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NORTHEAST SURETY AND FIDELITY  
CLAIMS CONFERENCE**

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**JURISDICTIONAL CHOICES IN BOND LITIGATION**

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# Jurisdictional Choices In Bond Litigation

## I. Introduction

The parties to a newly filed lawsuit are charged with having “to take the bull by the horns.” Oftentimes the analogy is used to describe the filing of a lawsuit as being the equivalent as declaring war. Be it war, bull riding or representing a party to a lawsuit, command and control particularly of jurisdictional issues may ultimately determine the outcome. Depending on the case, it is advantageous to have a strategy in an effort to be proactive rather than reactive.

Oftentimes, a case turns on the outcome of a particular “battle” which may have nothing to do with the merits of the case. Accordingly, the very forum in which a case will be heard could be one of the most critical factors to achieving the desired outcome in litigation. While a plaintiff may be faced with the decision whether to file a lawsuit in either State or Federal Court, its counsel may be instrumental in determining whether to file in one State Circuit Court over another, both of which may be a proper venue. Likewise, a defendant may have the ability to take control and command by removing a case to Federal Court when there is original jurisdiction and diversity between the parties.<sup>1</sup>

Diversity is not the only avenue to federal court in bond disputes.<sup>2</sup> 28 U.S.C. §1352 provides:

“The district courts shall have original jurisdiction, concurrent with State courts, of any action on a bond executed under the law of the United States, except

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<sup>1</sup> It is imperative when considering removal that the removing party knows the time limitation for filing a removal petition. In addition, generally all defendants must join the petition for removal. See generally 14 A.C. Wright, A. Miller & E. Cooper, *Federal Practice* 3731 (2d ed. 1985). See *Tri-City Newspapers, Inc. v. Tri-Cities Printing Pressman and Assistants Local 349*, 427 F.2d 325, 327 (5<sup>th</sup> Cir. 1970) (“Nominal or formal parties, being necessary or indispensable are not required to join in the petition for removal.”) See also Vollbrecht, Thomas J., “Removing a Non-Diverse Bond Case to Federal Court,” Fidelity & Surety Committee Newsletter, Spring 2005.

<sup>2</sup> Vollbrecht, Thomas J., “Removing a Non-Diverse Bond Case to Federal Court,” Fidelity & Surety Committee Newsletter, Spring 2005.

matters within the jurisdiction of the Court of International Trade under section 1582 of this title.”

Section 1352 was enacted to give federal courts jurisdiction of bond actions where, absent the necessary diversity and amount in controversy, it did not otherwise exist. *Koppers Co. v Continental Cas. Co.*, 337 F.2d 499, 506 (8<sup>th</sup> Cir. 1964) the statute is applicable where a regulation requiring a bond has the force at law.<sup>3</sup>

Command and control of jurisdiction is one of the keys to success in bond litigation. Accordingly, a surety is well advised to select counsel with a stocked arsenal: knowledgeable in the law of suretyship, control of the rules of civil procedure (including any local rules). Finally, counsel for a surety should possess not only a sense of creativity but the ability to step outside the box.

This paper is selection of case summaries, many of which the authors to this paper have had direct involvement over the last forty years. The cases summarized below were selected to represent the tip of the iceberg when it comes to obtaining command and control and to spark the creativity of the reader when confronted with jurisdictional choices in bond claims. Without overstating the obvious, it is important to remember and not lose sight of the fact that judges and/or juries ultimately decide the outcome of cases and that sometimes, despite ones best efforts, command and control may not always be achieved.

## II. Case Summaries

### **Parallel Litigation and the *Colorado River* Abstention Doctrine**

***Taylor Ridge Estates, Inc. v. Statewide Insurance Co.*, 2001 WL 1678745 (S.D. Iowa, 2001).**

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<sup>3</sup> Id. See *United States, ex. Rel Miss. Road Supply Co. v. H.R. Morgan, Inc.*, 542 F.2d 262, 266 (5<sup>th</sup> Cir. 1976) where a payment bond was required by a regulation of the Department of Interior.

Plaintiff Taylor Ridge Estates, Inc. (“TRE”), a non-profit corporation that operates a nursing care facility in Lenox, Iowa, obtained revenue bonds for the construction of an assisted living facility. TRE entered into a contract with John Gittemeir, Jr. Construction Company (the “Contractor”), a Missouri Corporation, for the construction of the facility, for which Statewide, a surety company organized in the State of Illinois doing business in the State of Iowa, was the surety. Whereupon, Statewide executed a Performance Bond and Payment Bond naming TRE as obligee. After the Contractor’s performance turned out to be defective, TRE terminated the Contractor and requested that Statewide meet its obligations for the completion of the project.

Statewide’s investigator discovered that TRE’s architect for the project improperly certified progress payments for defective work by the Contractor. Accordingly, Statewide refused to complete the project until TRE repaid the amount of the allegedly improperly certified payments. TRE did not return the funds, but obtained other bids to finish the project. In doing so, TRE discovered that the cost to complete the project exceeded the sum of the revenue bonds, and since it was unable to secure alternative financing, it defaulted on its revenue bond obligations. Statewide filed a lawsuit in Missouri state court alleging breach of contract by TRE, negligence by the architect, and seeking indemnity by the Contractor. TRE then filed a second lawsuit in Iowa District Court for Taylor County alleging breach of contract and negligence against the Contractor, and breach of contract, bad faith and intentional interference with a contract against Statewide. Statewide and the Contractor removed the case to the Southern District of Iowa.

Defendants moved to strike TRE’s Petition based on the *Colorado River* Abstention Doctrine. This doctrine recognizes that certain circumstances may permit “the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration.” Factors used in deterring whether dismissal of a concurrent action is appropriate include: the inconvenience of the federal forum; the desirability of avoiding

piecemeal litigation; the priority and progress of the state action; whether questions of federal law are present; the adequacy of the state forum in protecting the federal plaintiff's interests; and problems with exercising concurrent jurisdiction over the same piece of property. In denying the defendants motion, the court held that there is no inconvenience of the federal forum in Iowa, because: the construction project is located in Iowa, it is financed by an Iowa bank pursuant to bonds issued by an Iowa county, TRE is located in Iowa, the Contractor executed a contract to perform work in Iowa, the Contract indicates that it is to be interpreted and enforced under Iowa law, and the Contractor and Statewide were voluntarily involved in the project. The court also held that TRE's rights would not be adequately protected in Missouri, since the Missouri Court had not yet resolved TRE's pending motion to dismiss and since the Missouri case still remained in early pre-trial stages. Finally, the court held that avoiding piecemeal litigation cannot alone provide the basis for abstention.

### **Supplemental Jurisdiction Over State Law Claims**

***Colbert County Commission v. Fireman's Fund Ins. Co., 2004 WL 3522687 (N.D. Ala. 2004).***

Plaintiff Colbert County Commission ("Colbert"), filed a complaint, in Colbert County Circuit Court, alleging the Defendant Engineering Service Associates, Inc. ("ESA") was negligent in the performance of its obligation to monitor the progress and work quality in the construction of a water treatment plant, and that ESA breached its contract with Plaintiff. Plaintiff also accused Defendant Huffman, Inc., the project's general contractor, of negligence and breach of contract. Fireman's Fund, Huffman's surety, was accused of breaching its contractual obligations under a payment bond. Plaintiff claimed that Fireman's Fund was also guilty of bad faith, and that a judgment should be entered declaring that Fireman's Fund is liable on the bond. Fireman's Fund entered into a settlement agreement with Plaintiff and was

dismissed from the action. However, in Plaintiff's Third Amended Complaint, Fireman's Fund was re-named a defendant. Plaintiff claimed that Fireman's fund breached the settlement agreement, and that Fireman's Fund fraudulently induced the Plaintiff to enter into the settlement agreement. Fireman's Fund filed a notice of removal, and the Plaintiff filed a motion to remand. The court exercised jurisdiction over the claims against Fireman's Fund, since the district court had original jurisdiction over claims for breach of obligations under a payment bond. However, the court declined to exercise supplemental jurisdiction over the non-federal claims, which were remanded back to state court. Fireman's Fund then filed a Motion for Reconsideration, and at such hearing, the court found that the federal claims were inevitably intertwined with all the other claims in the action. Finding that the state law claims cannot be fully and fairly adjudicated in absence of the federal claims, and finding that the parties had been inconvenienced; the court vacated its previous order to remand the Plaintiff's claims, and held that federal jurisdiction would be exercised over all of the claims.

### **An Exception to Supplemental Jurisdiction**

***North American Mechanical Services Corp. v. Hubert*, 859 F.Supp. 1186 (C.D. Ill. 1994).**

North American was the prime contractor for the construction of a Federal Courthouse, and Hubert was a subcontractor of North American. United Fire was Hubert's surety who issued a performance bond in favor of North American for \$50,000. North American filed a complaint seeking damages against Hubert for breach of contract and seeking payment from United Fire on the performance bond. United Fire moved to dismiss the action against it, claiming lack of subject matter jurisdiction. The parties are diverse: North American (Texas), Hubert (Illinois), and United Fire (Iowa). However, while the amount in controversy between North American and Hubert exceeded \$50,000 (as required by 28 U.S.C. 1332), the amount in controversy between North American and United Fire was only \$50,000. The Magistrate

concluded that since the action against United Fire arose out of the same transaction as the action against Hubert, the court had supplemental jurisdiction under 28 U.S.C. 1367. The Court disagreed, finding that federal courts cannot exercise supplemental jurisdiction when doing so would conflict with the requirements of 1332. The Court held that it did not have supplemental jurisdiction, because 1367 expressly provides that district courts do not have supplemental jurisdiction over state claims when another federal statute expressly provides otherwise. Therefore, since 1332 provides otherwise, by requiring the amount in controversy to exceed \$50,000, and that requirement is not met, there is no supplemental jurisdiction.

**Despite Subject Matter Jurisdiction, Governmental  
Instrumentality Found Immune from Suit**

***Great American Ins. Co. v. Louis Lesser Enterprises, Inc.*, 353 F.2d 997 (8th Cir. 1965).**

In *Great American*, a claim was made for recovery on a subcontract by the subcontractor's surety-assignee, Great American Ins. Co., (New York corporation) against the defendant corporation, Louis Lesser Enterprises (Delaware Corporation) and others: D&L Construction Company (California Corporation), Ft. Leonard Wood C-9 Housing, Inc. and Ft. Leonard Wood C-10 Housing, Inc (Delaware Corporations)., and Continental Casualty Company (Illinois Corporation). Lesser collaborated with D&L Construction Company to enter into a contract with the U.S. Army for the construction of 700 units of military housing at Ft. Leonard Missouri. Lesser and D&L subcontracted with Clarence W. Franks for work and labor on the housing project. Franks executed a performance bond, upon which Great American was the surety. Franks and Great American claimed that they fully performed under the subcontract but defendants have failed to pay them the sum of \$82,348.38, due under the contract, and the sum of \$151,172.71 due for additional work. Plaintiffs also claimed that defendants established a fund for job claimants and creditors in California, for which Continental was the co-signer,

and from which they are owed money. The United States District Court for the Western District of Missouri dismissed the complaint. Plaintiffs appealed and three questions were at issue: (1) whether the court possessed jurisdiction of the subject matter; (2) whether venue was properly laid; and (3) whether service of process was sufficient to vest the court with personal jurisdiction?

Subject Matter Jurisdiction: Addressing the issue of subject matter jurisdiction, the appellees argued that since C-9 and C-10 were Government instrumentalities, they were no longer citizens of any state for diversity purposes, and therefore diversity jurisdiction was destroyed. The Court of Appeals disagreed, holding that even though C-9 and C-10 were Government instrumentalities, they were still corporate citizens of Delaware, where they were incorporated. Therefore their status did not destroy diversity jurisdiction, and the court had subject matter jurisdiction.

Venue: Under Title 28, U.S.C.A., § 1391(a), a civil action founded on diversity of citizenship may be brought in the judicial district where all of the plaintiffs or all of the defendants reside. Under §1391(c), “a corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.” Therefore, in order to find venue, with regard to Lesser, it has to be shown that Lesser was doing business in the district when Great American’s cause of action arose. Since of the court was unable to determine from the facts (1) when the appellant’s cause of action accrued and (2) whether, at that time, Lesser was doing business in the Western District of Missouri, the venue issue was remanded to the district court to allow the parties to present more evidence.

Personal Jurisdiction: Great American first argued that service upon the Secretary of State was sufficient to confer personal jurisdiction over Lesser and D&L under VAMS 351.630(1), which provides for service, through the Secretary of State, upon a foreign

corporation authorized to transact business in Missouri if an agent is not appointed or the agent cannot be found. The court of appeals disagreed, holding that since Lesser and D&L were not authorized to transact business in Missouri, service upon the Secretary of State was insufficient to confer jurisdiction over Lesser and D&L. Great American then argued that C-9 and C-10 were alter egos of Lesser and D&L, so service upon them constituted service upon Lesser and D&L. The court of appeals disagreed, holding that C-9 and C-10 were instrumentalities of the federal government and not alter egos or agents of Lesser and D&L, so service upon C-9 and C-10 did not constitute valid service on Lesser and D&L. Finally, Great American argued that service upon the Superintendent of Insurance of Missouri was sufficient to confer personal jurisdiction over Continental under VAMS 375.210(5). Under VAMS 375.210(5), service of process upon a foreign insurance company shall be made by delivery of a copy of the petition and summons to the Superintendent of Insurance, and service is valid and binding (1) in all actions brought by non-residents of Missouri upon any policy issued in Missouri, and (2) in all actions brought by non-residents of Missouri on a cause of action which arises out of 'business transacted, acts done, or contracts made' in Missouri. The court of appeals disagreed with Great American, holding that the action is not on bonds executed by Continental, so Continental would not be legally liable to Great American, and therefore there is no basis for holding that Great American's cause of action arose out of business transacted in Missouri under VAMS 375.210.

Conclusion: Subject matter jurisdiction was established; service of process was insufficient to confer personal jurisdiction over Lesser; D&L, and Continental, C-9 and C-10 were dismissed because they were instrumentalities of the federal government and immune from suit; and the issue of venue was remanded.

**Bankruptcy Court did not have jurisdiction  
over dispute between two non-debtors**

***In re Courtney Excavating & Construction, Inc., 325 B.R. 839 (W.D. Mo. 2005).***

At the request of debtor Courtney Excavating & Construction, Inc., First Home Savings Bank issued three irrevocable letters of credit which named Acstar as beneficiary, the surety which issued bonds on behalf of Courtney to secure its performance and payment of labor and materials on certain construction projects. Courtney, Tony Courtney, Donna Courtney and Rock Quarries, L.L.C. executed an indemnity agreement to indemnify Acstar from liability, loss, costs, damages, fees, or other expenses. Courtney later filed for bankruptcy, and Acstar presented the letters of credit for payment. First Home made a partial payment (\$439,706.72) on the third letter of credit, but refused to pay the first two letters of credit in the amounts of \$375,000 and \$380,000 respectively, plus the remainder of \$140,293.68 on the third letter of credit. First Home filed an adversary proceeding in the Bankruptcy Court for the Western District of Missouri, in order to determine the validity and extent of the debts owed to Acstar. Acstar filed a motion to dismiss for lack of subject matter jurisdiction claiming that the adversary proceeding was not a core proceeding sufficiently related to the bankruptcy of Courtney. The Court granted Acstar's motion to dismiss, finding that it must first determine whether the Court has subject matter jurisdiction over a dispute between two non-debtors. Finding that Section 157(b)(1) of the Bankruptcy Code gives a bankruptcy judge jurisdiction to hear a matter that is not a core proceeding of the bankruptcy if the matter concerns the property of the estate, the court held that it did not have subject matter jurisdiction in this case, because the letters of credit were not property of the estate and the issue of how the court will interpret the language in the letters of credit is purely a matter of state law. It is irrelevant that once First Home makes payment on the letter of credit to Acstar the actual liabilities of

Courtney to First Home are increased and the contingent liabilities to First Home are decreased.

It is important to note that prior to dismissal of the adversary complaint in the Bankruptcy Court for the Western District of Missouri, Acstar filed its own complaint against First Home in the United States District Court for the Eastern District of Missouri. Each of the branch locations of First Home are located in the Western District of Missouri, but jurisdiction and venue were also proper in the Eastern District of Missouri because First Home, which was organized under the laws of the State of Missouri, pursuant to 28 U.S.C 1391(c) in that First Home, being a Missouri Corporation, can be sued in any judicial district within the State of Missouri.

#### **Indemnitors are Back-doored into Federal Court Despite Lack of Diversity**

***National Surety Corp. v. Prairieland Construction Inc.*, 354 F.Supp.2d 1032 (E.D. Mo. 2004).**

National Surety issued construction bonds for Prairieland Construction Inc. Prairieland began falling behind in its work and in paying its subcontractors. Notwithstanding that National Surety tried to resolve the payment and performance issues with Prairieland, when the problems continued to exist, National Surety sent a letter to the bonded property owners requesting that no further payments be made to Prairieland without National Surety's consent. National Surety then demanded that Prairieland, its owners, and their wives indemnify it and post sufficient collateral pursuant to the terms of the indemnity agreement they executed for any claims that might have to be paid out on the bonds. Two indemnification agreements were executed. The first agreement was executed in 1999 by Prairieland and its shareholders Chester Vogt and Peter Libbra, and their spouses Joanne Vogt and Linda Libbra in Illinois. In September 2001 Peter Libbra then sold all of his stock in Prairieland to Gerald Dunne, and after doing so, the second indemnity agreement was executed in Missouri by Praireland,

Dunne and Vogt, and their spouses in October 2001. Only one bond was issued after the sale of stock and execution of the second indemnity agreement.

National Surety then moved for summary judgment against all seven indemnitors and the court held that National Surety was entitled to summary judgment on its claim for indemnification, based on the language in the indemnity agreements presented to the court with prima facie evidence of the liability of Prairieland, the Dunnes, the Vogts, and the Libbras. The Libbra's argued that the second indemnity agreement was a novation and superseded the first, and since they were not parties to the second agreement, they are not liable. The court disagreed. The second indemnity agreement did not state that it supersedes the first agreement, nor did it state that the Dunnes were replacing the Libbras or that the Libbras were discharged from liability. Therefore, since there is no evidence that shows National Surety intended to release the Libbras from their obligations under the first agreement, the Libbras were not released from liability.

Following the default of Prairieland on a school district project located in St. Louis County, the school district called upon National Surety to complete the project. Since, Prairieland had not been terminated by the school district, National Surety, being an Illinois Corporation, filed a declaratory judgment action in the United States District Court for the Eastern District of Missouri against the school district requesting that the court declare that pursuant to the contract documents, the school district would be required to terminate the Prairieland before National Surety could perform pursuant to the performance bond it issued. The very same day that National Surety filed suit in the district court, the school district filed a lawsuit against National Surety (alone) in the Circuit Court of St. Louis County, Missouri. National Surety removed the case filed by the school district to the district court. As a *defendant*, pursuant to 28 U.S.C § 1367(b), National Surety filed a third party complaint against Prairieland (a Delaware Corporation), the Libbras, (Illinois residents), the Vogts (Illinois

residents) and the Dunnes (Missouri residents). National Surety then moved to have the two district court cases consolidated. As a Plaintiff in the first-filed case, National Surety could have never brought its indemnification claims against the “Illinois resident” indemnitors.

One of the issues that arose almost immediately at a preliminary injunction hearing was which State Law applied. While most of the projects bonded by the surety were bonded for projects located in the State of Illinois, the last two projects bonded were located in the State of Missouri and were the projects on which most of the claims were made. The District Judge ultimately determined that Missouri law was the answer to these choice of law questions.

### **Jurisdiction is Proper Where Work was Completed.**

***Pipe Systems, Inc. v. American Manufacturers Mutual Ins. Co.*, 609 F.Supp. 571 (E.D. Mo. 1985).**

Pipe Systems, a Missouri corporation, alleged that it sold materials and furnished equipment to a contractor for the construction of a sewage facility in Louisiana. As required by the Louisiana Public Works Act, the contractor obtained a public works bond in the amount of \$607,553.50. American, issued the bond as surety. Pipe Systems brought an action in the United States District Court, Eastern District of Missouri alleging that since the contractor was in default, American was required to pay Pipe Systems out of the bond. American acknowledged Pipe systems claim, but disputed the amount claimed. American filed a motion to dismiss, asserting that this Court lacked jurisdiction and venue because the suit was not filed where the work was done, as required by the Louisiana Public Works Act. Pipe Systems argued that the Louisiana Public Works Act was not mandatory, but the Court disagreed, finding that the purpose of the statute was to provide a remedy to bring all interested parties together before one court and in one proceeding. The Court then held that it lacked jurisdiction, because the Louisiana Public Works Act required the statute to be brought where the work was completed, which was in Louisiana.

### **Registration of Preliminary Injunction Order in Foreign Courts**

***United Fire & Casualty Co. v. Coggeshall Construction Co., Inc.*, 1991 WL 169147 (C.D. Ill. 1991).**

This case was before the Court for hearing on a Temporary Restraining Order and Show Cause Order that had previously been entered. United Fire was a surety that bonded a number of construction projects for Coggeshall, for which Coggeshall agreed to indemnify United Fire. United Fire presented evidence that it was faced with \$600,000 in payment bond obligations, it anticipated that the bonded projects completion costs would exceed \$400,000, and that there was a possibility of liquated damage assessments for late completion which had already amounted to \$150,000 and were expected to continue at a rate of \$2000 per working day. Although Coggeshall had partially complied with the Temporary Restraining Order (by giving United Fire in excess of \$500,000 cash), the Court found that Coggeshall had not yet complied with the part of the Temporary Restraining Order which required them to provide \$500,000 collateral to United Fire. As a result, the Court granted United Fire a preliminary injunction, which gave them a lien upon Coggeshall's assets and property, and which required Coggeshall to turn over all construction contract progress payments. A copy of the Complaint filed by United Fire and Casualty is attached.

***United Fire & Casualty Co. v. Coggeshall Construction Co., Inc.*, 1992 WL 59099 (C.D. Ill. 1992).**

Plaintiff brought an action to register this Court's preliminary injunction order of June 28, 1991 in the eastern and western districts of Missouri, alleging that the Defendant had not complied with the Court's order and that Plaintiff must be able to secure Defendant's assets in Missouri in order to satisfy the Court's preliminary injunction, which requires the Defendant to post \$500,000 collateral with the Plaintiff. 28 U.S.C. 1963 states that "a judgment in an action for the recovery of money or property entered in any district court...may be registered in any

judicial district, when the judgment has become final by appeal or expiration of the time for appeal of when ordered by the court that entered the judgment for good cause shown..”

Although the Court held that traditional injunctions are not registerable under 1963, any judgment in an action for the recovery of money is registerable. Therefore, the Court found that the order granting the preliminary injunction requiring the Defendant to post \$500,000 collateral was an action for the recovery of money and registerable under 1963, so Plaintiff’s motion for an order to register was granted.

**Stay of Arbitration by the Federal District Court and  
Preemption by the Miller Act over State Law**

***Pensacola Construction Co. v. St. Paul Fire and Marine Ins. Co.*, 705 F.Supp. 306 (W.D. La. 1989).**

The plaintiff subcontractor, Pensacola, brought an action under the Miller act against the prime contractor, John Massman Contracting Co, and its surety, St. Paul. Pensacola alleges that it performed its contractual duties, yet has never received compensation. A number of issues were decided in this case. First, Massman’s Motion to Compel Arbitration was granted, since there was an arbitration agreement between the parties. Second, Massman’s Motion to Stay Proceedings between Pensacola and St. Paul was denied, as neither Pensacola nor St. Paul wished to stay their proceedings, and requiring Pensacola to stay its suit against St. Paul would be harmful to Pensacola and contrary to the Miller Act, which is intended to protect contractors. Third, St. Paul’s Motion for Declaratory Judgment or a Stay of Arbitration Proceedings was granted in part. While the Court held that it was inappropriate to stay an arbitration on the grounds that it could have a preclusive effect on federal litigation, it did grant St. Paul’s declaratory judgment that the arbitration proceedings between Massman and Pensacola will not have a preclusive effect on litigation between St. Paul and Pensacola. In doing so, the Court held that since no right is more basic than the right to have a court of law

adjudicate one's disputes, and since St. Paul never bargained this right away, it should be entitled to adjudicate its dispute. Fourth, the court granted St. Paul's Motion to Dismiss Pensacola's Claims for Attorney Fees and Damages, because attorney fees are not recoverable under the Miller Act, unless there is a pendent state law claim that authorizes such fees, and there was no such claim in this case. Finally, Massman's Motion to Dismiss for Lack of Proper Service Under Fed. R. Civ. P. 4(f) and for Lack of Minimum Contacts was denied, because the Miller Act provides for nationwide service of process, and Massman didn't have to have any contacts, since they had already agreed contractually to defend where service is made on attorney of any court of record.

***Pensacola Construction Co. v. St. Paul Fire and Marine Ins. Co., 710 F.Supp. 638 (W.D. La. 1989).***

Pensacola amended its complaint to state that diversity jurisdiction existed, and again claimed penalties and attorney fees against St. Paul under La. R.S. 22:658. St. Paul moved to dismiss the amendment on the ground that it fails to state a claim upon which relief may be granted. The Court found that Pensacola's right to recover attorney fees is not dependent on whether the claims is based on federal question or diversity jurisdiction, but whether or not La. R.S. 22:658 is pre-empted by the Miller Act. In granting St. Paul's Motion to Dismiss, the Court held that the Miller Act is intended to preempt state law.

### **III. Recent developments in Non-Surety Cases**

Some very recent Supreme Court decisions should be considered for their applicability to cases involving sureties where command and control is desired.

**National Bank is a Citizen of the State where main office is located.**

***Wachovia Bank v. Schmidt*, 126 S.Ct. 941 (2006).**

Plaintiff-respondent Schmidt and other South Carolina citizens sued Wachovia Bank in South Carolina state court for fraudulently inducing them to participate in an illegitimate tax shelter. Wachovia Bank was a national banking association with its main office in North Carolina and branch offices in many states, including South Carolina. Wachovia sought to compel arbitration, so it filed a petition in Federal District Court based on diversity under 28 U.S.C. §1332. The District Court denied the petition on the merits, but on appeal, the Fourth Circuit determined that the District Court lacked subject-matter jurisdiction, because §1348 provides that “national banking associations” are “deemed citizens of the States in which they are respectively located.” Therefore, since Wachovia had a branch in South Carolina, diversity was destroyed. The Fourth Circuit vacated the judgment, and instructed the District Court to dismiss the case. Certiorari was granted in the case, and the Supreme Court held that for purposes of diversity jurisdiction, a national bank is a citizen of the State in which its main office, as set forth in its articles of association, is located.

**State Agency not barred by Sovereign Immunity.**

***Central Virginia Community College v. Katz*, 126 S.Ct. 990 (2006).**

Bernard Katz was the court-appointed supervisor of the bankrupt estate. Wallace’s Bookstores, Inc. Just before filing for a Chapter 11 bankruptcy, Wallace’s did business with Virginia institutions of higher education which are considered “arms of the State” and entitled to sovereign immunity. Katz commenced proceedings in Bankruptcy Court to avoid and recover alleged preferential transfers to the institutions made by the debtor when it was insolvent. The institutions made a motion to dismiss the proceedings on the basis of sovereign immunity. The motion to dismiss was denied by the U.S. Bankruptcy Court for the Eastern District of Kentucky, affirmed by the District Court, and affirmed by the Sixth Circuit Court of Appeals.

Certiorari was granted, and the Supreme Court held that an adversary proceeding brought by a Chapter 11 Trustee to set aside alleged preferential transfers that debtor had made to state agencies was not barred by agencies' sovereign immunity.

#### **IV. Conclusion**

One's choice of jurisdiction may ultimately determine the outcome of a case. Sometimes however, as hard as it might be, both clients and their lawyers have to roll with the punches in an effort to achieve their same common goal. But knowing how to gain command and control and taking the risk to attain it may ultimately prove to be the turning point of a case and a critical factor in the outcome.

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Missouri, 1962  
Iowa, 1962  
Illinois, 1963  
United States District Court, Eastern District of Missouri, 1963  
United States District Court, Western District of Missouri, 1963  
United States District Court, Southern District of Illinois, 1963  
United States District Court, Central District of Illinois, 1963  
United States Court of Appeals, 8th Circuit, 1963  
United States Court of Appeals, 7th Circuit, 1963

***Bar Association Memberships, Professional and Civic Associations:***

American Bar Association  
The Missouri Bar  
Bar Association for Metropolitan St. Louis  
Bar Association of Illinois State  
Fidelity and Surety Law Committee, Vice Chairman  
Tort and Insurance Practice Section  
The Fidelity and Surety News Subcommittee, Liaison Member, St. Louis University;  
School of Law Editorial Staff  
Armed Services Board of Contract Appeals  
General Services Administration Board of Contract Appeals  
United States Department of Labor, National Bond Claims Association, Surety Claims  
Institute, St. Louis Surety Association

***Reported Cases:***

Shochet v. Allen, 987 S.W.2d 516 (Mo.App. E.D., Mar 16, 1999)  
Yerkes v. Asberry, 938 S.W.2d 307 (Mo.App. E.D., Feb 04, 1997)  
School Dist. Of University City ex rel. H & M Mechanical Corp. v. Reliance Ins. Co., 904 S.W. 2d 253, 103 Ed. Law Rep 496 (Mo.App. E.D., May 16, 1995)  
Metro St. Louis Sewer Dist. v. Transamerica Ins. Co., 878 S.W. 2d 521 (Mo.App. E.D., Jun 30, 1994)  
St. Louis Federal Sav. And Loan Ass'n v. Fidelity and Deposit Co. of Maryland, 654 F.Supp. 314 (E.D. Mo., Jan 09, 1987)  
Steinberg v. Fleishcher, 706 S.W. 2d 901 (Mo.App E.D., Mar 11, 1986)  
Pipe Systems, Inc. v. American Mfrs. Mut. Ins. Co., 609 F. Supp. 571 (E.D.Mo., Mar 19, 1985)  
Community Federal Sav. & Loan Ass'n v. Transamerica Ins. Co., 559 F. Supp 536 (E.D.Mo., Mar 25, 1983)  
Manufacturers Bank and Trust Co. of St. Louis v. Transamerica Ins. Co., 568 F.Supp. 790 (E.D.Mo., Mar 16, 1983)  
Groppe Co., Inc. v. U.S. Gypsum Co., 616 S.W. 2d 49, 32 UCC Rep. Serv. 35 (Mo.App. E.D., Jan 27, 1981)  
Wilbur Waggoner Equipment Rental & Excavating Co., Inc. v. Bumiller, 542 S.W. 2d 32 (Mo.App., Aug 03, 1976)  
Commercial Union Ins. Co. of America v. Talisman, Inc., 69 F.R.D. 490, 1 Fed. R. Evid. Serv. 104 (E.D.Mo., Oct 31, 1975)  
State ex rel. Caloia v. Weinstein, 525 S.W. 2d 779 (Mo.App., Jun 03, 1975)  
Weeks v. Missouri Pac. R. Co., 505 S.W. 2d 33 (Mo., Feb 11, 1974)  
American Ins. Co. v. Gilbert, 319 F. Supp. 1315 (E.D.Mo., Oct 27, 1970)  
United Bonding Ins. Co. v. Parke, 293 F. Supp. 1350 (E.D.Mo., Nov 15, 1968)  
Great American Ins. Co. v. Louis Lesser Enterprises Inc., 353 F.2d 1009 (8th Cir.(Mo.), Dec 16, 1965)  
Great Am. Ins. Co. v. Louis Lesser Enterprises Inc., 353 F.2d 997 (8th Cir.(Mo.), Dec 16, 1965)  
State ex rel. Great Am. Ins. Co. v. Jones, 396 S.W. 2d 601 (Mo., Nov 08, 1965)  
North American Mechanical Services Corp. v. Hubert, 859 F.Supp. 1186 (C.D.Ill., Aug 03, 1994)  
Farm Credit Bank of St. Louis v. Bietham, 262 Ill.App.3d 614, 634 N.E.2d 1312, 199 Ill.Dec. 958 (Ill.App. 5 Dist., Jun 10, 1994)  
In re Thomas Companies, Inc., 166 B.R. 677 (Bankr.C.D.Ill., May 04, 1994)  
United Fire and Cas. Co. v. Coggeshall Const. Co., 1992 WL 59099 (C.D.Ill., Feb 11, 1992)  
United Fire and Cas. Co. v. Coggeshall Const. Co., 1991 WL 169147 (C.D.Ill., Jun 28, 1991)  
A.J. Davinroy Plumbing & Heating v. Finis P. Ernest, Inc., 87 Ill.App.3d 1047, 409 N.E.2d 372, 42 Ill.Dec. 757 (Ill.App. 5 Dist., Aug 19, 1980)  
Village of Crainville, Illinois v. Argonaut Ins. Co., 469 F. Supp. 11 (E.D.Ill., May 24, 1976)

***Publications and Presentations:***

- "Named Obligee's rights Under the Payment Bond (Are There Any?); Rights and Limitations on the Obligee's Rights on Exhaustion of Performance Bond Penalties," 10th Annual Northeast Surety & Fidelity Claims Conference, Iselin, NJ, October 21, 1999.
- "The Duty of the Performing Surety to the Bond Principal and Indemnitors: Good Faith," Forum, Vol XV, No 5, Summer 1980, p.1005.
- "The Duty of the Performing Surety to the Bond Principal and Indemnitors: Good Faith, An Update," 3rd Annual Northeast Surety & Fidelity Claims Conference, Rocky Hill, Connecticut, November 12, 1992.
- "The Financial Institution Bond: Who is Covered Under Insuring Agreement (A)," 3rd Annual Northeast Surety & Fidelity Claims Conference, Rocky Hill, Connecticut, November 12, 1992.
- "Quantum Meruit Claims and Defenses in Building Construction Cases," 6th Annual Northeast Surety & Fidelity Claims Conference, Iselin, NJ, November 16-17, 1995.
- "Issues in Litigation By and Against Banks Arising Under the Uniform Fiduciaries Act, Related Provisions of the Uniform Commercial Code and the Related Cases," 7th Annual Northeast Surety & Fidelity Claims Conference, Iselin, NJ, October 24, 1996.
- "Elements of Proof in the Contract Bond Surety's Subrogation Action to Recover the Bonded Contract Funds," The Subrogation Rights of the Contract Bond Surety, 1990 TIPS Annual Meeting, Chicago, Illinois, August 7, 1990.
- Does the Exercise of Supervisory Control of Liquidation Constitute a "Taking Over" of a Bonded Financial Institution Which Activates the Automatic Termination Provision of the Blanket Bond? Bonding Company's View," Surety Claims Institute, Lake of the Ozarks, Missouri, June 20, 1985.
- "Claims for Damages and Defenses Contractor/Surety Defenses," Forum on the Construction Industry and TIPS Fidelity and Surety Law Committee, Thursday, January 29, 1998.
- "The Fair Credit Reporting Act and Sureties," 9th Annual Northeast Surety & Fidelity Claims Conference, Iselin, NJ, October 22, 1998.
- "The Use of Waiver and Estoppel Against Fidelity Bond Sureties," 9th Annual Northeast Surety & Fidelity Claims Conference, Iselin, NJ, October 22, 1998.

***Practice Areas:***

- Fidelity and Surety
- Financial Institution Bond Claims and Litigation
- Business and Commercial Law
- Construction Law, Litigation
- Trials and Appeals

***Practice:***

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***Legal Education:***

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*Juris Doctor*, 1999  
*Certificate in Health Law*  
*Editor-in-Chief, Fidelity and Surety News*

***Undergraduate Education:***

St. Louis University  
*Bachelor of Arts, Magna Cum Laude*, 1994

***Bar and Court Admissions:***

Missouri  
Illinois  
United States District Court, Eastern District of Missouri  
United States District Court, Western District of Missouri  
United States Court of Appeals, 8th Circuit  
United States Court of Appeals, 7th Circuit  
United States Court of Appeals, 5th Circuit  
United States Court of International Trade

***Bar Association Memberships, Professional and Civic Associations:***

American Bar Association  
Missouri Bar  
Illinois State Bar Association  
Bar Association of Metropolitan Saint Louis  
Association of Trial Lawyers of America  
St. Louis Surety Association  
International Business Law Consortium  
Missouri Athletic Club  
St. Louis Metropolitan Tribunal  
St. Gabriel the Archangel Parish Council

***Reported Cases:***

Amwest Surety Ins. Co. v. Concord Bank, 248 F.Supp.2d 867 (E.D.Mo. 2003)  
National Surety Corporation v. Prairieland Construction, Inc., et al., 354 F. Supp. 2d

1032 (E.D. Mo. 2004)  
National Surety Corporation v. Mehlville School District, et al., 2005 WL 290146  
(E.D. Mo. 2005)  
In re Stevens, 322 B.R. 133 (Bkrtcy. E.D. Mo. 2005)  
In re Courtney Excavating & Const., Inc., 325 B.R. 839 (Bkrtcy. W.D. Mo. 2005)

***Publications and Presentations:***

- “Named Obligee's rights Under the Payment Bond (Are There Any?); Rights and Limitations on the Obligee's Rights on Exhaustion of Performance Bond Penalties,” 10<sup>th</sup> Annual Northeast Surety & Fidelity Claims Conference, Iselin, New Jersey, 1999 (contributor)
- “What is 'Property' Under Fidelity Bond Coverage?,” 12<sup>th</sup> Annual Northeast Surety & Fidelity Claims Conference, Atlantic City, New Jersey, 2001(co-author)
- “Letters of Credit, What are they and what do I do with One?,” 13<sup>th</sup> Annual Northeast Surety & Fidelity Claims Conference, Atlantic City, New Jersey, 2002 (co-author)
- “Liquidated Damages: Have the Courts Gone too Far? Have Upper Tier Contracting Parties Gone Too Far?,” 15<sup>th</sup> Annual Northeast Surety & Fidelity Claims Conference, Atlantic City, New Jersey, 2004 (co-author)
- “Suretyship Updated: Missouri Law and Practice Pertaining to Construction Bonds and Other Surety Bonds,” (MOBARCLE 2005) (co-author)
- “The Use and Misuse of the General Indemnity Agreement,” 16<sup>th</sup> Annual Northeast Surety & Fidelity Claims Conference, Atlantic City, New Jersey, 2005 (co-author)

***Practice Areas:***

- Corporate Law
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- Fidelity and Surety Law
- Construction
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***Undergraduate Education:***

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