner Constr. Co., 560 F. Supp. 871).

2) Penal sum variations

<u>Statutory limitations on the penal sum amount</u>

The liability of a surety is limited to the penal sum if the surety elects payment over performance. Interest may also be recovered. N.Y. General Obligations Law Section 7-301.

<u>Effect of changes in work upon penal sum, if at all</u>

Generally, a material or substantial alteration of a contract made without the surety's consent, releases the surety from its obligations. Midland Steel Warehouse Corp., v. Godinger Silver Art Ltd., 276 A.D.2d 341, 714 N.Y.S.2d 466 (1st Dep't 2000).

3) Notice or filing requirement

<u>Case law rules concerning condition precedent notice</u>

The obligee must establish the default of the principal before collection on a performance bond. General Authority for Supply Commodities v. Ins. Co. of N. America, 951 F. Supp. 1097) (S.D.N.Y. 1997).

If the performance bond does not expressly provide for notice to the surety, no such notice is required prior to the owner taking steps to cure a default. Walter Concrete Construction Corp. v. Lederle Laboratories, 99 N.Y.2d 603, 788 N.E.2d 609, 758 N.Y.S.2d 260 (2003). However, "[n]otice provisions are ordinarily incorporated into insurance instruments, but even where they are not, the law will imply an obligation that the obligee notify the insurer of an occurrence or claim within a reasonable time." Town of Clarkstown v. North River Ins. Co., 803 F. Supp. 827 (S.D. N.Y. 1992).

4) Special state provisions

If a performance bond is required, the owner is limited to only 5 percent retention. N.Y. General Municipal Law Section 106-b.

5) Cases

<u>Cases discussing AIA forms of bonds A311 and A312</u>

A311 – The surety's liability is not dependant on a notice of default, the surety is liable for the obligees cost to complete, even if the surety could have reduced such costs if given notice an opportunity to mitigate such costs. Walter Concrete Construction Corp. v. Lederle Laboratories, 99 N.Y.2d 603, 788 N.E.2d 609, 758 N.Y.S.2d 260 (2003).

A312- A declaration of default is required as a condition precedent to the surety's liability, and the obligee's failure to declare a default is fatal to its performance bond claim. 120

Greenwich Development Associates, LLC v. Reliance Insurance Co., 2004 WL 1277998 (S.D. N.Y. June 8, 2004); USF&G v. Braspetro Oil Services Co., 369 F.3d 34 (2d Cir. 2004).

Not responsible for attorney's fees incurred by obligee in pursuing litigation, only responsible for fees incurred in remedying the default. USF&G v. Braspetro Oil Services Co., 369 F.3d 34 (2d Cir. 2004).

Cases in which the surety steps into shoes of obligee

A surety that completes the obligations of the contract gains a right to the contract funds that is superior to the principal's and its creditors. U.S. Fidelity & Guaranty Co. v. Triborough Bridge Authority, 297 N.Y. 31, 74 N.E.2d 226 (N.Y. 1947).

Surety "succeeded under principles of subrogation to all rights which defendant Authority might have against the contractor, including that of withholding money due the contractor and of applying it to the payment of unsatisfied claims for labor and materials furnished." U.S. Fidelity & Guaranty Co. v. Triborough Bridge Authority, 297 N.Y. 31, 74 N.E.2d 226 (N.Y. 1947).

A completing surety steps in to the shoes of the obligee if the principal forfeits its rights by defaulting. Firemen's Ins. Co. v. State of New York, 91 Misc. 2d 183 (Ct. Claims 1977), aff'd, 65 A.D.2d 241 (3rd Dep't 1979).

NORTH CAROLINA

1) Damages covered?

When is the surety obligated to perform?

The obligation of a surety is determined by the bond and the principle contract. Realty Co. v. Batson, 256 N.C. 298, 123 S.E.2d 744 (1962).

The surety and principal are co-obligees to the obligee, a written acknowledgement or payment by one obligor is binding on the other. Picket v. Rigsbee, 252 N.C. 200, 113 S.E.2d 323 (1960).

Limitation on damages; for example, no delay damages.

Surety is liable for interest on a claim from the date it is obligated to pay the claim, not the date of the breach. N.C. Gen. Stat. Section 24-5.

The liability for both damages and interest cannot exceed the penal sum of the bond. Lee v. Martin, 188 N.C. 119, 123 S.E. 631 (1924).

The language of the bond controls if the surety will be responsible for consequential or special damages. Knutton v. Cofield, 273 N.C. 355, 362-63, 160 S.E.2d 29, 34 (1968).

Surety is only liable if the principle is liable and in default. RGK, Inc. v. U.S.F.&G., 292 N.C. 668, 235 S.E.2d 234 (1977).

Surety's are not liable for claims of bad faith or treble damages. N.C. Gen. Stat. Section 75-1.1 *et seq*.

Generally, "no damage for delay" clauses are enforceable. However, on state public projects such clauses are prohibited if the delay was caused solely by the owner or its agent. N.C. Gen Stat Section 143-134.3.

Whether failure of contractor to provide insurance transfers burden to surety

A surety may be liable for the contractor's negligence if the contractor does not have insurance. Haywood County Consol. School Dist. V. U.S.F.&G., 43 N.C. App. 71, 73, 257 S.E.2d 670 (1979).

Which obligations of the principal contract must the surety perform?

For a public project, the bond must include the following clause "THE CONDITION OF THIS OBLIGATION IS SUCH, that whereas the Principal entered into a certain contract with the Contracting Body, numbered as shown above and hereto attached." N.C. Gen. Stat. Section 44A-33.

A contract will not be incorporated into the bond by language stating "hereto attached" unless the contract referenced is actually attached. Burgess v. Jim Walter Homes, 161 N.C. App. 488, 491, 588 S.E.2d 575, 578 (2003).

If the contract is incorporated into the bond, the contract provisions are to be considered " in any question of construction of any ambiguous language in the condition of the bond itself." RGK, Inc. v United States Fidelity & Guaranty Co., 292 N.C. 668, 679, 235 S.E.2d 234, 241 (1977).

2) Penal sum variations

3) Notice or filing requirement

<u>Case law rules concerning condition precedent notice</u>

The principles default is a condition precedent to a performance bond claim. Builders Corp v. Casualty Co., 236 N.C. 4513, 515, 73 S.E.2d 155, 156 (1952).

The surety may still be liable, if the obligee hires completion contractors without providing the surety an opportunity to complete. MCI Constructors, Inc. v. Hazen & Sawyer, 310 F. Supp. 2d 754, 762 n.7 (M.D.N.C. 2004), aff'd in part, rev'd in part on other grounds, 125 Fed. Appx. 471 (4th Cir. 2005).

Notice requirements are strictly enforced. If a "policy makes the giving of notice a condition precedent, the party seeking to enforce the contract has, under general common law contract principles, the burden of pleading and proving strict compliance. Since notice was given eight months after the accident and plaintiff presented no evidence to justify or explain the delay, notice was not given "as soon as practicable" as a matter of law." Great American Ins. Co. v. C. G. Tate Constr. Co., 303 N.C. 387, 391, 279 S.E.2d 769, 772 (1981).

4) Special state provisions

"[T]he surety is held entitled to a credit to the extent the owner makes premature payments, that is, payments in excess of the amount the contractor is entitled to receive as progress payments on account of completed work." Salem Realty Co. v. Batson, 256 N.C. 298, 307, 123 S.E.2d 744, 751 (1962).

5) Cases

<u>Cases discussing AIA forms of bonds A311 and A312</u>

The clause containing "claims for damages because of injury to or destruction of tangible property," does not relieve the contractor or surety from liability caused by the contractor's improper performance. Haywood Cty. Consol School Sys. V. U.S. Fidelity and Guar. Co., 43 N.C. App. 71, 73, 257 S.E.2d 670, 671 (1979).

<u>Cases in which the surety steps into shoes of obligee</u>

If the surety completes all contractual obligations under the bond, it is entitled to all remaining contract funds from the owner. Robinson Mfg. V. Blaylock, 192 N.C. 407, 135 S.E. 136 (1926); Hartford Acc. & Indem. Co. v. Coggin, 78 F.2d 471, 477-78 (4th Cir. 1935); Lacy v. mayrland Cas. Co., v. Miller, 143 F. Supp. 941, 944 (W.D. N.C. 1956).

The surety's right to contract funds from the owner includes the retainage. Commercial Cas. Ins. Co. v. Durham County, 190 N.C. 58, 128 S.E. 469 (1925).

NORTH DAKOTA

1) Damages covered?

Limitation on damages; for example, no delay damages.

"A surety cannot be held beyond the express terms of the surety's contract and if such contract prescribes a penalty for its breach, the surety cannot be held liable in any case for more than the penalty." N.D.C.C. Section 22-03-01.

Any claim against the performance bond bears interest on each transaction for labor, materials or supplies. The interest begins accruing 30 days after the last transaction. N.D.C.C. Section 24-02-25.1.

2) Penal sum variations

Statutory limitations on the penal sum amount

For public projects over $100,000, the penal sum of the bond must be at least equal to the contract price. N.D.C.C. Section 48-02-06.2.

For Department of Transportations projects over $20,000, the penal sum of the bond must be at least equal to the contract price. N.D.C.C. Section 24-02-25.1.

3) Notice or filing requirement

Statutory provisions

"Any person having a direct contractual relationship with a subcontractor, but no contractual relationship with the contractor furnishing the bond, does not have a claim for relief upon the bond unless that person has given written notice to the contractor within 90 days from the date on which the person completed the contribution." N.D.C.C. Section 48-02-15.

For Department of Transportation projects, the claimant must provide written notice to the contractor or surety furnishing the bond. N.D.C.C. Section 24-02-25.2.

Case law rules concerning condition precedent notice

Notice is an express condition to recovery from a bond furnished under N.D.C.C. Section 48-02-06.2. The notice requirement is contained in Section 48-02-15.

4) Special state provisions

5) Cases

OHIO

1) **Damages covered?**

Limitation on damages; for example, no delay damages.

"[T]he surety's obligation is derived from that of the principal, the liability of the surety is ordinarily measured by the liability of the principal. As a general rule, a surety on a bond is not liable unless the principal is an d, therefore, may plead any defense available to the principal with the exception of defenses which are purely personal to a principal, such as infancy, incapacity, or bankruptcy." Hopkins v. INA Underwriters Ins. Co., 44 Ohio App. 3d 186, 188, 542 N.E.2d 679-89 (1988) (citations omitted).

Generally, a surety will not be liable beyond the terms of the contract. Dean v. Seco Electric Co., 35 Ohio St. 3d 203, 205 (1988).

The surety's liability is limited to the penal sum of the bond. O.R.C. Section 153.57.

Punitive damages may be assessed against a surety. Suver v. Personal Service insurance Company (1984). Punitive damages are only awarded upon a showing that the acto of the principal was authorized, participated in, or ratified by the surety. Dean v. Seco Electric., 35 Ohio St. 3d 203, 206 (1988).

2) **Penal sum variations**

Statutory limitations on the penal sum amount

"As a general rule the obligation of the surety . . . cannot exceed that of the principal, it being said that it would be most unjust and incongruous to hold the surety liable, where the principal is not bound." East Cleveland v. Fidelity & Deposit Co., 5 F. Supp. 212, 214 (D. Ohio 1933).

Under a bond issued pursuant to O.R.C. Section 153.54 et seq. a surety should never be liable for more than the penal sum of the bond. O.R.C. Section 153.57.

Effect of changes in work upon penal sum, if at all

"whenever the change referred to in section 153.10 of the Revised Code is approved by the owner as defined in section 153.01 of the revised Code, accepted in writing by the contractor, and filed, the same shall be considered as being a part of the original contract, and the bond theretofore executed shall be held to include and cover the same."

3) **Notice or filing requirement**

Statutory provisions

Whenever the state, or any political subdivision, district, institution, or other agency thereof awards a contract for the construction, demolition, alteration, repair, or reconstruction of a public improvement, the contracting authority shall simultaneously notify the surety on the contractor's bond of the award and the agent of the surety who executed the bond on behalf of the surety. The notice shall be given in writing and mailed to the surety and the agent whose names and addresses appear on the bond. O.R.C. Section 9.32.

4) Special state provisions

5) Cases

<u>Cases in which the surety steps into shoes of obligee</u>

A surety can be held to have subrogated to the rights of the obligee in retained funds as well as rights of laborers and materialmen in the funds. Western Casualty & Surety Co. v. Brooks, 37 Ohio Op. 2d 317 (1996).

OKLAHOMA

1) Damages covered?

When is the surety obligated to perform?

The surety ensures the proper and prompt completion of the project in accordance with the contract and bidding documents. The performance bond protects the obligee by assuring completion of the project in the event of the principal defaulting. 61 O.S. Section 112B.2; Boren v. Thompson & Associates, 999 P.2d 438 (Okla. 2000).

Limitation on damages; for example, no delay damages.

A surety's liability is coextensive with that of the principal. U.S. Fidelity & Guaranty Co. v. Kern, 62 P.2d 1173 (Okla. 1936).

The surety is only liable up to the penal sum of the bond. Western Surety Co. v. Childers, 372 P.2d 214 (Okla. 1962). However, interest added to the principal amount may make the damages higher than the penal sum. Southern Surety Co. v. Enfield, 229 P. 446 (Okla. 1924).

The surety's liability is set by the express terms of the contract. Barbero v. Equitable General Ins. Co., 607 P.2d 670 (Okla. 1962).

A bond that is required by statute is to be strictly construed and not extedby implication beyond the clearly expressed intent of the statute Culver v. Mid-Continent Cas. Co., 526 P.2d 496 (Okla. 1980).

Claims for impaired bonding capacity or consequential loss of contracting capacity cannot be implied from the terms of a performance bond. Professional Construction Consultants, Inc. v. The State of Oklahoma, 646 P.2d 1262 (Okla. 1982).

Upon the principals default, the obligation of the surety is to either fulfill the obligations or pay the obligee the price of fulfilling the obligations. American Casualty Co. v. Town of Shattuck, 228 F. Supp. 834 (D.C. Okla. 1964).

2) Penal sum variations

Statutory limitations on the penal sum amount

The penal sum on public construction projects must be equal to the contact price. Title 61 O.S. Section 113.

3) Notice or filing requirement

Case law rules concerning condition precedent notice

"As a general rule, a surety is bound to perform the obligation of its principal, and cannot complain when the creditor does not notify him of the default of his principal . . . mere inaction of the creditor will not discharge the surety, and the fact that the principal is delinquent in payment of sums due, does not affect the liability of the surety. But this rule does not apply where there is a question of moral turpitude involved, or other unfitness for trust, after the knowledge of such conduct has come to the obligee's attention. If, however, the obligation of the surety is a continuing one, and the extent of the liability of the principal rests entirely within the knowledge of the obligee, notice of the principal's default must be given to the surety within a reasonable time or they will be discharged." J.R. Walker Co v. Jennings, 269 P. 265 (Okla. 1928) (citations omitted).

If the bond requires notification the surety may be relieved of liability under the bond due to failure to notify. To be relieved of liability the surety must establish prejudice. Unless notice is clearly set forth as a condition precedent to liability, the failure to notice is merely a breach and the surety is entitled to resulting losses. Southern Surety Co. v. MacMillan Co., 58 F.2d 541 (10th Cir. 1932).

4) Special state provisions

5) Cases

OREGON

1) Damages covered?

When is the surety obligated to perform?

If the principal breaches the surety can either perform the obligations or pay for the damages cause by the breach. Bio Mass one, L.P. v. S-P Const., 103 Or. App. 521, 529, 799 P.2d 152, 157 (1990).

"[I]n order to determine whether a guarantor or other surety is discharged by alteration of the underlying contractual obligation, a court must first ask whether the guarantor consented to the modification. If so, the guarantor is not discharged. If not, the court must determine whether the guarantor is an uncompensated or compensated surety. If the guarantor is uncompensated, a change to the guaranteed contract discharges the guarantor if the change is material, as long as the change is not one that could inure only to the guarantor's benefit. If on the other hand, the guarantor is compensated, an alteration to the contract discharges the guarantor only if it materially increases the guarantor's risk on the contract." Marc Nelson Oil Products, Inc. v. Grim Logging Co, Inc., 199 Or. App. 73, 80, 110 P.3d 120, 124, opinion adhered to as modified on reconsideration, 200 Or. App. 239, 115 P.3d 935 (2005).

"A material change is one that a careful and prudent person undertaking the risk would regard as substantially increasing the chance of loss." Samuelson v. Promontory Inv. Corp., 85 Or. App. 315, 320, 736 P.2d 207, 210 (1987).

Limitation on damages; for example, no delay damages.

If the bond is susceptible to more than one interpretation, the one that favors the obligee must be adopted. U.S. Fidelity & Guaranty Co. v. Thomlinson-Arkwright Co., 172 Or. 307, 317, 141 P.2d 817, 821 (1943).

Generally, a surety is only liable for actual damages and not liable exemplary or punitive damages, unless a statutory provision imposes such liability. Butler v. United Pacific Ins. Co., 265 Or. 473, 474-75, 509 P.2d 1184, 1185 (Or. 1973).

Surety is only liable to the penal sum of the bond. However, the surety will be liable for attorney's fees, interests, or costs that exceed the penal sum. U.S.Fidelity & Guaranty Co. v. Zidell-Steinberg Co., 151 Or. 538, 555, 50 P.2d 584, 591, modified, 151 Or. 538, 51 P.2d 687 (1935).

A surety has been held liable for statutory delay damages for a "frivolous" appeal. Stirling v. Dari-Delite, Inc., 262 Or. 359, 372, 498 P.2d 753, 756 (1972).

<u>Which obligations of the principal contract must the surety perform?</u>

"The reason for an incorporation by reference is to cause the provisions of one contract or document to apply to another contract or document to which they otherwise would not apply." Pioneer Resources, LLC v. Lemargie, 175 Or. App. 202, 209, 27 P.3d 520, 524 (2001), rev denied, 333 Or. 399, 42 P.3d 1243 (2002).

If a performance band refers to a contract in a sufficient manner to identify that contract, and there is no limitation on the undertaking, the contract is incorporated into the bond, and the surety is liable if there is a breach of any terms of the incorporated contract. Bio Mass One, L.P. v. S-P Const., 103 Or. App. 521, 528, 799 P.2d 152, 156 (1990).

2) Penal sum variations

<u>Statutory limitations on the penal sum amount</u>

"A surety can limit its liability to less than the entire construction contract." Bio Mass One, L.P. v. S-P Const., 103 Or. App. 521, 529, 799 P.2d 152, 157 (1990).

The general rule is that the liability of a surety is limited to the amount off its bond. However, when the principal defaults or fails to perform, the surety may, where permitted by contract or with the acceptance of the other party to the principal contract, assume the role of its principal for purposes of performing the obligation which it has bonded. When the surety does so, it becomes responsible for performance of the principal contract and for all obligations incurred in connection with performance, notwithstanding the limits of liability in the bond." Copeland Sand and Gravel, Inc. v. Insurance Co. of North America, 40 Or. App. 831, 834-35, 596 P.2d 623, 625 (1979), rev'd on other grounds, 288 Or. 325, 607 P.2d 718 (1980).

<u>Effect of changes in work upon penal sum, if at all</u>

"[I]n order to determine whether a guarantor or other surety is discharged by alteration of the underlying contractual obligation, a court must first ask whether the guarantor consented to the modification. If so, the guarantor is not discharged. If not, the court must determine whether the guarantor is an uncompensated or compensated surety. If the guarantor is uncompensated, a change to the guaranteed contract discharges the guarantor if the change is material, as long as the change is not one that could inure only to the guarantor's benefit. If on the other hand, the guarantor is compensated, an alteration to the contract discharges the guarantor only if it materially increases the guarantor's risk on the contract." Marc Nelson Oil Products, Inc. v. Grim Logging Co, Inc., 199 Or. App. 73, 80, 110 P.3d 120, 124, opinion adhered to as modified on reconsideration, 200 Or. App. 239, 115 P.3d 935 (2005).

"it is a settled rule of law that where a security reserved in a building contract for the benefit of the sureties on the builder's bond is lessened, impaired, or destroyed by a premature payment to the contractors, the sureties will b e released and is charged to the extent at least of the amount so paid. . . . But this doctrine can have no application where such payment is made with the knowledge and by the consent of the sureties." Enterprise Hotel Co. v. Book, 48 Or. 58, 62, 85 P. 333, 335 (1906).

3) **Notice or filing requirement**

<u>Statutory provisions</u>

For certain structure claims and certain small claims the claimant must file the claim and provide notice to the surety within 90 days of filing the complaint with the Construction Contractors Board. ORS 701.146(1).

<u>Case law rules concerning condition precedent notice</u>

"The requirement that notice be given timely is a substantive condition precedent to recovery under the Oregon Tort Claims Act that, if not satisfied, deprives a plaintiff of the right to make a claim." Butterfield v. State, 163 Or. App. 227, 232, 987 P.2d 569, 571 (1999), rev. denied, 330 Or. 252, 6 P.3d 1099 (2000) (internal quotations and citations omitted).

4) **Special state provisions**

5) **Cases**

<u>Cases in which the surety steps into shoes of obligee</u>

"It is universally recognized that the surety upon paying the creditor is entitled to be substituted to the creditor's position. This right is known as the right of subrogation. It amounts to equitable assignment, in that equity will treat the surety as though he were an assignee of the creditor, standing in his shoes to enforce the debt against the debtor together with any collateral held as security for the debt, entitled to all priorities and immunities enjoyed by the creditor." Reimann v. Hybertsen, 275 Or. 235, 239, 550 P.2d 436, 437, opinion modified, 276 Or. 95, 553 P.2d 1064 (1976).

"We see no reason why the subrogee, whose derivative rights normally include the benefits of all advantages available to the subrogor as to all persons, should not as well be subject to the limitations on the subroger's right of recovery as to all persons. We therefore hold that in a receivership proceeding, where a priority dispute exists between creditors of the same class, a judgment creditor whose claim is derived from another by way of subrogation, stands in the same position as would the subrogor and the creditor claiming priority: and the subrogee is subject to any defenses available against the subrogor." State, By and Through Healy v. Smither, 290 Or. 827, 837, 626 P.2d 356, 362 (1981).

PENNSYLVANIA

1) Damages covered?

<u>When is the surety obligated to perform?</u>

The surety's liability is construed by the terms of the bond, with due regard to the surrounding circumstances. Downingtown Area Sch. Dist. v. Int'l Fid. Ins. Co., 671 A.2d 782, 786 (Pa. Commw. Ct. 1996) (citing Lite-Air Prod., Inc. v. Fid. & Dep't. Co. of Maryland, 437 F. Supp. 801, 803 (E.D. Pa. 1977)).

The bond is the "primary determinant" for determining wither a surety is liable for damages. North American Specialty Ins. Co. v. Chichester Sch. Dist., 158 F. Supp. 2d 468, 471 (E.D. Pa. 2001).

<u>Limitation on damages; for example, no delay damages.</u>

Generally, if a surety fails to complete the principal's defaulted work , the surety is liable for the loss sustained by the obligee, not to exceed the amount of the bond. Turner Constr. Co. v. First Indem. Of America Ins. Co., 829 F. Supp. 752, 759 (E.D. Pa. 1993), aff'd, 22 F.3d 303 (3d Cir. 1994).

The surety may be held liable for damages beyond the cost of completion, depending on the language of the bond. Downingtown Area Sch. Dist. v. Int'l Fid. Ins. Co., 671 A.2d 782, 786-88 (Pa. Commw. Ct. 1996).

Pennsylvania has a "bad-faith statute," it states that a court may assess damages to an insurer that acts in bad faith toward the insured. 42 Pa. C.S.A. Section 8371.

Although some federal courts Many court cases have declined to extend the application of the "bad faith " statute to sureties, however the Pennsylvania Supreme Court has not yet addressed the issue. M.A. Bruder & Sons Inc. v. Williams, 47 Pa. D. & C. 4th 243 (Monroe County C.C.P. 2000); Collier Dev. Co., Inc. v. Jeffco Conswtr. Co., 25 D. & C. 4th 193

<u>Which obligations of the principal contract must the surety perform?</u>

Generally, if the principle contract is incorporated into the performance bond, the surety's liability cannot be extended beyond the agreed-upon provisions of the performance bond. North American Specialty Ins. Co. v. Chichester Sch. Dist., 158 F. Supp. 2d 468, 472-73 (E.D. Pa. 2001). However, if not inconsistent with the bond, an obligee may recover delay and liquidated damages if the damages are provided for within the principle contract. Downingtown Area Sch. Dist. v. Int'l Fid. Ins. Co., 671 A.2d 782, 786-88.

2) Penal sum variations

<u>Statutory limitations on the penal sum amount</u>

For many public projects, the penal sum of the bond must equal the contract price of the project. 8 P.S. Section 193.1; 62 Pa. C.S.A. Section 903(a).

3) Notice or filing requirement

4) Special state provisions

It is prohibited for any representative of a contracting body to require that bonds be furnished by a particular agent or broker. 8 P.S. Section 198(a).

5) Cases

<u>Cases discussing AIA forms of bonds A311 and A312</u>

A312 creates liability for the surety for legal costs that result from the principals default and from the actions or inactions of the surety. North American Specialty Ins. Co. v. Chichester Sch. Dist., 158 F. Supp. 2d 468, 473-74 (E.D. Pa. 2001).

<u>Cases in which the surety steps into shoes of obligee</u>

"[T]he surety stands in the shoes of other parties to the construction project through the use of the equitable doctrine of subrogation." In re Modular Structure, Inc., 27 F.3d 72, 74 n.1 (3d Cir. 1994).

The surety has the right to equitable subrogation and to contract funds held by the obligee. Jacovs v. Northeastern Corp., 416 Pa. 417, 206 A.2d 49 (1965).

RHODE ISLAND

1) Damages covered?

<u>When is the surety obligated to perform?</u>

Courts are required to strictly construe performance bonds. Rhode Island Department of Corrections v. ADP Marshall, Inc., No. Civ. A. PB99-4704, 2004 WL 877560 (R.I. Super. March 29, 2004).

<u>Limitation on damages; for example, no delay damages.</u>

A performance bond surety is not liable to persons who supplied labor or material during the performance of the project. Glens Falls Indem. Co. v. American Awning & Tent Co., 180 A. 367 (R.I. 1935).

Surety is only liable to a named obligee. Rhode Island Department of Corrections v. ADP Marshall, Inc., No. Civ. A. PB99-4704, 2004 WL 877560, at *9 (R.I. Super March 29, 2004).

Consequential damages are may be assessed against a surety to an amount above the penal sum of the bond, if the damages flow from the surety's breach of its own obligations under the bond. Marshall Contractors, Inc. v. Peerless Ins. Co., 827 F. Supp. 91, 95 (D.R.I. 1993).

Interest is added at 12 percent per year from the date the cause of action accrued. R.I. Gen. Laws Section 9-21-10.

2) Penal sum variations

3) Notice or filing requirement

4) Special state provisions

In the absence of a choice of law clause, a performance bond is construed in accordance with the law of the principal's obligation, unless some other state has a more significant relationship to the transaction or the parties. Marshall Contractors, Inc. v. Peerless Ins. Co., 827 F. Supp. 91, 94 (D.R.I. 1993).

5) Cases

<u>Cases in which the surety steps into shoes of obligee</u>

If the surety completes the contract, it succeeds by subrogation to all the rights of the obligee. The surety is entitled to the retained funds of the contract to the extent necessary to repair its loss. Glens Falls Indem. Co. v. American Awning & Tent Co., 180 A. 367, 376 (R.I. 1935).

SOUTH CAROLINA

1) Damages covered?

When is the surety obligated to perform?

"The state requires performance bonds for public construction contracts to protect itself from a principal's breach." Masterclean, Inc. v. Star insurance Co., 347 S.C. 405, 556 S.E.2d 371, 376 (2001).

"The bond's primary obligation rests on the principal to perform the contract. When the principal fails, the surety performs according to the terms of the bond." Masterclean, Inc. v. Star insurance Co., 347 S.C. 405, 556 S.E.2d 371, 376 (2001).

If a surety performs the principal's obligations, the surety becomes liable to all of its liabilities. National Loan and Exchange Bank v. Gustafson, 157 S.C. 221, 154 S.E. 167, 176 (1930).

Limitation on damages; for example, no delay damages.

"A surety's obligation is contractual and cannot extend beyond the terms of the bond and the intent of the parties thereto." S.C. Public Service Commission v. Colonial Construction, 274 S.C. 581, 266 S.E.2d 76, 77 (1980).

"A surety must pay the obligee only if the principal defaults." Masterclean, Inc. v. Star insurance Co., 347 S.C. 405, 556 S.E.2d 371, 376 (2001).

"[A] surety is not liable for punitive damages absent a showing of active participation in the fraud." Aiken County v. BSP Division of Envirotech Corp., 657 F. Supp. 1339, 1368 (D.S.C. 1986) *aff'd in part and rev'd on other grounds*, 866 F.2d 661 (4th Cir. 1989).

Generally, recovery on a performance bond cannot exceed the penal sum. Stelts v. Martin, 90 S.C. 14, 72 S.E. 550, 552 (1911).

Which obligations of the principal contract must the surety perform?

If an agreement is incorporated by reference into a bond, the two will be read together and construed as a whole. S.C. Public Service Commission v. Colonial Construction, 274 S.C. 581, 266 S.E.2d 76, 77 (1980).

2) Penal sum variations

Statutory limitations on the penal sum amount

For many public projects, the penal sum of the performance bond must be equal to the contract price. South Carolina Code Section 11-35-3030, 57-5-1660.

Effect of changes in work upon penal sum, if at all

The surety will be discharged from its obligation under the bond if the underlying risk is substantially changed, unless it has been notified or consents to the additional risk. Carriage Town, Inc. v. Landco., Inc., 998 F. Supp. 646, 648 (D.S.C. 1998).

3) Notice or filing requirement

<u>Case law rules concerning condition precedent notice</u>

"As a general rule, in all cases where the liability of a surety is dependent on the outcome of litigation in which his principal is or may be involved, a judgment against the principal is binding and conclusive on the surety, and the surety may not interpose defenses which should or might have been set up in the action in which the judgment was recovered, or require proof of the facts on which the judgment rests, or attack the validity of the judgment, except for fraud or collusion or want of jurisdiction. The rule is applicable even though the surety had no notice of the suit or opportunity to defend." Cooper v. Beauliau, 310 S.C. 392, 394 (S.C. Ct. App. 1992) citing Ward v. Federal Ins. Co., 233 S.C. 561, 106 S.E.2d 169 (1958).

"A surety must pay the obligee only if the principal defaults." Masterclean, Inc. v. Star insurance Co., 347 S.C. 405, 556 S.E.2d 371, 376 (2001).

Generally, courts will enforce specific conditions that are included in the bond before imposing liability on the surety. Lite house, Inc. v. North River insurance Co., 322 S.C. 26, 471 S.E. 2d 166 (1996); Kennedy v. Henderson, 289 S.C. 393, 346 S.E.2d 526 (1986).

4) Special state provisions

Bad faith refusal to pay a performance bond is not at affirmative cause of action by a principal against a surety. However, the principal may assert the surety's bad faith as a defense to an indemnity action brought by the surety against the principal. Masterclean, Inc. v. Star insurance Co., 347 S.C. 405, 566 S.E.2d 371, 376 (2001).

5) Cases

<u>Cases in which the surety steps into shoes of obligee</u>

"A surety's obligation is contractual and cannot extend beyond the terms of the bond and the intent of the parties thereto." S.C. Public Service Commission v. Colonial Construction, 274 S.C. 581, 266 S.E.2d 76, 77 (1980).

"A surety's obligation is contractual and cannot extend beyond the terms of the bond and the intent of the parties thereto." S.C. Public Service Commission v. Colonial Construction, 274 S.C. 581, 266 S.E.2d 76, 77 (1980).

SOUTH DAKOTA

1) Damages covered?

When is the surety obligated to perform?

For the construction of a "public improvement" a bond is required "from the contractor in a sum equal to the contract price, conditioned that the contractor will execute his contract and complete the building or building s according to the plans and specifications and to the full satisfaction of the board." SDCL Section 7-25-12.

Limitation on damages; for example, no delay damages.

"[A] surety cannot be held beyond the express terms of his contract, and if such contract prescribes a penalty for its breach, he cannot in any case be liable for more than the penalty." SDCL Section 56-2-12.

A performance bond only covers labor and material that could reasonably be regarded as within the contemplation of the parties at the time of contracting. Finch v. Enke, 222 N.W. 657, 658 (S.D. 1929).

Performance bonds "should be construed most strongly in favor of indemnity." Farmers State Bank v. Ed Cox and Son, 132 N.W.2d 282, 287 (S.D. 1965).

"The person liable is in default for not paying interest only when he knows or can readily ascertain the exact sum of his indebtedness by computation. Even assuming that the defendants had admitted coverage under their bond they could not have known the extent of their liability until that was determined by the court. Accordingly, there was no error in denying interest prior to judgment." Farmers State Bank v. Ed Cox and Son, 132 N.W.2d 282, 290-91 (S.D. 1965).

Which obligations of the principal contract must the surety perform?

"A contractors bond should be construed in connection with the contract with which it was executed and the statute requiring it. However, a bond may be conditioned more broadly than the minimum requirements of the statute." J.D. Evans Equip. Co., Sioux Road v. Johnson, 160 N.W.2d 637, 639 (S.D. 1968).

2) Penal sum variations

Statutory limitations on the penal sum amount

A performance bond with a penal sum of at least the contract price is required for any contract for the construction of a "public improvement." SDCL Section 5-21-1.

3) Notice or filing requirement

Statutory provisions

"[T]he surety within 60 days after entering into such performance bond shall send notice of the bond to the secretary of revenue." SDCL Section 5-21-4.

Case law rules concerning condition precedent notice

The notice requirements contained within performance bonds "merely establish[] a condition precedent which must be met before materialmen may recover against the surety, namely, the materialmen must have given notice that they are owed money on the project. If the materialmen give the appropriate notice under the terms of the bond, they still have one year in which to file their law suit. If the materialmen do not give the appropriate notice, they also have one year to sue but may be met with a defense of failure to give the required notice." Northwest Pipe Fittings, Inc. v. St. Paul Fire and Marine ins. Co., 508 N.W.2d 376, 378 (S.D. 1993).

4) Special state provisions

SDCL Section 31-23-5 states that "the remedy provided for in this chapter shall be exclusive."

Forfeiture of a bid security may result if a contractor fails to obtain a performance bond. Rapid City Area Sch. Dist. No. 51-4 v. Black Hills and Western Tours, Inc., 303 N.W.2d 811, 814 (S.D. 1981).

5) Cases

Cases in which the surety steps into shoes of obligee

"An insurer, upon paying a loss, is subrogated to the insured's right of action against any other person responsible for the loss. The right of the insurer against such other person arises out of the nature of the contract of insurance as a contract of indemnity, is derived from the insured, and at common law was to be enforced in his name. Subrogation is a normal incident of indemnity insurance." Harter v. American Eagle Fire Ins. Co., 6 Cir., 60 F.2d 245

TENNESSEE

1) Damages covered?

When is the surety obligated to perform?

When a contractor defaults the surety of the project can either perform the contract or pay the penal sum of its bond. If the surety elects to pay instead of perform, its liability is limited to the penal sum of the bond. However, if the surety takes over performance it has a duty to complete the contract at all costs. The penal sum does not limit the liability of a surety for damages caused by its own default while performing the contract. In re Technology for Energy, Corp., 123 B.R. 979, 982-83 (Bankr. E.D. Tenn. 1991).

Limitation on damages; for example, no delay damages.

Generally, the surety's liability is coextensive with the liability of the principal. In re Microwave Products of America, Inc., 118 B.R. 566 (Bankr. W.D. Tenn. 1990).

The statute requiring the bond is controlling in deciding the liability of a surety. The provisions of a bond that seek to diminish the surety's statutory liability are mere surplusage. Exchange Mut. Ins. Co. v. Olsen, 655 S.W.2d 938 (Tenn. 1983).

Which obligations of the principal contract must the surety perform?

Generally, a contract and a bond given to secure its performance must be construed together where construction of the contract is called for. McCall v. Towne Square, Inc., 503 S.W.2d 180, 183 (Tenn. 1973).

A contract incorporated by reference for a particular purpose is part of the agreement only for the purpose specified. Guerini Stone Co. v. P.J. Carlin Constr. Co., 240 U.S. 264, 277-78 (1916).

2) Penal sum variations

Effect of changes in work upon penal sum, if at all

A surety is released from its obligation if a cardinal change in the contract occurs without the surety's consent. In re Technology for Energy Corp., 140 B.R. 214, 227 (Bankr. E.D. Tenn. 1992).

3) Notice or filing requirement

4) Special state provisions

5) Cases

Cases in which the surety steps into shoes of obligee

The surety that completes the contract becomes subrogated to all of the rights of the creditor against the principal. Hickor Springs Mgf. Co., Inc. v. Evans, 541 S.W.2d 97 (Tenn. 1976).

<u>TEXAS</u>

1) Damages covered?

<u>Limitation on damages; for example, no delay damages.</u>

The common law duty of good faith and fair dealing does not apply to a surety. Assoc. Ind. v. CAT Contracting, 964 S.W.2d 276 (Tex. 1998).

If a surety fails to meet its obligations under a performance bond, the damages are generally the difference between the contract price and the cost to complete or repair the project. New Amsterdam Casualty Co. v. Bettes, 407 S.W.2d 307 (Tex. Civ. App.-Dallas 1966, writ ref'd n.r.e.).

Generally, a surety's liability is limited to the penal sum of the bond. Great American ins. Co. v. North Austin Municipal Utility Dist. 1, 908 S.W.2d 415 (Tex. 1995).

A surety can be responsible for liquidated damages. Victore Ins. Co. v. City of Bowie, 23 S.W.3d 499 (Tex. App.-Ft. Worth 2000, no writ).

Liquidated damages stop accruing after substantial completion, unless otherwise provided for in the contract. Page v. Travis-Williamson County Water & App. District No. 1, 367 S.W.2d 307 (Tex. 1963).

<u>Whether failure of contractor to provide insurance transfers burden to surety</u>

Generally, sureties are not liable for the deceptive acts of the principle. Qantel Business Systems, Inc. v. Custom Controls, 761 S.W.2d 302 (Tex. 1998).

Generally, sureties are not liable for damages caused by the negligence of the principal unless the bond reflects otherwise. Page v. Scholortt, 89 S.W.2d 249 (Tex. Civ. App.-Austin 1935).

<u>Which obligations of the principal contract must the surety perform?</u>

Performance bonds on a public work are required by statue to be conditioned upon the "faithful performance of the work in accordance with the plans, specifications, and contract documents." Tex. Gov't Code Section 2253.021.

2) Penal sum variations

<u>Statutory limitations on the penal sum amount</u>

The penal sum of a performance bond on a public work must be equal to the contract price. Tex. Gov't Code Section 2253.021(b).

3) Notice or filing requirement

<u>Statutory provisions</u>

A contract provision requiring a claimant to provide notice of claim for damages a condition precedent to the right to sue on a contract is not valid unless the stipulation is reasonable. Tex. Civ. Prac. & Rem. Code Section 16.071.

4) Special state provisions

5) Cases

UTAH

1) Damages covered?

When is the surety obligated to perform?

When a contractor defaults, the surety has the choice to either pay or perform. If the creditor does not accept payment, it risk forfeiting its rights to claim against the surety. Lilenquist v. Utah State Nat. Bank, 100 P.2d 185, 188 (Utah 1940).

A contractor may be liable to subcontractors and materialmen, if the contractor fails to perform undertakings or covenants of the contract. De Luxe Glass Co. v. Martin, 208 P.2d 1127, 1131 (Utah 1949).

Limitation on damages; for example, no delay damages.

"A surety's liability is limited to foreseeable damages. "The rule as to what damages are recoverable for breach of contract is based upon the concept of reasonable foreseeability that loss of such general character would result from the breach. Therefore, to be compensable the loss must result from the breach in the natural and usual course of events, so that it can fairly and reasonably be said that if the minds of the parties had adverted to breach when the contract was made, loss of such character would have been within their contemplation." Fleck v. National Property Management, Inc., 590 P.2d 1254, 1255 (Utah 1979).

A creditor will discharge the surety's obligations by dealing directly with the principal. If a creditor releases a principal's obligations, it also releases the surety's obligations. Horman v. Gordon, 740 P.2d 1346, 1354 (Utah App. 1987).

Which obligations of the principal contract must the surety perform?

"The general rule in Utah is that one contract will not merge into another unless it is plainly shown that that was the intent of the parties." Horman v. Gordon, 740 P.2d 1346, 1351 (Utah App. 1987) (quotation removed).

2) Penal sum variations

Statutory limitations on the penal sum amount

A performance bond with a penal sum equal to the contract price is required for all public projects. U.C.A. Section 63-56-504, 11-39-101

Effect of changes in work upon penal sum, if at all

[A] departure from the terms of the contract, faithful performance of which the surety guaranteed, should not fully release the surety. The provision does not mean that if the surety is damaged or injured by the departure or alteration, it cannot defend pro tanto for the damage or prejudice suffered by such alteration. A provision that the surety shall not be released in any way from liability cannot be converted into a defense by the owner against a claim for damage which the alteration or change in the work done under the contract may have caused the surety over and above the liability it would have had to pay if the change had not been made." Corporation of President of Church of Jesus Christ of Latter-Day Saints v. Hartford Accident & Indemnity Co., 95 P.2d 736, 740-41 (Utah 1939).

3) Notice or filing requirement

Case law rules concerning condition precedent notice

Provisions in bonds requiring the indemnitor to be provided adequate notice by the surety about claims against the surety will be enforced by the courts. American Bonding Co. v. Nelson, 763 P.2d 814, 816-17 (Utah App. 1988).

4) Special state provisions

5) Cases

Cases in which the surety steps into shoes of obligee

"Thus, in cases of surety-ship and guaranty, there is, if not an express contract, as in the instant case, an implied contract that the principal should indemnify the surety if the latter is compelled to pay the creditor." Beaver County v. Home indemnity Co., 52 P.2d 435, 450 (Utah 1935).

A surety's right of subrogation dates back to the time the contract was entered into. "Where a surety on a contractor's bond completes work abandoned by a contractor, such surety is entitled to moneys under the contract, sufficient to save him from loss on his surety-ship contract, and such right is superior to any assignment made by the contractor." Salt Lake City v. O'Connor, 249 P. 810, 815 (Utah 1926).

VERMONT

1) Damages covered?

When is the surety obligated to perform?

The surety's obligation is measured by its contract. Vermont-People's Nat. Bank v. Robbins' Estate, 166 A. 6 (1933).

"Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to b e extended by implication beyond the terms of his contract." Stern v. Sawyer, 78 Vt. 5, 61 A. 36 (1905).

Limitation on damages; for example, no delay damages.

"[W]hen the bond is breached, the penalty to the amount of the damages immediately becomes the debt of the surety and bears interest, the same as any other debt on contract, if the principal claim bears interest." City of Montpelier v. National Sur. Co., 97 Vt. 111, 122 A. 484, 488 (1923).

"It seems a fairly settle drule that a judgment against a principal is not ordinarily binding on his surety." Pierce Consulting Engineering Co. v. City of Burlington, 15 F.R.D. 23 (D. Vt. 1953) (citations omitted).

Which obligations of the principal contract must the surety perform?

"Where the meaning of such a bond is clear and unambiguous, it should be enforced, like other contracts, it should be enforced, like other contracts, according to the manifest intention of the parties. . . . The effect of the rule is to give such contracts of indemnity a reasonable construction, so as to give effect to the intention of the parties and to carry out, rather than defeat, the purpose for which they were executed." Town of Windsor, to use and Benefit of Samson Plaster Board Co. v. Standard Acc. Ins. Co., 112 Vt. 426, 26 A.2d 83 (1942).

When "a bond and contract are executed at the same time between the same parties as obligee and principal obligor relative to the same subject matter, they are taken in connection as forming several parts of one agreement." Westinghouse Elec. Supply Co. v. B.L. Allen, Inc., 138 Vt. 84, 91, 413 A.2d 122, 127 (1980) (citations omitted).

2) Penal sum variations

Statutory limitations on the penal sum amount

"The bond of a compensated surety is not to be so construed as to extend liability beyond the terms of the contract." Town of Windsor, to Use and Benefit of Samson Plaster Board Co. v. Standard Acc. Ins. Co., 112 Vt. 426, 26 A.2d 83 (1942) (citation omitted).

Effect of changes in work upon penal sum, if at all

"Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to b e extended by implication beyond the terms of his contract." Stern v. Sawyer, 78 Vt. 5, 61 A. 36 (1905).

"The rule is well settled that a compensated surety is relieved from its obligations for a departure from the contract only when the departure is shown to be material and prejudicial." City of Montpelier v. National Sur. Co., 97 Vt. 111, 122 A. 484, 488 (1923).

3) Notice or filing requirement

<u>Case law rules concerning condition precedent notice</u>

If the bond requires notice to be provided to the surety of any breach covered by the bond, the failure to provide such notice releases the surety from its obligation. Springield Co-op Freeze Locker Plant v. Wiggins, 115 Vt. 445, 63 A.2d 182 (1949).

4) Special state provisions

5) Cases

<u>Cases in which the surety steps into shoes of obligee</u>

"Subrogation is an equity called into existence for the purpose of enabling a party secondarily liable, but who has paid the debt, to reap the benefit of any securities or remedies which the creditor may hold against the principal debtor and by the use of which the party paying may thus be made whole." Walker Process Equipment Co. v. Cooley Bldg. Corp., 129 Vt. 333, 278 A.2d 714 (1971).

"[I]t is well settled that a surety paying the debt, will, in equity, be subrogated to the securities which the creditor holds." Benton v. Vailey, 50 Vt. 137 (1877).

"[T]he right of a surety to be subrogated to the rights of the contractor or his creditors, does not attach unless all the principal obligations are discharged. Walker Process Equipment Co. v. Cooley Bldg. Corp., 129 Vt. 333, 278 A.2d 714 (1971).

VIRGINIA

1) Damages covered?

When is the surety obligated to perform?

The liability of the surety is measured by that of the principal. Bd. Of Supervisors v. Southern Cross Coal Corp., 380 S.E.2d 636 (Va. 1989).

For public contracts, the performance bond is conditioned upon the faithful performance of the contract in strict conformity with the plans specifications and conditions of the contract. Va. Code Ann. Section 2.2-4337.

Limitation on damages; for example, no delay damages.

The surety's liability for non performance of a project is reasonable costs of completing the project, not the automatic forfeiture of the penal sum. Bd. of County Supervisors v. Sie-Gray Devs., Inc., 334 S.E.2d 542 (Va. 1985).

The penal sum of the bond is the surety's maximum amount of liability for breach. Bd. Of Supervisors of Stafford County v. Safeco ins. Co., 310 S.E.2d 445 (Va. 1983).

Under Virginia Code Section 8.01-382, an obligee may recover interests but not consequential damages. Bd. Of Supervisors of Stafford County v. Safeco ins. Co., 310 S.E.2d 445 (Va. 1983).

2) Penal sum variations

Statutory limitations on the penal sum amount

For all transportation works and public works over $100,000 a performance bond with a penal sum equal to the contract price is required. Va. Code Ann. Section 2.2-4337(A)(1)(2002); VDOT Road and Bridge Specifications Section 103.05.

Effect of changes in work upon penal sum, if at all

If there is a material change in the construction contract and the contractor defaults on the contract, the surety is discharged of its obligations. Southwood Builders, inc. v. Peerless Ins. Co., 366 S.E.2d 104, 106-08 (Va. 1998).

The surety can collect money improperly paid by the owner to the contractor. Continental ins. Co. v. City of Va. Beach, 908 F. Supp. 341 (E.D. Va. 1995).

3) Notice or filing requirement

Statutory provisions

By written notice, a surety may require that a creditor sue the principal of a debt before proceeding against the surety. If the creditor fails to institute the suit within 30 days after notice the surety will be discharged. Va Code Ann. Section 49-25

4) Special state provisions

Although the issue has yet to be heard by the Virginia Supreme Court, there may be a right to sue a surety for bad faith, or , at the least, a right to pursue bad faith as a defense to an indemnity action. Bell BCI Co. V. Old Dominion Demolition Corp., 294 F. Supp. 2d 807 (E.D. Va. 2003); Transamerica Premier ins. Co. v. Turf Specialists of No. Va., Inc., et al., 31 Va. Cir. 26 (Va. Cir. Ct. 1993).

5) Cases

<u>Cases in which the surety steps into shoes of obligee</u>

"When a principal defaults on a contract guaranteed by a performance or payment bond and the surety performs on the bond, principles of surety law and the doctrine of equitable subrogation impose certain rights and duties running between the surety, principal, and obligor, and allow the surety to enforce such rights and duties." XL Specialty Ins. Co. v. Commonwealth, 611 S.E.2d 3565 (Va. 2005).

When a surety defends an obligees suit, they stand in the principal's shoes and may assert any defenses that its principal could have asserted in the suit. Bd. Of Supervisors v. Southern Cross Coal Corp., 380 S.E.2d 636 (Va. 1989).

WASHINGTON

1) Damages covered?

When is the surety obligated to perform?

If the language of the bond is ambiguous, it is construed in favor of the surety. Joint Administrative Board of Plumbing and Pipefitting Industry v. Fallon, 89 Wn.2d 90 (1977).

Limitation on damages; for example, no delay damages.

The liability of a surety is not greater than that of the principal. Turner v. Wexler, 14 Wn. App 143 (1975); RCW 19.72.180.

The penal sum of the performance bond is the limit of the surety's liability. In re Davidson 31 Wn. App 480, 642 P.2d 1259 (1982).

Whether failure of contractor to provide insurance transfers burden to surety

"(1) A surety bond may not provide any type of insurance coverage. A surety bond shall not be liable for damages based upon or arising out of any tortuous injury including death to: (a) Any person; and (b) Any real or personal property. Failure to have any or adequate insurance required by contract does not transfer the burden to the surety. RCW 19.72.107.

2) Penal sum variations

Statutory limitations on the penal sum amount

The performance bond shall be in an amount equal to the full contract price. RCW 39.08.

3) Notice or filing requirement

Statutory provisions

Every party that furnishes materials supplies or provisions to an y subcontractor must supply the general contract with a notice in writing within 10 days after the date of the first deliver. This section does not apply to labor. RCW 39.080.065.

Case law rules concerning condition precedent notice

The failure to provide proper notice under RCW 39.080.065 by a claimant that provides both materials and labor to a subcontractor is a complete bar to recovery against the performance bond. LRS Electric v. Hamre Construction, 153 Wash 2d 731 (2005).

Failure to file a notice of claim prevents any lawsuit against the bond. Fidelity and Deposit Company of Maryland v. Conway, Inc., 14 Wash. 2d 551 (1942).

4) Special state provisions

5) Cases

Cases discussing AIA forms of bonds A311 and A312

Under A311, an obligee's failure to declare a default does not relieve the surety of its duty to pay on the bond. Colorado Structures, Inc., v. Insurance Company of the West, 125 Wash. App 907 (2005).

<u>WEST VIRGINIA</u>

1) Damages covered?

<u>When is the surety obligated to perform?</u>

Generally, the liability of the surety is coextensive with that of the principal. Gateway Communications, Inc. v. John R. Hess, Inc., et al., 541 S.E. 2d 595, 599 (W. Va. 2000).

<u>Limitation on damages; for example, no delay damages.</u>

Generally, legal expenses and accounting costs are not recoverable. Continental Realty Corp. v. Andrew J. Crevolin Co., 380 F. Supp. 246, 256 (S.D. W. Va. 1974).

Generally, the surety's liability is limited by the penal bond, otherwise it is the same as the principal. Mayle v. Aetna Casualty and Surety Company, 166 S.E. 2d 133, 135 (W. Va. 1969). The limit of liability is conditioned on the surety complying with the terms of its contract. Robinson v. Fidelity & Deposit Company, et. al., 383 S.E.2d 95 (W. Va. 1989).

<u>Which obligations of the principal contract must the surety perform?</u>

Generally, a surety is not looked upon with favor in regard to its liability. Continental Realty Corp. v. Andrew J. Crevolin Co., 380 F. Supp. 246, 256 (S.D. W. Va. 1974).

2) Penal sum variations

<u>Statutory limitations on the penal sum amount</u>

Generally, the surety's liability is limited by the penal bond, otherwise it is the same as the principal. Mayle v. Aetna Casualty and Surety Company, 166 S.E. 2d 133, 135 (W. Va. 1969). The limit of liability is conditioned on the surety complying with the terms of its contract. Robinson v. Fidelity & Deposit Company, et. al., 383 S.E.2d 95 (W. Va. 1989).

For Department of Transportation projects, a performance bond with a penal sum equal to 100 percent of the contract price is required. However, a principle at any time during the construction project, can obtain a penal sum for 102 percent of the project and thereby delete any provisions for retainage in the contract. W. Va. CSR 157-3-11.6.f.

3) Notice or filing requirement

4) Special state provisions

5) Cases

<u>Cases in which the surety steps into shoes of obligee</u>

Generally, sureties obtain a super priority to contract funds on a defaulted contract. Logan Planning Mill Company v. Fidelity & Casualty Company of New York, 212 F. Supp. 906 (S.D. W. Va. 1962).

WISCONSIN

1) Damages covered?

When is the surety obligated to perform?

For smaller public projects the form and terms of the bond will control damages. For larger projects the performance bond must extend to "the faithful performance of the contract." Wis. Stat. Section 779.14.

Generally the surety's liability coextends with the principal's. In addition to limitations set forth under the terms of the bond, the surety is also entitled to assert all defenses against claims that are available to the principal. Waukesha Concrete Products v. Capital Indem. Corp., Inc., 127 Wis. 2d 332, 379 N.W.2d 333 (Ct. App. 1985).

Limitation on damages; for example, no delay damages.

As a general matter, the surety is not liable for any amounts in excess of the penal sum of the performance bond. White v. Benkowski, 37 Wis. 2d 285, 155 N.W.2d 74 (1967).

Punitive damages are not available in connection with a breach-of-contract claim. White v. Benkowski, 37 Wis. 2d 285, 155 N.W.2d 74 (1967).

2) Penal sum variations

Statutory limitations on the penal sum amount

Generally, bonds on public works in must be in an amount at least equal to the contract price. Golden Valley Supply v. Amer. Ins. Co., 195 Wis. 2d 866, 537 N.W.2d 58 (Ct. App. 1995).

A surety's liability is limited to the penal sum of the bond, unless the surety exercises an option to complete the project. City of Wauwatosa v. Volpano, 224 Wis. 503, 272 N.W. 459 (1937).

The owners failure to conform with its contractual obligations will relieve the surety of liability at least to the extent that the surety's security has been compromised. City of Wauwatosa v. Volpano, 224 Wis. 503, 272 N.W. 459 (1937).

Effect of changes in work upon penal sum, if at all

No assignment, modification, or change of contract, change of the work covered thereby or extension of time to complete the contract will release the surety on a performance bond which is required under the public bonding law. Wis. Stat Section 779.14(1)(e)4.

3) Notice or filing requirement

4) Special state provisions

If the performance bond is insufficient to satisfy all claims, then the bond amount must be distributed proportionally among the claiming parties. Wis. Stat. Section 779.14(2)(b).

A public official is forbidden from requiring a specific surety or broker in association with a contractors bid. Wis. Stat. Section 779.14(1)(e)5.

5) Cases

WYOMING

1) Damages covered?

When is the surety obligated to perform?

The sureties liability for payment is limited to items contemplated when the bond was issued. Vaughn Excavating & Constr., Inc. v. P.S. Cook Co., 981 P.2d 485, 487 (Wyo. 1999).

Limitation on damages; for example, no delay damages.

The surety is liable for delay and liquidated damages if provided for in the contract. St. Paul Fire & Marine Ins. Co. v. City of Green River, 93 F. Supp. 2d 1170 (D. Wyo. 2000) aff'd, 6 Fed. Appx. 828 (10th Cir. 2001).

If a bond is required by a statute, the statutory provisions are incorporated into the bond. Vaughn Excavating & Constr., Inc. v. P.S. Cook Co., 981 P.2d 485, 487 (Wyo. 1999).

"The statutory bond is to secure performance of the contract, and not the performance of any duties outside the contract, though incidentally connected with it." Franzen v. Southern Sur. Co., 246 P. 30, 35 (Wyo. 1926).

Generally, any desired provision can be provided for in a contract, including limitation of damages clauses, as long as the clause is not specifically prohibited by statute or public policy. McKinney v. McKinney, 135 P.2d 940 (Wyo. 1943).

Which obligations of the principal contract must the surety perform?

Bonds are to be interpreted according to the contracts referenced therein. NEED CASE.

"The statutory bond is to secure performance of the contract, and not the performance of any duties outside the contract, though incidentally connected with it." Franzen v. Southern Sur. Co., 246 P. 30, 35 (Wyo. 1926).

2) Penal sum variations

Statutory limitations on the penal sum amount

For projects administered by the Wyoming Department of Administration and information, a performance bond with a penal sum equal to the contract price is required. Wyo. Stat. Section 9-2-1016(b)(xviii)(C).

3) Notice or filing requirement

Case law rules concerning condition precedent notice

Requirements to provide notice are enforced and are a condition precedent to an action against a surety bond. National Sur. Co. v. W. H. Holliday Co., 295 P. 913 (Wyo. 1931).

4) Special state provisions

A section of Wyoming Statutes are dedicated towards surety rights and remedies. These can be found at Wyo. Stat. Section 38.

5) Cases

<u>Cases in which the surety steps into shoes of obligee</u>

A surety that fulfills the obligations of the contract is equitably subrogated to the obligee's rights in security and has an equitable right of indemnification from the principal. Texas W. Oil & Gas Corp. v. Fitzgerald, 726 P.2d 1056, 1075 (Wyo. 1986).