

# Perrin Conferences

## National Construction Defect Conference



### Of Liens, Lawsuits and Leverage

Moderator



**Anthony Capasso, Esq.**  
*O'Toole Scrivo  
Cedar Grove, NJ*



**Elaine K. Fresch, Esq.**  
*Hawkins Parnell & Young, LLP  
Los Angeles, CA*



**Richard L. Mendelsohn, Esq.**  
*Malaby & Bradley LLC  
New York, NY*



**Hal Thompson**  
*Markel Surety  
Columbus, OH*

# Of Liens, Lawsuits and Leverage:

---

## Mobilizing Commercial Contract Disputes and Surety Bond Claims to Leverage Your Opponent in CD

# Construction Claims Other than Construction Defect Claims

## COMMERCIAL/CONTRACT DISPUTES

Disputes that result from a disagreement between parties to a contract (owners and contractors, contractors and subcontractors, subcontractors and suppliers), typically when one party fails to meet its obligation, or a disagreement arises as to compensation or project schedule. Examples include claims for increase in contract sums, extension of project scheduled, changed/differing site conditions, extra work or delay claims, and lien claims.

## SURETY BOND CLAIMS

Surety Bonds include Performance, Payment and Maintenance bonds. Claims are by surety bond beneficiaries (sometimes referred to as obligees) for satisfaction of the bond principal's obligation to pay or perform under a construction contract. Examples include claims against payment bonds by subcontractors for failure to receive payment from general contractors, claims against performance bonds by owners against general contractor for failing to complete construction contracts, and claims against maintenance bonds by HOAs or municipalities for failing to complete or maintain site work.

# Commercial/Contract Disputes

## Construction Liens

1. Definition – a construction lien is a security interest in real property on which construction work was completed.

### 2. Considerations

- ▶ Pre-Lien Procedures – Some states require certain filings or notices by lienors prior to filing liens (e.g., New Jersey requires a Notice of Unpaid Balance to be filed before filing a lien)
- ▶ Timing – Lien statutes set forth when liens can be filed and foreclosed
- ▶ Format – Each state has requirements for the content required in the lien document
- ▶ Notices – Typical practice is to sent lien notice to everyone upstream but lien statutes will set forth who needs to be provided with notice of a lien
- ▶ Service – Liens must be served as provided for in the applicable statute (typically by personal service or registered mail)
- ▶ Tiers – Depending on the state, only certain contractors, subcontractors, and suppliers can lien depending on where in the construction pyramid they fall

### 3. Benefits

- ▶ In most instances, liens are the only pathway to recovery for a subcontractor against an owner due to lack of privity.
- ▶ Liens act as an impediment to transfer, sale, or refinance of real property in most states.
- ▶ Foreclosure of liens can compensate lienors for monies owed when owner is insolvent

# Commercial/Contract Disputes

- ▶ Common for commercial/contract disputes to resolve pre-lawsuit
  
- ▶ Lawsuit Dynamics
  - Typical Plaintiff
    - Party A to contract or third-party beneficiary to contract
  
- ▶ Typical Defendant
  - Party B to contract, owner of real property
  
- ▶ Typical Causes of Action
  - Breach of Contract, Fraud, Unjust Enrichment, Quantum Meruit, Foreclosure of Lien
  
- ▶ Typical Relief
  - Payment for monies owed, specific performance, delay damages, and sale of real property through lien foreclosure

# Surety Bond Claims

- ▶ What is a surety bond? Bonds issue the guarantee the contractor's performance of the bonded obligation. The bond protects the owner (obligee) from default by the contractor in performance of work or payment to subcontractors.
  
- ▶ Surety Bonds vs. Insurance
  - 3-way contract vs. 2-way contract
  - Guarantee performance through completion vs. protection for property damage or personal injury from negligent work that is already completed
  - Bond principal retains economic risk vs. insurer retains economic risk
  
- ▶ Types of Bonds
  - Bid bonds, performance bonds, payment bonds, maintenance bonds
  
- ▶ Typically required on public improvements and large-scale private improvements
  
- ▶ Most states have bond specific statutes
  - The Miller Act of 1935 and the Little Miller Acts

# Surety Bond Claims

- ▶ Not uncommon for surety bond claims to resolve pre-lawsuit
  
- ▶ Claim Administration
  - Evaluation of any procedures identified in the bond
  - Evaluation of the Miller Act and Little Miller Act for any timing requirements
  - Determination of whether bond covers tier of claimant
  - Information gathering
    - Formal correspondence to bond claimant for information gathering
    - Formal correspondence to bond principal for written position
    - Site visit
    - Retention of consultant
  - Determination of validity of claim
    - Valid claim – surety satisfies claim through performance or payment
    - Invalid claim – surety takes no action
  
- ▶ Alternatives to Payment of Performance Claims
  - Agreement to a substitute/replacement contractors (also known as tender option)
  - Takeover agreements
  - Performance by bond principal with surety monitoring and oversight

# Surety Bond Claims

- ▶ Surety bond claims that proceed to lawsuits in theory involve the question as to whether the bond principal is in default of its obligations
  
- ▶ Lawsuit Dynamics
  - Typical Plaintiff
    - Bond obligee
  
  - Typical Defendant
    - Bond principal and bonding company
  
  - Typical Causes of Action
    - Breach of contract, specific performance
  
- ▶ Typical Relief
  - Delay damages, payment for completing project, payment for monies owed to subcontractor, and compel performance under the bond or construction contractor



# Construction Defect Lawsuit Characteristics

- ▶ Rarely resolve pre-lawsuit or early
  
- ▶ Lawsuit Dynamics
  - Typical Plaintiff
    - Homeowner association, homeowner, board of managers, developer, sponsor, public entity, or injured individual
  
  - Typical Defendant
    - Sponsor, developer, general contractor, construction manager, subcontractors, engineers, architects, and material suppliers
  
  - Typical Causes of Action
    - Breach of Contract, Negligence, Fraud, Indemnification and Contribution
  
  - Typical Relief
    - Money damages for property damage or personal injury

# Construction Defect Lawsuits

- ▶ Leverage Points
  
- ▶ “You owe me money”
  - Involvement of individuals as named parties
  - Counterclaims against Plaintiffs
  - Liens
  - State Prompt Payment Acts
  - Shifting of Attorneys’ Fees
  - Statutory Interest
  - Work stoppage
  - Bond Claims
  
- ▶ Expanding landscape of lawsuit with joinder of truly culpable parties
  
- ▶ Giving optics to Plaintiffs that litigation will not be expeditious

# Commercial • Contract Disputes

## ▶ Leverage Points

- Liens
- State Prompt Payment Acts
- Shifting of Attorneys' Fees
- Statutory Interest
- Work stoppage
- Bond Claims

# Surety Bond Claims

- ▶ Leverage Points
  - Early dismissal of lawsuit based on failure to comply with conditions precedent or invalid bond claim
  - Tender of defense of surety to bond principal
  - Bond coverage – is the claim actually covered by the bond?
  - Availability of alternatives to payment
  - Indemnification from bond principal

# Real Life Illustration – Example 1

- ▶ Owner files lawsuit against Concrete Prime Contractor for negligence alleging improper concrete placement in multi-story parking deck resulting in structural deficiencies and improper height between floor and ceiling, and inadequate sloping causing water ponding and leakage through floors.
- ▶ Concrete Prime Contractor counterclaims with filing of lien on property and counterclaiming for foreclosure of lien, breach of contract, and quasi-contractual theories of recovery.
- ▶ Concrete prime contractor's counterclaim is valued at approximately \$2 million.
- ▶ Given effect of lien on construction loan funding and monumental task of defense of counterclaim, Owner settles with Concrete Prime Contractor and Concrete Prime Contractor's insurer pays nothing.

# Real Life Illustration – Example 2

- ▶ General Contractor brings pre-suit claim against Site Work Subcontractor for negligence and failing to adequately prosecute excavation and dewatering work for new build multi-story residential building.
- ▶ Site Work Subcontractor files lien against project and makes bond claim to General Contractor's payment bond.
- ▶ General Contractor, under its agreement with the Owner, becomes obligated to indemnify the owner for the lien. As a result, General Contractor files a lawsuit for negligence and to discharge the lien.
- ▶ Site Work Subcontractor counterclaims for breach of contract, payment on the bond, and joins Owner to lawsuit to foreclosure on the lien.
- ▶ General Contractor settles through payment to Site Work Subcontractor. Insurer for site work subcontractor never pays anything on negligence claim.

# Real Life Illustration – Example 3

- ▶ General Contractor issues stop work notice to Public Owner for failure to receive payment on project that involved development of new recreational park, which included new playground area, soccer field, basketball court, and bathroom facilities.
- ▶ In response, Public Owner makes claim against General Contractor's performance bond for failing to complete the construction. Public Owner also makes pre-lawsuit demand to General Contractor to repair negligent work relating to fencing and concrete sidewalk work.
- ▶ Both surety and insurer are on notice of Public Owner's claim.
- ▶ Surety puts pressure on General Contractor to complete work and address any issues raised by Public Owner. Surety also threatens General Contractor with indemnification obligations if Surety must satisfy any obligations.
- ▶ General Contractor agrees to complete project.