RECENT DEVELOPMENTS IN FIDELITY AND SURETY LAW

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I. SURETY LAW

A. *Performance Bonds*

1. Arbitration

In *Old Republic Surety Co. v. J. Cumby Construction, Inc.*,[1] a prime contractor and subcontractor's surety entered into a takeover agreement.[2] The surety completed performance and filed suit to recover the remaining balance.[3] The contractor moved to stay and compel arbitration under the subcontract's arbitration provision, which was incorporated by reference into the performance bond.[4] In granting the motion, the court explained that the performance bond's references to the subcontract were sufficiently specific so that the surety could ascertain the identity of the document without issue.[5] The court further explained that enforcement of the arbitration provision against the surety was consistent with federal policy favoring arbitration.[6]

2. Conditions Precedent

In *Arch Insurance Co. v. Graphic Builders LLC*,[7] a prime contractor and modular manufacturer entered into a subcontract to fabricate and assemble an apartment building.[8] The contractor notified the manufacturer of various defects and demanded the warranty required under the subcontract.[9] The contractor defaulted the manufacturer, corrected the work, and filed a claim against the performance bond without terminating the manufacturer.[10] The surety denied the claim because the contractor failed to terminate, then filed suit seeking declaratory judgment, and moved for summary judgment.[11] In response, the contractor argued that the bond's condition precedent did not apply to the defective work or obligation to furnish a manufacturer warranty, and that the contractor was otherwise prevented from terminating the manufacturer because the modular structure had been delivered and installed.[12] The First Circuit rejected the contractor's arguments, emphasizing that the warranty claim arose from the failure

1. No. 1:21CV126-GHD-DAS, 2022 WL 3438227 (N.D. Miss. Aug. 16, 2022).
2. *Id.* at *1.
3. *Id.*
4. *Id.* at *2
5. *Id.* at *3.
6. *Id.*
7. 36 F.4th 12 (1st Cir. 2022).
8. *Id.* at 14.
9. *Id.*
10. *Id.* at 14–15.
11. *Id.* at 15.
12. *Id.* at 15–16, 18, 20–22.

to procure a warranty before completion of the subcontract (and not a demand for remediation under a warranty).[13] The court explained that the performance bond's terms did not exclude this warranty obligation from the conditions precedent and that the surety's performance options were "no less suitable for the warranty obligation than for the physical work of fixing the [underlying work]."[14] The court further explained that the contractor was not prevented from terminating the manufacturer under the circumstances because, as reflected in the contractor's own representations, the contractor had "ample knowledge" of the "alleged failures at a time when termination remained a viable option under the relevant principles of law."[15]

In *United States ex rel. McKenney's, Inc. v. Leebcor Services, LLC*,[16] a prime contractor asserted counterclaims arising from a subcontractor's deficient work against the subcontractor's performance bond almost two years after the bonded project was complete.[17] The court dismissed the contractor's claim against the surety for failure to furnish adequate notice, explaining that the contractor's "decision to sit on its hands deprived [the surety] of any opportunity to exercise its options under the [bond] to address the deficiencies [the prime contractor] identified, which could have limited the damage they caused."[18]

3. Surety Liability

In *Schuff Steel Co. v. Bosworth Steel Erectors*,[19] the prime contractor terminated the principal on a project to build a soccer stadium, which had a firm opening day deadline. The contractor immediately notified the surety of the termination, but claimed that it was forced to continue work on the project while the surety performed its investigation.[20] The contractor sued the principal and surety for breach of the performance bond, contending that the surety had not paid the contractor's claim.[21] The court granted the surety's motion for summary judgment and denied the contractor's motion for summary judgment on the breach of the performance bond count.[22] In so granting, the court reasoned that it was undisputed that the contractor began self-performing upon notifying the surety of its bond claim,

13. *Id.* at 18.
14. *Id.* at 19 (interpreting AIA A312 bond form).
15. *Id.* at 22–23.
16. No. 4:20cv179, 2022 WL 3592170 (E.D. Va. Aug. 18, 2022).
17. *Id.* at *39–40 (interpreting AIA A311 (1960) bond form).
18. *Id.*
19. No. 18-cv-0435 (TSC), 2022 WL 4534729 (D. D.C. Sept. 28, 2022).
20. *Id.* at *13.
21. *Id.* at *17–18.
22. *Id.* at *36.

which foreclosed upon the surety's bargained-for right to have a reasonable period of time within which to select a remedial option.[23]

4. Proper Claimants

In *Harris County Water Control & Improvement District No. 89 v. Philadelphia Indemnity Insurance Co.*,[24] the Fifth Circuit considered whether a prime contractor could assert claims against a subcontractor's performance bond when the bonded subcontract had been changed without notice to the subcontractor's surety.[25] The surety asserted that the undisclosed changes represented a new independent contract that happened to embrace the same subject matter as the bonded subcontract.[26] The court rejected the surety's argument, holding that the objective intent of the undisclosed changes was to amend and not replace the underlying subcontract.[27] The court explained that changed terms were described as a revised version of the bonded subcontract and contained the same section number, the same title, and the same subject matter as the bonded subcontract.[28]

5. Limitations

In *Northwest Arkansas Conservation Authority v. Crossland Heavy Contractors, Inc.*,[29] a public corporation filed suit against a prime contractor and its performance bond surety almost ten years after completion of a project. The district court granted the surety's motion for summary judgment under the statute of limitations.[30] The Eighth Circuit affirmed, holding that the public corporation could not invoke the doctrine of *nullum tempus* ["time does not run against the king"] because its claims arose from private-law theories that constituted proprietary rights, not the rights of the public.[31] The court emphasized that the public corporation did not sue to enforce statutes or regulations, and a victory would not allow it to exercise any sovereign right.[32]

In *Transit Wireless, LLC v. Fiber-Span, Inc.*,[33] although the prime contractor raised technical concerns about nodes installed on a project, which were partially addressed through retrofitting, the contractor used the nodes for

23. *Id.* at *35.
24. 31 F.4th 305 (5th Cir. 2022).
25. *Id.* at 308.
26. *Id.* at 309.
27. *Id.* at 310–11.
28. *Id.* at 310.
29. 47 F.4th 705 (8th Cir. 2022).
30. *Id.* at 707 (citing Ark. Code Ann. §§ 16-56-112(a), 18-44-508(b)).
31. *Id.* at 710–11.
32. *Id.* at 711.
33. 40 F.4th 79 (3d Cir. 2022).

nearly three years.[34] The contractor later demanded that the subcontractor replace the retrofitted nodes and, upon refusal, sued the subcontractor and its performance bond surety.[35] The subcontractor petitioned for bankruptcy.[36] The bankruptcy court dismissed the contractor's claim against the surety, reasoning that the claim was untimely under the contractual two-year statute-of-limitations period because suit was filed more than two years after the contractor accepted the nodes though use.[37] The district court reversed the bankruptcy court's decision, emphasizing that use of nonconforming goods is not acceptance in every case and that the contractor's use was reasonable under the circumstances.[38]

On appeal, the Third Circuit vacated the district court's opinion in part and concluded that the contractor's claim was untimely.[39] The contractual statute-of-limitations was dependent on delivery and not acceptance.[40] The term "delivery" had been interpreted under the UCC to constitute tender of goods, regardless of their conformity.[41] The court adopted this definition, noting that it was consistent with a commonsense understanding and was not dependent on some uncertain moment when the prime contractor might actually choose to accept the good.[42]

In *Shallow Water Equipment, LLC v. Pontchartrain Partners, LLC*,[43] the subcontractor argued that the discovery rule deferring the accrual of a cause of action until a plaintiff knew or should have known of the facts giving rise to a cause of action applied to Miller Act claims, rendering the subcontractor's claims timely.[44] The court determined that the subcontractor's claim against the performance bond filed three months after the Miller Act limitations period had expired was untimely.[45] Even if the discovery rule applied, the subcontractor's claim was still untimely because the subcontractor failed to exercise reasonable diligence in inspecting the vessel post-completion, where it would have discovered the damage to the vessel a year before the subcontractor filed its claim for said damage.[46]

34. *Id.* at 84–85, 88–90.
35. *Id.* at 90.
36. *Id.*
37. *Id.* at 91, 100–01.
38. *In re* Fiber-Span, Inc., No. 20-2244, 2021 WL 941878, at *8–10, 12 (D.N.J. Mar. 12, 2021).
39. 40 F.4th at 85, 100–01.
40. *Id.* at 101.
41. *Id.*
42. *Id.*
43. No. 21-CV-949, 2022 WL 3755041 (E.D. La. Aug. 30, 2022).
44. *Id.* at *34–35.
45. *Id.*
46. *Id.*

In *Southway Builders, Inc. v. United States Surety Co.*,[47] a prime contractor defaulted a subcontractor for untimely performance and asserted a claim against the subcontractor's performance bond.[48] The contractor subsequently entered into a memorandum of understanding with the subcontractor's sureties to ensure that work continued while the sureties investigated the claim.[49] The memorandum of understanding amended the bond's choice-of-law provision from Maryland to Virginia law.[50] When the contractor failed to file a lawsuit within the bond's contractual one-year limitations period, the sureties denied the prime contractor's claim, filed suit seeking declaratory judgment, and moved for summary judgment under the limitations period.[51] The contractor argued that the contractual limitations period was void *ab initio* under Maryland law when the performance bond was signed, and, therefore, the memorandum of understanding's choice-of-law provision could not resurrect the void limitations period under more lenient Virginia law.[52] The trial court granted the sureties' motion, holding that the limitations period was subject to and enforceable under Virginia law.[53] On appeal, the Supreme Court of Virginia affirmed on different grounds, explaining that the bond's alternative saving provision provided for the minimum period of limitations under Virginia law.[54] Surety contracts are construed as insurance contracts under Virginia law, and, therefore, the bond was subject to the one-year minimum limitations period required for insurance contracts and not the default five-year limitation period for causes arising in contract.[55]

6. Prevailing Party

In *City of Los Angeles Department of Airports v. United States Specialty Insurance Co.*,[56] the obligee prevailed on its breach of contract and enforcement of the performance bond claims, but the jury awarded only $1 to the obligee on the performance bond claim.[57] Both the obligee and the surety sought contractual attorney fees as a prevailing party.[58] The trial court rejected the surety's argument that it was the prevailing party, noting that the contract

47. No. 210310, 2022 WL 2978256 (Va. July 28, 2022).
48. *Id.* at *1.
49. *Id.*
50. *Id.* at *1–2.
51. *Id.* at *2
52. *Id.* at *2–3.
53. *Id.* at *2.
54. *Id.* at *1, 3.
55. *Id.* at *3–4 (citing Va. Code Ann. § 38.2-314).
56. 295 Cal. Rptr. 3d 265 (Ct. App. 2022).
57. *Id.* at 267.
58. *Id.* Under California law, when a contract includes an attorney fee provision, attorney's fees are granted to the prevailing party. Cal. Civ. Code § 1717.

and performance bond claims were interconnected: an award for the contractor on its breach of contract claim would offset or eliminate a damage award to the obligee.[59] The appellate court affirmed, finding the trial court had reasonably concluded that the outcome was mixed and neither party had prevailed so as to be awarded attorneys' fees.[60]

B. *Payment Bonds*

1. Jurisdiction, Venue, Arbitration, and Parallel Proceedings

In *Ross Group Construction Corp. v. RCO Construction, LLC*,[61] two construction companies executed a contract that included a choice of law and venue provision electing Oklahoma law and venue in a Tulsa, Oklahoma, state court or the federal district court for the Northern District of Oklahoma.[62] One party sued in the Northern District of Oklahoma.[63] One payment-bond surety sought to dismiss the case for improper venue or to transfer the case to the Southern District of Texas, where the work had been performed.[64] The surety sought to void the forum-selection clause under a Texas law that allowed a party obligated by the contract or agreement to perform the work that is the subject of the construction contract to void a provision making disputes under the contract subject to another state's law, litigation in the courts of another state, or arbitration in another state.[65] The court found that the law could only be invoked by a party obligated to perform the work that is the subject of the construction contract and that the surety was not such a party in this circumstance.[66] Because the law was inapplicable to the surety and the surety had asserted no other grounds to invalidate the forum selection clause, the court declined to dismiss or transfer the case.[67]

In *McKinnley Excavating, LLC v. C&C Contractors, LLC*,[68] a subcontractor sued the prime contractor and the surety under the Miller Act payment bond. The subcontract contained a dispute resolution provision requiring the arbitration of all claims.[69] The parties agreed to arbitrate, but they disputed whether the court's stay pending arbitration should extend to the

59. *Id.* at 269.
60. *Id.*
61. No. 19-CV-551-JFH-CDL, 2021 WL 5814280 (N.D. Okla. Dec. 7, 2021), *reconsideration denied*, No. 19-CV-551-JFH-CDL, 2022 WL 3104775 (N.D. Okla. Aug. 4, 2022).
62. *Id.* at *1.
63. *Id.*
64. *Id.*
65. *Id.* at *2 (citing Tex. Bus. & Com. § 272.001(b)).
66. *Id.*
67. *Id.*
68. No. 1:21-CV-69-KAC-SKL, 2022 WL 1788403 (E.D. Tenn. May 31, 2022).
69. *Id.* at *1.

surety.[70] The court granted a stay as to the subcontractor's claims against both the prime contractor and the surety.[71] It noted that the Sixth Circuit had not conclusively addressed a district court's obligation when a portion of an action is subject to arbitration but other claims remain.[72] The court determined, however, that the surety's obligations were dependent upon those of the general contractor, making the claims against the surety part and parcel of the larger adjudication of the subcontractor's claims against the prime contractor.[73] It reasoned that good-faith arbitration would preserve the subcontractor's rights against the surety and facilitate efficient adjudication of the subcontractor's claims against the surety.[74]

In *Whitman, Requardt & Associates, LLP v. ARGO Systems, LLC*,[75] the prime contractor sued a subcontractor in state court, alleging breach of contract and professional negligence. The subcontractor then sued the contractor and the surety in federal court for breach of the Miller Act payment bond, and the general contractor for breach of contract and unjust enrichment.[76] The federal court defendants filed a motion to dismiss or stay pending resolution of the state court action, which the federal court denied.[77] The federal court considered the motions in the context of the abstention doctrine, in which federal courts may abstain from exercising federal jurisdiction when there is parallel litigation in state and federal courts and exceptional circumstances exist to warrant abstention.[78] The court held that the state and federal proceedings were not parallel because the actions advanced different legal theories and sought different remedies, relying on both the fact that the federal proceeding involved a Miller Act claim and that the subcontractor had not asserted its affirmative claims in the state proceeding.[79] The court also found that abstention was inappropriate because no exceptional circumstances warranting abstention were present.[80]

70. *Id.*
71. *Id.* at *2.
72. *Id.*
73. *Id.*
74. *Id.*
75. No. CV ADC-21-2107, 2021 WL 6052574 (D. Md. Dec. 21, 2021).
76. *Id.* at *1.
77. *Id.* at *5.
78. *Id.* at *2.
79. *Id.* at *3–4.
80. *Id.* at *4–5 (citing Chase Brexton Health Servs., Inc. v. Maryland, 411 F.3d 457, 463–64 (4th Cir. 2005), which elucidates six factors to weigh when determining whether exceptional circumstances warranting abstention exist).

2. Liability

In *Owners Insurance Co. v. Fidelity & Deposit Co. of Maryland*,[81] a prime contractor failed to pay two subcontractors, resulting in an arbitration award in favor of the subcontractors for the value of the subcontractors' labor and material as well as associated costs, attorneys' fees, and interest. The contractor declared bankruptcy before paying, and the surety paid only for the subcontractors' labor and material.[82] The subcontractors (one of whom was now an assignee of the original subcontractor) then sued the surety in federal court for the whole of their arbitration award.[83] The subcontractors based their claims on their agreements with the contractor providing that they would be entitled to attorneys' fees and other costs if they had to pursue a claim against the general contractor to enforce their agreement.[84] In response, the surety asserted that the payment bond did not obligate it to pay for any of those expenses based on a paragraph stating that its obligations would become void if the general contractor promptly pays its subcontractors for all labor and material used or reasonably required for use on the project.[85]

The court ruled in favor of the subcontractors, finding that the surety confused the paragraph that describes the condition that voids its obligation with the paragraph that details the extent of its obligation should the prime contractor fail to pay for labor or material promptly.[86] The court considered various Miller Act cases in which courts had interpreted the phrase "justly due" to include attorneys' fees and other costs, suggesting that the phrase had become a term of art applicable beyond that context.[87] Accordingly, the court ruled that the payment bond obligated the surety to pay not only for labor and material but also for other related items to which the subcontractors are entitled under the subcontract.[88]

In *Level Heating & Air Conditioning Co. v. Patriot Construction., LLC*,[89] the subcontractor's failure to assert a plausible contract claim against the prime contractor required dismissal of the payment bond claim because the surety could not be obligated to pay sums the prime contractor was not obligated to pay. It further held that lost profits were damages unre-

81. 41 F.4th 956 (8th Cir. 2022).
82. *Id.* at 958.
83. *Id.*
84. *Id.* at 959.
85. *Id.* at 958.
86. *Id.* at 959.
87. *Id.* at 959–60 (citing United States *ex rel.* Maddux Supply Co v. St. Paul Fire & Marine Ins. Co., 86 F.3d 332, 336 (4th Cir. 1996) (per curiam) (collecting cases)).
88. *Id.* at 962.
89. No. DLB-20-3154, 2021 WL 5804297 (D. Md. Dec. 7, 2021).

coverable from the surety under the Miller Act requiring dismissal of the complaint.[90]

In *Federal Engineers & Constructors, Inc. v. Relyant Global, LLC*,[91] the prime contractor terminated its subcontractor over allegedly fraudulent price quotes. The subcontractor sued the contractor and surety, claiming that the allegations of fraud were a pretense to cancel the contract and avoid payment.[92] The court rejected the subcontractor's claim for violation of the federal Prompt Payment Act on grounds that it did not confer a private right of action.[93] The court allowed the subcontractor's claim for attorneys' fees under the Tennessee Prompt Payment Act to proceed based on that statute's non-waivable provision for reasonable attorney fees for a losing party that acted in bad faith in a payment dispute.[94] However, the court granted judgment on the subcontractor's claim for attorneys' fees under the Miller Act because state law cannot create remedies for Miller Act violations.[95]

In *Insight Investments, LLC v. North American Specialty Insurance Co.*,[96] a financing company made a $410,000 payment to a subcontractor in exchange for monthly payments over the course of the project and a share of the proceeds from selling buildings after the project was completed. The subcontractor failed to make its monthly payments, and the financing company made claim against the payment bond.[97] The surety moved for summary judgment on grounds that the financing company was not a proper claimant under the bond because it had not provided labor or material.[98] In granting the surety's motion for summary judgment, the court found that the financing company did not qualify as a claimant under the bond because it had only provided only money, not material, and the plain language of the bond did not cover monetary investments.[99]

3. Limitations

In *All Seasons Landscaping, Inc. v. Travelers Casualty & Surety Co. of America.*,[100] the court dismissed the subcontractor's bond claim as untimely, holding that the one-year limitations period commenced from when the subcontractor last performed work on the project, not from the date that the

90. *Id.* at *14.
91. No. 3:19-CV-73-KAC-JEM, 2022 WL 1721454 (E.D. Tenn. May 27, 2022).
92. *Id.* at *1.
93. *Id.* at *2. The Prompt Payment Act is codified at 31 U.S.C. § 3901 *et seq*.
94. *Id.* at *6–7 (citing Tenn. Code Ann. §§ 66-34-602(b)).
95. *Id.* at *8.
96. No. CIV-20-788-G, 2022 WL 1630982 (W.D. Okla. May 23, 2022).
97. *Id.* at *1.
98. *Id.* at *7–8.
99. *Id.* at *5, *8–9.
100. No. DBD-CV21-6039074-S, 2022 WL 1135703 (Conn. Super. Ct. Apr. 4. 2022).

subcontractor performed warranty work on the project, which was not part of the "original contract."[101]

In *Diamond Services Corp. v. T.W. Laquay Marine, LLC*,[102] the subcontractor's complaint against the surety, filed five days after the Miller Act one-year statute of limitations had expired, was dismissed as untimely, even though the surety denied the claim after the limitations period had expired and the complaint was filed one business day after the claim was denied.[103] The surety's representation that it would investigate and decide the claim, without any guarantee to pay, or suggestion about when it would decide the claim, or any promise that it would not invoke limitations, or prolonged negotiations or assurances of forthcoming settlement, were insufficient to estop the surety from asserting the limitations defense under the Miller Act.[104]

In *United States v. Philadelphia Indemnity Insurance Co.*,[105] the subcontractor avoided dismissal of its complaint based on the Miller Act limitations period by plausibly alleging that the prime contractor should be estopped from relying on the limitations period, as the prime contractor actively misled the subcontractor when the subcontractor agreed to accelerate the schedule in response to the contractor's notice to cure, but the contractor still terminated the subcontractor.[106] The court also stated that equitable tolling is not generally amenable to resolution on a Rule 12(b)(6) motion to dismiss because evidence beyond the pleadings was needed for the court to evaluate the merits of whether equitable tolling excused the subcontractor's late filing of the action.[107]

In *United States v. Federal Insurance Co.*,[108] the court denied the surety's motion for summary judgment and determined that payroll records alone are insufficient to provide definitive proof of the last day of labor (when the Miller-Act statute of limitations begins to run). The court determined that, even where payroll evidence is supported by documentary evidence, when that documentary evidence is disputed or susceptible to different interpretations, a genuine issue of material fact exists which should be brought to the jury in its role as finder of fact.[109]

101. *Id.* at *82–83.
102. No. 3:21-CV-78, 2022 WL 909004 (S.D. Tex. Mar. 24, 2022).
103. *Id.* at *2–3.
104. *Id.* at *4–5.
105. No. 3:21-CV-00286, 2022 WL 1609070 (M.D. Pa. May 20, 2022).
106. *Id.* at *15.
107. *Id.* at *15–16.
108. No. CV 20-00154, 2022 WL 1436846 (N.D. Okla. May 3, 2022).
109. *Id.* at *29.

4. Proper Claimants

In *Four Star Enterprises Equipment, Inc. v. Employers Mutual Casualty Co.*,[110] the trial court entered judgment in favor of a construction-equipment lessor, who attempted to collect against a payment-bond surety on a default judgment obtained against the lessee/subcontractor for failure to pay rent.[111] The issue on appeal was whether the lessor had an interest in the lawsuit against the bond, giving it a right of recovery, where the lessor completely assigned its rights.[112] The appellate court held that the lessor did not have standing to sue the surety because the lessor assigned its rights in the bond claim to an assignee in prior litigation.[113] As such, the lessor no longer owned rights to its claim against the surety, and the assignment vested the assignee with the right, title, and interest in the claim.[114]

5. Bad Faith

In *Southern Environmental Management & Specialties, Inc. v. City of New Orleans*,[115] the appellate court affirmed the trial court's judgment in favor of the surety on a payment-bond claimant's claim for bad-faith penalties and held that a surety that issues a statutory bond under the state Public Works Act is immune from bad-faith penalties for untimely payment provided under the state's insurance code.[116] The insurance code's immunity provision provides for immunity to a surety, as it expressly provides that sureties executing payment bonds for public works contracts under the public works statute shall be immune from liability for or payment of any claims not required by the public works statute.[117] Because the immunity provision confines a surety's liability to the parameters of the Public Works Act, and given that the bad-faith penalties are located outside of the Public Works Act, the bad-faith penalties are not applicable to the statutory surety.[118]

In *Bjorn Johnson Construction v. Sompo International Holdings, Ltd.*,[119] a prime contractor sued its payment bond surety for bad faith after the surety paid a disputed subcontractor claim without investigation.[120] According to

110. 648 S.W.3d 903 (Mo. Ct. App. 2022).
111. *Id.* at 906.
112. *Id.* at 908.
113. *Id.*
114. *Id.*
115. 339 So. 3d 1234 (La. Ct. App. 2022).
116. *Id.* at 1235 (citing La. Rev. Stat. § 38:2241, *et seq.* (the Louisiana Public Works Act) and La. Rev. Stat. §§ 22:1892 & 22:1973 (sections of the Louisiana Insurance Code)).
117. *Id.* at 1238, 1242.
118. *Id.* at 1242.
119. No. 2:22-cv-19-BMM, 2022 WL 2904748 (D. Mont. July 22, 2022).
120. *Id.* at *1–2.

the contractor, the surety's agent orally described the payment as "punishment" for the prime contractor's failure to pay undisputed amounts owing to the subcontractor.[121] The court denied the surety's motion to dismiss, explaining that the prime contractor's facts, taken as true, present a plausible claim that the surety acted in bad faith by disbursing funds.[122] The court emphasized that the surety's duty to investigate arose from its receipt of multiple warnings that the claim was fraudulent and not the duty to investigate as a general matter.[123]

C. *Other Bonds*

1. Lease Bond

In *Great American Insurance Co. v. 1914 Commerce Leasing*,[124] the surety provided a guaranty lease bond on behalf of its principal, a tenant in a commercial space. As a result of the COVID-19 pandemic (a *force-majeure* event), the principal failed to make payment to the landlord under the lease.[125] The landlord sued the surety in Tennessee, where the property was located, to enforce the bond.[126] The principal initiated a receivership action in Washington (where it had its principal place of business), and the lower court granted the surety's motion to enjoin any proceedings filed against it until the receivership matter concluded.[127] The court of appeals found that the lower court erred in granting the surety's motion, reasoning that the landlord should not be restrained from suing the surety because Washington had no connection to the landlord nor jurisdiction over the bond.[128] The court of appeals also found that, while the lease may have conferred jurisdiction in Washington, liability under the lease did not extend to liability over the bond, which resulted in the Washington filing being improper.[129]

2. License and Permit Bond

In *United States v. Multi-Corp Resources, Inc.*,[130] the surety issued a statutory contractors' bond that expressly exempted application of its provisions if the work occurred on sites owned by the federal government. The prime contractor filed a crossclaim against the surety after it terminated the subcontractor for failing to complete its work on the two project sites owned

121. *Id.* at *1–3.
122. *Id.* at *2, *5.
123. *Id.* at *3.
124. No. 37959-1, 2022 WL 2047235 (Wash. Ct. App. 2022).
125. *Id.* at *4.
126. *Id.* at *5.
127. *Id.* at *8.
128. *Id.* at *9, *16–17.
129. *Id.* at *16.
130. No. 2:21-cv-1681, 2022 WL 2482237 (D. Nev. July 6, 2022).

by the federal government.[131] The court granted the surety's motion to dismiss because the statute's express intent was not to extend coverage on the bond, but to provide recourse for acts that the statute declared to be unlawful.[132]

In *Caskey v. Old Republic Surety Co.*,[133] the claimant sued the surety on a contractor's licensing bond, alleging that the installation of her mobile home was defective, which caused damage, and that the surety failed to fulfill its statutory duties underlying the bond.[134] The appellate court affirmed the lower court's dismissal of the claimant's suit on summary judgment.[135] While the case law allows for claims to be made against sureties only by the insurance commissioner, an exception exists where a third party can bring tort claims against the surety if a lawsuit is initiated against the contractor and the surety within two years from the date of substantial completion.[136] Because the claimant failed to file a proper claim against the surety as required by the state's consumer protection act, the surety's duty to investigate was not triggered.[137]

3. Motor Vehicle Dealer Bond

In *Parish v. Ohio Casualty Insurance Co.*,[138] plaintiff sued a vehicle dealer and its surety for selling a vehicle with defects, misrepresenting the quality of the vehicle, and not advising plaintiff of an unreported accident history. The dealer filed a motion to compel arbitration, but the dealer never appeared, and the arbitrator awarded judgment in favor of plaintiff.[139] The case then proceeded against the surety.[140] The surety sought to exclude evidence of the arbitration; in response, the plaintiff argued that the surety should be collaterally estopped from re-litigating issues already decided in the arbitration between plaintiff and the dealer.[141] In affirming that the collateral estoppel defense was inappropriate, the appellate court reasoned that the plaintiff should have joined the surety in the arbitration proceedings to prevent diverging or inconsistent judgment or awards.[142]

131. *Id.* at *5.
132. *Id.* at *7.
133. 506 P.3d 650 (Wash. Ct. App. 2022).
134. *Id.* at 653.
135. *Id.* at 658.
136. *Id.* at 655–56 (citing Tank v. State Farm Fire & Cas. Co., 715 P.2d 1133 (Wash. 1986); Wash. Rev. Code § 18.27.117).
137. *Id.* at 657 (citing Wash. Rev. Code § 18.27.117(3)).
138. E075135, 2022 WL 1438099, *4–5 (Cal. Ct. App. 2022).
139. *Id.* at *3–4.
140. *Id.* at *4.
141. *Id.*
142. *Id.* at *8–9.

4. Probate Bond

In *Brazda v. SureTec Insurance Co.*,[143] the probate court awarded statutory penalties to the beneficiaries of an estate for the administrator's failure to make distributions.[144] The beneficiaries sought payment of the penalties from the administrator's surety.[145] The appellate court affirmed summary judgment for the surety as it was not liable for statutory penalties pursuant to the bond language and the statutory language, observing that the legislature was deliberate in enacting surety liability in other sections of the statute, and such liability was not present in the statute at issue.[146]

5. Public Official Bond

In *Knibbs v. Momphard*,[147] the estate of a decedent who was killed by a sheriff's deputy sued the deputy and his surety for various constitutional violations and wrongful death. The district court granted summary judgment to the deputy and surety, finding that the deputy's conduct was reasonable and that he was entitled to governmental immunity.[148] The Fourth Circuit found that there were enough facts to show that the deputy did not act reasonably under the circumstances and had not unnecessarily used excessive force.[149] It further found that the facts precluded any finding of any public official immunity as a matter of law.[150] While the district court denied the estate's bond claim, alleging that there was no evidence that the deputy acted tortiously, the Fourth Circuit disagreed, reasoning that public official immunity does not immunize a municipality from liability for torts committed by a municipal employee acting in his official capacity.[151] Where a municipality waives its governmental immunity pursuant to a sheriff's surety bond and is being sued for its own conduct in its official capacity, the sheriff's public official immunity is of no consequence.[152] Accordingly, the municipality waived its governmental immunity from the estate's wrongful death claims to the extent of the bond's penal sum.[153] Thus, even if the deputy was entitled to governmental immunity, such immunity did not absolve the claims against the municipality for the deputy's conduct in his official capacity.[154]

143. No. 01-21-00482-CV, 2022 WL 3363190 (Tex. App. Aug. 16, 2022).
144. *Id.* at *3. Statutory penalties were assessed pursuant to Tex. Est. Code Ann. § 360.301.
145. *Id.*
146. *Id.* at *13–14 (citing Tex. Est. Code Ann. § 360.301).
147. 30 F.4th 200, 212 (4th Cir. 2022).
148. *Id.* at 212–13.
149. *Id.* at 217.
150. *Id.* at 226.
151. *Id.* at 226–27, 231.
152. *Id.* at 231.
153. *Id.*
154. *Id.*

In *Stevens County Rasmussen v. Travelers Surety & Casualty Co. of America*,[155] the appellate court reversed a summary judgment order against three county commissioners for the alleged misuse of public funds. The lower court found that each of the three commissioners was personally liable, along with their sureties, for "misuse" of funds under the county's homeless plan, and granted summary judgment to the county.[156] The appellate court found that the commissioners were taking action as a legislative body and not in any individual capacity.[157] As a result, the commissioners could not be liable under the terms of their respective bonds.[158] The sureties did not appeal the lower court's judgment, and therefore summary judgment was maintained against them.[159]

6. Release of Lien Bond

In *RAM Construction Services of Cleveland, LLC v. Key Construction, Inc.*,[160] the district court granted summary judgment to a release-of-lien bond surety based on a lien waiver provision in the subcontract between the bond claimant and general contractor. The court recognized that, if the mechanic's lien would not have been enforceable as invalid, the surety cannot be held responsible to pay on the bond.[161] State law did not require independent consideration for the lien waiver as it is one of many terms that are part of the subcontract and the subcontract was supported by consideration.[162] Valid consideration supported the subcontract, and the court held that there was no dispute that the surety paid the claimant for the work that was not in dispute, and, as such, the surety was entitled to summary judgment on the claimant's release-of-lien bond claim.[163]

D. *Rights of Surety*

1. Indemnity

In *Westchester Fire Insurance Co. v. Edge Electric, LLC*,[164] the surety sought a default judgment against its principal for indemnification, including losses and attorney fees. The court concluded that the surety was entitled to compensatory damages to indemnify it for its loss related to a settlement that it paid under a bond, but it was unable to find that the surety was entitled to

155. 507 P.3d 417, 418 (Wash. Ct. App. 2022).
156. *Id.* at 418–19.
157. *Id.* at 420.
158. *Id.* at 422.
159. *Id.*
160. No. 1:20-CV-2227, 2022 WL 3699390, *8-9 (N.D. Ohio Aug. 26, 2022).
161. *Id.*
162. *Id.*
163. *Id.*
164. No. 8:22CV170, 2022 WL 4388797, *1-3 (D. Neb. Sept. 22, 2022).

attorney fees.[165] The court reasoned that it has long refused to enforce contractual provisions providing for the award of attorney fees for the prevailing party, instead holding to the American Rule that each party pay its own costs.[166] Because the surety did not give any reason why the American Rule would not apply, the court denied the surety's claim for attorney fees.[167]

In *Great American Insurance Co. v. LC Paving & Construction, LLC*,[168] the district court held that default judgment against the indemnitors was procedurally warranted, as the indemnitors received proper service but failed to answer the complaint, and that the surety's claims were meritorious as to the indemnitors' breach of the indemnity agreement.[169] The court further held that the surety requested appropriate relief, including its action for an injunction for specific performance and indemnification for losses and expenses incurred in procuring and executing the bond.[170] The court, however, denied the surety's request for attorneys' fees and costs because the surety only requested such relief vaguely (i.e., "[surety] requests 'other and further relief, at law or in equity, to which [surety] may be justly entitled'").[171]

In *US Fire Insurance Co. v. Martin Contractors, LLC*,[172] after the principal's bankruptcy, the surety sued the non-bankrupt indemnitors and filed a motion for summary judgment on its claims for its losses and expenses under the indemnity agreement.[173] In response, the indemnitors argued that the surety's payments in satisfaction of the bond claims violated the bankruptcy's automatic stay as the payments went to creditors that were named in the bankruptcy.[174] The court disagreed and found that an action against a surety to recover under a bond does not violate the automatic stay because the bond is not property of the debtor's estate.[175] Additionally, the debts owed to the claimants transfer to the surety upon payment of the claim, and, to the extent the indemnitors indemnify the surety for these losses, the surety's claim against the debtor will decrease accordingly.[176]

165. *Id.* at *4.
166. *Id.*
167. *Id.* at *5.
168. No. 6:21-CV-01028-ADA, 2022 WL 718796 (W.D. Tex. Mar. 9, 2022).
169. *Id.* at *7–8.
170. *Id.* at *8–10.
171. *Id.* at *14–15.
172. No. 21-00226-CG-B, 2022 WL 4227527 (S.D. Ala. Sept. 13, 2022).
173. *Id.* at *1–2.
174. *Id.* at *3–4.
175. *Id.* at *4.
176. *Id.*

2. Bankruptcy

In *Argonaut Insurance Co. v. Falcon V, LLC (In re Falcon V, LLC)*,[177] the Fifth Circuit affirmed the district and bankruptcy courts' decisions that the surety's bond program with the principal was not an executory contract and that the principal, accordingly, did not assume the bond program in its bankruptcy plan. The bond program was not an executory contract because, at the time of the principal's bankruptcy filing, the failure of either party to complete performance would not constitute a material breach of the contract, thereby excusing the performance of the other party.[178] The bonds issued pursuant to the bond program were irrevocable, meaning that, even if the principal failed to perform, the surety would not be excused from its performance obligations to the obligees.[179] Because the principal's failure to perform would not excuse the surety from performing, the bond program was not an executory contract, and it was not assumed under the principal's bankruptcy plan.[180]

In *Fidelity & Deposit Co. of Maryland v. TRG Venture II, LLC*,[181] the surety appealed a bankruptcy court's ruling that found the surety to be in civil contempt and assessed $9.5 million in damages against the surety. In its bankruptcy, the principal entered into a plan, to which the surety consented, which enjoined all parties subject to the plan from pursuing any released claims against any party covered by the plan.[182] A third party purchased property from the bankruptcy trust that was connected to the surety.[183] The obligees related to the property sued the third party and the surety in state court seeking performance on the contract between the principal and the obligees.[184] The surety filed counterclaims or third-party claims against the third party under theories of indemnity and/or unjust enrichment.[185]

The third party eventually sought an order from the bankruptcy court enforcing the plan and asserting that the plan barred the surety's state-law claims for indemnity and unjust enrichment.[186] The bankruptcy court granted the third party's motion, finding that, in consenting to the plan, the

177. 44 F.4th 348, 350–52 (5th Cir. 2022).
178. *Id.* at 355 (applying the Countryman test, Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 Minn. L. Rev. 439, 460 (1973), finding that while the first prong, that a contract is executory if performance remains due to some extent on both sides, may have been satisfied, the second prong described above was not).
179. *Id.* at 355.
180. *Id.*
181. No. 20 C 6105, 2022 WL 952737, *2, 5 (N.D. Ill. Mar. 30, 2022).
182. *Id.* at *3–4.
183. *Id.* at *4.
184. *Id.*
185. *Id.*
186. *Id.* at *4–5.

surety had released its state-law claims against the third party and awarding $9.5 million to the third party.[187] The surety appealed the court's decisions at every opportunity.[188] Ultimately, the district court affirmed the bankruptcy court's decision, finding that the surety had repeatedly and knowingly violated the terms of the plan, that the surety provided no substantive authority for its positions, and that there was no basis to find the bankruptcy court's granting of the motion and assessing contempt damages to be erroneous.[189]

3. Collateral Deposit

In *31 Holdings I, LLC v. Argonaut Insurance Co.*,[190] the trial court issued an order restraining the indemnitors from transferring, encumbering, or otherwise dissipating assets and requiring the indemnitors to post $3,630,500.00 as collateral pursuant to the Indemnity Agreement.[191] The appellate court affirmed the trial court's finding that the surety lacked an adequate remedy at law as to its claims and that the surety demonstrated irreparable injury.[192] In reversing the portion of the temporary restraining order related to depositing collateral, the appellate court found that the surety failed to satisfy its burden as to the mandatory injunctive relief provision requiring the indemnitors to deposit collateral by failing to (1) address or explain how the requirement to deposit collateral is part of a prohibitive injunction or incidental to its requested prohibitive relief; and (2) describe how the record demonstrates that such deposit was necessary to prevent irreparable injury or extreme hardship as required by Texas law related to mandatory injunctions.[193]

4. Contract Funds

In *Oriental Bank v. Builders Holding Company, Corp. (In re Builders Holding Company, Corp.)*,[194] an obligee ignored a letter of direction and deposited funds assigned to the surety into the principal's bank account. The bank applied the obligee's funds to a debt owed by the principal to the bank.[195] When the bank refused to return the funds, the principal filed for bankruptcy protection and instituted an adversary proceeding against the obligee and the bank.[196] The surety intervened and filed a counterclaim against

187. *Id.* at *5.
188. *Id.*
189. *Id.* at *16.
190. 640 S.W.3d 915 (Tex. App. 2022).
191. *Id.* at 922.
192. *Id.* at 926–27.
193. *Id.* at 928.
194. 43 F.4th 1, 4 (1st Cir. 2022).
195. *Id.*
196. *Id.*

the obligee, the principal, and the bank.[197] The bankruptcy court granted summary disposition to the surety on its claims against the bank, finding that the bank's set-off was not permitted under the Bankruptcy Code and that the bank was required to return the funds to the obligee.[198] The First Circuit vacated the bankruptcy court's decision, finding that the facts did not favor the surety because the statute obligated the return of funds if the principal is required to return a payment that it received from the obligee, but the facts of the case were that a third party was being required to return the payment that the third party received from the obligee, so the statute did not apply.[199] The First Circuit further remanded the case on the question of whether the set-off is senior to the surety's secured interest in the same collateral.[200]

5. Insurance/Co-Surety

In *Berkley Regional Insurance Co. v. Capitol Specialty Insurance Corp.*,[201] the surety sued the principal's two general liability insurers for equitable subrogation after it paid a performance bond claim. Under California law, the general liability insurer is only obligated to indemnify the insured for money ordered by a court.[202] The general liability insurers filed motions to dismiss, claiming that the surety never became legally obligated to pay damages to the obligee, so the surety's equitable subrogation claim must fail.[203] The court agreed, finding that the surety's payments to the obligee were not money ordered by a court, and dismissing the surety's complaint.[204]

6. Incorporation by Reference

In *Engineering & Construction Innovations, Inc. v. Bradshaw Construction Corp.*,[205] a prime contractor terminated a subcontract after the subcontractor failed to timely complete performance and sued the subcontractor and its surety.[206] The surety moved to strike the prime contractor's jury demand, arguing that the performance bond incorporated by referencing the subcontract's jury waiver provision.[207] The court denied the motion, explain-

197. *Id.* at 5.
198. *Id.* at 6.
199. *Id.* at 7. The law at issue is Article 1795, P.R. Laws Ann. tit. 31 § 5121.
200. *Id.* at 6, 8.
201. No. CV 20-6622 FMO (Ex), 2022 U.S. Dist. LEXIS 174458, *2-3 (C.D. Cal. Sept. 26, 2022).
202. *Id.* at *9, citing Certain Underwriters at Lloyd's of London v. Superior Ct., 16 P.3d 94 (Cal. 2001).
203. *Id.* at *8.
204. *Id.* at *10–13.
205. No.20-cv-0808, 2022 WL 3585153 (D. Minn. Aug. 22, 2022).
206. *Id.* at *1.
207. *Id.* at *2, 4.

ing that it would not impute the jury waiver to the surety because the jury waiver was expressly limited to the prime contractor and subcontractor.[208] The court further explained that the "liberal policy favoring enforcement of arbitration agreements does not apply in the jury waiver context when there is both a federal policy favoring jury trials and a presumption against waiver."[209]

II. FIDELITY LAW

A. *Computer Fraud*

In *Ernst & Haas Management Co., Inc. v. Hiscox, Inc.*,[210] the insured alleged that it sustained a loss when its employee was tricked into processing wire transfers to a fraudulent party after receiving email requests from an unknown person(s) purporting to be a supervisor.[211] The insured submitted the claim under its commercial crime policy, which provided coverage for a loss of money resulting "directly" from "Computer Fraud" or "Funds Transfer Fraud."[212] When the insurer denied coverage, the insured filed suit alleging breach of contract and other claims.[213] The court analyzed the language of the insured's original (earlier) policy, which, in the insured's view, provided broader coverage than the policy in effect when the insured discovered the alleged loss. The Ninth Circuit found that the insured's loss fell within both policy provisions. The court found that the district court improperly (1) analyzed the case as if it involved theft of funds *authorized* for payment, where "the entire purpose of [the fraudster's] email invoice was to provide *fraudulent* authorization"; (2) limited the "Computer Fraud" provision to mean a direct loss is limited to unauthorized computer use, like hacking; and (3) limited Funds Transfer Fraud to exclude fraudulent instructions to the insured's employee.[214]

In *City of Unalaska v. National Union Fire Insurance Co.*,[215] the city insured brought an action against the insurer after it denied the city coverage under the computer fraud insuring agreement of the city's government crime policy for losses resulting from funds transferred in response to fraudulent email requests.[216] The court found that, under Alaska law, fraudulent emails wherein the fraudulent party arranged to receive electronic transfers from the city and requested such payments came within the meaning of "use of a

208. *Id.* at *4–5.
209. *Id.* at *4 (cleaned up).
210. 23 F. 4th 1195 (9th Cir. 2022).
211. *Id.* at 1196.
212. *Id.* at 1198.
213. *Id.* at 1199.
214. *Id.* at 1200–03.
215. 591 F. Supp. 3d 440 (D. Alaska 2022).
216. *Id.* at 443.

computer," as that phrase would be understood by a reasonable insured.[217] Accordingly, the Computer Fraud insuring agreement applied to provide coverage for the city's losses resulting from transfers responding to such emails, despite the insurer's contention that the insuring agreement covered only computer hacking.[218] The court opined further that, although computer usage was ubiquitous, a reasonable layperson would consider the use of a computer to encompass a broad range of activities, including the sending of emails.[219]

B. *Discovery: Work Product; Attorney-Client Privilege*

In *Discovery Land Co. LLC v. Berkley Insurance Co.*,[220] the insured claimed an attorney defrauded it out of $18 million in connection with the purchase of a castle.[221] Four months after the insured uncovered the fraud, it requested that its insurer retroactively issue an endorsement adding the insured's wholly-owned entity, formed to purchase the castle, as an additional "named insured" under the policies.[222] The insurer agreed and the insured submitted proofs of loss related to the added entity.[223] After the insurer denied the claims, the insured filed a lawsuit.[224] In response to discovery requests, both parties objected to certain productions based on work product and attorney-client privileges.[225] The court ordered an *in camera* review of communications the insured claimed as privileged under the crime fraud exception and declined to compel production of the insurer's materials after the date that the insurer's outside counsel provided coverage analysis recommending claim denial.[226]

C. *Fidelity Bond – Indirect Loss Exclusion*

In *New Hampshire Insurance Co. v. MF Global Finance USA Inc.*,[227] a broker, associated with the insured and paid on a commission basis, violated federal law and sustained a $141 million loss while trading commodities futures from his personal trading account using the insured's electronic trading system.[228] The insured covered the debt, reported the loss, and made a claim on its fidelity bonds.[229] The insurers denied the claim, stating that

217. *Id.* at 451.
218. *Id.*
219. *Id.*
220. No. CV-20-01541-PHX-JJT, 2022 WL 194527 (Jan. 21, 2022 D. Ariz.).
221. *Id.* at *1.
222. *Id.*
223. *Id.*
224. *Id.* at *3.
225. *Id.* at *1.
226. *Id.* at *14.
227. 204 A.D.3d 141 (N.Y. Sup. Ct. 2022).
228. *Id.* at 145–46.
229. *Id.* at 146.

the insured did not suffer a "direct financial loss" and the broker was not an "employee." Litigation ensued, and both parties moved for summary judgment. The Supreme Court of New York found that the bonds covered the losses and that the insured was entitled to summary judgment as the exclusions did not apply and the loss was not indirect.[230] The court's ruling relied on the criminal plea agreement, equitable estoppel principles due to the insurer's previous arguments, and the court's prior factual rulings.[231]

D. *Damages and Indirect Loss*

In *Landmark American Insurance Co. v. Esters*, [232] the insured, an insurance agency, brought a claim against its insurer's crime policy to recover customers' premium payments stolen by the insured's employee and hurricane damage claims from customers that lacked insurance due to the stolen premiums.[233] The insurer moved for summary judgment, citing to cases holding that fidelity bond policies such as the policy at issue are intended to only cover direct losses but not liability claims and arguing that the hurricane damage claims were "indirect" losses excluded by the policy.[234] The court denied the insurer's motion, holding that (1) the policy language alone would determine the extent of the policy's coverage; and (2) the policy's exclusion for indirect losses included a "savings clause" under which indirect losses, including damages for which the insured was liable, could be covered.[235] The court concluded that the policy was, at a minimum, ambiguous as to coverage for such indirect losses and thus would cover the hurricane claims if the insured could establish that all elements of the "savings clause" in the policy applied.[236]

E. *Financial Institution Bond—Notice*

In *Mabrey Bancorporation, Inc. v. Everest National Insurance Co.*,[237] the insured bank brought a claim against its insurer's financial institution bond to indemnify it for losses due to unauthorized withdrawals from the insured's ATMs by thieves using counterfeit debit cards. The court granted the insurer's summary judgment motion, holding that (1) the insured failed to provide the required notice to the insurer within sixty days of discovery; and (2) a showing of prejudice, as required by the notice-prejudice exception under Oklahoma law, was inapplicable to a financial institution

230. *Id.* at 157.
231. *Id.*
232. No. 2:20-CV-1263, 2022 WL 1719415 (W.D. La. Apr. 27, 2022).
233. *Id.* at *1.
234. *Id.*
235. *Id.* at *4–5.
236. *Id.* at *5.
237. No. 4:19-cv-00571-RJS-JFJ, 2022 WL 1410715 (N.D. Ok. May 4, 2022).

bond.[238] As to the latter issue, the court found (1) public policy grounds for the notice-prejudice exception, to protect third-party members of the public, are inapplicable to financial institution bonds; (2) financial institution bonds are structurally analogous to claims made policies, for which Oklahoma courts had rejected the application of the notice-prejudice exception; and (3) parties to financial institution bonds do not need protection from their strict enforcement because the policy terms are fairly negotiated between them.[239]

F. *Voluntary Parting*

In *Central Mutual Insurance Co. v. Reliance Property Management, Inc.*,[240] the insured brought a claim against its insurer's commercial lines policy based on a wire transfer payment that the insured's employee was fraudulently induced into making by an unknown person. Based on the jury's verdict, the trial court awarded judgment in the insured's favor.[241] The Texas Court of Appeals affirmed the judgment but reversed in part, overturning the bad-faith damages awarded by the jury.[242] The court found that (1) the policy's "voluntary parting" exclusion and fraud-based crimes endorsement gave rise to an unreconcilable ambiguity that was properly resolved in favor of the insured despite the jury's finding to the contrary; (2) sufficient evidence supported the jury's finding that fraudulent emails directing wire transfer payments fell within the policy's forgery coverage; (3) the jury's finding that the insurer did not fail to pay the amount owed was immaterial as the jury also found that the insured had suffered a loss resulting directly from forgery and it was undisputed that the insurer did not pay for the loss, which the court concluded was covered by the policy; and (4) the insured failed to offer any evidence in support of the bad-faith damages awarded, requiring a reversal of that portion of the judgment.[243]

G. *Social Engineering Fraud*

In *SJ Computers, LLC v. Travelers Casualty & Surety Co. of America*,[244] the insured alleged losses resulting from wire transfers made by the insured's CEO to a fraudster in response to emails sent from the hacked email account of the insured's purchasing manager were covered under the policy's computer fraud coverage. The court held that (1) the insured's losses were not covered under computer fraud coverage provisions; (2) even if

238. *Id.* at *9.
239. *Id.* at *12–15.
240. No. 05-21-00071-CV, 2022 WL 1657031 (Tex. App. May 25, 2022).
241. *Id.* at *1.
242. *Id.*
243. *Id.* at *6–10.
244. No. 21-CV-2482 (PJS/JFD), 2022 WL 3348330 (D. Minn. Aug. 12, 2022).

the insured's losses were from computer fraud, an exclusion (which did not apply to the social engineering coverage) for a loss resulting from fraudulent instructions "used as source documentation to enter Electronic Data or send instructions" precluded coverage; and (3) the insured's losses resulted from social engineering fraud as defined in policy.[245] Accordingly, the court found that the loss suffered by the insured fell "squarely" within the policy's social engineering fraud provision, with a $100,000 coverage limit, and not under the policy's computer fraud provision, with a $1 million limit.[246] The court stated that the policy "clearly anticipates—and clearly addresses—precisely the situation that gave rise to" the insured's loss, and the policy "bends over backwards to make clear that this situation involves social-engineering fraud, not computer fraud."[247]

H. *Cumulation of Limits/Occurrence*

In *Town of Anmoore v. Scottsdale Indemnity Co.*,[248] the insured discovered that utility clerks employed by the town had embezzled money from the insured.[249] The insurer paid the 2012–2013 policy limit of $50,000 under the insured's public entity policy.[250] The insured then requested that the insurer evaluate whether embezzlement during the 2011–2012 policy period was also covered, to which the insurer denied coverage after determining that multiple acts of embezzlement constituted one occurrence and the policy limits did not cumulate year to year.[251] The insured filed a lawsuit alleging (1) breach of contract and the contractual duty of good faith and fair dealing; (2) insurance bad faith; and (3) vicarious liability for the acts of the adjustors and agents.[252] The court examined (1) whether the insurance coverage at issue constituted one continuous policy or multiple policies; and (2) whether the definition of occurrence in the policies was ambiguous.[253] The court concluded that it was clear from the policy that the parties intended the public entity policy to be one continuous policy, as the declaration page of the 2012–2013 policy form expressly stated that it was a renewal of the 2011–2012 policy form and, further, that the employee dishonesty coverage had remained the same since the insured's (first) 2006–2007 policy.[254] The court also found that the policy unambigu-

245. *Id.*
246. *Id.* at *1.
247. *Id.* at *5.
248. No. 1:21CV142, 2022 WL 3221826 (N.D.W. Va. Aug. 9, 2022).
249. *Id.* at *1–2.
250. *Id.* at *1.
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.* at *2.

ously defined multiple acts of embezzlement as one occurrence, and unambiguously restricted recovery to acts occurring in the policy period and prevented cumulation of policy limits from year to year.[255]

I. *Claim File Production*

In *Town of Anmoore v. Scottsdale Indemnity Co.*,[256] the insured town brought a lawsuit against the insurer for its coverage denial for alleged losses sustained from theft of funds by the insured's employee.[257] Following bifurcation of a bad-faith claim, the insured sought production of the claim file, as well as all communications authored by or with the primary insurance adjuster.[258] The insurer objected to the request on the basis that (1) the documents were not relevant to issues being litigated regarding the existence of insurance coverage as the parties bifurcated the claim of bad faith; and (2) it sought information protected by the work product doctrine and the attorney-client privilege.[259] The court found that the documents were relevant and should be disclosed as they would show, for example, how the insurer viewed the insured's request for coverage and the insurer's understanding of certain terms.[260] However, the court found that certain portions of the materials (for example, material generated after the declination and thus in anticipation of litigation) were protected by the attorney-client privilege and/or work product doctrine, and thus need not be disclosed.[261]

J. *Employee Theft*

In *Heartland Construction, Inc. v. Travelers Casualty & Surety Co. of America*,[262] the court granted the insurer's partial motion to dismiss, dismissing the complaint to the extent it sought damages under Insuring Agreements B. (Forgery or Alteration), C. (On Premises), and F. 1 (Computer Fraud) of the insured's commercial crime policy.[263] In the underlying claim, an employee of the insured wrongfully altered a contract.[264] The insured sought recovery under Insuring Agreements A.1. (Employee Theft); B.; C.; and F.1.[265] The insurer cited Exclusion D, which limited coverage caused directly or indirectly by an employee to Insuring Agreements A.1., A.2., A.3., F.2., or H.[266]

255. *Id.* at *5.
256. No. 1:21-CV-142, 2022 WL 2079190 (N.D. W. Va. June 8, 2022).
257. *Id.* at *1.
258. *Id.* at *3.
259. *Id.*
260. *Id.* at *3–5.
261. *Id.*
262. No. 2:21CV43 (RCY), 2022 WL 391308 (E.D. Va. Feb. 8, 2022).
263. *Id.* at *2.
264. *Id.* at *1.
265. *Id.*
266. *Id.* at *2.

As the loss resulted from the unlawful actions of the employee, the insurer argued that the exclusion would limit coverage for loss to that provided by Insuring Agreements A.1, A.2, A.3., F.2., or H.[267] The insured argued that the exclusion would apply "unless" the loss was covered under Insuring Agreements A.1., A.2., A.3., F.2., or H. and that, under this interpretation, the loss would be covered under each of the policy's nine insuring agreements.[268] The court found Exclusion D. unambiguous, stating that "it can be reasonably understood in only one way—to exclude coverage for loss resulting from fraudulent, dishonest, or criminal acts of employees unless coverage is available under one or more of the five enumerated Insuring Agreements."[269]

A subsequent decision in *Heartland Construction, Inc. v. Travelers Casualty & Surety Co. of America*, concerned whether a contract allegedly stolen from the insured constituted a "Security" under the policy because it was a subcontract that represented the insured's "Money."[270] The insured argued that the policy's definition of "Securities" as found in Employee Theft insuring agreement applied to the contract as a "contract representing Money or property" because it entitled the insured to a certain payment and the theft and destruction of the contract by the employee was an intentional, unlawful taking of the true subcontract that constitutes theft of a "Security."[271] The court found that the contract itself did not represent "Money" or a "Security" and granted the insurer's motion.[272]

K. *Definition of Hold*

In *RealPage, Inc. v. National Union Fire Insurance Co. of Pittsburgh*,[273] the insured's employee clicked a fake link in an email and provided the insured's login information to a third-party payment processor.[274] Bad actors then used a phishing scheme to steal login credentials and divert tenant rent payments intended for the insured's property management clients.[275] The insured reimbursed its clients and, having lost approximately $6 million, filed claims under its commercial crime policies for the stolen funds.[276] The primary insurer denied coverage, determining that the losses were not covered because the insured never "held" them as required by the policy.[277]

267. *Id.* at *4.
268. *Id.* at *3.
269. *Id.*
270. No.2:21CV43 (RCY), 2022 WL 4016884 (E.D. Va. Aug. 30, 2022).
271. *Id.*
272. *Id.*
273. 21 F.4th 294 (5th Cir. 2021).
274. *Id.* at 295.
275. *Id.*
276. *Id.*
277. *Id.*

The insured filed a lawsuit against its insurer challenging the denial of coverage.[278] In affirming the lower court's grant of summary judgment for the insurer, the United States Court of Appeals for the Fifth Circuit found that the insured never possessed or controlled the rental funds and, as such, never "held" them as required for coverage.[279]

L. *War or Hostile Acts Exclusion in Ransomware Attack*

In *Merck & Co., Inc. v. Ace American Insurance Co.*,[280] malware infected the insured's computer systems worldwide.[281] The insured had purchased "all risks" policies covering losses caused by corruption of computer data and software.[282] The insurers contended that the policies contained an applicable "hostile/warlike action" exclusion claiming that the source of the malware was from the Russian government as part of its hostilities against Ukraine.[283] The insured sued its insurer and the parties filed competing summary judgment motions. The parties disputed whether the facts conclusively showed that the malware was from the Russian government against Ukraine, which would fall within the "hostile/warlike action" exclusion of the policies.[284] The Superior Court of New Jersey rejected the insured's argument and found that the exclusion only applied to traditional forms of warfare and the insured never amended to the language exclude modern cyber-based attacks.[285]

278. *Id.*
279. *Id.* at 299.
280. No. UNN-L-2682-18, 2021 N.J. Super. Unpub. LEXIS 4566 (Dec. 6, 2021).
281. *Id.* at *1.
282. *Id.*
283. *Id.* at *1–2.
284. *Id.* at *2.
285. *Id.* at *11.