

**SEVENTH ANNUAL
NORTHEAST SURETY AND FIDELITY CLAIMS
CONFERENCE
OCTOBER 24-25, 1996**

***LIMITATIONS AND NOTICE DEFENSES TO PAYMENT BOND
CLAIMS -- CAN THE COURTS STILL BE RELIED UPON
TO ENFORCE THE SURETY'S RIGHTS?***

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Introduction

Most labor and material payment bonds, and the statutes that call for them on public improvement projects, require that claimants comply with certain notice of claim provisions. Similarly, a claimant that files suit against a payment bond surety must commence the action within the limitations period set forth in the bond or statute. The enforceability of these provisions has consistently been upheld by the courts. Some recent case law, however, indicates an unmistakable pro-claimant bias, particularly where requirements in the bond differ from those in a statute applicable to the same claim. Other recent decisions appear to enhance the payment bond surety's rights and defenses. This paper discusses some recent developments in the law regarding the surety's limitations and notice defenses to payment bond claims.

Sureties asserting these defenses can expect payment bond claimants to argue that they are not or should not be bound by the terms of the bond. After all, the claimant is not a signatory to the bond, and did not agree to its conditions. Almost without exception, however, the courts have enforced the notice provisions and short limitations periods set forth in payment bonds.

In Ribeira & Lourenco Concrete Construction, Inc. v. Jackson Health Care Assocs., the Appellate Division of the Superior Court of New Jersey ruled that a payment bond claimant is a third-party beneficiary, whose rights are measured by the terms of the bond.² The court stated that a surety can be liable only in accordance with the strict terms of its bond, and added that:

Contrary to plaintiff's argument, a one-year limitation period in a bond, such as the one under review, is valid, reasonable and enforceable. [Citations omitted.] Although there does not appear to be any reported decision precisely on point in New Jersey, there is persuasive authority elsewhere that the one-year limitation period bars any action filed after the one-year period even though the claimant, such as plaintiff here, had no knowledge of such bond provision.³

New York courts are in agreement. For example, in Timberline Electric Supply Corp. v. Ins. Co. of North America,⁴ the Appellate Division granted the surety's motion for summary judgment on the ground that the claimant's action was barred by the one-year limitations clause contained in the payment bond. The court reasoned that:

¹ The writer wishes to acknowledge the contribution of Marc D' Angiolillo, Esq. who assisted in the preparation of this article.

² 231 N.J. Super. 16, 21 (App. Div. 1989), aff'd, 118 N.J. 419 (1990).

³ Id. at 22.

⁴ 72 A.D.2d 905, 421 N.Y.S.2d 987 (4th Dep't 1979), aff'd, 436 N.Y.S.2d 707 (1980).

Although the period of limitation for an action based on a contractual obligation is set by statute (CPLR 213), the parties may by written agreement establish a shorter period. Absent proof that the contract is one of adhesion or the product of overreaching, or that the altered period is unreasonably short, the abbreviated period of limitation will be enforced.⁵

AIA Payment Bond Limitations Periods and Notice Provisions

Frequently, the contractual limitations period or notice requirement in issue is that which is set forth in one of the AIA payment bond forms. AIA Labor and Material Payment Bond Document A-311 provides that:

No suit or action shall be commenced hereunder by any claimant:

(a) Unless claimant, other than one having a direct contract with the Principal, shall have given written notice to any two of the following: the Principal, the Owner, or the Surety above named, within ninety (90) days after such claimant did or performed the last of the work or labor, or furnished the last of the materials for which said claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the materials were furnished, or for whom the work or labor was done or performed. Such notice shall be served by mailing the same by registered mail or certified mail, postage prepaid, in an envelope addressed to the Principal, Owner or Surety, at any place where an office is regularly maintained for the transaction of business, or served in any manner in which legal process may be served in the state in which the aforesaid project is located, save that such service need not be made by a public officer.

(b) After the expiration of one (1) year following the date on which Principal ceased Work on said Contract, it being understood, however, that if any limitation embodied in this bond is prohibited by any law controlling the construction hereof such limitation shall be deemed to be amended so as to be equal to the minimum period of limitation permitted by such law.

AIA Payment Bond Document A-312 sets forth more demanding notice requirements and a more complicated limitations clause. The following language appears in the A-312 payment bond:

4. The Surety shall have no obligation to Claimants under this Bond until:

⁵ Id. at 988. Also see Krugman & Fox Construction Corp. v. Elite Assocs., Inc., 562 N.Y.S.2d 188 (N.Y. App. Div. 1990), appeal denied, 568 N.Y.S.2d 913 (N.Y. 1991).

* * *

4.2 Claimants who do not have a direct contract with the Contractor:

1. Have furnished written notice to the Contractor and sent a copy, or notice thereof, to the Owner, within 90 days after having last performed labor or last furnished materials or equipment included in the claim stating, with substantial accuracy, the amount of the claim and the name of the party to whom the materials were furnished or supplied or for whom the labor was done or performed; and
2. Have either received a rejection in whole or in part from the Contractor, or not received within 30 days of furnishing the above notice any communication from the Contractor by which the Contractor has indicated the claim will be paid directly or indirectly; and
3. Not having been paid within the above 30 days, have sent a written notice to the Surety (at the address described in Paragraph 12) and sent a copy, or notice thereof, to the Owner, stating that a claim is being made under this Bond and enclosing a copy of the previous written notice furnished to the Contractor.

With regard to filing suit against the surety, the A-312 bond provides that:

No suit or action shall be commenced by a Claimant under this Bond other than in a court of competent jurisdiction in the location in which the work or part of the work is located or after the expiration of one year from the date (1) on which the Claimant gave the notice required by Subparagraph 4.1 or Clause 4.2.3, or (2) on which the last labor or service was performed by anyone or the last materials or equipment were furnished by anyone under the Construction Contract, whichever of (1) or (2) first occurs. If the provisions of this Paragraph are void or prohibited by law, the minimum period of limitation available to sureties as a defense in the jurisdiction of the suit shall be applicable.

Statutes of Limitations and Statutory Notice Provisions

Many states have statutes which require that contractors engaged in public construction obtain payment bonds. The statutes frequently contain limitations and notice provisions which differ from those set forth in the AIA documents. New Jersey and New York are illustrative.

New Jersey – The 1996 Amendments to the Bond Act

Important amendments to the New Jersey Bond Act⁶ became effective on August 24, 1996, including changes in the time for a payment bond claimant on a public project to commence suit, and new notice requirements for second tier claimants.

Prior to the amendments, claimants could not file suit until more than 80 days after final and complete acceptance of all of the bonded contract work by the public owner. Actions filed before 80 days were barred as "premature." The waiting period preserved the full penal amount of the statutory bond until all performance claims were resolved by final acceptance. (New Jersey requires one combination performance and payment bond, with a single penal sum.)⁷

Amended §145 of the Bond Act eliminates the surety's prematurity defense to payment bond claims, since final acceptance and the 80-day waiting period are no longer required prior to suit. The new section requires a claimant to furnish to the surety a statement of the amount claimed within one year from "the last date upon which such beneficiary [claimant] shall have performed actual work or delivered materials to the project." In addition, the claimant may not sue the surety for 90 days after providing this statement, nor more than one year from the last date that work was performed or materials furnished.⁸

The revised Bond Act also imposes a new notice requirement applicable to claimants who have no direct contract with the bond principal. The claimant now must provide written notice to the principal that he is "a beneficiary of the bond." The notice must be provided prior to commencing any work.⁹

New York -- The State Finance Law

Section 137 of the New York State Finance Law requires a bond guaranteeing prompt payment of claims for labor and materials furnished in connection with a public improvement. With regard to notice, the statute provides that:

a person having a direct contractual relationship with a subcontractor of the contractor furnishing the payment bond but no contractual relationship express or implied with such contractor shall not have a right of action upon the bond unless he shall have given written notice to such contractor within one hundred twenty days from the date on which the last of the labor was performed or the last of the material was furnished, for which his claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished

⁶ N.J. Stat. Ann. §§2A:44-143 to 147 (West 1987 and Supp. 1996).

⁷ N.J. Stat. Ann. §147.

⁸ The legislature may have to further amend §145 since, as presently enacted, a claimant's suit may be time-barred before the new 90-day waiting period expires.

⁹ N.J. Stat. Ann. §145.

or for whom the labor was performed.¹⁰

In addition, this section requires that any action upon the payment bond required by the statute must be commenced prior to the expiration of one year from the date on which final payment under the claimant's subcontract became due.¹¹

Conflicts Between Bond and Statute

Recently, a New York appellate court was called upon to determine whether to enforce the longer, more permissive time limits contained in a payment bond, or the shorter, stricter limitations period set forth in State Finance Law §137. Although the court ultimately rejected the surety's position and held that the bond (issued in connection with a public improvement in New York City) was a "common law bond" rather than a statutory bond, it appears that it would be incorrect to conclude that the law will favor the contractor-claimant (and not the surety) in every case in which the notice or limitations provisions in the payment bond conflict with those of the statute.

In Scaccia Concrete Corp. v. Hartford Fire Insurance Company,¹² the payment bond appended to the bid documents and issued by Hartford provided that all suits were to be commenced within two years after the completion of the contract. Scaccia, a concrete supplier, commenced its action against the surety within the two years, but not within one year from the date on which final payment to it became due as required in the State Finance Law. Scaccia also had not served a written notice of claim within 120 days from the date it last furnished materials in accordance with the statute.

Hartford moved for summary judgment dismissing the complaint on the ground that plaintiff had not complied with §137, and was time-barred. Scaccia insisted that the bond, not the statute, was controlling, particularly since the bond contained no reference to the State Finance Law.

In denying Hartford's motion, the Appellate Division emphasized two determinative factors:

1. neither the bid documents, the public contract, the approved bond form, nor the payment bond executed by the surety contained any mention of the statute; and
2. the payment bond was more liberal (pro-claimant) than the statute, in that the bond had no notice requirements and permitted suit by the claimant after the one-year statute of limitations in §137 had expired.

The court held that the common law bond furthered public policy by providing greater

¹⁰ N.Y. State Fin. Law §137(3) (McKinney 1989).

¹¹ N.Y. State Fin. Law §137(4)(b) (McKinney 1989).

¹² 212 A.D.2d 225, 628 N.Y.S.2d 746 (2d Dep't 1995).

protection to persons furnishing labor and materials for a public works contract.¹³

On the other hand, as noted in Scaccia, the language in the statute would be enforced under circumstances in which the bond contained more restrictive notice and limitations provisions than the statute. In other words, the bond may not be more restrictive than the statute.¹⁴

Nonetheless, it would be a fair reading of Scaccia to conclude that, when the provisions of bond and statute conflict in connection with a New York public works contract, and where the contract or bond refers to the statute, then the statutory notice and limitations provisions should be read into the bond, even if the statute is more restrictive than the bond.

Moreover, the Scaccia court neglected to rule upon the surety's contention that plaintiff's complaint should be dismissed because plaintiff failed to give the required (statutory) notice. Unlike the limitations question (where bond and statute conflicted), the Scaccia bond had no notice provision at all. A persuasive argument certainly can be made that, in the absence of notice language in the bond, there are no conflicting or contradictory provisions for a court to reconcile, and the statutory notice requirement should be enforced.¹⁵

Measuring the Limitations Period and the Time to Give Notice

Payment bond claimants and sureties seldom agree on whether the time limits set forth in the bond have been met. Courts usually enforce the plain meaning of such provisions, but recent case law indicates that even the most straightforward bond language may be subject to different interpretations by the parties and the courts. In particular, the limitations period set forth in the A-311 payment bond (no suit more than one year following the date on which the principal ceased work on the contract) has been discussed in a number of recent appellate court decisions in New Jersey and New York.

For example, in V. Petrillo & Son, Inc. v. American Construction Co.,¹⁶ the New Jersey Appellate Division rejected the trial judge's finding that the term "ceases work" means "completes work." Although the court conceded that it would be inclined to favor materialmen and laborers "in cases of doubtful or uncertain construction of the language in surety bonds," it added that in this case the principal had clearly "ceased work" more than one year before the claimant filed suit under the

¹³ Id. at 234.

¹⁴ Id. at 233. Also see Dutchess Quarry & Supply Co. v. Firemen's Ins. Co. of Newark, N.J., 190 A.D.2d 36, 596 N.Y.S.2d 898 (3d Dep't 1993).

¹⁵ Other jurisdictions have adopted a simpler analysis. In Town of Pineville v. Atkinson/Dyer/Watson Architects, 442 S.E.2d 73 (N.C. Ct. of App. 1994), the court flatly stated that "A time limit in a bond will be held void if it conflicts with any express limitations period in the public bond statute."

¹⁶ 148 N.J. Super. 1, 371 A.2d 799 (App. Div. 1977), cert. denied, 379 A.2d 235 (1977).

bond. The fact that the principal's work was not complete, and the owner had not yet issued a certificate of final acceptance, was ruled to not extend the one-year limitations period.¹⁷

The same limitations period was at issue in Timberline Electric Supply Corp. v. Ins. Co. of North America.¹⁸ Timberline admitted that the principal, L.R. Ward, Inc., ceased work on March 31, 1976, and that its suit was not commenced until September 19, 1977 -- more than one year after the principal ceased work. Timberline argued, however, that the surety became the "principal" when it undertook to complete the work upon Ward's termination for default. The surety (or its completion contractor) did not complete the work until September 23, 1976, and Timberline insisted that its suit was therefore timely.

The surety's motion for summary judgment, on the ground that the action was time-barred, was denied by the trial court. The New York Appellate Court reversed, granted INA's motion, and dismissed Timberline's complaint. The court reasoned that there was no ambiguity in the bond, and stated:

It is the plain meaning of the contract that I.N.A. would be liable for claims against Ward provided the claims were brought within one year from the time Ward ceased work on the project. There is no reason in law or fact to hold that I.N.A. by providing for the completion of the project, extended its liability as Ward's surety beyond that stated in the contract.¹⁹

Moreover, it is well established that corrective work, repair work or "punch list" work performed by a contractor does not toll the limitations period or extend the time for a claimant to commence an action under the payment bond.²⁰

It has been held that a claimant does not extend the time in which to bring suit merely by showing that the principal performed administrative tasks within a year before a payment bond action was commenced.²¹

¹⁷ Id. at 5.

¹⁸ 72 A.D.2d 905, 421 N.Y.S.2d 987 (4th Dep't 1979), aff'd, 436 N.Y.S.2d 707 (1980).

¹⁹ Id. at 906.

²⁰ U.S. for the use of Magna Masonry v. R.T. Woodfield, 709 F.2d 249, 251 (4th Cir. 1983); U.S. v. Sun Engineering Enterprises, Inc., 817 F. Supp. 1009, 1013 (D. Puerto Rico 1993).

²¹ Whitacre Construction Specialties, Inc. v. Aetna Casualty & Surety Co., 86 A.D.2d 972, 448 N.Y.S.2d 287 (4th Dep't 1982), aff'd, 57 N.Y.2d 1018, 443 N.E.2d 953, 457 N.Y.S.2d 479 (1982); Cf. Construction Specialties, Inc. v. Hartford Insurance Co., 97 A.D.2d 808, 468 N.Y.S.2d 675 (2d Dep't 1983).

The surety also prevailed in Ribeira & Lourenco Concrete Construction, Inc. v. Jackson Health Care Assocs.²² Ribeira, a masonry subcontractor, commenced an action on August 11, 1985 in New Jersey Superior Court against the project owner, the developer/general contractor, and other subcontractors to recover an unpaid balance due it for work on the bonded project. The bond principal (Green Cast Enterprises, Inc.) had been terminated and ceased work on February 13, 1985. On October 20, 1986, Ribeira amended its complaint to include a direct claim against the surety. The bond provided that no action shall be commenced more than one year following the date on which the principal ceased work. Accordingly, the surety moved to dismiss the amended complaint on the ground that plaintiff's cause of action against the surety was time-barred.

In response to the surety's motion, Ribeira asserted several arguments: (1) that the one-year limitations period was unenforceable because the claimant had no knowledge of that bond provision; (2) that the one-year provision is against public policy, since contract actions are generally subject to a six-year statute of limitations; (3) that Ribeira's action against the surety was timely because a subcontractor retained by the principal completed its work within the limitation period; and (4) that the claim against the surety asserted in Ribeira's amended complaint should relate back to the date that claimant filed its original complaint against the other defendants.

In every instance, the Superior Court and, on appeal, the Appellate Division, ruled in the surety's favor, holding that Ribeira's action against the surety was barred under the limitations period set forth in the payment bond. Notably, the appellate decision stated that:

the one-year period within which suit had to be commenced against [the surety] ran from the date that Green Cast ceased work on the project, not from the date that the last subcontractor retained by Green Cast completed its work under the contract.²³

A contrary result on the same issue was reached this year in Eagle Fire Protection Corp. v. First Indemnity of America Insurance Company,²⁴ a New Jersey Supreme Court decision filed on July 22, 1996. That is, the issue was whether the work of subcontractors on a construction site constitutes the work of the general contractor (principal). As in Ribeira, the surety had issued a payment bond which required that suit be commenced before the expiration of one year following the date on which the principal ceased work on the contract.

Although the surety argued that Ribeira was controlling, the Supreme Court strained to distinguish the case. Among other things, the high court noted that the principal in Ribeira had been terminated and dismissed from the project at the time it was deemed to have "ceased work." By contrast, the principal in Eagle Fire was not promptly terminated after it ceased performing physical work at the project, and the claimant did commence its action within one year of the date of formal termination. In addition, there was evidence that the principal was still storing metal partitions at the site, and that its subcontractors were still working as late as July or August of 1990. Claimant's

²² 231 N.J. Super. 16 (App. Div. 1989), aff'd, 118 N.J. 419 (1990).

²³ Id. at 24.

²⁴ 145 N.J. 345, 678 A.2d 699 (1996).

suit was filed on May 23, 1991.²⁵

The Supreme Court in Eagle Fire also noted that the principal's contract with the owner defined the general contractor's scope of work as including supervision of its subcontractors, not merely physical labor on the work site.²⁶

Also worth noting is the fact that the payment bond contained restrictive provisions which barred claimants from filing suit before the expiration of 90 days after the date on which the claimant furnished the last of its labor or materials. The court pointed out that, since Eagle Fire completed its subcontract work nine or ten months after the surety contended that the principal ceased work, and since the bond imposed this additional 90-day waiting period, Eagle Fire would have had at most ten days to commence an action under the bond. In fact, depending on when the claimant actually completed its work, Eagle Fire may have had no opportunity at all to sue the surety, based upon the surety's interpretation of the limitations period.²⁷ No doubt this anomaly had a great impact on the Supreme Court's analysis.

Not all recent cases interpreting limitations periods carry bad news for the surety, and not all involve AIA Document A-311 language. One 1996 decision from New York's Appellate Division, Fourth Department started with the assumption that State Finance Law §137 applied to the public works project on which the plaintiff, a subcontractor, had furnished labor.²⁸

As noted above, an action on a statutory bond under §137 must be filed within one year from the date on which final payment under the claimant's subcontract became due. Although plaintiff conceded that his suit had not been promptly commenced, he argued that the "pay-when-paid" provision in his subcontract had extended the limitations period beyond the one year and seven months that passed between completion of the work and the date that claimant's action was filed. The Appellate Division rejected claimant's argument, holding that the "pay-when-paid" clause does not indefinitely extend the limitations period, but merely establishes a time for payment. The court ruled that plaintiff was required to, but failed to commence its action within one year of a reasonable time after completion of the work, and granted the surety's motion to dismiss the complaint.²⁹

Application of Notice Provisions

Several recent decisions contain interesting analyses of 90-day notice provisions similar or identical to that found in the AIA A-311 payment bond form. In Dravo Corporation v. Robert B.

²⁵ Id. at 361-2.

²⁶ Id. at 358.

²⁷ Id. at 358-9.

²⁸ Construction Pace Setters, Inc. v. United States Fidelity and Guaranty Company, 639 N.Y.S.2d 191 (4th Dep't 1996).

²⁹ Id.

Kerris, Inc.,³⁰ the bond required that before any suit may be commenced thereon, the claimant must serve written notice upon any two of the following: the principal, owner, or surety -- within 90 days after claimant performed the last of the work, or furnished the last of the materials for which the claim is made, accurately stating the amount claimed and the name of the party to whom the labor or materials were furnished.³¹

The Third Circuit held that claimant failed to file timely notice, and reversed the lower court's judgment which had been entered against the surety. The facts reveal that the claimant (Dravo) did serve written notice, but it was delivered more than 90 days after the date on which Dravo delivered the last of the materials. Dravo argued that it subsequently performed certain start-up services, but the court noted that those services occurred after the date of the written notice. In rejecting the claimant's argument, the court said:

If read in its entirety, the notice provision clearly provides that notice must be given "within ninety (90) days after" the services were performed. The plain meaning of these terms is that notice must follow the last labor or delivery and that premature notice will not be considered as timely.³²

The same notice requirement was considered by a New York appellate court in Haun Welding Supply, Inc. v. National Union Fire Insurance Co. of Pittsburgh, PA.³³ Haun had furnished materials to a subcontractor on a cogeneration plant project, pursuant to an open account, and then commenced an action to recover \$76,831.84 in damages for materials delivered on various dates between April, 1993 and March, 1994. The Appellate Division reduced the amount of plaintiff's judgment by \$33,125.40, which was the cost of materials delivered more than 90 days before written notice of the claim was provided. In so doing, the court ruled that:

It is undisputed that plaintiff and the subcontractor had no single master or comprehensive contract. Rather, they had an open account whereby plaintiff supplied materials or rental equipment to the subcontractor as ordered and submitted an invoice to the subcontractor after each delivery. Therefore, each invoice represented a separate contract requiring compliance with the 90-day notice provision.³⁴

A different issue arose with regard to the application and enforcement of this notice requirement in Lynbrook Glass and Architectural Metals Corp. v. Elite Associates, Inc.³⁵ The

³⁰ 655 F.2d 503 (3d Cir. 1981).

³¹ Id. at 507-8.

³² Id. at 508-9.

³³ 636 N.Y.S.2d 512 (4th Dep't 1995).

³⁴ Id. at 513.

³⁵ 638 N.Y.S.2d 622 (2d Dep't 1996).

evidence established that plaintiff had failed to give the required written notice "within 90 days after such claimant did or performed the last of the work or labor, or furnished the last of the materials for which said claim is made." Plaintiff argued, however, that the surety had not asserted the notice defense in its answer, and should therefore be precluded from obtaining summary judgment based upon that defense. The court disagreed, stating that:

The plaintiff had a full and fair opportunity to argue the merits of the notice of claim defense in opposing the [surety's] motion for summary judgment. Therefore, despite the [surety's] failure to raise this defense as to the plaintiff in their answer, under the circumstances herein, the trial court properly granted the [surety's] summary judgment upon this defense in the absence of operable prejudice and surprise to the opposing party.³⁶

Waiver and Equitable Estoppel

Claimants often assert that their communications with the surety should result in a waiver of the limitations defense, or that the surety is estopped from asserting the limitations period. The majority of decisions preserve the surety's right to successfully assert the defense, even where there is evidence of communications or settlement discussions between the surety and claimant, either before or after expiration of the applicable limitations period.³⁷

The surety's position is strengthened, of course, when it acknowledges receipt of a claim "without prejudice," and reiterates its reservation of rights whenever communicating with a claimant.³⁸

It has been held that the tolling of a limitations period (whether contractual or statutory) based upon communicating with the surety requires some type of unconscionable conduct by the surety. Mere negotiations or discussions are insufficient.³⁹

Nor is the surety estopped from raising the limitations defense solely because the

³⁶ Id. at 624.

³⁷ Krugman and Fox Construction Corp. v. Elite Associates, Inc., 167 A.D.2d 514, 562 N.Y.S.2d 188 (2d Dep't 1990), appeal denied, 568 N.Y.S.2d 913 (1991).

³⁸ Id. at 516.

³⁹ Eagle Fire Protection Corp. v. First Indemnity of America Ins. Co., 280 N.J. Super. 430, 655 A.2d 939 (App. Div. 1995), rev'd on other grounds, 145 N.J. 345, 678 A.2d 699 (1996). Also see Visor Builders, Inc. v. Devon E. Tranter, Inc., 470 F. Supp. 911 (M.D.Pa. 1978).

claimant was not given notice of the existence of the bond.⁴⁰ Moreover, in rejecting the claimant's estoppel argument in the Ribeira decision, supra, the court pointed out that other elements of equitable estoppel were lacking:

There was no misrepresentation or concealment by [the surety] regarding the bond. Furthermore, the record reveals that [the surety] took no action with the intention or expectation that it would be acted upon by plaintiff and that plaintiff did not change its position to its detriment based upon any action taken by [the surety].⁴¹

CONCLUSION

It appears that the courts remain willing to enforce contractual and statutory limitations periods and notice requirements when they are asserted by sureties as defenses to payment bond lawsuits. A few recent decisions have extended the rights of payment bond claimants, however, and sureties must be prepared to distinguish those decisions or suffer the consequences.

⁴⁰ Ribeira & Lourenco Concrete Construction, Inc. v. Jackson Health Care Assocs., 231 N.J. Super. 16, 25 (App. Div. 1989), aff'd, 118 N.J. 419 (1990).

⁴¹ Id.

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