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TWO CURRENT ISSUES UNDER THE INDEMNITY: (1) THE ECOA AS A DEFENSE TO THE INDEMNITY AGREEMENT; AND (2) SURETY'S OFFENSE - USE OF THE INDEMNITY TO SETTLE AFFIRMATIVE CLAIMS

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PART I
DOES THE EQUAL CREDIT OPPORTUNITY ACT PROVIDE A SPOUSE WITH A DEFENSE TO THE INDEMNITY AGREEMENT?

Indemnitors and their attorneys are an imaginative group, and they have come up with a new defensive argument to assert against claims under the General Agreement of Indemnity. This defense typically is asserted by a wife of the president of the construction company, and she contends that the surety violated the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691 *et. seq.* The wife usually sets forth an argument along these lines: she swears she has no ownership interest in the contractor-principal, that she has never been an officer, director or employee of the contractor, and she was told by the agent of the surety that she is required to sign the indemnity agreement. She goes on to affirm that she has never provided any financial statement to the surety, that the surety never inquired about her independent financial condition, and thus she argues that the surety acted improperly in demanding her signature simply because she is the spouse.

The ECOA provides that it is unlawful for any creditor to discriminate against any applicant with respect to a credit transaction on the basis of sex or marital status. 15 U.S.C. § 1691(a)(1). As might be imagined, the Act has been used both offensively (claims in which affirmative relief is sought from a lender), and defensively (raised as a defense when a lender sues a debtor). It has also generated some unusual litigation. For example, in *Rosa v. Park West Bank & Trust*, 214 F.3d 213 (1st Cir. 2000), a bank customer who was biologically male sought to obtain a loan. The lender refused to give him an application, telling him that he had to go home and return dressed in male clothing. The District Judge threw out the case, but the First Circuit reversed, holding that the claim did state a cause of action.

More typical of the litigation seen arising under this statute is *Tease v. First Union Home Equity Bank*, 974 F. Supp. 1408 (D. Kan. 1997). There, a wife brought an action against the Bank alleging various violations of ECOA in connection with a loan to her husband which she cosigned. The Bank moved to dismiss the claim for failure to state a relief. The wife alleged that the Bank had required her to sign a promissory note on a loan for which only her husband had applied. She further stated that despite the fact that her husband had adequate creditworthiness to qualify the loan by himself, the Bank had required her to sign a mortgage pledge as collateral, not as a means of protecting itself but, she alleged, out of a discriminatory animus. The Court held that the wife's allegations were sufficient to state a claim. It is easy to see an analogous defense being raised to an action for indemnification.

One cannot help but wonder what later happened with the litigants in the *Tease* case; there is no further case law arising out of the claim. This suggests that since there was never an appeal after a trial, the case likely settled. If so, one would suspect that the allegations in the wife's complaint gave her leverage in settlement negotiations.

The regulations adopted under ECOA are tremendously important. Some of them create an exposure to the surety, and others provide a defense. The spouse who has been sued on an indemnity agreement will point to Rule 202.7(d)(1) to show a violation of the Act. This Rule provides that "a creditor shall not require the signature of the applicant's spouse . . . if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested.

If these requirements were applied to a surety they could open up a diverse set of issues. For example, did the surety independently review the husband-president of the contractor for his creditworthiness alone, and without the spouse? What assets did the wife bring which make the extension of credit possible? Did the underwriter independently review and rely upon the credit of the wife? Did the surety automatically demand the wife's signature to the indemnity agreement? One can imagine a very fertile ground for litigation of these questions. It is also easy to see how the indemnitors would want to play out defenses under the ECOA to the detriment of the surety.

Some courts have recognized that one of the purposes of the ECOA is to protect guarantors or sureties who suffer the result of discrimination. *See, Douglas County Nat'l Bank v. Pfeiffer*, 809 P.2d 1100 (Col. App. 1991) (wife who executed as surety to note of spouse was allowed to use ECOA as both a defense and as a counterclaim) . A wife perused by a surety may well argue that sureties are in the business of extending credit, and indeed, many sureties have time and again stated that they are not in the insurance business, but rather are in the credit business. Thus, she will contend that as a guarantor on a credit transaction to the surety, she should not be liable where the surety demanded her indemnity only because she was married to the president of the contractor/principal.

A SURETY BOND IS NOT A CREDIT TRANSACTION

The good news is that in those cases when an ECOA defense has been raised against the surety's demands under the General Indemnity Agreement, the indemnitors have lost. Even though there are a host of issues, arguments and positions that could be raised against the surety, the surety has prevailed. The courts have correctly recognized that the surety is not a "lender" as to which the ECOA and similar state statutes are directed.

The most powerful of these cases is *Capital Ind. Corp. v. Aulakh*, 313 F.3d 200 (4th Cir. 2002). This was a case of first impression in the Federal Appellate Courts and squarely dealt with the issue of whether the ECOA and its state analogues applied to surety bonds. The Court held that a surety bond does not constitute a credit transaction under these statutes, and affirmed the District Court's grant of summary judgment.

In *Aulakh*, the indemnitors contended that the indemnity agreement was

unenforceable against one or both of them because the wife's signature was procured in violation of ECOA and the Virginia Equal Credit Opportunity Act, Va. Code Ann. 59.1-21.19, *et seq.* They recited what is a very common situation in dealing with construction companies. The wife, they contended, had no involvement in the business of the contractor other than the fact that she was married to the sole shareholder. They contended that she was not active in the business and that the surety required she sign the indemnity agreement solely because of her spousal status. This, they argued, constituted credit discrimination under both the Federal and Virginia statutes. The Court noted that perhaps the main purpose of the ECOA was to eradicate discrimination against women. Since the surety had not offered any reason why it was requiring the wife to sign the indemnity agreement, the issue then turned to whether the statutes were applicable to sureties.

The key question before the Court was whether the surety bond arrangement between the contractor and Capital was a "credit transaction" under the state and Federal statutes. Both statutes define "credit" as "the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment. . . ." 15 U.S.C. § 1691A(d); Va. Code Ann. § 59.1-21.20(b). The statutes go on to define "creditor" as "any person who regularly arranges for the extension, renewal, or continuation of credit." 15 U.S.C. § 1691A(e); Va. Code Ann. § 59.1-21.20(c). The Court found that the regulations under the statute supported the surety's case. The regulations provide that a "credit transaction" is "every aspect of an applicant's dealings with a creditor regarding an application for credit or an existing extension of credit." 12 C.F.R. §§ 202.2(m) (2002).

The Court in Aulakh held that these provisions of the statute make it clear that the essence of the "credit" relationship is one that provides a right to defer payment on a debt or other obligation. 313 F.3d at 203.

The indemnitors argued that when the surety provided a bond, it "arranged" for subcontractors and suppliers to extend credit to the principal. While they acknowledge that the bonds do not necessarily extend the right to incur debt and defer payment beyond the sub's or supplier's payment terms, they pointed out that the bond gives the contractor the right to incur debt to subs and suppliers that is not COD or paid in advance, a right which the principal would not have without the bond.

The Court in *Aulakh* rejected this line of reasoning. It noted that there was nothing in either the bond or the indemnity agreement entitling anyone to defer payment of any debt. In order to become a credit transaction, the surety must have granted the contractor the right to defer payment, something which simply did not occur. Merely because the bond may have allowed the contractor to negotiate different contractual obligations and terms with suppliers did not give the contractor the right to defer payment. The Court found that the surety bond worked to ensure that there was no interruption or deferral of the cash flow, and then concluded that "It operated as an insurance instrument rather than a debt or credit instrument." 313 F.3d at 204.

Aulakh included one final cautionary note. It expressly stated that the holding should not be read to suggest that a surety bond can never operate as a "credit transaction" as defined in either a different statute or in a different set of circumstances. This Court simply

concluded that under the definition of the ECOA, the surety bonds in the instant case did not qualify as a credit transaction.

Finally, the Court concluded with this limit on its holding:

> Given the sophistication of modern capital markets, virtually all financial instruments have an inherent plasticity that allows them to operate in a variety of capacities. The linkages between insurance and debt markets, moreover, render suspect any attempt to develop a precise rule that separates such instruments into one category or another. The law forever plays catch-up with capital markets.

313 F.3d at 204.

Other courts which have been confronted with this issue have reached the same result. In *Universal Bonding Ins. Co. v. Esko & Young, Inc.*, 1991 W.L. 30049 (N.D. Ill. 1991), the District Court granted the surety's motion for summary judgment on the indemnity agreement and rejected the ECOA defenses raised by the indemnitors. The Court did this pointing out that the surety did not extend any right to the contractor to defer debt, did not incur debt and defer payment, and did not purchase anything and defer payment thereof. Thus, it concluded that there was no "credit" under the Act. 15 U.S.C. § 1691A(d). The Court found that the mere fact that an analysis of credit may be one of the considerations in the underwriting process, it did not turn the surety bond arrangement into a "credit transaction" as defined in the Act.

Cincinnati Insurance Co. v. Smigiel, 1997 U.S. Dist. LEXIS 6694 (E.D. Mich. Mar. 20, 1997), reached the same result where the bonds were workers compensation self-insurance bonds. Here, the principal had maintained self-insured status with the State of Michigan by letters of credit. These letters of credit were replaced by surety bonds. The Court concluded that definitions under the ECOA illustrated that the workers compensation bonds were not a credit transaction, and granted the surety's motion.

Completely aside from the issue of whether the surety is a creditor under the Act, is the question of whether a spouse signing a traditional bank note may use the statute as a defense. Another issue is whether the statute is a defense once its two year statute of limitations on affirmative claims has passed. The cases are in conflict. Some courts have found that the statute of limitations will bar defensive use of the Act, and further, that a violation of the Act does not void the underlying agreement. See, the cases collected at *Boone Nat'l Savings & Loan Ass'n F.A. v. Crouch*, 2001 W.L. 182415 (Mo. App. W.D. 2001); and *Hammons v. Ehney*, 924 S.W.2d 843 (Mo. 1996).

WHAT ABOUT THE FINANCING AGREEMENT?

When the surety finances the principal, it will typically prepare a package of documents which include a financing agreement and a promissory note. In order to proceed with financing, the surety will then require the principal and indemnitors - often including a spouse - to execute the promissory note. No cases have yet been litigated over the question of whether this financing arrangement constitutes a credit transaction under ECOA, and whether or not a spouse may have a defense to the promissory note. There are obviously a great many arguments that can be made on both sides of this issue, and it is not the purpose of this paper to try to offer a prediction as to how the courts will ultimately decide this issue. A few practical points are in order, however. These are:

- **Rely upon the wife's jointly held assets**. Where assets are jointly held, or where the spouse has title to the family home, the surety can quite easily justify demanding the spouse's guarantee. However, in order to do this, you must know that there are, in fact, jointly held assets, and this means asking the husband what assets there are. First, these can include joint checking accounts, brokerage accounts, real estate, and so forth. Second, in a great many instances, a husband may have transferred the home to his wife, and the surety is then going to be able to demonstrate it did indeed rely upon the wife's assets.

  The point which must be emphasized, however, is that the surety will have to obtain enough information to be able to make a case that it independently relied upon the spouse's credit and assets. Thus, it is prudent to obtain current financial information to pull in those assets.

- **Forget the promissory note and rely on the indemnity agreement.** The financing agreement and promissory note which are typically in the financing package are the instruments which will trigger an attack under the ECOA. The surety could give thought to the possibility of obtaining a promissory note only from the principal, and having the spouse sign off on a consent and an agreement that by entering into the financing arrangement, whatever obligations may have arisen under the indemnity agreement are valid debts, and that entering into the financing agreement does not constitute an affirmative defense to the indemnity agreement.

Sureties have had great success in defeating spousal claims under ECOA. The cases that have been decided are clear, well-reasoned, and persuasive.

The danger to the surety may, however, be lurking in financing arrangements entered into between the parties after the bonds have been written. There is a serious danger that courts may well look at the financing agreement as a credit transaction under ECOA, and subject spousal defenses to full ECOA scrutiny. The best way to avoid this is to make a factual case that spousal assets were relied upon by the surety.

The indemnitor spouse may rely upon cases such as *Silverman v. Eastrich Multiple*

Investor Fund, LP, 51 F.3d 28 (3rd Cir. 1995). There, a creditor obtained a judgment by confession against loan guarantors, including a wife, in state court. The wife subsequently commenced an ECOA action against the creditor to bar it from enforcing the claim. The Circuit Court reversed the District Court, and held that even though the statute of limitations may have run on the wife's affirmative ECOA cause of action, it did not preclude her from raising the ECOA claim defensively to bar enforcement of the debt against her, and that she was entitled to assert this defense. The Circuit Court noted that the ECOA has from its inception prohibited requiring spousal guarantees. It then found that even though the ECOA had a statute of limitations of two years, the expiration of that statute was only for affirmative actions; no bar existed for utilization of the Act as a defense. The court then went on to hold that where the creditor violated the ECOA, its claim against the guaranteeing spouse was void. As the court stated:

> If plaintiff was required to sign said Guaranty without any reliance by the lender upon her creditworthiness, solely for the purpose of expediting a loan for her spouse and his business, that Guaranty cannot be enforced against her.

151 F.3d at 33.

PART II
THE SURETY'S RIGHT TO SETTLE AFFIRMATIVE CLAIMS OF THE PRINCIPAL

The surety is frequently confronted with the following scenario: a very belligerent, very aggressive, and very broke principal asserts that it has claims against the obligee (always worth multiple millions) which it is pursuing. The obligee has claims back against the principal and surety, often running in the seven figures. The surety investigates the principal's claims, and comes to the conclusion that they are weak and problematic. At the same time, the obligee's claims, while perhaps not crystal clear, nevertheless, have some strength to them.

The principal in this situation is in a "heads, I win - tails, you lose" situation. If the principal prevails against the obligee, there is enough money to repay the surety and the principal can skate free without any debt. On the other hand, since the principal is already insolvent, a judgment against it for another million or so does not make any difference. Frequently, the surety finds that it is in the best interest of the surety to resolve the claims with the obligee, but cannot because of the principal's claims. The question then arises whether the surety has the right to control and settle the principal's claims. The answer to this is yes.

The Indemnity Agreement. There are several significant paragraphs of the Indemnity Agreement which need to be kept in mind here. These are:

> The Indemnitors will exonerate, indemnify, and hold harmless the Surety against any and all liability . . . .

> To further protect, exonerate and save harmless the Surety, Indemnitors shall pay over to Surety . . . all sums of money which Surety shall pay or cause to be paid or may be liable to pay . . . such payment to be made by Surety as soon as Surety notifies Indemnitor to deposit such funds with the Surety. . . .
>
> The Indemnitors hereby assign, transfer, pledge and convey to Surety as collateral security, to secure the obligations hereunder . . . all their rights under the contracts, referred to in such Bonds, including their right, title and interest in and to . . . (4) all actions, causes of actions, claims and demands whatsoever which the Principal may have in any way arising out of or related to such Bond or contract covered by such Bond.
>
> The Surety shall have the exclusive right to decide and determine whether any claim, liability, suit or judgment made or brought against the Surety or the Indemnitors or any one of them on any such Bond shall or shall not be paid, compromised, resisted, defended, tried or appealed, and the Surety's decision thereon, absent fraud, shall be final and binding upon the Indemnitors.
>
> The Indemnitors hereby authorize the Surety in its sole discretion to do any of the following . . . (c) to take such other actions as the Surety may deem expedient to obtain release from liability under any such Bond.
>
> The Indemnitors hereby irrevocably nominate, constitute, appoint and designate the Surety or its designee as their Attorney-in-Fact with the right, but not the obligation, to exercise all of the rights of Indemnitors or any of them to make, execute and deliver any and all additional or other assignments, documents or papers . . . but also to the full protection intended to be herein given to Surety under all other provisions of this Agreement.

The Surety's Duty of Good Faith. There have been a number of cases addressing the right of the surety to settle claims on the principal. These cases typically focus on the assignment clauses in the Indemnity Agreement and the power of attorney given to the surety. In addition, of course, the surety has rights of equitable subrogation arising outside of the Indemnity Agreement. Finally, the surety in some instances does not have an assignment which is perfected under the Uniform Commercial Code. This can arise either because the surety never filed a UCC filing, or in any event, filed but the principal declared bankruptcy within the 90 day preference period, and the filing is ineffective. Nevertheless, the surety still should be able to settle the principal's affirmative claims.

As a beginning point, it should be emphasized that the surety certainly should conduct an investigation of the claim it wishes to settle and be able to demonstrate that it settled its principal's claims in good faith. The surety does not need to be able to demonstrate that its principal's claims have no merit whatsoever. In other words, it does not have to prove that the principal's claims are invalid under a summary judgment's standard, or that the principal's claims would fail on a full trial to a jury on the merits. It only needs to be shown that the surety investigated, and proceeded to settle for good and valid reasons; in other words that it settled in good faith.

One of the leading cases dealing with this issue is *Hutton Construction Co., Inc. v. County of Rockland*, 52 F.3d 1191 (2nd Cir. 1995). The contractor, Hutton, brought claims against the County on a number of grounds including damages for wrongful termination. The surety had incurred losses on the project and Hutton failed to indemnify the surety. As trial of the case was about to commence, a settlement was reached between the County, the engineers and the surety. The surety took the position it had settled on their own part, as well as Hutton, even though Hutton did not take part in the settlement agreement. On the basis of the settlement, the surety moved to dismiss the action and sought enforcement of the settlement agreement. Hutton opposed the settlement of its claims by the surety. The District Judge granted enforcement of the settlement agreement, and the principal/contractor appealed.

The Second Circuit agreed that the surety had the right to settle Hutton's claims. The indemnity provided that Hutton had assigned all of its rights growing out of their contract to the surety. The Second Circuit coupled the assignment clause and the attorney-in-fact clause and concluded that the surety had the authority to settle all claims on behalf of Hutton, including not only claims against the surety on the bonds, but also Hutton's affirmative claims arising out of its bonded contracts.

The indemnity agreement Hutton executed also had a "Settlement Clause," the right "to adjust, settle or compromise any claim . . . upon the Bonds." The Second Circuit agreed with Hutton that the Settlement Clause did not give the surety the power to settle affirmative claims. However, since that power was furnished by other provisions of the indemnity agreement, the court concluded that its absence from the Settlement Clause was of no moment. The *Hutton* case is important for many reasons; it is a straightforward, powerful opinion by a very respected Court of Appeals.

The good faith requirement was echoed in *General Acc. Ins. Co. of America v. Merrit-Meridian Construction Corp.*, 975 F. Supp. 511 (S.D. N.Y. 1997). There, the court observed that under the terms of the Indemnity Agreement, the surety had the right to make payment and settle all claims unless the principal requested that the surety litigate and posted collateral to secure the amount of any possible judgment and the expenses of litigation. It went on to note that "this right to make payments and settle claims is limited only by the [indemnity agreement's] obligation to settle claims in good faith. 975 F. Supp. at 515.

Merrit-Meridian emphasizes one additional point, and that is the surety's ability to use the demand for collateral as a basis to tell the principal that it is time to either put up or shut up. If the principal wants to litigate, it must take the financial risk, not the surety. If the

principal is financially incapable of providing collateral, then clearly the surety is the only party with a genuine financial stake in a potential loss, and the surety's good faith settlement will be upheld. The surety initiated this action to recover over $4,000,000 on its indemnity agreement, and the principal responded by asserting that amounts paid under both the payment and performance bonds were not owed.

The District Court held that the surety's actions in settling claims were warranted under the settlement and assignment clauses. Also, it concluded that under the assignment clause and settlement clause, the surety had the right not only to settle claims against the contractor, but it had the right to settle the contractor's affirmative claims against the owners as well. 975 F. Supp. at 519.

Although *Merritt-Meridian* primarily discussed payment bond claims actually paid, much of the language in there dealing with the surety's right to settle claims is quite helpful in analyzing the surety's right to settle the principal's affirmative claims. The court made it plain that the surety's right to make payments and settle was limited only by the obligation to settle in good faith. The court noted:

> Sureties enjoy such discretion to settle claims because of the important function they serve in the construction industry, and because the economic incentives motivating them are a sufficient safeguard against payment of invalid claims. The many parties to a typical construction contract - owners, general contractors, subcontractors and sub-subcontractors - look to sureties to provide assurance that defaults by any of the myriad of other parties involved will not result in a loss to all of them.

975 F. Supp. at 516.

Another powerful case dealing with a surety's right to settle the principal's claims is *James McKinney & Son, Inc. v. Lake Placid 1980 Olympic Games, Inc.*, 61 N.Y.2d 836, 462 N.E.2d 137, 473 N.Y.S.2d 960 (Ct. App. 1984). McKinney had contracted with the owner to erect a structure, and was terminated. Reliance took over the project and ultimately settled with the owner. Under the terms of the settlement, Reliance released the owner from all claims Reliance had, including any claims or causes of actions arising out of the McKinney contract for construction of the project.

Two years later, McKinney filed suit against the owner claiming damages, and the owner raised the defense that the claim had been released by Reliance. The Court held that under the terms of the indemnification agreement, all of the rights of the plaintiff arising out of the contract had been assigned to Reliance, that McKinney was no longer the real party in interest, that these claims belonged to Reliance, and that McKinney had no right to assert any additional causes of action. 473 N.Y.S.2d at 962.

Recognition of the powerful rights given to the surety and enforceability of these rights has a history that is over 50 years long. One final case is *Compania de Remorque y Salvamento, S.A. v. Esperamce, Inc.*, 187 F.2d 114 (2nd Cir. 1951). This case involved

a claim made by the obligee against the surety and principal. The surety settled by paying money to the obligee and the surety also gave the obligee a release. The court held that the principal had assigned all of its rights to the surety. The court held that it was clear that the indemnity agreement gave the surety the power to settle the suit, including the power to decide what should be done with claims the principal was making against the obligee. The court recognized that it was in the surety's best interest to reduce the amount it had to pay by providing the obligee with a release of the principal's demands.

The principal may contend that where the surety asserts a right to settle affirmative claims based on the assignment clause, then the surety's acts must be governed by the Uniform Commercial Code. This can raise two obstacles. First, there is the question of whether or not the indemnity agreement was recorded under the Uniform Commercial Code, and recorded prior to the 90 day preference window. Second, the principal may argue that the surety's duties and obligations are burdened with the UCC's requirements related to this position of collateral. Even those principals who may feel they are bound by *Hutton*, *Supra.*, will take a clue from what the principal did in *Hutton*. There, the question of whether the collateral was handled in accord with the UCC's requirement was not addressed because it was raised for the first time on appeal, 52 F.3d at 1193, but the case could provide a road map to the principal as to how to raise it.

There are two responses to issues raised involving the UCC. The first is that the surety's rights under the indemnity agreement are not governed by their Code. UCC § 9-109(d)(6) provides: "Inapplicability of Article. This Article does not apply to: (A) Assignment of a right to payment under a contract to an assignee that is also obligated to perform the contract." Since the principal's assignment to the surety arose in connection with the surety's duty to perform the contract, Article 9 of the UCC does not apply. The official comments to the Code make it clear that the exclusion is designed to take out of Article 9 of the UCC assignments of receivables that which, by their nature, do not concern commercial financing transactions. Official Comment 12. An assignment to a party with a duty to perform is not a financing transaction, and simply not governed by the Code.

There are a number of cases addressing the point that the surety's rights of assignment are outside of the UCC. This rule was recognized by the Florida Supreme Court in *Transamerica Insurance Co. v. Barnett Bank of Marion County, N.A.*, 540 So.2d 113 (1989). This case involved resolving claims in court as to who had priority to contract balances. The combatants were a bank which had filed its statements under the Uniform Commercial Code and the surety. Although the case is, perhaps, better known for its recognition of the surety's right of equitable subrogation, it also deals with the surety's right of assignment from a contractor. The court concluded that the surety's assignment was not governed by the UCC, since it is an assignee required to undertake performance of the contract. The court noted that the surety's assignment is contingent on performance by the surety in the event of default. The court found that this contingent assignment based on contractual performance sharply contrasted with the non-contingent assignment to a financier which does not call for performance. 540 So.2d at 116. *See also*, *National Shawmut Bank of Boston v. New Amsterdam Cas. Co.*, 411 F.2d 843 (1st Cir. 1969).

There is always a minority rule, and in this case, Texas supplies it. The court in *Associated Ind. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276 (Tex. 1989), held that the Code prohibited a surety from disposing of collateral, including any causes of action, in a commercially unreasonable manner. Without going into all of the Code requirements, suffice it to say that the requirements under the Uniform Commercial Code are greater than those under the indemnity agreement, where the surety only has to settle in good faith. (The *CAT* case dealt with former UCC Code § 9-504. This section has been revised into new sections, primarily UCC §§ 9-610, 9-611 and 9-615.)

Finally, the surety can assert that its rights of equitable subrogation mean that the surety, not the contractor, is the real party at interest, and the surety has the right to recover from the owner. See: <u>The Surety's Subrogation Rights</u>, Bacharach and Burch, Law of Suretyship, ABA and its bibliography.