

**TWELFTH ANNUAL  
SOUTHERN SURETY AND FIDELITY CLAIMS  
CONFERENCE**

**PENAL SUM ISSUES  
RELATING TO PROBATE BONDS**

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## **PENAL SUM ISSUES RELATING TO PROBATE BONDS**

A surety is not liable for more than the penal sum of its bond,<sup>1</sup> **unless it is a probate surety!**

This article is designed to address various issues relating to excess penal sum liabilities of sureties on probate bonds. It is by no means an exhaustive survey of the law, but merely one intended to assist attorneys and practitioners in identifying concepts and principles applicable to claims against and in excess of the penal sums of probate bonds. In this paper we address the concepts of interest, attorney's fees, bad faith damages, multiple claimants, bond periods/terms, and alteration. In addition there are some general principles, which need to be kept in mind when evaluating penal sum issues.

### **GENERAL CONCEPTS**

#### **How is the Penal Sum of a Probate Bond Determined?**

Central to the concept of a surety's liability for a penal sum is a fundamental understanding of how (and why) the amount ("penal sum") of a probate bond is determined. Most states require a bond by a probate fiduciary in an amount related to the value of the personal property the fiduciary controls and is expected to receive during a specified period of time, which is usually tied to an accounting period.

A typical bond statute requiring a bond from a personal representative directs the personal representative to post a bond from a commercial surety in the amount equal to the personal property in the fiduciary's possession and the annual receipts by the fiduciary.<sup>2</sup> Bonds are usually not required to cover the value of real property owned by the estate.<sup>3</sup> Some courts make no distinction between commercial sureties and other sureties and simply require a bond in an amount no less than double the probable value of the ward's personal property.<sup>4</sup>

In the states where a bond is required in the amount of the value of the property held and the income received for an accounting period, these jurisdictions likewise require the fiduciary to increase the bond when it is not sufficient.<sup>5</sup> Likewise most jurisdictions require annual returns or reports from fiduciaries in order to evaluate the status of the estate and, importantly, to determine whether an additional bond or rider is necessary to protect the estate from losses incurred as a result of a breach of the fiduciary duty by the conservator, guardian, administrator, or trustee. Thus, a bond is intended to protect amounts subject to the fiduciary's control—during a snapshot period of time.

The significance of these principles cannot be understated. Probate sureties frequently find themselves facing a greater loss because of the failure (over a number of years) of probate courts to properly monitor or perform their administrative duties of reviewing the annual returns/reports required of guardians, administrators, conservators, and trustees. Sometimes it is not uncommon to find that fiduciaries (both unsophisticated

and dishonest) completely fail to file the required returns. Sometimes probate courts allow estates to remain pending for years without issuing any kind of notice or citation to the surety indicating that the returns and reports have not been filed. When a defalcating guardian starts off with a \$200,000.00 bond based on a \$150,000.00 corpus and \$50,000.00 in annual social security and annuity settlement payments but fails to file returns for six years without notice from the probate court, the loss could be more than \$500,000.00.

Logically, when a surety issues a bond with a penal sum, which is greater than the actual value of property in the possession of the fiduciary as well as the amount of income the fiduciary will receive during the appropriate accounting period, it effectively bonds a loss greater than which otherwise would be expected by the court, the estate, and the surety. Similarly when fiduciaries fail to file returns and reports required by law for multiple years and a breach is subsequently discovered, there is a high likelihood that the probate surety bond, issued only for the amount originally held by the fiduciary plus the income to be received in the ensuing accounting period, will not be sufficient to satisfy the conversion or misappropriation occasioned by the fiduciary. It is in those instances that the probate courts feel compelled to restore funds to which the estate is otherwise entitled, and find themselves looking first to the deep pockets of the surety to make the estate whole because of the otherwise unprotected losses caused by the bonded principal.

### **The Starting Premise**

The general rule is well settled that the liability of a surety is limited to the amount or penal sum stated in the bond.<sup>6</sup> The object of a penalty in a bond is to limit the obligation of the signers, and in an absence of a condition extending the liability, a surety can not be held for more than the penal sum named.<sup>7</sup> Unless otherwise provided and subject to an exception, the liability of sureties on an official bond is limited by the penalty of the bond and if the penalty is larger than required by statute, the liability, it has been held, should be limited to the amount required by law.

### **Penal Sum Limitation Rationales**

Among the surety's arsenal of defenses is the widely recognized view that suretyship and bonds are in derogation of the common law and as such they are strictly construed and suretyship will not be extended by implication.<sup>8</sup> This strict construction principle is at once consistent with, and at the same time, contrary to the reality that most probate bonds are statutory bonds. Most claims representatives are familiar with the concept that an obligation that is not expressed in the actual language of the bond but is required by statute is deemed a part of the bond. Statutory bonds are interpreted so that the statutory obligations are a part of the bond even if the bond language would not provide such coverage. Most courts adhere to the view that the actual terms of the bond will not lessen the obligation imposed by the statute requiring the bond.<sup>9</sup> Several courts have observed that the language of the bond may increase the obligation the surety owes with respect to the acts of its bonded principal beyond those otherwise required by the statute.<sup>10</sup> Some courts hold that the language of a bond cannot extend the surety's obligation beyond that required by the statute.<sup>11</sup> As a result it goes without saying that when considering liability

under a probate bond, reference must be made to both the statute requiring the bond and to the actual bond terms.

A number of states have limited the damages available under probate bonds to the actual out-of-pocket loss of assets sustained by the estate.<sup>12</sup> Still others suggest that the penalty is the minimum obligation--that the entire bond is forfeited by any breach by the bonded fiduciary, however slight.<sup>13</sup>

### **EXCESS PENAL SUMS ARGUMENTS**

#### **INTEREST**

Perhaps the most frequently encountered argument is that the penal sum does not limit the obligation to pay for interest due on damages caused by a fiduciary's breach of duty running from the date of the breach or from discovery of the breach. The rationale most often advanced is that the fiduciary would have been earning interest on this sum, and if the bonded fiduciary duties had been fulfilled, the fiduciary would have obtained increased bond coverage to protect the interest he should have been the earning.<sup>14</sup> This argument ignores the fact that if the surety had been given notice that its principal was defalcating it would have petitioned for a discharge and thus reduced the loss, limited it to the original penal sum.

Certain courts recognize that the penal sum limits the prejudgment interest chargeable to a probate surety. Some courts hold that interest may begin to run from the date of notice to the surety. Others hold that interest runs from the date of the principal's breach. Research reveals that sureties do not frequently appeal awards of interest that break their bond penalties, but that the appellate courts address the issue anyway.

The traditional view that the surety's liability for interest may not exceed the penal sum of the bond is represented by the decision in *Moseley v. Johnson*.<sup>15</sup>

In the case *In Re: Davison*,<sup>16</sup> the court addressed the liability of a surety for interest in addition to the penal amount of a guardianship bond. In *Davison*, the court held that interest on the penal amount of the bond begins accrue on the date the surety is notified of the principal's breach or demand for payment. In the *Davison* case, Aetna issued a \$100,000 guardian bond on behalf of an incompetent estate. After the ward died, the guardian filed an accounting final report which revealed a shortage of more than \$120,000. Prior to this accounting, the surety had been notified of this probable breach. The executor of the estate contended that the defalcation was almost \$70,000 more than revealed by the accounting. Subsequently, the parties stipulated that the loss was in an amount between the initial suggestion of a loss and the amount contended by the executor—still greater than the bond penalty. The probate court refused to assess Aetna for attorney's fees in excess of its bond limit, but did find the surety liable for interest on its \$100,000 penal sum from the date of the issuance of the citation to the surety.

The *Davison* surety did not appeal the award of interest (but did appeal an award of attorney fees). The *Davison* Court, nevertheless, addressed the interest award and stated that interest on the penal amount of a bond due from a surety begins to accrue on the date

the surety is notified of the principal's breach or demand has been made for payment. The *Davison* court cited Illinois, Montana, and California as following what it characterized as the "majority rule" that the surety becomes liable for pre-judgment interest over and above the penal sum of its bond from the date it becomes aware that it owes the penal sum of the bond.<sup>17</sup>

The Kansas Supreme Court had ruled that interest is recoverable from the time liability arises on a guardian bond, even if it means that the amount of recovery exceeds the bond penalty. *In re Smith's Estate*, 211 Kan. 397, 507 P,2d 189 (1973).

Recently in *Old Republic Surety Company vs. Cross*,<sup>18</sup> a surety appealed a probate court judgment which awarded the penal sum of the bond for principal, prejudgment interest at the rate of 10% and attorneys fees. The surety apparently did not appeal the award of prejudgment interest even though it was in excess of the penal sum, but instead argued the propriety of the calculations of the amount of prejudgment interest. Interestingly enough in *Cross* the surety obtained a reversal of the award of attorney's fees in excess of the penal sum of the bond. There is no discussion in *Cross* which suggests that the award of prejudgment interest in excess of the penal sum was also proper. A review of the underlying case reveals that under Texas law if a surety is held liable on its bond it is also liable for prejudgment interest commencing on the date demand was made.<sup>19</sup> One of the cases cited by the lower court in *Cross* holds that interest is available in addition to the penalty if an ascertainable sum was due prior to judgment.

In *American Fidelity Company vs. Bernard*,<sup>20</sup> the court held that a probate surety who bonded the same fiduciary as both executor and trustee was liable for interest in addition to the penal amount of its bond for the executor from the date of the probate court decrees.

In the case *Foster vs. Kerr and Houston*,<sup>21</sup> Maine's high court held that when there is a breach of condition of the bond, in absence of an accounting, judgment should be in the penal sum of the bond and that interest is added to the amount of the penalty of a bond from the date of breach.<sup>22</sup> Maine statutes provide that in subsequent proceedings the Court will order an execution to issue for "so much of the penalty of the bond as appears to be due, with interest and costs."<sup>23</sup>

### **ATTORNEYS FEES AND COSTS**

It costs an estate or obligee money to prosecute claims against the surety to recover amounts due as a result of the fiduciary's breach. Probate courts and successor fiduciaries all complain loudly that they should be able to recover attorney's fees from the surety in excess of the bond penalties or the value of the bond is diminished. The prevailing view remains that sureties are not liable for attorney's fees and costs incurred to enforce a principal's liability.<sup>24</sup>

The most recent case to discuss the liability of a probate surety for attorney's fees in excess of the penal sum of the bond is *Old Republic Surety Company vs. Cross*<sup>25</sup> discussed above. In the *Cross* case, the surety posted a \$60,000.00 administrator's bond. In the first

round of litigation the court of appeals determined that the *Cross* surety was liable to the successor administrator for actual damages resulting from the bonded principal's failure to perform duties as administrator. On remand the probate court entered a judgment awarding \$60,000.00 to the successor, post judgment interest at the rate of 10%, prejudgment interest at the rate of 10%, and \$35,000.00 in attorney's fees. The surety appealed the award of attorney's fees in excess of the penal sum of its bond. On appeal the *Cross* Court relied upon a performance bond surety case and held that the general rule that a surety's liability on its underlying contract is limited to the penal sum of its bond applies to probate bonds.<sup>26</sup> The Court held that the terms of the bond do not provide a basis for recovering attorney's fees in excess of the penal sum of the bond.

The *Cross* Court also rejected a contention that because the claim was against a valid oral or written contract, attorneys fees were available pursuant to Texas statutory law. The Court held that the bond itself did not create an interest in a third party so as to allow recovery of attorney's fees by successor administrator as a third party beneficiary of the contract.

Another interesting case is the decision in *Old Republic Surety Company vs. Reischmann*,<sup>27</sup> In the *Reischmann* case the surety posted a bond in the penal sum of \$50,000.000 on behalf of a successor guardian. A guardian *ad litem* discovered that the successor guardian fell behind in paying nursing home bills for the ward and that she used guardianship funds to pay her home mortgage. In addition there was a finding that the successor guardian failed to collect obligations due to the ward from other family members. When the guardian *ad litem* filed a suit for damages, attorney's fees, and interest the surety retained counsel, and contacted its principal. The principal defended the complaint and with this Surety's assistance filed amendments and supplemental returns with the probate court. The probate court, after hearing the evidence, entered an order surcharging the successor guardian and her surety for the full penal sum of the bond. The surety paid the penal sum before the court actually entered its written order. The estate then sought attorney's fees and costs, which the probate court awarded against the fiduciary and surety. On appeal the surety argued that the award of attorney's fees was incorrect because it exceeded the penal sum of the bond and because the surety was not required to pay a judgment until the principal's liability is established and proof is made that the principal cannot pay.

The *Reischmann* court reasoned that because payment on a bond becomes due when the misconduct of the principal occurs (not when it is established by court order), if an estate is forced to litigate in order to secure payment on the bond the ultimate value of the bond is diminished by the litigation costs. To ensure that the estate receives the full value of the bond, the *Reischmann* court further reasoned that the attorney's fees and costs should be assessed against a surety unless the surety was justified in delaying payment under the bond. Even though the *Reischmann* court recognized that the filing of a claim by itself does not justify an award of costs and attorneys fees over the amount of the bond, and that a surety must be given a reasonable amount of time to investigate and pay the claim, the court looked at the findings of fact by the probate court in that case. The probate court in *Reischmann* wrote in its opinion that the surety actively opposed the surcharge claim and aggressively defended the case from the perspective of its bonded principal and

that the surety's conduct went beyond fair dealing and constituted bad faith. Based upon these express factual findings the *Reischmann* Court did not go beyond the discretion of the trial court and affirmed the award of attorney's fees.

Interestingly, in its decision, the *Reischmann* court predicted cases where the surety would launch an investigation of a guardian's actions without its principal's cooperation. The court noted that the investigations may prove to be time consuming and costly with the surety thereafter being required to justify its diligence and refusal to pay the claim. As result the *Reischmann* court logically and accurately predicted that because of its ruling, surety bonds in probate cases would become harder and more expensive to obtain.

A positive result for sureties was obtained in the *In re: Davison*<sup>28</sup> case discussed above. As indicated above, the *Davison* surety was aware before the guardian's final return was filed of a possible shortage in excess of its bond. Later, the executor of the estate made a demand upon the surety for an amount even greater than the apparent shortage revealed by the return. Ultimately, the parties stipulated that there was a shortage of unaccounted for sums greater than the penal sum of the bond. Still later, the executor filed a lawsuit to surcharge the surety, and the executor claimed that the surety should be responsible for its attorney's fees. The *Davison* court ruled that generally a surety's liability may not exceed the penal amount of its bond. This includes liability for attorney's fees. The executor argued that under Washington law, a court had discretion to fix liability for attorney's fees jointly between a surety and a principal, but the court rejected this argument, noting that it was subject to another Washington statutory principle, which expressly limits the overall liability of a surety to the penal sum of a bond.<sup>29</sup> The *Davison* court observed that the limitation could be varied by terms in the bond and cited authorities from the Fifth Circuit and Oklahoma, and also noted that bad faith on the part of the surety would also allow recovery of attorney's fees, citing a Massachusetts case.

## **BAD FAITH**

Bad faith damages are usually distinguished from awards of attorney's fees and the award of both are penalties designed to inhibit sureties and insurers from unreasonably denying claims.

The award of attorney's fees in the *Reischmann* case discussed above was premised upon the written finding of the surety's bad faith by the probate court. The Florida Supreme Court in *Nichols vs. Preferred National Insurance Company*,<sup>30</sup> ruled that Florida Statute § 627.428 regarding attorney's fees and costs does not apply to actions against sureties on guardianship bonds and further that this statute does not preclude an award of attorney's fees and costs beyond the penal sum of the guardianship bond where the attorney's fees and costs were incurred as a result of the surety's misconduct rather than that of the principal. The *Nichols* Court ruled that misconduct means the failure to act diligently and pay a claim without unreasonable delay, and further ruled that the determination in whether the delay in paying the claim was unreasonable is a matter within the trial court's discretion and determined on a case by case basis.<sup>31</sup> *Reischmann* apparently takes the *Nichols* ruling a step further by ruling that surety misconduct" in the form of defending a claim allows an award of damages beyond the penal sum.

In Georgia, when a surety fails to pay a claim within sixty days of a demand, if the denial is made in bad faith, the surety may be held liable for attorney's fees and bad faith damages equal to 25 percent of the amount due.<sup>32</sup>

There has never been a reported probate decision in Georgia addressing this statute, but the reality is that the first notice that probate sureties receive of a possible claim in Georgia is usually service of a citation to show cause from the probate court why a judgment should not be entered against its bond for some breach of duty which is generally not specified in the citation. Hearings are usually scheduled within 30 days of service and the Georgia probate surety is left scrambling to determine the status of the bonded estate, the location of its principal, the location and condition of bonded assets, and the defenses, if any, available.

However the availability of "bad faith" damages against a Georgia probate surety generally is suspect because, the Georgia Court of Appeals has held that this statute is the only method to recover attorneys fees and bad faith damages from a surety in Georgia and that the institution of legal proceedings against a surety before the expiration of the 60 days permitted for investigation precludes such damage awards.<sup>33</sup> Because the first notice to the Georgia probate surety is the actual institution of legal proceedings, the obvious argument is that bad faith damages should not be available.<sup>34</sup> This analysis seems to parallel that of the Washington court in *Davison* discussed above.

#### **MULTIPLE CLAIMANTS**

Some claimants have argued that the penal sum is available to each person aggrieved by the breaches of duty by a probate fiduciary.

The decision in *Western Surety Company v. Murphy*, 754 P.2d 1237 (Utah App. 1988) sent a shudder through the industry. The court in *Murphy* allowed recovery by multiple claimants from the surety each up to the penal sum of the bond, because the court viewed the bond as ambiguous and susceptible of interpretation so as to allow recovery by each claimant up to the penal sum.

In *Mitchell v. Laurens*,<sup>35</sup> it was held that several creditors on the official bond of a master in chancery could recover the amount of the penalty of a bond, but that they must take ratably if their damages and judgments exceed the penal sum of the bond.

Interesting issues are created when a bonded principal serves in multiple capacities and is bonded in each of these different capacities. A surety has historically been able to avoid liability when it bonds a principal who serves multiple roles as guardian, executor, and trustee employing the doctrines of "transfer of assets"<sup>36</sup> and "retainer of assets"<sup>37</sup> with appropriate presumptions that the fiduciary in the bonded role transferred assets to himself in an unbonded capacity or a fiduciary who was not bonded or retained assets and did not transfer assets to himself in the bonded capacity.

However when the same fiduciary has multiple capacities such as guardian, executor, and trustee and is bonded in each of those capacities the temptation of claimants and probate courts to tap at the sureties in each bonded capacities is almost too much.

In *American Fidelity Company vs. Bernard*,<sup>38</sup> an individual was appointed as conservator then as executor, then as trustee over the substantial estate of an individual. The *Bernard* fiduciary in his capacity as conservator obtained a \$50,000.00 bond from The Hartford Accident and Indemnity Company. Upon the death of the ward, the fiduciary obtained an executor's bond in the amount of \$100,000.00 from American Fidelity Company. Pursuant to the a testamentary trust, the fiduciary was appointed trustee one year after the ward's death and obtained another bond from American Fidelity Company in the amount of \$100,000.00. Unfortunately the *Bernard* fiduciary co-mingled assets, intermingled accounts by and amongst the conservator, executor, and trustee estates, and other unrelated estates under his charge. The Probate Court of Hillsboro County New Hampshire appointed a Certified Public Accountant to audit the accounts and records of the fiduciary and he generated a report showing that there were deficits by the fiduciary in his capacity as: conservator in the amount of \$12,087.41; executor in the amount of \$208,722.60; and trustee in the amount of \$4,549.77. The conservator surety was found liable for the \$12,087.41 and interest in addition thereto plus a *pro rata* share of the expenses of the accountant.

The executor surety tendered \$100,000.00 in connection with the executor's bond and paid the penal sum of this bond. The surety argued that this bond was intended to cover the same \$100,000.00 as protected by the executor bond. The *Bernard* Court, however, noted that the fiduciary as trustee had a duty to collect the total amounts due from himself as executor of the additional unbonded \$108,752.60. Thus the surety for the trustee became liable for the penal amount of the trustee's bond.

Consequently even though the executor's bond limited the sureties liability to \$100,000.00 for breach of the fiduciaries duties as executor, the trustee surety nevertheless became liable for the additional \$100,000.00 of the fiduciary's defalcation as an executor by virtue of its bond on behalf of the same fiduciary as trustee, even though it believed that it had issued a bond to protect money which was covered and repaid by another bond.

### **STACKING BOND PERIODS/TERMS**

Frequently an estate can incur significant expenses in undertaking to discover and verify the amount of a loss caused by a breaching fiduciary. It is not uncommon for the estates and their representatives to seek an award of these expenses in addition to the penal sum of the bond, which is exhausted by the principal defalcation of the fiduciary. Estate representatives and even probate courts will go to great lengths to recover these expenses from a viable surety even when they exceed the penal sum of the bond. One of these arguments is that the bond is a separate obligation for each year it is in effect.

Some bond claimants have argued that bond penal sums are recoverable for each effective term of the bond, and that each year a bond is renewed the penal sum of the bond is available to pay for the losses caused by the bonded principal in that period.

In *United States Fidelity and Guaranty Company vs. Christoffel*,<sup>39</sup> the surety issued a \$50,000.00 bond on behalf of a guardian of an incompetent adult. For four years the surety charged a renewal premium for this bond. The court issued a judgment against the principal and the surety jointly and severally in the amount of \$200,000.00 with the principal being liable for an additional \$178,789.62. The trial court found that the appellates bond was a “cumulative” bond and imposed liability for the four years that the bond was in effect.

The *Christoffel* Court on appeal recognized that there is no practical way to calculate bond premiums except on an annual basis when dealing with an incompetent adult and held therefore that the fact that annual premiums are charged does not make a bond cumulative as opposed to continuous. The court observed that there was no intention on the part of the principal that the bond be cumulative and that applicable state statutes do not require the bond to be of such nature. The Court reasoned as have other courts on other bonds<sup>40</sup> that the guardian could have satisfied the statutory requirement by posting a \$50,000.00 cash bond and that at any time during the administration of the estate the probate court could have required him to give a new bond in a higher amount.

Finally the *Christoffel* Court observed that the surety could be released without the probate court’s permission under certain circumstances which concept was irreconcilable with the argument that the liability of the surety is predicated upon an annual obligation, stacked each year.<sup>41</sup>

In an excellent analysis, particularly applicable to cases where sureties are exposed to enormous amounts after lengthy periods of non-accounting by fiduciaries, the *Christoffel* Court observed that adherence to statutory requirements for annual returns by the probate courts would obviate the losses that might otherwise occur if the bond is not treated as cumulative. The Court in *Christoffel* went to great lengths to distinguish cases involving different types of renewal bonds and insurance coverage from probate bonds involving obligations issued for definite periods (i.e. a one year indemnity bond, an annual realtors license bond, annual public official one year term bonds). Refreshingly the *Christoffel* court remanded the case and ordered that the judgment against the surety be limited to the \$50,000.00 penal sum of its bond.

## **BOND ALTERATION**

A terrible result (hopefully precluded by present-day limited powers of attorney, and the equal dignities rule<sup>42</sup>) was reached in *White v. Dugan*, 140 Mass 18 2 N.E. 110 (Mass. 1885). In *White* the surety issued a bond to its principal for a penalty of \$2,000.00. Between issuance and submission to the Court, the principal modified the bond to a larger penalty, although he reported only the original \$2,000.00 amount to the surety. After he absconded with the sum entrusted to him, the Probate Court entered judgment for the increased penal sum and the surety appealed. On appeal the *White* Court ruled that the expectations of the surety were of no significance, when it empowered the principal with an apparently unlimited bond. The *White* Court distinguished several cases applying the equal dignities rule.

## ENDNOTES

<sup>1</sup> The following is a table of authorities following the general rule that a surety is not liable beyond the penal sum of its bond:

Jurisdiction	Authority	Holding
Alabama	<i>Victoria Insurance Company v. Ross Neely Systems, Inc.</i> , 757 So.2d 453 (Ala. Civ. App. 2000).	"Because the liability of a surety arises out of a contract, it is axiomatic that a surety can not be held liable for an amount greater than the amount named in its bond."
Alaska	<i>Miller v. Alaske-Canadian Oil &amp; Coal Co.</i> , Alaska St. § 113, 16.270 (a)(s), 4 Alas. 439 (1911).	"The terms and maximum penalty of the bond have reference to a fixed and certain amount. The total aggregate liability of the surety shall be limited to the amount of the penalty of the bond."
Arizona	<i>Ed Stearman &amp; Sons, Inc. v. State Exrel. Union Rock &amp; Materials Co.</i> , 1 Ariz. App. 192, 400 P.2d 863 (Ariz. Ct. App. 1965).	"[T]he total recovery of all claimants under the bond shall not exceed the bond's penal sum."
Arkansas	82 Ark. 414, 102 S.W. 222 (1907).	"Of Course, the sureties [sic] could not be held liable for a sum in excess of the amount of the bond for a single breach thereof."
California	<i>T&amp;R Painting Constr., Inc. v. St. Paul Fire and Marine Ins. Co.</i> , 23 Ca. App. 4 <sup>th</sup> 738 (1994)	"We conclude that the subcontractor in this case can recover from the surety the attorney fees provided for in its subcontract and ordered by the Court, so long as the total recovery against the surety, including attorney fees, does not exceed the penal sum of the bond." (Citations Omitted).
Colorado	<i>Edmonds v. Western Surety Company</i> , 962 P.2d 323 (Colo. Ct. App. 1998).  <i>Empire State Sur. Co. v. Lindenmeier</i> , 54 Colo. 497, 131P. 437 (1913).	"[I]f a bond is an indemnity bond, the obligee's right of recovery will be limited to the actual damages sustained, not to exceed the face amount of the bond."  "It is a general rule, and well settled that sureties [sic] are liable only to the extent of the penalty of the bond."
Connecticut	<i>United Constr. v. H. O. Canfield Co.</i> , 19 Conn.Supp. 450, 116 A.2d. 914 (1955).	"No Connecticut case has been cited in which more than the penalty on the bond ever has been authorized as a recovery. In the span of 132 years, our Supreme Court has held that judgment may enter for less than the penalty, where justice requires it, but never in any case to exceed the penalty."
Delaware	<i>Delaware exrel Savory Cooks Inc. v. Fidelity &amp; Deposit Company of Maryland</i> , 37 Del 24, 194 A.2d 858 (1963), 10 Del Code § 1504	"Nothing contained in this chapter shall make a recognized obligor or other party liable for damages beyond the penalty of his recognizance, bond, or specialty; or in any manner extend, abridge or alter the legal operation of any recognizance or other instrument."
Washington, D.C.	<i>In re Estate of Spinner</i> , 717 A.2d 362 (D.C. 1998).	"The law is established that the liability of a surety can not be extended beyond the terms of the surety contract."
Florida	<i>Nichols v. Preferred Nat'l Ins. Co.</i> , 704 So.2d 1371 (Fla. 1997)	"When principals misappropriate, guardianship funds are insufficient to discharge their duties; attorney's fees and costs for a claim based solely on this negligence are limited to the face amount of the bond ..."
Georgia	<i>Congress Re-Ins. Corp. v. Archer-Western Contractors, Ltd.</i> , 226 Ga. App. 829, 487 S.E.2d. 679 (1997).	"O.C.G.A. § 9-12-13 and Georgia case law interpreting the statute limit recovery against sureties to no more than the penalty of the bond."
Hawaii	<i>Allen v. Lincoln</i> , 9 Haw. 364 (Haw. 1894)	"It is undoubtedly good indemnity against all liens, his own included, to the full extent of the sum named—but we fail to see that it can go any farther."
Idaho	<i>State ex. rel. Summers v. Lake Tavern, Inc.</i> , 76 Idaho 111, 278 P.2d 192 (1954).	The penal sum of a bond is the limit of liability and not a liquidated damage upon breach of

		an underlying covenant.
Illinois	<i>Griffin Wellpoint Corp. v. Engelhardt, Inc.</i> , 414 N.E.2d 941 (Ill. App. 1980)	[The liability on a Performance Bond ]is clearly limited by the penal sum.
Indiana	<i>Graeter v. DeWolf</i> , 112 Ind. 1, 113 N.E. 111 (1887).	"A surety on a bond cannot, as a rule, be held liable for any sum greater than the penalty thereof."
Iowa	<i>Iowa State Commerce Comm'n v. IGF Ins. Co.</i> , 309 N.W.2d 445 (1981).	"A surety is usually only liable to proper claimants up to the face amount of a bond."
Kansas	<i>In Re Smith's Estate</i> , 211 Kan. 397, 507 P.2d 189 (1973)	"The penalty of the bond fixes the limit of liability of the surety at the time liability arises."
Kentucky	<i>K.R.S. § 62.070</i>	"Recovery against the surety (or a public official bond) shall be limited to the amount of the penalty fixed in the bond."
Louisiana	<i>America Surety Co. of N.Y. v. Ryan</i> , 185 La 678, 170 So. 34 (1936); <i>L&amp;A Contracting Co., Inc.v. ram Industrial Coatings, Inc.</i> , 762 So.2d 1223 (La.App. 1 <sup>st</sup> Cir. 2000); <i>Hershell Corporation v. Firemen's Fund Insurance Company</i> , 743 So.2d 698, 705-706 (La.App. 3 <sup>rd</sup> Cir. 1999).	Jurisprudence has held that a surety that obligates itself to fulfill all the obligations of its principal is thereby bound to pay all sums adjudged, even if these are found to be in excess of the actual bond amount."
Maine	<i>Pennell v. Card</i> , 96 Me. 392, 52 A. 801 (1902).	"As the damages awarded exceed the penalty of the bond, the Plaintiff is entitled to recover the amount of the penalty, with interest thereon, as damages for the detention from the date of the breach of the bond."
Maryland	<i>Commissioners of Leonardtown v. Fidelity and Casualty Co.</i> , 259 Md. 532, 270 A.2d. 788 (1970).	"...[T]he surety's total liability is limited to the amounts stated in the original bond."
Massachusetts	<i>Peerless Ins. Co. v. South Boston Storage and Warehouse Inc.</i> , 397 Mass. 325, 491 N.E.2d. 253 (1986).	"A surety's bond is a contract. It sets the limits of the surety's liability. The fact that this bond is required by statute does nothing to alter the settled principles of contract and suretyship law. ...the general rule is that the penal amount limits the amount to that amount."
Michigan	<i>Fidelity &amp; Deposit Co. v. Cody</i> , 278 Mich. 435, 270 N.W. 739 (1936).	"The surety knows exactly what his limit of liability is and the risk he assumes. He simply obligates himself for the period of one year to pay all adjudicated fines and damages which the liquor dealer fails to pay, up to the amount of the penalty stated in the bond."
Minnesota	<i>Independent School District No. 24 v. Weinman</i> , 243 Minn 469, 472 68 N.W.2d 248, 250 (1955).	[I]n no event shall the Surety's liability exceed the penal sum.
Mississippi	<i>Broome v. Hattiesburg Building &amp; Trades Council</i> , 206 So.2d 184 (Miss 1967).	[B]y the great weight of authority nothing beyond the sum which has been designated in the bond as a penalty may be recovered.
Missouri	<i>R.A. Vodhof Construction Co. v. Block Tack Fire Protection Dist.</i> , 454 S.W.2d 588 (Mo.App. 1970).	The bond is not a general declaration of liability...but recovery is limited to the amount of the bond.
Montana	<i>K-W Indus. v. National Sur. Corp.</i> , 231 Mont. 461, 754 P.2d. 502 (1988).  Mont. Code Ann. § 28-11-411 (2000).	"We have held in other cases that § 28-11-411, MCA, limits the liability of a surety to the express terms of its contract."  "Extent of Surety's liability. A surety can not be held beyond the express terms of its contract, and if such a contract prescribes a penalty for its breach, he can not in any case be liable for more than the penalty."
Nebraska	<i>W. T. Rawleigh Co. v. Bunning</i> , 107 Neb. 475, 186 N.W. 331 (1922).	"The extent of a surety's liability is strictly limited to that assumed by the terms of his contract."
Nevada	<i>Basic Refractories, Inc. v. Bright</i> , 72 Nev. 183, 298 P.2d 810 (1956).	"[T]he bond does not provide for protection against damages beyond the amount of the penalty...[T]he obligee must stand the loss himself or at least look elsewhere than to the surety."
New Hampshire	<i>Lisbon Sav. Bank &amp; Trust Cooulton's</i>	"If it appears that the administrator is liable

	<i>Estate</i> , 91 N.H. 477, 22 A.2d 331 (1941)	upon an accounting beyond the amount of the penalty, action besides or otherwise than on the bond may be brought against him, but with no liability of the sureties [sic] on the bond over and above its penalty."
New Jersey	<i>Monmouth Lumber Co. v. Indemnity Insurance Co.</i> , 21 N.J. 439, 122 A.2d 604 (1956).	"[The Surety's] liability to the obligees is limited to the penal sum stated. It has long been settled law that a surety is chargeable only according to the strict terms of its undertaking and its obligation cannot and should not be extended either by implication or by construction beyond the confines of its contract."
New Mexico	No Law Found	No Law Found
New York	<i>Brainard v. Jones</i> , 18 N.Y. 35 (1858).  N.Y. GEN. OBLIG. LAW § 7-301 (McKinney 2000)	"In the event of payment, the amount recoverable from a surety shall not exceed the amount specified in the undertaking except that interest in addition to this amount shall be awarded from the time of default by the surety."  "In the event of payment, the amount recoverable from a surety shall not exceed the amount specified in the undertaking except that interest in addition to this amount shall be awarded from the time of default by the surety."
North Carolina	<i>State v. Pettee</i> , 50 N.C.App. 119, 273 S.E.2d 317 (1980).	Surety is liable only for the face penal amount on guardian bond
North Dakota	N.D. CENT. CODE § 22-03-03 (1999).  <i>Rosedal v. Harding</i> , 64 N.D. 431, 252 N.W. 884 (1934).	"A surety cannot be held beyond the express terms of his contract and if such contract prescribes a penalty for its breach, he cannot be liable in any case for more than the penalty."  "A surety cannot be held for more than the penalty prescribed for its breach."
Ohio	<i>Elliott v. Marc Wilcher Realty, Inc.</i> , 111 Ohio App. 261, 171 N.E.2d 543 (1959).	"Generally, it is held that the liability of a surety is limited to the penal sum stated in the bond, and that such liability of a surety on a statutory bond 'cannot be enlarged by implication beyond its terms and its statutory office.'"
Oklahoma	OKLA. STAT. ANN. TIT. 15 § 373 (2000).  <i>Maryland Cas. Co. v. Alford</i> , 111 F.2d 388 (D.C.Okla. 1946).	"A surety cannot be held beyond the express terms of his contract, and if such contract prescribes a penalty for its breach, he cannot in any case be liable for more than the penalty."  Surety's liability is limited to penal sum of bond
Oregon	<i>New Amsterdam Casualty Co. v. Hyde</i> , 148 Or. 229, 34 P.2d 930 (1934).	"It is well-established rule of law that a surety or bondsman may only be held for the amount of the penalty stipulated in the bond."
Pennsylvania	<i>Pennsylvania Turnpike Commission v. U. S. Fidelity &amp; Guaranty Co.</i> , 412 Pa. 222, 194 A.2d 423 (1963).	"In the absence of statutory provisions to the contrary, the intention of the parties as garnered from the contents of the contract is the determinative factor."
Rhode Island	<i>Narragansett Pier R. Co. v. Palmer</i> , 70 R.I. 298, 38 A.2d 761 (1944).	Liability of surety is determined solely by language of the bond

South Carolina	<i>North River Ins. Co. v. Claar</i> , 299 S.C. 8, 382 S.E.2d 8 (1989).	"The general rule is well settled that the liability of surety is limited to the amount, or the penal sum, stated in the bond."
South Dakota	<i>Minnehaha County ex rel. Willadsen v. Willadsen</i> , 69 S.D. 412, 11 N.W.2d 55 (1943).	"Thereby the surety became liable only for payments in default, not exceeding the penal sum of the bond."
Tennessee	<i>State v. Polk</i> , 82 Tenn. (14 Lea) 1 (1884).	"Upon common law principles it is clear that the surety cannot be held bound beyond the terms of the bond, for the obvious reason that persons can only be held liable by the contract which they have actually entered into."
Texas	<i>Great American Ins. Co. v. North Austin Mun. Utility Dist. No. 1</i> , 908 S.W.2d 415, 38 Tex. Sup. Ct. J. 817 (1995).	"It is well settled that a performance bond is enforceable only to the extent of the obligee's actual damages. Likewise, when an obligee's actual damages exceed the penal amount of a bond, a surety's liability generally is limited to the penal sum of the bond." (Citations omitted)
Utah	<i>Western Surety Company v. Murphy</i> , 754 P.2d 1237 (Utah App. 1988).	Bonds from paid sureties are construed strictly against sureties, but penal sum of bond, if stated unambiguously, is upheld.
Vermont	<i>City of Montpelier v. National Sur. Co.</i> , 97 Vt. 111, 122 A. 484 (1923).	"The bond of a compensated surety is not to be so construed as to extend liability beyond the terms of the contract. The plain intention of the parties cannot be nullified by construction. Where the meaning of such a bond is clear and unambiguous, it should be enforced, like other contracts, according to the manifest intention of the parties."
Virginia	<i>Tenant's Executor v. Gray</i> , 19 Va. (5 Munf.) 494 (1817).	"[T]he Judgment was erroneous, in this, that it gave damages exceeding those laid in the Writ; and also in this, that, as the principal and interest exceeded the penalty of the Bond, the Judgment ought to have been for the penalty, and damages, not exceeding those in the Writ."
Washington	<i>Matter of Guardianship of Davison</i> , 31 Wash.App. 480, 642 P.2d 1259 (Wash.App. 1982).	"Generally, a surety's liability may not exceed the penal amount of the bond."
West Virginia	<i>Robinson v. Fidelity &amp; Deposit Co.</i> , 181 W.Va. 463, 383 S.E.2d 95 (1989).	"For if no bad faith or breach is present in the surety's actions, under the insurance contract, '[I]t is well settled principle of law that the extent of liability of the surety is limited by the penalty of the bond and is otherwise the same at that of the principal'"
Wisconsin	No Law Found	No Law Found
Wyoming	<i>U.S. Fidelity &amp; Guaranty Co. v. Nash</i> , 20 Wyo. 65, 121 P. 541 (1912).	"Under a bond given by a guardian running to three wards jointly, whose interest in the trust property are equal, the liability of the surety to each ward held limited to one-third of the amount of the penalty".
1 <sup>st</sup> Circuit Court of Appeals	<i>Thomas Laughlin Co. v. American Surety Co.</i> , 114 F. 627 (1st Cir. 1902)	
2 <sup>nd</sup> Circuit Court of Appeals	<i>United States v. Seaboard Surety Co.</i> , 817 F.2d 956 (2d Cir. 1987)	
3 <sup>rd</sup> Circuit Court of Appeals	<i>Fidelity &amp; Deposit Co. v. United States</i> , 229 F. 127 (3rd Cir. 1915)	
4 <sup>th</sup> Circuit Court of Appeals	No Law Found	

5 <sup>th</sup> Circuit Court of Appeals	<i>Bill Murphy Co. v. Elliott</i> , 207 F.2d 103 (5th Cir. 1953)	
6 <sup>th</sup> Circuit Court of Appeals	<i>Maryland Casualty Co. v. Sparks</i> , 76 F.2d 929 (6th Cir. 1935)	
7 <sup>th</sup> Circuit Court of Appeals	<i>Massachusetts Bonding &amp; Ins. Co. v. United States</i> , 54 F.2d 1039 (7 <sup>th</sup> Cir. 1931)	
8 <sup>th</sup> Circuit Court of Appeals	<i>American Surety Co. v. James A. Dick Co.</i> , 23 F.2d 464 (8th Cir. 1927)	
9 <sup>th</sup> Circuit Court of Appeals	<i>United States use of Balzer Pacific Equipment Co. v. Fidelity &amp; Deposit Co.</i> , 895 F.2d 546 (9 <sup>th</sup> Cir. 1990)	
10 <sup>th</sup> Circuit Court of Appeals	<i>Maryland Casualty Co. v. Alford</i> , 111 F.2d 388 (9th Cir. 1940)	
Washington D.C. Court of Appeals	<i>Davis v. Peerless Ins. Co.</i> , 255 F.2d 534 (D.C. App. 1958)	

<sup>2</sup> Georgia Statutory requirements for the amount of bonds by guardians and administrators are found in O.C.G.A. §§ 29-4-12 and 53-6-51; See Alaska St. § 13.26.215(a).

<sup>3</sup> O.C.G.A. § 29-4-1(b), O.C.G.A. § 53-6-51(c).

<sup>4</sup> See Ohio R.C. § 2109.04.

<sup>5</sup> O.C.G.A. § 29-4-14, In Georgia, bonds may also be reduced, without affecting liability for prior acts. O.C.G.A. § 53-6-52.

<sup>6</sup> *North River Insurance Company v. Claar*, 299 S.C. 8, 282 S.E.2d 8 (1989); *Brown v. National Surety Corporation*, 207 S.C. 462, 36 S.E.2d 588, 589-590 (1946).

<sup>7</sup> 11 C.J.S., Bonds 57.

<sup>8</sup> *Balboa Ins. Co. v. A.J. Kellos Constr. Co.*, 247 GA 393, 394, n. 1, 276 S.E.2d 599 (1981).

<sup>9</sup> *United States Fidelity and Guaranty Company vs. Christoffel*, 115 Ariz. 507, 566 P.2d 308 (1977); *Royal Indemnity (o.v. Business Factors)*, 96 Ariz. 165, 393 P.2d 261 (1964).

<sup>10</sup> *SimsCrane Service, Inc. v. Reliance Insurance Co.*, 514 F.Supp. 1033, (S.D. Ga. 1981), aff'd, 667 F.2d 30 (Ha. Civ. 1982). Bond language may increase liability beyond statute

<sup>11</sup> *Graham v. Indiana ex rel Board of Commissioners of Jefferson County*, 66 Ind. 386 (1879).

<sup>12</sup> See *Brockston v. Speers*, 216 Ala. 385, 113 So. 248 (1927); *Dean v. Portus*, 11 Ala. 104 (1847).

<sup>13</sup> 12 AmJur 2d Bonds §§ 44, and 683.

<sup>14</sup> 12 AmJur 2d Bonds § 48.

<sup>15</sup> 114 N.C. 257, 56 S.E. 922 (1907).

<sup>16</sup> 31Wash. App. 480, 642 P.2d 1259 (1982).

<sup>17</sup> See also, 57 A.L.R. 2d 317, 318 (1958) and 11 J. *Appleman Insurance* § 6422 (1981).

<sup>18</sup> 27 S.W.3d. 35 (Tx.App. San Antonio 2000).

<sup>19</sup> *Howze vs. Surety Corporation of America*, 584 S.W.2d 263, 268 (Texas 1979).

<sup>20</sup> 104 N. Hamp. 146, 181 A.2d 628 (1962).

<sup>21</sup> 133 Maine 389, 402, 179 A. 297.

<sup>22</sup> See also *Davis vs. American Surety Company of New York*, 144 Maine 187, 67, A.2d 421 (1949).

<sup>23</sup> *Maine R. Stat* § 151-16.

<sup>24</sup> 74 AmJur 2d *Suretyship* § 167; *Great American Indemnity v. State*, 32 Del.Ch. 562, 88 A.2d 426; *Alexander v. Fidelity & Casualty Co.*, 232 Miss. 629, 100 So.2d 347 (1958).

<sup>25</sup> 27 S.W.3d 35 (Tx. App. 2000).

<sup>26</sup> See *Great American Insurance Company vs. North Austin Municipal Utility District*, 908 S.W.2d 415 (Texas 1995).

<sup>27</sup> 713 So.2d 34 (Fla. App. 1998).

<sup>28</sup> 31 Wash. App. 480, 642 P.2d 1259 (1982).

<sup>29</sup> See, *Revised Code of Washington* § 19.72.180 which provides that the total amount of all recoveries by one or more obligees shall not exceed in the aggregate the penal sum specified in such bond. See also, In re: *Estate of Beard*, 60 Was.2d 127, 372 P.2d 530 (1962).

<sup>30</sup> 704 So.2d 1371 (Fla. 1997).

<sup>31</sup> 704 So.2d. at 1374-75.

<sup>32</sup> O.C.G.A. § 10-7-30.

<sup>33</sup> *Columbus Fire & Safety Equipment Co. v. America Druggist Ins. Co.*, 166 GA.App. 509, 510, 304 S.E.2d 471 (1983).

<sup>34</sup> The author has from time to time encountered awards of attorneys fees by probate courts in the Southeastern United States (within the penal sums of existing bonds). Even though the case law in Georgia is clear that attorneys fees can only be awarded under the requirements of O.C.G.A. § 10-7-30, because the amount did not justify the cost of an appeal, the awards have not been appealed, but paid by the surety.

<sup>35</sup> 41 S.C. Law, 109, 7 Rich. 109. *Mitchell* was authoritatively cited in *North River Insurance Company v. Claar*, 299 S.C. 8, 282 S.E.2d 8 (1989) where claim was made against a motor vehicle/wholesale dealer surety bond. The penal sum of the bond was for \$15,000.00 and the bond was required by S.C. Ann. § 56-15-320. Thirty-eight persons suffered losses by the motor vehicle dealer and the surety tendered its

\$15,000.00 penal sum in connection with an interpleader action. The statute required a surety bond in the penal amount of \$15,000.00. The statute also provides that a new bond or proper continuation certificate must be delivered each year, but specified that regardless of the number of years a bond remains in effect the "aggregate" liability of the surety for any and all claims is limited to \$15,000.00 on each bond and to the amount of the actual loss incurred. The bond in the *Claar* case specified that the surety is required to indemnify the owner of a motor vehicle as aggrieved by any fraud, . . . or violation by the principal in the amount of \$15,000.00 provided that the aggregate liability of the surety for any and all claims is limited to \$15,000.00 or to the amount of the actual loss incurred whichever is less."

The *Claar* court observed that a statutory bond includes the provisions of the statute creating the obligation. See also *Nationwide Mutual Insurance Company v. Howard*, 288 S.C. 5, 339 S.E.2d 501, 504 (1985).

The *Claar* Court held that the meaning of the words in the statute, the aggregate liability for the surety for any and all claims is limited to \$15,000.00 on each bond, caps the liability of the surety irrespective of the number of people injured and the amount of their claims. The Court also noted that the phrase "an owner" in the statute does not create an ambiguity such that surety would be liable for the penal sum of its bond to each owner. Again the *Claar* Court referred to the language in the statute and embraced the manifest intent by the legislature in South Carolina that the surety's maximum liability would be the penal sum of its bond.

<sup>36</sup> *Mockey v. Coaze*, 18 How (U.S.) 100, 104-105, 15 L.ed 299 (1855).

<sup>37</sup> See *Hutson v. Jenson*, 110 Wis. 26, 85 N.W. 689 (1901); 39 AmJur 2d § 232 Retainer of Assets Doctrine

<sup>38</sup> 104 N. 146, 181 A.2d 628 (1962).

<sup>39</sup> 115 Ariz. 507, 566 P.2d 308 (1977).

<sup>40</sup> An illustrative analysis of these concepts is set forth in the case *National Grange Mutual Insurance Company v. Prioleau*, 269 S.C. 161, 236 S.E.2d 808 (1997). This was a declaratory judgment by a securities dealer's surety, statutory surety against its principal. A \$10,000.00 bond was issued for a broker dealer and required to be drawn in favor of all persons aggrieved by the principal's noncompliance with the South Carolina Uniform Securities Act. The bond in the *Prioleau* case was renewed or continued in effect for periods of one year over the course of several years. Each of two years while the bond was in affect, a loss of \$10,000.00 a year was suffered, that is \$20,000.00 for two years was sustained. The surety conceded that under its bond it was liable for \$10,000.00. The principal argued that the surety under the bond would be responsible for up to \$10,000.00 during each registration period if losses occurred in each such bond period.

The *Prioleau* Court observed that under the South Carolina statute the bond is a continuous obligation and shall cover the full period or periods of registration and ruled that it does not terminate at the end of a registration period and thereafter renew and create an additional obligation. The *Prioleau* Court reasoned that if a cash bond was posted by the principal the cash would simply be held from year to year with no additional sum being on deposit each year and thus the maximum penalty would always be the amount of cash posted. The *Prioleau* Court over a strong dissent noted that statute expressly limited the amount of the bond and expressly limited the liability of the surety to the "aggregate" penal sum of the bond. The statutes requiring probate bonds and other miscellaneous bonds throughout the United States, seldom contain any language that expressly limits its liability of a surety to the "aggregate" penal sum of its bond.

<sup>41</sup> See also *N. Ray Rising*, 201 Misc. 869, 112 N.Y.S.2d 349 (1952).

<sup>42</sup> *Gazaway v. Continental Insurance Co.*, 216 Ga. App. 125, 453 S.E.2d 91 (1995).