FIFTEENTH ANNUAL
NORTHEAST SURETY AND FIDELITY CLAIMS CONFERENCE

SEPTEMBER 30 - OCTOBER 1, 2004

RESOLVING PERFORMANCE BOND EXPOSURES THROUGH ASSIGNMENTS OF BONDED CONTRACTS

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Introduction

Surety claims professionals tend to consider the following options when confronted with actual or anticipated performance bond claims: financing the principal, buying out the claim with the obligee, tendering a completion contractor, executing takeover and completion contracts with either the principal or another contractor, or denying liability.

Another option, but one that appears to be less commonly considered and less popular than the foregoing, is facilitating the assignment of the bonded contract from the principal to either a company related to the principal or a third party contractor. This option may be most viable in circumstances that also lend themselves to tenders. Assignments may sometimes be more advantageous to sureties than tenders. There may be circumstances under which an assignment is viable but a tender is not. There may also be circumstances where assignments can serve as viable substitutes to takeover agreements and completion contracts.

The thesis of this paper is that "assignments" are legally and practically available in many claims contexts and that, in some cases, assignments have advantages over the more common claims options listed above. This is not to suggest that "assignments" are a panacea but rather that assignments are an under-utilized option that can offer meaningful advantages to a surety under certain circumstances.

This paper will explore the legal issues that may be triggered by arranged assignments, the practical advantages and disadvantages of arranged assignments, and the fact paradigms that may be particularly conducive to such assignments. Attached to this paper as exhibits are form documents that can be used as a starting point from which to draft the necessary assignment documents.

Legal Considerations

Many construction contracts incorporate anti-assignment clauses that purport to preclude assignments of the work to be performed under the contract either absolutely or in the absence of consent from the obligee. Strict enforcement of these clauses would seriously limit the desirability of assignments as completion options.

Anti-assignment clauses are disfavored and construed narrowly in many jurisdictions in deference to policies that seek to facilitate commercial transactions by fostering the free alienability of contracts.[1]

To this end, the majority trend is for courts to draw a distinction between an assignor's "right to assign" as opposed to the assignor's "power to assign."[2]

To the extent that an anti-assignment clause is construed to prohibit solely the "right to assign", an assignment in violation of the clause under the majority view does not void the assignment but only entitles the other contracting party to an award of its out of pocket losses caused by the illicit assignment.[3] Where a clause merely prohibits assignments, the clause is typically construed to impair solely the "right to assign."[4]

[1] Rumbin v. Utica Mut. Ins. Co., 254 Conn. 259, 757 A.2d 526, 531 (2000), 531, citing 3 E. Farnsworth, Contracts (2d Ed. 1998) § 11.4, pp. 82-83 ("Given the importance of free assignability . . . anti-assignment clauses are construed narrowly whenever possible.").

[2] *See, e.g.:* Rumbin v. Utica Mut. Ins. Co., 254 Conn. 259, 757 A.2d 526 (2000); Bel-Ray Co. v. Chemrite (Pty.) Ltd., 181 F.3d 435 (3d Cir. 1999); Cedar Point Apartments, Ltd. v. Cedar Point Inv. Corp., 693 F.2d 748 (8th Cir. 1982); Pravin Banker Associates, Ltd. v. Banco Popular Del Peru, 109 F.3d 850 (2d Cir. 1997); Lomas Mortgage U.S.A., Inc. v. W.E. O'Neil Constr. Co., 812 F.Supp. 841 (N.D. Ill. 1993); In re Tycon Tower I Inv., 1995 Va. Cir. LEXIS 1455 (1995); Hanigan v. Wheeler, 19 Ariz. App. 49, 52 (1972); Wonsey v. Life Ins. Co. of North America, 32 F.Supp.2d 939 (E.D. Mich. 1998); Macklowe v. 42nd St. Dev. Corp., 170 A.D.2d 388 (N.Y. Sup. Ct. App. Div. 1991); Pro Cardiaco Pronto Socorro Cardiologica, S.A. v. Trussell, 863 F.Supp. 135 (S.D.N.Y. 1994); Garden State Buildings L.P. v. First Fidelity Bank, N.A., 70305 N.J. Super. 510, 702 A.2d 1315 (N.J. Super. Ct. App. Div. 1997); Reuben H. Donnelley Corp. v. McKinnon, 688 S.W.2d 612 (Tex. App. 1985); In re Freeman, 232 B.R. 497 (Fla. Bankr. 1999); Paccom Leasing Corp. v. E.I. du Pont de Nemours & Co., 1991 U.S. Dist. LEXIS 15518 (D. Del. 1991); International Telecommunications Exchange Corp. v. MCI Telecommunications Corp., 892 F.Supp. 1520 (N.D. Ga. 1995); In re Kaufman, 37 P.3d 845 (Okla. 2001).

[3] See cases cited in footnote 2, supra.

[4] See cases cited in footnote 2, supra

As a result, the assignment is legally enforceable but an aggrieved party's sole remedy for a breach is limited to an award of damages. "Where a contract contains a promise to refrain from assigning, an assignment that violates it would not be ineffective. 'The promise creates a duty in the promisor not to assign. It does not deprive the assignor of the power to assign and its breach, therefore, would simply subject the promisor to an action for damages while the assignment would be effective. . . .'" [5]

An assignment is void under the majority view only where an anti-assignment clause" is construed to negate the power to assign. Many courts are reluctant to reach this conclusion and only do so where a clause explicitly states that an assignment contrary to its terms is "void" or other like language. As some courts have noted:

> "[T]o reveal the intent necessary to preclude the power to assign, or cause an assignment violative of contractual provisions to be wholly void, such clause must contain express provisions that any assignment shall be void or invalid if not made in a certain specified way. Otherwise, the assignment is effective and the obligor has the right to damages."[6]

However, the courts can differ on what is required under the majority rule to manifest an intention to void an assigned contract. For example, in Bank of America, N.A. v. Moglia,[7] the Seventh Circuit found that "magic words" are not required in an anti-assignment clause. The Court cited Comment C to the Restatement (Second) of Contracts §322(2), which states, "[w]here there is a promise not to assign but no provision that an assignment is ineffective, the question whether breach of the promise discharges the obligor's duty depends on all the circumstances." [8]

Assuming an anti-assignment clause under the majority rule that solely impairs the right to assign, an obligee that objected to an assignment arranged by the surety and its principal could conceivably file suit for an award of damages resulting from the assignment. However, it would presumably be difficult or impossible to demonstrate an out of pocket loss where a construction contract or subcontract is assigned by the original contractor to a competent, financially viable replacement that has in place all of the contractually required bonds and insurances and is in compliance with all eligibility requirements under the contract. Therefore, while the opportunity exists for a party to seek damages for an assignment in a jurisdiction that applies the majority rule, the reality is that there will generally be no damages caused by an assignment.

There is a credible minority of jurisdictions that reject the majority rule, do not draw a distinction between "the power to assign" and "the right to assign," and hold that

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[5] Hanigan v. Wheeler, 19 Ariz. App. 49, 52 (1972) quoting J. Murray, Jr., Grismore on Contracts § 258 at 421 (1965). Accord Restatement (Second) of Contracts § 322(2)(b) (1981) ("A contract term prohibiting assignment of rights under the contract, unless a different intention is manifested . . . gives the obligor a right to damages for breach of the terms forbidding assignment but does not render the assignment ineffective.").

[6] Bel-Ray, 181 F.3d at 442, citing Garden State Buildings, 702 A.2d at 1321.

[7] 330 F.3d 942 (7th Cir. 2003).

[8] Id. at 948.

assignments in the face of an anti-assignment clause are generally void.[9] In general, these courts are more concerned with upholding parties' right to contract for specific terms and enforcing the clear terms of the anti-assignment clause than with requiring "magic words," even going as far as calling it unnecessary "empty verbiage." [10]

To the extent that a jurisdiction subscribes to the above-referenced minority rule on anti-assignment clauses, a contracting party's right to void an assignment may nonetheless be limited to the extent that the particular anti-assignment clause accords discretion to the owner/obligee to approve or disapprove the assignment. Many jurisdictions read into contracts an implied covenant of good faith and fair dealing.[11] Where an implied covenant is read into a construction contract, a contracting party may only withhold its consent to an assignment under a discretionary anti-assignment clause for reasons consistent with the parties' reasonable and justified expectations at the time of contract formation.[12] It would seem under this analysis that a party could not withhold its consent under a discretionary anti-assignment clause to an assignment to an objectively qualified contractor that was in compliance with all of the terms of the contract documents.[13]

In contrast, some jurisdictions refuse to add a reasonableness requirement to a private contract when the parties did not do it themselves, surmising that if the parties wanted to require reasonableness when giving or withholding consent then they would have included that language in the contract.[14]

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[9] *See, e.g.*: J.G. Wentworth S.S.C. Ltd. P'ship v. Callahan, 649 N.W.2d 695 (Wis. Ct. App. 2002) (court was critical of the majority view but could be seen to support it based its decision on anti-assignment clause that limited the "power" to assign); Texas Dev. Co. v. Exxon Mobil Corp., 119 S.W.3d 875 (Tex. App. 2003); Hedges v. Woodhouse, 8 P.3d 109 (Mont. 2000); Bank of America, N.A. v. Moglia, 330 F.3d 942 (7th Cir. 2003); Travertine Corp. v. Lexington-Silverwood, Ltd. P'ship, 2004 Minn. LEXIS 373 (Minn. 2004). The decisions from the intermediate appellate courts in Texas are split between the minority and majority rules. Compare Texas Dev. Co. v. Exxon Mobil Corp., 119 S.W.3d 875 (Tex. App. 2003) (minority rule) with Reuben H. Donnelley Corp. v. McKinnon, 688 S.W.2d 612 (Tex. App. 1985) (majority rule).

[10] Moglia, 330 F.3d at 948.

[11] *See, e.g.*: Julian v. Christopher, 320 Md. 1, 575 A.2d 735 (Md. 1990); Warner v. Konover, 210 Conn. 150, 553 A.2d 1138 (Conn. 1989); Gulfside Casino P'ship v. Mississippi State Port Auth., 757 So.2d 250 (Miss. 2000); Castle v. McKnight, 116 N.M. 595, 866 P.2d 323 (N.M. 1993); Bayou Land Co. v. Talley, 924 P.2d 136 (Colo. 1996); Sterling Nat'l Mortg. Co. v. Mortgage Corner, 97 F.3d 39 (3rd Cir. 1996); Cimino v. FirsTier Bank, 247 Neb. 797, 530 N.W.2d 606 (Neb. 1995). Accord Restatement (Second) of Contracts § 205 ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.").

[12] Id.

[13] Id.

[14] Enfield Equip. Co., Inc. v. John Deere Co., 2000 U.S. App. LEXIS 17424 (4th Cir. 2000); Reynolds v. McCullough, 739 S.W.2d 424 (Tex. App. 1987)

In sum, it would appear that in many jurisdictions an obligee would lack the legal authority to void an assignment from the bonded contractor to a new contractor. Even in jurisdictions where an obligee might retain and exercise this power, it is possible that a surety may be able to circumvent this impediment by facilitating an assignment to an objectively acceptable contractor, even if that assignment is unacceptable to the obligee.

Possible Advantages and Disadvantages of Assignments

Assuming an enforceable assignment, the possible advantages of assignments include the following:

1. It is often advantageous for a party to sign as few contract documents as possible. Even the most carefully drafted contract can generate claims and interpretations that could not reasonably have been anticipated by one or both contracting parties. Where a surety facilitates the assignment of a bonded contract, the primary contract document is an assignment agreement executed by the principal and a new contractor. It may be possible for the surety to resolve a performance bond claim or an anticipated claim through an arranged assignment without executing a contract or any other documents.

2. An assignment facilitated by a surety may obviate the need for the obligee to execute any new contract documents. Drafting new contract documents can be time-consuming and contentious and may deter an obligee from agreeing to a completion solution that is advantageous to the surety.

3. In some cases, the most substantial impediment to arranging a cost-effective resolution of a performance bond claim is a contentious or unrealistic obligee. A surety can arrange for an assignment by dealing solely with its principal and a new contractor. It may be possible for an assignment agreement to be executed without the surety having to deal at all with the obligee.

4. An arranged assignment between a principal and a new contractor can include the assignment of one or more of the principal's subcontracts and vendor agreements, to the extent desired by the new contractor. Through this vehicle, the pre-existing subcontractors and vendors may have no legal right and little leverage to re-negotiate their commitments to the principal.

5. An arranged assignment may obviate the need for the surety to monitor or participate in the completion of the bonded project.

The possible disadvantages of assignments may include the following:

1. An assignment must be finalized before the principal is terminated on the bonded contract. Arguably, once the contract is terminated, nothing remains to be assigned. On the other hand, it would be possible to submit an assignment agreement to the obligee post-termination and ask the obligee to

revoke the termination so that the assignment can be rendered effective. If the obligee refuses to do so, the surety could take the position that it had submitted a viable completion option and that its financial exposure was capped by the losses that would be generated through the assignment, if any.

2. An assignment usually requires the principal's cooperation at least in the form of executing an assignment agreement with the new contractor. Such cooperation may not always be forthcoming. Under the right circumstances, a surety could execute an assignment agreement with a new contractor as attorney-in-fact for the principal in reliance on the attorney-in-fact, assignment, and possibly other provisions of the indemnity agreement.

3. One of the advantages of an assignment may be avoiding the need for detailed contact and negotiations with the obligee. The flip-side disadvantage may be that the surety forgoes the opportunity to negotiate with the obligee at an early stage regarding contract balance, change orders or claims. Some or all of these issues could be excluded from the scope of the assignment to the new contractor so that the surety would retain the right to pursue these issues/claims on its own behalf either with the consent of the principal or through the doctrine of equitable subrogation. However, the surety's ability to pursue these issues effectively may be prejudiced to the extent that an assignment results in the surety having no direct participation in the completion of the project.

4. Handling a performance bond exposure through an assignment may not be conducive to securing a release of the performance bond from the obligee, even if the new contractor tenders to the obligee its own bond that provides overlapping protection to the obligee. However, to the extent that the new contractor's price exceeds the contract balance, the surety would have the choice of paying the difference up-front to the new contractor in a lump sum or paying the difference to the obligee so that the obligee could disburse the funds to the new contractor over time through progress payments. The surety could condition payment to the obligee on the obligee's commitment to execute a release of the performance bond.

5. At the time at which it may be necessary to negotiate an assignment agreement, the new contractor's actual completion costs may be dependent on the resolution of events that have not yet taken place. The new contractor's contingency for known uncertainties or unknown risks may be in excess of the loss that the surety is willing to incur. An arranged assignment between the contractor and the principal would not preclude a confidential side agreement with the completion contractor under which the surety would be obligated to pay additional sums to the completion contractor depending on how work on the project progresses. As an example, the new contractor may be concerned at the time of the assignment that the obligee could at some point demand that it accelerate its work due to delays allegedly caused

by the principal. There may be considerable doubt as to whether acceleration will be needed due to concurrent delay issues involving other trades. The new contractor could agree to delete from its price its contingency for possible acceleration and the new contractor and the surety could enter into a confidential side agreement under which the surety would agree to compensate the new contractor for acceleration costs actually incurred, if any, and preserve its right through the new contractor to contest the principal's responsibility for such costs.

6. A new contractor may be reluctant to accept an assignment of the bonded contract to the extent that it could be exposed to the obligee's claims against the principal. The new contractor could decide to assume this risk and assess a premium as part of its completion price. Or, any such claims exposures could be excluded from the assignment, in which event the surety would remain exposed to these risks and would likely not be able to negotiate a performance bond release from the obligee. In the alternative, the new contractor could take an assignment of these risks from the principal as part of an overall assignment of the bonded contract and the surety and new contractor could enter into a side agreement under which the surety would agree to compensate the original contractor to the extent of actual costs incurred by the new contractor as a result of these risks.

It is helpful to consider these advantages and disadvantages in the context of specific paradigms that illustrate contexts in which assignments may be most viable.

Paradigms

Principal is financially unable to commence work on one or more bonded projects

Assume that the principal has incurred cash flow problems and is unable to commence work on a bonded project or continue work on a project that has just commenced. The surety has decided that it will not finance its principal and it does not want its principal to be involved in the completion work in any respect

A surety's conventional, preferred completion choice may be to attempt to tender a new, bonded contractor.

However, the surety could, as an alternative, arrange for the principal to assign the bonded contract to a new contractor having its own bonds. The draft assignment agreement that is attached to this paper as Exhibit 1 could be adapted for this purpose.[15] To the extent that the new contractor's price exceeded the contract balance, the Surety could offer to pay the difference to the obligee in exchange for a release of its performance bond. To the extent that the principle had performed work, there would be at least three options for dealing with exposures for possible

[15] A corresponding letter to the obligee is attached as Exhibit 2.

defects in that work: (a) the new contractor could price that risk into its completion price and assume full responsibility to the obligee; (b) the new contractor could accept an assignment of the risk as part of the overall assignment, exclude this exposure from its fixed price, but enter into a side agreement with the surety under which the completion contractor would be reimbursed by the surety in whole or part for costs incurred in correcting the principal's work; (c) or the risk could be entirely excluded from the assignment, in which event the surety would remain obligated to the obligee and likely could not secure a complete release from the performance bond or possibly only a partial release.

To the extent that the obligee was asserting or threatening to assert a claim for liquidated or other delay damages due to delays caused by the principal, the surety could handle this exposure similarly as part of an assignment: (a) the new contractor could price that risk into its completion price and assume full responsibility to the obligee; (b) the new contractor could accept an assignment of the risk as part of the overall assignment, exclude this exposure from its fixed price, but enter into a side agreement with the surety under which the completion contractor would be reimbursed by the surety in whole or part for acceleration or delay damages assessed by the obligee for the principal's work; (c) the risk could be entirely excluded from the assignment, in which event the surety would remain obligated to the obligee and likely could not secure a complete release from the performance bond or possibly only a partial release; or (d) the surety could work out a separate settlement with the obligee.

The possible advantages of an assignment as opposed to a tender under these circumstances may include the following:

1. An assignment may be a better way of dealing with a difficult obligee than a tender, particularly an obligee that is insistent that the surety take over and complete the bonded project. A difficult obligee may withhold its consent to a tender and may argue that language in the performance bond conditions a tender on the obligee's consent. Transmitting a fully executed assignment agreement with suitable bonds and insurance to the obligee may be persuasive in convincing the obligee of the need to accept a new contractor without surety participation in the completion process. The assignment agreement also obviates the need for the new contractor and obligee to enter into and/or a negotiate a new contract between them and this may provide an additional inducement for the reluctant obligee to accept an assignment.

2. A difficult obligee may insist upon negotiating with a surety regarding liquidated or delay damages at a time of a tender, even if it is premature at that time to determine whether there would ultimately be delay or compensable delay for which the principal would be responsible or whether scheduling issues caused by the principal's actions could be addressed by accelerating work and which party might be responsible for the costs of acceleration. In some instances, it is advantageous to resolve these issues with the obligee at the earliest possible time. In other instances, it is advantageous for the surety to delay addressing these issues with the obligee

or to resolve these issues without dealing with the obligee. An assignment could facilitate the latter options.

3. The draft assignment agreement set out at exhibit 1 includes an assignment of the principal's subcontracts and vendor agreements to the extent requested by the new contractor. The opportunity for the principal's vendors and subcontractors to re-negotiate price and terms should be at a minimum, if at all. Presumably under a tender, the bonded contract is ended, at which point the subcontractors and vendors can assert that their obligations to the job are at an end, at least at their prior price. A tender situation may therefore create additional risk of added completion costs.

Principal is unable to complete projects that are in punchlist or warranty stages

The surety's first conventional option may be to attempt to buy out its performance bond obligations. If the obligee will not agree to a buy out or if the obligee's price is too high, the surety's other conventional option may be to take over the project and retain a completion contractor to perform the remaining work. The amount of the outstanding work may not justify the drafting and negotiation necessary to finalize takeover and completion contracts nor may this volume of work warrant injecting the surety into the management and paperwork for the project.

An alternative approach could be to arrange for the principal to assign the contract to a new contractor. The surety may need to negotiate a time and materials rate with the new contractor or possibly a fixed price for the punch list and a time and materials price for warranty work or additional corrective work that might arise at a future time. Depending on the amount of the undisbursed contract funds in relation to the costs for the outstanding work, the surety could agree to pay the new contractor directly and recover the contract balance from the obligee or arrange for the obligee to pay the completion contractor directly out of the contract balance. A draft assignment agreement that addresses these issues is attached hereto as Exhibit 3, though this draft contemplates paying the new contractor a fixed price for the outstanding work.

Principal is financially unable to complete and the Surety intends to finance completion through one of the Principal's related companies

A surety may decide to finance completion through the principal's sister or affiliated company. The obligee may be resistant to having the related company complete the work or it may only agree to do so if the surety takes over the project and enters into a completion agreement with the affiliated company. In addition, the surety may anticipate that the obligee might make unreasonable demands in the course of negotiating a takeover agreement, may refuse to limit the surety's liability to the penal sum, or may demand concessions from the surety in connection with its principal's outstanding claims, change order requests or other disputes. Though the surety may be willing to finance completion, it may prefer not to play as formal a role in the completion process as that which is generally necessitated as a result of having entered into a takeover agreement. In lieu of takeover and completion contracts, the surety could arrange for the principal to assign the contract to its affiliated company. The surety would presumably advise the obligee that the original bonds would remain fully operative. Under this scenario, there should be little if any need

for the surety to negotiate with the obligee regarding any terms of completion. If the obligee refuses to work with the sister company, the surety can take the position that it has performed its obligations under the performance bond and that its exposure is capped by its likely loss had it financed the sister company to completion.

This kind of arrangement could be memorialized in the form of two agreement—an assignment agreement between the principal and its affiliated company and an agreement between the affiliated company and the surety which be similar in content to a financing agreement between the surety and its principal.

Principal is unable to complete a bonded contract which is 30% to 80% complete— Surety will not use the principal to complete

Sureties are most likely to takeover projects and retain completion contractors where the volume of outstanding work is substantial and the surety has decided that it will not or cannot use its contractor to complete. In these contexts, there are often sound financial reasons for the surety to be substantially involved in monitoring and overseeing the completion process.

There may, however, be unusual circumstances where an obligee is so difficult that a surety cannot negotiate a satisfactory takeover agreement or where the surety does not want to assume the surrogate role of contractor and intermediary between the obligee and the completion contractor. In these circumstances, it could be possible for the Surety to arrange for the bonded contract to be assigned to the new contractor and then effectively manage the new contractor through a confidential side agreement. There would be no need to negotiate a takeover agreement or any other agreement with the obligee. The surety would have no formal role in the completion process with the new contractor functioning as its surrogate. Presumably, the new contractor would not agree to assume the surety's risks and the surety would need to have significant trust in the new contractor's ability to efficiently complete the work and protect the surety's interests. Under this kind of scenario, the side agreement between the surety and the completion contractor may need to have separate payment terms between the surety and the completion contractor to account for that portion of the completion contractor's price that exceeded the undisbursed contract balance.

Of all of the paradigms discussed herein, the use of an arranged assignment in this context is the least likely.

Conclusion

For all of the foregoing reasons, assignments of bonded contracts can be a valuable tool in the right contexts for minimizing a surety's exposure to performance bond claims.

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