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**PROBATE BONDS: SOURCES OF SALVAGE
WHEN THE PRINCIPAL IS A LAWYER**

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I. INTRODUCTION¹

Fiduciary bonds include Personal Representative's Bonds and Guardianship Bonds. Each state's statutes include specific provisions regarding the duties and responsibilities of a Personal Representative and a Guardian, as well as specific provisions for the removal of any Personal Representative or Guardian that has failed to properly abide by his or her responsibilities and obligations. If the court removes a Personal Representative or Guardian as a fiduciary as a result of wrongdoing, it may direct the fiduciary's Surety to forfeit its Bond.² Once a Surety has forfeited its Bond or otherwise made payment to an Estate or Guardianship as a result of a surcharge action or valid demand on the Bond, the Surety should timely pursue all sources of salvage against its principal. Unique opportunities for salvage may exist when the principal is also a lawyer, or when the principal retained the services of a lawyer.

II. POTENTIAL WRONGDOING BY THE PRINCIPAL

A. Examples of Wrongdoing by a Surety's Principal

On a state by state basis, case law has developed enumerating specific grounds warranting removal of a Personal Representative or Guardian. Valid reasons for removal of a fiduciary include: (1) adjudication of incompetency, physical or mental incapacity; (2) failure to comply with any order of the court; (3) failure to account for the sale of property or to produce and exhibit the assets of the Estate or Guardianship; (4) the wasting or maladministration of the Estate or Guardianship; (5) conviction of a felony; and (6) the acquiring by the fiduciary of conflicting or adverse interests that may adversely interfere with the administration of the Estate or Guardianship.³ Wrongdoing by a Surety's Principal serving as a Personal Representative or Guardian usually results in payment by the Surety of claims on the Bond.

B. Professionals, Including Attorneys, Assist the Principal

Many Personal Representatives and Guardians seek the assistance of professionals, including attorneys, while fulfilling his or her fiduciary duties. Florida, for example, has enacted statutes which specifically provide for payment to any attorney who has rendered services to an Estate or Guardianship.⁴ In addition, in Florida, if the Personal Representative is a member

¹ The authors acknowledge Melissa A. Register, an associate in the Trusts and Estates Practice Group at Shumaker, Loop & Kendrick, LLP, and Steve Hogan, a student at the Florida State University College of Law and summer associate with the firm, for their assistance with this paper.

² For a more in depth discussion of various ways in which a Personal Representative or Guardian abuses the fiduciary relationship and a defalcation occurs, please see Duane A. Daiker & Tammy N. Giroux, *Fiduciary Bonds: When Good Principals Go Bad* (May 18, 2001) (presented at the Twelfth Annual Southern Surety and Fidelity Claims Conference).

³ FLA. STAT. §§ 733.504, 744.474 (2009).

⁴ FLA. STAT. §§ 733.106, 744.108 (2009).

of The Florida Bar and has rendered legal services in connection with the administration of the Estate or Guardianship, then in addition to a fee as Personal Representative or Guardian, the Principal may also receive payment of a fee for the legal services rendered in his or her capacity as an attorney.⁵ Even if the Principal relied on the advice and assistance of a professional, such as an attorney, the Principal will be subject to removal and the Bond subject to surcharge and forfeiture if the advice from the professional was incorrect and results in loss to the Estate or Guardianship.⁶

III. SURETY'S RECOVERY AGAINST PRINCIPAL PURSUANT TO LAWS OF INDEMNIFICATION

A. Contractual Indemnification

Most Principals on Bonds execute Indemnification Agreements as part of the application process. Written Indemnification Agreements are very specific and the indemnitor clearly covenants and agrees to indemnify and save the Surety harmless from and against all liability, claims, losses, costs, damages, suits, charges and expenses, including reasonable attorney's fees, which the Surety shall incur. After sustaining a loss on its Bond, the Surety can obtain a judgment against its Principal in the full amount paid by the Surety on the demand upon the Bond, plus all reasonable attorney's fees and costs incurred.⁷

B. Common Law Indemnification

In the absence of a written Indemnification Agreement, a Surety can pursue its common law rights of indemnification based upon the laws of the state in which the loss was incurred. For a party to prevail on a claim of common law indemnity, a party must satisfy a two-prong test. First, the party seeking indemnification must be without fault, and its liability must be vicarious and solely for the wrong of another. Second, indemnification can only come from a party who was at fault.⁸ In the context of probate cases, specifically Estates and Guardianships, a Surety satisfies the two-prong test for common law indemnification. As a general rule, an indemnitee is entitled to recover, as part of its damages, reasonable attorney's fees and reasonable legal costs and expenses that it is compelled to pay as a result of suits by

⁵ FLA. STAT. §§ 733.617(6), 733.6171, 744.108 (2009).

⁶ Courts may reverse prior awards of fees where the court subsequently finds that the acts taken by the Personal Representative and/or the attorney were voidable. *Montanez v. Crockett, Franklin & Chasen, P.A.*, 687 So. 2d 943 (Fla. 3d DCA 1997).

⁷ See Daiker & Giroux, *supra* note 2; see also *Hartford Fire Ins. Co. v. P & H Cattle Co., Inc.*, 248 Fed.Appx. 942 (10th Cir. 2007) (holding that prior version of state statute making it unlawful to contract for payment of attorney's fees in bond did not apply to indemnity agreements or in actions to recover loss based upon a bond); *Schneider v. National Railroad Passenger Corp.*, 987 F.2d 132 (2d Cir. 1993) (holding that attorney's fees are recoverable when incurred in defending a claim where a party is entitled to indemnification).

⁸ See Daiker & Giroux, *supra* note 2; see also *Dade County School Board v. Radio Station WQBA*, 731 So. 2d 638 (Fla. 1999); *Welch v. Complete Care Corp.*, 818 So. 2d 645 (Fla. 2d DCA 2002).

or against it relating to the matter for which it is indemnified.⁹ Generally, litigants may recover reasonable attorney's fees in an indemnity action whether the indemnity is implied by law or arises from contract.¹⁰ However, it is important to note that even where the Surety may legitimately recover its attorney's fees, the court may limit recovery to those fees that are reasonable, incurred to protect the Surety's interest, and incurred while acting in good faith.¹¹

IV. SURETY'S RECOVERY IN TORT AGAINST A PRINCIPAL WHO IS AN ATTORNEY OR AGAINST THE ATTORNEY RETAINED BY THE PRINCIPAL

Although the Principal may have retained counsel to assist with the performance of all required duties and obligations, the Surety often still sustains a loss. If the Principal served not only as the fiduciary (Personal Representative or Guardian) but also as the attorney for the fiduciary, then the Surety should conduct a further examination of possible alternate sources of salvage. The same is true if the Principal retained independent counsel. The Surety should analyze whether the facts support an argument that the professional owed responsibility to any person or entity other than the Principal, and whether the Surety may pursue a malpractice action against its Principal or its Principal's counsel.¹² Some states, like Florida, recognize a cause of action against a participant in the breach of the fiduciary duty.¹³

A. Criteria for Establishing a Claim for Legal Malpractice

Generally, to establish a claim for legal malpractice, a nonclient plaintiff must prove: (1) the existence of an attorney-client relationship which gives rise to a duty of care to the plaintiff; (2) negligence in the legal representation of the plaintiff; (3) the resulting negligence was the proximate cause of the injury and damage to the plaintiff; and (4) the fact and extent of the injury alleged.¹⁴ The attorney-client privilege may extend beyond the fiduciary principal if a

⁹ *Leon County v. Stephen S. Dobson, III, P.A.*, 957 So. 2d 12, 14 (Fla. 1st DCA 2007); *Rosati v. Vaillancourt*, 848 So. 2d 467, 470 (Fla. 5th DCA 2003); *Continental Cas. Co. v. City of South Daytona*, 807 So. 2d 91 (Fla 5th DCA 2002).

¹⁰ *Lesavoy v. Lane*, 2008 WL 2704393 (S.D.N.Y. 2008); *Burke v. Com.*, 852 N.E.2d 122 (Mass. App. Ct. 2006); *Golden Eagle Ins. Co. v. Insurance Co. of the West*, 121 Cal. Rptr. 2d 682 (Cal. App. 4 Dist. 2002); *Borg-Warner Acceptance Corp. v. Philco Finance Corp.*, 356 So. 2d 830 (Fla. 1st DCA 1978); *Rubin Quinn Moss Heaney & Patterson, P.C. v. Kennel*, 832 F.Supp. 922 (E.D. Pa. 1993).

¹¹ 74 AM. JUR. 2D SURETYSHIP § 161 (2009).

¹² For a more in depth discussion of the impact of a professional's neglect or negligence on a probate bond surety, please see Michael J. Weber, *Who's Watching the Store: The Impact of a Professional's Neglect on the Probate Bond Surety*, in THE LAW OF PROBATE BONDS, 65 (William A. Downing & Jeffrey M. Frank eds., 2001).

¹³ *Gracey v. Eaker*, 837 So. 2d 348, 353 (Fla. 2002) (holding that the elements for a cause of action for breach of fiduciary duty are the existence of a fiduciary duty, and the breach of that duty such that it is the proximate cause of the plaintiff's damages); *Centrust Savings Bank v. Barnett Bank & Trust Co.*, 483 So. 2d 867 (Fla. 5th DCA 1986) ("A third person, who, although not a transferee of trust property, has notice that the trustee is committing a breach of trust and participates therein is liable to the beneficiary for any loss caused by the breach of trust.")

¹⁴ *Charles Reinhardt Co. v. Winiemko*, 513 N.W.2d 773, 775 (Mich. 1994); see also, *Law Office of David J. Stern, P.A. v. Security Nat'l Servicing Corp.*, 969 So. 2d 962, 966 (Fla. 2007) (holding that a legal malpractice action has three elements: the attorney's employment; the attorney's neglect of a reasonable duty; and the attorney's negligence as the proximate cause of loss to the client).

non-client, such as the Surety, was an intended third party beneficiary of the legal services rendered.¹⁵ Some jurisdictions apply the following multi-factor balancing test to determine whether an attorney owes a duty to a nonclient: (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury; (5) the extent to which the profession would be unduly burdened by a finding of liability; and (6) the policy of preventing future harm.¹⁶

B. Obstacles to a Claim for Legal Malpractice

Historically, the rule has been that an attorney could not be liable to anyone other than his or her client in an action arising out of his or her professional duties, in the absence of fraud or collusion.¹⁷ In denying liability to one not in privity of contract for the consequences of professional negligence, the courts have relied principally on two arguments: (1) that to allow such liability would deprive the parties to the contract of control of their own agreement; and (2) that a duty to the general public would impose a huge potential burden of liability on the contracting parties.¹⁸ In addition, most states, including Florida, adhere to the majority view that legal malpractice claims are generally not assignable.¹⁹

V. SURETY'S RECOVERY UNDER PRINCIPLES OF SUBROGATION

In jurisdictions which do not recognize a cause of action for professional malpractice by the Surety against the Principal (who is also an attorney) or the Principal's attorney, or in jurisdictions which do not allow the assignment of legal malpractice claims, then the Surety may choose to pursue its rights of subrogation.²⁰ Subrogation arises by operation of law where one having a liability or a right or a fiduciary relation in the premises pays a debt due by another under such circumstance that he is in equity entitled to the security or obligation held by the creditors whom he paid.²¹ Situations may arise where a surety is subrogated to the rights of the estate.²²

¹⁵ *Credit Union Central Falls v. Groff*, 966 A.2d 1262, 1272 (R.I. 2009) ("We now recognize that the liability of an attorney may extend to third-party beneficiaries of the attorney-client relationship if it is clear that the contracting parties intended to benefit the third party.").

¹⁶ *In re Estate of Drwenski*, 83 P.3d 457, 464-65 (Wyo. 2004).

¹⁷ 7 AM.JUR.2D ATTORNEYS AT LAW, § 234 (2009); *Newhouse by Skow v. Citizens Security Mutual Ins. Co.*, 501 N.W.2d 1, 8 (Wis. 1993); *Baker v. Coombs*, 219 S.W.3d 204, 208-09 (Ky. Ct. App. 2007).

¹⁸ See *Weber*, *supra* note 12, at 73; Joan Teshima, *Attorney's Liability To One Other Than Immediate Client For Negligence in Connection With Legal Duties*, 61 A.L.R. 4th 615, § 2 (2009).

¹⁹ *Law Office of David J. Stern, P.A.*, 969 So. 2d 962.

²⁰ *Dolan Title & Guaranty Corp. v. Hartford Accident & Indemnity Co.*, 395 So. 2d 296 (Fla. 5th DCA 1981) (holding that the lack of an assignment of the malpractice claim did not prevent Hartford from maintaining a common law subrogation action).

²¹ *North v. Albee*, 20 So. 2d 682 (Fla. 1945) (holding that the surety who has paid or satisfied the principal's debt or obligation is entitled to be subrogated to and to have the benefit of all securities which may at any time have been put into the creditor's hands by the principal debtor, or which the creditor may have obtained from the principal debtor); see also *Dantzler Lumber & Export Co. v. Columbia Casualty Co.*, 156 So. 116 (Fla. 1934)

VI. PRACTICE POINTS: EXAMPLES OF REAL SCENARIOS

Consider the following hypotheticals which may warrant the Surety investigating alternate sources of salvage:

A. Medicaid Title XIX Application Process

- An elderly person has been deemed incapacitated (the “Ward”). The court has appointed a guardian or conservator for the Ward (the “Guardian”).
- The surety has issued a bond for the Guardianship/Conservatory in connection with the principal promising the faithful performance of his or her duties.
- The Guardian has the duty to use the Ward’s assets to support the Ward and pay her debts, and to provide for the Ward’s care, comfort and maintenance, either through the assets or through private or public assistance, and the Guardian is required to perform these duties within a reasonable time.
- The Guardian needs to obtain Medicaid benefits for the Ward, and in doing so, must properly liquidate the Ward’s assets for Medicaid eligibility.
- The Guardian must timely complete the Medicaid Title XIX application with correct and comprehensive information regarding the Ward’s assets.
- If Medicaid denies the Title XIX application, then the Ward, through the Guardianship, will be charged full insurance rates by the nursing home facility, and not Title XIX rates.
- Assume delays occur in the approval process of the Title XIX application for the Ward, and family members of the Ward contend that losses have resulted to the Guardianship (or the subsequent estate upon the death of the Ward) as a result of the Guardian’s maladministration or breach of his or her fiduciary duties. The Ward was charged full insurance rates due to the failure to timely establish Title XIX rates.

(same); *Am. Contractors Indem. Co. v. Saladino*, 9 Cal. Rptr. 3d 835, 839 (Cal. Ct. App. 2004) (holding that subrogation is the surety’s right to recover from debtors the obligations paid to a creditor); *Nat’ Union Fire Ins. Co. v. Riggs Nat’l Bank*, 646 A.2d 966, 968 (D.C. 1994) (“Where one party has paid the debt of another, justice requires that the payor be able to recover his loss from the one who should have paid it, to prevent unjust enrichment.”).

²² *Capitol Indem. Corp. v. Fleming*, 58 P.3d 965, 969 (Ariz. Ct. App. 2004) (holding that the surety could be subrogated to the estate’s judgment against conservator, but not the estate beneficiary’s right to sue the conservator’s attorney for malpractice); *Am. Liberty Ins. Co. v. AmSouth Bank*, 825 So. 2d 786, 791 (Ala. 2002) (holding that the surety was subrogated to the estate’s right to sue the bank for misappropriation of estate funds).

- Assume the Guardian is a lawyer who thought he was knowledgeable of the requirements of Title XIX, including the proper and legal way to liquidate assets in order for the Ward to qualify for Title XIX rates; however, the facts show that the Guardian failed to properly follow the law.
- Assume the Guardian is a nonlawyer who retained a lawyer who represented that he was knowledgeable of the requirements of Title XIX; however, the facts show that the attorney provided the Guardian with incorrect legal advice upon which the Guardian reasonably relied.
- Litigation is initiated against the Guardian and the surety, and the claims include an action for surcharge and an action for breach of fiduciary duties.
- Should the Guardian and surety be liable to the Guardianship (or subsequent estate upon the death of the Ward), if the failure to timely establish Title XIX rates was the result of interference by family members and the improper withholding of critical asset and income information by family members?
- Should the Guardian and surety be liable to the Guardianship (or subsequent estate upon the death of the Ward), if the failure to timely establish Title XIX rates was the result of the Guardian relying on incorrect advice of counsel?
- Can the nursing home facility pursue a legal action directly against the Guardian and the surety, seeking to recover on the bond for losses the nursing home suffered as a result of the Guardian's failure to ensure payment to the nursing home for the Ward's care?
- What sources of salvage are available to the surety if the surety is required to forfeit the bond to the Guardianship, the Estate or the nursing home facility? How can the surety recover from its principal?
- Can the surety recover under tort principles for breach of fiduciary duty? Can the surety make a claim against its principal's malpractice insurance carrier? Can the surety make a claim against its principal's attorney's malpractice carrier?

B. Improper Application of Elective Share Statutes

- A person has died (the "Decedent") leaving a valid Last Will and Testament (the "Will"), and a formal probate administration has been opened (the "Estate"). The court has appointed a personal representative of the Estate (the "Personal Representative").

- The surety has issued a bond for the Personal Representative in connection with the principal promising the faithful performance of his or her duties.
- The Personal Representative has the duty to settle and distribute the Estate in accordance with the terms of the Decedent's Will and applicable law as expeditiously and efficiently as is consistent with the best interests of the Estate.
- Assume the Decedent's Will did not provide for his or her surviving spouse, or the Decedent's Will provided that the surviving spouse shall receive the minimum amount of the Decedent's estate payable to a surviving spouse as required by law (a/k/a an "elective share"). The largest asset of the Estate is a piece of residential real property.
- The Decedent's surviving spouse notifies the Personal Representative that he or she will claim an elective share of the Decedent's Estate. The value of the elective share is calculated using the fair market value of the Decedent's assets as of the Decedent's date of death.
- Assume delays occur in the distribution of assets to the surviving spouse in satisfaction of the elective share and during that time, the value of the Estate assets, particularly the residential real property, decrease significantly. The surviving spouse and the residuary beneficiaries of the Estate contend that losses have resulted to the Estate as a result of the Personal Representative's maladministration or breach of his or her fiduciary duties. The residuary beneficiaries' share may be reduced or eliminated, and the surviving spouse may not even receive the entire elective share amount.
- Assume the Personal Representative is a lawyer who thought he was knowledgeable of the requirements of the probate code and the law on elective share; however, the facts show that the Personal Representative failed to properly follow the law.
- Assume the Personal Representative is a nonlawyer who retained a lawyer who represented that he was knowledgeable of the requirements of the probate code and the law on elective share; however, the facts show that the attorney provided the Personal Representative with incorrect legal advice upon which the Personal Representative reasonably relied.
- Litigation is initiated against the Personal Representative and the surety, and the claims include an action for surcharge and removal of the Personal Representative and an action for breach of fiduciary duties.

- Should the Personal Representative and surety be liable to the Estate if the failure to timely distribute the elective share amount was due to the Personal Representative's belief that the residential real property held in the Estate should not be sold in a depressed real estate market, instead choosing to wait several years before attempting a sale?
- Should the Personal Representative and surety be liable to the Estate if the failure to timely distribute the elective share amount was due to the Personal Representative relying on incorrect advice of counsel?
- What if the Decedent's Will instead provides for an "elective share trust" for the benefit of the surviving spouse, but due to drafting errors, the elective share trust fails to satisfy the surviving spouse's elective share? What if the same lawyer serving as Personal Representative or representing the nonlawyer Personal Representative drafted the incorrect elective share trust and may be subject to a malpractice action for the drafting errors?
- What sources of salvage are available to the surety if the surety is required to forfeit the bond to either the Estate, the surviving spouse or the beneficiaries of the Estate? How can the surety recover from its principal?
- Can the surety recover under tort principles for breach of fiduciary duty? Can the surety make a claim against its principal's malpractice insurance carrier? Can the surety make a claim against its principal's attorney's malpractice carrier?

VII. CONCLUSION

This paper has provided general information regarding possible avenues of salvage when the Surety sustains a loss on a fiduciary bond, specifically a Personal Representative's Bond or Guardianship Bond. Unique opportunities for salvage may exist when the principal is also a lawyer, or when the principal retained the services of a lawyer. As set forth above, the Surety must carefully consider a wide variety of issues in determining all viable sources of salvage.

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