RECENT DEVELOPMENTS IN FIDELITY AND SURETY LAW

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I. SURETY LAW

A. *Performance Bonds*

1. Conditions Precedent

In *Oldcastle Precast, Inc. v. Concrete Accessories of Georgia, Inc.*,[1] a surety claimed it was discharged from all obligations under its performance bond because the obligee failed to comply with the conditions precedent of written notice and declaration of default.[2] The obligee argued that the conditions precedent did not preclude a claim under paragraph 1 of the performance bond, which provided that the surety was jointly and severally obligated with the principal to perform the bonded contract.[3] The court granted the surety's motion for summary judgment, explaining in part that the conditions precedent, as the more specific provisions, narrowed the scope of the surety's obligations under the performance bond.[4]

1. 2019 WL 403865 (D. Idaho Jan. 31, 2019).
2. *Id.* at *8.
3. *Id.*
4. *Id.*

2. Arbitration

In *Federal Insurance Co. v. Metropolitan Transportation Authority*,[5] an obligee moved to dismiss a surety's claim seeking declaratory judgment that it had no obligation to complete the bonded contract. The obligee and surety disputed whether the surety was bound by the arbitration provision included within the bonded contract, which the surety did not sign.[6] In granting the obligee's motion to dismiss, the court held that the bond incorporated the bonded contract by reference, and that the arbitration clause contained language broad enough to compel the surety to be compelled to arbitrate.[7]

3. Venue

In *Pioneer Mechanical Services, LLC v. HGC Construction, Co.*,[8] the court considered whether a surety was bound by the bonded contract's forum-selection clause. The court granted the obligee's motion to transfer, explaining that the surety was bound by the forum-selection clause because the bond incorporated the bonded contract by reference without limiting which terms were incorporated.[9] The court further explained that the surety's claim for unjust enrichment based on the surety's completion work was subject to the forum-selection clause because it arose out of or related to the bonded contract.[10]

4. Principal's Defenses

In *Waverly City School District Board of Education v. Triad AR, Inc.*,[11] an obligee entered into separate contracts for differing scopes of work with four contractors to build four schools. After the schools were completed and occupied, the schools experienced issues with water intrusion and heaving concrete slabs.[12] The obligee remediated the defects and sued the contractors and their common performance bond surety.[13] As discovery and pretrial proceedings progressed, the obligee settled claims with the architect, a contractor, and the construction manager, among others, in excess of the

5. 2018 WL 5298387 (S.D.N.Y. Oct. 25, 2018).
6. *Id.* at *3.
7. *Id.* at *4–5.
8. 2018 WL 6521529 (W.D. Pa. Dec. 12, 2018).
9. *Id.* at *4.
10. *Id.* at *5.
11. 2018 WL 6257804 (Ohio Ct. App. Nov. 20, 2018), *appeal denied*, 119 N.E. 433 (Ohio 2019).
12. *Id.* at *2.
13. *Id.*

remediation costs.[14] The trial court found that the surety and its remaining principals were no longer liable because the obligee had been made whole.[15] The appellate court reversed, holding that the settlements did not prevent the obligee from recovery on separate and distinct defect claims under separate and distinct contracts.[16] The court further held that the obligee was not required to allocate damages among remaining co-defendants, noting that the remaining parties could be responsible for the full extent of damages if their breaches were a substantial factor contributing to the construction defects.[17]

In *Iowa Great Lakes Sanitary District v. Travelers Casualty & Surety Co. of America*,[18] an obligee demanded that a vendor remove and refund an ultraviolet disinfection system under a two-year equipment warranty because of issues known before substantial completion. The obligee refused the vendor's rehabilitation proposal and brought suit against the surety and vendor.[19] After the district court granted summary judgment dismissing the obligee's claims, the obligee appealed.[20] The obligee argued first, that it could rely upon lay testimony to demonstrate the system was defective, and second, that the surety's liability was not dependent on the obligee's claims against the vendor.[21] The Eighth Circuit affirmed summary judgment, reasoning that expert testimony was required to demonstrate equipment defects.[22] The court further reasoned that the obligee could not maintain a claim against the bond based on defects known prior to substantial completion in the absence of fraud or mistake.[23]

In *Hanover Insurance Co. v. Dunbar Mechanical Contractors, LLC*,[24] an obligee entered into a contract in which a Service-Disabled Veteran-Owned Business ("SDVOB") was required to perform at least 15% of the work on the project. The obligee subsequently entered into a subcontract with the principal, which was not a SDVOB, for performance of nearly 88% of the project.[25] After the principal defaulted, the obligee made a demand on the performance bond.[26] The surety denied the obligee's demand based on illegality and sued for a declaratory judgment that it was not obligated to

14. *Id.*
15. *Id.* at *3.
16. *Id.* at *7–8.
17. *Id.* at *8.
18. 913 F.3d 760 (8th Cir. 2019).
19. *Id.* at 761–62.
20. *Id.* at 761.
21. *Id.* at 763–64.
22. *Id.*
23. *Id.* at 765.
24. 2019 WL 2353046 (E.D. Ark. June 3, 2019), *appeal filed*, June 14, 2019.
25. *Id.* at *1.
26. *Id.*

act under the bond.[27] The court granted the surety summary judgment, reasoning that the bonded contract was illegal and unenforceable, and that any performance thereunder could potentially expose the surety to liability under the False Claims Act.[28]

In *Pipeline Contractors, Inc. v. Keystone Airpark Authority*,[29] the court considered whether a principal and its surety could be estopped from challenging an obligee's capacity to contract, sue, and be sued. The principal and surety waited nearly six years to amend their pleadings and move for summary judgment, asserting that the obligee was not a legal entity because it was not authorized by the state legislature to contract, sue, or be sued.[30] The court affirmed the trial court's ruling, reasoning that the principal and surety were "properly estopped" from challenging the obligee's capacity because they "engaged in years-long litigation" and the principal "accepted payment on the contract."[31]

5. Bad Faith

In *M.E.S., Inc. v. Safeco Insurance Co. of America*,[32] an owner terminated multiple construction contracts after a prime contractor failed to timely cure defects. The surety took over the projects and incurred losses.[33] The prime contractor subsequently sued the surety asserting bad faith and breach of contract, among other claims.[34] The court granted the surety's motion dismissing the prime contractor's bad faith claim. The appellate court affirmed and held that the prime contractor's assertion that the surety acted inappropriately by attending cure meetings was "particularly frivolous" because the owner had required the surety's attendance.[35] The court further rejected the prime contractor's argument that the surety was "motivated to induce [the prime contractor] to fail," noting that the prime contractor's failure to meet its contractual obligations would have triggered the surety's obligations under the bond.[36]

27. *Id.*
28. *Id.* at *2–3.
29. 276 So. 3d 436 (Fla. Dist. Ct. App. 2019).
30. *Id.* at 438.
31. *Id.* at 439.
32. 910 F.3d 705 (2d Cir. 2018).
33. *Id.* at 706–07.
34. *Id.* at 707.
35. *Id.*
36. *Id.*

B. *Payment Bonds*

1. What Is Covered

In *Prime Mechanical Service v. Federal Solutions Group, Inc.*,[37] the court granted a surety's motion to dismiss a subcontractor's Miller Act claim against a payment bond. The surety argued that the subcontractor failed to show that it had furnished "labor" under the Miller Act.[38] The district court agreed, emphasizing that the term "labor" under the Miller Act encompasses "'manual labor'" and generally excludes "'work by a professional, such as an architect or engineer.'"[39] The court continued, explaining that the subcontractor's alleged on-site field meetings, on-site field coordination, on-site field measurements, and product and equipment submittals were "clerical or administrative tasks" which did not "involve the physical toil or manual work necessary to bring them within the scope of the Miller Act."[40]

2. Jurisdiction and Arbitration

In *United States* ex rel. *National Fire Protection, LLC v. Selective Insurance Co.*,[41] the prime contractor and surety moved to compel arbitration under an arbitration provision in a subcontract that granted the prime contractor "sole and absolute discretion" to arbitrate. In response and in a cross-motion for summary judgment, the subcontractor argued that the arbitration provision was void for lack of consideration under Maryland law.[42] The court agreed with the subcontractor and granted summary judgment.[43] The court held that the arbitration provision was void under existing precedent because there was "no mutual exchange of promises to arbitrate."[44]

In *United States* ex rel. *Preferred Masonry Restoration, Inc. v. International Fidelity Insurance Co.*,[45] a subcontractor filed a Miller Act claim against a payment bond surety. More than one year later, the surety moved to allow the prime contractor to intervene and stay the underlying action pending arbitration between the prime contractor and subcontractor. In response, the subcontractor argued that the motion was untimely and that

37. 2018 WL 6199930 (N.D. Cal. Nov. 28, 2018).
38. *Id.* at *2.
39. *Id.* at *3 (quoting United States *ex rel.* Shannon v. Fed. Ins. Co., 251 F. App'x 269, 272 (5th Cir. 2007); United States *ex rel.* Naberhaus-Burke, Inc. v. Butt & Head, Inc., 535 F. Supp. 1155, 1158 (S.D. Ohio 1982)).
40. *Id.* (quoting United States *ex rel.* Constructors, Inc. v. Gulf. Ins. Co., 313 F. Supp. 2d 593, 597 (E.D. Va. 2004)).
41. 2018 WL 6621507 (D. Md. Dec. 17, 2018).
42. *Id.* at *2.
43. *Id.* at *2–3.
44. *Id.* at *2 (citing Noohi v. Toll Bros., 708 F.3d 599 (4th Cir. 2013)).
45. 2019 WL 4126473 (S.D.N.Y. Aug. 30, 2019).

the prime contractor waived its right to arbitration.[46] The court granted the motion, explaining that the underlying delay was mitigated by certain circumstances, including unsuccessful mediation and illness.[47] The court emphasized that there was a "'strong presumption in favor of arbitration'" and that the subcontractor could not demonstrate prejudice by "'delay alone.'"[48]

In *Rock Roofing, LLC v. Travelers Casualty & Surety Co. of America*,[49] the surety moved to compel arbitration under an arbitration provision in a subcontract. The surety argued that the subcontractor's claim against the payment bond was subject to arbitration because the claim arose out of the subcontract.[50] In response, the subcontractor argued that the arbitration provision did not apply because the surety did not sign the subcontract and, in the alternative, the payment bond itself provided a separate basis to file suit.[51] The court granted the motion to compel arbitration, explaining that the surety could compel arbitration through equitable estoppel because the subcontractor "must rely on the terms of the [subcontract] in making a claim against" the surety.[52] The court further held that the arbitration provision "trumped any right to bring suit" under the bond because the subcontractor's claim was derivative of its rights under the subcontract and allowing suit would render the arbitration provision "meaningless."[53]

3. Venue

In *United States* ex rel. *Salt Energy, LLC v. Lexon Insurance Co.*,[54] a subcontractor filed a Miller Act claim against a payment bond surety in connection with work performed on a United States Embassy parking garage in Burkina Faso. The surety moved to dismiss or, in the alternative, to transfer venue because the subcontractor filed suit in the wrong district under the Miller Act's venue provision, which requires an action to be brought in the district "in which the contract was to be performed and executed."[55] In response, the subcontractor argued that venue was proper "wherever substantial performance of the prime or subcontract took place, regardless of where the government project lies."[56] The court granted the surety's

46. *Id.* at *2.
47. *Id.* at *3.
48. *Id.* at *6 (quoting Thyssen, Inc. v. Calypso Shipping Corp., S.A., 310 F.3d 102, 104–05 (2d Cir. 2002); Murray v. UBS Sec., LLC, 2014 WL 285093, at *4 (S.D.N.Y. Jan. 27, 2014)).
49. 2019 WL 4418918 (D.N.M. Sept. 16, 2019).
50. *Id.* at *4.
51. *Id.* at *5.
52. *Id.* at *6.
53. *Id.* at *7.
54. 2019 WL 3842290 (S.D. Fla. Aug. 14, 2019).
55. *Id.* at *3 (quoting 40 U.S.C. § 3133(b)(3)).
56. *Id.*

motion, adopting the "majority view" and explaining that the plain language of the Miller Act's venue provision and relevant legislative history demonstrated that a contract is "performed and executed" at "the final site of the government project."[57] The court continued, however, explaining that it must apply the general venue statute—and not the Miller Act venue provision—because the underlying project occurred abroad.[58] In evaluating the surety's motion under the general venue statute, the court determined that it was "in the interest of justice" to transfer the case because "[a] substantial part of the events giving rise to the claim occurred" in the proposed forum (the Eastern District of Virginia), including negotiation, execution, and administration of the prime contract.[59] The court further determined that the subcontractor's activities in the initial forum, which included "billing, making phone calls, and other coordinating activities" were "essentially ministerial and administrative" and did not "rise to the level of substantial performance."[60]

4. Notice

In *84 Lumber Co. v. Continental Casualty Co.*,[61] a second-tier subcontractor appealed the dismissal of its payment bond claim under the Louisiana Public Works Act ("LPWA") as untimely. The second-tier subcontractor argued that actual notice furnished by email to the prime contractor's attorney satisfied the LPWA, which required service by "registered or certified mail." The Fifth Circuit affirmed summary judgment, reasoning that the LPWA "prescribes a specific, two-prong method by which notice must be given" and must be "strictly construed."[62]

In *United States* ex rel. *A&C Construction & Installation Co. WLL v. Zurich American Insurance Co.*,[63] a second-tier subcontractor brought a claim under the Miller Act against the prime contractor's payment bond sureties. The sureties moved for summary judgment, asserting that the second-tier subcontractor's claim was time-barred because it provided untimely written notice of its claim and failed to timely file suit. The second-tier subcontract argued that its notice was timely because it leased equipment to the subcontractor and supplied its third-tier subcontractor's work at the Project after it provided written notice.[64] The court granted the sureties' motion for summary judgment.[65] The court explained that the second-tier subcontractor

57. *Id.* at *4.
58. *Id.* at *4–5 (citing 28 U.S.C. § 1391(b)).
59. *Id.* at *5.
60. *Id.*
61. 914 F.3d 329 (5th Cir. 2019).
62. *Id.* at 335–36 (citing La. Stat. Ann. § 38:2242).
63. 2019 WL 4034639 (N.D. Ill. Aug. 27, 2019).
64. *Id.* at *3.
65. *Id.*

could not rely on its earlier notice for subsequently provided equipment and labor.[66]

5. Limitations

In *United States* ex rel. *American Civil Construction, LLC v. Hirani Engineering & Land Surveying, P.C.*,[67] the court considered whether a Miller Act claim was timely. After a five-day bench trial, the surety moved for judgment as a matter of law, arguing that the subcontractor failed to present "direct evidence" that compensable work occurred within one year of commencing the action.[68] The court rejected the surety's argument, emphasizing that the subcontractor's circumstantial evidence was sufficient.[69] The court further explained that the work was "compensable" under the subcontract because "common sense" required it to occur.[70]

In *United States* ex rel. *Wells Cargo, Inc. v. Alpha Energy & Electric*,[71] the court considered whether a second-tier subcontractor's claim under the Miller Act was untimely because the subcontractor had attempted to provide notice at the prime contractor's erroneous address listed in the payment bond. The prime contractor moved for summary judgment, arguing that strict enforcement of the Miller Act's 90-day notice period barred the second-tier subcontractor's claim. In response and in a cross-motion for summary judgment, the second-tier subcontractor argued that its notice to the erroneous address was timely and effective. The court rejected the prime contractor's argument, explaining that "[c]ourts do not blindly apply the notice provision in the Miller Act" and that "prejudice" must be shown.[72] The court continued, explaining that the prime contractor could not demonstrate prejudice and, in the alternative, that dismissal would otherwise be "inequitable" because the second-tier subcontractor "relied on the incorrect address" provided by the prime contractor.[73] As a result, and because the second-tier subcontractor otherwise established its entitlement to relief, the court granted its motion for summary judgment on its Miller Act claim.[74]

66. *Id.* at *4.
67. 345 F. Supp. 3d 11 (D.D.C. 2018).
68. *Id.* at 20, 41.
69. *Id.* at 41–42.
70. *Id.* at 42–43.
71. 2019 WL 3291523 (D. Nev. July 22, 2019).
72. *Id.* at *5.
73. *Id.*
74. *Id.*

6. Proper Claimants

In *United States* ex rel. *Diversified Lenders, LLC v. SureTec Insurance Co.*,[75] a surety moved to dismiss an assignee's Miller Act claim for lack of standing. The surety argued that the assignee was not a proper party because it did not actually "furnish labor or materials" on the underlying project.[76] The court rejected the surety's argument, holding that the Miller Act, like its predecessor statute, the Heard Act, did not prevent the assignment of claims.[77] The court also noted that the payment bond itself did not prevent assignment.[78]

7. Principal's Defenses

In *Travelers Casualty & Surety Co. of America v. Harlingen Consolidated Independent School District*,[79] the obligee released project retainage funds to the prime contractor without obtaining the surety's consent. The surety filed suit seeking declaratory judgment that the obligee was liable for losses incurred under the payment bond because it had breached the bonded contract, which only authorized release of retainage "[u]pon such acceptance and consent of the surety."[80] The obligee argued that the surety lacked standing to contest the release of retainage and that it was entitled to rely on the representations of the prime contractor.[81] The court held that the obligee was liable for the surety's losses because it had materially breached its contractual duty to obtain the surety's consent.[82]

In *DC Mason Builders, Inc. v. Bancroft Construction Co.*,[83] a second-tier subcontractor sued the prime contractor and its payment bond surety. The prime contractor and its surety moved for summary judgment, asserting that the second-tier subcontractor released and otherwise failed to substantiate its claim against the payment bond.[84] The court agreed, holding that the "unambiguous" releases executed by the second-tier subcontractor barred its claim for work incurred prior to the date of the last such release.[85] The court further agreed that the second-tier subcontractor's supporting declaration asserting that its final payment application was denied was insufficient to allow the fact finder "to make a fair and reasonable estimate

75. 2018 WL 6070340 (M.D. Ga. Nov. 20, 2018).
76. *Id.* at *2.
77. *Id.* (citing United States *ex rel.* Sherman v. Carter, 353 U.S. 210 (1957)).
78. *Id.*
79. 2018 WL 7204025 (S.D. Tex. Nov. 2, 2018).
80. *Id.* at *4.
81. *Id.* at *3.
82. *Id.* at *6.
83. 2018 WL 6179535 (D. Md. Nov. 27, 2018).
84. *Id.* at *9.
85. *Id.* at *10.

of the amount of the damage."[86] As a result, the court granted the prime contractor and surety's motion as to actual damages sought by the second-tier subcontractor.[87]

In *United States* ex rel. *Five Star Electric Corp. v. Liberty Mutual Insurance Co.*,[88] a subcontractor filed a Miller Act claim against a payment bond surety seeking damages for unpaid work beyond the original contract price and damages for delays. The surety and prime contractor moved to dismiss for failure to state a claim.[89] The district court granted the motion and denied the subcontractor's motions for leave to amend.[90] The Second Circuit affirmed in part and vacated in part.[91] The court held that the subcontractor sufficiently pled its claims for unpaid work for agreed-upon changes because the subcontractor alleged that it had received less than the combined total of the original contract price and agreed-upon changes.[92] The court further held that the subcontractor failed to sufficiently plead its claims relating to additional work beyond agreed-upon changes and delays caused by the prime contractor, noting that the prime contractor did not approve the additional work and that the subcontractor's delay claim was barred by the contract's "no-damages-for-delay clause."[93] Finally, the court held that the subcontractor was barred from recovering in *quantum meruit* or unjust enrichment because the parties did not dispute the "subcontract's validity or enforceability."[94]

In *MA Cleaning & Landscaping Design, Inc. v. Banneker Ventures, LLC*,[95] the court considered whether a subcontractor could pursue claims against a prime contractor and its surety for extra work even though the prime contractor had refused to pursue such claims against the owner. The prime contractor and surety argued that the subcontract's "pay-if-paid" clauses were a precondition to subcontractor recovery.[96] The subcontractor argued that the "pay-if-paid" clauses were unenforceable under the prevention doctrine because the prime contractor had refused to pursue the subcontractor's claim for extra work.[97] The court granted the prime contractor and surety's motion for summary judgment, reasoning that the "pay-if-paid" clauses barred the subcontractor from recovery against the

86. *Id.*
87. *Id.*
88. 758 F. App'x 97 (2d Cir. 2018).
89. *Id.* at 98–99.
90. *Id.*
91. *Id.* at 98, 101.
92. *Id.* at 99–100.
93. *Id.* at 100–01.
94. *Id.* (citing Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp., 418 F.3d 168 (2d Cir. 2005)).
95. 2019 WL 3766488 (D. Md. Aug. 8, 2019).
96. *Id.* at *4.
97. *Id.*

prime contractor because the owner "has not, and will not" pay for the subcontractor's claim for extra work.[98] The court further reasoned that the prime contractor was not required to pursue the subcontractor's claim for extra work because the subcontract's pass-through provision enabled the prime contractor to pursue claims "in its sole discretion."[99] The court lastly reasoned that the "pay-if-paid" clauses also barred the subcontractor from recovery against the surety because the subcontract contained a "'clear and explicit waiver'" of rights under the Miller Act.[100]

8. Bad Faith

In *United States* ex rel. *Metal Sales Manufacturing Corp. v. A.C. Dellovade, Inc.*,[101] a supplier sued a subcontractor and its payment bond surety. The surety moved to dismiss the supplier's bad faith claim, arguing that the supplier's claim was preempted by the Miller Act and was otherwise insufficiently pled.[102] In denying the surety's motion, the court held that the Miller Act does not "prohibit other separate state law claims themselves, premised on the underlying [construction] contract."[103] The court further held that the supplier's allegations were sufficient to "provide a reasonable inference that [the surety] engaged in bad faith," noting that the supplier alleged that the surety failed to pay, investigate, and settle the claim without lawful justification.[104]

C. *Other Bonds*

1. Injunction Bond

In *National Collegiate Athletic Association v. Governor of New Jersey*,[105] several sports leagues moved for an injunction preventing sports betting under a recently enacted New Jersey law. The leagues argued that the law violated the Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. §§ 3701–3704.[106] The district court agreed, granted the injunction, and required the sports leagues to post a multimillion-dollar bond under Federal Rule of Civil Procedure 65(c).[107] The district court reaffirmed its decision in a subsequent summary judgment ruling. The New Jersey Thor-

98. *Id.*
99. *Id.* at *5.
100. *Id.* (quoting United States *ex rel.* Tusco, Inc. v. Clark Constr. Grp., LLC, 235 F. Supp. 3d 745, 757 (D. Md. 2016)).
101. 2019 WL 4060876 (W.D. Okla. Aug. 28, 2019).
102. *Id.* at *1.
103. *Id.* at *2 (citing United States *ex rel.* Sunworks Div. of Sun Collector Corp. v. Ins. Co. of N. Am., 695 F.2d 455 (10th Cir. 1982)).
104. *Id.* at *3.
105. 939 F.3d 597 (3d Cir. 2019).
106. *Id.* at 599.
107. *Id.*

oughbred Horsemen's Association ("Horsemen's Association") appealed, and ultimately the United States Supreme Court reversed, holding that PASPA's prohibition of sports gambling was unconstitutional.[108]

The Horsemen's Association sought a judgment on the injunction bond.[109] The district court denied the motion, holding that the Horsemen's Association was not "wrongfully enjoined" because PASPA's constitutionality was only introduced on appeal.[110] The district court further held that "good cause" existed to deny the motion because PASPA was constitutional under binding precedent when the injunction was issued.[111] The Third Circuit rejected this reasoning and vacated the district court's order.[112] The Third Circuit held that the Horsemen's Association was "wrongfully enjoined" because it ultimately obtained a final judgment on the merits.[113] The Third Circuit adopted the "majority" position and held that there is "a rebuttable presumption that a wrongfully enjoined party is entitled to recover provable damages up to the bond amount."[114] The Third Circuit further held that the related objective factors, such as the failure to mitigate, the reasonableness of damages, the outcome of the lawsuit, and the parties' resources, did not rebut the Horsemen's Association's entitlement to recovery against the injunction bond.[115]

2. Appeal Bond

In *Sherman v. Sherrod*,[116] litigation arose in connection with the sale of an ophthalmology practice. The buyer obtained summary judgment for breach of contract. The seller appealed and was required to post an appeal bond. The appellate court affirmed the imposition of liability for breach of contract but remanded for a determination of damages. On remand, the trial court conducted a jury trial, entered a new judgment for damages for breach of contract, and a separate judgment for attorneys' fees and costs. The seller appealed without an additional appeal bond and the appellate court affirmed the separate judgment for attorneys' fees and costs but again remanded the breach of contract claim for a determination of damages. On remand, and before a second trial on damages, the trial court ordered disbursement of the appeal bond in order to satisfy the separate judgment.[117]

108. See Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018).
109. *Nat'l Collegiate Athletic Ass'n*, 939 F.3d at 602.
110. *Id.*
111. *Id.* at 603.
112. *Id.* at 609.
113. *Id.* at 607.
114. *Id.*
115. *Id.* at 608.
116. 2019 WL 254353 (Mich. Ct. App. Jan. 17, 2019).
117. *Id.* at *1–2.

In reversing the trial court, the appellate court reviewed the plain language of the appeal bond and explained that "the appeal bond was issued to assure payment of the damages awarded for the breach of contract claim, and not subsequent or related judgments obtained after the issuance of the bond."[118] The appellate court further explained that "nothing precluded [the buyer] from seeking to have more than one appeal bond in this matter, particularly given the extensive number of appeals undertaken."[119] As a result, the appellate court concluded that the appeal bond proceeds could not be disbursed because "the issue of damages for the breach of contract remains to be determined."[120]

D. *Rights of Surety*

1. Indemnity

In *Allied World Insurance Co. v. American Western Steel, LLC*,[121] a surety brought an indemnity action for losses incurred under performance and payment bonds. The indemnitors argued that the indemnity agreement was unenforceable because third parties had rendered performance of the bonded contracts impossible. The indemnitors further argued that the surety failed to mitigate its damages. The court granted the surety summary judgment, holding that the indemnitors' ability to perform the bonded contracts had "no legal impact" on the enforceability of the indemnity agreement.[122] The court further rejected the indemnitors' mitigation defense, explaining first, that the indemnity agreement broadly authorized the surety to settle claims involving the bonds, and second, that the indemnitors had failed to plead or otherwise argue breach of the implied covenant of good faith and fair dealing.[123]

In *International Fidelity Insurance Co. v. La Porte Construction, Inc.*,[124] an indemnitor argued that the indemnity agreement was unenforceable because she did not read or understand the terms of the indemnity agreement and because she had signed the indemnity agreement under duress.[125] The court granted the surety summary judgment, holding that the indemnitor had the "capacity" and "opportunity" to read the indemnity agreement.[126] In evaluating the indemnitor's duress defense, the court initially recognized that the indemnitor had satisfied the first duress ele-

118. *Id.* at *8.
119. *Id.*
120. *Id.* at *9.
121. 2018 WL 6602153 (S.D. Tex. Dec. 17, 2018).
122. *Id.* at *3.
123. *Id.* at *3–4.
124. 2019 WL 575886 (D. Utah Feb. 12, 2019).
125. *Id.* at *6.
126. *Id.*

ment, "improper threat," because the indemnitor had not received notice of the multimillion-dollar bonded contract before she was asked to sign the indemnity agreement and otherwise lacked legal counsel and relevant expertise.[127] The court continued, however, explaining that the indemnitor had failed to satisfy the second duress element, "no reasonable alternative," because the prospect of "financial loss" did not make the indemnitor's right to refuse to sign the indemnity agreement an unreasonable alternative.[128]

In *Arch Insurance Co. v. Centerplan Construction Co.*,[129] the indemnitors argued that the surety had breached its implied duty of good faith and fair dealing because its claim settlements disregarded the bonded contract's "pay-if-paid" clause, were otherwise motivated by "self-interest," and because the surety conducted an insufficient investigation.[130] The court rejected the indemnitors' arguments, explaining in part that a surety does not act in bad faith simply because it settles claims that involve "colorable defenses."[131] The court further explained that self-interested settlements—without evidence of improper motive—are insufficient to constitute bad faith.[132] Lastly, the court noted that the indemnitors failed to demonstrate that the surety's claim investigation was deficient, let alone "more than negligen[t] or unreasonable."[133]

In *U.S. Specialty Insurance Co. v. Strategic Planning Associates, LLC*,[134] after the bonded subcontractor refused to provide collateral, the surety settled the performance bond claim and waived the subcontractor's claims against the prime contractor without providing further notice.[135] The surety also made payments to the subcontractor's suppliers and second-tier subcontractors before claims were made against the payment bond.[136] The surety filed an indemnity action and moved for summary judgment, relying on language in the indemnity agreement that barred the indemnitors from challenging the surety's good faith in settling claims if the indemnitors failed to provide requested collateral.[137] The indemnitors asserted that the surety acted in bad faith because its settlement with the prime contractor resolved claims outside the scope of the subcontract and its payments to

127. *Id.* at *7.
128. *Id.* at *8.
129. 368 F. Supp. 3d 350 (D. Conn. 2019).
130. *Id.* at 370–79.
131. *Id.* at 372.
132. *Id.* at 372–74.
133. *Id.* at 375–79 (citing PSE Consulting, Inc. v. Frank Mercede & Sons, Inc., 838 A.2d 135 (Conn. 2003)).
134. 387 F. Supp. 3d 679 (E.D. La. 2019).
135. *Id.* at 683–84.
136. *Id.*
137. *Id.* at 684–86.

suppliers and second-tier subcontractors were made before those suppliers and subcontractors made claims on the payment bond.[138]

The court granted the surety's motion in part, holding that the indemnitors were barred from challenging the surety's good faith in settling payment and performance bond claims because the subcontractor failed to post collateral upon request in accordance with the indemnity agreement.[139] The court ruled, however, that the indemnity agreement's collateral requirement was inapplicable with respect to "other losses sustained or expenses incurred where a claim had not been asserted against [the surety]."[140] Therefore, the court denied the surety's motion with respect to pre-claim payments made to the subcontractor's suppliers and second-tier subcontractors, allowing the indemnitors to challenge the surety's good faith in making these payments.[141]

In *Colonial American Casualty & Surety Co. v. Sevinor*,[142] two indemnitors appealed a trial court decision awarding a surety damages in connection with losses incurred under payment and performance bonds. The indemnitors argued that the payment bonds were unenforceable because they "failed to conform" to statutory requirements "governing bidding procedures for public construction projects."[143] The appellate court affirmed, holding that the indemnitors were liable for the surety's losses even if the bonds were unenforceable because the indemnity agreement required indemnification if the surety made payments "in good faith under [its] belief that . . . [it] was or might be liable therefor."[144] The appellate court continued, explaining that the undisputed facts established that the surety paid the claims under the good faith belief that it was liable under the bonds because the claims appeared timely and legitimate, and the indemnitors otherwise did not object after receiving notice.[145]

2. Collateral Deposit

In re LDR Industries, LLC[146] involved competing claims to an irrevocable letter of credit ("ILOC") submitted by the debtor to its surety after executing a second indemnity agreement. The surety moved for summary judgment, arguing that it was entitled under an earlier indemnity agreement to apply the ILOC toward losses incurred on a custom bond posted before

138. *Id.* at 688.
139. *Id.* at 690.
140. *Id.*
141. *Id.* at 690–91.
142. 2019 WL 3187742 (Mass. App. Ct. July 16, 2019), *appeal denied*, 132 N.E.3d 942 (Mass. 2019).
143. *Id.* at *1 (citing Mass. Gen. Laws ch. 84, § 44F).
144. *Id.*
145. *Id.* at *2.
146. 2018 WL 6177133 (Bankr. N.D. Ill. Nov. 8, 2018).

the ILOC was submitted. In response and in a cross-motion for summary judgment, the debtor argued that the ILOC should be released for distribution under its reorganization plan because it could not be applied retroactively.[147] The bankruptcy court granted the surety's motion, holding that neither the language of the first indemnity agreement nor the ILOC barred retroactive application.[148] The court emphasized that the ILOC itself did not reference any specific bond number, bond amount, or bond period.[149]

In *American Contractors Indemnity Co. v. Sailsbery*,[150] a surety moved for a temporary restraining order and preliminary injunction compelling indemnitors to post cash collateral. The surety alleged that the indemnitors "may be dissipating or hiding assets" and that it "fear[ed]" at least one indemnitor was taking steps to conceal, remove, or dissipate assets in an attempt to avoid its obligations.[151] The court denied the surety's motion, noting that "beliefs and fears" are insufficient to demonstrate irreparable harm and that the surety otherwise failed to demonstrate that its potential bond loss was not "redressable by a money judgment."[152]

In *Fidelity & Deposit Co. of Maryland v. Edward E. Gillen Co.*,[153] a surety filed suit against an indemnitor in connection with its losses under payment bonds. The surety and indemnitor settled all claims except the surety's claim for *quia timet* seeking cash collateral and restricting money disbursement. After the surety and indemnitor filed cross-motions for summary judgment, the district court dismissed the surety's remaining claim, explaining that the indemnitor's insolvency precludes *quia timet* relief.[154] On appeal, the Seventh Circuit rejected the district court's reasoning, explaining that "insolvency does not preclude *quia timet* relief" because an indemnitor's "insolvency may often serve as a reasonable basis" to seek court intervention.[155] The court affirmed on alternative grounds, however, explaining that state and federal precedent prevented the surety from supplementing its rights under the written indemnity agreement with equitable principles such as *quia timet*.[156]

147. *Id.* at *6.
148. *Id.* at *8–9.
149. *Id.* at *10.
150. 2019 U.S. Dist. LEXIS 95796 (D. Nev. June 6, 2019).
151. *Id.* at *3.
152. *Id.* at *3–4.
153. 926 F.3d 318 (7th Cir. 2019).
154. *Id.* at 321, 323–24.
155. *Id.* at 323–24.
156. *Id.* at 326–28.

3. Subrogation

In *United States* ex rel. *Wesco Distribution, Inc. v. Liberty Mutual Insurance Co.*,[157] an owner terminated a bonded contract and entered into a take-over agreement with the principal's surety ("Surety A"). Surety A entered into a ratification agreement with the principal's subcontractor and later defaulted the subcontractor and terminated the subcontract.[158] Surety A asserted claims against the subcontractor's surety ("Surety B") for breach of the subcontract and breach of the payment and performance bonds.[159] After Surety A obtained judgment against Surety B, Surety B appealed, asserting that Surety A could not assert a claim against the bonds because it was not a "successor" to the principal and, in the alternative, that Surety B's obligations under the performance bond were discharged by "material alteration" of the bonded subcontract caused by the ratification agreement.[160] The Eighth Circuit affirmed the judgment, holding that Surety A became equitably subrogated to its principal's rights when it satisfied the principal's obligations under the prime contract and subcontract, thus qualifying Surety A as a successor to the principal.[161] The court further held the ratification agreement did not discharge the performance bond because it "expressly left the [s]ubcontractor's performance obligations, time to complete its work, and compensation unchanged."[162]

In *Liberty Mutual Insurance Co. v. SBN V FNBC LLC*,[163] a principal defaulted on numerous bonded projects and the surety completed performance, paid subcontractors and suppliers, and otherwise fulfilled its bonded obligations. The surety filed suit against the principal's lender seeking declaratory judgment that it had a "priority interest in all bonded contract receivables and funds to the extent of net losses."[164] Both parties moved for partial summary judgment regarding bonded projects with receivables exceeding costs and expenses incurred by the surety. The surety argued that it was entitled to offset its losses on bonded projects with common owners because it was "equitably subrogated to the rights of the project owners" by fulfilling its bonded obligations.[165] The court disagreed, explaining that the surety could not "use surplus funds from one project to defray losses taken on other projects, even if the projects have common owners."[166] The court held that the surety had a superior interest in

157. 921 F.3d 744 (8th Cir. 2019).
158. *Id.* at 747.
159. *Id.*
160. *Id.* at 747–49.
161. *Id.* at 748.
162. *Id.* at 749.
163. 2019 WL 346707 (E.D.N.C. Jan. 28, 2019).
164. *Id.* at *2.
165. *Id.*
166. *Id.* at *3 (citing W. Cas. & Sur. Co. v. Brooks, 362 F.2d 486 (4th Cir. 1966)).

receivables and contract funds on each bonded project up to the amount of the surety' net loss, whereas the lender's successor-in-interest had superior interest in any surplus.[167]

In re *Kappa Development & General Contracting Inc.*[168] involved competing claims by a surety and secured lender to retainage on two construction projects held by the debtor-in-possession. The surety claimed that it was entitled to the retainage under the principle of equitable subrogation.[169] The secured lender relied on its perfected security interest in the debtor's accounts receivable, general intangibles, and account proceeds.[170] The bankruptcy court granted the surety's motion, holding that the surety was entitled to retainage on the first project, in which the debtor defaulted prepetition, because equitable subrogation was not dependent on perfection and alternatively, the secured lender's claim was unenforceable because the debtor, as a defaulting contractor, had no rights in the retainage.[171] The bankruptcy court further held that the surety was entitled to retainage on the second project, in which the debtor defaulted post-petition, because the retainage never became property of the estate.[172]

4. Attorney Fees

In *International Fidelity Insurance Co. v. Americaribe-Moriarty JV*,[173] a performance bond surety sought attorneys' fees against an obligee after obtaining summary judgment discharging the bond. The district court granted the surety's motion pursuant to the bonded contract's general indemnity provision and the reciprocal effect of a state statute.[174] The obligee appealed the attorneys' fee award, and the appellate court reversed. The Eleventh Circuit reasoned that state law limited the general indemnification provision to "liability for claims brought by third parties, and not to suits between the contracting parties."[175] Because the general indemnification provision was limited to third-party claims, neither the surety nor its principal could recover attorneys' fees under the general indemnity provision against the obligee.[176]

In *Hunt Construction Group, Inc. v. Cobb Mechanical Contractors, Inc.*,[177] the court considered whether a surety could assert a claim for breach of contract

167. *Id.* at *4.
168. 2019 WL 2867110 (Bankr. M.D. Miss. July 2, 2019).
169. *Id.* at *1.
170. *Id.*
171. *Id.* at *6–7.
172. *Id.* at *8 (citing Pearlman v. Reliance Ins. Co., 371 U.S. 132 (1962)).
173. 906 F.3d 1329 (11th Cir. 2018).
174. *Id.* at 1335 (citing Fla. Stat. § 57.105(7)).
175. *Id.* at 1336–37.
176. *Id.* at 1339.
177. 2018 WL 5114151 (W.D. Tex. Oct. 18, 2018), adopted by slip op. (W.D. Tex. Nov. 5, 2018).

against an obligee under a performance bond. The obligee filed a motion to dismiss the surety's breach of contract claim, arguing that Texas law did not recognize an affirmative claim for damages by a surety against an obligee.[178] The court granted the obligee's motion, reasoning that an obligee "cannot be sued for breach" because it is a beneficiary under a performance bond that "takes on no affirmative obligations."[179] The court further reasoned that the surety's position that the obligee's actions excused the surety's performance was a defense and not an affirmative claim.[180]

II. FIDELITY LAW

A. *Financial Institution Bonds*

In *Janney Montgomery Scott, LLC v. National Union Fire Insurance Co. of Pittsburgh*,[181] the insured on a financial institution bond claimed damages arising from a Ponzi scheme conducted by its former employee. The insured's former employee convinced clients to withdraw substantial sums of money from their accounts and deposit them into an account controlled by the employee.[182] With respect to payments made to these clients by the insured, the court held that coverage hinged on whether the insured was legally obligated to its clients for the wrongful acts of its former employee. As to legal fees and other defense costs incurred from defending such claims, the court held they were excluded from coverage because arbitrations fell within the "legal proceeding" exclusion.[183] Finally, the court held the bond did not offer coverage for the clients' loss of use of funds, because that amounted to "potential" income that was expressly excluded by the bond.[184]

B. *Computer Fraud Coverage*

In *Tidewater Holdings, Inc. v. Westchester Fire Insurance Co.*,[185] the court granted summary judgment in favor of the insurer on a claim for coverage under the computer fraud provision of its policy. The claim arose after the insured's employee altered payment details for one of its clients after being directed to do so by an imposter's email. This resulted in multiple payments to the imposter's account.[186] The insurer agreed to provide coverage under the supplemental funds transfer endorsement, which provided for

178. *Id.* at *2.
179. *Id.* at *3.
180. *Id.*
181. 2019 WL 400533 (Pa. Com. Pl. Jan. 22, 2019).
182. *Id.* at *1.
183. *Id.* at *4.
184. *Id.* at *5.
185. 389 F. Supp. 3d 920 (W.D. Wash. 2019).
186. *Id.* at 922.

coverage in less than the total amount of the loss.[187] This endorsement also included exclusions that the insurer would not be liable for any loss resulting from any fraudulent transfer request under any insuring clause other than the supplemental funds transfer endorsement.[188] The court agreed with the insurer that the losses arose as the result of a fraudulent transfer request such that there coverage was excluded under the computer fraud provision.[189]

In *Posco Daewoo America Corp. v. Allnex USA, Inc.*,[190] the insured was hacked by an imposter posing as an employee, who obtained wire payments from the insured's customer for outstanding receivables.[191] After failing to recover from its customer, the insured sought to recover for losses it claimed were caused by computer fraud. The court granted the insurer's motion to dismiss, holding that the insured did not sufficiently plead that it owned the funds and establish there was a loss of covered property.[192] Furthermore, the court found that an account receivable is not tangible property.[193]

Sanderina, LLC v. Great American Insurance Co.[194] focused on whether a court should stay an insured's discovery pending a ruling on the insurer's motion for summary judgment. The insurer issued a commercial crime policy that covered "loss resulting directly from the use of a computer 'to gain access to [the insured's] computer system.'"[195] The insured alleged an imposter, acting as the owner, convinced its controller to deposit a large sum of money into the imposter's bank account. The insured's corporate designee testified at deposition that there was no evidence of a breach of the insured's computer network, although such a breach was possible. The insurer filed a motion for summary judgment and sought to stay the insured's issuance of discovery, arguing that the testimony of the insured's corporate designee provided sufficient facts upon which to determine summary judgment. The insured opposed the motion to stay and sought an extension of discovery by arguing that additional discovery would assist the insured in defending summary judgment. The court ruled in favor of the insurer and stayed discovery, noting that the insured pointed to no additional discovery that would aid in determining whether a breach of the computer network occurred.[196] The court took a "preliminary peek" at the

187. *Id.*
188. *Id.*
189. *Id.* at 924.
190. 2018 WL 6077983 (D.N.J. Nov. 19, 2018).
191. *Id.* at *1.
192. *Id.* at *4.
193. *Id.* at *5.
194. 2019 WL 356802 (D. Nev. Jan. 29, 2019).
195. *Id.* at *1.
196. *Id.* at *3.

pending motion for summary judgment and noted that it could be decided without additional discovery.[197]

C. *Employee Theft Coverage*

1. Who Is an Employee

The policy in *Albany Airport HIE, LLC v. Hanover Insurance Group, Inc.*[198] included a Special Employee Theft Exclusion that excluded coverage for loss resulting from theft by one of the insureds or its members.[199] The policy defined "member" to include an owner of an LLC.[200] The insureds argued that the theft was carried out in the manager's individual capacity as an employee rather than a "member"; therefore, the exception did not apply.[201] The court granted the insurer's motion for summary judgment, holding that because the theft was performed by the sole member of an LLC which was a named insured under the policy, the exception applied.[202]

In *Greenwald v. Western Surety Co.*,[203] the insurer issued a dishonesty bond to a neurosurgeon's professional corporation.[204] The insured company employed a business and financial manager, who in addition to working for the insured P.C. acted as the neurosurgeon's "personal assistant," and was responsible for managing a real estate company owned by the neurosurgeon.[205] The financial manager's separate duties, coupled with the theft scheme, raised issues regarding who was an insured under the bond and what losses were covered. The court first held that the only insured under the bond was the P.C., not the neurosurgeon individually or his real estate company.[206] Thus, the P.C. could only recover losses that it sustained while the employee was acting in the ordinary course of business for the P.C.[207] The court then reversed the trial court's grant of summary judgment to the P.C., finding that issues of material fact existed as to the amount of losses sustained by the P.C.[208]

In *C.S. Crossan, Inc. v. Federal Insurance Co.*,[209] the Eighth Circuit affirmed an order of summary judgment in favor of the insurer concluding that coverage was precluded under an "Employee Theft" and "Forgery" policy.[210]

197. *Id.*
198. 391 F. Supp. 3d 193 (N.D.N.Y. 2019).
199. *Id.* at 196.
200. *Id.*
201. *Id.* at 197–98.
202. *Id.* at 198–99.
203. 436 P.3d 1278 (Idaho 2019).
204. *Id.* at 1282.
205. *Id.*
206. *Id.* at 1287–89.
207. *Id.* at 1291.
208. *Id.* at 1291–93.
209. 932 F.3d 1142 (8th Cir. 2019).
210. *Id.* at 1144.

The claim arose from malfeasance by an administrative assistant of a property management-company who forged checks directed to herself on accounts belonging to the owners of the managed commercial rental properties.[211] The parties disputed whether the administrative assistant was an authorized representative such that the policy's "Authorized Representative" exclusion applied, or whether the assistant was an "employee" such that the claim was covered under the policy's "Employee Theft" coverage.[212] The court found that the assistant's lack of check-signing authority did not preclude her from being an authorized representative. Because she was an authorized representative of the commercial property owner, coverage was excluded under the policy.[213] In addition, the court found that she did not satisfy the policy's express requirements for being an "employee" whose acts could result in coverage under the policy's "Employee Theft" provision.[214]

2. Direct Loss

In *rePlanet Holdings, Inc. v. Federal Insurance Co.*,[215] the insured purchased a crime policy, which covered "direct losses" as a result of the employee's actions.[216] An employee of the insured stole printers and created vouchers.[217] The insurer claimed that the policy did not cover the loss because the insured did not suffer a "direct loss" and, instead, suffered financial loss only after the unauthorized vouchers were cashed in.[218] The insured sought to amend the complaint to add allegations that the insurer systematically denies all first-party claims and to add a cause of action for fraud, contending that the policy is illusory.[219] The insurer argued that the claim for fraud was futile and did not meet the Rule 12(b)(6) threshold.[220] The court allowed the amendment, and noted that, by issuing the policy, the insurer made a tacit representation that the policy would have value in the areas of purported coverage.[221]

In *Summit Real Estate Management, LLC v. Mid-Century Insurance Co.*,[222] the insured's employee engaged in a scheme of embezzlement that extended over multiple policy years. The policy provided coverage for "direct loss"

211. *Id.*
212. *Id.*
213. *Id.* at 1148.
214. *Id.* at 1149.
215. 2019 WL 3337907 (E.D. Cal. July 25, 2019).
216. *Id.* at *2.
217. *Id.* at *1.
218. *Id.* at *2.
219. *Id.*
220. *Id.* at *8.
221. *Id.*
222. 445 P.3d 905 (Or. Ct. App. 2019).

from employee dishonesty discovered within one year from the end of the policy period. It also contained a "prior insurance" insurance provision for losses occurring during the period of any prior insurance and that would have been covered, "except that the time within which to discover the loss or damage had expired."[223] The insured argued that this prior insurance provision included all prior policy years wherein the loss occurred, while the insurer argued that it applied only to losses in the policy year immediately prior to discovery.[224] The court held that the "prior insurance" provision applied only to losses in the policy year prior to discovery.[225] The court further held that the insured's costs in auditing and documenting the claim were not direct losses under the policy.[226]

3. Discovery of Loss

In *Franklin County Commission v. Madden*,[227] the court granted the insurer's motion to dismiss, finding that the loss was not covered because the insured did not discover the loss in the period dictated by the terms of the policy. The court disagreed with the insured's argument that the insurer fraudulently suppressed the fact that the insured needed to purchase additional insurance after the cancellation of the prior policy.[228] The court found that there was no legal duty on the insurer to inform the insured of the need for additional coverage.[229]

In *Starr Insurance Holdings, Inc. v. United States Specialty Insurance Co.*,[230] the court granted summary judgment in favor of the insurer on a claim under a policy covering dishonest or fraudulent acts of an employee. The court found that the insured had discovered the alleged dishonest acts before the policy period.[231] Furthermore, the court found that the loss arose from the breach of contract and not from employee dishonesty such that the claim was not covered under the fidelity bond.[232]

4. Single or Separate Occurrences

In *Law Tanning Co., LLC v. Westfield Insurance Co.*,[233] the insured sought coverage under a commercial crime insurance policy, arguing each check was a separate occurrence. The insurer argued that the loss was a single

223. *Id.* at 906.
224. *Id.*
225. *Id.* at 910.
226. *Id.* at 912.
227. 2019 WL 4143042 (N.D. Ala. Aug. 30, 2019).
228. *Id.* at *5.
229. *Id.*
230. 2019 WL 954756, at *1 (N.Y. Sup. Ct. Feb. 27, 2019).
231. *Id.* at *2–3.
232. *Id.* at *3.
233. 2018 WL 6411398 (E.D. Wis. Dec. 6, 2018).

occurrence with policy limits of $25,000.[234] Further, the insurer argued that the insured was owed nothing under the policy because the office manager had paid back more than the insured lost during the policy period.[235] The court found that both an isolated act of dishonesty and multiple acts of dishonesty by the same employee must be treated as a single occurrence under the policy.[236] Since the policy covered all losses no matter when they were sustained, the employee's partial repayment of the loss did not eliminate the insured's right to recovery of the $25,000 policy limits.[237]

5. False Pretense Exclusion

In *Rainforest Chocolate, LLC v. Sentinel Insurance Co.*,[238] the court found that the False Pretense Exclusion did not preclude coverage for the insured's loss. The claim arose after an employee received an email from a fraudster purporting to be from the employee's manager, instructing the employee to transfer funds electronically to an outside bank account. The insured sought coverage under its business-owner policy. The insurer denied the coverage under the False Pretense Exclusion, which stated that the insurer would not pay for "physical loss" caused by a fraudulent scheme.[239] The court held that the False Pretense Exclusion's use of the undefined term "physical loss" was ambiguous.[240] The court found that the policy used the terms "physical loss" and "loss" at different points in the policy, "lead[ing] the average reader to assume there was some difference between them."[241] The court held the term's ambiguity should be construed against the insurer and, as a result, the exclusion did not bar coverage.[242]

234. *Id.* at *2.
235. *Id.*
236. *Id.* at *3–4.
237. *Id.* at *6.
238. 204 A.3d 1109 (Vt. 2018).
239. *Id.* at 1112.
240. *Id.* at 1115.
241. *Id.* at 1116.
242. *Id.*