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**SURETIES' EQUITABLE REMEDIES: THE WRIT OF  
QUIA TIMET AND INJUNCTIVE RELIEF**

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## **SURETIES' EQUITABLE REMEDIES: THE WRIT OF QUIA TIMET AND INJUNCTIVE RELIEF**

Suretyship is one of the most ancient legal relationships, and its risks have long been recognized.<sup>1</sup> The risk springs from the peculiar nature of a surety's business: it guarantees the payment of another's debt without assuming that debt. In this regard, a surety's obligations are starkly different from those of an insurer. While an insurer stands between its insured and a covered loss, a surety stands behind its principal and seeks, justifiably, to make sure that any loss falls on that principal. The surety is implicated only when the principal is unable or unwilling to pay its debts.

The underwriting process for a bond is thus completely different from that of an insurance policy, and resembles more closely the underwriting process for a bank loan. The surety is interested not in the likelihood of loss, but in the technical and financial capabilities of its principal and (even today) the principal's character. This approach underscores the fact that the bond is an extension of credit rather than a policy of insurance. However, even though the surety approaches underwriting like a banker, it takes a more miserly view of its cash. The surety is in business to extend its credit, not to make loans, and when it issues a bond it does so with the expectation that it will not be called upon to pay. It is true that the surety agrees to perform if its principal does not, but this undertaking is based upon the promise of the principal to the surety that it will perform.

The surety thus places itself at risk to pay another's debt based upon that person's express promise that this will not happen. This peculiar juxtaposition of risk and reliance centering around the affairs of another person has brought sureties to courts of equity on a regular basis over the centuries, and those courts have responded, deeming sureties to be "favorites" of equity.<sup>2</sup>

### **I. EQUITABLE REMEDIES USED BY SURETIES**

All of the equitable remedies discussed herein share one common thread — they are all attempts by the surety to force its principal to use its assets to secure the surety from loss on the principal's debt. Those remedies are exoneration, Quia Timet, and specific performance.

**Exoneration.** Of these three equitable remedies, exoneration is the simplest to obtain, the most limited in scope and, perhaps, the least interesting to practitioners outside of the surety field. However, it is the fountainhead of the other remedies discussed, and we therefore will start here.

Exoneration is an equitable remedy which is only available to a surety. It is, in essence, the right of the surety to compel the principal to pay its own debt. In the words of Judge Learned Hand:

In equity, . . . before paying the debt a surety may call upon the principal to exonerate him by discharging it; he is not obliged to make inroads into his own resources when the loss must in the end fall upon the principal.

*Admiral Oriental Line v. United States*, 86 F.2d 201, 204 (2d Cir. 1936).<sup>3</sup>

The theory appears to be that, since the liability ultimately will fall on the principal in any event, the surety should be allowed to force payment now rather than later:

The right of the surety to be exonerated from liability is founded on equitable principles — the primary duty of the principal to pay the debt, and it being unreasonable that the surety should be burdened with the liability, a cloud hanging over him, at the will of the creditor, and the risk of ultimate loss.

*Doster v. Continental Casualty Company*, 268 Ala. 123, 105 So. 2d 83, 86 (Ala. 1958). As a result, it is not necessary for the surety to show irreparable harm or to prove that its principal ultimately will not be able to pay the debt:

And in order to maintain such bill it is not necessary for the surety to show any fraudulent disposition of property or any special reason for fearing a loss. When a surety comes into a court of equity to compel the principal to pay the debt, he stands in the position of an equitable assignee and may use the remedies of the creditor at his own risk and cost.<sup>4</sup>

In order to maintain a bill for exoneration, it is only necessary to show the existence of the debt, that the debt is that of the principal and that the surety's liability is absolute.<sup>5</sup>

Once these facts have been established, the surety can use exoneration in two ways. First, it can compel the principal to pay the debt itself. This was the object of the surety in *Doster, supra*. In that case, the surety was faced with \$24,000 in liquidated claims. *Doster* conceded that it had some \$21,000 in funds, and that the "bulk of the monies which he has on hand" had come from the bonded job, but he refused to pay his debts. The court ordered the funds seized and turned over to the claimants in exoneration of the surety.<sup>6</sup>

The second way in which the surety can use exoneration is to direct the flow of funds in the hands of a third party. In particular, a surety which is faced with a situation in which there are unpaid, undisputed claims of subcontractors and suppliers can seek an order requiring contract funds to be paid to those claimants rather than to the principal. Thus, in the case of *National Surety Corporation v. Barth*<sup>7</sup>, the court considered the competing claims of the surety, the suppliers and subcontractors, the principal's judgment creditors, the State of New Jersey (seeking an offset on a previous obligation of the contractor) and the United States of America (seeking unpaid taxes) and held that, under the surety's rights of exoneration, the contract funds should be applied first to bonded claims.<sup>8</sup>

It can be seen that, while exoneration is a powerful remedy, it is very narrow in scope. Its greatest limitation is that it is available only when the surety's debt has become final and absolute.<sup>9</sup> The problem presented, from the surety's point of view is a practical one — in most instances, when the surety receives word of a default, its liability is still contingent. Faced with

competing claims of the owner, the principal, and the subcontractors and suppliers, the surety may not know the extent of its liability, but it certainly knows that in all likelihood something terrible is about to happen. Under these circumstances, exoneration is not available, because the claims are not final and absolute. And yet, it is in this very situation that the surety needs to be able to prevent the diversion of contract funds and to compel the principal to honor its obligations. In such circumstances, the surety may turn to its second equitable remedy, the writ of quia timet.

**Quia Timet.** Unlike exoneration, which is an equitable remedy available only to a surety, the remedy of quia timet is available to any supplicant in equity, provided that the necessary elements for its issuance are shown. Quia timet is a Latin phrase meaning “because he fears,”<sup>10</sup> and provides a means to obtain equitable relief before an injury is sustained. In a bill of quia timet, a party seeks the aid of the court because he fears “some future probable injury to his rights or interests” by the wrongdoing or neglect of the defendant.<sup>11</sup> This bill is not applicable if an injury has already occurred which requires any compensation or other relief.<sup>12</sup>

In his *Commentaries on Equity Jurisprudence*, Story points out that quia timet presents an “analogy to certain writs of common law whose objects” were of a similar nature, but which are no longer available. The six writs in law were known as brevia anticipantia, or writs of prevention, and could be maintained before any molestation, distress, or impleading.<sup>13</sup> Similarly, the writ of quia timet arose in equity “to accomplish the ends of precautionary justice and . . . to prevent wrongs or anticipated mischiefs, and not merely to redress them when done.”<sup>14</sup>

Although the writ is ancient, modern courts have continued to accept bills of quia timet in a variety of circumstances. In some ways, it seems to have been a precursor to the modern declaratory judgment action. For example, the writ of quia timet has been used in a suit for cancellation of execution upon a judgment.<sup>15</sup> It has also been used in suits to determine property rights,<sup>16</sup> to determine an insurer's duty to defend,<sup>17</sup> and to determine a patent infringement.<sup>18</sup>

However, the writ of quia timet can do much more than simply declare rights — it can also be used to provide mandatory relief. For example, the writ of quia timet has been used to obtain specific performance of a contract to purchase waterfront property,<sup>19</sup> and in a suit to perpetuate testimony of severely injured person after an action was commenced.<sup>20</sup> As an offensive weapon, however, quia timet appears to retain its greatest vitality in the hands of sureties.

In *Escrow Agents Fidelity Corporation v. Ableman*,<sup>21</sup> an escrow agent was alleged to have embezzled more than \$4,000,000. The surety which had written the crime policy “sought relief based on the theory of quia timet, an equitable remedy which allows an aggrieved party to obtain prejudgment relief to prevent an anticipated injury.”<sup>22</sup> The alleged malefactor demurred, describing the bill of quia timet as “a concept that pre-dates movable type, and has virtually no application in modern society.”<sup>23</sup> The trial court agreed, and sustained the demurrer. The court of appeal reversed:

Although quia timet has by and large been abandoned in favor of other legal and equitable prejudgment remedies, it is by no means

obsolete. Although rarely utilized in general practice, it is widely and effectively used in fidelity and surety bond cases.<sup>24</sup>

The appeal court noted that quia timet had been forsaken in many areas of law in favor of newer, more effective remedies, but that the equitable remedy remained viable:

Had these statutory remedies completely replaced quia timet, however, it would have been news to the fidelity and surety bond industry, and to those judges of the Los Angeles Superior Court who have granted relief in cases similar to this one.<sup>25</sup>

The appeal court expressly noted that it was publishing the opinion “to provide current authority on the viability of quia timet relief.”<sup>26</sup>

It is small wonder that the writ of quia timet has remained in use in the fidelity and surety practice, for it is of ideal use there:

Quia timet is in fact especially suited to surety cases. A surety is obligated by law to pay the creditor of its defaulting principal immediately upon the principal’s default or defalcation. Although a surety may file an action at law . . . , the fact that it may eventually obtain a judgment against the principal is of little comfort . . . if , in the interim, the principal has absconded with the very funds which could have been used to satisfy the bond. Quia timet allows the surety to prevent the principal from dissipating those funds . . . .<sup>27</sup>

The remedies available in connection with quia timet to prevent the dissipation of funds are quite flexible. As the intent is to prevent harm, the court has a great deal of latitude in fashioning a remedy. Sometimes a court simply orders the funds to be frozen in the hands of the owner. Other courts have appointed receivers. Others have directed that the funds be paid directly to suppliers and subcontractors.<sup>28</sup> However, most frequently, quia timet is used by sureties to require the deposit of collateral to cover the surety’s anticipated loss.<sup>29</sup>

For example, in *Northwestern Nat. Ins. v. Alberts*,<sup>30</sup> in which the surety sought an order requiring its principal to post collateral for an anticipated liability, and based its demand on a contractual indemnity provision. The principal resisted, urging that the contract was no longer in effect. The court held that it did not need to resolve the issue, for the surety had an equitable right to enforce the deposit of collateral under the doctrine of quia timet.<sup>31</sup> The court defined quia timet within the surety context as:

. . . a right used to protect a party against an anticipated future injury when it cannot be avoided by a present action at law, for example, by allowing a surety to compel its principal to post collateral for an anticipated liability.<sup>32</sup>

While the remedies available under a writ of quia timet are flexible, the requirements for having such a bill sustained are not. The key elements are set forth in the case of *Borey v. National Union Fire Insurance Company of Pittsburgh, Pennsylvania*,<sup>33</sup> in which the United States Court of Appeals for the Second Circuit stated:

Specifically, the surety must establish that the debt . . . will come due, that the principal is or will be liable for the debt, and, that absent equitable relief, the surety will be prejudiced because it will be forced to advance the money to the creditor.<sup>34</sup>

The surety easily can fail on any of these tests. In the case of *Transamerica Premium Insurance Company v. Cavalry Construction Co.*,<sup>35</sup> the surety failed to establish that the debt would come due. In that case, the owner filed a lawsuit against the surety in the amount of \$5,000,000 and payment claims in the amount of \$357,000 were also filed. The surety demanded collateral in the amount of \$1,187,000 (the amount of its bond). The court denied quia timet relief on the grounds that the existence of a lawsuit was insufficient proof that the surety “realistically” faced a loss.<sup>36</sup> Similarly, establishing that the principal will become liable for the debt can be difficult. If the principal has a defense, the surety is entitled to neither exoneration nor quia timet.<sup>37</sup>

In addition, the surety must show that the loss is anticipated, but not yet liquidated. Indeed, the existence of an anticipated liability is the hallmark of quia timet, and is the distinguishing feature between exoneration and quia timet. The distinction between exoneration and quia timet was explored in the *Borey* case, *supra*. In that case, the court held:

Quia timet is the right of the surety to demand that the principal place the surety “in funds” when there are reasonable grounds to believe that the surety will suffer a loss in the future because the principal is likely to default on its primary obligation to the creditor. Exoneration, though closely related, is distinct. It is the surety’s right, after the principal’s debt has matured, to compel the principal to honor its obligation to the creditor.<sup>38</sup>

The difference between the two remedies is also nicely shown in the case of *Morley Const. Co. et al. v. Maryland Casualty Co.*,<sup>39</sup> in which the surety feared a diversion of contract funds to the president of its principal. The trial court denied specific performance, but granted exoneration. The court of appeal reversed the exoneration award on grounds that the surety’s liability was not yet fixed, but remanded on the issue of specific performance. The contractor filed a writ to the United States Supreme Court on the grounds that the surety had not filed a cross-appeal, and that the appeal court therefore had no jurisdiction to consider the denial of specific performance. The Supreme Court granted the writ, reversed the court of appeal, but remanded with instructions to reconsider the issue of exoneration.

On remand, the court of appeal deftly sidestepped its earlier position that exoneration was improper under the circumstances by finding that the complaint really partook “of the nature of

a bill of quia timet,” and that the surety was entitled to be exonerated from liability.<sup>40</sup> The basis of its holding was that, while the surety’s liability was not fixed, it had good reason to fear a loss.

All of this leaves the surety with a small dilemma. There is a gap between the remedies of exoneration and quia timet. Under exoneration, the surety can force the principal to pay a liquidated claim; under quia timet it can require security for an unliquidated claim. However, neither equitable remedy allows it to require collateral for a liquidated claim which it intends to dispute. This gap is filled by the standard indemnity agreements required by sureties, and brings us to the surety’s third equitable remedy -- specific performance of its indemnity agreements.

**Specific Performance.** Compensated sureties generally will not issue bonds unless a general agreement of indemnity has been executed by the principal and any other indemnitors who may exist. The agreement of indemnity governs the relationship between the principal, the indemnitors and the surety, and is relied upon by the surety in issuing any bonds on behalf of the principal. Sureties customarily include “collateral deposit” clauses in their indemnity agreements, requiring the principal and any indemnitors to “place the surety in funds” under certain circumstances. A typical clause reads as follows:

If the Company shall set up a reserve to cover any claim, suit or judgment under any such bond, the Indemnitors will, immediately upon demand, deposit with the Company a sum of money equal to such reserve, such sum to be held by the Company as collateral security . . . .<sup>41</sup>

Through the use of such clauses, a surety can avoid the stringent (and subjective) requirements of quia timet, and tie the right to demand security to an objective event, such as the posting of a reserve. Having created this right through contract, the surety need only find a vehicle to enforce it. For this, sureties have turned to specific performance.

\_\_\_\_\_ Specific performance is an equitable remedy to enforce a contract.<sup>42</sup> The object of specific performance is to put the promisee in the position in which it would have been had the promise been performed.<sup>43</sup> “By ordering the promisor to render the promised performance, the court attempts to produce, as nearly as practicable, the same effect as if the contract had been performed.”<sup>44</sup> Courts will grant specific performance only when the legal remedy of damages is not adequate to protect the injured party.<sup>45</sup> “A critical factor in determining whether damages are an adequate remedy is whether money can buy a substitute for the promised performance.”<sup>46</sup> A person may seek specific performance after there had been a breach of a contract either by non-performance or repudiation.<sup>47</sup>

Specific performance is not a preferred remedy. “The practical limitations on specific relief in equity grew out of the problems inherent in coercing the defendant to perform its promise.”<sup>48</sup> Courts are reluctant to order performance if difficulties of supervision or enforcement are foreseen, especially “if the absence of clear standards may lead to conflict and unfairness.”<sup>49</sup> Consequently, for courts to draft decrees which guide future conduct, courts have required that contract terms be expressed with greater certainty if specific relief is ordered than if damages were to be awarded.<sup>50</sup> “Thus, it has come to be that, although an injured party can always claim

damages for breach of contract, that party's right to specific relief as an alternative is much more limited."<sup>51</sup>

The specific enforcement of a collateral deposit clause by a surety thus often turns on the issue of whether the court believes that the surety has an adequate remedy at law. In the case of *Milwaukie Construction Co. v. Glenn Falls Insurance Co.*,<sup>52</sup> the surety had sought specific performance of a collateral deposit clause in the indemnity agreement. The trial court granted the relief, and the principal appealed, arguing that the trial court erred in assuming equity jurisdiction, as the surety had an adequate remedy at law. The appeal court affirmed the trial court's decision to award equitable relief:

At the time of commencement of this action, appellee could not determine its liability . . . . The contracts had not been completed and it was not known what recoveries might be made and what further payments would be received . . . . It is clear that where appellee knew it was going to have liability claims filed against it but did not know the amount of those claims, the legal remedy of money damages would not be adequate.<sup>53</sup>

This appears to be the majority view. In the cases of *National Surety Corporation v. Titan Const. Corp.*,<sup>54</sup> and *Safeco Ins. Co. v. Schwab*,<sup>55</sup> the courts held that a deposit clause could be specifically enforced upon a showing that damages were not ascertainable, and there was thus no adequate remedy at law.

A different result was reached in the case of *Transamerica Premium Insurance Company v. Cavalry Construction Co., Inc.*<sup>56</sup> In that case, the surety was seeking the deposit of collateral pursuant to a written indemnity agreement which required the deposit once a reserve was posted. The court, confusing the remedies of specific performance and quia timet, refused to grant the majority of the requested relief on the grounds that the existence of a claim was insufficient proof that the surety "realistically" faced a loss. However, the indemnity agreement required deposit once the surety posted a reserve, not when it faced a loss, and the legal analysis should have turned not on whether the surety faced a loss, but on whether the surety had an adequate remedy at law. If not, it was entitled to specific performance. The issue was clearly framed by the court in *United Bonding Insurance Company v. Stein*,<sup>57</sup>

. . . the only conditions precedent to defendants' obligation were the plaintiff's estimate that a reserve was necessary and its demand on defendants for current funds in the amount of such reserve. Once these conditions are fulfilled equity will specifically enforce such a promise where, as in the instant case, a legal remedy for subsequent damages would not suffice.<sup>58</sup>

However, if the surety's loss is an ascertainable, certain sum, then regardless of the wording of the indemnity agreement, the surety will not be entitled to specific performance, for it will be deemed to have an adequate remedy at law:

The sum was made certain by a Peruvian judgment; and the amount of interest can be determined by simple mathematical calculations. Under these circumstances, no resort to equitable remedies is necessary to protect appellee and specific performance is unavailable.<sup>59</sup>

It is clear from a review of the cases that most courts grant specific performance when the surety is unable to determine the magnitude of its loss.<sup>60</sup> The rationale was set forth by the court in *Safeco Ins. Co. Of America v. Schwab*:

Sureties are ordinarily entitled to specific performance of collateral security clauses. If a creditor is to have the security position for which he bargained, the promise to maintain the security must be specifically enforced.<sup>61</sup>

The problem is that, faced with an ongoing dissipation of funds, even specific performance may not be an adequate remedy. In such circumstances, sureties have turned to interlocutory, injunctive relief to protect their exoneration, quia timet and specific performance rights.

## II. ENFORCEMENT OF EQUITABLE RIGHTS THROUGH INJUNCTIVE RELIEF

Although exoneration, quia timet and specific performance provide the surety several equitable remedies, these remedies are often meaningless if the surety cannot obtain immediate relief. Consequently, to ensure recovery, many sureties seek a preliminary injunction. As a general rule of law, the sine qua non for the issuance of a preliminary injunction is irreparable harm.<sup>62</sup> The demonstration of irreparable harm is “the single most important prerequisite for the issuance of a preliminary injunction.”<sup>63</sup> Furthermore, an applicant must show more than the mere possibility of irreparable harm: “An applicant for a preliminary injunction ‘must show that it is *likely* to suffer irreparable harm if equitable relief is denied.’”<sup>64</sup>

When one considers the circumstances under which a request for specific performance of a collateral deposit clause is made, or a bill for quia timet relief is filed, the need for quick action becomes obvious. In general, there are outstanding claims presenting a threat to the surety, and a fear that the principal will dissipate its funds rather than pay the bills. Final relief in three years will be cold comfort if the dissipation of funds cannot be stopped immediately. And yet, the defaulting principal can always contend that, ultimately, the surety’s losses will be compensable through monetary damages. Sureties reply that, without injunctive relief, the right to collateral is meaningless. The issue, then, is the showing that the surety must make in order to obtain interlocutory injunctive relief. Or, more succinctly stated, within the context of bills of quia timet, what constitutes irreparable harm?

A handful of courts have recognized that, without the remedy of interlocutory injunctive relief, the right to collateral provided by the indemnity agreement and by the bill of quia timet is meaningless. Having reached this conclusion, they have held that the loss of the right to be collateralized is, in and of itself, irreparable harm.<sup>65</sup> For example, in *Northwestern National Insurance Company of Milwaukee, Wisconsin v. Barney*,<sup>66</sup> the surety was faced with having to

pay a \$2,484,672.08 judgment in favor of a bank. It had previously paid \$451,587.87 to the bank and the principals had refused to reimburse the surety. Fearing the principals would likewise refuse to pay the \$2,484,672.08, the surety sought an injunction requiring the principals to exonerate and indemnify the surety. The court noted the existence of a collateral deposit provision in the indemnity agreement, and also found that the surety had established its right to *quia timet* and exoneration. Consequently, the court ordered specific performance of the indemnity agreement by requiring the principals to deposit the full amount of the bank's judgment against the surety into the registry of the court within seven days. By requiring the deposit before the deadline set for payment by the surety to the bank, the surety's rights of *quia timet* and exoneration remained enforceable. The court held that injunctive relief in this case was appropriate to avoid the loss of the right to be collateralized : "[u]nless the injunctive relief requested below is granted, [the surety] will not be adequately secured for its obligations and will forever and irreparably lose its rights of *quia timet* and exoneration."

A similar conclusion was reached by United States District Judge Sweet in *Northwestern National Insurance Company of Milwaukee, Wisconsin v. Alberts*.<sup>67</sup> Agreeing with the *Barney* decision, the court stated:

. . . Northwestern's only remedy at law to enforce these rights [*quia timet* and exoneration] is the instant motion. See *Wingsco* at 6. ('Denial of Northwestern's requested relief will forever deny to Northwestern its ability to assert and enforce its *quia timet* and exoneration rights under the Indemnity Agreement, at common law, and in equity.') The defendant's contention that a suit for monetary damages, another remedy at law is available, is unpersuasive because the present action seeks a vindication of these rights — to be collateralized while the litigation is pending, not an ultimate settlement of accounts . . . . Therefore, the loss of the rights, not the potential financial loss, constitutes the irreparable harm.<sup>68</sup>

In short, unless the defendants are required to collateralize the surety immediately, the surety will lose its equitable right to be collateralized prior to payment. Moreover, the court found injunctive relief to be warranted because without it the surety would not be adequately secured and would irreparably lose its rights of *quia timet* and exoneration.

Unfortunately for sureties, their victory in Judge Sweet's opinion was short lived, as it was vacated by the Second Circuit. The reversal by the Second Circuit cannot be distinguished away — it explicitly rejects Judge Sweet's reasoning.<sup>69</sup> According to the Second Circuit, the loss of a surety's right to *quia timet* and exoneration, standing alone, is not determinative of whether irreparable harm exists. Instead, the Second Circuit held that the surety has to establish that it cannot be made whole following resolution of the case on the merits.

This line of reasoning was more explicitly discussed in the *Borey* case, in which the court stated:

Even if the surety would "forever" lose these rights -- an assumption in which we do not join -- we have held that irreparable harm does not

necessarily follow. In *Abish* . . . we held that the loss of a surety's rights to quia timet and exoneration does not "cause serious or irreparable consequences." We stated that "[i]n determining whether irreparable harm exists, the critical inquiry is not whether the surety's rights are lost, but whether the loss of those rights will cause serious or irreparable harm." We held . . . that because the surety's claims for quia timet and exoneration relief contemplated a monetary award, the surety would have to establish more to persuade us that it could not "be made whole upon resolution of the merits."<sup>70</sup>

The surety thus must provide evidence of damage that cannot be remedied by a monetary judgment:

The court in *Firemen's Insurance Company of Newark, New Jersey v. Keating*,<sup>71</sup> also rejected the surety's argument that irreparable harm results from the loss of its rights to exoneration and quia timet. After noting that the rights of exoneration and quia timet have historically been recognized in connection with a judgment on the merits, not in the preliminary stage of case where little or no discovery has been taken, the court concluded that the only rights the surety "may lose if injunctive relief is denied are, when plainly viewed, simply rights to money. As such, the loss of those rights may be compensated by a corresponding monetary award after the parties' claims are resolved on the merits, and thus no injury of an irreparable nature will occur."<sup>72</sup>

A similar approach to irreparable harm was taken by the court in *Safeco Insurance Company of America v. Criterion Investment Corporation*,<sup>73</sup> which involved the enforcement of a collateral security clause. Although the court ordered the enforcement of the collateral security clause, it refused to issue an injunction prohibiting the defendants from transferring any assets to other persons before satisfaction of the defendants' collateral obligations. The court found that the requisite showing of irreparable harm had not been made. The court noted that several means were available to enforce the judgment recognizing the defendants' collateral security obligations, such as the registration of the judgment creating a lien against the judgment debtor's assets.<sup>74</sup>

Nonetheless, although the majority view appears to reject the notion that the mere loss of the rights of quia timet and specific performance are irreparable harm, and looks instead to whether the injury can be compensated by monetary damages, the approach is not purely theoretical. If the surety can prove that assets are being diverted and that this diversion will render the principal unable to pay damages, the surety may get relief. As noted by the court in *Borey*:

[t]here are occasions when the situation is deteriorating during the lawsuit and it becomes increasingly likely that if the surety prevails on its claims for equitable relief, it will win a Pyrrhic victory because by that time the principal will be unable to provide the funds that will furnish the *quia timet* or exoneration relief. In these cases, the surety

may seek a preliminary injunction to maintain the status quo during the trial of the basic action.<sup>75</sup>

Irreparable harm justifying the issuance of a preliminary injunction also can be shown where there is evidence that the defendant intends to transfer its assets out of the jurisdiction making recovery of money damages uncollectible as a practical matter.<sup>76</sup>

However, in those cases where no evidence is presented to show that the defendants will not be able to satisfy a money judgment against them, nor any evidence that the defendants will attempt to dissipate assets in order to frustrate a money judgment, it appears that most courts will deny a surety's request for a preliminary injunction to protect its rights of quia timet and exoneration.<sup>77</sup>

1. He that goeth surety for a stranger shall surely smart for it." Proverbs 11:15
2. *American Surety Co. v. Lewis State Bank*, 58 F.2d 559, 560 (5<sup>th</sup> Cir. 1932).
3. *Accord, Filner v. Shapiro*, 633 F.2d 139 (2d Cir. 1980); *Schirm v. Auclair*, 597 F. Supp. 202 (D.Conn. 1984); *Georgetown College v. Madden*, 505 F. Supp. 557 (D.Md. 1980), *aff'd in pertinent part*, 660 F.2d 91 (4<sup>th</sup> Cir. 1981); *Moore v. Topliff*, 107 Ill. 241, 1883.
4. *Id.*, 105 So. 2d at 86. *Milwaukie Construction Co. v. Glenn Falls Insurance Co.*, 367 F.2d 964, 964 (9<sup>th</sup> Cir. 1966); *See also Moore v. Topliff, supra*.
5. *Northwestern National Insurance Company of Milwaukee v. Alberts*, 741 F. Supp. 424 (S.D. N.Y. 1990), *reversed on other grounds*, 937 F.2d 77 (2d Cir. 1991).
6. *Doster*, 105 So. 2d at 84.
7. 20 N.J. Super. 100, 89 A.2d 104 (N.J. Super. Ct. Ch. Div. 1952), *aff'd* L.N.J. 506, 95 A.2d 145 (1953)
8. *See also Western Casualty and Surety Company v. Biggs*, 217 F.2d 163 (7<sup>th</sup> Cir. 1954). The *Barth* decision also turned on the court's holding that the funds were impressed with a constructive trust on behalf of the subcontractors and suppliers. *Barth*, 89 A.2d at 107-108.
9. *E.g., Northwestern National Insurance Company of Milwaukee v. Alberts, supra*.
10. Black's Law Dictionary 1247 (6<sup>th</sup> ed. 1990).
11. Story, *Commentaries on Equity Jurisprudence*, § 1142 (14<sup>th</sup> ed. 1918). *See also Re, Cases and Materials on Remedies*, 269 (1982).
12. Story, *Commentaries on Equity Jurisprudence*, § 1142, at 525.
13. These writs were "(1) a man may have a Writ of Mesne ... before he be distrained; (2) a Warrantia Chartae, before he be impleaded; (3) a Monstraverunt, before any distress or vexation; (4) an Audita Querela, before any execution sued; (5) a Curia Claudenda, before any default of enclosure; (6) a Ne injuste Vexes, before any distress or molestation." *Id.*
14. Story, *Commentaries on Equity Jurisprudence*, § 1142, at 526.
15. *See, e.g., Lenett v. Lutz*, 215 Ga. 369, 110 S.E.2d 628 (1959).
16. *See, e.g., Newman Mach. Co. v. Newman*, 275 N.C. 189, 166 S.E.2d 63 (1969) (suit to determine title to shares of stock); *Burdess v. United States*, 553 F. Supp. 646 (E.D. Ark. 1982) (suit to declare easement upon real property); *Kawa Leasing, Ltd. v. Yacht Sequoia*, 544 F. Supp. 1050 (D. Md. 1982) (suit to quiet title to vessel).
17. *See, e.g., Porter v. Alabama Farm Bureau Mut. Cas. Ins. Co.*, 279 Ala. 499, 187 So. 2d 254 (1966).
18. *See, e.g., Broadview Chemical Corp. V. Loctite Corp.*, 474 F.2d 1391 (2d Cir. 1973).
19. *Benson v. Shotwell*, 87 Cal. 49, 25 P. 249 (1890).
20. *See, e.g., Mosseller v. United states*, 158 F.2d 380 (2d Cir. 1946). *See generally, Re, Cases and Materials on Remedies*, at 269 (1982).

21. 4 Cal. App. 4<sup>th</sup> 491, 5 Cal. Rptr. 2d. 698 (1992).
22. *Id.*, 4 Cal. App. 4<sup>th</sup> at 492, 5 Cal. Rpt. 2d. at 699. Although the case does not say, presumably the surety sought to prevent the dissipation of funds.
23. *Id.*, 4 Cal. App. 4<sup>th</sup> at 496, 5 Cal. Rpt. 2d. at 701.
24. *Id.*, 4 Cal. App. 4<sup>th</sup> at 493, 5 Cal. Rpt. 2d. at 699.
25. *Id.*, 4 Cal. App. 4<sup>th</sup> at 495, 5 Cal. Rpt. 2d. at 701.
26. *Id.*
27. *Id.*, 4 Cal. App. 4<sup>th</sup> at 495 - 496, 5 Cal. Rpt. 2d. at 701.
28. See, e.g., *Fidelity and Deposit Company of Maryland v. McClintic-Marshall Corporation*, 115 N.J. Eq. 470, 171 A. 382 (N.J. 1934).
29. *Milwaukie Construction Co. V. Glenn Falls Insurance Co.*, *supra*; *Firemen's Ins. Co. Of Newark, N.J. v. Keating*, 753 F. Supp. 1146 (S.D. N.Y. 1990).; *Northwestern National Insurance Company of Milwaukee v. Alberts*, *supra*.
30. *Supra*.
31. *Id.*, at 430.
32. *Id.*, at 429.
33. 934 F.2d 30 (2d Cir. 1991).
34. *Id.*, at 33.
35. 552 So. 2d 225 (Fla. Dist. Ct. App. 1989).
36. *Id.*, at 226.
37. *Borey*, 934 at 33
38. *Borey*, 934 at 32. See also *Northwestern Nat. Ins. v. Alberts*, *supra* (in which the court also distinguished between the rights of exoneration and quia timet, noting that for the former, the surety must demonstrate that the liability is absolute, "whereas to invoke the doctrine of quia timet, a surety need only show reasonable grounds for anticipating that its rights are being jeopardized and thus it will incur a liability by the threatened conduct of its principal." 741 F. Supp. at 430-431.)
39. 84 F.2d 522 (8<sup>th</sup> Cir. 1936), *remanded* 300 U.S. 185, 57 S.Ct. 325, 81 L.Ed. 593 (1937), *on remand* 90 F.2d 976 (8<sup>th</sup> Cir. 1937), *cert. den.* 302 U.S 748, 58 S.Ct. 266, 82 L.Ed. 578 (1937), *reh. den.* 302 U.S 779, 58 S.Ct. 362, 82 L.Ed. 602 (1937)
40. *Id.*, 90 F.2d at 977. It appears that no bill of quia timet had been filed. Thus, through confusion of terms, the court of appeal was able to accomplish on remand what it failed to do on original consideration -- grant relief that had not been requested.
41. *Gray v. Travelers Indemnity Company*, 280 F.2d 549 (9<sup>th</sup> Cir. 1960); *cf. Employers Insurance of Wausau v. Bond*, U.S. Dist. LEXIS 951 (D. Md. 1991) at p. 3, n.3. While most companies require collateral in an amount equal to the reserve which they set, others base the amount of collateral on

42. *Farnsworth on Contracts*, Vol. III § 12.2 (1990).
43. *Id.*, § 12.4.
44. *Id.*, § 12.5, at 163. *See also*, § 12.6.
45. *Id.*, § 12.6, at 167 (1990). *See In Re Estate of Gosmire*, 331 N.W.2d 562 (S.D. 1983).
46. *Farnsworth on Contracts*, Vol. III § 12.6, at 171.
47. *Id.*, Vol. III § 12.5, at 164. *See Bonde v. Weber*, 6 Ill.2d 365, 128 N.E.2d 883 (1955); *Powell v. Moore*, 204 Okla. 505, 231 P.2d 695 (1951).
48. *Farnsworth on Contracts*, Vol. III § 12.4, at 162.
49. *Id.*, at 162-63 (1990). *See also Id.*, § 12.7, at 179.
50. *Id.*, § 12.4, at 163. *See Bethlehem Engineering Export Co. v. Christie*, 105 F. 2d 933, 934 (2d Cir. 1939). *See also Farnsworth on Contracts*, Vol. III § 12.7, at 177.
51. *Id.*, § 12.4, at 163).
52. *Supra*.
53. *Id.*, at 965.
54. 26 N.Y.S.2d 227 (Sup. Ct. 1940), *reversed* 260 A.D. 911, 24 N.Y.S. 2d. 141 (1940).
55. 739 F.2d 431 (9<sup>th</sup> Cir. 1984).
56. 552 So. 2d 225 (Fla. Dist. Ct. App. 1989).
57. 273 F. Supp. 929 (E.D.Pa. 1967).
58. *Id.*, at 929.
59. *Commercial Insurance Co. Of Newark, New Jersey v. Pacific-Peru Construction Corp.*, 558 F.2d 948, 955 (9<sup>th</sup> Cir. 1977).
60. *American Motorists Ins. Co. v. United Furnace Co.*, 876 F.2d 293 (2d Cir. 1989); *Safeco Ins. Co. v. Schwab*, 739 F.2d 431 (9<sup>th</sup> Cir. 1984); *Milwaukie Const. Co. v. Glen Falls Ins. Co.*, *supra*; *Employers Insurance of Wausau*, 1991 U.S. Dist LEXIS 951 (D. Md. 1991); *Safeco Ins. Co. v. Criterion Investment Corp.*, 732 F. Supp. 834 (E.D. Tenn. 1989); *United Bonding Insurance Co. v. Stein*, *supra*.
61. *Safeco Ins. Co. v. Schwab*, 739 F.2d at 433, *quoting with approval Marine Midland Trust Co. v. Alleghany Corp.*, 28 F. Supp. 680, 683-684 (S.D.N.Y. 1939).
62. Besides a showing of likely irreparable harm, to obtain a preliminary injunction, the plaintiff must also show either "(1) a likelihood of success on the merits of its case or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in its favor." *Firemen's Insurance Co. of Newark, New Jersey v. Keating*, 753 F. Supp. at 1150.
63. *Borey*, 934 F.2d at 34 .
64. *Id.*
65. *Northwestern National Insurance Company of Milwaukee, Wisconsin v. Barney*, 1988 U.S. Dist. Lexis 18627 (N.D. Ohio Nov. 23 , 1988); *Wingsco Energy One, et al. v. Vanguard Groups Resources 1984, Inc.*, 1989 WL 223756 (S.D. Tex. 1989); *Northwestern National Insurance Company of Milwaukee*,

*Wisconsin v. Alberts, supra.* See also *Doster v. Continental Casualty Company, supra.*

66. 1988 U.S. Dist. Lexis 18627 (N.D. Ohio Nov. 23 , 1988).

67. *Supra.*

68. 741 F. Supp. At 431.

69. *Northwestern National Ins. Co. v. Alberts, supra.*

70. 934 F.2d at 34 (citations omitted), *quoting in part Abish v. Northwestern National Insurance Company*, 924 F.2d 448, 453 (2d Cir. 1991).

71. *Supra.*

72. *Id.* at 1156.

73. 732 F. Supp. 834 (E.D. Tenn. 1989).

74. *Id.*, at 843-844. *Accord, Firemen's Insurance Co. of Newark, New Jersey v. Keating, supra.*

75. 934 F.2d 30, 33 (2d Cir. 1991).

76. *In re Feit & Drexler, Inc.*, 760 F.2d 406, 416 (2d Cir. 1985).

77. *Firemen's Insurance Co. of Newark, New Jersey v. Keating* , 753 F. Supp. at 1156-57.