# SURETY TODAY PRESENTATION

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## INDEMNITY AGREEMENTS – USEFUL PROVISIONS AND POTENTIAL PITFALLS FOR CLAIMS HANDLERS

## I. INTRODUCTION (Stover)

Indemnity Agreements are a staple of the surety industry and such agreements have been routinely upheld and enforced by courts all across the country. While common place in the industry, the form of such Agreements can vary significantly from company to company and from time period to time period within a company. Often you will see older Indemnity Agreements that are not as robust as more recent agreements. Further, there are variations in Indemnity Agreements between Commercial Surety and Contract Surety. This is to be somewhat expected of course, because Commercial Surety does not typically involve contract balances and project completion obligations, etc. Still, many of the Commercial Surety Indemnity Agreements are – pitiful and frankly are an embarrassment to the term "Indemnity Agreement." Some are just a few paragraphs in the application for the bond. It is always disheartening to get that mini-Indemnity Agreement and know that so many really great rights for the surety and obligations of the indemnitors are not going to be applicable. Notwithstanding, Indemnity Agreements are an extremely important tool for the claims handler in addressing claims and in dealing with principals and indemnitors.

I commend to everyone the ABA/FSLC 2008 book "The Surety's Indemnity Agreement Law and Practice, 2nd Ed.," of which our very own George Bachrach was one of the editors along with Tracey Haley and Marilyn Klinger. It is a very comprehensive and thorough examination of virtually all of the issues relating to Indemnity Agreements. Today Rich will start us off with a discussion about some cases where certain terms of the Indemnity Agreement were actually used against the Surety! Next, I will talk about some of the useful provisions of the Indemnity Agreement and Justin will finish with an examination of some other aspects of caution regarding Indemnity Agreements.

## II. DISCUSSION

### A. JUDGMENTS BY DEFAULT AGAINST A SURETY'S PRINCIPAL AND THE ROLE OF THE INDEMNITY AGREEMENT (Pledger)

My focus is to discuss some provisions in an indemnity agreement which may actually be used ***against*** the surety. In cases decided since the turn of the millennium, a few of those provisions include (1) the power of attorney, (2) the right to settle and (3) the assignment clauses.

The argument is that these provisions confer upon the surety both the right and opportunity to defend its principal.

## 1. Introduction

As a general proposition, the liability of a surety is governed by the language of the bond it issues, the obligation it secures, and any statutes or regulations which may apply. In cases in which the surety agrees to be bound by a judgment against its principal, the entry of such a judgment is a condition precedent and is usually binding on a surety. No argument there.

However, in those instances in which the surety has secured the performance of some obligation but has ***not*** agreed, as part of the condition of the bond, to be bound by a judgment against its principal, the result is less predictable.

## 2. The Traditional Approach.

Under the traditional approach, the primary focus to determine the binding effect of a judgment against the principal was on the ***merits*** of the controversy, and whether the surety had notice and an opportunity to defend. However, some more recent cases focus on the binding effect of a judgment by ***default*** against the principal, particularly in those cases in which the surety appears in the proceeding, but its principal fails to respond.

With the turn of the millennium, a dramatic shift occurred under Alabama law with the decision in *Drill South, Inc. v. Internat'l Fid. Ins. Co.*, 234 F.3d 1232 (11th Cir. 2001). The problem was compounded by the Supreme Court of Virginia which followed *Drill South's* lead in *American Safety Cas. Ins. Co. v. C.G. Mitchell Const., Inc.*, 601 S.E.2d 633 (Va. 2004). Both cases are almost identical factually.

In both *Drill South* and *American Safety,* the claimants filed suit against the principal and the payment bond surety. In *Drill South*, the principal failed to file any responsive pleadings whatsoever, but the surety was actively defending its own interests.

In *American Safety,* the principal and the surety retained separate counsel and both filed responsive pleadings on their own behalf. More than a year after suit was commenced, an order was entered permitting the principal's attorney to withdraw as counsel. Shortly thereafter, the principal's registered agent resigned and its corporate existence was terminated by the State Corporation Commission.

Now, this is where it gets interesting – and troubling.

In *Drill South*, the claimant obtained a judgment by default against the principal, the surety having advised that it took no position on a default judgment against its principal, ***provided*** that the default judgment was not deemed binding on it as surety. Several months later, the court concluded that the surety was bound by the default judgment and awarded summary judgment against it.

On appeal, the surety, relying upon the traditional approach, argued it could not be bound

by a default judgment against its principal because such judgments are not binding upon a surety actively defending in the same action. Although the court expressly acknowledged the "existence of the authority supporting that position," it rejected that authority simply concluding, without elaboration, that it did not find the "reasoning persuasive." The court observed that "[t]he record is replete with instances in which the district court afforded the surety both notice and opportunity to step in and defend the merits of the claims against its principal and the extent of its liability." However, despite the district court's order directing any party wishing to be heard on the request for a judgment by default, the surety "chose not to defend the principal against the default judgment and offered no evidence on principal's liability, and failed to step in and defend the merits of the judgment or damages."

*Drill South* dramatically changed the traditional approach by extending the rule binding a surety with a default judgment when it has both notice and opportunity to defend to include, not only separate actions, but actions in which the surety is already actively defending its own interests.

In *American Safety*, the Supreme Court of Virginia extended the analysis in *Drill South* to bind a surety with a default judgment imposed as a discovery sanction against its principal.

After the principal's counsel withdrew as counsel, its registered agent resigned and its corporate existence was terminated, the claimant then scheduled the principal's corporate deposition. No one appeared. It filed a motion seeking the entry of an order compelling the appearance of a corporate designee for the principal and awarding sanctions. By this time, the principal's officers and directors had resigned. Nonetheless, the trial court entered an order granting the motion to compel and requiring a corporate designee to appear on behalf of the principal. Despite the order, no corporate representative was designated or appeared on behalf of the principal. The court awarded a judgment by default against the principal, notwithstanding the fact that American Safety claimed there were genuine issues of material fact as to the quantum of damages.

The court then awarded summary judgment against American Safety, notwithstanding American Safety's argument that it did not have the ability to make a corporate designee appear on behalf of its principal and otherwise had a right to defend itself against the payment bond claim.

On appeal, American Safety described the primary issue as whether the trial court could use "a default judgment imposed as a discovery sanction against a defunct corporation, without more, to impose" liability upon a surety. The Court, however, noted that American Safety never challenged the fact that it had notice of C.G. Mitchell's claim, and had both the right and opportunity to defend its principal.

***The common thread*** running through both *Drill South* and *American Safety* is the courts' reliance upon the surety's indemnity agreements. Both courts reviewed and concluded that the power of attorney, right to settle and assignment clauses in each agreement conferred upon the sureties both the right and opportunity to defend their principals.

There is a paucity of case law on the use of power of attorney or attorney-in-fact clauses in indemnity agreements. However, most commentators and other authorities agree that the power of attorney clause “facilitates the surety’s exercise of the assignment clause found in the Indemnity Agreement.” *The Surety’s Indemnity Agreement – Law & Practice* (Marilyn Klinger, Gary Judd and George J. Bachrach, ed. 2002) Tort and Insurance Practice Section, American Bar Association, at 213 -15. In *Hutton Cons. Co., Inc. v. County of Rockland,* 52 F.3d 1191 (2nd Cir. 2010) the court held the indemnity agreement unambiguously appointed the surety as the principal’s attorney-in-fact with the power to exercise all rights assigned to the surety under the agreement upon contractor's default on sureties' demand for indemnification.

**3. Some Recent Cases.**

**(a) The Eighth Circuit’s *Iafrate Construction* Decision.**

Some of the practical problems with saddling a surety with the harsh results of *Drill South* and *C.G. Mitchell* were evident in *Angelo Iafrate Const., LLC. v. Potashnick Const., Inc.,* 370 F.3d 715 (8th Cir. 2004), a case in which the court expressly declined to extend *Drill South*.

In that case*,* sufficiently similar to *Drill South* and *C.G. Mitchell*, the obligee filed suit against the principal and its surety under a performance bond. The surety filed an answer on its own behalf and actively defended, but the principal did not. A default was noted by the clerk and the matter went to trial as against the surety who substantially prevailed. The obligee then obtained default judgment the principal.

On appeal, the Eighth Circuit observed that *Drill South* involved a judgment by default “entered without objection by the surety and before the surety fully litigated its own case,” and expressly declined to extend it to a case in which the surety had obtained a favorable ruling before the default judgment was entered against its principal. Although the court distinguished the two cases, *Iafrate Construction* implicitly recognized the conundrum created when a surety is actively defending claims in a case in which its principal has failed to appear and faces the risk of inconsistent results.

**(b) *Harris County Water Control v. Philadelphia Indemn. Ins. Co.*, 2019 WL 5191129 (USDC SD Texas)**

In this case, the obligee filed suit against both the principal and the surety. The surety, Philadelphia Indemnity, was actively defending the claim against the surety. The principal failed to file responsive pleadings so the court granted the obligee’s motion for the entry of default under the Federal Rules. The court then declined to grant the obligee’s motion for *judgment* by default because of the potential for incongruous and inconsistent rulings, and prejudice to the surety. It noted the surety could raise arguments the principal could have raised.

**4. Jurisdictions Likely to Follow *Drill South* and *C.G. Mitchell*.**

New Mexico - *Van Meter v. Mr. Z of Albuquerque, LLC*, 2005 WL 8164244 (USDC DN Mex)(agrees with *Drill South* as long as the notice and opportunity to be heard requirement is met). Observes that:

- Not enough that surety merely was a party to the case; the surety must have had a reasonable opportunity to contest the merits of the case, or to prevent a default judgment from issuing against its principal, before it will be bound by a judgment against the principal (*C.G. Mitchell* – surety had right to ensure principal complied with discovery orders, but failed to do anything to exercise that right)

- Surety bound by default judgment against principal where surety was given numerous opportunities to step in and defend the merits of the claims against its principal (*Drill South*)

- Surety bound by default judgment against principal where it had four years to defend the action and raise relevant issues, but neglected to do so (*Kentucky Ins. Guar. Ass'n v. Dooley Constr., Co.* 732 S.W.2d 887 (Ky App. 1987)

Also observed that:

Where the surety actively litigated the merits, or was not responsible for the principal's actions during the litigation, the surety is not bound by a default judgment issued against the principal

- Texas - *Trinity Universal Ins. Co. v. Briarcrest County Club Corp*, 831 S.W.2d 453 (Tex. App. 1992) (where there was issue of fact as to whether surety had adequate opportunity to litigate merits and prevent default from issuing against principal, summary judgment against surety was not appropriate)

- California - *All Bay Mill & Lumber Co., Inc. v. Surety Co. of the Pacific*, 208 Cal.App.3rd 11 (1989) (where surety litigated merits and won, after principal had defaulted, judgment against principal was not binding on surety).

- Nevada - *Gearhart v. Pierce Enters., Inc.,* 779 P.2d 93 (Nev. 1989) (where surety was not responsible for principal's failure to comply with discovery order, default judgment against principal was not binding on surety)

Kansas - *Davis Contracting, L.P v. B.E.N. Construction, Inc.,* 2007 WL 293915 (USDC D Kan)(arbitration award against principal later ratified by state court enforceable by default against surety since surety had notice of the state court action, tendered its defense to the principal and used the same counsel as the principal)

Georgia - *WFI Georgia, Inc. v. Government Technical Services, LLC,* 2009 WL 10701929 (USDC NDGA)(attorney-in-fact language in the indemnity agreement between Gray, the surety, and the principal is virtually identical to the language in *Drill South* and conferred the right to adjust, settle or compromise any claim, demand suit or judgment upon the payment bond. This language gives Gray the legal right to step in and defend its principal against default judgment at every stage of WFI's proceedings against it. In the current circumstances Gary cannot step in and defend its principal without hiring counsel on its behalf. Thus, Gray has a choice to either obtain counsel on its principal's behalf or allow Gray to default and risk being bound by the default)

Missouri - *Harris v. Mortgage Professionals, Inc.,* 781 F.3d 946 (8th Cir. 2015) law) (appears to follow *Drill South*)

New Mexico - *McAlpine v. Zangara Dodge, Inc.,* 183 P.3d 975 (Ct. App. NM 2008)(an MDV bond case)(appears to follow *C.G. Mitchell*)(GAIC allowed default to be entered without challenge; it argued it had no right to act as principal's attorney-in-fact ad had no opportunity to defend against the default. The court observed that the indemnity agreement provided that "'Surety shall have the right, but is not required to adjust, satisfy, compromise any claim, demand, suite or judgment upon said bond.' We consider this language sufficient to convey to GAIC the right to intercede on behalf of the principal at the default hearing.")

All of these cases highlight the importance – in light of *Drill South* and *American Safety* – of the need for a surety to immediately and actively oppose any motion for the entry of a default judgment against its principal until it has had an opportunity to present its evidence in defense of the claims.

**B. USING THE INDEMNITY AGREEMENT IN HANDLING CLAIMS (Stover)**

In the May 2020 episode of Surety Today, I discussed a lot of financial and economic data that pointed to a potentially rough economy in the coming months. Of course, a rough economy typically translates into increased claims activity for sureties. I subsequently published that economic data in an article and I included the following recommendations for sureties to start considering now:

(1) Sureties should consider requesting collateral. Now might not be the best time to demand cash collateral, but letters of credit or liens on real estate or other non-cash collateral might be helpful. If you are currently holding collateral, you might want to evaluate whether it is sufficient.
(2) Sureties should consider placing projects on funds control or requiring implementation of joint checks to help ensure that project funds get to the right places. Hard economic times can lead to more robbing Peter to pay Paul scenarios.
(3) Sureties should consider getting updated financial information from principals or conducting a books and records review to try to determine the financial health of the principal and its ability to weather the future economy.

(4) Sureties should consider sending out job status update requests to obligees to try to determine if there are any problem projects.
(5) Sureties should expect an increase in bankruptcy filings as companies try to use the bankruptcy process to stay afloat.
(6) Sureties should file their Indemnity Agreements as UCC-1 financing statements.
(7) Sureties should consider using the trust fund provision in the Indemnity Agreement to require that bonded project funds be segregated and placed in separate accounts so that those funds are not comingled with the principal's general funds in the event of a bankruptcy or bank sweep.
(8) Sureties should remember that in many jurisdictions the courts may still be closed, have limited access or be backlogged from the prior closures and may not be able to provide timely assistance or injunctive relief. Accordingly, Sureties should be thinking in terms of "self-help" and using the rights under the Indemnity Agreement or UCC where applicable.

As you can see, many of my recommendations have their genesis in typical provisions of Indemnity Agreements. My message to the surety industry is this - Now is the time to be proactive, review those Indemnity Agreements and see what rights can be enforced now to protect the surety. Think of your Indemnity Agreement as a shield against the impact of the pandemic. So, let's explore some of those useful Indemnity Agreement provisions.

**1. <u>Trust Fund Provision</u>**

As I noted, the economic data suggests that sureties may see an uptick in bankruptcy filings by principals. One of the key provisions in the Indemnity Agreement that can help sureties is the Trust Fund provision. Most Indemnity Agreements have a provision that states that all funds from bonded projects are held in trust by the principal for the benefit of the surety and the subcontractors and suppliers that performed work on the project. Generally speaking, the creation of a trust alters title and ownership of the trust property. Instead of the principal having total and complete ownership over the bonded contract funds, upon creation of a trust, the principal becomes the trustee with only bare legal title, and the beneficiaries of the trust - the sureties, the subs, the suppliers, become the "equitable owners" of the trust funds. When a bankruptcy case is filed, pursuant to Section 541 of the Bankruptcy Code, a bankruptcy estate is created and by operation of law, all of the debtor's property, wherever located and by whomever held, automatically becomes "property of the estate." However, Section 541(d) of the Code provides that property in which the debtor does not have equitable title, such as funds held in trust, are not property of the estate.

Accordingly, most bankruptcy courts hold that trust fund provisions in an Indemnity Agreement are valid and that the bonded contract funds, as trust property, are not property of the bankruptcy estate. So, those trust fund provisions can be used by the surety to argue: (1) that trust funds that are being held in the estate should be released, (2) that the automatic stay, which applies when a bankruptcy is filed, does not apply to the trust funds and (3) that use of trust funds cannot give rise to a preference claim. Thus, the existence of trust provisions can be very beneficial to sureties in the bankruptcy context.

Whether a valid trust exists will be evaluated as of the date of the filing of the bankruptcy case, and the party asserting the existence of a trust will bear the burden of establishing its existence. Further, the bankruptcy court will look to state law to determine if the trust fund provision creates a valid express trust under the law of the applicable jurisdiction. In the hand full of cases where Indemnity Agreement trusts have been denied, the issues usually relate to the language of the trust fund provision being insufficient under local law to created a valid trust.

### 2. UCC Security Interests

One of the primary proactive actions a surety can take now to protect itself is to use its rights under the security agreement provision of the Indemnity Agreement to perfect a secured party status under the UCC. By perfecting a security interest as a secured creditor the surety may be able to protect some of its interests in the event that there are any gaps or timing issues with respect to the surety's equitable subrogation rights or the Indemnity Agreement or in the event of a bankruptcy. In addition, courts generally have a better understanding and greater experience with the UCC security interests as opposed to a surety's equitable rights and the surety may find a more understanding and sympathetic court as a secured party under the UCC. Keep in mind that secured rights under the UCC and equitable subrogation rights are not mutually exclusive. This is so because the UCC does not apply to equitable subrogation.

As discussed earlier, sureties may need to revert to "self-help" provisions. Under the UCC a secured creditor has a number of statutorily authorized self-help rights including the right to demand from the Principal or others holding secured collateral to make payment, release the collateral or otherwise render performance to or for the benefit of the surety. Use of self-help rights and others under the UCC must be exercised with commercial reasonableness and in accordance with the specific terms of the UCC. Properly exercised, the UCC rights can supplement the other rights in the Indemnity Agreement and give the surety a greater reach to protect its interests.

### 3. The Surety's Power of Attorney or Attorney In Fact Provision

Other "self-help" remedies typically exist in many Indemnity Agreements and one of those common provisions is the "power of attorney" or "attorney in fact" provision when used in conjunction with other rights in the Agreement. Rich discussed the circumstance where a court used these rights against the surety, but under these provisions if there is a default, the surety is granted the power to undertake actions on behalf of and in the name of the Principal and Indemnitors. Such rights include the power to exercise all rights assigned to the surety including the rights to: all machinery, equipment, materials, tools on bonded projects, to all sums due or to become due on all bonded and unbonded contracts, all subcontracts on bonded projects, to make, execute and deliver any and all instruments, documents or papers, including endorsement of checks. Sureties have used the power of attorney provision to settle claims, including a principal's affirmative claims, execute Indemnity Deeds of Trust, letters of direction, joint check agreements, deductive change orders, etc.

### 4. <u>Finally, another very useful tool for the surety is The Surety's Demand for Collateral</u>

In many cases, the Indemnity Agreement will contain a provision that allows the surety to make demand upon the principal and indemnitors to provide collateral to the surety to secure the surety against potential liability for claims, losses or damages as a result of having issued bonds for the principal. Collateral is frequently required as a condition of issuance of commercial bonds and additional collateral may be required as the commercial relationship continues if additional risk is assumed. Obtaining collateral is a key protection against losses and something that sureties in this economic climate need to seriously consider requesting.

Even if the Indemnity Agreement does not have an express collateral demand provision, sureties can still consider invoking the common law rights of *quia timet* and *exoneration* to obtain collateral from indemnitors. Moreover, in the commercial surety context, the surety has the power of commercial leverage. If the principal and indemnitors want the bond or they don't want the surety to cancel the bond, the surety has some leverage to demand the collateral. On the contract side of the house the surety cannot generally cancel the payment and performance bonds once they have been issued. However, in some instances, the Indemnity Agreement may have a provision that requires the Indemnitors to get the surety's bond released and discharged so that the surety has no further obligations under the bonds. This provision could be invoked if the Indemnity Agreement does not allow for the demand of collateral and would have the same effect, at least with respect to prospective losses.

While collateral demand provisions are routinely upheld and enforced, there are some common themes that come up in the cases where the courts have balked at enforcing collateral demands. First, avoid delay in seeking to enforce the collateral demand provision. One court cited the old equity maxim that equity aids the vigilant and not the party who slumbers on its rights; so, no slumbering. Second, you may not be able to rely on the language in your Indemnity Agreement. Sometimes, the Agreement will state that if the surety has to move to enforce the collateral demand, the surety is entitled to injunctive relief or it may provide that the indemnitors agree that there is irreparable harm. In one court's recent decision regarding such language, the court said that it was not bound by such terms in the agreement as it was the province of the court to decide whether irreparable harm existed. Third, follow the terms of the collateral demand provision. If a reserve is required to be posted, it must be posted. If written notice is required and must be sent by certified mail, you must follow those requirements. If the indemnitors are entitled to a stated period of time to comply, they must be given that period of time before moving to the next step.

## C. CAUTION IN THE INDEMNITY AGREEMENT (Thatch)

So, we have been looking at the Indemnity Agreement and some provisions and some results to look out for. It is important for us to remember as surety practitioners that even if we believe language in an Indemnity Agreement is crystal clear or well within our understanding, that a judge may not always see it that way. To illustrate this, I wanted to briefly discuss a couple of cases in which courts have reached interesting conclusions when looking at the provisions of an Indemnity Agreement.

1. **Good Faith** – "*shall be entitled to reimbursement for any disbursements made by it in good faith, under the belief that it was liable, or that such disbursement was necessary or prudent*." In *Atl. Contracting & Material Co. v. Ulico Cas. Co.*, 380 Md. 285, 302, 844 A.2d 460, 470 (2004), the surety received a claim from a subcontractor for work allegedly done on the project. The principal contested that the amount was due. The surety paid the roughly $21K claim, but the principal refused to indemnify the surety. The principal claimed that the claimants work was not for the project, but equipment the principal was using at the project site. The Court of Special Appeals upheld the payment under the good faith provision of the Indemnity Agreement because it was made "without fraud." The Court of Appeals overturned the lower court and held that the courts should look to a "reasonableness" standard for the surety's conduct in investigating and paying a claim. The Court cited to other jurisdictions like New York, Kansas, Kentucky and the U.S. Court of Appeals for the 10th Circuit and stated, "We conclude rather that a standard of reasonableness also should be implied in the good faith analysis of a surety's actions in determining whether it may recover against the principal." The *Ulico* Court held "[w]e hold that the good faith standard allows the surety a discretion limited by the bounds of reasonableness." If a surety unreasonably pays for an obligee's work that is not covered under a payment bond, then the *surety should not be entitled to indemnification from the principal, without further ado, under the good faith provision in the indemnity agreement.*

In *Ulico* Court created a 4-factor test:

- (1) the obligations of the surety as provided by the terms and coverage of the bond;
- (2) whether the principal has made more than generalized demands that the surety deny the claim;
- (3) the cooperation, or lack thereof, by the principal, in dealing with the surety;
- (4) the thoroughness of the investigation performed by the surety

**2. Right to Settle** – Many Indemnity Agreements give the surety a right to settle claim. However, in *Bond Safeguard Ins. Co. v. Ward*, 484 F. App'x 400, 403–04 (11th Cir. 2012), the right to settle provision was modified. The provision provided: "The Company, ***after consultation with the Principal,*** shall have the exclusive right to determine for itself and the Indemnitors whether any claim or suit brought against the Company or the Principal upon any such bond shall be settled or defended and its decision shall be binding and conclusive upon the Indemnitors." The Court found that the language "after consultation with Principal" created as condition precedent to the surety's right to be indemnified. In *Bond Safeguard*, surety met with the principal to discuss defaults on two projects. But, the Court found that this was not enough to constitute a "consultation." Essentially, with this language inserted, the surety needed to get the principal's input on potential settlement before agreeing to any settlement.

**3. Waiver of Indemnity** – In *Reliance Ins. Co. v. Jack's Constr. Co.*, 360 So. 2d 292, 294 (Ala. 1978), the Court addressed a waiver of indemnity issue. In *Reliance,* the Indemnity Agreement provided that "the Agreement of Indemnity is continuing and will apply to all 'Such Bonds' which the Company may have executed or procured the execution of from time to time, and over an indefinite period of years; however, any Indemnitor may by written notice

by registered or certified mail to the Bonding Department of the Company at its Head Office, 401 Walnut Street, Philadelphia, Pennsylvania, disavow his liability as to any bond or bonds which may be executed by the Company subsequent to fifteen days after receipt by the Company of such notice." The facts of the case reveal that the surety's branch bond manager met with the indemnitors with the local agent and had a general discussion about releasing the indemnitors. The bond manager said he "saw no reason" for them to continue as indemnitors after looking at the financial statement. At time of the meeting, no bonds were in default. After the meeting a default occurred. Despite the bond provision requiring written notice to the surety, the oral release by the bond manager was deemed sufficient to discharge the personal indemnitors by the Court.

**4.** **Assignment/Right to Intervene** – In *Guarantee Co. of N. Am., USA v. Ikhana*, LLC, 941 F.3d 1140, 1148–49 (Fed. Cir. 2019), the Court held that the surety could not use the assignment clause in the Indemnity Agreement to assert a right to intervene in a case pending before the Armed Services Board of Contract Appeals (ASBCA). In *Ikhana,* the principal was terminated and it appealed the termination to Armed Services Board of Contract Appeals. Subsequently, the surety reached a settlement with U.S. Army Corps of Engineers (the "Corps"). The surety then sued Ikhana for declaratory judgment in the United States District Court for the Eastern District of Virginia. The surety sought a declaration that the indemnity agreement authorized it to "settle [Ikhana's] dispute with the [Corps] and dismiss the [ASBCA] appeal." The district court stayed the surety's action pending resolution of Ikhana's ASBCA appeal.

The surety filed a motion to intervene in the ASBCA case asserting the assignment clause in the Indemnity Agreement as justification of its right. The Board denied the surety's motion to intervene and said that the Board had no jurisdiction to hear from the surety for events that occurred prior to any takeover/settlement under the Contract Disputes Act. Thus, there are limits to the rights the surety can exert arising from its Indemnity Agreement.