SURETY TODAY PRESENTATION

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THE SURETY AND UNIONS

I. INTRODUCTION

In this presentation we will explore the Surety and Unions. In many circumstances the surety will provide bonds for a principal that employees various union members and is a party to a Collective Bargaining Agreement ("CBA"), or the principal may not be a "union shop," but has signed a Project Labor Agreement ("PLA"), so that it can participate on a project that has been designated as a union project. In these circumstances, the surety may find itself faced with claims from unions for dues, wages, or from union benefit funds for contributions owed for retirement funds, vacation funds, PAC funds, education funds, etc. Sometimes the surety will issue a bond to the union directly just to secure the union and its benefit funds for a principal. So, today we will spend some time talking about unions and the various benefit funds, the law with respect for union claims, some potential defenses and some practical tips for addressing union claims.

II. FRINGE BENEFIT BONDS

The fringe benefit bond is issued specifically and expressly to protect the union trusts and benefit funds like pensions, health and welfare, education, political action committee fund, apprenticeship programs, etc. These bonds are sometimes referred to as "Union Bonds," "Health and Welfare Bonds," "Wage and Welfare Bonds" or "Collective Bargaining Bonds." Under these bonds the union and its various benefit funds are the obligees and the bonded principal is the employer who is obligated under a CBA to make various contributions to the union and such funds. The surety is secondarily liable under such bonds, with liability typically arising when the principal is and is declared to be in default under the terms of the CBA. Fringe benefit bonds can have a specific termination period or may be continuous with termination tied to the CBA. With a continuous bond, as long as the principal is a party to the CBA and the CBA is in force, the fringe benefit bond will remain in place. Some fringe benefit bonds may have a cancellation provision which the surety can avail itself of if it no longer wishes to bond the principal. However, cancellation is not typically effective as to liability that has already accrued while the bond was in place.

A friend of mine who is a claims handler that handles a lot of fringe benefit bond claims gave some good advice recently, she said that in her experience you have to RTFB - Read The Friendly Bond. She stated that there is very little uniformity in these types of bonds and while each may have some similar provisions, each also may have unique provisions that might not be favorable to the surety. For example, she described a situation where a fringe benefit bond had a $10,000 penal sum limit, but upon closer examination, the penal limit was for each covered employee! So that bond form gave potentially large exposure depending on how many covered employees the principal employed; and her underwriting department simply missed it. Needless to say, she promptly arranged to cancel the bond before incurring further exposure liability.

Fringe benefit bonds differ from payment bonds in that a payment bond is issued for one project and is project specific and it remains in place for that project essentially until limitations have run. A fringe benefit bond covers all of the principal's employees that are subject to the CBA, regardless of what project they are working on, for a designated period of time. Payment bonds also are generally limited as to the scope of damages, while fringe benefit bonds typically allow recovery of damages set forth in the CBA, which can include attorney's fees, liquidated damages, interest, etc.

Union fringe benefit trust funds typically operate by requiring the principal to provide monthly reports detailing the hours worked by each covered union employee and then to remit payment of the fringe benefit deductions to the trust funds monthly. Periodically, sometimes quarterly, the trusts will audit the principal to verify the self-reporting and payments required. A fringe benefit bond for a Maryland union benefits fund provides that if the required payments are not made when due and/or the required reports are not timely filed, then the full penal sum of the bond ($10,000 in this case) was to be paid to the funds upon certification by the union. If the principal subsequently paid the amounts owed or provided the reports the union would refund the remaining amount less liquidated damages, attorneys' fees, accountant fees and all other costs and expenses of the union. This bond is essentially a forfeiture bond, particularly if the principal has gone out of business and won't be paying the amounts owed or filing the reports. The question remains under this bond form whether a court would allow a surety to seek a refund if it could establish the proper lesser amounts owed.

While the scope of exposure under a fringe benefit bond may be somewhat broader, the exposure is generally ameliorated by typically smaller penal sum limits, which are generally in the low tens of thousands. In one CBA I reviewed the penal sum of the fringe benefit bond was determined by the number of employees – 1-4 employees $5,000, 5-8 employees $10,000 and 9 or more $25,000. As with a payment bond, the surety may avail itself of any defenses that the principal would be able to assert with respect to claims against the fringe benefit bond. Although, the principal's defenses may be limited by ERISA and the terms of the CBA.

III. PAYMENT BONDS

The typical payment bond provides that the surety and principal bind themselves to pay sums that are justly due for labor, materials, and equipment furnished for use in the performance of the construction contract. EJCDC C-615 (2013). In further defining "labor, materials, and equipment" the EJCDC bond provides that it includes all items for which a mechanics lien could be asserted, which may broaden the scope of coverage of the bond depending on the local mechanics' lien statute. A West Virginia state Little Miller Act bond form provides that "[t]he condition of this obligation is such that if Contractor shall, well and truly perform the contract, and shall pay off, satisfy and discharge all claims of subcontractors, labors, materialmen and all persons furnishing materials or doing work pursuant to the Contract, . . . then this obligation shall be null and void." In some jurisdictions, the Little Miller Act or other statutory requirement may specifically require payment of union dues and fringe benefits under the payment bond. Under New York's Little Miller Act the phrase "moneys due to persons furnishing labor to the contractor or his subcontractors" as used in the statute is defined to include:

> all sums payable to or on behalf of persons furnishing labor to the contractor or his subcontractors, for wages, health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay, life insurance or other benefits, payment of which is required pursuant to the labor law or by the contract in connection with which the bond is furnished or by a collective bargaining agreement between organized labor and the contractor or subcontractor, and which are computed upon labor performed in the prosecution of the contract. A trustee or other person authorized to collect such payments shall have the right to sue on the payment bond in his own name and subject to the same conditions as if he were the person performing the labor upon which such sums are computed.

N.Y. State Fin. Law § 137(5)(b) (McKinney).

Because of the requirement that a payment bond surety satisfy claims from laborers for wages, the majority of the courts have held that the surety is generally obligated to pay claims for union fringe benefits and that the authorized representative, usually a trustee, of the fringe benefit funds, is entitled to assert such claims on behalf of the union employees. *See U.S. for Benefit and on Behalf of Sherman v. Carter*, 353 U.S. 210, 77 S. Ct. 793, 1 L. Ed. 2d 776 (1957) (holding that fringe fund trustees stood in the shoes of employees and thus were entitled to recover the sums withheld from their wages as union benefits); *Forsberg v. Bovis Lend Lease, Inc.*, 2008 UT App 146, 184 P.3d 610 (Utah Ct. App. 2008) (allowing recovery under a payment bond for unpaid fringe benefits owed to union-related trusts as constituting payment for "labor" under the applicable payment bond statute); *Hartford Fire Ins. Co. v. Trustees of Const. Industry*, 125 Nev. 149, 208 P.3d 884 (2009) (allowing recovery of unpaid fringe benefits because the trust "stood in the shoes" of the workers); *Fidelity and Deposit Co. of Maryland v. Sheet Metal Workers' Intern. Ass'n Local Union No. 20*, 7 N.E.3d 1024 (Ind. Ct. App. 2014) (surety liable for unpaid union fringe benefits owed to employees of a second-tier subcontractor); *United States f/u/b/o/ Vealey v. Suffolk Construction Co.*, 1998 WL 241628 (S.D.N.Y. 1998) (union benefit fund was a proper party to sue on a payment bond to recover benefits owing to the subcontractor's union laborers); *Operating Engineers Health and Welfare Trust Fund v. United States*, 135 F.3d 671 (9th Cir. 1998) (union was a proper claimant against the payment bond for unpaid benefits); *Alibrandi Bldg. Systems, Inc. v. Wm. C. Pahl Const. Co., Inc.*, 187 A.D.2d 957, 590 N.Y.S.2d 370 (4th Dep't 1992) (union had a claim under the State Finance Law for union dues plus interest against a payment bond); *Trustees, Florida West Coast Trowel Trades Pension Fund v. Quality Concrete Co., Inc.*, 385 So. 2d 1163 (Fla. 2d DCA 1980); *Indiana Carpenters Cent. and Western Indiana Pension Fund v. Seaboard Sur. Co.*, 601 N.E.2d 352 (Ind. Ct. App. 1992); *Dobbs v. Knudson, Inc.*, 292 N.W.2d 692 (Iowa 1980); 3 BRUNER & O'CONNOR CONSTRUCTION LAW § 8:165 Payment bonds—Class of covered items—Labor; 11A

COUCH ON INS. § 165:20 Laborers; employees—Employee pension, benefit, and similar fund trustees.

Courts holding the surety liable under a payment bond for payment of fringe benefits view the concept of “wages” for a laborer broadly; including direct wages and indirect wages. Under a broad view, fringe benefits are seen as being part of the bargained for “complete compensation” for work performed by a laborer. These courts point to the fact that in the CBA or PLA, the principal has agreed that in exchange for work performed by a union employee the various amounts for the wages and funds will be paid.

In *United States, ex rel. Sherman v. Carter, supra.,* the bonded principal, a general contractor, agreed in the CBA to pay 7 ½ cents per hour of labor to the union health and welfare fund for its union laborers. The principal failed to pay the contribution and the trustee of the fund sued the surety. The surety argued that the contributions to the health and welfare fund were different than wages. The surety contended that the laborers were paid their wages due in their paychecks and that the fund contribution was paid directly to the fund and not the laborer and thus such contributions were not wages.

The United States Supreme Court rejected this argument, holding that wages for purposes of the Miller Act was not limited to just the pay check. The Court observed that the unpaid contributions were part of the consideration the principal agreed to pay for the services of the laborers. Thus, the employees were not paid in full for their work until the fund contributions were paid.

Addressing the right of a trustee of the fund to sue on the bond, the Court noted that the trustees are claiming recovery for the sole benefit of the beneficiaries of the fund, and those beneficiaries are the very ones who have performed the labor. The contributions are the means by which the fund is maintained for the benefit of the employees and of other construction workers. The Court stated "[f]or purposes of the Miller Act, these contributions are in substance as much 'justly due' to the employees who have earned them as are the wages payable directly to them in cash."

In *Pipeline Industry Benefit Fund v. Aetna Casualty & Surety Co*., 503 P.2d 1286 (Okla. 1972), the principal was required under the CBA to pay wages as well as fifty-five cents an hour to the health and welfare fund established for the union laborers. The applicable Oklahoma statute at the time defined "wages" "all remuneration for services from whatever source, including commissions and bonuses and the cash value of all remuneration in any medium other than cash. Gratuities customarily received by an individual in the course of his work from persons other than his employing unit shall be treated as wages received from his employing unit." 40 O.S.1961, s 229(l). Under this definition, the Court held that the surety was liable for the unpaid health and welfare payments which are considered wages and part of the labor costs. The Court stated "[s]imply because some of the workman's pay goes into a fund for his sickness and old-age security instead of in a paycheck does not alter the fact that the fringe benefits are a result of his own efforts the same as the money he puts in his pocket."

Similarly, in *Trustees, Florida West Coast Trowel Trades Pension Fund v. Quality Concrete Co.*, 385 So.2d 1163 (1980), the principal was contractually obligated to pay union benefits in the CBA, but failed to do so. Looking to case law from the Miller Act for guidance, the Florida Court of Appeals ruled that if such funds could not be recovered against a payment bond, large portions of the laborers' compensation would be unprotected. Because the purpose of the Florida Little Miller Act is to protect laborers, the Court held that the surety is liable for the union benefit payments under the payment bond.

While the majority of courts have held the surety liable under the payment bond for fringe benefits, some courts have held that a surety is not liable under its payment bond for such benefit claims. In *Operating Engineers Local 324 Health Care Plan v. Sentry Ins.*, 654 F. Supp. 191 (E.D. Mich. 1985), the trustees of fringe benefit trust funds asserted a claim against a payment bond. The surety argued that the Michigan Little Miller Act should be strictly construed and that under such construction the trustees do not have standing because they are not "claimants," as defined by the statute, and cannot obtain the relief sought because fringe benefits are not included within the provisions of the statute. The Court agreed that the Little Miller Act was required to be strictly construed and that the trustees of the employee benefit funds were not claimants within the meaning of the statute and did not have standing to bring suit against the surety. The Court noted that the statute "did not say that a claimant *or its representatives or its assignees* may sue and simply identifies a claimant as one who furnishes labor or material." Similarly, the Court concluded that the Michigan Legislature, through silence, has clearly manifested its legislative intent to exclude fringe benefits from wages. Thus, the Court concluded that the term wages, as set forth in the statute, is limited to the literal definition of that word. The Court noted that there was nothing within any case law or legislative history which would suggest that "wages" was meant to be construed so broadly as to include fringe benefits. The Court stated, "[i]t is presumed that, if the Legislature had intended to include 'fringe benefits' within [the statute], it could have said so. It is obvious that the Legislature did not."

The Court in *Trustees Of Sheet Metal Workers' Local Union No. 17 v. U.S. Fire Ins. Co.*, 73 Mass. App. Ct. 1117, 899 N.E.2d 919 (2009), held that the provisions of the payment bond extend bond coverage only to those providers of labor and/or material who qualify as defined claimants. The bond expressly defined a "claimant" as "one having a direct contract with the principal for labor, material, or both ...” and permits only “Claimant[s] as herein defined” to sue on the bond. Based on the language of the bond, the Court held that the trustees had no rights under the bond or under controlling case law to sue on the bond.

IV. UNIONS AND FRINGE BENEFIT FUNDS ARE SUBJECT TO THE SAME DEFENSES AS ANY CLAIMANT

A. <u>The Union/Fringe Benefit Claimant Must Fall Within the Statutory Protection</u>

In *J. W. Bateson Co., Inc. v. U.S. ex rel. Bd. of Trustees of Nat. Automatic Sprinkler Industry Pension Fund*, 434 U.S. 586, 98 S. Ct. 873, 55 L. Ed. 2d 50 (1978), the general contractor entered into a contract with the United States for construction of an addition to a hospital and pursuant to the Miller Act provided a payment bond. A sub-subcontractor, the sprinkler installer, had entered into a CBA with the Sprinkler Fitters Union and was obligated under the agreement to pay over amounts withheld from employees' wages for union dues and vacation savings, and to contribute to the union's welfare, pension, and educational trust funds. When the sub-sub failed to make the payments the union and trustees of the funds filed suit against the general contractor and its surety.

Under the Miller Act, the claimant must have a direct contract with the general contractor or a subcontractor. Accordingly, the Supreme Court held that employees of a sub-subcontractor were not entitled to recover under the prime contractor's Miller Act payment bond for failure of the sub-subcontractor to turn over fringe benefit funds and union dues which had been withheld from the union employees, since such employees did not have a contractual relationship with prime contractor or a subcontractor.

B. <u>The Union/Fringe Benefit Claimant Must Comply With Notice Requirements</u>

In *Trustees of Heating, Piping & Refrigeration Pension Fund v. Milestone Const. Servs., Inc.*, 991 F. Supp. 2d 713 (D. Md. 2014), the general contractor entered into three contracts with the National Institute of Standards and Technology to perform construction work on three buildings. Pursuant to the Miller Act, the general contractor provided payment and performance bonds. The general contractor then entered into a subcontract with a mechanical contractor to perform pipefitting and related construction work. The subcontractor operated a union shop and had entered into a CBA with the Steamfitters Union in which it agreed to make contributions for each hour worked by a pipefitter. When the subcontractor failed to make the required contributions, the Steamfitters union and its pension fund, medical fund, training fund, promotion fund, communications and productivity fund, and the retirement savings fund filed suit against the surety. The surety contended that it was entitled to summary judgment because the union and its various funds failed to give proper notice under the Miller Act. The Act requires a claimant to give written notice to the contractor within 90 days from the date on which the person did or performed the last of the labor or furnished or supplied the last of the material for which the claim is made. The notice must state with substantial accuracy the amount claimed. The Court noted that the Miller Act requires proper and timely notice as a condition precedent of the right to maintain suit on a payment bond and while the Miller Act as a whole is to be liberally construed, the notice requirements are designed to protect the general contractor and the requirements concerning the notice are to be strictly applied. In this case, the notice provided by the union and its funds failed to state any amount owed in violation of the requirement of the Miller Act. Accordingly, the Court granted summary judgment in favor of the surety because the notice served by the union and funds failed to state the amount claimed with substantial accuracy.

C. Union/Fringe Benefit Claimants Must Comply with Limitations

In *Minnesota Laborers Health and Welfare Fund v. Granite RE, Inc.*, 826 N.W.2d 210 (Minn. Ct. App. 2012), the plaintiffs were union fringe benefit funds that collected funds on behalf of union employees from employers bound by various collective bargaining agreements. The principal under the bond was bound by such a collective bargaining agreement and allegedly failed to pay fringe benefit obligations for work performed by employees on the bonded project. The trial court dismissed the case filed by the funds because the suit was barred by a one year limitation provision in the bond.

On appeal, the Minnesota Court of Appeals held that, the surety can be bound by the principal's alleged fraudulent concealment of a cause of action, but that genuine issues of material fact remained about whether the plaintiffs acted with reasonable diligence to discover the fraudulent concealment. The court reversed judgment for the surety and remanded the case for further proceedings.

D. ERISA Preemption

Employee Retirement Income Security Act ("ERISA") is a comprehensive federal statutory scheme governing employee benefit plans, including the fringe benefit plans of unions. *Boggs v. Boggs*, 520 U.S. 833, 841, 117 S.Ct. 1754, 138 L.Ed.2d 45 (1997). All employee benefit plans must conform to various reporting, disclosure, and fiduciary requirements and pension plans must also comply with participation, vesting, and funding requirements. ERISA does not require employers to provide any given set of minimum benefits, but instead controls the administration of benefit plans, by imposing reporting and disclosure mandates, participation and vesting requirements, funding standards, and fiduciary responsibilities for plan administrators. *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 650, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995).

"Congress enacted ERISA, 'to promote the interests of employees and their beneficiaries in employee benefit plans' and to 'eliminate the threat of conflicting or inconsistent State and local regulation of employee benefit plans.'" *Operating Eng'rs Health & Welfare Trust Fund v. JWJ Contracting Co.*, 135 F.3d 671, 676 (9th Cir. 1998) (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983)). To that end, Congress included an express preemption provision providing that "ERISA 'supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan ....' " *Id.* (quoting ERISA § 514(a), 29 U.S.C. § 1144(a)).

ERISA's preemptive scope is nearly all-encompassing if read literally. The Supreme Court has observed that "[i]f 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course." *Travelers*, 514 U.S. at 655, 115 S.Ct. 1671. Such is a result "no sensible person could have intended." *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 336, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997).

Instead of interpreting "relate to" literally, the Court has incorporated general principles of preemption analysis. First, the Court has applied the presumption that a state law directed at an area of traditional state concern is not preempted. Relying on preemption cases outside the ERISA context, the Court has explained that "where federal law is said to bar state action in fields of traditional state regulation," "the 'assumption [is] that the historic police powers of the States [are] not to be superseded by the Federal Act unless that [i]s the clear and manifest purpose of Congress.' " *Id.* Second, the Supreme Court has incorporated principles of field and conflict preemption. The courts assess whether the state "'law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress,'" or targets a "field of traditional state regulation." *Id.* Whether a state law targets a "field of traditional state regulation," is a quintessential field preemption inquiry, and whether it "stands as an obstacle" to ERISA's "purposes and objectives," speaks to conflict preemption.

Accordingly, under the modern approach a state law is not preempted merely because it has a literal "connection with" an ERISA plan. Instead, the law must actually *govern* a central matter of plan administration or *interfere* with nationally uniform plan administration. Similarly, a state law is no longer preempted simply because it makes literal "reference to" an ERISA plan. Instead, it must both identify ERISA plans and *act* immediately and exclusively *upon* ERISA plans or make the existence of ERISA plans essential to the law's operation. And because, under a field preemption analysis ERISA preemption extends only to the limits of ERISA's regulatory domain, a state law does not impermissibly "act upon" an ERISA plan if it targets an area of traditional state concern, unless it poses an obstacle to ERISA's objectives or invades the federal field.

In light of the preemption analysis, the majority of the courts have held that when a union or its benefit funds are asserting payment bond claims, such claims are not preempted by ERISA. *See Greenblatt v. Delta Plumbing & Heating Corp.*, 68 F.3d 561, 575-576 (2d Cir. 1995), *Giardiello v. Balboa Ins. Co.*, 837 F.2d 1566, 1569 (11th Cir. 1988); *Xaros v. U.S. Fidelity & Guar. Co.*, 820 F.2d 1176, 1180 (11th Cir. 1987); *Carpenters Health & Welfare Trust Fund v. Tri Capital Corp.*, 25 F.3d 849, 855-856 (9th Cir.), *cert. denied*, 130 L.Ed.2d 495, 115 S.Ct. 580 (1994), *overruled on other grounds, Southern California IBEW-NECA Trust Funds v. Standard Industrial Electric Company*, 247 F.3d 920 (2001); *International Union of Operating Engineers*

Local 57, AFL-CIO v. Seaboard Surety Company, 946 F. Supp. 141, 144 (D.R.I. 1996) and *Ragan v. Tri County Excavating, Inc.*, 62 F.3d 501, 512-513 (3d Cir. 1995).

ERISA provides authority for participants or beneficiaries under plans to file civil actions to recover benefits due under plans and to enforce rights under the terms of the plans. ERISA provides:

> Delinquent contributions - Every *employer* who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

The ERISA statute defines "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity." 29 U.S.C. §1002(5). In the past, union funds have asserted that sureties are employers under the statute. However, the majority of courts that have addressed this issue have rejected such argument and held that a surety is not an employer within the meaning of ERISA. *See Giardiello v. Balboa Ins. Co.,* 837 F.2d 1566, 1569 (11th Cir.1988). A surety does not become an employer within the meaning of ERISA "simply by guaranteeing an employer's ERISA obligations." *Greenbalt v. Delta Plumbing & Heating Corp.,* 68 F.3d 561, 575–76 (2d Cir.1995). The courts have recognized that a surety is a separate entity which guarantees payment of certain sums should an employer default on obligations. As such, a surety does not act "in the interests of the employer" as used in the statute defining the term "employer" under ERISA. Rather, a surety acts directly in the interest of the employees damaged by the employer's failure to pay. Moreover, payment bonds are issued for a project pursuant to contractual requirements of the general contractor and/or owner or pursuant to statutory requirements of the Miller Act or Little Miller Acts and are for the protection of the general contractor and owner. Sureties have no involvement in and are not signatories to the CBA or Project Labor Agreement and have no ownership in or relationship with the principal other than as surety. Further, sureties do not assume any obligations other than those set forth in the Payment Bond related to the Project. Sureties do not typically undertake any employer related functions and do not undertake any administrative duties with regard to any alleged ERISA plans. Accordingly, the majority of courts have held that a surety has no exposure under ERISA as an employer.

E. <u>No Surety Liability Under LMRA</u>

The Labor Management Relations Act ("LMRA") is codified at Title 29 of the United States Code §141 *et seq*. LMRA provides that suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce, as defined in the Act, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. The majority of the courts that have analyzed the scope of jurisdiction under LMRA have concluded that claims against non-signatories to the underlying labor agreement are not subject to liability or federal jurisdiction. *See Greenblatt*, 68 F.3d at 572-573; *Xaros*, 820 F.2d at 1180-1181; *Laborers Local 938 Joint Health & Welfare Trust Fund v. B.R. Starnes Company of Florida*, 827 F.2d 1454, 1457 (11th Cir. 1987); *International Union, United Mine Workers of America v. Covenant Coal Corp.*, 977 F.2d 895, 897-898 (4th Cir. 1992); and *United Food and Commercial Workers Union, Local No. 1564 v. Quality Plus Stores, Inc.*, 961 F.2d 904 (10th Cir. 1992). The Fourth Circuit, addressing a union's claim held:

> We find the majority position to be more persuasive. Our analysis begins, as always, with the plain language of the provision. [LMRA] authorizes 'suits for violation of contracts between an employer and a labor organization . . .' [citation omitted] Applying the most natural interpretation of this language, we find that a

> suit against a non-signatory of a contract cannot be considered a suit for violation of the contract. As the court below reasoned, 'It is axiomatic that only a party to a contract can violate that contract. A contract governs only the conduct of the parties who have agreed to its terms.' [citation omitted]

Covenant Coal Corp., 977 F.2d at 897.

In *B. R. Starnes, supra.*, the Eleventh Circuit noted that the "critical feature" of LMRA jurisdiction is that "suit may be brought for violation of a labor contract only against those who are parties to the contract in issue." *Id*. at 1457. After noting that the sureties were not parties to the collective bargaining agreement the Court observed, "[A]ny liability on the part of defendants would be pursuant to state law in an action to recover upon the payment and performance bonds posted . . ." *Id*.

F. <u>Union Wage Claims and Standing</u>

There is a split of authority on the issue of whether a union can make a claim for unpaid wages against a payment bond. Under LMRA a labor union "may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States." In *U.S. ex rel. United Brotherhood of Carpenters Local 2028 v. Woerfel Corp.*, 545 F.2d 1148 (8th Cir. 1976) the carpenters' union sought to collect a retroactive pay increase awarded to its members based on the CBA. The Eighth Circuit held that the union lacked standing to sue on a payment bond under the Miller Act for wages in the absence of an assignment of the individual employee entitled to the wages. The Court concluded that a CBA is not a contract for performance of services, it governs only the general rules of conduct between employer and employee. The right to the payment of money remains with the individual employee because the employee not the union provided the labor and the Miller Act only allows one who has provided labor to sue on the bond. The Court further noted that LMRA does not appoint the union as the general litigation agent of its members, but merely defines unions as having the capacity to sue.

Other courts have addressed the standing issue under the associational standing requirements set forth by the Supreme Court in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 342-343 (1977). Under the *Hunt* test there are three factors an association must satisfy before it can be granted standing to sue on behalf of its members. First, the members must have standing to sue in their own right. Second, the interests sought to be protected must be germane to the associations' purpose. Finally, the claim and relief sought must not require the participation of the individual members in the lawsuit. The Ninth Circuit in *Roofers Local 40 v. Ins. Corp of Am.*, 919 F.2d 1398 (9th Cir. 1990), noted that courts have consistently held that union claims for purely monetary relief for its members involve individualized proof of each member's loss and thus the individual participation of association members is required. As a result, the third requirement of the *Hunt* associational representation test is not satisfied. Courts in other jurisdictions have reached the opposite conclusions. So, depending on the jurisdiction you are in and the nature of the claim being made, standing may provide a defense to the surety.

V. PRACTICAL TIPS

A. Gather the Relevant Documents

As noted earlier, the union fringe benefit funds' claim will be based on the alleged hours worked by the union employee. As the claims handler you must make sure you have all of the relevant documents to evaluate the claim. You will need a copy of the CBA or PLA, the Payment Bond or Fringe Benefit Bond, the principal's internal payroll records, time sheets, certified payroll, daily project reports and any records maintained by the general contractor, architect or owner which might show who was working on the project and what they were doing.

In addition, you will need to get a copy of the funds' audits and the reports submitted by the principal to the funds.

B. Check the Details

In evaluating a union benefits claim you should always check the hourly rates applied by the funds. Make sure they apply the hourly rate for the work the employee was performing on the specific job is accurate. Check the dates the work was performed with the effective dates of the fringe benefit bond and CBA to ensure that the work was covered. With respect to claims against a payment bond make sure that the claim is for work performed on the bonded project.

C. Make Note of Whether You Are Dealing With a Union Principal

When you have a bonded principal going bad be sure to make note of whether they are a union shop or not. If they are a union shop you need to make sure you are looking for the data that you will need to determine the amount of potential exposure to the unions and the fringe benefit funds. Unions and the funds are notorious for taking a long time to make their claims and if you are not expecting it the contract funds may be gone, documents may be gone, witnesses may be gone. You also need to assess the potential exposure as part of the evaluation of what course of action to take with respect to the failing principal.