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**CLASS ACTIONS SUITS UNDER PAYMENT BONDS FOR
PREVAILING WAGES IN NEW YORK:
WHERE DID THIS CLAIM COME FROM?**

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CLASS ACTIONS SUITS UNDER PAYMENT BONDS FOR PREVAILING WAGES IN NEW YORK: WHERE DID THIS CLAIM COME FROM?

Sureties issuing bonds in New York have, on an increasing basis, been named as parties in class-action lawsuits brought under payment bonds issued in connection with public contracts. In such suits, the class seeks recovery from the surety for the failure of the principal, or its subcontractor, to pay prevailing wages in connection with a public construction project. The obligation of a contractor, and its subcontractors, to pay prevailing wages on such projects is set forth in the New York State Constitution¹, other state statutes², and, almost always, the underlying bonded contract. Service of the complaint is usually the surety's first notice of a claim (usually a large one) that can involve several projects and, quite frequently, more than one surety.

This paper will address the legal, factual, and practical issues that a surety will have to confront when faced with such claims. Whether a class actually exists and, if so how it should be defined, is the initial issue that must be resolved. Determining if there are any bond or statutory defenses comes into play in connection with the class issues, as well as in establishing any factual defenses the surety may have. Finally, and usually of greatest significance, the merits of the claim - how much is the surety liable for - must be addressed. The surety needs to determine what evidence exists that can minimize its exposure. It must also consider how it can refute the plaintiffs' evidence, particularly the audit upon which the class will heavily rely, to prevent the plaintiffs from establishing their own claim. Addressing these issues at the outset of the case allows the surety to structure its investigation and defense with an eye towards cost-effectively reducing its loss.

I. ISSUES RELATING TO THE CLASS AND CERTIFICATION

When defending a class action claim, one of the first inquiries the surety must make is whether there is a class at all and, if so, how it should be defined. The answers to these issues may, as a threshold matter, give the surety some sense of the magnitude of its exposure, as well as the costs that may be incurred in defending the claim.

The standard for class certification is set forth in Article 9 of New York's Civil Practice Law and Rules.³ Article 9 authorizes a class action if (1) the class is so numerous that joinder of all members is impracticable; (2) questions of law or fact common to the class predominate over any question affecting only individual members; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; (4) the representative parties will fairly and adequately protect the interests of the class; and (5) a class action is superior to other available methods for the fair and efficient adjudication

¹ See N.Y. Constitution, Article I, § 17.

² N.Y. Labor Law § 220 *et. seq.*

³ CPLR Article 9 is based upon Fed. R. Civ. Pro. 23. *O'Hara v. Del Bello*, 47 N.Y.2d 363 (1979). There is no reason why these types of cases cannot proceed in Federal courts, assuming the court can maintain jurisdiction over the case on diversity of citizenship grounds under 28 U.S.C. § 1332. From a practical perspective, however, Federal court jurisdiction is unlikely because the plaintiffs cannot aggregate their "separate and distinct" individual underpayment claims to satisfy the \$75,000 threshold required by 28 U.S.C. § 1332(a). See *Snyder v. Harris*, 394 U.S. 332 (1969); *Gilman v. BHC Securities*, 104 F.3d 1418 (2d Cir. 1997).

of the controversy.⁴ These criteria will be liberally construed in favor of allowing the class to be certified.⁵

The plaintiffs, within 60 days after the time for all named defendants to file a responsive pleading, must move for an order confirming the class.⁶ Such an order may be conditional and can be altered or amended on motion.⁷ To proceed as a class action, the court must find that the criteria of CPLR § 901 have been met; factors to be considered by the court include (1) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (2) the impracticability or inefficiency of prosecuting or defending separate actions; (3) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (4) the desirability or undesirability of concentrating the litigation of the claim in the particular forum; and (5) the difficulties likely to be encountered in the management of a class action.⁸

The order permitting the class action shall define the class, and may be limited to members who do not opt out of the class within a reasonable time after receiving notice.⁹ A class may be divided into sub-classes¹⁰, usually upon cross-motion by the surety in response to the class' motion for certification. In cases where a surety may have only written a few bonds that are the subject of a suit in which several sureties and many projects are involved, the creation of a sub-class can serve to reduce the surety's litigation costs by helping it narrow its own issues and avoid becoming embroiled in discovery issues that have nothing to do with its own particular liability.

The definition of the class can also be important, and the surety should oppose certification of a class whose definition is broader in scope than that which includes only the claimants who can properly seek recovery under the payment bond. The payment bond will usually expose the surety to liability if the principal, or one of its subcontractors, fails to pay prevailing wages in connection with the underlying public contract. A purported class, however, may seek certification in which the class definition includes members who worked for an affiliate or controlled entity. Since the surety agreed only to answer for payment for labor supplied to the named principal (or its subcontractors), the surety should not be responsible for liabilities incurred, directly or secondarily, by other parties. Certification of an improperly defined class can therefore be opposed by relying on New York's Statute of Frauds, which, in part, requires that a promise to answer for the debt or default of another be in writing.¹¹ A bond principal may be statutorily liable for prevailing wage violations committed by other parties, such as "substantially-owned affiliated entity or any successor or subsidiary".¹² The surety, however, did not agree to answer for anything other than

⁴ CPLR § 901(a)(1)-(5).

⁵ See e.g. Godwin Realty Associates v. CATV Enterprises, Inc., 275 A.D.2d 269, 712 N.Y.S.2d 39 (App. Div. 1st Dept. 2000); Lauer v. New York Telephone Co., 231 A.D.2d 126, 659 N.Y.S.2d 359 (App. Div. 3rd Dept. 1997).

⁶ CPLR § 902.

⁷ Id.

⁸ Id.

⁹ CPLR § 903.

¹⁰ CPLR § 906(2).

¹¹ N.Y. General Obligations Law § 5-701(a)(2).

¹² See Labor Law §§ 220-b(2)(i), 220-b(4)(g).

debts, as described by the bond or applicable law, that are (i) related to the bonded contract, and (ii) incurred by the bond principal or, if applicable, its subcontractors. A proposed class definition that would expose the surety to greater liability should be opposed.

Prompt resolution of the threshold issue of certification allows the litigants, and the court, to streamline issues and better determine how the case should be managed. Pre-certification discovery is permitted, and a “mini-hearing” should be held if certification is opposed.¹³ For the surety, pre-certification discovery can have tangible benefits. It gives the surety the chance to determine more accurately how many claimants there really are, and therefore better determine its exposure. If the number of claimants is low, joinder of all members of the class may not be impracticable. The efficiency argument, which is one of the strongest arguments in favor of certifying a prevailing wage class, may therefore not exist.

Similarly, discovery may show that the claims of the named plaintiffs (whom it stands to reason are the most interested members in the case at the time the complaint is filed) may not be typical of purported class’ claims since the claims of the named plaintiffs may be much higher than those of the unnamed members. It may also turn out that some of the members’ claims are untimely, further demonstrating that the claims of the named plaintiffs are not typical of the class as a whole. Pre-certification discovery can also help to narrow the definition of the class, so that the surety does not expend unnecessary resources in disproving its liability for claims that are not properly within the scope of its bond.¹⁴ Finally, the surety may want to oppose certification because the court has the discretion to award attorneys fees, over and above the actual damages awarded the class, if the class prevails.¹⁵

Once a class is approved and defined, an order to that effect will be issued,¹⁶ and reasonable notice of the class action will be given to its members.¹⁷ The surety should obtain the class members’ response to the notice to see how many members it truly contains, both to better assess its liability, and, potentially, to re-contest the certification issue if it turns out that the actual class is not actually numerous enough to support class certification.

¹³ See also Chimenti v. American Express Co., 97 A.D.2d 351, 467 N.Y.S.2d 357 (App. Div. 1st Dept. 1983), where the appellate court, in decertifying a class, found that the lower court improperly relied upon plaintiffs’ counsel’s conclusory affidavit attesting to the satisfaction of the certification requirements, and should have permitted limited discovery on the certification issues and conducted a mini-hearing.

¹⁴ See Pesantez v. Boyle Environmental Services, 251 A.D.2d 11, 673 N.Y.S.2d 659 (App. Div. 1st Dept. 1998), where the appellate court modified the definition of the class since there was no evidence that any purported class member worked for a subcontractor of the principal.

¹⁵ CPLR § 909.

¹⁶ CPLR § 903

¹⁷ CPLR § 904.

II. THE SURETY'S LIABILITY

Whether the class is certified or not, the surety must address its potential liability to the plaintiffs. In conducting such an analysis, the surety must focus on whether it has defenses under its bond and, if not, the scope and extent of its liability.

A. **Bond Defenses**

The scope of the surety's liability arises under its payment bond and the underlying contract between the principal and obligee that is typically incorporated by referenced into the payment bond. If the payment bond is issued in connection with a contract between the principal and a public entity for the construction of a public improvement, the surety's liability will also be construed in accordance with New York State Finance Law § 137,¹⁸ New York's "Little Miller Act."¹⁹

If SFL 137 applies, the payment bond will be construed in accordance with both its own terms and the requirements of the statute. New York's Court of Appeals, the highest court in the state, has held that the oft-cited distinction between "common law" and "statutory" bonds no longer exists where the payment bond is mandated by SFL 137.²⁰ If the underlying contract is one that requires the issuance of a payment bond pursuant to SFL 137, the payment bond, regardless of what it says, may be subject to the statute's terms. If the bond is silent as to an area addressed by the statute (such as a limitations period within which suit can be filed), the terms of the statute will be read into the bond.²¹ Similarly, if the bond gives less protection to, or places greater burdens upon, claimants than is afforded or imposed by the statute, the more liberal statutory provision will control (i.e. the bond provides a floor, not a ceiling).²² The converse, however, is not true: should the bond give greater protection to claimants than that afforded by the statute, the surety

¹⁸ Hereinafter referred to as "SFL 137".

¹⁹ Pursuant to SFL 137, the required bond guarantees prompt payment of moneys due to "all persons furnishing labor or materials to the contractor or his subcontractors in the prosecution of the work provided for in [the] contract." SFL 137 applies, with limited exceptions based on the dollar threshold of the contract, to all contracts for a "public improvement" with (i) the "State of New York", (ii) a "municipal corporation", (iii) a "public benefit corporation", and (iv) a "commission appointed pursuant to law." SFL 137 (1). A "public improvement" is defined as "an improvement of any real property belonging to the state or a public corporation . . ." Lien Law § 2(7). A "public corporation" is defined to include "a municipal corporation, a district corporation or a public benefit corporation." General Construction Law § 66(1). The definition of a "municipal corporation" includes a county, city, town, village and school district. General Construction Law § 66(2); General Municipal Law § 2. A "public benefit corporation" is a "corporation organized to construct or operate a public improvement . . ." General Construction Law § 66(2). Examples of public benefit corporations include the New York City School Construction Authority (Public Authorities Law § 1727), the Dormitory Authority (Public Authorities Law § 1677), the Metropolitan Transit Authority (Public Authorities Law § 1263), and the Triborough Bridge and Tunnel Authority (Public Authorities Law § 552). Public housing authorities, such as the New York City Housing Authority, are public corporations (Public Housing Law § 3[2]).

²⁰ A.C. Legnetto Const. Inc. v. Hartford Fire Ins. Co., 92 N.Y.2d 275, 277, 680 N.Y.S.2d 45 (1998).

²¹ See Windsor Metal Fabrications, Inc. v. General Accident Ins. Co. of Am., 94 N.Y.2d 124, 134, 700 N.Y.S.2d 90, 95 (1999) (pointing out that the payment bond in Legnetto was silent as to its limitations period).

²² Dutchess Quarry & Supply Co., Inc. v. Firemen's Ins. Co. of Newark, New Jersey, 190 A.D.2d 36, 39, 596 N.Y.S.2d 898, 900 (App. Div. 3rd Dept. 1993).

will be held to the language of its bond.²³ Applying the most liberal construction possible does no more than hold the surety to the terms of its guarantee, and furthers the public policy of assuring payment to the persons who provide the labor and material for the public improvement.

SFL 137 does not apply automatically where the labor was provided in connection with a public improvement. The underlying bonded contract must also have been between the principal and a statutorily defined public entity. Many municipalities and public authorities have taken to using construction managers to administer construction projects and contracts. Where the party with which the principal contracts is a construction manager, attention must be paid as to whether or not the construction manager is acting as an agent for the public entity; this should be determined under a common-law agency analysis. The surety should review the principal's contract with the construction manager, as well as the construction manager's contract with the owner, as well as the surety's own underwriting file for the subject bond or bonds. If the documents establish that the construction manager is not an agent, such that the principal is not in privity with the public entity or an agent thereof, there is no reason that SFL 137 should govern the payment bond. Similarly, where the surety issues a bond for a subcontractor on a public improvement, in favor of a general contractor as obligee, SFL 137 should not control the scope of the surety's liability because the underlying bonded contract is not one with a public body.

The applicability of SFL 137 will usually impact upon two of the surety's strongest defenses to payment bond claims: (i) the limitations period within which suit can be brought against the surety, and (ii) the requirement of notice imposed upon claimants, particularly second-tier claimants who contend that they were not paid prevailing wages by one of the principal's subcontractors. As to the limitations period, SFL 137(4)(a) prohibits an action under the bond if it is commenced "after the expiration of one year from the date on which final payment under the claimant's subcontract became due." As to the notice requirement, SFL 137 does not require pre-suit notice by a claimant having a "direct contractual relationship" with the principal. SFL 137(3), however, requires that claimants not having such a relationship with the contractor/principal (i.e. those whom a subcontractor failed to pay), must provide written notice to the principal "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".

Accordingly, if the prevailing wage plaintiffs were employed by the principal itself, SFL 137 applies to the payment bond, suit must be filed against the surety within one year of the date on which final payment became due the plaintiffs, and any bond requirement of pre-suit notice will be void.²⁴ Under Labor Law § 220-g, a suit by an employee to recover prevailing wages may be brought, against a payment bond required by SFL 137, "within one year of the date of the last alleged underpayment . . ." If SFL 137 does not apply, the terms of the bond alone will govern. Because each member of the claiming class may not

²³ See Scaccia Concrete Corp. v. Hartford Fire Ins. Co., 212 A.D.2d 225, 628 N.Y.S.2d 746 (App. Div. 2nd Dept. 1995); Mason Tenders District Council Welfare Fund v. Rubino, 2001 U.S. Dist. Lexis 515 (S.D.N.Y. 2001).

²⁴ This would have an adverse impact upon a surety's ability to rely upon provisions, such as the pre-suit notice requirement for direct claimants that is set forth in the American Institute of Architects form A312 payment bond, that are more burdensome or restrictive than those set forth by SFL 137, if the statute applies.

have worked on the underlying contract on the same dates, or may have been last “underpaid” on a different date, discovery must be taken to determine if some members of the class may be time-barred from asserting their claims. This potentially critical inquiry should be made before the class is certified, so as to prevent potentially time-barred class members from boot-strapping onto the timely claims of other members.

While the limitations defense remains intact whether it is construed under the terms of the bond or SFL 137, the applicability of SFL 137 is important in determining the viability of the notice defense. If SFL 137 applies, any notice requirement that the bond imposes upon direct claimants will not be enforced. More importantly (and unfortunately for sureties) if the payment bond was issued to satisfy the requirements of SFL 137, the notice requirement imposed upon second-tier claimants will not apply to claims for prevailing wages under the Labor Law. As expressly set forth in Labor Law § 220-g, a suit under a bond mandated by SFL 137 may be filed by an affected employee “without prior notice”. Given the express reference to SFL 137 in Labor Law § 220-g, New York courts have held that second-tier prevailing wage claimants need not provide notice to the bond principal when suing under an SFL 137 bond.²⁵ If, however, the payment bond was not issued to meet the requirements of SFL 137, the bond’s notice requirements remain in effect.

Two other defenses may also be available to the surety, although their ultimate benefit is questionable. The first addresses the preemption of state Labor Law claims by its Federal counterpart, the Davis-Bacon Act.²⁶ The applicability of the Davis-Bacon Act, as it relates to non-Federal projects, depends upon the nature of the funding for the public contract. Particularly in contracts involving public housing authorities, the funding may be provided by the Federal government, in which event the Labor Law is preempted by the prevailing wage laws set forth in the Davis-Bacon Act, which does not afford claimants a private cause of action for a violation thereunder.²⁷ Similarly, a quantum meruit claim for the

²⁵ See Sullivan v. International Fidelity Ins. Co., 255 A.D.2d 128, 679 N.Y.S. 2d 391, 392 (App. Div. 1st Dept. 1998), where the Court found that Labor Law § 220-g relieved the second-tier claimants from providing notice under a bond issued in compliance with the requirements of SFL 137. The Court stated that “[T]he public policy implemented by Article 8 of the Labor Law, seeking to ensure payment of prevailing wages on public construction contracts, is paramount to the surety’s interest in avoiding liability for obligations imposed upon it without its consent.”

²⁶ 40 USC § 276a et seq.

²⁷ In Majstrovic v. R. Maric Piping, Inc., 171 Misc.2d 429, 655 N.Y.S.2d 285 (Sup. Ct., Kings Co. 1997), the court dismissed a suit for prevailing wages due for labor supplied on several New York City Housing Authority contracts, holding that the plaintiffs had no private cause of action under the Davis-Bacon Act, which preempted the Labor Law because the contracts were Federally funded. The court, however, dismissed the claim against the surety only on timeliness grounds, and did not address whether the surety was liable for the alleged underpayment under its bond. See also Grochowski v. Ajet Const. Corp., 2000 U.S. Dist LEXIS 11632 (S.D.N.Y. 2000) (the Davis-Bacon Act provides the exclusive means of recourse where the mandated wages have not been paid); Weber v. Heat Control Co., 579 F. Supp. 346 (D.N.J. 1982) (holding there is no private right of action under the Davis-Bacon Act, and suggesting that the claimant pursue administrative relief from the appropriate state Department of Labor or contractual relief in state court); but see McDaniel v. Univ. of Chicago, 548 F.2d 689 (7th Cir. 1977), cert. denied 434 U.S. 1033 (1978) (holding, after remand from an earlier vacatur by the Supreme Court, that a private right of action does exist under the Davis-Bacon Act, and that the claimant might have a breach of contract claim in state court).

proper value of labor performed has been rejected as “an indirect attempt to privately enforce the Federal prevailing wage schedules.”²⁸

Because the surety’s liability is usually co-extensive with that of its principal, the preemption defense may be effective. If a quantum meruit claim cannot succeed in recovering unpaid prevailing wages, it follows that an ordinary breach of contract action should also be rejected as a “back door” effort to get around the administrative requirements of the Davis-Bacon Act. There is also a split among the Federal Circuits as to whether the Davis-Bacon Act confers a private right of action, on a third-party beneficiary theory, when the underlying contract expressly sets forth not only that prevailing wages are required, but the actual amount of the wages to be paid.

However, the Davis-Bacon Act does provide that if amounts withheld from payments due the contractor are insufficient to reimburse the laborers for the underpayment, the laborers do have a direct cause of action against the surety.²⁹ Were the surety to seek dismissal of a suit seeking wages due under the Davis-Bacon Act prior to compliance with the Act’s administrative remedies, a court could either order a stay or equitably toll the applicable limitations period while the administrative process runs its course. The end result is that the surety is not entirely relieved of potential liability simply because the Labor Law is preempted by the Davis-Bacon Act.

A second defense commonly asserted by contractors and/or their sureties is that the class’ claims under Labor Law § 220 require that an aggrieved employee must first exhaust his administrative remedies before commencing a private right of action to recover unpaid prevailing wages. As noted above, however, Labor Law § 220-g expressly authorizes the claimant to bypass the administrative process and proceed directly against a payment bond issued to satisfy the requirements of SFL 137.

While Labor Law § 220-g is unclear as to whether the employee is free to pursue directly a Labor Law claim as opposed to a breach of contract claim for a failure to pay prevailing wages as required by the statute, the practical consequence for the surety is that the claimant can seek, under the bond, the amount he is owed. It seems clear that exhaustion of administrative remedies is no defense to a surety whose bond will be construed in accordance with SFL 137, since the claimant’s common-law breach of contract claims survive.³⁰ Even for bonds not subject to SFL 137 interpretation but which were

²⁸ Gonzalez v. D&S Zaffuto Joint Venture, 271 A.D.2d 356, 707 N.Y.S.2d 87 (App. Div. 1st Dept. 2000)

²⁹ 40 U.S.C. 276a-2(b); see United States ex. rel. Bradbury v. TLT Construction Corp., 138 F.Supp.2d 237 (D.R.I. 2001) (an private action against a Miller Act bond [40 U.S.C. § 270A et seq.] must wait until the administrative determination is made and there are insufficient withheld funds to satisfy the claim.

³⁰ In Pesantez v. Boyle Environmental Services, Inc., 251 A.D.2d 11, 673 N.Y.S.2d 659 (App. Div. 1st Dept. 1998), the court dismissed the claim seeking relief under Labor Law § 220 due to a failure to exhaust administrative remedies, but allowed the breach of contract and payment bond claims to proceed; see also Samborski v. Linear Abatement Corp., 1998 U.S. Dist. LEXIS 12306 (S.D.N.Y. 1998). In Wright v. Herb Wright Stucco, Inc., 50 N.Y.2d 837, 430 N.Y.S.2d 52 (1980), the Court of Appeals adopted the dissenting opinion from the Appellate Division (72 A.D.2d 959, 422 N.Y.S. 253 [App. Div. 4th Dept. 1979], which allowed plaintiffs to proceed with their common-law breach of contract claims for the underpayment of prevailing wages notwithstanding their failure to exhaust their administrative remedies under Labor Law § 220. Given that the payment bond is intended to secure payment of such contractual obligations, common sense dictates that a common-law claim against the payment bond will be

issued in connection with public contracts, the exhaustion defense may still not forestall a common law claim under the bond.

B. Factual Defenses

The surety will also have to address the actual merits of the class' claim. There are several inquiries the surety must resolve to determine its liability: Did the class members actually provide labor in connection with the bonded contract? If so, when did the class members first and last provide such labor? How much, and in what manner, were the members paid? How much less than the required amounts were the class members paid? How should the individual class members be classified in the prevailing wage scheme? Who has the documents that establish, or refute, the class' claim? Each of these questions must be answered, in one form or another, for the surety to determine its liability.

One problem the surety may face in conducting its factual analysis may be the recalcitrance of its principal in either defending the claim or in providing information that can help the surety determine its true exposure. Notwithstanding any contractual or common-law right it may have to seek indemnification from the principal and individual indemnitors, the surety must keep in mind that the one of the central (if unpleaded) allegations in a prevailing wage claim is that the employer has either (i) withheld for its own benefit monies that are due the laborers, or (ii) lied to the public body in falsely certifying that it has paid prevailing wages to the workers who supplied labor to the project. Under either scenario, the contractor faces potential criminal charges.³¹ Such a criminal violation may occur, separately, with each falsely certified payroll report that the contractor submits, potentially subjecting the contractor to cumulative penalties. Furthermore, if the Department of Labor is involved in the investigation, the employer may fear debarment from bidding on, or being awarded, public works contracts.³² The surety, therefore, may well find that its principal, if still around at all, is not particularly anxious or willing to provide evidence, either documentary or testimonial, that might assist the surety but sink the principal.

The plaintiffs have the burden of proof in establishing their claim by a preponderance of the evidence, and, as in any contract action, must establish their damages to a reasonable degree of certainty. In other words, the plaintiffs must show how much they worked, how much they should have been paid, and how much they were actually paid.³³

permitted even where administrative remedies have not been exhausted. See also Fata v. S.A. Healy Co., 289 N.Y. 401, 46 N.E.2d 339 (1943); Melissakis v. Proto Construction & Development Corp., 741 N.Y.S.2d 731, 2002 App. Div. LEXIS 4855 (App. Div. 2nd Dept. 2002).

³¹ Labor Law § 220-c provides that “[A] contractor of subcontractor who shall upon his oath verify any statement required to be filed under this act which is known by him to be false shall be guilty of perjury and punishable as provided by the penal law.” The applicable provisions of the Penal Law are §§ 175.30 and 175.35 (offering a false statement for filing in the second and first degrees, respectively), §§ 210.35 and 210.40 (making an apparently sworn false statement in the second and first degrees, respectively), § 210.45 (making a punishable false written statement, and §§ 210.05 and 210.10 (perjury in the third and second degrees, respectively).

³² Labor Law § 220-b(3)(b) provides that two findings by the Department of Labor, within a consecutive six-year period, that a contractor wilfully failed to pay prevailing renders the contractor ineligible to bid on, or be awarded public work, for five years.

³³ The actual amount of wages due is set forth by Labor Law § 220(5)(a) as “the rate of wage paid in the locality, as hereinafter defined, by virtue of collective bargaining agreements between bona fide labor organizations and

The surety, however, would be remiss in not affirmatively seeking documentation that reflects its possible exposure. The plaintiffs should be required to produce documentation reflecting the compensation (wages and benefits) they acknowledge receiving from their employer (the contractor/principal or its subcontractor), such as W-2 statements or Internal Revenue Service form 1099. They should also be pressed to explain, either through documents or deposition testimony, what projects they worked on and how many hours they worked on each project. These responses should be tested against documentary evidence obtained from either the principal (or its allegedly offending subcontractor), such as payroll records, time cards, daily sign-in and/or attendance sheets, and certified payroll records.

Such information can also be obtained from the public owner, either by subpoena or pursuant to a "FOIL" request under New York's Freedom of Information Law.³⁴ Many public entities however, have unwritten internal policies whereby they will not produce unredacted certified payroll records, ostensibly on privacy grounds, absent a court-ordered subpoena. Public owners will, however, provide project documents that may help the surety determine if a defense exists, either on potential limitations grounds or regarding the quantum of the claim. The benefit of going the Freedom of Information Law route is that the documents received pursuant to the request, unlike documents produced in response to a subpoena, do not have to be produced to the plaintiffs absent a discovery demand; this may allow the surety to see how strong, or weak, its defenses are without plaintiffs' counsel knowing that information.

Unless the surety is virtually certain that it can prevail on some other defense, it will have to conduct an audit of the principal's and other available records, either on its own initiative or in response to an audit already conducted by the plaintiffs. The audit is critical to determining the amount of the surety's liability, and will likely be worth its cost. Where a principal has performed bonded and unbonded work, expect that the plaintiffs, shockingly, will claim to have been underpaid on the bonded projects, particularly those projects where claims can still be made timely. The class' audit may assume that overtime was worked, and may assume that individual workers should be classified in such a way that they are entitled to higher wages and benefits. These assumptions need to be carefully explored; the more holes put in the class' audit, the more the surety can save. A deposition of the public owner's project officer may help establish whether overtime was actually worked, as well as the true nature of the labor supplied. For example, if masonry labor is at issue, expect that the class' audit will reflect that almost every worker was a bricklayer, not a lesser-paid mason tender. The audit should look to reconcile the wages earned, and due, with the manpower actually spent on a project-by-project basis. Demand should be made of the plaintiffs to produce all documents upon which their auditors relied, as well as for the auditors' notes.

It is equally important to test the amount of the class representatives' claims against those of the other members. The representatives will likely be owed the most money of the

employers of the private sector, performing public or private work provided that said employers employ at least thirty per centum of workers, laborers or mechanics in the same trade or occupation in the locality where the work is being performed."

³⁴ Public Officers Law § 87 et. seq.

individual class members. Even if the class is properly certified, contesting the “typicality” of the representatives claims is important; a class action claim can allow for damages to be computed loosely. The representatives may claim to have been underpaid on bonded projects for two years, at a rate of \$10 per hour; based on an eight-hour day and a fifty-week work year, a two-year claim is \$40,000 per employee. For a 40-member class (not an atypical size), the claim is \$1.6 million. Even if there is no question, or no way of refuting, the underpayment history, the surety may be able to successfully contest an across-the-board application of the amount due the representatives, so that the basis for extrapolating the representatives’ damages to those of the class as a whole becomes suspect, if not completely unsupportable.

All of the pre-trial discovery proceedings, and the audit, should be focused not only on determining how much the surety is potentially liable for, but on whether the plaintiffs can prove their case at trial. Do the plaintiffs have admissible evidence? While the plaintiffs’ auditor can testify to his findings, if the factual predicates for those findings are significantly undermined, the findings may be worthless, if not inadmissible.

C. Resolution

Because of the risk and expense in going through trial, these claims, like most commercial claims, are settled.³⁵ How the settlement will be funded is subject to negotiation. If all the class members are known by virtue of their earlier responses to the notice that is served subsequent to class certification, the settlement can be funded on the basis of the class’ actual damages. The amount of the settlement should be deposited with the class administrator, and notice of the settlement will be sent to all members who responded to the first notice, although the court may direct that it be sent to all members, effectively giving them a second chance at the settlement fund. The settlement order should provide for a release in favor of the surety on behalf of all class members, and will likely provide that attorneys fees for the class’ counsel be deducted. The claimants will then submit their proofs of claim to the administrator, who will, subject to approval of the court, make distributions.

As to interest to be paid, if any, the surety should take the position that it is not it liable for pre-suit interest. Unless the surety received notice of the claim prior to the suit being filed, it was never in default of its bond obligations prior to the suit being commenced.³⁶ In fact, it can be argued that the surety is not in default at all, even post-suit, until the plaintiff class provides some indicia of the surety’s liability.

Another element of the settlement involves the class’ attorneys’ fees. If a judgment has been entered in favor of the class,³⁷ the court may award, in its discretion, fees to the representatives’ counsel and, in the interests of justice, may direct the opponent of the

³⁵ Pursuant to CPLR § 908, a class action cannot be dismissed or settled without approval of the court, on notice to the class as the court directs.

³⁶ Pursuant to General Obligations Law § 7-301, interest starts to run against a surety from the date of its own default.

³⁷ Pursuant to CPLR § 905 the judgment, whether of not favorable to the class, must include and describe the class members.

class to pay the fees.³⁸ The issue of the surety's liability for these fees, however, is unclear. The surety almost never receives pre-suit notice of prevailing wage claims, thereby depriving it of the chance to investigate or adjust the claim. While SFL 137 allows for an award of attorneys fees in limited situations,³⁹ the public policy behind assessing attorneys fees against sureties (for compelling claimants to litigate claims to which there was no defense) is not furthered when the surety had no opportunity to settle the claim. Furthermore, attorneys fees are not "labor" incorporated into the bonded project, so the surety is not ordinarily liable for such fees under the bond. In the regular course of settling such claims, the fees will be deducted from the settlement fund, and the court will have to approve the amount in the order settling and dismissing the case.

CONCLUSION

A prevailing wage class action suit can confront the surety with significant exposure from unanticipated claims. Even when a principal is already "in claim", a prevailing wage suit seeking millions of dollars on a dozen projects is new cause for concern. The potential criminal consequences for the surety's principal can further cloud the issues and hamper the surety's ability to defend itself. A prompt investigation, focusing on getting information from the principal so that the surety can best determine its own liability, and how to minimize it, is often be the best approach for the surety to take. Despite the potential morass of determining what the laborers are owed on each project, the surety should not lose sight of the fact that the purported class members are seeking their wages - not lost profit or overhead - and are often looking for a quick, and sometimes even properly due, payment. If the investigation shows the potential for real exposure in the future, an early settlement may be warranted and can result in substantial savings for the surety. Simply accepting at face value, however, the class' claims can result in an overpayment. The surety, whether structuring its defense towards settlement or trial, needs to use a critical eye to separate the wheat from the chaff, the proof from the conjecture, the admissible from the inadmissible, so as to determine its true exposure and how it should handle its defense.

³⁸ CPLR § 909.

³⁹ SFL 137 § (4)(c) allows for an award of attorneys fees only where the court, upon review of the entire record, makes a finding that "it appears that either the original claim or the defense interposed to such claim is without substantial basis in fact or law." See Northeast Caissons, Inc. v. Columbus Construction Corp., 268 A.D.2d 512 (2d Dept. 2000).

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