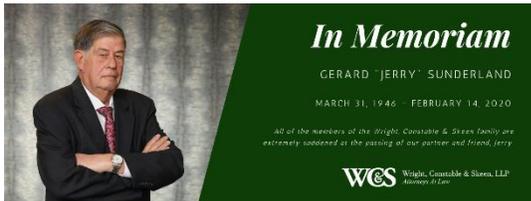


## SURETY TODAY PRESENTATION

Given by  
**Michael Stover and George Bachrach**  
**Wright, Constable & Skeen, LLP**  
**Baltimore, Maryland**  
**March 9, 2020**

### Resolving Issues Between Multiple Sureties with the Same Principal in Default – Revisiting The “Guiding Claim Procedures”



George and I want to take a minute to address a sad and somber matter: As many of you know, on February 14, 2020, our friend, colleague and partner Jerry Sunderland lost his year-long battle with two cancers. He beat one, but the second was just too much for him. Just like in his life, Jerry fought hard and bravely and he regularly came in to work right up until just before the end. Jerry was 73 when he passed and he led a too-short, but wonderful life. Before becoming a lawyer, Jerry was a lieutenant in the Army during the Vietnam War. After graduating from the University of Maryland School of Law he practiced law for over 40 years. He was an in-house surety claims adjuster for Aetna and then for F&D and after that he was an Assistant Attorney General for the State of Maryland for a few years before going into private practice. He had an incredible memory for the law and could bring his unique perspective to solving any surety related problems. Jerry was married to his wife Sue for over 50 years and he is survived by Sue and their three sons and 5 grandkids. He was a devoted husband and father and we will all miss him.

George and I also wanted to thank everyone who expressed their condolences, thoughts and prayers for Jerry. There really was a tremendous out pouring of love, affection and respect for Jerry after he passed and we shared all of those messages with his wife Sue and she is very appreciative as well.

### Introduction (GJB)

More and more today, two or more sureties are writing performance and payment bonds for the same principal. There are essentially two such situations.

1. In the first situation, the sureties are co-sureties for the principal on performance and payment bonds on one bonded project or multiple bonded projects – a typical co-surety arrangement, especially when the penal sums of the bonded contracts are very large. In the modern co-surety arrangement, there is frequently a written Co-Surety Agreement that sets forth the rights, duties and obligations of the sureties.<sup>1</sup> These rights, duties and

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<sup>1</sup> Co-Surety relationships are discussed in THE SURETY'S INDEMNITY AGREEMENT: LAW & PRACTICE, 166-175 (Marilyn Klinger, George J. Bachrach & Tracey L. Haley eds., Am. Bar Ass'n, 2d ed. 2008).

obligations may address such issues as who will be the lead surety, whether there is going to be one or more indemnity agreements, notices to each surety, settlement authority for claims, the allocation of losses and reimbursements among the sureties, and other issues. Such Co-Surety Agreements are NOT the topic of discussion for today.

2. In the second situation, the sureties are writing bonds for the same principal either at the same time for different bonded projects or the second surety is writing subsequent bonds for the principal after the first surety has decided not to issue more bonds for that principal. Under those circumstances, there is rarely, if ever, a written arrangement between the two sureties unless the principal gets into trouble on the bonded projects for both sureties. The question is, at the time of the principal's defaults on those bonded projects, whether an agreement of some kind can be reached by the sureties to resolve any conflicts. There is guidance in the surety industry.

Today, we are going to address certain standards or guidelines known as the Surety's Guiding Claim Procedures,<sup>2</sup> which may assist two or more sureties in reaching an agreement when a principal's potential or actual default could affect the rights and obligations of more than one surety. There is some confusion as to whether the true name of these guidelines is the Guiding Claim Procedures or the Guiding Principles as both seem to be used interchangeably, sometimes in the same document. If we, the speakers, go back and forth on the name, we apologize.

Some sureties today may either know about the Guiding Claim Procedures or act consistently with their terms without knowledge of their existence. They are important because we see two or more sureties issuing separate bonds for different contracts for the same principal all the time without some written understanding between the sureties when defaults and losses start to arise. When this happens, the "wheel of surety life" does not have to be re-invented every time to deal with the obvious conflicting sureties' interests. The Guiding Claim Procedures are well-recognized guidelines that can help resolve what could be thorny and contentious issues between the sureties.

Mike Stover and I will provide an overview of the Surety's Guiding Claim Procedures. Then, we will have two "guest commentators" provide some of their insights on handling claims when two sureties are involved. They are:

1. Jim Hamel of Zurich, N. A.; and
2. Gretchen Eck of Liberty Mutual Surety.

Mike and I will then provide a summary, including some concerns that have been raised, and then address any questions you may have.

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<sup>2</sup> The Surety's Guiding Claim Procedures were promulgated on February 5, 1957, by the then Surety Association of America (now known as the Surety and Fidelity Association of America), and a copy has been provided to all surety claims representatives who have requested a copy from me. They have been amended over the years.

## 1. **The Guiding Claim Procedures Are Guidelines – Not Law (Section 9).** (MAS)

Before we start describing what the Guiding Claim Procedures are and what they can do for two or more sureties when their same principal is in default, I want to discuss what the Procedures don't do and what they are not. The Guiding Claim Procedures are only to be considered as a guide to sureties with respect to sureties reaching some subsequent agreement going forward.

Section 9 of the Guiding Procedures makes clear that the procedures are not intended to be legally binding.<sup>3</sup> Section 9 provides in part: “. . . these Guiding Claim Procedures do not create legal rights or obligations among any sureties.” With respect to Sections 2 through 8 of the Procedures, Section 9 points out that the obligations could become binding if the sureties expressly agree to be bound and such agreement is reduced to writing. In the absence of a written agreement, Section 9 reiterates again that the “Procedures do not create legal rights or obligations among the Sureties.” Section 9 separates out Section 1 from being part of a subsequent agreement because as I will discuss in a minute Section 1 of the Procedures addresses knowledge and notice once a surety's investigation reveals the presence of another surety; so it addresses the time period before the sureties are known to each other.

Obviously, because the Guiding Procedures are not binding, the best practice is to negotiate the terms of any cooperation and memorialize any agreements in an executed written document.

## 2. **When The Guiding Claim Procedures Are Not Intended To Apply (Section 8).**

Continuing along the line of what the Guiding Procedures are not intended to be, Section 8 of the Procedures discusses in which situations the Procedures are not intended to apply.<sup>4</sup> Section 8 addresses four circumstances where the Procedures are inapplicable:

- (a) where a surety issued bonds after having actual knowledge of loss incurred by another surety on a bond issued previously;
- (b) where circumstances make the procedures unreasonable, impracticable or unduly burdensome;
- (c) where reinsurers, co-sureties or the SBA do not agree; and

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<sup>3</sup> Section 9. As to Section 1. hereof these Guiding Claim Procedures do not create legal rights or obligations among any Sureties. As to Section 2. through 8. hereof, legal rights and obligations are created among sureties to the extent that such Sureties may expressly agree to be bound by those Sections with respect to any Contractor after their respective claim investigations have been made. Until such agreement is reduced to writing and executed by the concerned sureties, these Guiding Claim Procedures do not create legal rights or obligations among Sureties.

<sup>4</sup> Section 8. These Guiding Claim Procedures are not intended to apply in the following situations:

- (a) The interests of any Surety that arise out of any bond or bonds it shall execute or commit itself to execute in behalf of any Contractor after such Surety shall have actual knowledge of loss incurred by another Surety arising from any bond previously executed on behalf of the Contractor.

- (b) Where special circumstances exist which would make it unreasonable, impracticable or unduly burdensome to apply them.

- (c) Where reinsurers, co-sureties or the Small Business Administration will not agree to such application.

- (d) Where the contractor refuses to cooperate with the sureties in the implementation of these Guiding Claim Procedures.

(d) where the contractor refuses to cooperate.

The first scenario in Subsection (a) makes sense, it's like to trying to buy insurance after you have the accident. If a surety comes in and issues bonds after it is aware of losses incurred by the earlier surety, it should not get the benefit of any equitable sharing of assets or expenses that is contemplated by the Procedures. The "Johnny come lately" surety could be gaining an advantage that it would not otherwise be entitled to if it were allowed to participate. The element of "joint misfortune" that befalls two or more sureties that the Guiding Procedures are designed to address and which justify joint actions is not present where the other surety comes to the situation knowingly and willingly. Of course, every situation is somewhat unique and in some circumstances it may make sense to reach some kind of cooperation agreement with the Johnny-come-lately surety. Notwithstanding Section 8(a), the parties can agree to waive any such restriction.

Subsections (c) and (d) basically provide that if the relevant stakeholders do not agree to the application of the Guiding Procedures then the Procedures should not be used. The Subsections identify reinsurers, co-sureties, the SBA or the contractor. For the most part, these seem like common sense provisions, because if you don't have buy-in from the relevant stakeholders you could end up in a far worse position than if there was no cooperation between the sureties under the Guiding Procedures. Typically, the analysis that convinces the sureties to utilize the Procedures would be sufficient to convince the other stakeholders, but sometimes there may be conflict with a pre-existing internal company policy, terms of other agreements or treaties or the other stakeholder(s) may perceive an unfair outcome, etc. Obviously, the sureties could agree to apply the Procedures if their cost/benefit analysis shows a clear advantage regardless of stakeholder buy-in, but as the drafters of the Guiding Procedures seem to recognize, you could be asking for trouble.

Subsection (d) states that the Procedures do not apply if the contractor "refuses to cooperate" with the implementation. I think that provision might be giving the contractor too much power especially in light of the likely Indemnity Agreement obligations that a contractor will be bound to, including the obligation to cooperate and the discretion that sureties are given in the typical GIA to settle and resolve claims.

One stakeholder that I would add to the list in these Subsections might be the Indemnitors. In many jurisdictions courts have judicially required sureties to act reasonably toward the indemnitors in addressing claims and to consider the impact of the surety's actions on the indemnitors. Thus, even where the clear language in the Indemnity Agreements gives the surety the complete and full discretion to resolve claims, utilize assets, compromise claims, in some jurisdictions, courts have ignored such language and engrafted some kind of duty. Other courts will apply a duty of good faith and fair dealing to the surety's actions. Sureties considering implementing the Guiding Procedures should consider all the stakeholders, including the Indemnitors.

### 3. **Initiating The Implementation Of The Guiding Claim Procedures (Section 1).**<sup>5</sup>

Section 1 of the Guiding Procedures addresses how the process of considering using the Procedures gets started. Section 1 provides that whenever a surety during its investigation of a default obtains knowledge of another surety with open bonds, the investigating surety shall request that the contractor give immediate notice to the other sureties. If the contractor refuses to give the notice, Section 1 requires the surety to notify the contractor that the surety intends to give the notice and then the surety may do so. This Section is somewhat at odds with Section 8(d) which essentially says that the Procedures don't apply if the contractor refuses to cooperate. Section 1 gives the green light to go around the contractor if it refuses to cooperate with respect to notice.

Obviously, the point of giving notice is to engage the other surety in the discussion about whether to use the Guiding Procedures or not. The notice also let's the other surety know that another surety is involved and that it should consider its actions toward the specific and general assets that George and I will discuss shortly.

I suspect that the Procedures take the tack of going through the contractor first to attempt to avoid any issues with allegations of interference, disclosure of confidential or private information, etc. Section 1 attempts to ameliorate this issue by also requiring that the notice provided by the surety "shall not contain any information in violation of any confidential relationship between the investigating surety and the Contractor." I do not like the drafter's use of the concept of "confidential relationship," there are many court decisions out there that hold that there is no confidential relationship between the surety and principal and that the surety is not a fiduciary to the principal. I think the drafter's point is more that the surety should not share any confidential or private information in the notice and that is quite valid. One thing for claims handlers to be mindful of is whether any applicable state adjuster rules, regulations or procedures regarding privacy and keeping information confidential would apply to the Section 1 notice requirement of the Guiding Procedures. Obviously, for the process of utilizing the Guiding Procedures to start the sureties need to find each other and open a dialogue on the subject and in the process of doing that sureties need to consider the entire situation and circumstances of the parties and any obligations under applicable law.

### 4. **The definitions: Loss, General Assets and Specific Assets (Section 2).**<sup>6</sup> (GJB)

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<sup>5</sup> Section 1. Whenever a Surety, while investigating a claim against a Contractor or a voluntary or involuntary default of a Contractor, acquires knowledge that other Surety(ies) have bond(s) outstanding on behalf of the Contractor, the investigating Surety:

- (a) shall request the Contractor to give notice immediately to the other surety(ies) of the situation; or,
- (b) if the Contractor refuses and after giving the Contractor notice of its intention to do so, may give notice to the other surety(ies).

Such notice to the other surety(ies) by the investigating surety shall not contain any information in violation of any confidential relationship between the investigating surety and the Contractor.

<sup>6</sup> Section 2. Definitions: As used herein,

- (a) "Loss" includes losses and allocated expenses paid or incurred excluding salaries of the employees of the respective Sureties.
- (b) "General Assets" means all tangible and intangible property and rights to property of the Contractor, other than Specific Assets.

Much of what the Guiding Claim Procedures address is the sureties' salvage – what recoveries each surety should receive when a principal is in default on multiple bonds issued by multiple sureties. To make matters simpler, the Guiding Claim Procedures list four definitions.

The first definition is the definition of “Loss.” Now, each of the sureties' Indemnity Agreements probably define the surety's loss, and sometimes that definition is a laundry list of premiums, performance and payment bond losses, investigation expenses, attorneys' fees, consultants' fees, accountants' fees, interest, etc. The definition of “Loss” in the Guiding Claim Procedures includes merely “losses and allocated expenses paid or incurred excluding salaries of the employees of the respective Sureties.” Since any agreement between the sureties will be reduced to writing, their agreement about the exact definition of “Loss” may be more completely defined to fit the situation.

The second definition is the definition of “Specific Assets,” which are those assets described in Section 3 of the Guiding Claims Procedures to which one surety has superior or priority rights over other sureties. I will discuss Section 3 in a moment.

The third definition is the definition of “General Assets” and the fourth definition is the definition of “Net Proceeds” as used in Section 4 of the Guiding Claim Procedures, which Mike will address shortly.

## 5. **The rights to Specific Assets (Section 3).**<sup>7</sup> (GJB)

Section 3 of the Guiding Claim Procedures provides that as between the multiple sureties, unless otherwise agreed, the surety on a particular bonded project has superior or priority claims or rights to the following types of Specific Assets.

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(c) “Specific Assets” means those assets described in Section 3, to which one Surety has superior or priority rights over other Sureties.

(d) “Net Proceeds,” as used in Section 4, means gross proceeds less legal and other expense (excluding salaries of employees of Sureties) incurred in acquiring control and liquidating General Assets.

<sup>7</sup> Section 3. As between the Sureties, and unless otherwise agreed, the surety on a particular job has a superior or priority claim or right to Specific Assets as follows:

(a) The proceeds of any contract shall be used in the following order of priority:

- (1) to pay the costs of completing the Contract,
- (2) to pay obligations incurred by the Contractor prior to default to suppliers of labor, material and services furnished for use in the performance of the contract; and
- (3) to repay any indebtednesses or obligations of the contractor to the Surety,
- (4) to be held as General Assets in accord with Section 4.

(b) All material ordered, purchased or manufactured specifically for such contract and paid for by the Contractor or the Surety shall be used by the Surety on that contract to complete the contract.

(c) The Surety on a bond covering a contract shall have a prior right to all equipment on the site of the contract at the time the first surety begins a claim investigation for use in the completion of said contract and any other contract secured by a bond executed by that Surety in favor of the Contractor.

(d) Any excess materials covered by (b) above and the equipment covered by (c) above shall be sold by the Surety having possession thereof. Prior lien holders on the equipment shall be paid to the extent of their lien and the balance of the proceeds from such sales shall be held by that surety and applied to its losses or expenses according to the priorities in Paragraph 3(a) above, except sub-paragraph 3(a)3.

First, and most obviously, the bonded contract funds on each of the individual surety's own bonded projects. The Guiding Claim Procedures concept is that the bonded contract funds from one surety's bonded contract should be used in the following order of priority:

- a. To pay the costs of completing that bonded contract;
- b. To pay the principal's obligations incurred prior to default to its subcontractors and suppliers for their performance, materials and services provided on that bonded contract;
- c. To "repay any indebtedness or obligations of" the principal to the surety; and then
- d. To hold any balance as a "General Asset," which Mike will discuss.

Using the bonded contract funds to pay for the completion of the bonded contract and for the payment of potential bonded contract payment bond claims is standard and reasonable, and complies with contract, indemnity and subrogation law. However, using any excess bonded contract funds after those payments to "repay any indebtedness or obligations" that the principal may owe to the surety, including under the Indemnity Agreement, is something that the multiple sureties would have to expressly agree to as the excess bonded contract funds could very well come under the definition of "General Assets" instead. And, if there is a secured lending bank or a Trustee in the principal's bankruptcy case floating around looking for "excess bonded contract funds," all of the sureties may have a fight on their hands.

That same fight with the secured lending bank or the Trustee in the principal's bankruptcy case may also extend to any salvage of other Specific Assets that the multiple sureties may otherwise agree on in writing under the Guiding Claim Procedures. These "Specific Assets" include:

- a. "All material ordered, purchased or manufactured specifically for such contract and paid for by the [principal] or the Surety," which shall be used by the surety on that contract to complete that contract.
- b. The "prior right to all equipment on the site of the contract at the time the first surety begins a claim investigation for use in the completion of said contract and any other contract secured by a bond" executed by that surety for the principal.

The surety's use of the materials purchased for a particular bonded contract, and, more directly, specifically manufactured materials for that particular bonded contract, is supported by case law in the jurisdictions in which the issue has arisen. Furthermore, the surety may well have better rights to those materials over the claims of the secured lending bank or the Trustee in the principal's bankruptcy case. This issue was discussed in a prior Surety Today Presentation concerning "The Surety and the Uniform Commercial Code" (August \_\_, 2016). Furthermore, Mike Stover has written about this topic in a paper presented at the 2017 Northeast Surety & Fidelity Claims Conference.<sup>8</sup> However, while the multiple sureties may agree on the use of the principal's equipment to complete one or more of the bonded contracts, the secured lending

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<sup>8</sup> Michael A. Stover, *Protecting the Surety's Interests in Stored Materials from the Principal's Bankruptcy Trustee and Secured Lender* (unpublished paper submitted at the Twenty-Eighth Annual Northeast Surety and Fidelity Claims Conference on September 14, 2017).

bank, the Trustee in the principal's bankruptcy case, and the lessors of the equipment may have other ideas and attempt to enforce their rights to the detriment of the sureties and their plans.

As between the multiple sureties, Section 3(d) of the Guiding Claim Procedures deals with the sureties' sale of any excess materials under Section 3(b) and equipment under Section 3(c). Again, other creditors such as the secured lending bank, the Trustee in the principal's bankruptcy case, and any equipment lessors may have other plans for the disposition of the excess materials and equipment. Section 3(d) also proposes to apply the sales proceeds to pay off prior lien creditors on the equipment to the extent of their liens and then to apply the excess balance of the proceeds as agreed among the sureties, something that may or may not occur.

In summary, Section 3 addresses "Specific Assets" where one surety may have superior or priority rights to certain assets can be dealt with among the multiple sureties under the Guiding Claim Procedures, but with the acknowledgement and understanding that other parties – the principal's bank, the Trustee in the principal's bankruptcy case, and any equipment lessors – may not only have an interest in what occurs, but also a better interest and superior or priority rights to the sureties' rights.

## 6. **The rights to General Assets.** (MAS)

### a. The definitions of "General Assets" and "Net Proceeds" (Section 2).

Section 4 of the Guiding Procedures addresses the treatment between the sureties of "general assets." As George noted, the Procedures broadly define the term general assets in Section 2. The definition is simply "(b) 'General Assets' means all tangible and intangible property and rights to property of the Contractor, other than Specific Assets." So, you need to refer to and understand what George just discussed under Specific Assets to be able to understand what the Guiding Procedures intend to cover under the term General Assets. While the definition does not mention it, one must also consider the assets addressed in Section 6 as not constituting general assets and George will discuss Section 6 a little later. With the exception of what is addressed in Sections 3 and 6, the drafters intended the term general assets to be broad and all encompassing.

As we will discuss next, in Section 4's treatment of general assets the concept of distributing "net proceeds" is utilized. Section 2 defines "net proceeds" as meaning:

"(d) . . . gross proceeds less legal and other expense . . . incurred in acquiring control and liquidating General Assets."

So, before any funds are apportioned between the sureties under the Guiding Procedures, the funds are used to reimburse the surety that incurred the expense and fees associated with generating those funds. Now let's turn to Section 4 to see how the Procedures address general assets.

b. Generally – the treatment of General Assets (Section 4).<sup>9</sup>

Section 4 provides that the Sureties should cooperate and proceed jointly in the name of one or more of them, but for the benefit of all, to secure control of all general assets of the contractor, and third party indemnitors who indemnify all concerned sureties by taking title thereto, security interests therein, liens thereon or such other measures as they may jointly deem appropriate. So, the first part of Section 4 discusses the process of gathering up all the applicable assets.

Now that the assets have been gathered, what do you do with them? Section 4 continues by stating that unless otherwise mutually agreed any general assets or the proceeds therefrom should be held in trust for the benefit of all sureties concerned. Thus, Section 4 first establishes a trust over all of the assets to protect them while they are being held. Section 4 then provides that the net proceeds should be distributed among the sureties in the ratio which the loss to each surety bears to the aggregate of the losses of all sureties. Such distribution shall be made from time to time as the Sureties may agree. It may be difficult to determine the ratio of losses until later in the process and early distributions may not be possible unless the parties can agree on interim loss ratios and distributions. The sureties may also need to share their loss information to justify their losses for purposes of determining the ratio. This sharing arrangement and its allowance for recovery of actual costs, expenses and fees and protection of the assets is an eminently fair and equitable treatment of the assets.

7. **Other provisions.** (GJB)

- a. Section 6<sup>10</sup> – What sureties don't need to share (third party indemnitors of one surety only and collateral taken by a surety prior to the execution of bonds by the other surety(ies).

When the principal is in default with multiple sureties on multiple bonded contracts, not every right, asset or piece of collateral held by a surety has to be shared with the other sureties. The Guiding Claim Procedures describes two such instances in Section 6.

First, the sureties may have different sets of indemnitors executing their Indemnity Agreements. When one surety obtains a recovery or reimbursement of all or a portion of its loss from one of its third-party indemnitors who is NOT an indemnitor of the other sureties sustaining

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<sup>9</sup> Section 4. The Sureties concerned should cooperate and proceed jointly in the name of one or more of them, but for the benefit of all, to secure control of all General Assets of the Contractor, and third party indemnitors who indemnify all concerned sureties by taking title thereto, security interests therein, liens thereon or such other measures as they may jointly deem appropriate, subject to any prior liens, security interests or encumbrances thereon that may then be perfected.

Unless otherwise mutually agreed any General Assets or the proceeds therefrom should be held in trust for the benefit of all Sureties concerned. The net proceeds thereof, should be distributed among the Sureties in the ratio which the loss to each Surety bears to the aggregate of the losses of all Sureties. Such distribution shall be made from time to time as the Sureties may agree.

<sup>10</sup> Section 6. Recovery by any Surety from a third party Indemnitor of one Surety, who is not an Indemnitor of other Sureties sustaining loss, shall not be shared with such other Sureties; and, collateral taken by a surety at any time prior to the execution of a bond or bonds by the other sureties shall not be shared with such other sureties.

a loss under their bonds, such a recovery or reimbursement does not have to be shared with the other sureties. Since the other sureties had no rights against the first surety's indemnitor, they do not have rights in any such recoveries that reduce the first surety's own losses.

Second, one surety may have obtained collateral, either in the underwriting process or under the terms of the collateral demand provision in the Indemnity Agreement, prior to the execution of any of the bonds for the principal by the other sureties. The first surety exercising its rights to obtain such collateral does not affect those other sureties, who have not yet exposed themselves to the risk of having written bonds, and the first surety does not have to share that collateral.

Two thoughts arise concerning the issue of one surety obtaining collateral *after* the other sureties become involved with and write bonds for the principal. First, such action could spur a bankruptcy filing of the principal – voluntary or involuntary – if the first surety obtained the collateral within the 90-day preference period. Second, the first surety, under an agreement with the other sureties, could hold such collateral as a “General Asset” for the benefit of the group of sureties under Section 4 rather than release its rights to the collateral and expose that collateral to other non-surety creditors to the detriment of all of the sureties.

b. Section 7<sup>11</sup> – Principal's prior use of contract proceeds.

Similar to Section 6, Section 7 addresses the issues of what happens as a result of the principal's use and application of the proceeds of any contract, bonded by one surety, bonded by another surety, or on a non-bonded contract. Namely, the principal may collect contract funds from many sources, place them in one account, and use or apply them to pay subcontractors, suppliers and overhead expenses from those contract funds without any thought about or regard to which contract funds are used to pay what bills on what particular contracts. If the principal's application of the contract funds without regard to their source or their use with respect to a particular contract is done “without the knowledge, direction or encouragement” of one or more of the sureties who may have benefited by the principal's actions, that surety and those sureties “shall not be responsible to any other Surety” for the principal's application, or possible misapplication in a trust fund statute jurisdiction, of such contract funds.

This is similar to the situation that Mike and I have discussed in a prior Surety Today Presentation when a lending bank receives bonded contract funds from a bonded project and applies them to the principal's secured loan from the bank. If the bank is without knowledge of the principal's default on the bonded contract, whether it is a performance or payment default, and the bank has not committed a fraud, the bank is normally entitled to retain the deposited bonded contract funds.

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<sup>11</sup> Section 7. A Surety shall not be responsible to any other Surety on account of the application by Contractor of the proceeds of any contract to the payment of obligations not incurred on said contract when such application was made without the knowledge, direction or encouragement of the Surety(ies) who may have benefited therefrom.

At some point, the sureties will be stuck with what the principal has done with the use, application and allocation of prior received contract funds, regardless of their source. Some sureties may be the beneficiaries of and some sureties may be hurt by the principal's actions. If the surety or sureties have no knowledge of the principal's prior actions and did not direct or encourage the principal to take such prior actions, the sureties are not responsible to each other for what has occurred, either to their benefit or to their detriment.

#### **8. Comments by Guest Speakers**

As noted at the beginning, we have two distinguished guest commentators with us today. The first is Ms. Gretchen Eck, she is Senior Surety Counsel at Liberty Mutual Surety in Chicago. She has been with Liberty since 2012. Prior to joining Liberty, Gretchen was with Hinshaw & Culbertson for almost 6 years. She earned her Bachelors of Arts degree from the University of Notre Dame in International Relations and German – Guttentag Fraulien Eck! She earned her law degree from Ave Marie School of Law and her LLM from DePaul University College of Law.

Next, we have Mr. James Hamel, he is Claims Counsel at Zurich American Insurance Company in the Dallas/Fort Worth area. Jim has been with Zurich since 2010. Prior to joining Zurich, he was with Langley, Weinstein and Hamel for 3 years. He earned his Bachelors of Arts degree from the University of Texas at Dallas and his law degree from the Southern Methodist University.

**[To hear the remarks and comments of Gretchen and Jim follow the link:  
<https://suretytoday.podbean.com/e/resolving-issues-between-multiple-sureties-with-the-same-principal-in-default-%e2%80%93-revisiting-the-guiding-claim-procedures/>]**