

**SEVENTH ANNUAL  
SOUTHERN SURETY & FIDELITY CLAIMS  
CONFERENCE  
APRIL 11-12, 1996**

***THE SURETY'S RESPONSIBILITY WHERE THERE IS A VARIATION  
BETWEEN THE BOND & STATUTORY REQUIREMENTS (OR WHO  
WROTE THIS DAMN THING?)  
-- WITH SPECIAL EMPHASIS ON GEORGIA LAW***

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Some might think that a rational financial institution would undertake a multi-million dollar liability only after it had fully and carefully reviewed the document it was signing. One might reasonably think that no solvent, sane party would put their assets on the line in a risky business without carefully drafting – or at least reviewing – the document it was signing. Indeed, one might think that a financial institution putting its assets on the line would have the bargaining power to allow it to dictate the terms of the contracts it signed. One might rationally think all of these things to be true, unless they have been exposed to the wonderful world of suretyship.

The practical realities of the surety world are that sureties quite often do not have the opportunity to draft the terms of the bonds. This is especially true on public bonds. Payment and performance bonds on public construction contracts are typically a part of the bid documents. The bonds in those documents may have been prepared by an architect, engineer, or city manager using a form that had first been prepared by a savant idiot on a waterline construction project in Bumdoodle, Georgia. Even the most sophisticated architects and engineers on public projects seldom give much thought to terms of payment and performance bonds and, quite often, have a very skimpy background in understanding the rights and responsibilities of the parties on public bonds.

One quite often sees public work contract bonds included in the bid documents which are AIA Form documents. While these payment and performance bonds may be commercially acceptable in private contractual arrangements, they contain a great many provisions which are inconsistent with Little Miller Act statutory requirements.

Miscellaneous bonds are often drafted by the proto-typical faceless bureaucrat of some state agency. The miscellaneous bonds which must be submitted to those agencies are often prepared with little forethought and they are typically prepared by those with little or no real life experience in understanding the suretyship transaction.

Thus, we come to the issue of evaluating the surety's responsibility where there is a variation between the language used on the bond on the one hand and the language used in a statute mandating that bond on the other hand. This paper will briefly touch on the general rules dealing with that issue and give special attention to how these issues are decided under Georgia law.

**1. The General Rule.**

*American Jurisprudence Second* states the general rule to be:

In most jurisdictions, performance and payment bonds required to be furnished by a general contractor on a public project under statutes or ordinances may be conditioned more broadly than the governing law requires. While the surety is required by statute to afford protection under certain statutory rules, if the surety

elects by the terms of its bond to extend the protection of the less stringent rules, it may do so and is bound by the terms of the bond. ...Some courts, however, have treated any additions to the bond over the statutory requirement as surplusage, or even as invalidating the bond. Under this view, the liability of the parties to a statutory bond given by a public contractor is measured by the statute and not by the wording of the bond.

17 *Am.Jur.* Contractors' Bonds, § 73.

## 2. ***The Georgia Rule.***

Fortunately, for sureties in Georgia the courts have adopted the rule that language in a bond which deviates from the statutory requirements is surplusage; in addition, language required by the statute but missing from the bond is read in. For quite a number of years the rule has been applied to miscellaneous bonds such as livestock dealers and used car dealers bonds, as well as to payment and performance bonds.

A great case summarizing the law in Georgia on this can be found in the 1961 opinion of the Georgia Supreme Court in *Campbell v. Benton*, 217 Ga. 368, 122 S.E.2d 223 (1961). In this case, the Court was construing liability under a livestock dealer's bond which was conditioned upon the dealer's payment of purchase price of livestock. The bond was given under a statute which provided that the Commissioner of Agriculture as trustee could maintain an action on the bond. The bond went further, however, and contained a provision beyond the statute and stated that any person damaged by any condition of the bond could maintain an action on the bond and that both the surety and the principal waived every defense based upon the fact that the person damaged or in whose name suit was brought was not a party or privy to the bond. In spite of this language, the Supreme Court held that individuals could not maintain an action on the bond.

The Supreme Court stated the rule to be that whatever is included in the bond but which is not required must be read out, and whatever is not expressed but ought to have been incorporated must be read in, so as to conform to the requirements of the statute. The Supreme Court must have really meant this to be the law, because they quoted this rule twice, once from CJS and again from a prior Georgia Court of Appeals decision.

Once Georgia's courts determine that the bond is a statutory bond, they very straightforwardly apply the "read-in – read out" rule, even where the bond has a provision which liberalizes liability, as was the case in *Campbell, supra*. This rule was straightforwardly applied in *Talmadge v. General Cas. co. of America*, 88 Ga. App. 234, 76 S.E.2d 562 (1953). The *Talmadge* case dealt with a real estate brokers bond where the plaintiff sought damages as a result of a real estate agent's failure to observe certain statutes regulating their conduct. The bond in question was a statutory bond but contained non-statutory language providing that the bond was to secure and save harmless all persons who might be injured or damaged by any wrongful act of the real estate broker.

The Georgia Court of Appeals dismissed the plaintiff's complaint holding that the covenant in the bond allowing any injured person to sue was not an obligation contemplated by the statute, and that the sentence which the plaintiff relied upon (that any wrongful act was covered) was invalid under the requirement that provisions not contemplated by the statute must be read out. Application of the read-in – read out rule, of course, sometimes cuts against the surety. In *Home Ind. Co. v. Battey Machinery Co.*, 191 Ga. App. 322, 136 S.E.2d 193 (1964), the surety provided a bond requiring that any lower tier/non-privy subcontractor having a claim was required to give written notice to any two of the following: the principal, the owner, or the surety, within 90 days of the date on which he last did work that he was still unpaid. The Georgia Little Miller Act has a different notice requirement; the notice requirement of the payment bond at issue was therefore held to be invalid and unenforceable.

Thus, *Battey Machinery, supra*, establishes that notice provisions broader than what is mandated by the statute will be read out. But what about a statutory payment bond which fails to contain any notice requirement? The Georgia Court of Appeals has held that the notice requirement contained in the Little Miller Act will be read into the bond in such a situation.

Georgia's Little Miller Act provides that a non-privy subcontractor or supplier must give the general contractor written notice within 90 days of the date from which he last performed work or furnished material that he is unpaid. O.C.G.A. § 36-82-104. In *Denny & Assoc. v. So. Aggregates Co.*, 184 Ga. App. 382, 363 S.E.2d 50 (1987), St. Paul provided a payment bond which did not have any 90 day notice requirement and the supplier did not give notice to the general contractor. The supplier argued that by omitting mention of the 90 day notice requirement, the surety waived the requirement. The Court of Appeals rejected this contention. The Court in *Denny* held that in the absence of anything appearing to show a different intention, it will be presumed that the requirements of the law are read into the bond and whatever is not expressed in the bond and ought to have been incorporated will be read into the bond as if inserted in it. The Court did note, however, that the notice requirement could not, as a matter of law, ever be waived but only that the waiver could not be presumed from silence. The mere omission of a requirement from the terms of the bond in the absence of anything else will not be deemed to be a waiver.

In order to fall within the purview of the read-in – read-out rule the Court must, of course, find that the bond is a statutory bond. In *St. Paul – Mercury Ind Co. v. Koppers*, 95 Ga. App. 687, 99 S.E.2d 275 (1957), the payment bond issued by the surety again required notice to any two of the following: the principal, surety, or owner. Notice was not given in accord with the terms of the bond and the surety defended on the basis that the bond was not a statutory bond. The surety contended that even though the bond was on a public project, and named a public agency as obligee, it was not a public works bond because the language in the bond was at variance with the language in the statute. The Court rejected this argument, holding that no law declared that a bond given under the Little Miller Act but which contains a provision not authorized by the statute is void or invalid. The Court quickly dispatched the surety's argument by stating that the incorporation of a clause in the bond not required by the statute did not render the bond invalid, nor did it affect its character as a valid statutory bond. Once the Court concluded that the bond was given under the statute the offending terms were read out, but the bond was not held to be void and of no effect.

The surety, however, can sometimes prevail by showing that the bond is not a statutory bond. In *Collins v. USF&G*, 72 Ga. App. 875, 45 S.E.2d 474 (1957), an action was brought against a surety contending that it had issued a public official bond and an individual injured by a police officer could maintain an action on the bond. The bond, however, did not state that it could be brought by any injured citizen, but rather was simply to indemnify the city in question for wrongful acts of a police officer. The plaintiff argued that it was a public officials bond and because of this the requirements of the statute should be read into the bond and allow the plaintiff to maintain an action. The surety prevailed, however, when it convinced the court that the bond was not a statutory bond, but was rather a common-law bond. The Court of Appeals agreed and concluded that because it was a common-law bond the surety was liable only under the terms of the bond, and the statute requiring a public official bond could not possibly be applied.

In *H.W. Ivey Constr. Co., Inc. v. Southwest Steel Products*, 111 Ga. App. 527, 142 S.E.2d 394 (1965), the Court reaffirmed the notion that a payment bond given on a public project would be governed in accord with the statute and rejected the notion that a bond with terms at variance with the statute was either void or invalid.

Georgia requires used car dealers to provide bonds. O.C.G.A. § 43-47-1 *et seq.* When confronted with the question of how a used car dealers bond should be interpreted, the Georgia Court of Appeals applied a very common sense formula to determination of the surety's liability. The Court took the requirements of the statute, read them into the bond, and then examined the four corners of the bond. Using these principles, the Court reiterated the read-in – read-out rule.

### **3. The Rule in Other States.**

There is considerable conflict between the states as to this issue. While Georgia takes a very conservative route, some other states do and some do not.

#### **A. Illinois.**

Illinois is typical of many states which do not give the surety as much protection as Georgia. In *Aluma Systems, Inc. v. Frederick Quinn Corp.*, 564 N.E.2d 1280 (1990), the Court in grappling with this question came down on the other side of the issue. The Court held that once the surety and principal have given a bond which satisfies the minimum requirements of the statute, the statute in a sense becomes *functus officio*. The Court concluded that there was nothing to prevent the parties from entering into a contract and bond which goes far beyond the statutory provisions.

#### **B. Miller Act – Capehart Bonds.**

In *Gypsum Contractors, Inc. v. Am. Surety Co.*, 37 N.J. 315, 181 A.2d 174 (1962), the general contractor entered into two contracts with the Department of Air Force for housing projects. The payment bond which was issued by the surety was not on the form prescribed by the Federal Acquisition Regulations and contained a provision that

suit on the bond must be commenced in a state court of competent jurisdiction where the project is situated or in the United States District Court where the project is located. An action was brought in the state court in New Jersey, but the Court rejected jurisdiction. It found that the clause authorizing suit in a state court did not change the character of the bond from a Miller Act undertaking.

**C. Florida.**

Florida courts have recognized a distinction between statutory bonds and common-law bonds. Statutory bonds are those which meet the minimum requirements of a statute, and common-law bonds are those which provide coverage in excess of the minimum required by the statute. Thus, if the surety extends its minimum requirements to provide greater coverage, Florida will recognize them. Once the courts conclude that the bond is a common-law bond, the more expansive coverage is enforced. *Florida Keys Community College v. Ins. Co. of North America*, 456 So.2d 1250 (Fla. App. 3 Dist. 1984).

**D. Tennessee.**

Tennessee is like Florida in recognizing a distinction between common-law and statutory bonds. When the terms of the bond meet the minimum requirements of the code, Tennessee courts recognize a statutory bond. *Heeglar v. MacAdoo Contractors, Inc.*, 487 S.W.2d 312 (Tenn. App. W.S. 1972). On the other hand, when the bond expands coverage, it is a common-law bond and the surety will be held to the terms of its bond. *Wal-Board Supply Co., Inc. v. Daniels*, 620 S.W. 2d 686 (Tenn. App. Ws. 1981).

The *Wal-Board* opinion emphasizes the dilemma faced by sureties when others write their bonds. The Tennessee court, as do all too many, seems to think that the surety may have drafted the bond. Thus, the Court stated that if the bondsman elects by the terms of its bond to extend protection under less stringent rules, it may do so and be bound by the terms of the bond.

**D. Louisiana.**

Louisiana, like Georgia, essentially has a read-in – read-out rule. Thus, in Louisiana statutory bonds are to be construed in light of the public statute and whatever is written into the bond which is not required by the statute will be read out, and what is not in will be read in. *E.L. Burns Co., Inc. v. Cashio*, 289 So.2d 226 (La. App. 1974).

Thus, Louisiana, like Georgia, holds that where a bond is issued on private construction, it is a conventional–common-law bond and the statutory provisions are not applicable. However, where the bond is for a public project, the terms of the statute govern liability under the bond.

*Nicholson & Loup, Inc. v. Carl E. Woodward, Inc.*, 596 So.2d 374 (1992).

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Since sureties providing bonds for many public obligations often have little control over the language contained in their bond, jurisdictions like Georgia will provide a safe haven for interpreting bond liability to be limited to that mandated by the statute. However, perhaps the primary point to be emphasized is that the law varies greatly from state to state. The surety must be certain to know what construction has been given to its obligation by the particular state in which liability is raised before accepting or rejecting liability.

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