# NINTH ANNUAL
# NORTHEAST SURETY AND FIDELITY CLAIMS CONFERENCE
## OCTOBER 22 - 23, 1998

## DEFENDING SUBDIVISION BOND CLAIMS

**PRESENTED BY:**

**JOSEPH C. GLAVIN, JR., ESQ.**
**FIRST INDEMNITY OF AMERICA INSURANCE COMPANY**
**ARMEN SHAHINIAN, ESQ.**
WOLFF & SAMSON, PC
280 Corporate Center
5 Becker Farm Road
Roseland, New Jersey
(973) 740-0500
(FAX (973) 740-1407

## DEFENDING SUBDIVISION BOND CLAIMS

**By Joseph C. Glavin, Jr. and Armen Shahinian[1]**

### Introduction

Among the travails which burden those who represent sureties is the defense of the dreaded subdivision or developers bond. These obligations, which are required by the land development laws of most states, are posted pursuant to municipal approvals for the development of land and constitute financial assurance that a developer of land, either residential or commercial, will complete the requisite public site improvements before disappearing into the night. Depending upon the statute applicable in the relevant jurisdiction, such obligations may combine a performance bond with a financial guarantee bond and sometimes include overtones of a completion bond. In some instances, the applicable statute may require a pure forfeiture bond. Some jurisdictions also require the bond to include a guarantee of payment to laborers, subcontractors and material suppliers similar to the obligation customarily found in a payment bond. Although letters of credit, cash, certificates of deposit, and other financial instruments may also be used in some jurisdictions, this discussion will deal solely with subdivision bonds.

Because the law relating to subdivision of land is entirely a creature of legislation, see e.g., Pennington Homes, Inc. v. Stanhope, 41 N.J. 578, 197 A.2d 870 (1964), the requirement that subdivision bonds be procured from developers is generally specified in such land use statutes. These statutes may also prescribe the form and content of the bond. Section 277 (Subd. 1) of the Town Law of New York and N.J.S.A. 40:55D-84 in New Jersey are examples of such legislation. While state statutes vary, the general purpose and intent of the bond required by all is to guarantee the completion of the public improvements. The land use law may also delegate to a municipal government or county government, either of which is in most instances the ultimate obligee, the right to adopt ordinances with respect to the form and content of the subdivision bond. Such enabling legislation usually also defines what improvements may be guaranteed by subdivision bonds. Such improvements may include any or all of the following:

1. Streets;
2. Grading;
3. Pavement;
4. Gutter;
5. Curbs;
6. Sidewalks;
7. Street lighting;
8. Shade trees;
9. Surveyor's monuments;
10. Water mains;
11. Culverts;

[1] The authors gratefully acknowledge the assistance of Andrew Kent, an associate in the Roseland, New Jersey offices of Wolff & Samson, in connection with the preparation of this article.

12. Storm sewers;
13. Sanitary sewers or other means of sewerage disposal;
14. Drainage structures;
15. Erosion control;
16. Sediment control;

Public improvements of open space and, in the case of site plans only, other on site improvements and landscaping.

Although the form of subdivision bonds may differ by jurisdiction, the bonds included in Appendix A hereto are typical of such instruments. It should be noted that there is often attached to the bond a list of the guaranteed improvements, which may also include the approximate cost of the improvements to be completed as calculated by the municipal engineer, together with such statutory additions as may be allowable. This total amount generally establishes the penal sum of the bond. An additional cash deposit may also be required of the developer as part of the guarantee.

**Overall issues in resolving claims**

The resolution of claims under subdivision bonds would seem straightforward in that the surety, upon the default of its principal, generally is required either to pay the obligee the cost of completion of the prescribed improvements or to enter upon the subdivision and complete such improvements itself. Unfortunately, unlike contract bonds, there is no remaining balance of unpaid funds due from the obligee to the principal to which the surety may become subrogated and which may ameliorate the loss. Thus, losses on subdivision bond claims as a percentage of the penal sum, tend to be greater than on traditional contract surety bonds. The developer/principal and the individual indemnitors also have an annoying habit of becoming insolvent at the most inconvenient times. Defenses to subdivision bond claims, therefore, can have a substantial impact on the surety's ultimate net loss.

Once a subdivision bond claim has been asserted, the surety must establish the quantum of improvements which remain incomplete. Thereafter, a determination must be made as to the extent to which the principal would have been responsible for these improvements since that should be the measure of the surety's liability as well. A practical word should be said here about the advantages of obtaining an initial evaluation of the state of completion of the improvements by an experienced engineer or builder. Such evaluation should be compiled after a walk through of the site, either with or without a representative of the obligee. Aerial photographs of the site are also often extremely helpful, not only in assessing the improvements remaining to be installed, but also in serving as an exhibit later in the event defenses to the claim are asserted and the matter proceeds to a trial. Care must always be taken to be certain that the punchlist of uncompleted improvements provided by the municipality does not include unbonded or unbondable items. Improvements which will not be owned ultimately by the obligee or which are private or may become the property of a utility generally should not be the surety's responsibility. In addition, while claims may properly be asserted for the cost of installing the prescribed improvements, the surety generally is not obligated to pay for the cost of operating or maintaining such improvements.

Also, the punchlist prepared by the municipal engineer, who after all is employed by and

paid by the taxpayers, often includes the correction of items which are irritants to the public, but may not be the responsibility of the surety. Such items may include cracked sidewalks, chipped curbing, and dead or dying landscape items which have not been properly maintained. These items may have been properly installed, but may not have been properly maintained after their dedication. Municipal demands to remedy such problems often create serious points of disagreement with the surety so that creating a completely consensual punchlist may not be possible. However, the use of a little horse trading may go a long way toward resolving these issues. The driving force behind the complaints of the municipal obligee may very well be the accumulated demands of homeowners who tire of driving over roads which do not have a final course of paving and vent their unhappiness with the local government. The careful defense lawyer should cull out complaints of this kind from the punchlist.

In addition to establishing the quantum of the improvements remaining to be completed, the surety must ascertain the remaining amount of the penal sum of the bond. Obviously, in the absence of any mechanism for the reduction of the bond during its coverage period, the original penal sum is the applicable number. In some jurisdictions, such as New Jersey, however, there is a mechanism in the legislation for a partial reduction of the penal sum of the bond as the construction of the subdivision progresses. Developers have the opportunity, but the not the obligation, to move before the appropriate governmental agency for a reduction of the penal sum of the bond as improvements are completed. The New Jersey statute provides as follows:

> 40:55D-53 (d)(1). Upon substantial completion of all required street improvements (except the top course) and appurtenant utility improvements, and the connection of the same to the public system, the obligor may request of the governing body in writing, by certified mail, addressed in care of the municipal clerk, that the municipal engineer prepare in accordance with the itemized cost estimate prepared by the municipal engineer and appended to the performance guarantee pursuant to subsection a. of this section, a list of all uncompleted or unsatisfactory completed improvements. If such a request is made the obligor shall send a copy of the request to the municipal engineer, the request shall indicate which improvements have been completed and which improvements remain uncompleted in the judgment of the obligor. Thereupon the municipal engineer shall inspect all improvements covered by the obligor's request and shall file a detailed list and report in writing with the governing body and shall simultaneously send a copy thereof to the obligor not later than forty-five (45) days after receipt of the obligor's request.

The statute goes on to provide that the municipal engineer shall render his opinion with respect to the completion of the improvements to the governing body which shall then either approve and accept or reject the improvements determined by the engineer to be complete. Upon acceptance, the surety would be released from liability under the performance guarantee with respect to those completed and accepted improvements, although the penal sum of the bond can never be reduced below thirty percent (30%) until all of the improvements have been accepted. The statute further provides that inaction by the municipal engineer with respect to the developer's request for a reduction allows the developer to apply to a court in a summary manner to compel the engineer to act. Reduction of the penal sum of the bond by

law must reduce the cash deposit, if any, proportionately. There does not appear to be any provision in the statute which would preclude the surety from making the application for reduction if the principal either declines or fails to do so. If the principal on the bond or the surety has had the penal sum of the bond reduced, then obviously the liability of the surety is lessened; but nevertheless the obligation to complete or pay up to the balance of the penal sum remains.

Subdivision bonds generally engender claims which are very difficult to defend. As time passes between the inception of work and the obligee's ultimate notification of the principal's default, improvements which have been installed but not accepted may begin to deteriorate, thereby increasing the surety's problems. At best, the surety's position is usually reduced to a negotiation and compromise of its responsibilities based upon a combination of the defenses which can be raised. Obviously, the best defense to a subdivision bond claim is to have underwritten it well in the first place and taken adequate collateral wherever possible.

Before proceeding to a discussion as to the various specific defenses, some general observations should be made about typical situations. To the extent possible, general contract defenses should be asserted against the municipality, including the often overlooked defenses of equitable estoppel and laches. The estoppel defense arises out of factual circumstances in which the municipality may have issued certificates of occupancy or building permits in violation of its own laws which preclude such activities until a certain quantum of improvements have been installed. Local ordinances may require that all public improvements except the final course of road paving be installed before certificates of occupancy will be issued. An argument can be made that the issuance of such certificates in advance of that activity by the principal precludes the municipality from later on taking a position that the other improvements are not completed satisfactorily.

With respect to the laches argument, it is not unusual for a subdivision claim to be made many years after the developer has left the site. Land use laws generally require that the public site improvements be completed within a certain time frame, but municipalities often neglect to bring a claim or file suit against the surety for months, or even years, thereafter. By then, the surety's interests have been clearly compromised as the financial condition of the principal is usually considerably worse than it would have been had the claim been timely made at or near the time the developer has sold the improved lots or built and sold homes thereon.

It should also be remembered that most municipalities will have an inspector observing the activity of the developer during the occurrence of certain events, such as the pouring of concrete or paving of roads. Defenses can be fashioned out of the inspector's daily reports which are generally maintained by municipal engineer or the construction official. Such reports may prove helpful both in establishing the quantum of improvements which were completed satisfactorily, and in supporting an argument that the municipality permitted the developer to deviate from the requisite approvals and is thereby estopped from complaining of these same deviations after the fact.

**Where all or a portion of the subdivision is never developed**

Presumably, the purpose of requiring site improvements is to serve the public needs created by the development and resulting occupation of the land. Undeveloped land has no need for streets, curbs, sidewalks, sewers, or shade trees. Thus, the question arises whether the surety should be excused from its obligations under a subdivision bond where the development fails at such a stage that all or a substantial portion of the land remains untouched and therefore unoccupied. Arguably, since the need for the improvements has never arisen, no purpose would be served by requiring the surety to install improvements.

In such cases, the result for the surety has varied depending upon several factors: (a) whether the municipality actually undertakes or intends in the future to cause to subdivision improvements to be made, (b) whether development has even commenced, (c) the jurisdiction, and (d) the applicable statutory or bond language.

For example, Clearwater Assocs. v. Bridge & Son, 144 N.J.Super. 230, 365 A.2d 204 (App. Div. 1976), concerned the validity of a municipality's assignment of rights under a subdivision bond to a private party. In deciding the issue, the Appellate Division compared two out of state cases: Morro Palisades Co. v. Hartford Acc. & Indemnity Co., 52 Cal.2d 397, 340 P.2d 628 (Sup. Ct. 1959) [which refused to recognize the assignment] and County of Will v. Woodhill Enterprises, Inc., 4 Ill. App. 3d 68, 274 N.W.2d 476 (App.Ct. 1971) [which upheld the assignment]. The Court noted that whereas there was "no suggestion in *Morro* that the improvements were ever made or would be ever made", in "*County of Will*, on the contrary, the assignment was made for the purpose of securing performance of the improvements and on that basis was validated." Recognizing that the purpose of a subdivision bond is "to provide the means by which a municipality may insure completion of a bargained for performance", the Appellate Division ruled as follows:

> We therefore hold that a municipality may assign its rights under a bond where the assignment is for the *purpose of obtaining the performance* guaranteed by the bond and upon a showing *that the improvements have been made*. Clearwater Assocs., at 229 (emphasis supplied).[2]

In the Clearwater Assocs. case, the developer had "abandoned project, leaving two partially completed houses, partially completed sewers and curbs and rough graded streets." *Ibid.*, at 224. The borough, presumably wanting the improvements completed, gave the subsequent owner of the property an assignment of rights under the subdivision bond in exchange for completing the improvements. Because the assignment was for the purpose of obtaining performance, it was permitted. Implicit in the reasoning of Clearwater Assocs., however, is that subdivision bonds are not intended to provide a monetary windfall merely because a developer failed to perform, where the municipality does not, in fact, seek to procure the completion of the improvements.

Another scenario exists where the municipality does in fact desire the improvements,

---

[2] The Supreme Court of Virginia also permitted the assignee of a municipality's rights under a subdivision bond to recover, after the fact, the cost of improvements which the assignee had actually made. This requirement of showing that the improvements had (already) been made was later relaxed where the cost of prospective improvements appeared to exceed the penal sum of the bond. See, Transdulles Centre Limited Partnership v. USX Corporation, 761 F.Supp. 430 (E.D.Va. 1991) and cases cited therein.

On the general subject of assignability of subdivision bond claims, it should be noted that the bond in Clearwater Assocs. had no express provision prohibiting its assignment. *Id.*, at 226. Had the bond included such a provision, the holding may have been different.

but the improvements are not genuinely necessary because the development never started. On point is River Vale Planning Board v. E&R Office Interiors, Inc., 241 N.J.Super. 391, 575 A.2d 55 (App. Div. 1990). The case involved a municipality attempting to enforce a variance, site plan conditions and a developer's agreement for a project which had been abandoned prior to the commencement of any construction. The opinion notes that the developer's agreement required the posting of both a $102,088 "performance bond" and a $10,208 "cash performance bond". *Id.*, at 395-396. The developer argued that his obligation to perform the developer's agreement was contingent on going ahead with the project itself. Both the trial court and the Appellate Division agreed:

> In our view the trial judge correctly applied legal principles in concluding that the installation of the improvements contemplated by the Developer's Agreement as a condition of site plan approval was subject to *an implied or constructive condition that those improvements were required only if the developer proceeded with the project contemplated by the application and approval*. The Developer's Agreement was entered into as part of the approval process of Jerman's site plan application. Once his application had been abandoned, there was no need for the developer to proceed under the agreement and no burden placed upon the municipality because of increased facilities or higher density use. Jerman gave up the benefits and the burdens of the agreement. Since the site plan is not going to proceed as proposed, the municipality may not enforce that agreement. *Ibid.*, at 400 (emphasis supplied, citations omitted).

The court then noted that "[u]nder these circumstances, the board may, if it desires, rescind the site plan approval and variance", id. at 400-01, and cited, *inter alia*, "New Windsor v. Inbro Development, 112 Misc.2d 983, 448 N.Y.S.2d 99 (1982) (condition of performance bond not actuated where developer fails to commence work)." While the cited case was mentioned only parenthetically, the Appellate Division in River Vale Planning Board clearly approved of the reason and the result.

As noted in River Vale Planning Board, the New Windsor v. Inbro Development case relieved a surety of any responsibility for the completion of improvements where "no part of the subdivision was developed which required completion of any improvements. The developers simply failed to commence any improvements or building activity in the approved subdivision." *Id.*, at 984. The New Windsor holding, however, was not based on any common law doctrine or analysis. Rather, it resulted from the plain language of New York's enabling statute for subdivision bonds. That statute limited the surety's ultimate responsibility to the amount expended to complete improvements "commensurate with the extent of building development that has taken place in the subdivision[.]" *Id.*, at 983.

Other cases apply New York's subdivision bond statutes in a similar manner. In Town of Shawangunk v. Goldwil Properties Corp., 61 A.D. 2d. 693; 403 N.Y.S. 2d. 784 (3d Dept. 1978), a developer posted a bond issued by Republic to guarantee completion of specified public improvements. After the construction and sale of only one home, the developer failed and a bank foreclosure commenced on the remaining lots of the development. During the pendency of the foreclosure, other homes were completed and additional foundations were constructed. The Town sued to enforce the bond. The Appellate Division held that the liability of the surety would "be commensurate with the extent of building development that had taken

place in the subdivision" because that was the language employed by the Legislature in the governing law, Subdivision 1 of Section 277 of the Town Law. The court therefore ordered the payment of the penal sum of the bond to the Town so that it could complete improvements reasonably justified by that part of the subdivision which had been developed. Any part of the penal sum which was not needed to complete the improvements for the developed portion of the subdivision was to be refunded to the surety. See also Village of Warwick v. Republic Insurance Company, 104 Misc. 2d. 514; 428 N.Y.S. 2d. 589 (Sup. Ct. N.Y. 1980). This same basic application of statutory language was recently applied to dismiss the obligee's claims in City of Peekskill v. Continental Insurance Company, 999 F.Supp. 584 (S.D.N.Y. 1998) (where the developer failed prior to any development that would give rise to the need for public improvements).

There is also authority by way of an opinion of the Office of the State Comptroller of New York, opinion number 81-158, issued May 29, 1981 to the effect that a town planning board may not require a developer or its surety to construct streets and other improvements which would lie entirely within an area abandoned by the developer and would service only lots in that area. In other words, in a phased subdivision situation, neither the developer nor the surety would be required to complete public improvements in those phases which had not been started.

Other than in New York, where the statutes specifically so provide, there does not appear to be any case law limiting the surety's responsibility for completing subdivision improvements to the developed portion of a partially developed subdivision. An argument can be made, however, that the reasoning behind River Vale Planning Board should apply and improvements should be only to the extent required commensurate with the level of development; because where there will be no occupancy, there is no need for improvements.

In California, one decision appears to excuse liability for the failure to make site improvements where the development has not been started at all. Unfortunately, this case has not developed much of a following. Later decisional authority in California denies the surety any defense where the bond language is unconditional and where the municipality actually intends to complete the subject improvements.

In that case, County of Yuba v. Central Valley National Bank, Inc., 20 Cal.App.3d 109, 97 Cal.Rptr. 369 (1971), an appellate court affirmed the dismissal of a county's claim upon a bank "instrument of credit" securing a development agreement. The obligation stated that "[i]n the event the work is not completed", the bank would pay $35,020 "for the completion of said improvements." *Id.*, at 112. Due to a shift in the local population base, however, the developer found it impossible to sell homes. As a result, no development was ever commenced on the tract for which the instrument of credit was issued. In denying recovery, the trial court noted that "construction of streets would serve no useful purpose in the absence of such a subdivision, and that none of the parties intended streets to be constructed except as part of construction of such a subdivision." *Id.*, at 111. The trial court based its ruling on the doctrine of "frustration of purpose" and stated that to require the bank to pay the county "would be to uphold an illegal forfeiture." *Id.* Agreeing, appeals court put special emphasis on the language of the instrument of credit:

> [T]he instrument of credit was executed by Bank and county with the expectation that the performance it secured related to improvement work which would at least have commenced. The purpose of the instrument was to insure full completion of streets and drainage facilities in order to protect and serve the public. The existence of this purpose, the inclusion in the instrument of credit of references to 'completed street improvements' and 'completion of said improvements', and the presence of the parties' one mutual interest in development of a residential subdivision, support the trial court's conclusion that at least partial improvement of the land and construction of the streets was contemplated as a prerequisite to the emergence of the obligations owned (sic) by Bank and CGO to County.
>
> §§§
>
> In addition to the absence of any breach of contract, the record discloses no damage whatsoever to County. We agree with the trial court that to permit recovery in the circumstances of this case would be to uphold an 'illegal forfeiture.' *Id.*, at 113-114.

County of Yuba was distinguished by City of Sacramento v. Trans Pacific Industries, Inc., 98 Cal.App.3d 389, 159 Cal.Rptr. 514 (1979). There, the developer defaulted, leaving the city "with a partially improved, partially occupied tract of land which it had a contractual right to have fully improved in accordance with the subdivision agreement." *Ibid.*, at 397. The city brought suit against the developer and the surety. While the suit was pending, the city entered into an agreement with a new developer who undertook to complete the subdivision improvements based upon "the city's conditional promise to repay him if it prevailed in its action against the defendants." *Id.*[3] The defendants then attempted to argue that, because the new developer had completed the improvements, the city had suffered no damages and recovery should be barred by the rule set down in County of Yuba. Rejecting that argument, the City of Sacramento court said:

> The County of Yuba case is of no aid to defendants since there is no showing herein of any unfulfilled condition precedent[4] to the surety's obligation to pay. Moreover, there is an additional basis of distinction. Although the county was suing to collect on a bond to guarantee performance of the builder's obligation to construct and dedicate certain public improvements if in fact he built at all on the land, there is no indication that the county had any need, or any intention, to use any money recovered in the lawsuit to install the improvements. Since the land was still uninhabited farmland, there was no need thereon for roads, easements, or rights of way. (See, 20 Cal.App.3d at p. 112) In effect, a forfeiture was involved. (*Id.*, at p.111) Here, in contrast, development had commenced on some of the parcels, and was planned on the rest. A palpable need existed for the needed improvements to be constructed on Watkins' land. Judgment in City's favor did not constitute a forfeiture, but rather paid for Watkins' performance of TPI's unfulfilled obligations. The element of

[3] Note that this was essentially the same arrangement found permissible in Clearwater Assocs. and elsewhere.

[4] City of Sacramento and other cases which distinguish County of Yuba put special emphasis on the "conditional" language of the instrument of credit in Yuba, which is predictably found absent in the case of subdivision bonds. See, e.g., General Insurance Company of America v. City of Colorado Springs, 638 P.2d 752, 758, n. 7 (Colo. 1982).

damages has thus been made out. *Id.*, at 398.

Similarly, in Board of Supervisors of Stafford County v. Safeco Insurance Company of America, 226 Va. 329, 310 S.E.2d 445 (1983), the Supreme Court of Virginia, citing City of Sacramento, declined to follow County of Yuba where a developer had commenced a small amount of work prior to abandoning the project. While there was no direct evidence that Stafford County actually intended to complete the bonded improvements, the Court found that there was a presumption that the County would properly use the bond proceeds.[5]

Two very recent, identically named, California decisions have dealt a serious blow to County of Yuba, particularly with respect to its applicability to defending claims on subdivision bonds. City of Los Angeles v. Amwest surety Insurance Company, 63 Cal.App.4$^{th}$ 378, 73 Cal.Rptr.2d 729 (1998) [City of Los Angeles I] and City of Los Angeles v. Amwest surety Insurance Company, __ Cal.App.4$^{th}$ ___, 76 Cal.Rptr.2d 903 (1998) [City of Los Angeles II].

City of Los Angeles I distinguished County of Yuba on two grounds.[6] The first was the language of the bond, which the Court perceived to require the payment of the *full penal sum* upon any default.[7] The second was a finding that the applicable government code vested the city with the discretion over whether to "initiate proceedings" to revert the undeveloped land into "acreage." The city elected not to do so, from which the court concluded that the city "fully intends to utilize the monies obtained by Amwest to construct the improvements set forth in the subdivision improvement agreement[.]" The court added that "[t]he funds will not go into the general coffers of the City to be used for purposes unrelated to the parcel." That last observation suggests the possible continued viability of County of Yuba, at least where it is clear the municipality has no intention at all of completing the subdivision improvements.

In City of Los Angeles II, the court affirmed a summary judgment against the surety where the was no proof offered by either side as to whether the city had suffered any damages or whether the development would, or was intended to, go forward. The record on the summary judgment motion consisted of only three facts, all of which were stipulated; namely, "that City and Jama had entered the agreement; that Amwest had provided the bond; (and) that Jama had failed to perform the agreement with City." On that record, the appeals court

---

[5] Two justices dissented, however, noting as follows:

> Manifestly, the bonds, as well as the subdivision ordinances and the applicable statute, created the obligation to indemnify the County for the cost of the uncompleted streets, water lines and sewer lines. Implicitly, the agreements indicate that the parties intended to provide security for full completion of the streets and lines once construction had begun. Here, such construction was never commenced; indeed, there was only de minimus work done on the subdivision parcels. As a matter of fact, the streets and utility lines in this aborted development will never be constructed.
>
> Under these circumstances, no damage has been or will be suffered by the County. Yet, the majority has converted a performance bond into a contract for liquidated damages. This inequitable result amounts to a forfeiture, penalizing the surety under the guise of enforcing the terms of an indemnity bond. Stafford County, at 451-452 (Compton, J., dissenting).

[6] The decision indicated that a very small amount of improvement work had been performed. This, however, was not cited as a rationale for distinguishing the case from County of Yuba.

[7] It is impossible to tell from the portion of the bond actually quoted in the decision whether the bond, in fact, included such a provision for the automatic payment of the penal sum. The quoted provision of the subdivision agreement requires that upon default the surety "shall be liable to City for the cost of construction and installation of the public improvements and for costs and reasonable expense and fees, including reasonable attorneys' fees incurred in enforcing this agreement and Contract." The quoted provision of the municipal code of the city likewise provided for recovery for "charges" and "damages", etc., but not for forfeiture of the penal sum of the bond. Given the extent to which improvements remained to be completed, it is possible that the costs involved exceeded the bond's penal sum in any event.

affirmed summary judgment in the full penal sum [$56,000] of the bond. The court interpreted the subdivision bond as requiring an outright forfeiture of the penal sum if the developer failed to perform. As with City of Los Angeles I, the decision cites no specific bond language which supports that harsh interpretation, except the routine recitation that if the principal fully performed, then the surety's obligation "shall become null and void; otherwise it shall be and remain in full force and effect." The court opined that had the surety intended to limit its obligation to the city's actual losses, it "knew or should have known that a different instrument, an indemnity bond, was available[.]" While expressly rejecting "any argument that the bond should not be enforced because the City suffered no damages", the court nevertheless observed that it was the surety had burden of proving that the city would sustain no damages and/or that the "that the development will not go forward eventually."

As noted, it is unknown whether the Amwest bonds in the City of Los Angeles cases were really drafted as forfeiture bonds. Assuming that they were not, the decisions, especially City of Los Angeles II, appear to confuse the concept of the penal sum of a bond with the concept of a contractual liquidated damages provision. Those decisions also distinguish County of Yuba to such an extent that the continued usefulness of that decision is in doubt. Unless or until the City of Los Angeles cases are clarified or overturned, a surety may wish to think twice before relying too heavily on County of Yuba to support a denial of liability.

**Certificates of Occupancy**

A Certificate of Occupancy ("CO") has been described as "a tangible manifestation that property has been improved and is being used in conformity to applicable municipal ordinances." Dresner v. Carrarra, 69 N.J. 237,242, 353 A.2d 505 (1976). By statute, new structures cannot be occupied without a CO or, at least, a Temporary Certificate of Occupancy ("TCO"), see, e.g., N.J.S.A. 52:27D-133. From a practical standpoint, without a CO, a developer will find it extremely difficult, if not entirely impossible, to close on the sale or lease of any new building. Mortgage lenders, for example, generally demand a CO as a prerequisite to closing a mortgage loan on a newly constructed home. See, e.g., Rzepiennik v. U.S. Home Corp., 221 N.J.Super. 230, 534 A.2d 89 (A.D. 1987). Developers, of course, cannot make any money without sales or rentals, and buildings which cannot be legally occupied have little value.

Thus, the municipality's control over the issuance of a CO is the "carrot" motivating the developer to perform its subdivision improvement obligations. Once CO's are issued, however, and the properties are sold, the municipality is left only with a "stick", i.e., the municipality's after-the-fact ability to enforce the subdivision bond. Unfortunately, this "stick" supplies little motivation to the developer who, by the time a bond claim is made, may be insolvent. As a result, a municipality's improper issuance of CO's, permits the developer/principal to reap the benefits of the municipality's "conditional" site plan approval (or conditional issuance of a zoning permit) without first complying with the conditions which were the bases upon which subdivision approval was granted in the first place. In this situation, the bond obligee has violated its own "contract" in essentially the same manner as an obligee on a construction performance bond has violated its contract when it overpays its principal for work not yet performed. In the latter case, such a release of security creates a *pro tanto* discharge for the surety to the extent of the overpayment. But what of the former case?

The surety may argue that the municipal obligee, by improperly issuing CO's, voluntarily and/or negligently released collateral security for performance upon which the surety was entitled to rely, at least as to those portions of the subdivision for which CO's were issued before the completion of the improvements. It is well settled that the negligent release by the obligee of collateral security results in the *pro tanto* discharge of the surety. Langeveld v. L.R.Z.H. Corp., 74 N.J. 45, 376 A.2d 931 (1977); Boorstein v. Miller, 124 N.J. Eq. 526, 3 A.2d 87(Ch. 1938).

Conceptually, there is a difficulty with this applying this argument. "The rule forbidding impairment of collateral 'has as its chief aim the protection of these potential benefits made available through subrogation.'" Katsoufris v. Adamo, 216 N.J.Super. 84, 89, 522 A.2d 1046 (A.D. 1987), quoting, Langeveld, *supra.*, at 51. CO's are different from "collateral" in that the municipality's governmental authority over the issuance of CO's would not appear to be a power which the surety could acquire under its right of subrogation. Thus, the municipality could accurately argue that its issuance of CO's in no way prejudiced the surety's subrogation rights. To this, however, the surety may counter that the release of a CO is tantamount to releasing a lien on the subject property, in that the principal could not have sold the property without a CO. It is the release of the property from restrictions on its use and occupancy, not

the CO's per se, which directly prejudices the surety's subrogation rights.

The obligee's equitable duties vis-a-vis the surety, however, are not limited to preserving the surety's subrogation rights. Generally speaking, the obligee owes a duty to the surety not to unjustly or unnecessarily increase the surety's risk of loss. Impairment of collateral is but one of several defalcations of the obligee which can give rise to the complete or partial discharge of the surety and which are classified generally by the *Restatement of the Law, 3rd, Suretyship and Guaranty*, §37, under the heading of "Impairment of Suretyship Status." These include: "Release of Underlying Obligation" (§39), "Extension of Time" (§40), "Modification of Underlying Obligation" (§41), "Impairment of Collateral" (§42) and "Delay in Enforcement; Running of Statute of Limitations as to Underlying Obligation" (§43). For an "Impairment of suretyship Status" which does not neatly fall into a predetermined category, the *Restatement* includes the following "catch all" provision:

> §44. Other Impairment of Recourse
>
> If otherwise than described in §§39-43 the obligee impairs the principal obligor's duty of performance (§21), the principal obligor's duty to reimburse (§§22-25), or the secondary obligor's right of restitution (§26) or subrogation (§§27-31), the secondary obligor is discharged from its duties pursuant to the secondary obligation to the extent that such impairment would otherwise cause the secondary obligor a loss.
>
> Comment:
>
> *a. Purpose*... Most often, the impairment of recourse can be described as either a release, extension, or other modification of the underlying obligation, or as an impairment of collateral... However, other acts of the obligee may impair the principal obligor's duty of performance, the principal obligor's duty to reimburse, or the secondary obligor's right of restitution or subrogation in ways which do not fit precisely within one of these categories. Accordingly, this section provides that any act resulting in such impairment gives rise to the concomitant discharge of the secondary obligor.
>
> *b. Acts covered.* An impairment of recourse covered by this section is an act by the obligee that increases the risk that the secondary obligor will be called upon to perform or that the secondary obligor will be unable to recover from the principal obligor...

In the subdivision bond context, the municipality's early or improper issuance of a CO is arguably an "impairment" giving rise to at least a *pro tanto* discharge for the surety because it "increases the risk that the secondary obligor will be called upon to perform" by removing the principal's immediate and primary motivation to perform. Moreover, by enabling the premature sale of new buildings in the absence of completed subdivision improvements, the obligee permits the principal to liquidate and disburse its assets, thereby increasing the risk that the surety "will be unable to recover from the principal obligor."

The surety will also be injured where the obligee's removal of the principal's motivation to perform its obligations occurs when the principal is still capable of performing. An analogous example is found in Illustration #7 to the *Restatement's* section 40, dealing with extensions of time granted by the obligee to the principal which prove prejudicial to the surety:

> 7. D borrows $1,000 from C. S guarantees D's obligation to C. As the due date approaches, D, who is insolvent, makes arrangements to work at a second job in order to earn the money to repay C. C, however, grants D a six-month extension of the due date of the loan. As a result, D cancels the arrangements for the second job. At the end of the six-month extension, D, who has no assets, fails to repay the loan. Had D worked at the second job, D would have had the assets to repay the loan on the original due date. S is discharged from the guaranty.[8]

Thus, whether or not the CO or the real property may be considered collateral, the surety is on non-frivolous ground in raising the defense that the obligee's improper issuance of a CO results in a partial discharge of the surety's obligations under its bond, at least until some court holds otherwise.

There is no *reported* decisional authority where a surety was granted a discharge because the municipal obligee's improperly issued a CO. There is, however, at least one unreported oral decision where a trial-level court accepted such an argument. Township of Middletown v. Rocham Developers, Inc., et al., Docket No. MON-L-68001-79 (N.J. Superior Court, Law Div. November 15, 1982). The opinion is attached as Appendix B at the end of this article. This unpublished opinion is of no binding authority, but may be cited in New Jersey in accordance with N.J. Rules Governing the Courts of the State of New Jersey, Rule 1:36-3.

The defense, of course, presupposes that the municipality's issuance of the CO's was somehow improper. That conclusion, however, may not be assumed simply because the municipality issued CO's despite incomplete subdivision improvements. Whether and to what extent a municipality can withhold CO's from the principal as a method of enforcing the principal's obligation to complete subdivision improvements is a potentially complex issue. In many cases, the release of CO's may be statutorily required whether or not certain improvements remain to be completed.

In New Jersey, for example, prior to 1975, there was no statute which expressly required, authorized or addressed the municipal use of CO's at all. Nevertheless, there was a widespread practice of requiring CO's as "a method of assuring that there has been compliance with the building permit after the building has been erected." J.D. Land Corp. v. Allen, 114 N.J. Super. 503, 510-511, 277 A.2d 404 (A.D. 1971). In J.D. Land Corp., a developer challenged a municipal ordinance which permitted the municipality to condition the issuance of the CO's for *any* buildings in a subdivision on the completion of all subdivision site improvements in the *entire* subdivision. The Appellate Division struck down the ordinance as

---

[8] See, also, Comment "d." to the *Restatement*, section 40, which states in relevant part: "Sometimes the loss is caused by the motivational impact of the extension. That is, but for the extension, the principal obligor would have acted in such a manner that would have resulted in the principal obligor bearing the cost of performance; as a result of the extension, however, the principal obligor acted in such a manner that the cost of performance would be borne by the secondary obligor."

"unreasonable" and serving "no legitimate purpose[.]" *Id.*, at 511. Nevertheless, that court did recognize that municipalities had the implied authority to withhold CO's both to enforce building permits and as a tool of subdivision control. This second use of CO's, however, had to be exercised pursuant to ordinances with standards such that "the withholding of a certificate of occupancy as a subdivision control must be related to the health, welfare and safety of the occupants of the residence for which the certificate is sought." *Id.*, at 512. Finding no such standards in the ordinance at issue, the Appellate Division declared the ordinance invalid.

In 1975, the New Jersey Legislature passed the State Uniform Construction Code Act, N.J.S.A. 52:27D-119, *et seq.*. This act was intended to impose a measure of uniformity on the municipal regulation of construction throughout the State. The Act requires that "[n]o building or structure hereafter constructed shall be used or occupied in whole or in part until a certificate of occupancy shall have been issued by the enforcing agency." N.J.S.A. 52:27D-133 This section further states that "[a] certificate of occupancy shall be issued by the enforcing agency when all of the work covered by a construction permit shall have been completed in accordance with the permit, the code, and other applicable laws and ordinances."

At first glance, the Act could be interpreted to preempt the use of CO's as a method of subdivision enforcement. The Act *requires* the issuance of CO's after the completion of "all of the work covered by a construction permit", that is, *not* work required by a conditional site plan approval or zoning permit which typically covers a far greater geographical area.

In Dresner v. Carrara, 69 N.J. 237, 242, 353 A.2d 505 (1976), the New Jersey Supreme Court, in *dicta*, noted that "[t]he employment of certificates of occupancy as legitimate tools of land use and subdivision control was very ably discussed" in J.D. Land Corp., *supra*, and that the recent Act "contemplates the use of certificates of occupancy in some of the instances" previously found permissible based on common law. The Court then noted, at 243, that "[t]here may be, or there may later develop, other occasions where such a certificate will serve a useful and valid end in land use control."

In a later New Jersey case, Home Builders Leage v. Evesham Tp., 174 N.J.Super. 252, 260, 416 A.2d 81 (A.D. 1980), the Appellate Division resolved that question without reservation:

> The references in the statutes and rules to "other applicable laws and ordinances" refer to standards adopted which may not be appropriate for coverage within the scope of the act. *These, obviously, would include compliance with a zoning ordinance or an ordinance requiring connection to a water or sewer system*. (emphasis supplied).[9]

The applicable provisions of the New Jersey Administrative Code, section 5:23-2.1, *et seq.*, help clarify the municipal construction official's authority to withhold a CO due to a

---

[9] This was shortly followed by two decisions of the New Jersey Supreme Court which, *inter alia*, found that the State Uniform Construction Code Act did not preclude municipalities from using documents *called* "certificates of occupancy" as a method of enforcing health regulations governing rental housing which were authorized by separate enabling statutes. Dome Realty, Inc. v. Patterson, 83 N.J. 212, 416 A.2d 212 (1980) and State v. C.I.B. International, 83 N.J. 262, 416 A.2d 362 (1980).

developer's failure to complete subdivision improvements. Section 5:23-2.16 requires that construction permits shall be conditioned upon, among other things, work which will conform to "prior approvals." Section 5:23-1.4 defines "prior approvals" as meaning necessary certifications or approvals by Federal, State or Local agencies, "which are conditions precedent to the issuance of a construction permit *or a certificate of occupancy*" including, but not limited to, zoning, soil erosion and sediment control, highway curb cuts, water and sewage treatment works approval, and other items. Section 5:23-2.23(j) adds that "[n]o temporary or final certificate of occupancy shall be granted until all required utilities, including but not limited to water, sewer, electric and gas are installed and in service."

Those regulations, however, as well as the applicable ordinances of any given municipality, must be read in conjunction with the J.D. Land Corp. case. Under that case, the surety is arguably entitled to rely on its municipal obligee not to grant CO's in violation of the obligee's own ordinances where the incomplete subdivision improvements at issue is "related to the health, welfare and safety of the occupants of the residence for which the certificate is sought." *Id.*, at 512. Such improvements need not even be directly on or bordering the lots in question. For example, the failure to complete gutters, paving or sidewalks at the start of a dead end street arguably will isolate and endanger the welfare of the whole street. A soil erosion problem in one area could create a hazard in other areas. At the same time, however, the surety will have no legitimate complaint if CO's are issued for one end of a large development far from any incomplete site work. In the end, any defense to the surety based on the municipal obligee's improper issuance of CO's will depend on (1) the provisions of the municipality's applicable ordinance(s), and (2) the location and import of the incomplete site improvements in relation to those buildings for which CO's were issued.

**Where the bond purports to secure improvements or other items which are beyond the municipal obligee's authority to require:**

There are situations where the municipal obligee makes performance demands on the surety which appear to go beyond items for which the municipality was statutorily authorized to require a bond. This may arise simply as a result of a municipal official or attorney who misunderstands the scope of the surety's undertaking. Other times, however, the developer's agreement or the municipal ordinance itself purport to require these "extra" items, despite the language of the enabling statute. Fortunately, in these situations, the courts appear to come down on the side of the surety.

New Jersey Shore Builders Association v. Township of Marlboro, 248 N.J.Super. 508, 591 A.2d 950 (A.D. 1991) is directly on point. The case involved a challenge to a municipality's "practice of requiring developers to pay for the costs of electricity for lighting on those street dedicated as a condition of subdivision or site plan approval" prior to the acceptance of those streets by the municipality. *Id.*, at 510. At issue was the language of the enabling statute, N.J.S.A. 40:55D-53, subsection "a", which permits municipalities to require the following performance guarantees from the subdivision developer as a condition for site plan approval, etc.:

(1) *The furnishing of a performance guarantee in favor of the*

> *municipality in an amount not to exceed 120% of the cost of installation for improvements it may deem necessary or appropriate including*: Streets, grading, pavement, gutters, curbs, sidewalks, *street lighting*, shade trees, surveyor's monuments ... water mains, culverts, storm sewers, sanitary sewers or other means of sewage disposal, drainage structures, erosion control and sedimentation control devices, public improvements of open space and, in the case of site plans only, other on-site improvements and landscaping.
>
> (2) Provision of a maintenance guarantee to be posted with the governing body for a period not to exceed 2 years after the final acceptance of the improvement, in an amount not to exceed 15% of the cost of the improvement. *In the event that other governmental agencies or public utilities automatically will own the utilities to be installed* or the improvements are covered by a performance or maintenance guarantee to another governmental agency, *no performance or maintenance guarantee, as the case may be, shall be required by the municipality for such utilities or improvements.* Shore Builders, at 512, (emphasis supplied by the court).

In Shore Builders, the municipality's electric service came from a public utility. Under local regulations, the developer was responsible to pay for the costs to the public utility to install underground electric facilities. Ownership of those facilities, however, was in the public utility, not the developer. As such, under N.J.S.A. 55D-53a(2), the municipality was expressly prohibited from requiring a performance guarantee of the underground electrical facilities built and owned by a public utility (albeit at the developer's expense).

But what of the electricity itself? It was needed for the "street lighting" for which N.J.S.A. 55D-53a(1) does expressly authorize a bond requirements. In framing the applicable legal issues, the Appellate Division noted: "A municipality can exercise subdivision controls only by virtue of enabling legislation. Any exercise of that power must be consistent with such legislation." *Id.*, at 511 (citations omitted). In this context, Shore Builders held as follows:

> The legislative purpose of the [Municipal Land Use Law] authorizing the enactment of subdivision ordinances is to protect the public interest by requiring installation of necessary improvements and assuring such through a performance bond prior to subdivision approval.
>
> §§§
>
> Neither the statute itself, nor case law, defines whether electricity costs are included in "street lighting" or are considered an improvement.
>
> §§§
>
> Here, we conclude that the cost of electricity is also not an improvement and is therefore not bondable. Electricity is intangible and is not analogous to buildings or other permanent structures. *Id.*, at 513-514 (citations and certain portions of the text omitted for clarity).

An earlier trial-level court held similarly in a case where the facts were far less arguable for the municipality. Eastern Planned Comm. V. Middletown, 235 N.J.Super. 467, 563 A.2d 81 (L.D. 1989). There, the municipality refused to release the developer's subdivision bonds

solely because the developer had "failed to form a homeowner's association as required by the planning board resolution[.]" *Id.*, at 469. Citing the language of N.J.S.A. 40:55D-53 and noting that the municipality derived its power through statutory delegation, the Court held that the municipality was without authority to retain the bonds for the purpose stated.

There are reported decisions in other states which likewise set forth the general proposition that a municipality may not impose upon a developer a bonding requirement of broader scope than that set forth in the specific enabling statutes authorizing subdivision bonds. In such cases, this principle has been applied to defeat the claims of contractors who urged interpretations of bond language which, they claimed, permitted their recovery as third party beneficiaries of the bonds. See, e.g., Hewson Construction, Inc. v. Reintree Corporation, 685 P.2d 1062, 1066 (Wash. 1984) ("The Washington statute gives only the municipality power to enforce plat obligation bonds thus contractors such as Hewson have no right of action to enforce the bonds."); Evola v. Wendt Construction Co., 170 Cal.App.2d 21, 25, 338 P.2d 498, 501 (1959) ("No authority is given by the section which would authorize the governing body to enact an ordinance on the subject; none that would permit the county to expand the agreement to protect labor or material claimants."); See, also, W.S. Dickey Clay Mfg. Co. v. Ferguson Investment Co., Inc., 388 P.2d 300, 303 (Okl. 1963), in which the court stated:

> There is no language in the statute or in the ordinance of effect that such performance bond shall provide that the principal shall pay all bills for contractors, subcontractors, labor and materials incurred in completion of such improvements and utilities. Nor is there any language in the statute or ordinance granting to the planning commission the authority to make such a requirement.
>
> The construction of the bond should be consonant with the effectuation of the apparent purposes of the Legislature and the City Council.

All of the foregoing cases dealt with subdivision bonds required by municipalities under ordinances pursuant to enabling statutes. Where the ordinance required bonding of items for which the relevant enabling statute provided no authority, or where a "claimant" urged an interpretation of a subdivision bond which conflicted with the enabling statute, the surety's liability was limited. A different result, however, occurred where a developer and its surety were found to have *volunteered* a payment bond not required by the municipality. Thus, in Rexroth and Rexroth, Inc. v. General Casualty Company of America, 242 Cal.App.2d 363, 51 Cal.Rptr. 505 (1966), a surety was held bound to an express material and labor bond which was printed and executed on the reverse side of the performance bond.[10] Under the circumstances, the court held: "We conclude that since there is nothing in the record indicating that the material and labor bond was written under the compulsion of the county, there is no reason why it is not a valid common-law bond." *Id.*, at 368.

The holding in Rexroth was based on a novel set of facts which are unlikely to exist in a typical subdivision bond claim. The general legal principle that statutory bonds will be

[10] The text of the performance bond is not recited in the opinion. From the context, one might infer that the bonding agent erroneously selected a bond form intended for construction projects, with performance and payment bond language on alternate sides of the form.

construed to give effect to their statutory purpose will, in most cases, defeat claims based on interpretations of allegedly ambiguous bond language which contradict the enabling statutes authorizing the requirement of subdivision bonds. Neither will courts hold the surety liable where the anti-statutory aspect of the claim - - be it based on the language of the developer's agreement, on an ordinance, or on the language of the bond itself - - originates with the over-reaching demands of the municipal obligee on the developer. The surety, however, may be held liable where it *voluntarily* executes a bond of broader scope than contemplated by the enabling statute. See, e.g. Mount Florence Group v. City of Peekskill, 235 A.D.2d 787, 652 N.Y.S.2d 814 (3rd. Dept. 1997), (holding that where a subdivision bond provided for a longer limitations period than the relevant statute, the surety was bound by the more liberal language of the bond0. See, also, Board of County Supervisors of Prince William County v. Sie-Gray Developers, Inc., 230 Va. 24, 334 S.E.2d 542, 546 (1985), which holds as follows:

> To allow appellees to assert a defense of ultra vires would contravene the general principal that one who makes a contract with a municipality is estopped to assert that it was ultra vires, when it is sought to be enforced against him. A defense unavailable to Sie-Gray would likewise be unavailable to Republic, as Surety. (citations omitted)

## CONCLUSION

Subdivision bonds are creatures of statute. Their scope, efficacy and interpretation are based substantially upon the particular land use law of the jurisdiction in which they are issued. Certain defenses, however, may be available to sureties consistent with the language of most state's land use laws. In addition to traditional contract and common law defenses, a surety should be alert to defenses which may be available to it based upon the obligee's failure to comply with the relevant enabling legislation or its own subdivision laws and/or the obligee's conduct in frustrating the surety's reasonable expectation that the principal's incentive to perform will not be impaired by the obligee to the surety's prejudice.

## JOSEPH C. GLAVIN, JR.

Joseph C. Glavin, Jr., born Newark, New Jersey, November 15, 1932; admitted to bar, 1963, New Jersey. Education St. Peter's College (A.B. 1955); Seton Hall University (J.D. 1963). Mr. Glavin served a judicial clerkship in the Superior court of New Jersey 1963-1964. Assistant Prosecutor, Essex County 1963-1966. Tax Commissioner, Essex County 1966-1971. Assistant County Counsel, Essex County 1971-1979. Special Counsel for New Jersey Legislative Committee 1978. Adjunct Professor Seton Hall School of Law 1986-1988. Partner Schumann, Hession, Kennelly & Dormant, Jersey City, New Jersey 1980-1984, Partner Sherren & Glavin, Roseland, New Jersey 1984-1986. Member New Jersey State Bar Association. Past Chairman New Jersey State Bar Fidelity and Surety Committee. General Counsel, First Indemnity of America Insurance Company, 1987 to present. Mr. Glavin has also represented a number of other carriers in surety and surety related matters. And, also, has represented Princeton Insurance Company and Health Care Insurance Exchange in the defense of medical malpractice litigation.

## ARMEN SHAHINIAN

Armen Shahinian is a member of the firm of Wolff & Samson, P.A. in Roseland, New Jersey and New York, New York. He received his Bachelor of Arts degree in 1971 from Brown University and his Juris Doctor degree in 1974 from New York University School of Law, where he served as an editor of the Annual Survey of American Law. He was admitted to the bar of the State of New Jersey in 1974 and to the bar of the State of New York in 1980. He is a member and Vice-Chair of the Fidelity and Surety Law Committee of the Tort and Insurance Practice Section of the American Bar Association. He is also a member of the Regions Division of FSLC currently serving as New Jersey Chair and is a former chair of the New Jersey State Bar Association's Fidelity and Surety Law Committee. Mr. Shahinian is also a member of the ABA Forum Committee on the Construction Industry and Section of Public Contract Law. Mr. Shahinian is also a former Chair of the Supreme Court of New Jersey's District Ethics Committee for the West Essex County, New Jersey District.

Mr. Shahinian's practice is concentrated in the areas of fidelity and surety law and construction litigation. He has presented numerous papers on fidelity and surety topics at bar association continuing legal education programs and at construction, surety and fidelity, and surety industry educational conferences, including, most recently, Obligee's Failure to Disclose Material Facts or Misrepresentations as a Basis for the Complete Discharge of the Surety, (THE AMERICAN SURETY ASSOCIATION SPRING MEETING, May 1998), Strategic Use of the General Indemnity Agreement in Settling Bond Claims Over a Principal's Objections (ABA TIPS MIDWINTER MEETING, January 26, 1996), with Scott Baron, The Late Notice Defense to Financial Institution Bond Claims Dissected: No Showing of Prejudice From Late Notice Should be Required (THE FIDELITY LAW ASSOCIATION, November 1996), Who is a Covered "Employee" Under the Financial Institution Bond?, FINANCIAL INSTITUTION BONDS, c.3 (ABA TIPS, D. Clore, Ed. 1995); The General Agreement of Indemnity, THE LAW OF SURETYSHIP, c.27 (ABA TIPS, E. Gallagher, Ed. 1993) and, with Bogda Clarke, Anatomy of a Workout Agreement - Extension of Surety Credit to the Troubled Contractor - Financing Considerations, Strategies and Financing Agreements, 1994 SURETY CLAIMS INSTITUTE (1994). In addition, his publications with his partner, David Samson, include The Surety's Reliance on Accounting Professionals in Underwriting: Augmenting Salvage Prospects, 20 SURETYSCOPE (NASBP Spring 1995); Mechanic's Liens on Public Projects, C. 41, THE McGRAW HILL CONSTRUCTION BUSINESS HANDBOOK (Second Ed. 1985); and Liability of the Architect to the Contractor for Delay Damages, C.4, AVOIDING LIABILITY IN ARCHITECTURE, DESIGN AND CONSTRUCTION (John Wiley & Sons 1983)