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**JOINT DEFENSE ISSUES IN SURETY
AND FIDELITY CLAIMS AND LITIGATION**

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I. INTRODUCTION¹

Documents and information that are attorney-client and/or work product privileged are at risk of losing their privileged status where they are shared with parties other than the client and its counsel. Situations arise in the course of claims investigations and claims litigation where both surety and fidelity carriers may be inclined to share otherwise privileged documents or information with third parties to litigation such as brokers, co-insurers, co-sureties or reinsurers. Such information may be shared among primary or excess fidelity carriers. A surety may share information with its principal, its principal's counsel or with other sureties where interests overlap.

The risk of such sharing of information is particularly acute in the context of contract suretyship. The surety often finds itself aligned with the interests of its bonded principal. The surety and the principal may share a common interest in defending against claims under performance bonds by obligees, as well as claims under payment bonds by subcontractors and suppliers. Similarly, the surety and the principal may share a common interest in prosecuting affirmative claims against obligees, subcontractors, banks, design professionals or other third parties.

Because of these shared interests, agents and employees of the surety and the principal regularly communicate with each other. This communication can range from the simple (i.e., the surety asking the principal for its position in response to a payment bond claim) to the complex (i.e., the surety and the principal's representatives meeting to discuss the status of multiple bonded projects, multiple obligee defaults, possible affirmative claims, financing the principal, etc). They may share significant and sensitive information about claims, defenses and strategies. They may also share work product and investigative materials generated by experts, consultants and attorneys. Finally, they may develop and share litigation strategies.

Not surprisingly, the content of the communications between the surety and the principal is often the subject of discovery in litigation. Often a surety will be asked to produce its claim files, or its investigative files, concerning the principal and the claim at issue. The principal will be asked to produce all written communications with the surety. The surety and the principal may also be subject to depositions concerning communications between the parties. There are also circumstances where the surety or fidelity carrier is asked through discovery to disclose possibly privileged documents which have been shared with brokers, reinsurers, co-insurers or co-sureties, or primary or excess carriers.

When faced with such discovery and with arguments that privilege has been waived as a result of information exchanges, the surety or fidelity carrier should consider the applicability of the joint defense privilege, also sometimes referred to as the common interest doctrine. Under the appropriate circumstances, the joint defense privilege or common interest doctrine

¹ Note that the views expressed in this article do not necessarily reflect the views of Travelers Bond or any of its affiliated companies. This article is intended for general informational purposes only. None of it constitutes legal advice, nor is it intended to create any attorney-client relationship between you and the author. You should not act or rely on this information without seeking the advice of your own attorney.

could provide a legal basis for the surety or fidelity carrier to withhold disclosure of confidential or sensitive documents and communications which would otherwise be discoverable.

The surety must also consider whether it can, or should, memorialize any joint defense arrangement in a contract or agreement with the principal.

This paper addresses the applicability and use of the joint defense privilege or common interest doctrine in surety and fidelity litigation. Section II of the paper discusses the joint defense privilege and common interest doctrine in general. Section III discusses the applicability of these doctrines in contexts common to fidelity and surety litigation. Section IV discusses the potential use and invocation of this privilege in contexts specific to surety claims and litigation. Section V discusses the use of joint defense agreements in surety litigation. Section VI sets forth tips for preserving and asserting the privilege. Finally, the appendix to this paper includes a sample joint defense agreement.

II. JOINT DEFENSE AND COMMON INTEREST PRIVILEGES IN GENERAL

The joint defense privilege originated in the context of criminal codefendants whose attorneys shared information in the course of devising a joint strategy for their clients' defense.² The joint defense has since been extended by courts to apply to civil co-defendants, companies that have been individually summoned before a grand jury who shared information before any indictment was returned, potential co-parties to prospective litigation, plaintiffs who were pursuing separate actions in different states and civil defendants who were sued in separate actions.³

The Federal Rules of Evidence provide that the principles of common law, as interpreted by the courts, govern rules of privilege.⁴ Thus, federal courts develop rules of privilege, including joint defense privilege, on a case-by-case basis. While the joint defense privilege or common interest doctrine is widely recognized in various jurisdictions, some courts have declined to extend the joint defense privilege beyond a situation where two parties are

² United States v. Under Seal (*In re* Grand Jury Subpoenas), 902 F.2d 244, 248 (4th Cir. 1990); Fed. Election Comm'n v. Christian Coalition, 178 F.R.D. 61, 72 (E.D. Va. 1998).

³ United States v. Under Seal, 902 F.2d at 249. See also *Cont'l Oil Co. v. United States*, 330 F.2d 347, 350 (9th Cir. 1964) (applying joint defense privilege to communications between those summoned to testify before a grand jury and their attorneys prior to an indictment being returned); *Schachar v. Am. Acad. of Ophthalmology, Inc.*, 106 F.R.D. 187, 191-92 (N.D. Ill. 1985) (finding a joint defense privilege existed between plaintiffs in class action in Georgia and plaintiffs in class action in Illinois arising out of same antitrust issues and involving some of the same defendants); *Western Fuels Ass'n Inc. v. Burlington Northern R.R. Co.*, 102 F.R.D. 201, 203 (D. Wyo. 1984) (holding that joint defense privilege allows counsel for clients facing a common litigation opponent to exchange privileged communications and attorney work product without waiving either privilege); *In re LTV Sec. Litig.*, 89 F.R.D. 595, 604 (N.D. Tex. 1981) (holding that disclosure of privileged information by an attorney to actual or potential co-defendants, or to their counsel, in the course of a joint defense does not constitute a waiver of the attorney-client privilege); *Transmira Prods. Corp. v. Monsanto Chem. Co.*, 26 F.R.D. 572, 578-79 (S.D.N.Y. 1960) (holding that work product doctrine protected materials shared between attorneys for civil codefendants sharing a common interest in separate actions).

⁴ FED. R. EVID. 501.

represented by the same attorney.⁵ Before the joint-defense privilege is relied upon, the law of the particular jurisdiction should be researched.

The joint defense privilege is closely related to the common interest rule or common interest privilege. Some courts consider the joint defense privilege and the common interest rule to be two names for the same principle⁶, while others draw distinctions between the two.⁷ Regardless, the principle underlying the joint defense privilege and common interest rule is the same.⁸ The rationale behind the joint defense privilege is that persons who share a common interest in litigations should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims.⁹ Some courts require the parties to the joint defense to have identical interests.¹⁰ Other courts do not require a complete commonality of interests and acknowledge that the parties to the joint defense may have adverse interests in substantial respects.¹¹

The Restatement of the Law Governing Lawyers provides as follows with respect the common interest arrangements:

(1) If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged. . . that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication.

⁵ DAVID M. GREENWALD ET AL, TESTIMONIAL PRIVILEGES, § 1.78 (3d ed. 2005). See also *State v. Hydrite Chem. Co.*, 582 N.W.2d 411, 421-22 (Wis. Ct. App. 1998) (holding that state statute provides for common interest exception where two parties jointly retain an attorney and declining to broaden common interest exception beyond that contemplated by the statute).

⁶ *In re Grand Jury Subpoena*, 274 F.3d 563, 572 (1st Cir. 2001); *In re Software Technology, LLC*, 135 Fed. Appx. 422, 422 (Fed. Cir. 2005).

⁷ *Beneficial Franchise Co., Inc. v. Bank One, N.A.*, 205 F.R.D. 212, 216 (N.D. Ill. 2001) (explaining that “[w]hile often arising in the context of a joint defense, the common interest doctrine applies to any parties who have a ‘common interest’ in current or potential litigation, either as actual or potential plaintiffs or defendants.”)

⁸ Jeffrey J. Carlson, *The Joint Defense Privilege: An Illusion or a Magic Wand?*, in ATTORNEY-CLIENT PRIVILEGE IN CIVIL LITIGATION: PROTECTING AND DEFENDING CONFIDENTIALITY 397, 400 (Vincent S. Walkowiak ed., 2d ed. 1997).

⁹ *United States v. Under Seal (In re Grand Jury Subpoenas)*, 902 F.2d 244, 249 (4th Cir. 1990); *Fed. Election Comm’n v. Christian Coalition*, 178 F.R.D. 61, 73 (E.D. Va. 1998); *Western Fuels Ass’n v. Burlington Northern R.R. Co.*, 102 FR.D. 201, 203 (D. Wyo. 1984); *Visual Scene, Inc. v. Pilkington Bros.*, 508 So.2d 437, 440 (Fla. Dist. Ct. App. 1987).

¹⁰ DAVID M. GREENWALD ET AL, TESTIMONIAL PRIVILEGES, § 1.80 (3d ed. 2005) (citing, e.g., *Bank of America, N.A. v. Terra Nova Ins. Co. Ltd.*, 211 F. Supp. 2d 493, 496 (S.D.N.Y. 2002) and *Cheeves v. Southern Clays, Inc.*, 128 F.R.D. 128, 130 (M.D. Ga. 1989)).

¹¹ *United States v. Bergonzi*, 216 F.R.D. 487, 495 (N.D. Cal. 2003); *McKesson Corp. v. Green*, 597 S.E.2d 447, 452 n.8 (Ga. Ct. App. 2004).

(2) Unless the clients have agreed otherwise, a communication described in Subsection (1) is not privileged as between clients described in Subsection (1) in a subsequent adverse proceeding between them.¹²

The common interest privilege protects communications between a lawyer and two or more clients regarding a matter of common interest.¹³ The common interest rule also may apply where multiple parties are represented by multiple counsel so long as the parties share a common interest in a legal matter.¹⁴ The joint defense or common interest rule protects the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel.¹⁵ The common interest doctrine allows a party to assert the attorney-client privilege to protect statements made not only to his or her own attorney, but also statements made to an attorney for a codefendant for a common purpose related to the defense of both defendants.¹⁶ The common interest doctrine also protects communications between a client and his attorney when the attorney later shares the communications with codefendants for the purposes of a common defense.¹⁷

Some courts have held that it is not necessary that actual litigation be in progress for the common interest rule of the attorney-client privilege to apply.¹⁸ These courts have reasoned that the need to protect the free flow of information from client to attorney exists whenever multiple clients share a common interest about a legal matter and therefore it is unnecessary for there to be actual litigation in progress.¹⁹

The joint defense privilege can apply to the work-product doctrine as well as the attorney-client privilege.²⁰ Federal Rule of Civil Procedure 26(b)(3) provides the standard for application of the work-product doctrine. Federal Rule of Civil Procedure 26(b)(3) provides

¹² RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 (2000).

¹³ *In re Sealed Case*, 29 F.3d 715, 719 (D.C. Cir. 1994); *In re Auclair*, 961 F.2d 65, 69-70 (5th Cir. 1992).

¹⁴ *United States v. Schwimmer*, 882 F.2d 237, 243-44 (2d Cir. 1989); *Walsh v. Northrop Grumman Corp.*, 165 F.R.D. 16, 18 (E.D.N.Y. 1996).

¹⁵ *Schwimmer*, 882 F.2d at 243-44; *United States v. Bay State Ambulance and Hosp. Rental Serv.*, 874 F.2d 20, 28 (1st Cir. 1989); *Country Life Ins. Co. v. St. Paul Surplus Lines Ins. Co.*, No. 03-1224, 2005 U.S. Dist. LEXIS 39691, at *18 (C.D. Ill. Jan. 31, 2005); *United States v. United Techs. Corp.*, 979 F. Supp. 108, 111 (D. Conn. 1997).

¹⁶ *United States v. Evans*, 113 F.3d 1457, 1467 (7th Cir. 1997); *Country Life Ins. Co.*, 2005 U.S. Dist. LEXIS 39691 at *17-18.

¹⁷ *Waller v. Fin. Corp. of Am.*, 828 F.2d 579, 583 n.7 (9th Cir. 1987); *United States v. McPartlin*, 595 F.2d 1321, 1336 (7th Cir. 1979); *Country Life Ins. Co.*, 2005 U.S. Dist. LEXIS 39691 at *17-18.

¹⁸ *Schwimmer*, 882 F.2d at 243-44 (2d Cir. 1989); *In re Sulfuric Acid Antitrust Litig.*, 235 F.R.D. 407, 416-17 (N.D. Ill. 2006); *Sony Elecs., Inc. v. Soundview Techs., Inc.*, 217 F.R.D. 104, 108 (D. Conn. 2002).

¹⁹ *Schwimmer*, 882 F.2d at 243-44; *Sulfuric Acid Antitrust Litig.*, 235 F.R.D. at 416-17.

²⁰ *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 94 (3d Cir. 1992); *United States ex. rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 685 (S.D. Cal. 1996); *Western Fuels Ass'n Inc. v. Burlington Northern R.R. Co.*, 102 F.R.D. 201, 203 (D. Wyo. 1984).

that “a party may obtain discovery of documents and tangible things otherwise discoverable. . . and prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.”²¹ This rule appears to implicitly recognize that a surety and its principal may have a common interest in litigation.

Some courts have held that the work product privilege is not waived by disclosure to a third party if the disclosure does not substantially increase the likelihood of an opposing party obtaining the information.²² In connection with the common interest rule, some courts have reasoned that the concept underlying the common interest rule is inherent in the work-product doctrine’s waiver rule in that disclosure to a third party generally waives the work-product doctrine only where the disclosures results in, or increases the likelihood of, disclosure to an adversary.²³ Disclosure between parties sharing a joint defense is not likely to significantly increase the disclosure of the information to an adversary.

The joint defense privilege or common interest rule is not a separate privilege, but rather is an extension of the attorney-client privilege and work product privilege.²⁴ It is an exception to the general rule that disclosure of privileged information to a third party waives the attorney-client privilege.²⁵ The communication sought to be protected by the joint defense privilege must meet the requirements of the attorney-client privilege or work product doctrine, except for its disclosure to the third party claimed to be party to the joint defense.²⁶ Since the joint defense privilege is not an independent privilege, communications between two clients who are parties to a joint defense are not protected by the joint defense privilege unless an attorney is involved in the communication.²⁷

The burden is on the party claiming the joint defense privilege to prove the existence of the joint defense privilege.²⁸ The party claiming the privilege must show that: (1) the

²¹ FED. R. CIV. P. 26(b)(3).

²² See *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980).

²³ See *ECDC Envtl, L.C. v. New York Marine & Gen. Ins. Co.*, No. 96 Civ. 6033(BSJ) (HBP), 1998 U.S. Dist. LEXIS 8808, at *49 n. 6 (S.D.N.Y. June 5, 1998).

²⁴ See *United States v. Evans*, 113 F.3d 1457, 1467 (7th Cir. 1997); *Schwimmer*, 892 F. 2d at 244; *Waller v. Fin. Corp. of Am.*, 828 F.2d 579, 583 n.7 (9th Cir. 1987); *Sulfuric Acid Antitrust Litig.*, 235 F.R.D. at 416-17.

²⁵ *United States v. Under Seal (In re Grand Jury Subpoenas)*, 902 F.2d 244, 249 (4th Cir. 1990); *Fed. Election Comm’n v. Christian Coalition*, 178 F.R.D. 61, 72 (E.D. Va. 1998); *Visual Scene, Inc. v. Pilkington Bros.*, 508 So.2d 437, 440 (Fla. Dist. Ct. App. 1987).

²⁶ *United States v. Under Seal*, 902 F.2d at 249; *United States v. McPartlin*, 595 F.2d 1321, 1336-37 (7th Cir. 1979).

²⁷ See *United States v. Mikhel*, 199 Fed. Appx. 627, 628 (9th Cir. 2006).

²⁸ *Schwimmer*, 892 F.2d at 244; *In re Beville, Bresler & Schulman Asset Mgmt Corp.*, 805 F.2d 120, 126 (3d Cir. 1986).

communications were made in the course of a joint-defense effort; (2) the statements were designed to further the effort; and (3) the privilege has not been waived.²⁹ As the joint defense privilege is an extension of the attorney-client privilege or work product doctrine, the party claiming the joint defense privilege must also establish that the communications in question are protected by the attorney-client privilege or work product doctrine.

In order to be protected by the joint defense privilege, the parties claiming the joint defense must show that they had a common legal interest, not just a common business, commercial or financial interest.³⁰ The parties also must show cooperation in formulating a common legal strategy.³¹ Only those communications made in the course of an ongoing common enterprise and intended to further the enterprise are protected.³²

Like the attorney-client or work product privilege, the joint defense privilege may be waived by disclosure to a third party not a party to the joint defense.³³ However, many courts hold that a waiver by one party to the joint defense does not constitute a waiver by the other parties to the joint defense and that a joint defense privilege cannot be waived without the consent of all parties who share the privilege.³⁴ A party may disclose its own communications without consent of the other parties to a joint defense.³⁵ Furthermore, most courts hold that communications subject to the joint defense privilege are not privileged with respect to subsequent litigation between the parties to the joint defense where the parties are adverse.³⁶

A written agreement is not necessary to invoke the joint defense privilege, but the parties asserting the privilege must show an expressed intent to cooperate in the litigation.³⁷ Also, the parties by agreement cannot broaden the scope of the privilege allowed by law.³⁸ A

²⁹ Haines v. Liggett Group, Inc., 975 F.2d 81, 94 (3d Cir. 1992); *In re* Bevill, Bresler & Schulman Asset Mgmt Corp., 805 F.2d at 126; United States v. Bergonzi, 216 F.R.D. 487, 495 (N.D. Cal. 2003); McKesson Corp. v. Green, 597 S.E.2d 447, 452 n.8 (Ga. Ct. App. 2004).

³⁰ Country Life Ins. Co. v. St. Paul Surplus Lines Ins. Co., No. 03-1224, 2005 U.S. Dist. LEXIS 39691, at *19 (C.D. Ill. Jan. 31, 2005); Sony Elecs., Inc. v. Soundview Techs., Inc., 217 F.R.D. 104, 108 (D. Conn. 2002); Walsh v. Northrop Grumman Corp., 165 F.R.D. 16, 18 (E.D.N.Y. 1996).

³¹ Sony Elecs., Inc., 217 F.R.D. at 108.

³² Schwimmer, 892 F.2d at 243; Corporate Express Office Prods., Inc. v. Gamache, No. 1:06-MC-127 (LEK/RFT), 2006 U.S. Dist. LEXIS 90345, at *39 (N.D.N.Y. Dec. 13, 2006).

³³ Western Fuels Ass'n. v. Burlington Northern R.R. Co., 102 F.R.D. 201, 203 (D. Wyo. 1984); Visual Scene, Inc. v. Pilkington Bros., 508 So.2d 437, 440 (Fla. Dist. Ct. App. 1987).

³⁴ John Morrell & Co. v. Local Union 304A of the United Food & Commercial Workers, 913 F.2d 544, 556 (8th Cir. 1990); United States v. Under Seal (*In re* Grand Jury Subpoenas), 902 F.2d 244, 248 (4th Cir. 1990); Western Fuels Ass'n, 102 F.R.D. at 203.

³⁵ *In re* Grand Jury Subpoena, 274 F.3d 563, 572 (1st Cir. 2001).

³⁶ *Id.* at 573; EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 457 (4th ed. 2001).

³⁷ Gamache, 2006 U.S. Dist. LEXIS 90345 at *39; Country Life Ins. Co. v. St. Paul Surplus Lines Ins. Co., No. 03-1224, 2005 U.S. Dist. LEXIS 39691, at *20 (C.D. Ill. Jan. 31, 2005).

³⁸ *In re* Grand Jury Subpoena, 274 F.3d at 574-75.

joint defense agreement may be formed only with respect to the subject of potential or actual litigation, so there can be no joint defense agreement where there is no matter to jointly defend.³⁹

The Federal Rules of Civil Procedure provide that, when information is withheld because of a claim of privilege, the party withholding the information must make the privilege claim expressly and describe the nature of the documents or communications withheld in a manner which will enable other parties to assess the applicability of the privilege or protection.⁴⁰ Many state rules or local federal rules may similarly provide that a party withholding information must produce a privilege log. Any privilege log will need to include documents withheld on the basis of the joint defense privilege. Since the joint defense privilege is not a privilege in and of itself, but is an extension of the attorney-client privilege or work product doctrine, any document which is claimed to be protected by the joint defense privilege must also be claimed as protected by the attorney-client privilege or work product doctrine.

In the civil context, some common situations where the joint defense privilege arises are in multi-defendant toxic tort defense, patent law, and information exchanges between insurers and their insureds. Toxic tort actions are often brought against multiple defendants and the defendants may choose to enter into a joint defense for strategic and economic reasons.⁴¹ In patent law, it is common that more than one party has an interest in the same patent and for the parties to share the same lawyer to protect it.⁴² In the insurance context, where an attorney is hired by an insurer to defend the insured and the same attorney represents the interests of the carrier and the insured, a common interest exists which protects communications from third parties.⁴³

III. JOINT DEFENSE AND COMMON INTEREST ISSUES IN CONTEXTS COMMON TO SURETY AND FIDELITY CLAIMS AND LITIGATION

A. Co-Insurers, Co-Sureties, and Primary and Excess Carriers

Co-insurers, co-sureties, and primary and excess carriers often share information regarding pending claims and litigation and may be obligated to do so by contract or by the common law. These parties typically have common interests in mitigating or obviating their exposures to claims.

However, the interests of co-insurers, co-sureties and primary and excess carriers may not always be common. Under varying circumstances, a primary carrier may owe an excess

³⁹ Id. at 575.

⁴⁰ FED. R. CIV. P. 26(b)(5)(A).

⁴¹ Carlson, *supra* note 7, at 397.

⁴² EPSTEIN, *supra* note 35, at 197.

⁴³ Id. at 214, 457.

carrier duties to provide notice of a claim and disclose information regarding the claim, diligently investigate claims, and fairly settle claims within policy limits. Litigation between primary and excess carriers may ensue where the excess carrier determines that the primary carrier has materially violated these purported duties. Either by contract or common law, a “primary” co-insurer or co-surety may owe a duty to the other insurer or surety to provide notice of claim, investigate the claim, and fairly settle the claim. Disputes and litigation may ensue among co-sureties or co-insurers where one party believes that these duties have been violated.

The case law suggests that primary and excess carriers, co-insurers and co-sureties may be able to assert in many contexts that, due to their shared interests in the resolution of a claim, otherwise privileged documents or communications do not lose their privileged status simply because of the sharing of documents or communications among them.⁴⁴ However, the complexity and unpredictable nature of the relationships between primary and excess carriers and among co-insurers makes it difficult to make blanket statements regarding the applicability of these privileges to shared documents in particular contexts.

As interests among co-insurers., co-sureties and primary and excess carriers can become adverse, a primary issue in evaluating such privilege claims is whether the carriers in fact shared a common interest as of the time that communications were exchanged. If one carrier had denied coverage as of the date of sharing or was considering same and the other carrier had acknowledged coverage, the privileges may be waived as to the shared documents.⁴⁵ If excess and primary carriers were assessing the merits of a settlement proposal or settlement strategy differently as of the time of information exchanges, the privilege may be at risk. If co-insurers or co-sureties disagreed regarding litigation tactics or settlement strategies as of the time of information exchanges, the privilege may be at risk. Any evidence of a lack of harmony among the carriers as of the time of information exchanges can be used by a third party to argue that the carriers did not share common interests and, therefore, the sharing of information equated to a privilege waiver.⁴⁶

Where co-insurers, co-sureties or primary and excess carriers share communications, particularly where this occurs in advance of litigation, there may be issues regarding whether the shared communications are more closely associated with a routine claims resolution process or are more properly identified as being in anticipation of litigation.⁴⁷ The same considerations apply to communications to and from counsel; i.e, was counsel providing legal advice or advice regarding business or claims strategies?⁴⁸

⁴⁴ See *Bovis Lend Lease, LMB, Inc. v. Seasons Contracting Corp.*, No. 00 Civ. 9212 (DF), 2002 U.S. Dist. Lexis 23322 (S.D.N.Y. Dec. 5, 2002).

⁴⁵ *Id.*

⁴⁶ See *United States v. Brennan*, 938 F. Supp. 1111, 1128-30 (E.D.N.Y. 1966) (noting that in order for the court to determine whether communications among co-insurers are privileged, the court must hear evidence to determine whether the co-insurers’ interests were common as of the time of disclosure).

⁴⁷ *Pereira v. Aetna Cas. & Sur. Co. (In re Payroll Express Corp.)*, No. 95 Civ. 4385 (SAS), 1996 U.S. Dist. LEXIS 18230 (Bankr. S.D.N.Y. Dec. 9, 1996).

⁴⁸ See *Certain Underwriters at Lloyd’s v. Fidelity and Cas. Co. of New York*, No. 89 C 0876, 1997 U.S. Dist. LEXIS 19670 (N.D.Ill. Dec. 9, 1997).

There may also be issues as to whether the joint interests of carriers as of the time of disclosures addressed business interests or litigation strategies.⁴⁹ If, at the time of shared communications, primary and excess carriers share a common business interest but are not collaborating on a common litigation strategy, the joint defense privilege may not attach.⁵⁰

In sum, communications among primary and excess carriers, co-insurers, and co-sureties are unlikely to result in privilege waivers where these communications take place in the course of litigation and relate to common litigation strategies and the carriers are working together without conflict. To the extent that any of these factors is missing or in doubt, there is a risk that document and information sharing could result in a privilege waiver.

B. Surety or Fidelity Carrier Communications with Brokers

Brokers may communicate with underwriters regarding their concerns that a surety claim may be paid or a fidelity claim may be denied. The underwriters may seek clarifications from the claims department. Claims personnel may convey privileged information or documents to the underwriters and the underwriters may send letters or emails to the broker incorporating privilege information or possibly convey privileged documents to the broker.

Under these or analogous circumstances, the communication of privileged documents or information to a broker may cause a waiver of the privilege.⁵¹ To the extent that a broker shares a common business interest with a litigant but not a common litigation interest or to the extent that the interests of the broker and litigant are in conflict, the joint defense privilege may not apply.⁵² In contrast, the sharing of information with a broker may not result in a waiver if a broker has a direct stake in litigation, was a source of information for a litigant's attorney, or regularly acted as agent for the surety or fidelity carrier in terms of conveying information among parties with common or joint interests.⁵³

C. Surety or Fidelity Carrier Communications with Reinsurers

In large loss surety and fidelity litigation, communications with reinsurers may be a fertile source of useful information for parties adverse to the fidelity or surety carrier. The prospects for successfully objecting to such disclosures in discovery can be enhanced greatly

⁴⁹ See *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 152 F.R.D. 132, 140-41 (N.D.Ill. 1993) (holding that communications shared between carrier and reinsurer are not protected by the common interest doctrine where the communications were intended to keep each other informed about claims as a matter of standard business practice and not to prepare a joint litigation defense).

⁵⁰ See *Pereira v. Aetna Cas. & Sur. Co.*, 1996 U.S. Dist. LEXIS 18230.

⁵¹ See *SR Int'l Bus. Ins. Co., Ltd. v. World Trade Center Props., LLC*, No. 01 Civ. 9291 (JSM), 2002 U.S. Dist. LEXIS 10919 (S.D.N.Y. June 19, 2002); *Int'l Surplus Lines Ins. Co. v. Willis Corroon Corp.*, No. 91 C 6057, 1992 U.S. Dist. LEXIS 17332 (N.D.Ill. Nov. 12, 1992); *Rhodes v. AIG Domestic Claims, Inc.*, No. 05-1306-BLS2, 2006 Mass. Super. LEXIS 19 (Mass. Super. Ct. Jan. 27, 2006).

⁵² See *SR Int'l Bus. Ins. Co., Ltd.*, 2002 U.S. Dist. LEXIS 10919; *Int'l Surplus Lines Ins. Co.*, 1992 U.S. Dist. LEXIS 10919; *Rhodes*, 2006 Mass. Super. LEXIS 19.

⁵³ *Minn. Sch. Bds. Ass'n Ins. Trust v. Employers Ins. Co. of Wausau*, 183 F.R.D. 627 (N.D. Ill. 1999); *Royal Surplus Lines Ins. Co. v. Sofamor Danek Group, Inc.*, 190 F.R.D. 463 (W.D. Tenn. 1998).

to the extent that the surety or fidelity carrier can document that its communications with reinsurers are substantially based on counsel's opinions rendered in anticipation of litigation. On the other hand, the sharing of attorney communications and work product with reinsurers can create a risk that the privilege accorded to sensitive information and documentation may be waived.

Some courts have ordered the disclosure of communications with reinsurers, notwithstanding claims of privilege, holding that these communications were made in the ordinary course of business per the contractual obligations among the parties.⁵⁴ Other courts have been more generous in finding that communications from carrier to reinsurer were infused with attorney work product and communications, the information was compiled in anticipation of litigation, and the carrier and reinsurer shared common interests in the litigation outcome.⁵⁵ The prospects for maintaining privileges are likely to be enhanced to the extent that litigation is pending as of the date of the communications to the reinsurer and the communications with the reinsurer clearly incorporate attorney communications and opinion.

IV. JOINT DEFENSE AND COMMON INTEREST ISSUES SPECIFIC TO SURETY CLAIMS AND LITIGATION

While the joint defense privilege or common interest rule arises frequently in the practice of surety claims and litigation, case law on the issue is sparse. In *Reliance Ins. Co. v. McNally*, a district court recognized that a surety and principal share a common interest in confronting claims and defenses.⁵⁶ In *McNally*, the surety was a plaintiff and the principal was one of the defendants.⁵⁷ The other defendant, McNally, moved to compel production of documents from the principal, which the principal claimed were work product.⁵⁸ McNally claimed the work product privilege was waived because the communications were disclosed to the surety.⁵⁹ The principal argued that it had a common interest with its surety in defending against the counterclaim and crossclaim of the subcontractor.⁶⁰ The court held that the principal and surety had a common interest in the outcome of the litigation and that sharing of information between them and their attorneys does not intrinsically carry a waiver of the work product doctrine.⁶¹

⁵⁴ See *Front Royal Ins. Co. v. Gold Players, Inc.*, 187 F.R.D. 252 (W.D. Va. 1999); *Bull Data Sys., Inc.*, 152 F.R.D. at 140-41.

⁵⁵ See *Bondex Int'l, Inc. v. Hartford Accident & Indem. Co.*, No. 1:03CV1322, 2006 U.S. Dist. LEXIS 6044 (N.D. Ohio Feb. 14, 2006); *Minn. Sch. Bds. Ass'n Ins. Trust*, 183 F.R.D. 627; *Great Am. Surplus Lines Ins. Co. v. Ace Oil Co.*, 120 F.R.D. 533 (E.D. Ca. 1988).

⁵⁶ *Reliance Ins. Co. v. McNally*, No. 89-2401-V, 1992 U.S. Dist. LEXIS 22605, at *9-10 (D. Kan. Feb. 5, 1992).

⁵⁷ *Id.* at *4.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at *9-10.

In *Levingston v. Allis-Chalmers Corp.*, the court conducted an in camera review of various categories of documents sought from the surety and recognized that communications between the surety or the surety's attorneys and the principal's attorneys were designed to further their common interest and were privileged.⁶² However, notably the *Levingston* court also held that documents which constituted work product in prior litigation involving bond claims by subcontractors of the principal which were unrelated to the present action were discoverable, with the exception of mental impressions and opinions of its attorneys.⁶³

Following are several scenarios in which the joint defense privilege may arise along with a discussion of the issues implicated by each scenario.

A. Pre-Suit Communications Between the Surety and the Principal

There are numerous scenarios under which the surety and the principal will communicate prior to litigation. For example, it is customary that the surety will seek its principal's position in response to the receipt of a claim on a performance or payment bond. The surety's inquiry to its principal represents the usual first step in the surety's independent investigation of the claim, and is often reflected in a letter from the surety's claim handler to the principal (or the principal's attorney). Following this inquiry, the surety and the principal may exchange correspondence, phone calls, and emails concerning the claim and possible defenses. Meetings between the parties, their attorneys and consultants are also possible.

These communications are memorialized in the claims investigation files of the surety, which may include documents reflecting strategies, mental impressions and pre-litigation work product of the parties, their counsel and consultant. If litigation ensues, the surety and the principal may be subject to discovery concerning their pre-suit communications. In response to such discovery, the surety should consider whether the joint defense privilege could be invoked to limit discovery of confidential, strategic or otherwise sensitive communications. The viability of any such privilege claim requires a case-by-case analysis of the circumstances and the context of the communications at issue.

While the joint defense privilege could be invoked in the appropriate case, the surety will likely have difficulty establishing the privilege as to its pre-suit communications with the principal. Many of these communications are in furtherance of the surety's independent investigation of the claim. During this stage, the surety has not made a decision to pay or deny the claim. The communications are not made in furtherance of a common defense to a claim because the defense has not yet been identified or adopted as the surety's formal position. Until the surety formally denies the claim, it is unlikely that any communications with the principal would satisfy the criteria for a claim of joint defense. Moreover, the joint defense privilege generally requires the involvement of an attorney. Before litigation, it is often the case that communications between the surety and the principal are undertaken between non-lawyer representatives or agents of the parties. However, once the surety has investigated and denied the claim, and assuming that the other criteria for the joint defense privilege have been

⁶² *Levingston v. Allis-Chalmers Corp.*, 109 F.R.D. 546, 549-51 (S.D. Miss. 1985).

⁶³ *Id.* at 552-53.

satisfied, it is possible that pre-suit communications between agents of the principal and the attorney could be subject to a claim under the joint defense privilege.

B. Information or Opinions of a Consultant Retained by the Surety or Principal and Shared Between the Surety and Principal

The surety or its principal may obtain information and opinions from consultants at various stages of the bond claim process and through the course of subsequent litigation. For instance, the surety may retain a consultant to review materials and a project site in the course of investigating a performance bond claim. The principal may retain a consultant during the course of litigation, share the consultant's opinions with the surety, and not disclose the consultant as a trial expert. The surety or the principal may retain a consultant who is later disclosed as a trial expert.

To the extent that a consultant is retained by the surety to aid in the investigation of a bond claim, regardless of whether this information is shared with the principal, it will likely be subject to disclosure because the consultant's opinions were used in the surety's determination of the claim. Since the consultant's opinions were considered prior to any denial of the claim and as part of the surety's independent investigation, it would be difficult to claim such communications were in furtherance of a common defense. Likewise, if a consultant of the principal provides information to the surety during the course of the surety's investigation of the claim, this information likely must be disclosed since the surety considered it in determining whether to pay or deny the claim. Once the surety has denied the claim, further opinions from the consultant may be subject to the joint defense privilege if they were made in anticipation of litigation. If they were made as a part of the surety's ongoing review of new information, even if after denial of the claim, it may be problematic to claim such communications are subject to the joint defense privilege.

If a principal or surety, after litigation has commenced, obtains a consultant who will not testify at trial, and shares the consultant's opinions with the other party's attorney, the communications can likely be claimed as subject to the joint defense privilege, if a joint defense has been undertaken. The consultant's opinions would be considered the work product of the party who retained the expert. The fact that the opinions are shared with other party to the joint defense may not be considered a waiver of the work product privilege where a common interest is recognized.

If a consultant is disclosed as a testifying expert, all documents considered by the expert, including communications with counsel, generally must be disclosed. In the case of a consultant who also acted as a consultant in anticipation of litigation, this could open up large amounts of communications between the consultant and the principal, surety and their attorneys. Also, to the extent the consultant was copied on communications between the surety, principal and their attorneys, these communications likely would no longer be privileged.

C. Communications Where the Principal and the Surety Share the Same Counsel or the Same Consultant

In some instances the surety and the principal are represented by the same attorney and the same law firm. This arrangement is usually undertaken pursuant to a formal tender

agreement between the parties. In these situations, the attorney often finds himself or herself as the conduit for substantive communications between the clients. These communications can be confidential, sensitive and potentially useful to claimants and other parties. For example, the principal may prepare a summary of claims, defenses or backcharges for use or reference by the surety. The document may be prepared with the assistance of, or at the request of, counsel. Counsel may also prepare and disseminate similar documents to either or both clients. The surety and the principal may also share the same consultant, and the consultant's work product may be distributed, through counsel, to both parties. This work product can include preliminary claims and defense analysis, draft reports and otherwise confidential communications.

Once litigation commences, the surety or the principal may be subject to discovery directed to these communications. In such instances, the joint defense privilege may apply to some of the communications between the parties. As noted earlier in this paper, the general rule is that disclosure of otherwise privileged communications to third parties acts as a waiver of the privilege as to the content of these communications. The joint defense privilege is especially useful in these circumstances, since the sharing of otherwise privileged communications between the principal and the surety would not result in a waiver of the privilege (assuming that the requirements of the joint defense privilege have been met). Successful assertion of the joint defense privilege in these circumstances would be helped by either a formal joint defense agreement, or a provision in the tender of defense agreement explicitly recognizing the existence of a joint defense arrangement.

D. Applicability of the Privilege in Indemnity Litigation Between the Principal and the Surety

Sureties commonly bring indemnification actions against principals and indemnitors. Since an indemnification action may later be brought with respect to a matter where the principal and surety defend pursuant to a joint defense agreement, the surety should consider prior to engaging in a joint defense how joint defense privileged communications will be treated in the indemnification action. Courts have generally held that communications subject to the joint defense privilege are not privileged with respect to subsequent litigation between the parties to the joint defense where the parties are adverse, absent an agreement to the contrary. Therefore, if the surety and principal engage in the joint defense of a matter and subsequently the surety brings an indemnity action against the principal, any communications which were previously privileged may no longer be claimed as privileged. The parties by agreement may agree that the information will remain privileged. If a written joint defense agreement is entered, the treatment of privileged information in future litigation in which the parties are adverse should be addressed in the agreement.

Given the general rule that the joint defense privilege does not apply when the parties to the joint defense are involved in subsequent litigation, can the surety bring a cross-claim for indemnification against its principal in a suit brought against the surety and its principal by a third party and still claim that a joint defense is being undertaken? At least one court has held, in the fidelity context, that a cross-claim for indemnification does not destroy a joint defense effort.⁶⁴ In that case, the plaintiff argued that, because a cross-claim for subrogation and

⁶⁴ See *Resolution Trust Corp. v. Fid. and Deposit Co. of Md.*, No. 92-1003 (WHW), 1995 U.S. Dist. LEXIS 21903 (D.N.J. Apr. 27, 1995).

indemnification had been asserted, the joint defense privilege could not be maintained and any information shared by the joint defendants was discoverable to third parties.⁶⁵ The court found the plaintiff's logic flawed in two ways.⁶⁶ First, the court was not satisfied that the assertion of a cross-claim created the necessary adversity to eviscerate the joint defense privilege.⁶⁷ Second, the court reasoned that, even if the cross-claim did create sufficient adversity, the purpose of the waiver rule in subsequent litigation between the parties was to enable the parties to the joint defense to use the information against one another in subsequent litigation, not to enable outside parties to discover the previously privileged information.⁶⁸ One way to bolster a claim that the joint defense privilege exists where a cross-claim has been asserted is to address that issue specifically in a joint defense agreement.

E. Applicability of the Privilege Between the Surety, Principal and Completing Contractor Relative to a Bank's Claim for Undisbursed Contract Funds

The common interest doctrine may arise when a principal in financial difficulty fails to complete a project and the surety takes over. In such a circumstance, creditors of the principal, such as its bank, may seek to recover undisbursed contract funds on bonded projects. The principal, indemnitors, the surety and the completing contractor will have a common interest in the undisbursed contract funds being used to finance the completion of the project. If litigation is brought against them by the bank, the surety, principal, indemnitors and completing contractor may decide to undertake a joint defense. Once litigation is ongoing and a joint defense is undertaken, privileged communications shared between the parties to the joint defense can be claimed as protected by the joint defense privilege. When the bank has not instituted an action, but has made a demand to the funds, it is not as clear whether the joint defense privilege can be claimed. Several courts have held that the joint defense applies to anticipated litigation as well as ongoing litigation. In these jurisdictions, if the parties can show that litigation was reasonably anticipated and that the parties were communicating in furtherance of a common legal interest, it may be possible to claim the joint defense privilege, as long as there is attorney involvement.

F. Communications Among Sureties

A second tier subcontractor may assert claims under the first tier subcontractor's payment bond and the prime contractor's payment bond. The contractor's surety and the subcontractor's surety may both be defendants in litigation brought by the claimant or the claimant may sue one of the sureties and the defendant surety may file a third party complaint against the other surety. The sureties may choose to share privileged information regarding the merits of the plaintiff's claim and defenses thereto. To the extent that the sureties agree as to which surety is primary, there may be no conflict among the sureties and their interests may be common in all respects. In this event, there is a strong argument that the sharing of information does not waive any privilege that otherwise attaches. However, there may be a

⁶⁵ Id. at *2, 5.

⁶⁶ Id. at *5.

⁶⁷ Id.

⁶⁸ Id. at *5-6.

dispute as to which surety is primary, particularly if one of the issues in dispute is whether the alleged nonpayment of the plaintiff is primarily the result of the wrongful actions of the contractor or the subcontractor. In this event, there may be a significant risk that the sharing of privileged information will cause a waiver. It may be possible to minimize this risk, at least in part, to the extent that information regarding common issues is distinct from information relating to issues in dispute and the shared information relating to common issues can be readily segregated from information related to disputed issues.

V. THE USE OF JOINT DEFENSE OR JOINT PROSECUTION AGREEMENTS

In some cases the surety may deem it advisable to formalize its joint defense arrangement via a written agreement, usually with the principal and the principal's indemnitors. The purpose of such an agreement is to memorialize the parties' collective understanding that communications which would otherwise be privileged can be shared within the joint defense group, without a waiver of privileges as to these communications.

The use of joint defense agreements (or joint prosecution agreements, where the parties' efforts are directed toward asserting affirmative claims) can be helpful, but will not of itself guarantee that all communications covered by the agreement will later be deemed to be protected from disclosure by a court or an arbitrator. The agreement can certainly be cited by the parties as compelling evidence of a common interest or joint defense arrangement. Nonetheless, the parties cannot by agreement create a privilege where none otherwise existed. Thus, any party signing a joint defense agreement must do so with the knowledge that its communications could later be subject to disclosure if a court or arbitrator were to find that the elements of the joint defense privilege have not been met.

Joint defense or joint prosecution agreements typically have the following key terms and provisions:

- Identification of the parties and individuals who are in the group (i.e., the surety, the principal, their counsel, consultants and experts);
- Identification of the claims, litigation or arbitration giving rise to the joint defense arrangement;
- A declaration that the parties have knowingly undertaken a joint defense arrangement as to the matters identified;
- A declaration that communications within the group are made in furtherance of the joint defense arrangement, and that disclosures within the group are not intended as a waiver of privilege;
- A provision limiting the parties' right to disclose privileged communications to third parties (except as required or compelled by law);
- A procedure for providing other parties to the agreement with notice and the opportunity to respond if information or documentation is to be disclosed by one party;
- A provision that the joint defense agreement is not intended to impair or affect claims which the parties may have against each other; and
- A mechanism for withdrawal from, or termination of, the joint defense agreement, with the continued protection of privileged communications after the withdrawal or termination.

The appendix to this paper contains a sample of a joint defense agreement in surety litigation.

VI. TIPS FOR PRESERVING OR ASSERTING THE JOINT DEFENSE PRIVILEGE

Like all discovery issues, the joint defense privilege is most effectively preserved when it is considered sooner rather than later. In the surety arena, this means as soon as it has become evident that joint defense issues may arise in addressing the claim or the litigation. While each situation must be judged on its own merit, the following are some general indicia where joint defense issues may be most likely to arise:

- Where the principal and the surety are represented by the same counsel;
- Where the principal and the surety share the same expert or consultant;
- Where either the surety or the principal has retained a consultant and wishes to share the consultant's work product with the other party;
- Where the claims against the principal and surety are likely to require extensive consultant or expert review (i.e., construction delay claims, construction failure claims, design defect issues);
- Where the surety faces multiple defaults and claims on multiple projects;
- Where the surety and the principal/indemnitors have a generally cooperative relationship; and
- Where the surety and the principal share common grounds to jointly pursue affirmative claims against third parties such as banks, design professionals or obligees/owners.

The surety claims professional should consider each of these factors and, on a case-by-case basis, determine whether joint defense issues or communications may arise. If so, the surety should consider whether a joint defense agreement is necessary or advisable. While a written joint defense agreement is not required to prove the existence of a joint defense privilege, such an agreement will make the burden of proof easier to meet. Another advantage to creating a joint defense agreement is that the parties contractually agree to keep shared information confidential. The existence of a signed contract may have the effect of causing a party to be more careful about sharing potentially privileged communications with parties outside the agreement. Another advantage is that the expectations of the parties are memorialized with respect to the confidentiality of communications, how work of experts or consultants will be shared, how parties can terminate the joint defense arrangement, and how joint defense materials will be treated once the relationship ends.

Another consideration in entering a joint defense agreement is the degree to which the surety wants to share confidential or sensitive information with the other parties to the joint defense. The existence of an agreement does not guarantee that confidential information will stay within the joint defense group. There is always some risk that a party may breach the agreement by disclosing information to outside parties. This risk must be weighed against the benefits of sharing information.

A joint defense agreement could prove problematic if information obtained or generated during the joint defense relationship is later the subject of discovery in litigation between the principal and the surety. For example, the surety may claim that it must disclose a joint

defense communication in order to defend against a principal's bad faith claim. The principal may object because the communication was disclosed pursuant to the joint defense agreement. If the principal's objection is sustained, the surety will have been deprived of the use of important evidence at trial. One way to address this potential problem is to include in the joint defense agreement a provision which explicitly allows a party to disclose a joint defense communication if needed to respond to a claim by the other party to the agreement.

It should also be kept in mind that a joint defense agreement cannot broaden the scope of the joint defense privilege recognized by courts. Thus, if a joint defense agreement goes beyond what is recognized by the courts, such as protecting communications about matters not part of the joint defense of a matter, the joint defense agreement with respect to these communications may not be upheld by a court.

In addition to the use of joint defense agreements, the surety should consider the following recommendations for preserving or asserting the joint defense privilege:

- Label documents as "Joint Defense Privileged" where appropriate;
- Have their attorneys enter into retention agreements with consultants and experts, and also have the attorneys act as the primary conduit for the exchange of information with consultants and experts; and
- Take appropriate measures to limit the disclosure of sensitive or confidential information to third parties.

As to the applicability of the joint defense privilege in contexts where information is shared in common among sureties and fidelity carriers, communications between primary and excess carriers, co-insurers, co-sureties, and reinsurers should clearly identify information reflecting attorney-client communications or attorney work product. To the extent that any of these relationships are defined by contract, the parties should consider incorporating into the contract a joint defense understanding. Where possible, there should be a careful consideration of privilege risks prior to sureties or fidelity carriers transmitting privileged information to brokers.

VII. CONCLUSION

The joint defense privilege is an important concept to consider in surety and fidelity litigation. A joint defense arrangement can benefit both the surety and the principal by allowing for the easier exchange of information and saving costs. If a joint defense arrangement is undertaken, the surety should consider the advisability of entering into a written joint defense agreement to memorialize the agreement. It is also important to remember that the joint defense privilege operates only with the attorney-client privilege or work product privilege, so will not protect documents that would not otherwise be privileged. Used wisely, a joint defense (or prosecution) arrangement can play a significant role in defending against claims under payment and performance bonds and fidelity policies, defending against other third-party claims and in prosecuting affirmative claims.

JOINT DEFENSE AGREEMENT

This writing memorializes an agreement (the "Joint Defense Agreement") by and among: _____ ("the Surety"), _____ ("Contractor"), _____ ("Assignee"), and _____ ("Individual Indemnitors") for the joint defense of certain claims asserted by _____ Bank ("Bank") in connection with undisbursed contract funds on projects bonded by the Surety. The promises contained herein represent full and mutual consideration for this Joint Defense Agreement.

W I T N E S S E T H:

WHEREAS, Contractor entered into the following construction contracts and subcontracts:

(referred to collectively as "the Bonded Contracts" or "the Bonded Projects"); and

WHEREAS, the Surety issued payment and performance bonds ("the Bonds") in connection with each of the Bonded Projects; and

WHEREAS, Contractor and the Individual Indemnitors, inter alios, entered into a General Agreement of Indemnity ("the Indemnity Agreement") with the Surety and its affiliated and parent companies under which they agreed, inter alia, to indemnify the Surety for any losses incurred by the Surety as a consequence of having issued the Bonds; and

WHEREAS, Contractor currently lacks the necessary working capital to complete the Bonded Projects and has so advised the Surety; and

WHEREAS, Contractor is currently in default of its obligations under the Bonded Contracts, including being unable to complete the Bonded Projects and pay obligations owed to subcontractors and vendors for work performed and materials provided on those Projects; and

WHEREAS, Contractor has assigned the Bonded Contracts to Assignee and Assignee has agreed to complete the Bonded Projects with financing from the Surety; and

WHEREAS, the Surety has agreed to significant concessions in regard to the indemnity obligations owed by Contractor and the Individual Indemnitors, inter alios, if Assignee satisfies specified performance criteria for the completion of the Bonded Projects; and

WHEREAS, the Surety has and will continue to incur losses in completing the Bonded Projects and paying subcontractors, vendors and laborers for material and services provided to the Bonded Projects; and

WHEREAS, the Bank has filed a suit styled _____ (“Suit 1”) through which it has sought to garnish, inter alia, undisbursed contract funds from the Bonded Projects; and

WHEREAS, the Bank has filed a suit styled _____ (“Suit 2”) through which it seeks to recover all undisbursed contract funds from the Bonded Projects and prevent Assignee from completing the Bonded Projects; and

WHEREAS, the Surety, Contractor, Assignee , and the Individual Indemnitors share a common interest in having Assignee complete the Bonded Projects and applying the bonded contract funds to underwrite the completion of the Bonded Projects and pay the bills associated with those Projects.

NOW THEREFORE, in consideration of the commonality of interests among the Surety, Contractor, Assignee, and the Individual Indemnitors, the mutual promises contained herein, and for other good and valuable consideration the receipt whereof is hereby acknowledged, the Surety, Contractor, Assignee, and the Individual Indemnitors hereby agree as follows with respect to the conduct of the defense of any and all claims by the Bank relating to the completion of the Bonded Projects and/or the undisbursed contract funds on the Bonded Projects (“the Bank’s Bonded Claims”).

1. Contractor, Assignee, the Surety and the Individual Indemnitors (“the Signatories”) may jointly share and disclose and have, in fact, since _____ 20--, shared and disclosed attorney-client communications and work product consisting of documents, strategies, ideas, factual and legal defenses, information pertaining to expert witnesses, and other information and mental impressions relative to the Bank’s Bonded Claims (collectively referred to as the "Confidential Information" and relating solely to information relating to the “Bank’s Bonded Claims”), all in connection with an ongoing and joint effort to formulate a common strategy and mount a common defense to the Bank’s Bonded Claims.

2. The communication of Confidential Information on and after _____ 20-- is understood and agreed to be made pursuant to and in furtherance of the attorney-client relationships of each of the Signatories. Confidential Information shall be disclosed only in furtherance of the common interests of the Signatories and such information shall be presumed to have been disclosed for such purposes. All such Confidential Information shared or disclosed among the Signatories shall be used only in furtherance of the purposes of this Joint Defense Agreement.

3. The disclosure and use of such Confidential Information by the Signatories among themselves pursuant to this Joint Defense Agreement shall not be construed as a waiver of any confidences or privileges, attorney-client, attorney-work product or otherwise.

4. The Signatories shall maintain the confidentiality of all written and oral Confidential Information disclosed pursuant to this Joint Defense Agreement, and will not disclose any Confidential Information to any party, person, partnership, corporation or proprietorship that is not a party hereto except to those with respect to whom such communications are necessary (such as expert consultants or expert witnesses) pursuant to and in furtherance of the attorney-client relationship.

5. Counsel for the signatories will consult one another and make reasonable effort to coordinate their positions with respect to the defense of the Bank's Bonded Claims.

6. The disclosure of Confidential Information by the signatories to each other in furtherance of this Joint Defense Agreement shall in no way prejudice or limit any claims which the Signatories may have against one another, nor shall it be construed as a waiver between the Signatories of any claim of attorney-client privileges or attorney work product with respect to any communications, documents, or information not discussed or disclosed among the parties and their attorneys. The Signatories recognize that they may have claims against one another, and it is their intent to preserve all privileges and confidences, which attach to communications, documents and information relative to any claims they may have against one another.

7. This Joint Defense Agreement shall be binding on the respective successors, assigns, distributees or legal representatives of the Signatories, and shall not be modified or amended except by a writing executed by all parties.

8. This Joint Defense Agreement constitutes the entire agreement between the parties concerning the subject matter set forth herein, and no oral statements or promises, and no understandings not included in this writing shall be valid or binding.

9. This Agreement shall be governed by the Law of the State of _____.

10. Nothing in this Agreement shall be construed to create, acknowledge or revive an enforceable right or cause of action in any third party not a signatory hereto. The parties reserve all of their rights, claims and defenses in connection with persons or entities that are not parties to this Agreement.

11. This Agreement may be executed in any number of counterparts, each of which, when so executed, shall be an original and all of which shall constitute one and the same instrument.

12. The parties hereby acknowledge that each party and its counsel have reviewed and revised this Agreement, and that the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Agreement or any amendments, exhibits or schedules hereto.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals.

Signed this ___ day of _____, 20__.

CONTRACTOR

By:
Its:

SURETY

By:
Its:

INDEMNITOR

ASSIGNEE

By:
Its:

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GARY M. CASE is a member of the firm Wolf, Horowitz, Etlinger & Case LLC in Hartford, Connecticut. His practice focuses on surety, fidelity, construction, insurance coverage and subrogation. He received his undergraduate degree from Fairfield University (B. S., cum laude 1988). He received his J. D. from the University of Connecticut School of Law (J. D. with high honors, 1991), and an L. L. M. in Insurance Law from the University of Connecticut School of Law in 2003. He has also served as an Adjunct Instructor of Law at the University of Connecticut School of Law (Moot Court and Lawyering Process Programs).

Gary has presented numerous papers concerning surety and fidelity law. He was a contributing author to the "Law and Practice of Insurance Coverage Litigation," West Group & ABA Tort and Insurance Practice Section 2000, and the "The Law of Payment Bonds," American Bar Association, Tort and Insurance Practice Section. 1998. In 2004 Gary presented a paper on surety defenses at the ABA's "Back to Basics" program in Hartford, Connecticut. In 2006, at the ABA's Fidelity & Surety Law Committee's Mid-Winter Meeting, Gary co-presented "Whose Claim Is It Anyway? Allocation of Fidelity Exposures Among Multiple Carriers and Multiple Policies – Theory and Practice."

Gary has also been a contributing author to the following recent ABA publications: "Performance Bond Manual" (Lawrence Lerner and Theodore Baum, Editors) (2006); "The Law of Motor Vehicle Dealer Bonds" (William Downing, Lisa Jennings-Baroun, James Kreamer and Aaron McKee, Editors) (2006); and "Contractor's State License Bonds Desk Reference" (Edward Lodgen, Catherine Squillace and Mark Herbert, Editors) (2006).

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ROBYN L. SONDAK is a graduate of the University of Connecticut and the University of Connecticut School of Law. She was hired by Justice David Borden of the Connecticut Supreme Court and clerked for Judge Sidney Landau of the Connecticut Appellate Court. Robyn worked in the private sector for seven years where she represented various insurance companies focusing on first party bad faith insurance defense, insurance coverage litigation and appellate litigation. She began her career with Travelers in 1999 when she joined the Travelers Staff Counsel program handling large loss personal lines defense matters and property loss subrogation recovery. In 2002 Robyn became the National Director for Training and Development for the Travelers Staff Counsel program where she was responsible for coordinating training and education for over 60 offices and 500 attorneys. She remained in this position until she joined the Travelers Bond Litigation Unit in the winter of 2005. Robyn has also been an adjunct professor at the University of Connecticut School of Law.

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