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**- JUDICIAL EXPANSION OF THE PROBATE SURETY'S  
OBLIGATION -  
Where There's an Estate (with or without a will),  
Courts Find a Way**

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**--Judicial Expansion of the Probate Surety's Obligation--  
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**--Judicial Expansion of the Probate Surety's Obligation--  
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**I. Introduction**

The Bible quotes the servant, Job, in his reverence to God as follows:

***"Give me, O' God, the pledge you demand. Who else will put up security for me? Job 17:3 (New International Version).***

Those of us who study the Bible—interpret this passage as a commitment of faith by His most faithful follower, Job. But those of us who also deal with surety claims have become cynical and paranoid about claimants and courts—particularly with respect to commercial bonds and specifically probate bonds for estates. The later see a statement like this and fear that bond principal and obligees view sureties as having the unlimited resources of God and responsible for unlimited actions by the fiduciaries they bond, before, during, and after the bonds are issued. Of course this paranoia leads to the wise counsel in another Biblical passage:

***"He that is surety for a stranger shall smart for it: and he that hateth suretiship is sure."*** Proverbs 11:15 (King James Version).

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This presentation addresses recent cases that have endeavored to (our collective dismay), expand the obligation of the commercial surety in probate court settings to unreasonable and certainly unintended lengths. So that you will not be totally discouraged, there is some discussion of a few cases that have resisted the temptation to hold the surety responsible for everything.

It is important to remember that the statutory schemes in the fifty states for probate estates vary widely. There are differences not only in statutory language, but also in underlying political, policy, and individual jurist interpretations. It goes without saying that the case interpretations in one jurisdiction will not necessarily be applicable in another jurisdiction. But the decisions in these cases are instructional and informative—particularly in the jurisdictions where they were rendered and may be helpful to understand the perspective that may be advanced in a jurisdiction where the law is not developed.

**II. Foundations of Surety's Commercial Probate Bond Expectations**

There are several understood intentions of the surety when it issues a bond for a probate fiduciary. Some of these foundations follow. Citations to these principles are found in many probate codes and decisions, and therefore citations will not necessarily be provided in this section.

***“The contract of a surety sets the limits of the surety's liability.”<sup>1</sup>***

***“The scope of a surety's liability is determined by the intent of the parties.”<sup>2</sup>***

***“The terms and conditions upon which one becomes a surety are to be ascertained from the instrument creating that undertaking construed in reference to the usages of business, the object sought to be accomplished, the relations of the parties to each other, and the attending circumstances.”<sup>3</sup>***

***“The scope of the contract between the parties and the court is that the fiduciary and the surety stand bound to perform the statutory conditions required of the fiduciary set out in the law.”***

***“The obligation of a surety on a probate bond is the obligation of the principal.”<sup>4</sup>***

***“Liability on a probate bond given to perform the statutory conditions is limited to the requirements of the statute, and if more be added than the law requires, although it will not vitiate the whole bond ... yet no breach can be assigned in any part of the condition not included within the requisitions of the statute.”<sup>5</sup>***

***“Where a bond is given to perform the statutory conditions, liability will be limited to the obligations that the fiduciary properly assumes under the statute, even though a Probate order would seem to require more.”***

### **III. Surety Liability for Acts Outside of Bond Period**

#### **A. Liability of Surety for acts by principal before bond issued.**

There is, unfortunately, a line of cases<sup>6</sup> holding sureties liable for acts and misdeeds performed by their bonded principals before they were bonded and indeed

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<sup>1</sup>*Peerless Ins. Co. v. South Boston Storage & Warehouse, Inc.*, 397 Mass. 325, 327, 491 N.E.2d 253 (1986). For more information on the penal sum limits of bonds, See *The Law of Probate Bonds*, Chapter 10 (William A Downing & Jeffrey M. Frank Editors 2001).

<sup>2</sup>*Peerless Ins. Co. v. South Boston Storage & Warehouse, Inc.*, 397 Mass. 325, 327, 491 N.E.2d 253 (1986).

<sup>3</sup>*Roger Williams Grocery Co. v. Sykes*, 357 Mass. 485, 488-489, 258 N.E.2d 553 (1970), quoting from *Miller v. Perry*, 333 Mass. 155, 158, 129 N.E.2d 143 (1955).

<sup>4</sup>*Bassett v. Fidelity & Deposit Co.*, 184 Mass. 210, 214, 68 N.E. 205 (1903).

<sup>5</sup>*Hall v. Cushing*, 26 Mass. 395, 9 Pick. 395, 403 (1830)

<sup>6</sup> See *Liability of Sureties on Bond of Guardian, Executor, Administrator or Trustee for Defalcation or Deficit Occurring Before Bond was Given*, 82 ALR 585 (1933). See also *Law of Probate Bonds*, Chapter 6 (William A Downing & Jeffrey M. Frank Editors 2001)

even before an estate was created.<sup>7</sup> A discussion of several recent cases follows wherein claims were made for liability of the principal and surety for acts that occurred before the estate or bond was established or issued respectively.

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The most extreme of these new cases is **Wood v. Tuohy**, 67 Mass. App. Ct. 335, 854 N.E.2d 96 (2006), where a conservator misused substantial amounts of the ward's property before becoming conservator and for more than a year after becoming conservator. The **Wood** Court held Western Surety Company liable for more than 2/3 of its \$600,000 bond provided for the conservator for the amounts misappropriated by the bonded principal before and after the fiduciary was appointed and the bond was issued. Like many of the other cases involving pre-appointment liability, the principal in **Wood** obtained a power of attorney from her future ward and began to transfer/pilfer her assets using the power of attorney before being appointed as her conservator.

Both the trial court and the court of appeals in **Wood** ruled that Western Surety's bond covered pre-estate and post estate actions by the conservator:

The **Wood** trial judge concluded (1) that the order appointing the conservator "informed" Western Surety, and it should have known, despite its stipulated lack of actual knowledge, that there existed questions regarding the conservator's conduct before her appointment; (2) that the order, requiring an accounting from a period of more than a year before appointment as conservator, was intended to expand the bond, and thus the surety's liability, to cover preappointment conduct, dating from the time the ward came to live with her; (3) that the conservator owed the ward's estate \$406,862.38 plus interest from January 1, 1998, as a result of her misapplication of Anderson's funds; (4) **that Western Surety was responsible for the conservator's conduct with regard to whatever of the ward's assets came into her possession prior to her appointment that were still under the conservator's control as of the**

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<sup>7</sup>The decisions in the following cases support retrospective liability for the surety for acts before its bond was issued. *Matthews v. Mauklin*, 142 Ala. 434, 4 Am. Ann. Cas. 344, 38 So. 849 (1905); *Beakley v. Cunningham*, 112 Ark. 71, 165 S.W. 259 (1914); *State v. Hunter*, 73 Conn. 435, 47 A. 665 (1900); *Pfeiffer v. Knapp*, 17 Fla. 144 (1879); *Employers Liability Assur. Corp. v. State*, 163 Md. 119, 161 A. 249 (1932); *McIntire v. Linehan*, 178 Mass. 263, 59 N.E. 767 (1901); *Lindquist v. Thang*, 188 Minn. 437, 247 N.W. 506 (1933); *Mitchell v. Columbia Cas. Co.*, 111 Mont. 88, 106 P.2d 344 (1944); *Wilkins v. Deal*, 128 Neb. 78, 257 N.W. 486 (1934); *Century Indemnity Co. v. Maryland Cas. Co.*, 89 N.H. 121, 193 A. 221 (1937); *Estate of Camarda*, 103 Misc.2d 362, 425 N.Y.S.2d 1012 (1980); *Humphrey v. American Surety Co.*, 213 N.C. 651, 197 S.E. 137 (1938); *Continental Cas. Co. v. Ackerman* 52 Ohio App. 15, 2 N.E. 2d 778 (1935); *Baird v. Patterson*, 172 Okla. 158, 44 P.2d 90 (1935); *Grandy v. Williams*, 147 Or. 409, 34 P.2d 622 (1934); *Commonwealth v. Searle* 254 Pa. 474, 98 A. 1056 (1916); *McDowell v. Caldwell*, 7 S.E. Eq. 43, 16 Am. Dec. 635 (S.C. App. 1827) *Ward v. Maryland Cas. Co.*, 140 Tex. 124, 166 S.W. 117 (1942); *Newcomb v. Ingram*, 211 Wis. 88, 248 N.W. 171 (1933). See also the following cases where liability appears to require solvent principal at the time or after the bond was issued. *Arnold v. Maryland Cas. Co.*, 53 Ga. App. 844, 187 S.E. 129 (1936); *United States Fidelity & Guaranty Co. v. State*, 40 Ind. App. 136, 81 N.E. 226 (1907); *Munsell's Guardianship*, 239 Iowa 307, 31 N.W. 2d 360 (1948); *Cooper v. Howell*, 305 Ky. 12, 202 S.W.2d 740 (1947); *Reilly v. American Bonding Co.*, 138 La. 315, 70 So. 237 (1915); *King v. Jones*, 971 S.W.2d 916 (Mo. App. 1998); and *Owens v. McMahan*, 122 Wash. 191, 210 P. 200 (1922).

**date of her appointment in March, 1999;** and (5) that the conservator became a constructive trustee of assets misappropriated between December 1, 1997, and March 31, 1999, at least with respect to those over which she still had control as of the date of appointment. These misappropriations amounted to \$358,022.62, and the judge found that the conservator had a duty to reconvey them to the estate and, having failed so to do, she failed to carry out her duties as conservator. ***In short, the judge ruled that Western Surety became liable for its principal's pre-appointment misdeeds but only to the extent of assets over which she had control at the time of her appointment.*** Unfortunately the court of appeals expanded even this holding when Western Surety appealed as set out below.

On appeal, the **Wood** Court set forth several rationales for holding a surety liable for property belonging to the ward obtained by its principal before an estate had been created<sup>8</sup>. But as the basis for its decision, the **Wood** court “interpreted”/held that the Massachusetts statute requiring an inventory by the conservator imposed an obligation on a conservator to disclose all property of the ward which came into the conservator’s possession before and after appointment. Of course there is no such language in the inventory statute at issue in **Wood**. After leaping that construction canyon, it was only a skip for the **Wood** court to hold that the fiduciary’s failure to inventory property she had converted prior to her appointment, rendered the surety liable for said property—apparently without regard to whether such property still existed when she was appointed as conservator.

The **Wood** decision does not reveal evidence that this pre-appointment-converted-property still existed when the conservator was appointed. Moreover there is a suggestion that the principal’s personal possessions at the time of her appointment and afterwards were about \$150,000.00 less than the judgment. The surety in **Wood**

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<sup>8</sup>The claimants in **Wood** argued, on authority of *Choate v. Arrington*, 116 Mass. 552 (1875), *McIntire v. Linehan*, 178 Mass. 263, 59 N.E. 767 (1901), and *Koutoudakis v. Great Am. Indem. Co.*, 285 Mass. 466, 189 N.E. 621 (1934), that Western Surety is responsible for any assets Vaz received before, as well as after, the execution of the bond, and before, as well as after, her appointment as conservator. Even though the **Wood** court accepted the principle it rejected the authorities and basis propounded by the claimants—“We think that reliance on these authorities is misplaced and that the cases are inapposite. In the first two cited cases, the surety was charged for defalcations occurring prior to execution of the bond, but not, as here, for matters occurring before appointment of the fiduciary. *Choate v. Arrington*, *supra* at 556-557. *McIntire v. Linehan*, *supra* at 265-266, 59 N.E. 767. In *Koutoudakis v. Great Am. Indem. Co.*, *supra* at 467, 189 N.E. 621, the surety was charged with maladministration of property not technically a part of the estate, but which came into the fiduciary's hands, again after appointment.”

The claimants in **Wood** also argued that the trial judge was correct in her judgment that Western Surety should be held liable for defalcations occurring before Vaz's appointment and before Western Surety issued its bond, because a condition of the Probate and Family Court order under which Vaz was appointed required that she account for all of Anderson's property that had come into her possession from December 1, 1997, and the order established the scope of both Vaz's and the surety's engagement. They contended that, even though Western Surety had no actual knowledge of the original probate order requiring Vaz to account for property that came into her possession from December 1, 1997, forward, because the requirements were easily susceptible of being known by Western Surety, therefore Western Surety should pay to the extent of property remaining in Vaz's hands or under her control as of the date of her appointment. The **Wood** court expressly rejected this argument—dispensing with any requirement to show converted property remaining in the fiduciary's hands upon appointment.

stepped up to the plate and essentially said “we are liable for anything in the estate she took after appointment and anything she took prior to her appointment still in her possession after her appointment, and we are liable for any other property/money she obtained from any source after appointment which she could have returned to the estate as restitution for pre-appointment conversions.” This tender by the surety wasn’t enough.

The **Wood** Court cited an 1816 case as the foundation for its view that a probate court could hold a fiduciary and its surety liable for the pre-estate misdeeds of the fiduciary.<sup>9</sup>

The **Wood** holding that liability is determined by the unreported assets not detailed in the inventory constitutes a “forfeiture” created by the mere issuance of a bond—and the amount may be based on nothing that existed at the time or after the bond was issued. In light of the court’s “hocus pocus” play with statutory language judicially imposing a duty to account for the ward’s property the conservator obtained by the principal through a power of attorney, before she was bonded and imposing liability on a surety by default if the accounting is not made irrespective of whether the property even existed, it is no wonder that probate bonds are harder and harder to obtain.

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More recently the court in **In Re Estate of Berg**, 2007 WL 756732 (Mich. App. March 13, 2007) ruled that pre-death power of attorney transfers by the administrator were possible assets of the estate. The **Berg** case did not involve a judgment against the surety, but nevertheless addressed claims that property transferred to the fiduciary and his relatives pursuant to powers of attorney by the decedent before his death constituted property of the estate. The **Berg** court ruled that (because there were fact questions about the circumstances and possible undue influence exerted by the fiduciary and his relatives over the decedent in connection with these transfers) summary disposition of the claims in favor of the fiduciary was improper.

One transfer involved use of a power-of-attorney to add the fiduciary and his brother to a couple of the deceased’s financial accounts with a right of survivorship.

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<sup>9</sup>*Dawes v. Edes*, 13 Mass. 177 (1816). The **Wood** Court analyzed this case as follows: “In *Dawes*, the sureties argued, as here, that with respect to the statutory condition for administrators, the requirement that an administrator render an inventory and account of such property “*which have or shall come* to the hands of the administrator” (emphasis original), signaled a legislative intent to charge a surety for defalcations occurring only after the appointment of the administrator, and that the statutory condition should have no retrospective operation covering property in the hands of the administrator prior to appointment. The *Dawes* court disagreed, ruling that the condition of the bond, as prescribed in the statute, was to cover everything belonging to the estate of the deceased that had “come to the hands of the administrator since the death of the deceased, as well before as after the execution of the bond.” Accordingly, the surety was liable for any property that had come to the administrator’s hands, before as well as after the execution of the bond and the granting of administration. While the language of G.L. c. 205, § 1, is somewhat different from the statute at issue in *Dawes*, and *Dawes* involved a fiduciary other than a conservator, the principle of retroactive liability for both principal and surety is clearly established.”

The other transfer involved the deceased's purchase of expensive farm equipment for the fiduciary's father shortly before his death. The **Berg** court held that the presumption of undue influence created a fact question which precluded summary disposition of the claim. The **Berg** court observed that even though the deceased's will bequeathed all his farm equipment to the fiduciary's father the issue was not moot, because if the equipment had not been purchased the funds used for the purchase would have been distributed to the other will beneficiaries evenly. As a result the Michigan Court in **Berg** ruled that pre-estate transfers by and to the ultimate fiduciary and his relatives could be part of the estate for which the administrator (and any surety for an administrator) could be liable.

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In **Manson v. Goss** 2003 WL 1876965 (Tenn.Ct.App. April 15, 2003), Western Surety Company was slapped with a judgment against its \$250,000.00 penal sum bond which included \$35,700.56 in funds misappropriated by defendant Anthony L. Goss before the death of the deceased through a power of attorney.<sup>10</sup>

The **Manson** court recited two rationales that courts have relied upon to find coverage for defalcations committed prior to the bond's execution. The first is that a fiduciary who misappropriates or misapplies assets has, subsequently, a continuing duty to reconvey those assets to the estate. A court-fiduciary who fails to recover such misappropriated assets from himself is continually in breach. See *Bromen v. O'Connell*, 185 Minn. 409, 241 N.W. 54 (1932)(the duty to make good a loss by defalcation is a continuing one); *Beakley v. Cummingham*, 112 Ark. 71, 165 S.W. 259, 263 (1914) (guardian's failure to preserve assets of the estate until accounting was a continuing breach); 28 C.J. 1293, § 492; Cf. *National Surety Corp. v. Ellison*, 88 F.2d 399 (8th Cir.1937); *Mitchell v. Columbia Casualty Co.*, 111 Mont. 88, 106 P.2d 344 (1940)(acknowledging theory of liability predicated upon continuing breach).

The **Manson** Court stated that the "second, distinct, rationale ... is based upon the trustee's breach of his duty to account for and his duty to pay over the assets of the estate during the term of the later-filed bond. The surety on the later-filed bond is not held liable for the defalcations or misappropriation, committed prior to the bond's issuance, *per se*; rather, the surety is held liable for the failure to account for those misappropriated or converted funds and to pay them over *during* the term of the later-filed bond." See *In re Foodsource, Inc.*, 130 B.R. 549, 562-63 (N.D.Cal.1991).

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**Fidelity and Deposit Co. of Maryland v. Colonial Bancgroup, Inc.** 2003 WL 23324215 (Nov 30, 2003 M.D.Ala.) is another reported case revealing that Probate Courts hold a surety responsible for property taken by a fiduciary prior to his appointment—although the issues in this case were not about the surety's liability for

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<sup>10</sup>This outrageous judgment also included \$88,589.89 in prejudgment interest from the date of the bond, and \$43,947.61 attorneys fees incurred by the successor executor of the estate.

the principal's pre-estate dishonesty.

In **Colonial Bancgroup** the ward had given a power of attorney naming her later named conservator as her attorney-in-fact. The power of attorney included the power to make deposits, withdrawals, and transfers "in and to such banks or other financial institutions as in his discretion may be beneficial to me," and to endorse checks payable to the grantor for deposit "in a bank or banks where he chooses to conduct business for me." In early 2000, the ward suffered a stroke that left her unable to manage her personal affairs or care for herself. On July 31, 2000, the Probate Court of Montgomery County conditionally appointed the power-of- attorney-grantee as conservator upon the filing of a \$150,000 bond. On August 24, 2000, Fidelity and Deposit Co. of Maryland provided the bond.

The bonded principal in **Colonial Bancgroup** deposited three checks made out to the ward into his personal account at Colonial. He signed all three checks with his name and with the payee's name. The combined value of the checks was \$95,638.87. This money came from the payee's annuity account with SunAmerica Life Insurance Company. The first check for \$56,000 from her SunAmerica account in April 2000. At this point the power of attorney was in effect, but the principal had not yet been appointed the conservator of the ward's estate. In November and December 2000, after the appointment as conservator the principal completed two affidavits to "affirm" his power of attorney to request withdrawals of \$4,266.07 and \$35,372.80 from the SunAmerica account. He deposited these two checks into his personal account at Colonial in December 2000.

Fidelity's principal was removed as guardian and conservator in April 2001. The Probate Court entered two orders, in July 2001 and May 2002, requiring Hammons and Fidelity, as surety, to pay \$77,419.79 and \$47,339.82 to the successor conservator of Jeffers's estate.

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Western Surety dealt with the issue of liability for pre-bond acts in another Massachusetts case at the turn of the century. **Brockelman v. Western Surety Company**, 11 Mass.L.Rptr. 623, 2000 WL 1273438 (Mass Super 2000). **Brockelman** involved an ancillary estate administration in Massachusetts for a man who died in 1980. The primary estate was administered in Greece. The decedent's wife was appointed as ancillary administratrix in 1981. She sold stocks and interests of non Massachusetts corporations and Massachusetts entities and placed the proceeds into her personal accounts in 1981. She posted a \$500,000 bond in the ancillary proceeding by Western Surety Company in October 1983 together with an accounting. She had also been ordered in February 1983 to file previously unfiled estate returns/accountings. She had been ordered to post a bond in March 1983. Her state and federal estate tax and income tax returns were not filed until late 1987 and early 1988.

The **Brockelman** court ruled that the surety was not liable for any

mismanagement of assets that are not part of the Massachusetts ancillary estate—specifically the proceeds from the sale of non Massachusetts corporations and entities, which she had placed in her name before she was bonded.

With respect to the proceeds from the sale of Massachusetts property, the **Brockelman** Court expressly stated—“A surety on a bond is liable for any default of an executrix or administratrix in not accounting for assets received before as well as after the execution of the bond. (citing several of the authorities cited by the Court in **Wood** above).” Fortunately the **Brockelman** court reviewed the record and observed that despite the absence of a formal accounting, the probate court had previously determined that the Ancillary Estate’s Massachusetts assets held by the bonded administratrix were fully accounted through formal requests to the court dealing with these assets. While she was in technical breach of her duty—no loss had been occasioned by her failure to file returns, and she was allowed to file retroactive returns to cure her technical breach.<sup>11</sup>

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The **Manson** court cited but rejected the holding in a Missouri case which held that a surety was not liable for the pre-estate acts of its bonded principal. **King v. Jones**, 971 S.W.2d 916, 917-18 (Mo.App.1998). In **King**, the surety for a guardian was held not liable for \$29,500 received by the guardian on behalf of her ward prior to the execution of the bond. The funds in question were “rightfully” received by the guardian and initially accounted for to the ward. Also, prior to the execution of the guardian’s bond, the guardian-Jones expended these funds on a house, but failed to give her ward any ownership interest in the house. Subsequently, King was appointed guardian *ad litem*. King sought an order holding State Farm Fire and Casualty Company, the surety on the original guardian’s bond, liable for the \$29,500 misapplied. The trial court entered summary judgment in favor of State Farm and the guardian *ad litem* appealed, arguing retrospective effect of the bond. The court of appeals affirmed the summary judgment finding first that the expenditure of the funds “rightfully” within the guardian’s possession occurred prior to the execution of the bond, and secondly that, due to Jones’ inability at all times to return the funds to her ward, the surety should not be held liable for the \$29,500. This is commonly referred to as “the solvency requirement.”

In explaining the solvency requirement, the **King** court stated that it was important that “in *Gilliam*, the court pointed out that when the guardian filed her first settlement on October 26, 1965, she still had on hand funds sufficient to make restitution to the purchasers. *Id.* This fact distinguishes *Gilliam* and *In re Keisker’s Estate* from the present case because there is no evidence in this case that Jones was

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<sup>11</sup>The **Brockelman** Court granted summary judgment to Western Surety Company on all other counts at issue holding that with respect to the liability for late filing of the Massachusetts tax returns that the administratrix was prohibited from preparing filing and paying such taxes because the assets of the ancillary estate were frozen by an injunction obtained by the heirs, because as ancillary administratrix she had no legal right or responsibility for federal tax returns and because under Massachusetts law she could not mismanage real property the title to which passed directly to the heirs/will beneficiaries.

able to reimburse the estate during the time she was bonded by State Farm. In fact, there is substantial evidence that Jones was unable to reimburse the estate. Jones' answers to interrogatories indicated that she had no assets. In response to State Farm's request for admissions, King stated that he had "no evidence that Helen Jones could ever reimburse the estate." In addition, King's report to the probate court acknowledged that "it is obvious that [Jones] is without funds" to pay back the \$29,500."

The ruling in *King* appears to legally sound. If the fiduciary in fact misappropriates the property of someone and then becomes the fiduciary of the victim, upon appointment as a fiduciary, the victim's estate would be the fiduciary's creditor. The fiduciary would have a duty to collect the debt owed for the estate, the breach of which would render the fiduciary and his surety liable. However—just as with any debt owed to an estate—if the debtor has no ability to pay the debt, the surety cannot be responsible for the fiduciary/debtor's failure to collect from himself due to the inability to pay. The existence of a bond does not guarantee payment of debts owed to the estate when the debtors do not have the ability to pay.

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*In re Conservatorship of Estate of Risch*, 2005 WL 1941383 (Cal.App. 1 Dist. April 15, 2005) is a case where the court rejected liability for acts that occurred prior to the establishment of the probate estate. California has a unique statute that renders a fiduciary liable for any profits obtained by the fiduciary with respect to an estate for whom the fiduciary oversees in cases of breach of duty.<sup>12</sup> In *Risch* the ultimate conservator obtained an interest in certain property in which the ward had a one-half interest before being appointed as successor. After being appointed conservator an action was brought against him for various breaches and a judgment was rendered for \$160,614.14 for breaches after appointment, and \$120,000.00 for the profit he received from his acquisition of the property in which the ward had an interest before his appointment as conservator.

On appeal the *Risch* Court reversed the judgment against the conservator for the value of his profit obtained through acquisition of an interest in the property owned in part by the ward on a number of grounds because there was no evidence that suggested the conservator obtained his interest in this property after he became guardian. The evidence revealed that the conservator obtained his ownership in the property with the ward before he became conservator.

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The logic of the cases holding that probate bonds cover acts by their principals before an estate was even created appears to be little more than judicial fiction. These decisions all lack any evidentiary foundation or bearing to reality. The concept that the surety intended to bond property which did not exist when its bond was issued is simply

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<sup>12</sup> Section 2401.3, subdivision (a)(2), provides that, "[i]f [a] conservator breaches a fiduciary duty, [he or she] is chargeable with ... [¶] [a]ny profit made ... through the breach of duty, with interest."

judicial imagination.

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**B. Liability of Surety for Acts after Principal is No Longer Fiduciary.**

*In Re Lazdins*, 02-4-01743-3 (King County Wash Sup. Ct. 12-21-06) is a case where the surety became liable for acts by its principal after its principal was no longer a fiduciary. Washington law provides -- somewhat different from other states -- that a property guardian becomes an administrator of an estate—upon application with the consent of the guardian’s surety to be the surety for the administrator. In the *Lazdins* case Ohio Casualty Insurance Company bonded the property guardian. When the ward passed away, the former property guardian “acting” as administrator contested a will proffered by the executor named therein and used estate funds to pay for the will contest. The Washington Court held that Ohio Casualty was liable on its guardian’s bond for funds the acting-administrator did not deliver to the named executor of the will after her authority to act as guardian ended and for the attorneys fees she spent from the former ward’s estate to unsuccessfully attack the will.

The result in *Lazdins* would probably have been different if the will contest had been successful but the unanswered question, is what notice did the probate court or anyone give to the surety that its principal was acting beyond the scope of his authority, upon the death of the ward? Did the nominated executrix make any demand on the surety for delivery of the estate funds—which would have enabled the surety to seek collateral or even freeze the funds in the principal’s estate accounts? The absence of notice of this mess in *Lazdins* appears to be the biggest complaint available to the surety.

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A truly scary result is found in *Siread v. Barnett*, 164 S.W.3d 471 (Tex.App.-Dallas 2005). In this case the Hartford Casualty Insurance Company issued a \$90,000 temporary administrator’s bond, and ultimately a \$90,000 permanent administrator’s bond for the same person. The court issued a judgment against the principal for \$342,250 for breach of duty after her appointment as permanent administrator and against the surety for \$180,000 and the surety appeal.

Hartford argued on appeal that the evidence did not sustain a finding that the breaches during both temporary administration and permanent administration equaled the amount of both bonds. But the *Siread* court was unpersuaded and instead held that because neither administration was ever “terminated” that the bonded fiduciary had a continuing duty under each bond to recover from herself, the breach of which was recoverable from the bonds.

There are two problems with the decision in **Siread**. The first problem is the missing application of the “solvent principle” discussed in the section above, which should be applicable to the retrospective liability imposed on Hartford for the breach of duty under the permanent administrator’s bond with respect her misdeeds before the permanent administrators bond was issued. The second and perhaps more fundamental problem, skirted by legalisms in **Siread** is that to any reasonable person by the very definition of a permanent administration, the term of the temporary of the temporary administrator is ended. The presumptions of transfer from the fiduciary in the initial fiduciary capacity to the successor fiduciary capacity together with the principles of strict construction in favor of a surety<sup>13</sup> and public policies of not extending suretyship by implication should have protected Hartford from liability under its temporary bond. The **Siread** court expressly stated the fiduciary “failed in [her role as temporary administrator] to recover assets from herself as previous administrator. Accordingly the trial court did not err in concluding that Hartford was liable for \$90,000 on each bond.”

#### **IV. Penal Sum Limitations Disregarded**

Without a doubt, one of the most important protections on any bond, commercial, contract or otherwise, is the principle that the maximum liability of the surety is the penal sum limit of the bond. Cases that disregard the penal sum limit of a bond strike fear in the very heart of sureties and make all sureties reevaluate the decision to even do business in a jurisdiction that disregards this intended limit on its exposure.

##### **A. Court Costs, Interest, Attorneys Fees, Bad Faith, and Multiple Claims**

***In re Conservatorship of Huerta*** 273 Kan. 97, 41 P.3d 814 (Kan.,2002) involves six cases, where successor conservators brought an action against former conservators unable to adequately account for the ward's assets and against the sureties for the former conservators. In each case, the District Court, found the former conservators had converted assets, and entered judgment against the former conservators and their sureties. The former conservators and their sureties appealed, and the appeals were consolidated. The Kansas Supreme Court, held that: (1) sureties were liable for interest and costs in excess of penal sum of bonds, and (2) sureties' liability for interest arose on date of each conversion.

There were three sureties involved in ***Huerta***--St. Paul Fire & Marine Insurance Company, United States Fidelity & Guaranty Company, and Old Republic Surety Company. The sureties all argued that the probate court erred by awarding judgments to the injured wards in excess of the penal sums stated on the bonds.

The sureties argued that case law in Kansas limits the liability of the surety to the amount of the bond, citing ***Koch v. Merchants Mutual Bonding Co.***, 211 Kan. 397, 507

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<sup>13</sup> See ***Mackey v. Coxe***, 18 How. (U.S.) 100, 15 L.Ed. 299 (1858); ***Wooley v. Price***, 86 Md. 176, 37 A. 644 (1897); and ***In Re Guardianship of Snyder***, 224 Wis. 200, 272 N.W. 1, 111 ALR 211 (1937). (The doctrine of Transfer of Assets – a person serving in successive fiduciary capacities is presumed to have transferred the assets from himself in his bonded capacity to himself in his non-bonded capacity).

P.2d 189 (1973); *School District v. DeLano*, 96 Kan. 499, 152 Pac. 668 (1915); *McMullen v. Winfield Building & Loan Association*, 64 Kan. 298, 67 Pac. 892 (1902); and *Burchfield v. Haffey*, 34 Kan. 42, 7 Pac. 548 (1885).

The *Huerta* Court rejected these arguments stating, “While the penalty of the bond fixes the limit of liability of the surety at the time the liability arises, yet if the principal or surety fail to discharge that liability when it matures, interest may be allowed on the amount from the time the liability arises, even if the amount of recovery shall exceed the penalty. The rationale of this holding is explained in this fashion: “ ‘... Interest is recoverable against both [principal and surety] ... from the time of the default, not as a part of the penalty, but for the detention of the money after the same became due ....’

**B. Cumulative Bonds —Stacked Periods of Penal Sum Liability—Not Continuous Single Bond**

Another constant fear of probate sureties is the assertion by claimants and courts that the bond and its penal sum are essentially renewed each year—rendering the surety liable for breaches by its principal each year up to the penal sum of the bond.

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The result referenced above in *Siread v. Barnett*, 164 S.W.3d 471 (Tex.App.-Dallas 2005) looks like a “stacking” result. Even though there were two bonds, there was only one principal, one surety and one estate. In *Siread*, the Hartford Casualty Insurance Company issued a \$90,000 temporary administrators bond, and ultimately \$90,000 permanent administrators bond for the same person. The court issued a judgment against the principal for \$342,250 for breach of duty after her appointment as permanent administrator and against the surety for \$180,000.

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The claimant in *May v. Continental Casualty Co. (CNA Surety)*, 2007 WL 2669571 (D.C. September 13, 2007), asserted that the bond was cumulative (*i.e.*, not continuous) and argued that the renewal premiums paid each year by the estate required a finding that a bond and subsequent rider covered losses suffered in each year up to the penal sum for each year. In *May* the losses caused by the fiduciary exceeded the penal sum of the bond as increased by a rider ordered by the court before the defalcation was discovered. The successor conservator argued that the surety was liable for 8 years times the penal sum of the original bond for each year this bond was in effect (8x\$10,000=\$80,000), and six years times the amount of the rider for each year after the rider was issued (6x\$113,500=\$581,000). The surety tendered the simple total penal sums of the bond and rider (\$123,500) and filed a petition for discharge, which the probate court denied. CNA appealed.

On appeal the **May** court reversed the judgment against the surety. The court observed that the statutory scheme requiring the bond did not suggest that probate bonds should be cumulative. The court further observed that the bond period in both the statute and from the face of the bond was indefinite—observing that the statute provides that such bonds shall continue in force through the final accounting. The statutory scheme also limited damages on default of the fiduciary to the amount of the bond and made no reference to annual damages.

The **May** court rejected the argument that because bonds are based on existing assets and anticipated annual income that the penal sum can be tapped up to its maximum each year. “The annual accounting and audit process, when followed, is designed to detect malfeasance on the part of the conservator, including misappropriation of the income of the estate, thus only a single year’s income should be at risk at one time.... ‘Adherence to the statutory requirements ... obviates any need to interpret the bond as being cumulative. *In Re Rising*, 201 Misc 869, 112 N.Y.S. 2d 349, 353 (N.Y. Sur. Ct 1952)” The **May** court recited language from decisions in Arizona and North Carolina holding that probate bonds are continuous for the entire period of the estate as opposed to cumulative for each year of the estate.<sup>14</sup>

## V. Standard Defenses Ignored/Limited

In this section, we will look at cases attacking traditional defenses like the statute of limitations, *res judicata*, offset, and limited bond purposes which effectively expand bond coverage.

### A. Statute of Limitations Limited

In **Wood v. Lowery**, 2007 WL 674648 (Tenn. Ct. App. October 25, 2006) a will beneficiary sued the executrix and trustee of residuary trust alleging mismanagement of estate funds. One of many issues addressed in **Lowery** was whether the action filed more than 3 years after the plaintiff received her distributions and signed a release was barred by the general statute of limitations in Tennessee for conversion. Tennessee has a 10 year statute of limitations for actions against guardians, executors, and administrators on their bonds. The court ruled that the three year statute of limitations was not applicable to the claim in **Lowery**.

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Recently in **In re Estate of Bishop** 2004 WL 917693, 2004-Ohio-2197 (Ohio App. 2 Dist. April 30, 2004), the court dealt a huge blow to the statute of limitation defense available to probate sureties under Ohio law.

In **Bishop** the court ruled that a cause of action for a claim for surcharge against the bond begins to run from the time of final settlement of accounts by the bonded

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<sup>14</sup> *United States Fidelity & Guaranty Co. v. Christoffel*, 115 Ariz. 507, 566 P.2d 308, 312 (Ct. App. 1977); and *North Carolina ex rel. Duckett v. Pettee*, 50 N.C. App. 119, 273 S.E.2d 317, 320 (1980).

principal. The Ohio Court did more than reject the statute of limitations arguments advanced by the Surety in **Bishop**,<sup>15</sup> the court rendered the statute virtually indefinite under certain circumstances.

First, the surety argued that the claim was time-barred, pursuant to Ohio law, because more than ten years passed since the cause of action accrued. “American contends that the real estate sale occurred more than eighteen years ago on July 29, 1985, and that Jones breached his fiduciary duty to file a subsequent account on April 16, 1986. Thus, American contends that any action on the bond would have had to have been filed on or before April 16, 1996.”

Under Ohio law (R.C. 2305.12), an action on the bond of an administrator must be brought “within ten years after the cause thereof accrued.” R.C. 2109.61 states that “[a]n action may be prosecuted on the bond of a fiduciary against any one or more of the obligors thereof by any person who has been injured by reason of the breach of any condition of the bond.” R.C. 2307.06, which provides for a civil action on an official bond, including an administrator’s bond, states that when a person renders his sureties liable on a bond, an injured person “may bring an action thereon, in his own name, against the person and his sureties to recover the amount to which he is entitled by reason of the delinquency.”

The **Bishop** Court stated that Jones, the bonded principal, could be held liable on the administrator’s bond until the ten-year statute of limitations under R.C. 2305.12 had expired. See *Jackson v. Conn* (July 12, 1995), Clark App. No. 95-CA-11. . . . Ohio courts have generally held that an action accrues against the surety on a bond when “some sort of determination or adjudication of the liability of the principal has occurred.”

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<sup>15</sup>A review of the facts, arguments and the ruling in **Bishop** can be helpful. In **Bishop** the successor administrator of the estate of Anna Bell Bishop appealed a judgment of the Montgomery County Court of Common Pleas, Probate Division, which granted summary judgment in favor of American States Insurance Company (“American”) on his surcharge action against American as the surety for the original Administrator, Charles E. Jones.

Anna Bell Bishop died testate in Dayton, Ohio in December 1982. Bishop’s will was admitted to probate on December 13, 1982, and her adult brother, Charles E. Jones, was appointed Administrator, with will annexed, of her estate. Western Casualty & Surety Company issued a fiduciary bond on behalf of Jones in the amount of \$18,000. American is the successor-in-interest to Western.

On April 17, 1984, Jones filed his First and Partial Fiduciary’s Account. The account indicated that Jones continued to hold estate assets totaling \$36,876.50, which consisted of \$1,876.50 in personal property and real estate valued at \$35,000. Jones received an extension of time for the filing of his Second and Final Account, due to the scheduled sale of the real estate. The sale of the property was completed in July 1985. Jones never filed another account. Jones died on December 31, 1996, more than eleven years after the sale of the property. Almost five years later--On October, 2001--the probate court found that Jones was in default of filing accounts, had failed to administer the estate in a timely manner, and had breached his fiduciary duty. The court removed Jones as administrator and appointed Reid as successor administrator. On June 25, 2002, Reid filed an application to surcharge the fiduciary bond. Reid filed a motion for summary judgment on his surcharge application. American opposed the motion and filed a cross-motion for summary judgment, arguing that Reid’s claims against it were barred by the statute of limitations set forth in R.C. 2305.12, the doctrine of laches, and the doctrine of impairment of subrogation rights. On July 14, 2003, the magistrate denied Reid’s motion and granted American’s motion. Reid appealed.

*Cleveland City School Dist. Bd. of Edn. v. United Pacific Ins. Co.* (Cuyahoga App. No. 60374 June 28, 1991). **The liability of the deceased administrator is generally determined when the account is settled.** E.g., *Schraff v. Harrison*, 94 Ohio Misc.2d 104, 703 N.E.2d 877 (1998), affirmed, Geauga App. No. 99-G-2233 (Nov. 11, 2000); and *Massachusetts Bonding & Ins. Co. v. Winters Natl. Bank & Trust Co.*, 130 F.2d 5 (6<sup>th</sup> Cir. 1942).

There is no discussion by the **Bishop** court of the right of action that arose when the fiduciary did not file returns. It was undisputed that Jones failed to file any accounts subsequent to April 17, 1984, and neither the probate court nor Bishop's intended beneficiaries sought to compel Jones to file additional accounts between 1986 and 2001. Upon Jones' death in 1996, no estate was opened and no administrator was appointed who could file the required final accounting. On October 1, 2001, the probate court found that Jones had breached his fiduciary duties and removed him, posthumously, as administrator of Bishop's estate. No final account of Bishop's estate has been filed. It was not until April 10, 2003, that Reid was appointed as successor administrator of Jones' estate. Although an unfathomable length of time elapsed between the filing of Jones' first account and his removal as administrator, the **Bishop** Court on appeal found that nothing in this interval triggered the statute of limitations for the filing of a surcharge action against Jones' surety, American. Accordingly, the court found that Reid's surcharge action was filed within the statute of limitations.

The **Bishop** Court also rejected American's laches defense. Certainly, the blame for the unreasonably long delay in this case could have fallen on many shoulders. The Court even "admitted" that the probate court itself had a statutory duty to require the settling of the accounts. However, once Reid was appointed as the successor administrator, he promptly initiated the surcharge action. His action fell within the ten-year statute of limitations. Although American was clearly disadvantaged as a result of the lapse in time between Jones' actions and his removal, which then led to the surcharge action against American on the administrator's bond, that lapse was not attributed to Reid or even the probate court as bond obligee. Accordingly, the probate court's grant of summary judgment in American's favor could not be sustained based on the doctrine of laches.

As a fourth reason in support of the trial court's decision, American asserts that it must be discharged from liability under its bond to the extent that its rights to subrogation have been impaired. Subrogation is an equitable doctrine under which, once the surety pays the obligation of its principal, the surety steps into the shoes of the creditor that it has paid, and the surety is entitled to enforce the creditor's rights against the principal and any other person whose actions made the surety liable to the creditor for the default. *Maryland Cas. Co. v. Gough*, 146 Ohio St. 305, 315, 65 N.E.2d 858 (1946); *American Insurance Co. v. Bur. of Workers' Comp.*, 62 Ohio App.3d 921, 925, 577 N.E.2d 756 (1991). In *American Ins. Co.*, the court of appeals recognized that, when equitable, a surety may also be subrogated to the rights and remedies of its principal against third parties, where those rights arise from or are closely related to the debt that the surety was required to pay under the suretyship agreement. 62 Ohio

App.3d 921, 925, 577 N.E.2d 756. A surety may be discharged from its obligation under a suretyship arrangement when its subrogation rights have been impaired.

The surety in **Bishop** argued that interpreting the statute of limitation as commencing only when a final return is allowed indefinitely extends the statute in cases where no return is filed or where one is filed but not approved. Despite that reality, the Court in **Bishop** held the surety liable and opened the door for claims against the surety where returns have not been filed or allowed.

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The decision in **Bishop** is not the only case to effectively extend to eternity the statute of limitation defense of a surety in probate matters. See **In re Estate of Green**, 816 A.2d 14 (D.C. 2003). In **Green** a special master was appointed to state an account for first personal representative. After making the account, the special master requested a surcharge against the personal representative's surety. The Superior Court of the District of Columbia, entered judgment for special master, and surety appealed. The Court of Appeals, held, as a matter of first impression, that a cause of action on bond accrues, and the five-year statute of limitations begins to run, when the court approves a final accounting.<sup>16</sup>

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<sup>16</sup>Following is part of the text of the decision in **Green**. The first personal representative, Mr. Avery had failed to arrange for sale of the estate's main asset, a house located as 1324 Michigan Avenue, in the Northeast quadrant of the District of Columbia. He refused to close the estate, had moved to Maryland, and had rented the Michigan Avenue property. Mr. Avery and Ms. Madison settled their differences. On October 26, 1993, Mr. Avery agreed to pay his sister \$68,000 for her share of the Michigan Avenue property, and to divide funds in the estate account equally between brother and sister. The trial court entered a consent order on January 18, 1994, granting authority to Mr. Avery to sell the Michigan Avenue property without an additional undertaking, and specifying that Ms. Madison's complaint against Mr. Avery would be dismissed following sale of the property and disbursement of the assets of the estate. The special master petitioned for compensation and sought payment from Old Republic's bond [for Mr. Avery]. Old Republic denied liability on the bond on the ground that the claim was barred under the applicable District of Columbia five-year statute of limitations. Old Republic contends that under D.C.Code § 12-301(6) (1995), which allows five years for filing a claim "on an executor's or administrator's bond," the time "beg[an] to [run] when [Mr. Avery] [was] removed from his position." Old Republic asserts that: "The [s]uccessor [p]ersonal [r]epresentative could have taken 20 years to investigate the case and the statute of limitations would still not have accrued. If the trial court's decision is allowed to stand, D.C. Code § 12-301(6) is rendered virtually meaningless."

The language of § 28-2504 is compelling and clear. The fiduciary's "bond shall continue in force as against both principal and sureties until the funds or estate are fully accounted for and paid over or delivered to the parties interested therein or their attorney, other than himself." In light of this clear language, and the absence of any exception based upon the removal of a personal representative and the appointment of a successor personal representative, we conclude that the bond given to Mr. Avery by Old Republic remained in place until the final statement of account was filed by the special master on February 15, 2001, and approved by the Probate Division on August 27, 2001. Therefore, we hold that the special master's claim on the removed personal representative's bond accrued when the final account was filed by the special master and approved by the Probate Division of the trial court. No section of the probate code or implementing rules is inconsistent with this conclusion. Indeed, D.C.Code § 20-526(d) imposes on the removed personal representative a continuing duty to "account for ... the property belonging to the estate," and § 20-1301, which identifies the final account as the trigger to close an estate, includes no exception in the case of an estate administered initially by a subsequently removed

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The same kind of decision which ties the statute of limitation defense to the existence of an approved settlement of accounts has been issued in Arkansas. See **Nutt v. Delta Trust & Bank**, 79 Ark.App. 257, 85 S.W.3d 927 (Ark.App.,2002). The Court in **Nutt** observed that in *Sample v. Sample*, 237 Ark. 178, 372 S.W.2d 609 (1963), the supreme court stated that until the guardian's liability had been established by an order of the probate court, no cause of action could be maintained against the sureties on the bond. See *Continental Ins. Companies v. Rowan*, 252 Ark. 980, 482 S.W.2d 102 (1972) (Holding that any legitimate claims should first be assessed against the guardianship estate, then if those funds are insufficient, judgment should be rendered against guardian and surety); *Harrison v. Benton State Bank*, 6 Ark.App. 355, 642 S.W.2d 331 (1982).

In the **Nutt** case there was no information as to the remaining assets of the guardianship estate, and how, if at all, the money was spent for the benefit of the appellant. Even though the appellee may have liabilities under Ark. Code Ann. § 28-65-215 (1987), they cannot be addressed by this court, or even the probate court, until a full and proper accounting has been given by the guardian of the appellant's guardianship estate. A full accounting must be filed and a hearing held by the probate court pursuant to Ark.Code Ann. § 28-65-320 (1987). The Arkansas Supreme Court has held that where a guardian fails to comply with the statutes regarding discharge and accounting, the guardian's surety is not released from liability on its bond. *Nabors v. Quick*, 245 Ark. 560, 433 S.W.2d 844 (1968).

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In **USF&G Co. v. Conservatorship of Melson** 809 So.2d 647 (Miss.,2002), the court held that the statute of limitations on a claim against USF&G's public officials bond for the Chancery court-clerk did not begin to run until the conservator of an estate accounted to the ward for the funds subject to his custody and control. In **Melson** a successor conservator of a physically incapacitated ward brought action against former conservator, who was a chancery clerk, and against his clerk's bond, for moneys spent and invested without court approval. The Chancery Court, Wilkinson County, ordered repayment of disbursements made by the clerk. The principal and surety appealed. The Supreme Court held that the claim was not barred by statute of limitations.<sup>17</sup>

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personal representative.

<sup>17</sup> Rance O'Quinn (O'Quinn), as Massachusetts conservator of Iris Althea Melson (Melson), filed suit for moneys spent and invested without court approval on May 30, 1995, in the Chancery Court of Wilkinson County, Mississippi. Previously, on August 4, 1994, O'Quinn had filed to have the Mississippi temporary conservator, Thomas T. Tolliver, Jr. (Tolliver), discharged and the 1992 first and final accounting set aside. Tolliver had been appointed to serve as the conservator in Wilkinson County, Mississippi, on December 2, 1988. The appointment order of December 5, 1988 specifically stated, that Tolliver would served as temporary conservator for Melson under his current public official's bond. USF & G had issued the public official's bond to Tolliver as chancery clerk. Judgment was entered against USF&G and

The **Melson** Court citing *Bell v. Rudolph*, 70 Miss. 234, 12 So. 153, 154 (1892), held that the statute of limitations does not begin to run in favor of a surety on a guardian's bond against the ward from the time he is discharged from liability for future acts of the guardian, but from the time the guardian accounted to the ward.

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Tolliver, jointly and severally, in the amount of \$108,666.03, plus interest at the rate of 8% per annum from December 29, 1999. No pre-judgment interest or attorney fees were awarded

**B. Res Judicata Principles Limited**

At least as important to sureties as the statute of limitation defense is the defense of *res judicata*. *Res judicata* prohibits the relitigation of a claim where it has been or could have been asserted in a previous suit involving the same parties and was resolved without liability to the surety. In some jurisdictions the effect of prior suits and settlements can effectively release the surety if the principal is released.<sup>18</sup> Following is a discussion of some cases which disregard the defense of *res judicata* by ignoring the element that prohibits future litigation if the claim against the bond could have been raised in the prior lawsuit.

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There is still some hope for probate sureties that prior actions closing an estate prevent claims against probate bonds. Recently the Court in ***Patterson v. Travelers Casualty and Surety Company***, \_\_\_ A.2d \_\_\_\_, 2007 WL 4259794 (App. Ct Conn. 12/11/07) the court recognized and breathed jurisprudential life into a long cherished principal of *res judicata* with respect to returns/accountings filed by a fiduciary, which had no caveat or appeal. In ***Patterson*** the bonded executors filed a final return in 1994, which was approved by the probate court. Ten years later an action alleging breach of duties was filed by the deceased's grandson. At trial the court directed verdict for the surety on the basis of the doctrine of *res judicata* and the statute of limitations.

On appeal the ***Patterson*** court observed that even though courts should be hostile to directed verdicts, the law applicable to the facts of the case required the directed verdict for the surety, because the probate court's approval of the final return, terminated the fiduciary obligations. When no appeal was filed the order became final and unassailable in absence of fraud, citing the Connecticut general statute regarding the effect of probate court orders.

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In ***Jewish Home for Elderly of Fairfield County, Inc. v. Cantore***, 96 Conn.App. 326, 901 A.2d 49 (Conn. App. 2006), the plaintiff, the Jewish Home for the Elderly of Fairfield County, Inc., brought an action on a probate bond pursuant to General Statutes (Rev. to 1995) § 45a-144(a) against the defendants, J. Michael Cantore, Jr., conservator of the person and estate of Diana Kosminer, and Continental Casualty Company ("Continental"), the surety on the bond. After a jury trial, the verdict was returned in favor of the plaintiff, and Continental appealed. On appeal, Continental claimed that the trial court improperly determined that the plaintiff's claim was not barred by the doctrine of *res judicata*.<sup>19</sup>

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<sup>18</sup> Georgia law provides that the release of one joint and several contractual obligor releases all, O.C.G.A. § 13-4-80. See also O.C.G.A. § 11-3-65.

<sup>19</sup>The following is the procedural and factual background. Kosminer was a patient of the plaintiff, a state

Before the trial the conservator and the plaintiff entered into a stipulated judgment in a collection action in favor of the plaintiff in the amount of \$49,679.47. In the subsequent suit against Continental against its \$50,000.00 bond—after judgment against the surety, Continental assigned as error that the plaintiff's action was barred by the doctrine of *res judicata* because the stipulated judgment entered in the collection action was a final judgment as to the debt owed by Kosminer. The **Cantore** Court rejected Continental's argument:

“The doctrine of *res judicata* holds that an existing final judgment rendered upon the merits without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated as to the parties ... in all other actions in the same or any other judicial tribunal of concurrent jurisdiction.... If the same cause of action is again sued on, the judgment is a bar with respect to any claims relating to the cause of action which were actually made or which might have been made.... To determine whether two claims are the same for purposes of *res judicata*, we compare the pleadings and judgment in the first action with the complaint in the subsequent action.... The [doctrine] of *res judicata* ... [is] based on the public policy that **a party should not be able to relitigate a matter which it already has had an opportunity to litigate [emphasis not in opinion]**.... [W]here a party has fully and fairly litigated his claims, he may be barred from future actions on matters not raised in the prior proceeding.” (*Trinity United Methodist Church of Springfield, Massachusetts v. Levesque*, 88 Conn.App. 661, 671-72, 870 A.2d 1116, cert. denied, 274 Conn. 907, 908, 876 A.2d 1200 (2005). “An issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined.... 1 Restatement (Second), Judgments § 27, comment (d) (1982). An issue is necessarily determined if, in the absence of a determination of the issue, the judgment could not have been validly rendered. F. James & G.

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licensed nursing home. On June 8, 1987, the Stamford Probate Court appointed Cantore as conservator of the person and estate of Kosminer. Pursuant to General Statutes (Rev. to 1995) § 45a-139, Cantore executed and filed with the court a probate bond in the amount of \$50,000, naming himself as principal and Continental as surety. The bond provided that it was conditioned, as required by § 45a-139, on Cantore's “faithfully perform[ing] the duties of his trust and administer[ing] and account[ing] for all monies and other property coming into his hands, as fiduciary, according to law....”

On August 29, 1989, upon Cantore's request, Kosminer was admitted to the plaintiff's facility as a “private, self-pay” resident, where she remained until her death in 1995. At the time of Kosminer's admittance, her estate had assets of approximately \$160,000. Despite the ample resources of the estate, Cantore failed to make timely payment to the plaintiff for the care and services provided to Kosminer. Instead, on May 2, 1990, more than eight months after Kosminer had been admitted to the plaintiff's facility, Cantore made an initial application on Kosminer's behalf to the department of income maintenance (department) for title XIX (medicaid) assistance, which, if Kosminer had been eligible, would have paid for the cost of her care. This application was denied on the ground that Cantore had failed to provide the department with information to verify that Kosminer's assets did not exceed \$1600, the maximum amount permitted for medicaid eligibility.

Hazard, Civil Procedure (3d Ed.1985) § 11.19.” *Efthimiou v. Smith*, 268 Conn. 499, 507, 846 A.2d 222 (2004). “The applicability of *res judicata* ... raises a question of law, and is, therefore, subject to plenary review.” *Cahaly v. Somers*, 89 Conn.App. 816, 819, 877 A.2d 837, *cert. denied*, 275 Conn. 910, 882 A.2d 669 (2005).”

The **Cantore** court ignored the prior opportunity the plaintiff had in its first suit and stated the following: “Here, although both actions sought to collect the debt owed by Kosminer, the claims raised in the present action differ fundamentally from those raised in the collection action. The collection action was a simple breach of contract claim seeking payment for services rendered, having nothing to do with the nature of Cantore's duties, or his performance, as conservator. Cantore and Continental were not in privity for purposes of the collection action because Continental was not a party to that contract and, thus, Continental was not a party to the collection action. The collection action did not implicate in any way the probate bond on which Cantore was the principal and Continental, the surety. The collection action contained no allegation that Cantore breached his fiduciary duties by failing to pay Kosminer's bills or by failing to qualify Kosminer for medicaid benefits in a timely manner. Nor did the collection action contain any allegation that Cantore breached the probate bond. Accordingly, the **Cantore** court decided that the claims in the bond action were not litigated in the collection action and, therefore, were not barred by the doctrine of *res judicata*.”

The proper analysis in **Cantore** required a determination of whether the nursing home could have asserted claims against the conservator for breach of duty in the first suit, not whether they were asserted. Continental will not be the only surety to pay for this erroneous ruling ignoring the fundamental element of *res judicata*.

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The court in **Burt v. Rhode Island Hosp. Trust Nat. Bank**, 2006 WL 2089254 (R.I. Super. 2006.) rejected the surety's *res judicata* defense based on ruling in its favor in earlier trials. The doctrine of *res judicata* “makes a prior judgment in a civil action between the same parties conclusive with regard to any issues that were litigated in the prior action, or that could have been presented and litigated therein.” *ElGabri v. Lekas*, 681 A.2d 271, 275 (R.I.1996).

In seeking summary judgment against plaintiff Burt on *res judicata* grounds, the executor defendants point to the ruling in **Burt v. Rhode Island Hospital Trust**, C.A. No. PC 93-1285 (R.I.Super.Ct.1993), which resulted in judgment as a matter of law for the defendant in 2003 and which was dismissed with prejudice on appeal in 2004. In the 1993 version of **Burt**, the plaintiff filed a breach of fiduciary duty claim against Fleet as co-executor of Magda Burt's estate, alleging that Fleet had spent too much of the estate's money in the course of its administration. Neither plaintiff Raymond Cyr nor defendant Gates were parties to that action. When plaintiff Burt attempted to amend his complaint in that earlier case, on the eve of trial in 2003, to include a claim against Fleet relative to breaches alleged in 1995 sale of the Nyman stock the court precluded him

from doing so (noting the difference in the claims and the fact that the complaint before the court concerned conduct prior to 1993) because the proposed amendment was untimely. The court then granted judgment as a matter of law in favor of Fleet with respect to his breach of fiduciary duty claim regarding spending by the executor, and the Supreme Court dismissed Burt's appeal with prejudice by agreement of the parties the following year.

The claim of breach of fiduciary duty connected with the 1995 stock sale, filed here by plaintiffs Burt and Cyr against both executor defendants, is not the same as the 1993 case that plaintiff Burt filed against Fleet, as executor, alleging that it spent too much of the estate's money in the course of administering the estate prior to 1993. The **Burt** court reasoned that “[t]rying the claim of the plaintiffs here for breach of fiduciary duty arising out of the 1995 stock sale, rather than ruling that such a claim had to have been brought in the 1993 case, if at all, makes sense as it constitutes a convenient trial unit distinct from plaintiff Burt's earlier filed claims and conforms to the parties' expectations.”

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The court in **Cashion v. Torbert**, 881 So.2d 408 (Ala. 2003) used the principle of *res judicata* to protect a surety where the claimant had an opportunity to participate in prior estate accounting proceedings. The **Cashion** court reasoned that because the claimant, could have asserted in the probate court the criticisms of Torbert's conduct as conservator and her alleged “fraud on the court,” which Cashion included in her brief filed in support of her report of insolvency, and because she participated without protest in duly noticed proceedings looking to the entry of a final settlement, we cannot conclude that she was deprived of the opportunity fully to present her claims to the probate court. As noted, , “*res judicata*” applies not only to those claims that Cashion did assert in the probate court proceedings, but also to those claims that she could have asserted there. Although Cashion acknowledges that Judge McKinney conducted two hearings, and although she acknowledges that transcripts of those hearings would have been available to her, she does not include in the record a transcript of either.

The general law of *res judicata*-that the preclusive effect of a prior adjudication applies to claims made in a subsequent action which “could have been raised” in the prior adjudication-is well settled. See, e.g., *West v. City of Mobile*, 689 So.2d 14 (Ala.1997)(prior action challenging City contracts barred subsequent action based upon competitive bid law because such claims could have been raised in the earlier litigation); *Robinson v. Holley*, 549 So.2d 1 (Ala.1989)(earlier action filed by beneficiary of estate seeking accounting and declaratory judgment barred a second action by beneficiary raising claims of fraud that could have been raised in the earlier litigation); and *Lesley v. City of Montgomery*, 485 So.2d 1088 (Ala.1986)(property owner's action to enjoin City's construction of a retaining wall barred a subsequent action for damages that could have been claimed in the first action). *Alabama Power Co. v. Thompson*, 250 Ala. 7, 12, 32 So.2d 795, 800 (1947): “In this jurisdiction a judgment will operate as *res judicata* or as estoppel notwithstanding an appeal when the appellate court action is based on a

review of the record made below. *Corinth Bank & Trust Co. v. Lawler*, 218 Ala. 83, 117 So. 620 (1928); *Collier v. Alexander*, 142 Ala. 422, 38 So. 244 (1905); *Viberg v. State*, 138 Ala. 100, 35 So. 53, 100 Am. St. Rep. 22 (1903).”

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**C. Bond Issued for Limited Purpose Covers Any Loss**

In *USF&G Co. v. Conservatorship of Melson* 809 So.2d 647 (Miss.,2002) (see discussion and facts above) the court held that a USF&G's public officials bond for the Chancery court-clerk provided coverage for breaches of fiduciary duty by the clerk also serving as conservator of an estate. In *Melson* a successor conservator of physically incapacitated ward brought action against former conservator, who was a chancery clerk, and against his clerk surety, for estate monies spent and invested without court approval. The Chancery Court, Wilkinson County, ordered repayment of disbursements made by clerk. Conservator and surety appealed. The Supreme Court held that clerk's public official's bond provided coverage as surety on clerk's conservatorship.

USF&G's position is that the public bond only covers Tolliver's performance or nonperformance of the duties of his office. In order for the surety to be held liable under its public official's bond, the official's act or omission must be within the scope or duties of his office. *United States Fid. & Guar. Co. v. State ex rel. Stringfellow*, 254 Miss. 812, 182 So.2d 919, 922 (1966); see also *McCoy v. Key*, 155 Miss. 64, 123 So. 873 (1929); *Dean v. Brannon*, 139 Miss. 312, 104 So. 173 (1925).

Miss.Code Ann. § 93-13-21 provides:

If someone will not qualify as guardian of a ward who has property, it shall be the duty of the chancery court or the chancellor in vacation to appoint the clerk of said court to be the guardian of the ward, who shall discharge the duties of guardian, under the order and direction of the court, and be subject to be dealt with as for a contempt for failure. He shall be required to give a special cumulative bond as guardian, and his official bond shall also cover his liability as guardian, and he shall; but he shall not be bound to incur any cost, except out of the estate of his ward; and he shall be allowed not more than ten percent (10%) on the amount of the estate, if finally settled. At the expiration of his right to the office, he shall make a settlement of his guardianship, and immediately deliver the property of the ward to his successor in office or to such other person as the court or chancellor may have directed.

In *Faust v. Murphy*, 71 Miss. 120, 13 So. 862 (1893), the Mississippi Supreme Court stated, "Where the chancery clerk has been appointed guardian, if no specified bond be required of him, the code provisions control, and his official bond will stand as security for the ward."

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The surety in *Goldberg v. Hartford Fire Ins. Co.* 269 Conn. 550, 849 A.2d 368 (Conn.,2004) had better results than the surety in *Melson*.

In **Goldberg** a successor conservatrix of an estate brought action on the probate bond to recover deficiencies based on misappropriation of estate funds by original conservator who was principal on the bond. The Superior Court, Judicial District of Fairfield, rendered judgment for successor conservatrix, in accordance with report of a trial referee. Surety appealed. The **Goldberg** court held that the surety was liable only for the deficiency relating to sale of real property by the original conservator—not all defalcations by original conservator.

The sole issue in **Goldberg** was whether the named defendant surety, Hartford Fire Insurance Company was liable to the plaintiff, Rita Goldberg, as conservatrix of the estate of Janet A. Colonari, for the entire misappropriation of the estate's funds by the former conservator, Gregoire R. Sideleau, or whether it was liable only for those misappropriated funds relating to the sale of real property.<sup>20</sup>

The issues presented in **Goldberg** required determination of the intent of the parties to the suretyship contract and the Probate Court in ordering the \$20,000 bond, discernable by examining the language of the bond form and the circumstances surrounding the transaction. See, e. g., *Poole v. Waterbury*, 266 Conn. 68, 87-88, 831 A.2d 211 (2003). If the terms of the contract and circumstances of the transaction revealed that the parties intended to be bound by a global bond, then Hartford would be liable for the entire deficiency of \$12,017.92; in contrast, if the parties intended to execute a specific bond, then Hartford would be liable only for the \$250 deficiency relating to the sale of Colonari's real property.

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<sup>20</sup>In **Goldberg** the Bridgeport Probate Court appointed Sideleau as conservator of Colonari's estate. The appointment decree provided that "Sideleau accepted the position of trust, and ... the court dispensed with the requirement of a bond." On September 4, 1996, Sideleau petitioned the Probate Court for permission to sell Colonari's real property. At this time, the Probate Court required Sideleau to post a bond in the amount of \$20,000, with sufficient surety. The bond was executed on a standard bond form contains three options, with accompanying boxes to be marked, indicating the nature of the principal's (Sideleau's) authority. The box corresponding to the second option, which "authorize[d] and empower[ed]" Sideleau to sell and to convey Colonari's real property, clearly was marked.

Thereafter, as a result of Sideleau's misappropriation of the estate's funds, the Probate Court ordered his removal as conservator and directed him to submit a final accounting, which he presented in January, 2000. The Probate Court subsequently appointed the plaintiff as successor conservatrix of Colonari's estate. The court accepted Sideleau's final accounting with exceptions, noting numerous deficiencies, including a discrepancy of \$250 relating to Sideleau's sale of Colonari's real property. The trial referee found that Sideleau had "failed to properly account for \$12,017.92 withdrawn from the assets of the estate and owes this sum to the plaintiff."

Hartford argued that the trial court improperly determined that the October, 1996 bond subjected it to liability for all deficiencies, including those unrelated to the sale of Colonari's real property. It argues that the court must determine the scope of its obligation under the bond through the text of the bond and the governing statute, and that an analysis of these provisions compels the conclusion that the bond subjects it only to limited liability for Sideleau's misappropriation of \$250 in connection with the sale of Colonari's real property. Hartford also contends that the trial court's determination runs contrary to the text of the bond and the standard bond form, and further renders certain provisions of title 45a of the General Statutes inoperable.

Under Connecticut law “[t]he liability of sureties is determined by the specified conditions of the bond .... [W]hen a bond is required by statute, a court will read the statute into the contract between the principal, surety and obligee.” *Southington v. Commercial Union Ins. Co.*, 254 Conn. 348, 358-59, 757 A.2d 549 (2000); accord *Ames v. Commissioner of Motor Vehicles*, 267 Conn. 524, 530, 839 A.2d 1250 (2004). Moreover as with the interpretation of all contracts, the instrument is construed “to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction.... [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and ... the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract.... Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms.” *Poole v. Waterbury*, supra, 266 Conn. at 87-88, 831 A.2d 211, quoting *Niehaus v. Cowles Business Media, Inc.*, 263 Conn. 178, 188, 819 A.2d 765 (2003).

A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity. Similarly, any ambiguity must emanate from the language used in the contract rather than from one party's subjective perception of the terms.” *Poole v. Waterbury*, supra, 266 Conn. at 88, 831 A.2d 211, quoting *Niehaus v. Cowles Business Media, Inc.*, supra, 263 Conn. at 188-89, 819 A.2d 765. Moreover, “[t]he mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous.... If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous.... By contrast, language is unambiguous when it has a definite and precise meaning ... concerning which there is no reasonable basis for a difference of opinion.” *Poole v. Waterbury*, supra, at 88, 831 A.2d 211.

Although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact ... [w]here there is definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law.” *Southeastern Connecticut Regional Resources Recovery Authority v. Dept. of Public Utility Control*, 244 Conn. 280, 290, 709 A.2d 549 (1998); accord *Poole v. Waterbury*, supra, 266 Conn. at 88, 831 A.2d 211.

An examination of the bond form in **Goldberg** reveals that the box corresponding to the second option, which “authorize[d] and empower[ed]” Sideleau to sell and to convey Colonari's real property, clearly was marked, thereby indicating the restricted nature of the bond. Furthermore, the circumstances surrounding the transaction indicate the bond's limited scope. The Probate Court waived the requirement of a bond to cover Sideleau's actions when it appointed him as conservator in May, 1994. Moreover, no evidence was presented to the court, either prior to or in conjunction with the filing of the application for permission to sell Colonari's property, to suggest the need for a global bond covering all of Sideleau's duties as conservator. The only bond deemed necessary was the \$20,000 bond required by the court in conjunction with Sideleau's application for permission to sell Colonari's real property. The **Goldberg** court observed that these

facts further support the conclusion that the bond was limited in scope. Accordingly, both the parties to the suretyship contract, namely, Sideleau and Hartford, as well as the Probate Court in requiring the bond, intended the bond to cover only Sideleau's actions in connection with the sale of Colonari's real property.

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#### **E. Offset Defenses Ignored**

The decision in *In re Conservatorship of Estate of Ayala*, 2003 WL 1889953 (Cal.App. 2 Dist. April 17, 2003) rejected an offset defense asserted by the bonded principal. After the son of a missing woman was appointed conservator of her estate and then removed from the position by the court, the court-appointed conservator filed a petition to compel an accounting, for damages, and to surcharge the bond. The Superior Court, Los Angeles County, surcharged the removed conservator \$96,268.59, plus interest at a legal rate, and awarded removed conservator only \$1,500.00 in expenses and \$1,000.00 in fees. The removed conservator appealed. *Ayala* held that removed conservator was not entitled to offset any amount that he was surcharged by the amount the removed conservator was likely to inherit from the estate because his interest in the estate was not vested until the ward expired. Any funds presently in the estate could be exhausted before the ward dies.

#### **VI. Unintended Coverage within Penal Limits**

##### **A. Appreciation/Lost Income**

The case of *In re Guardianship of Dorson*, 934 A.2d 545 (N.H. 2007) represents an expansion of the surety's obligation from the statutory interest rate on lost funds to the gain that the fiduciary may have earned if he had invested the converted assets in existing holdings. *Dorson* holds that the surety for a defaulting conservator owed the investment gain the stolen assets would have earned.

In *Dorson*, the principal fled the United States taking funds from an annuity contract with him. The surety paid the successor conservator the amount stolen, and the issue was the successor conservator's claim for an additional amount. The surety argued that at most it owed interest at the legal rate from the time the funds were taken until it replaced them. The conservator argued that the surety owed the appreciation in the value that the liquidated units in the annuity contract would have earned had they remained invested during the relevant period. The *Dorson* Court held that such "appreciation damages," proven by the claimant's expert, were appropriate to make the estate whole. The *Dorson* court declined to address any hypothetical loss in the investments except to say that "Presumably, had the fund from which the money was taken depreciated in value, the probate court would have imposed a different remedy."

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In the case *In re Conservatorship of Estate of Ayala*, 2003 WL 1889953 (April 17, 2003 Cal.App. 2 Dist.), discussed above, the removed conservator was held liable for the \$5,077.80 income he should have recovered .

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In *Sudnick v. Klein*, 2002 WL 31895117, 2002 -Ohio- 7341 (Ohio App. 11 Dist. December 31, 2002), beneficiary of will brought declaratory judgment action, seeking to hold executor of estate personally liable for financial losses that occurred in estate while under his control.

The Court of Common Pleas, Probate Division, Geauga County, dismissed action, and beneficiary appealed. The Court of Appeals, 708 N.E.2d 735, reversed and remanded. On remand, the Court of Common Pleas, Probate Division, Geauga County, entered judgment in favor of beneficiary, and the executor appealed. The *Sudnick* court held that competent, credible evidence supported finding that executor failed to use due care and beneficiary was entitled to interest on her share of estate that would have been earned if executor had not breached his fiduciary duty. <sup>21</sup>

The *Sudnick* Court held that an executor who continues a decedent's business after one month from the date of appointment as executor, without first obtaining the permission of the probate court, does so at his peril, and may be accountable for any losses incurred by the business. Appellant's liability, if any, must be premised on the common-law doctrine of breach of fiduciary trust, in that he either exceeded the scope of his authority or failed to timely liquidate the estate. To be successful on such a claim, appellee had to prove, by clear and convincing evidence, the existence of a duty arising out of a fiduciary relationship, a failure to observe that duty, and an injury resulting approximately therefrom. *Strock v. Pressnell*, 38 Ohio St.3d 207, 216, 527 N.E.2d 1235(1988); *Snead v. McCaskey*, 11th Dist. No. 96-G-2007, 1997 WL 402396, at 3(June 27, 1997). See, e.g., R.C. 1701.59 (providing that clear and convincing evidence is required to prove a breach of fiduciary duty by corporate directors).

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In *Alford v. Marino*, 2005 WL 3310114 (Tex.App.-Houston [14 Dist.],2005), an

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<sup>21</sup> The facts of *Sudnick* are instructive. The probate court issued a written judgment awarding appellee \$123,271.32, which was determined by calculating what appellee's share of the estate would have been if the corporation had been liquidated at the time of the decedent's death. In doing so, the probate court found that appellant had been negligent in the administration of the estate. Specifically, the court, found that appellant had "failed to use due diligence and care in monitoring the single most valuable asset of the estate, the decedent's wholly owned excavating business ," and that he "was negligent in not taking steps to liquidate the business when it should have been obvious that the business was no longer viable and that continued operation was detrimental to the estate." The probate court offset a settlement appellee had already received from David G. Davies ("Davies"), the attorney who had represented her interest in the estate during the estate's decline. Accordingly, the probate court ultimately entered judgment in appellee's favor for \$63,271.32.

administratrix of the decedent's estate brought an action against the decedent's guardian seeking to recover, among other things, social security payments issued for the decedent but delivered to the decedent's mother during periods of the guardianship. The **Alford** court held that the guardian was not required to account for social security benefits paid to the ward's mother as payee of the benefits during the period of guardianship.

## B. Unintended Coverage for Prejudgment Interest

Most sureties expect to be responsible for prejudgment interest from the time they are given notice of a possible loss up to the bond penal sum. However sureties typically do not intend to be responsible for interest before they are given the opportunity to pay and never in excess of the bond penal limit.

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In six cases, a successor conservator brought an action against a former conservator unable to adequately account for the ward's assets and against the surety for the former conservator. ***In re Conservatorship of Huerta*** 273 Kan. 97, 41 P.3d 814 (Kan.,2002). In each case, the District Court, Sedgwick County, found the former conservators had converted assets, and entered judgment against the former conservator and their sureties. The former conservators and their sureties appealed, and the appeals were consolidated. The Supreme Court, held that: (1) sureties were liable for interest and costs in excess of penal sum of bonds, and (2) sureties' liability for interest arose on date of each conversion.

St. Paul Fire & Marine Insurance Company, United States Fidelity & Guaranty Company, and Old Republic Surety Company (sureties) contend that the probate court erred by awarding judgments to the injured wards in excess of the penal sum stated on the bonds.

The sureties argued that case law in Kansas limits the liability of the surety to the amount of the bond. In support of this contention, the sureties cite *Koch v. Merchants Mutual Bonding Co.*, 211 Kan. 397, 507 P.2d 189 (1973); *School District v. DeLano*, 96 Kan. 499, 152 Pac. 668 (1915); *McMullen v. Winfield Building & Loan Association*, 64 Kan. 298, 67 Pac. 892 (1902); and *Burchfield v. Haffey*, 34 Kan. 42, 7 Pac. 548 (1885). ...'While the penalty of the bond fixes the limit of liability of the surety at the time the liability arises, ...if the principal or surety fail to discharge that liability when it matures, interest may be allowed on the amount from the time the liability arises, even if the amount of recovery shall exceed the penalty.'

"The rationale of this holding is explained in this fashion:

" '... Interest is recoverable against both [principal and surety] ... from the time of the default, not as a part of the penalty, but for the detention of the money after the same became due ....' (p. 304.)" *Koch*, 211 Kan. at 400,

507 P.2d 189.

This rationale does not explain why the surety should be liable before it has notice of the breach of duty and a corresponding opportunity to cure the breach by payment of its penal limits.

**C. Unintended Coverage for Attorneys Fees**

In **Colonial American Casualty & Surety Co. v. Scherer**, 214 S.W.3d 725 (Tex. App-Austin 2007), the Court ruled that because Texas statutory law provides that attorneys fees are recoverable from the fiduciary for breach of duty, the surety is also liable for attorneys fees. On the positive side, the **Scherer** court expressly ruled that all recovery is limited to the penal sum of the bond. The **Scherer** decision reduced the surety's obligation by the \$13,856.46 in attorneys fees awarded in excess of the \$30,000.00 penal sum of the bond, which in that case was all of the attorneys fees.

**D. Unintended Coverage for Payments Benefiting Estate Including Encroachments Permitted but Later declared Inappropriate**

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An executor of testator's estate appealed the probate court's order that required executor to reimburse estate for funds expended for repairs to testator's house which the executor occupied as a life tennantt and for payment of property taxes. **In re Saccu's Appeal From Probate**, 97 Conn.App. 710, 905 A.2d 1285 (2006).

The **Saccu** Court, held that testator did not intend through use of phrase in his will authorizing the executor to pay for "ordinary maintenance and repairs" to supersede common-law maintenance obligations of the executor as life tenant; and evidence supported trial court's finding that work performed on house was ordinary and thus executor's individual obligation as life tenant. The order for the executor to repay the estate was affirmed.

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The Court in **Hartford Casualty Insurance Co. v. Morton**, 141 S.W.3d 220 (Tex. App.-Tyler 2004) also surcharged the surety for expenses for the "benefit" of the ward made by the temporary guardian. The probate court in **Morton** had granted the temporary guardian the power to pay all bills...and to make any and all reasonable and necessary expenditures from the estate." While the ward was in a nursing home, the temporary guardian and her spouse (who had been disqualified from being guardian) moved into the ward's house and used \$78,492 of the ward's money to make repairs and improvements and pay taxes on the ward's real property.

The **Morton** court held that the expenses paid from the corpus of the estate for repairs and improvements to the ward's real estate were not authorized without prior

court permission despite the power granted by the Probate court in the letters guardianship. The court recognized that under Texas law a guardian could spend income without prior court approval—but expenditures were limited to only \$5,000 per year by statute without prior court approval. Thus the **Morton** court reduced the judgment on appeal to \$73,492.

**E. Unintended Coverage for Losses Caused by Others including Ward**

In **Estate of Deigh v. Perkins**, 135 Wash.App. 1007, 2006 WL 2895073 (Wash.App. Div. 1 2006), address the liability of others for losses attributable to a bonded fiduciary. In **Perkins**, a claim was made against the estate's original personal representative, for misappropriation of estate assets and breach of fiduciary duties. The court appointed Adams the successor personal representative. The successor personal representative settled with the bonded fiduciary before trial. In their settlement agreement, the original personal representative assigned her legal malpractice claims against Matthew Perkins, the attorney she hired while serving as personal representative of the Deigh estate, in return for Adams' agreement not to execute on the judgment against her.

Adams then brought a legal malpractice and breach of fiduciary duty claim against Perkins. The trial court dismissed Adams' claims on summary judgment because she lacked standing and the legal malpractice claim could not be assigned. Adams argues she did have standing because Perkins owed a duty to the estate. She also asserted the legal malpractice claim could be assigned because Roberta assigned it to the estate, which was not an adversary in a previous action. Finally, she contended the trial court erred by striking declarations she presented in opposition to Perkins' summary judgment motion and by denying her motion for reconsideration.

The **Perkins** court affirmed the dismissal of Adams' case for lack of standing because, under the holding in *Trask v. Butler*, an attorney for a personal representative of an estate has no duty to the estate or its beneficiaries.

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The decision in **Estate of Ayala** discussed above also exposed the surety for losses caused by relatives of the conservator. The **Ayala** Court of Appeal, held that the removed conservator was responsible to the estate of his mother for the cost of his mother's automobile damaged by the fiduciary's sister.

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Loper Lumber Co. v. Windham, 282 So.2d 256, 260 (Ala.1973). The surety does not cite, and this court does not find, any authority holding that a third party can be held liable for allowing an agent to do things he was authorized to do, simply because the party did not know the agent was an agent

## F. Unintended Coverage for Debts of Insolvent Estate

It seems absurd, but probate sureties frequently find themselves paying for debts owed by an estate they bond. In absence of out and out conversion by a bonded fiduciary of money that would have paid the debt, no surety ever expects to be responsible for debts owed by the estate they bond. However the following cases have certainly expanded the bond coverage in this regard.

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The recent decision in *In Re Conservatorship of Irwin*, 732 N.W.2d 411 (S.D. 2007) illustrates how a surety can become responsible for the payment of debts of an estate. In *Irwin*, the ward's only child became guardian and conservator. During the course of her service as conservator, the *Irwin* conservator liquidated several accounts owned by the ward with other heirs with a right of survivorship to pay the debts. It was not disputed that the debts were owed or that the conservator should have paid the debts. There was no dispute that funds in these accounts were generated by ward and thus were subject to being used to pay the wards debts. The complaints by the survivor parties/heirs was that the conservator used these accounts in preference to other survivorship accounts owned by the ward with the conservator as survivor beneficiary—meaning that the conservator was acting to preserve the property she would receive upon the ward's death at the expense of others who had no control over the payment of the ward's debts.

The *Irwin* court agreed with the survivors/interest owners of the accounts used to pay the Estate debts other than the accounts in which the conservator had the survivor interest. "We agree that [the conservator] breached her fiduciary duty by failing to meet the statutory requirements. She did not obtain court approval before accessing joint accounts as required by [South Dakota law]. However to remedy this breach, the circuit court required total reimbursement of the funds accessed without court approval. While it does appear that [the conservator] and some of her children received more than their initial share, the proper remedy is not surcharging [the conservator] for the entire amount.... [The conservator] should only be charged to the extent that she benefited from the breach of duty." The *Irwin* court therefore reversed the surcharge of \$65,041.58 and directed the court to apportion the debt payment from all the accounts in which the estate held an interest in order to treat the survivors equally.

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The *Jewish Home for Elderly of Fairfield County, Inc. v. Cantore*, 96 Conn.App. 326, 901 A.2d 49 (Conn.App. 2006) case discussed above with respect to the principles of *res judicata* is a perfect example of a surety becoming responsible for payment of an estate debt. In *Cantore*, a nursing home brought collection action against patient's conservator and probate bond surety, Continental Casualty Company (Continental), was held liable for this debt which was unpaid when medicaid refused to pay after the conservator had spent all the estate money in an effort to qualify the ward

for Medicaid benefits.<sup>22</sup>

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***Masonic Healthcare v. Latham***, 36 Conn. L. Rptr. 377, 2004 WL 202967 (Conn.Super. 2004), involved a motion (by the fiduciary and surety) to strike a complaint brought by Masonic Health Care Center to recover monies spent for care and services provided to the deceased Susan Stevens and brought against her conservator Mr. Latham for an alleged violation of his fiduciary duties. Mr. Latham was appointed conservator in March 1995 and filed a probate bond as a condition of his appointment. Latham is principal on the bond and the Hanover Insurance Company is the surety. Latham and Hanover refused to pay the monies claimed to be owing by the plaintiff healthcare facility.

The complaint alleges that the defendant had a duty to make prompt application for medical assistance when her assets approached \$1,600.00 and in connection with such application he had a duty to “spend-down” his ward's assets to that amount. The complaint goes on to allege that *while his ward was still alive* the defendant filed an application with the Department of Social Services for Medicaid benefits. On July 19, 2001, after the ward died, the department denied the application for the months of May, June, July and August 2001 for the defendant's “failure to spend-down assets, specifically maintaining a burial fund in the amount of \$4,494.00, in excess of the limit allowed by Medicaid,”

The ***Latham*** Court stated that despite the references to post-death months, the application for benefits must refer to care provided to the ward before she died. Also the failure to “spend-down assets” must refer to a failure that occurred while the ward was still alive as to what could there be a spend-down in regard to care and services, the subject of the Medicare application, after the ward died? The fact that the department's decision was not *issued* while the ward was alive was, according to the ***Latham*** Court irrelevant to the issue raised by the complaint that the acts claimed to be a violation of

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<sup>22</sup>The following is the procedural and factual background of ***Cantore***. Kosminer was a patient of the plaintiff, a state licensed nursing home. On June 8, 1987, the Stamford Probate Court appointed Cantore as conservator of the person and estate of Kosminer. Pursuant to General Statutes (Rev. to 1995) § 45a-139, Cantore executed and filed with the court a probate bond in the amount of \$50,000, naming himself as principal and Continental as surety. The bond provided that it was conditioned, as required by § 45a-139, on Cantore's “faithfully perform[ing] the duties of his trust and administer[ing] and account[ing] for all monies and other property coming into his hands, as fiduciary, according to law....”

On August 29, 1989, upon Cantore's request, Kosminer was admitted to the plaintiff's facility as a “private, self-pay” resident, where she remained until her death in 1995. At the time of Kosminer's admittance, her estate had assets of approximately \$160,000. Despite the ample resources of the estate, Cantore failed to make timely payment to the plaintiff for the care and services provided to Kosminer. Instead, on May 2, 1990, more than eight months after Kosminer had been admitted to the plaintiff's facility, Cantore made an initial application on Kosminer's behalf to the department of income maintenance (department) for title XIX (medicaid) assistance, which, if Kosminer had been eligible, would have paid for the cost of her care. This application was denied on the ground that Cantore had failed to provide the department with information to verify that Kosminer's assets did not exceed \$1600, the maximum amount permitted for medicaid eligibility.

fiduciary duty while the ward was alive.

The **Latham** court observed that the even though the complaint alleged that “on his initial denial” the defendant “failed to promptly appeal the denial or take appropriate action to obtain Title XIX benefits for the period of May 2001 though August 2001,” there is something to be said for the defendant's position that “In order for a conservator to have authority to act and in this case appeal or otherwise pursue the application for Medicaid benefits, there must be a live person designated as the conservator's ward,” citinig *Noble v. Corkin*, 45 Conn.Sup. 330, 332, 21 Conn. L. Rptr. 547 (Blue, J.1998). The fiduciary also argued that under § 52-599(a) only the executor or administrator of the estate “has the right to pursue claims or causes of action that arose prior to her death.” Subsection (a) of the statute provides: “A cause or right of action shall not be lost or destroyed by the death of any person but *shall survive in favor of or against the executor or administrator of the deceased person.*”

After loosening the leash for the fiduciary and surety, the **Latham** Court proceeded to wrap it around their necks and throw them off the cliff. “But noting that the language of this statute precludes a claim against a conservator for breach of a fiduciary duty by a party claimed to have been harmed by that breach during the ward's (deceased's) life. The claim is that: ‘The defendant Latham, as conservator of the Estate, breached his fiduciary duty by not properly pursuing Medicaid benefits *while Stevens (the ward) was alive.*’ (Emphasis by court.). Could the executor bring an appeal at this point? Even if he or she can, why should the plaintiff be denied the right to pursue its claim on the probate bond? Can the plaintiff sue the estate? Why have probate bonds, even if that in fact is a remedy?”

Thus the **Latham** court allowed the action against the bond to proceed even though it observed that the Estate was statutorily empowered to seek the very review it claimed the fiduciary should have made. So much for the fair and inexpensive administration of justice!

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In a similar case creditors that had provided goods and services to a ward filed separate actions seeking removal of guardian and payment of debts incurred. **In re Ewanicky**, 2003 WL 21469181, 2003-Ohio-3351 (June 26, 2003 Ohio App. 8 Dist.). The Court of Common Pleas, Probate Court Division, Cuyahoga County, No. 855756B, removed guardian and ordered her to pay debts that ward's estate had incurred during guardianship.

On appeal, the **Ewanicky** creditors asserted that, Jurczenko's failure to pay the \$50,283.47 caused Ewanicky's estate to accrue the debt in question. The **Ewanicky** court agreed, citing R.C. 2111.151(B)(3), and holding that a guardian is personally liable for a ward's debt when the “negligence of the guardian or conservator gave rise to or resulted in the debt.”

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The court in *Ewanicky* did not cite the next case where the administratrix (and her surety) were exonerated for not having paid debts owed by the estate. In *Smith v. Estate of Mattern* 2002 WL 31812678, 2002-Ohio-6883 (Ohio App. 5 Dist. Dec 9, 2002), mortgagees brought action against administratrix of estate of deceased mortgagor, alleging that administratrix breached her fiduciary duties in regards to mortgaged property of the estate. The Probate Court, Stark County, granted administratrix summary judgment. The mortgagees appealed. The Court of Appeals held that: (1) the administratrix did not breach her fiduciary duties by waiting to sell mortgaged property, and (2) the administratrix was not required to expend her own personal funds to preserve property.

In *Mattern* at the time of his death, the decedent had no money. He owned a Chrysler which was later sold by the estate for \$1,000. A personal injury claim settled soon after his death, provided the estate with \$2,978. Thus, the estate contained total assets of \$3,978.

The *Mattern* court stated that “Executors and administrators of an estate are fiduciaries. R.C. 2109.01. While a determination of a breach of fiduciary duty depends largely upon circumstances in each case, waste or diminution of the estate, or negligence causing loss to the estate, can result in a finding of a breach of fiduciary duty. Therefore an administratrix may have a duty to sell real property of the estate if it appears other assets of the estate will not be sufficient to pay outstanding debt. *Stout v. Stout* (1910), 82 Ohio St. 358, 363, 92 N.E. 465. Further, a party in possession of collateral has a duty to preserve it on behalf of secured creditors. See *Buckeye Fed. Sav. & Loan Assoc. v. Guirlinger*, 62 Ohio St.3d 312, 316, 581 N.E.2d 1352 (1991).”

In *Mattern* the mortgagees recognized and conceded there were no funds available to the estate to pay for repairs or maintenance. As a result the Court affirmed that the executrix had no duty to expend her own personal funds to preserve the asset. “Given the insolvency of the estate, we find no error in the trial court's decision Ms. Jarvis did not breach her fiduciary duties.”

## **VII. Disregard of Known Breaches by Principals**

One of the most vexing realities to probate sureties is that frequently their representatives discover upon investigating (following their first receipt of notice of a problem from the probate court), that the court, claimants and others involved in the case have long had actual knowledge if not reasonable notice that the bonded principal is in breach. This notice of breach often exists in a myriad of things actually contained in the court record ranging from the lack of returns for many years to details disclosed in returns that goes completely unnoticed and even sometimes allowed. What is truly frustrating is that one of the foundational concepts is that anything that a bond obligee does (or does not do) that increases the risk of loss to the surety discharges the surety. In the subtly doubting yet expressive word of Bill Cosby's Noah—“Right!”

## A. Duty to File Returns-Ignored

The Court in *In Re Cooper*, 27 Fiduc.Rep.2d 146, 2005 WL 3739300 (Pa. Com.Pl. June 7, 2005) addressed a *sua sponte* order by the court “alarmed” by the alleged misappropriations of an incapacitated person’s funds. In *Cooper* the guardian (who initially had a \$60,000 bond, with an additional \$229,500 rider following an order authorizing the sale of real estate) invested more than \$150,000 through an individual and his business—neither of which had any broker license.<sup>23</sup> Following the petition to sell the real estate, no report on the sale, the proceeds or any annual return was filed for the next 4 years. When the guardian did file a petition to ratify expenses and expend principal she noted that she had placed \$176,928.37 with the aforementioned consultant and advised the court that she had been unable to communicate with the consultant and had reported him to the Pennsylvania Securities Commission.

Much of the *Cooper* decision goes into the detail of how poorly the consultant handled the estate money delivered to him by the guardian as well as much of the guardian’s personal funds. But ultimately the court ruled that the guardian was responsible for his misuse and loss of the estate money (and consequently the surety) was liable for the sums totaling \$244,307.49 less \$85,700 returned to the estate by the consultant). When the court gave the guardian credit for the \$3,50270 in the estate and the \$183,777.49 of proper disbursements from the total Estate of \$379746.88 the resulting surcharge in *Cooper* was \$158,607.49.

The *Cooper* court did not address the issue of the increased risk to the estate and loss occasioned after the accounting/annual return due to the court was not filed for the 3 years after the real property had been sold. The facts of *Cooper* reveal that at least \$31,591.66 was delivered to the consultant after returns/reports/accountings were due but not filed.

## B. Returns Allowed but Later Challenged

The court in *In re Conservatorship of Ashley*, 2007 WL 549915 (Cal.App. 1 Dist. February 23, 2007) surcharged Seaboard Surety Company on its bond and riders for losses incurred on investments and loans revealed on previously allowed returns.

The bonded conservator in *Ashley* made his first return the year after his appointment and reported that the estate had increased in value to \$47,225.81 including a \$32,000 loan. The court approved the return and required additional bonds. Seaboard provided an additional bond of \$88,000 in October 1997. The conservator filed his second return in July 1999 with another increase of the estate to \$105,393.83 due to sale of the ward’s home for \$68,000 with a note that the loan had been extended

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<sup>23</sup> Nathaniel Gaddy testified evasively but eventually conceded that he had entered into a consent order with the National Securities Board concerning his license after allegations of unauthorized withdrawals from the variable annuity contract of a public customer.

and noted that \$50,000 had been used to purchase an annuity from Pacific Life. Seaboard furnished an additional bond of \$55,000 in March 1999 to cover the additional value of the estate property. The second return was allowed with the following language—"The Conservator has performed his duties as Conservator, and on behalf of the Conservatee's best interest, [and] that the Conservatorship shall continue in force and effect."

The trouble began when the original conservator died (no return was filed by the original conservator for the year period between the second return and the death of the original conservator) and his son was appointed as successor conservator. The successor conservator filed a third return covering the period following the original conservator's last return. It identified both the loan and the annuity as assets. The court auditor however expressed concerns about the viability of these assets after the third return was filed. Eventually the second conservator resigned, and thereafter the county conservator filed a petition for a surcharge representing the unpaid loan and Pacific Life annuities (and social security payments which had been issued to the second conservator).

The **Ashley** trial court issued an order finding that Jack Ottovich breached his fiduciary duty to the conservatee by making the loan and by purchasing the annuity. The trial court thus imposed a surcharge in the amount of \$58,660.51, consisting of (1) the principal amount of the \$32,000 loan plus 8.25% interest per annum (totaling \$51,123.35), and (2) the \$2,375 penalty for selling the annuity before its maturity date plus 2% interest per annum on the annuity's principal amount (totaling \$7,536.64). The trial court further ruled that liability for the surcharge would be joint and several against: (1) the Estate, (2) appellants Karen Rayl, Harvey Ottovich and Randy Ottovich, as the Estate's administrators, and (3) respondent Seaboard, as the Estate's surety.

On Appeal the **Ashley** court essentially rejected any legal attack on the judgment, ruling that all errors asserted on legal grounds were waived because they were not asserted at trial without any real discussion. There is absolutely no explanation on *res judicata*, collateral estoppel or any other principles about how the probate court could approve the returns revealing the loans and investments not once but twice and then hold the principal and surety liable for the failure of the borrower and investment obligee to pay the estate. **Ashley** is simply a bad decision.

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The court in **Burt v. Rhode Island Hosp. Trust Nat. Bank**, 2006 WL 2089254 (R.I. Super. 2006.) held that a principal has a duty to investigate the reasonableness of stock prices. The **Burt** court found that the issue of the reasonableness of the price paid by the fiduciary was a fact question and ruled that a trial on this question was required by the probate court. "At this juncture, the facts presented by both parties are such that reasonable minds could differ as to a resolution of the question of whether the executor defendants in acting or failing to act in this manner breached the prudent man standard

in their dealings with plaintiffs.” **Burt** citing *Hershey v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 317 F.3d 16, (1<sup>st</sup> Cir. 2003).

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A ward's successor guardian filed a motion for leave to file exceptions to settlement of guardian's first partial account and second and final distributive account based on claims of fraud by prior guardian in the case *In re Guardianship of Guzay*, 2003 WL 22177106, 2003-Ohio-5036 (September 23, 2003 Ohio App. 10 Dist.). The Court of Common Pleas, Probate Division, Franklin County, No. 455209, set aside its prior entries on settlements of accounts and surcharged the prior guardian's bondsman for losses. The surety appealed. The **Guzay** court held that: (1) the prior guardian committed constructive fraud, as opposed to actual fraud, and (2) bondsman's due process rights were not violated.

The first guardian filed a second and final account with the court on September 28, 1999. On February 14, 2001, Art filed exceptions to all accounts previously filed by both former guardians. The exceptions dealt primarily with missing assets in an Eisner Securities account, including a claim that a National City Bank account had received approximately \$92,969 in wire transfers from the ward's account with Eisner Securities during the period from December 19, 1997 through February 26, 1998.<sup>24</sup>

On April 23, 2001, Art filed a Rule 60 motion for relief from the judgments approving accounts, and for an order surcharging the former fiduciary, Erwin, and the fiduciary's bondsman. In the accompanying memorandum, Art asserted that, as a result of illegal conversions, apparently made by Erwin and/or her spouse, the guardianship was missing \$185,838.33 in assets. Also on April 23, 2001, Art filed amended exceptions, asserting in part that a review of the ward's National City Bank account disclosed that ten checks were written to a Bank One account, held in the name of Joseph E. Erwin, totaling \$90,338.33. Art also asserted that the National City Bank

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<sup>24</sup> On October 20, 2000, Andrew J. Art filed an application for appointment as successor guardian over the person and estate of Guzay. On October 27, 2000, a magistrate conducted a hearing on the application. At that hearing, the second (successor) property guardian Kelleher expressed concern regarding one of the ward's accounts that she held with Eisner Securities, Inc. (“Eisner Securities”). Kelleher stated that a representative from Eisner Securities had informed him that original guardian-Erwin’s husband, Joseph Erwin, an employee at that firm, had been terminated from his employment, and that he was under investigation by the firm and by the Federal Bureau of Investigation. During the hearing, the magistrate accepted the resignations of both Erwin, as guardian of the person, and Kelleher, as guardian of the estate. The magistrate rendered a decision appointing Art as successor guardian of the person and estate of Guzay, with bond set at \$272,000. The trial court adopted the magistrate's decision by entry filed October 27, 2000.

On January 8, 2001, Art filed a motion for leave to file exceptions to the accounts. In the motion, Art asserted that Kelleher had informed him that certain monies might be missing from Guzay's account held with Eisner Securities due to an alleged malfeasance by an employee or principal of Eisner Securities. Art asserted that, while Kelleher reported assets of at least \$83,762.98 in one of the Eisner Securities accounts, representatives of Eisner Securities recently informed him that there was a zero balance in the account.

statements were delivered to former guardian Davis Erwin's home address; Art claimed that the former guardian knew or should have known that there were irregularities in the assets of the guardianship.

The probate court accepted the contentions of the successor guardian as follows: \$185,838.33 for misappropriated assets, \$66,892.10 for interest since the date of the misappropriations through April 30, 2002, and \$2,208.93 in costs advanced by the successor guardian. The court awarded additional damages sought in the successor guardian's exceptions as follows: \$8,570.91 for unauthorized brokerage commissions; \$210 for unauthorized wire transfer fees; \$3,611.54 for interest on unauthorized commissions and wires through April 30, 2002; and \$4,083.70 for penalties and interest on a First National Bank loan which remains unpaid due to the insolvency of the guardianship. The **Guzay** court ordered the successor guardian to proceed against his or her bondsman to satisfy this obligation.

### **VIII. Impairment of Subrogation Rights**

#### **A. Statutory Subrogation Impairment**

In *Fidelity and Deposit Co. of Maryland v. Colonial Bancgroup, Inc.* 2003 WL 23324215 (Nov 30, 2003 M.D.Ala.), discussed above, the court dismissed a surety's "subrogated" claim against a bank.

On September 2, 1998, Jeffers signed a power of attorney naming Hammons as her attorney-in-fact. The power of attorney gave Hammons the power to make deposits, withdrawals, and transfers "in and to such banks or other financial institutions as in his discretion may be beneficial to me," and to endorse checks payable to Jeffers for deposit "in a bank or banks where he chooses to conduct business for me." In early 2000, Jeffers suffered a stroke that left her unable to manage her personal affairs or care for herself. On July 31, 2000, the Probate Court of Montgomery County conditionally appointed Hammons as Conservator over Jeffers's estate upon the filing of a \$150,000 bond. On August 24, 2000, Hammons obtained a \$150,000 surety bond from Fidelity and Deposit Company of Maryland.

Hammons deposited three checks made out to Jeffers into his personal account at Colonial. Hammons signed all three checks with his name and with Jeffers's name. The combined value of the checks was \$95,638.87. This money came from Jeffers's annuity account with SunAmerica Life Insurance Company. In April 2000, Jeffers requested the first check for \$56,000 from her SunAmerica account. At this point the power of attorney was in effect, but Hammons had not yet been appointed the conservator of Jeffers' estate. In November and December 2000, after Hammons had been appointed conservator and when the power of attorney was still in effect, Hammons completed two affidavits to affirm his power of attorney to request withdrawals of \$4,266.07 and \$35,372.80 from the SunAmerica account. He deposited these two checks into his personal account at Colonial in December 2000.

In August 2000 and March 2001, the Alabama Attorney General received information that Hammons was not paying Jeffers's nursing home bills in a timely manner. The Attorney General discovered Hammons had sold some of Jeffers's property and had misappropriated some of the funds. Hammons was indicted for theft, pled guilty, and was sentenced to ten years' imprisonment.

Hammons was removed as guardian and conservator of Jeffers's estate in April 2001. The Probate Court entered two orders, in July 2001 and May 2002, requiring Hammons and Fidelity, as surety, to pay \$77,419.79 and \$47,339.82 to the successor conservator of Jeffers's estate. Fidelity sued Hammons and obtained a judgment against him for \$124,759.61 plus attorneys' fees and costs; it has recovered \$17,866 of this amount. The successor conservator of the Jeffers estate assigned all its rights and claims relating to these losses to Fidelity, and Fidelity now brings this suit to recover the value of the three checks that it alleges Colonial wrongfully allowed Hammons to deposit.

Fidelity alleges that Colonial wrongfully allowed Jared Hammons to deposit into his personal account three checks with a total value of \$95,639.98 that were payable to his maternal grandmother, Dorothy Jeffers, who is incapacitated. Fidelity was the surety on these and other funds that Hammons misappropriated from Jeffers, and is the assignee of Jeffers's claims against Hammons. Fidelity brings this claim as the assignee and subrogee of the Jeffers estate's claims against Hammons. Under Alabama law, a surety who pays the debt of his principal "stands in the shoes" of the payee and "may enforce the payee's rights in order to seek reimbursement." *American Liberty Ins. Co. v. AmSouth Bank*, 825 So.2d 786, 790 (Ala.2002).

The parties agree that Jeffers executed a valid power of attorney appointing Hammons her attorney-in-fact. The power of attorney created an express, actual agency relationship between Jeffers and Hammons. See *Fisher v. Comer Plantation, Inc.*, 772 So.2d 455, 465 (Ala.2000) ("An express agency is an actual agency created as a result of the oral or written agreement of the parties."). It gave Hammons the right to "make deposits ... of funds in and to such banks or other financial institutions as in [Hammons's] discretion may be beneficial to [Jeffers]," and to "endorse checks payable to [Jeffers] for deposit in a bank or banks where [Hammons] chooses to conduct business for [Jeffers]." This clearly gave Hammons the authority to sign checks made out to Jeffers and to deposit them into banks of his choosing. In addition, at the time Hammons deposited the two checks in December 2001, he was the conservator of Jeffers's estate and her guardian; this gave him "all the powers and duties conferred [to guardians] under the law". This gave him additional authority to sign her name and to deposit the checks made out to her.

While a third party dealing with an agent is held to be subject to the burden of ascertaining the extent of the powers of the agent, it seems that where the agent is, in fact, acting within the scope of the authority granted to him, the principal ought to be bound for the acts of the agent, whether the third party made any inquiry as to the extent of the agent's authority or not."

Thus, the **Colonial Bankcorp** court dismissed the surety's claim and diminished the rights of the subrogated surety which had been liable for the misdeeds of its principal in withdrawing the money from the bank.

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**In re Guardianship of Tatum**, 2002 WL 1751247 (Feb. 4 2002 Tenn.Ct.App.) involves liability for misappropriation of funds in a guardianship estate. After a guardian was appointed by the probate court, Fidelity and Deposit Company of Maryland executed a guardianship bond as surety. The order appointing the guardian provided for the guardian's attorney to have joint control of the guardianship estate with the guardian. BellSouth Telecommunications, Inc. owed certain sums to the ward and was notified by the guardian's attorney of the joint control provision. The guardian's attorney also requested that the funds be sent to him to be deposited in the guardianship accounts. BellSouth ignored the request and sent the check payable to the guardian. Subsequently, the guardian misappropriated the funds, and the substitute guardian was awarded judgment against F&D.

F&D then filed a third party complaint against BellSouth for the sums so paid, and after a non-jury trial, the probate court entered judgment for F&D against BellSouth. BellSouth has appealed.

The **Tatum court** evaluated the case as follows:

"BellSouth was duly notified of the [joint control] provision and rejected the request of the ward's attorney that the funds be sent to him for deposit in the guardianship estate. BellSouth's action resulted in a loss to the ward's estate, and BellSouth makes no issue that upon reimbursement of the estate by the surety, the surety stands in the shoes of the ward.

"BellSouth was fully informed that joint control was provided for by the court, and if BellSouth had complied with the attorney's request, the funds would not have been misappropriated by the guardian. If there had been some confusion on the part of BellSouth, further inquiry would have resolved this confusion and thus again prevent a loss from occurring. "Where one of two persons must suffer loss by the acts or fraud of a third party, he who enables that third party to occasion the loss or to permit the fraud ought to be the sufferer."William H. Inman, **Gibson's Suits in Chancery** § 2 (7th ed.1988). **See also Commercial Bank and Trust Co. v. Southern Indus. Banking Corp.**, 16 Tenn.App. 141, 66 S.W.2d 209 (Tenn.Ct.App.1932).

"In the case before us, BellSouth's deliberate choice to ignore the court order and the attorney's request allowed the guardian to misappropriate the funds.

"Accordingly, the order of the probate court is affirmed. The case is remanded to the probate court for such further proceedings as may be necessary. Costs of the

appeal are assessed against appellant, BellSouth Telecommunications, Inc.

## **B. Settlements**

In *Central Bank of Houston v. Guardianship of Nesbitt*, 2006 WL 3518568 (Tex. App. –Hous. 1<sup>st</sup> Dist. December 7, 2006), a property guardian with a \$10,000 bond from Universal Surety converted \$41,114.16 in a restricted account with Central Bank of Houston. The Bank had made a safekeeping agreement with the probate court not to release funds in the account without court approval. The successor guardian sued the bank, which asserted a third party claim against the surety. The estate, surety and bank entered into a “Mutual Global Release” with all parties surrendering any claims against one another arising out of or in connection with or that could have arisen out of or in connection with any transaction made the basis of the underlying cause of action. The action between the parties was non-suited with prejudice

The bank later obtained repayments from the fallen fiduciary as ordered by the district court as part of his criminal sentence. The estate and surety sought a writ of mandamus against the bank for the first \$10,000 of the funds the bank received and obtained a “turnover” order from the probate court for the first \$10,000.00. The *Nesbitt* court of appeals reversed the turnover order, dismissed the suit, and enforced the Mutual Global Release reasoning that the dismissal and settlement agreement resolved all claims by and between the parties. The *Nesbitt* court stated that because the bank was not a judgment debtor the issuance of a “turnover” order against it was not permitted under Texas law and thus the order was void. The *Nesbitt* court also dismissed the mandamus, leaving Universal Surety with only recourse against its principal for the funds it paid.

There is no explanation in *Nesbitt* as to why the criminal court did not order payment to the estate, bank, and surety.

## **IX. Miscellaneous Issues**

### **A. Prejudicial Statements by Court in Surcharge Trial Permitted**

In *McGrede v. Coursey*, 131 S.W.3d 189 (Tex.App.-San Antonio, 2004) the court considered an appeal from a suit for misapplication or conversion of estate assets against Appellant George McGrede, a prior guardian of the estate of Georgia Ruth Hester. Melydia Edge initially brought suit against McGrede in her capacity as successor guardian of the estate. By the time the case went to trial Hester was deceased, and the independent executor of her estate, appellee Melanie Coursey, became the named plaintiff.

At trial, Mark Stanton Smith testified as an expert in guardianships and fiduciaries on behalf of Coursey. He was called to explain guardianships and their purpose. He also explained what an inventory is used to determine the bond, and why a bond is

needed in a guardianship situation. During his testimony, Smith talked about bonds and mentioned the words “insurance company” and “bonding company.” The probate court gave the jury an instruction to disregard any information regarding either a bonding company or insurance company, specifically instructing them “not to give any thought to the concept of whether there is or is not insurance of any kind involved in this.”

Following a jury trial, final judgment was rendered in favor of the Estate in the amount of \$93,405.42 for the conversion charges and an additional \$93,405.42 as exemplary damages for McGrede's breach of fiduciary duties. McGrede appealed the judgment. On appeal, McGrede contends Smith's testimony should not have been allowed into evidence and constitutes reversible error.

The **McGrede** court found that Smith's testimony did not serve as part of an argument involving McGrede's possession of insurance, but rather stood as a partial explanation of how a guardianship is run and the responsibilities of a guardian. In the present case. The court further stated that any curative measure, such as the instruction given to the jury by the court would most likely not have served to accentuate and magnify the prejudicial effects of the testimony. In addition the court observed, “McGrede presents this Court with no evidence showing that Stanton's testimony probably caused the rendition of an improper judgment.” See *Dennis*, 362 S.W.2d at 309.

## **B. Liability for Guardian withholding Money from Ward**

In *Trapp v. State*, 53 P.3d 1128 (Alaska,2002), a ward filed suit against conservator, alleging that conservator intentionally or negligently withheld funds, violated duty of confidentiality, and defamed ward. The Superior Court, Third Judicial District, Anchorage granted conservator's motion to dismiss. Ward appealed. The Supreme Court, held that conservator was not shielded by absolute quasi-judicial immunity.

Alaska Statute 13.26.305 provides:

- (a) Unless otherwise provided in the contract, a conservator is not individually liable on a contract properly entered into in a fiduciary capacity in the course of administration of the estate unless the conservator fails to reveal the representative capacity and identify the estate in the contract.
- (b) The conservator is individually liable for obligations arising from ownership or control of property of the estate or for torts committed in the course of administration of the estate only if personally at fault.

Other sections of the Alaska conservatorship code also suggest that wards may pursue claims against conservators. Alaska Statute 13.26.245 provides that “[i]n the exercise of powers, a conservator shall act as fiduciary and shall observe the standards of care applicable to trustees under Alaska Statutes 13.36.225-13.36.290.” The phrase “standard of care” is generally used to define the circumstances in which a party is liable

in tort, and fiduciaries are generally liable to those whom they are charged with protecting when they breach their fiduciary duties.

Alaska Statute 13.26.215 authorizes the court to require a conservator to furnish a bond “conditioned upon faithful discharge of all duties of the trust according to law.” Subsection .220(a)(1) provides that the conservator is jointly and severally liable with the sureties on the bond; subsection (2) of section .220(a) provides that the bond may be enforced in the court which appointed the conservator “in any proceeding pertaining to the fiduciary duties of the conservator”; and subsection (3) provides that “any interested person” can initiate a proceeding against the surety. The statutory bond requirement thus contemplates that claims for money damages may be brought for breaches of fiduciary duties against the conservator and the surety by “any interested person.” The statute does not suggest that the latter category does not include the ward. To the contrary, the ward is typically the person most directly affected by a breach of fiduciary duty.

The *Trapp* Court observed that “Fiduciaries, of course, are subject to liability to their wards for harm resulting from ordinary negligence in the discharge of their fiduciary duties; if anything, they are charged with a *higher* standard of care than are persons who do not owe fiduciary duties.” See *Pino v. Budwine*, 90 N.M. 750, 568 P.2d 586 (1977); *Guerra v. New Mexico Human Servs. Dep’t*, 96 N.M. 608, 633 P.2d 716 (App.1981) (guardian accepting assets of ward held to stringent and high standards of conduct). The *Trapp* court did not rule that the conservator was liable—only that the ward could bring suit against his conservator and surety for breach of duty.

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## X. Conclusion

The cases above are just the most recently exposed tips of the ice-berg. There are many ways that probate courts can expand the obligation of a probate surety beyond the intentions of the underwriter and indeed the company.

Probate courts have issued judgments over and above bond penal sums—which have been affirmed on appeal for things like interest, court costs, attorneys fees, and bad faith. Even judgments for unintended coverage for items like lost income, appreciation, attorneys’ fees, prejudgment interest, and certain debts owed by the estate within the penal limits have been rendered against sureties. Judgments unreasonably expanding statutes of limitations such that they may never run have been upheld. *Res Judicata* principles have been limited to leave sureties exposed after final accountings have been approved and after estates have been closed for years. Probate bonds have been held cumulative and stacked rendering sureties liable for the penal sum for multiple years and/or multiple claimants. Probate bonds issued for limited purposes have been interpreted to cover losses totally unrelated to the property they were issued to protect. Probate courts have ignored offset and set-off claims that their bonded principals have with respect to the bonded estate. Probate courts have held sureties liable for breaches revealed to the court through annual returns for years

without any action by the court. Probate courts hold sureties liable for actions of relatives of the fiduciary and even the ward. The examples of probate bond coverage expansion may be endless.

It is thus incumbent on claims professionals and surety counsel to become familiar with these cases and critically review them in order to be effective advocates and limit the next attempt to expand the coverage of probate bonds. Stay tuned for more.

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(Cases in bold type are discussed in this Presentation)

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## About the Authors



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Toni has been with State Farm's corporate office in Bloomington, Illinois since 2004. As counsel, she provides consulting and legal advice to the bond claim operation for 23 states located throughout the country and the centralized Fidelity and Surety underwriting department. Prior to 2004, Toni was engaged with insurance defense matters for State Farm in the Kansas City metropolitan and surrounding areas. Before coming to State Farm in 1991, Toni was employed with a plaintiff's law firm.

Toni is a member of National Bond Claims Association and American Bar Association. She holds the designations of Chartered Property and Casualty Underwriter, Chartered Life Underwriter, and Associate in Fidelity and Surety Bonding.

The authors wish to extend special acknowledgement and appreciation to **Christina Gulas** for her research and assistance in preparation of this topic. Christina is a bright young associate who generated more than 1000 cases for review in preparation of the paper and assisted in the final review and editing of the paper.



Christina joined Bovis, Kyle & Burch, LLC in the summer of 2007 as a law clerk and will join the firm as an associate in the fall of 2008. Christina will be the newest addition to the firm's Surety, Fidelity, and Construction section.

Christina received her undergraduate degree from the University of Virginia (B.A. 2005), and is currently pursuing her law degree at Georgia State University (J.D. expected May 2008). While at Georgia State Christina received the Cali Award for her performance in both Constitutional Law I and Food and Drug Law. Christina also served as the law school senator for the Georgia State Student Governance Association in 2005-2006.

Christina was born in Indiana, Pennsylvania 4/7/83. She is recently engaged. Christina and her fiancé, Emil Modugno, are planning an October 2008 wedding.



**Tim Burson** joined Bovis, Kyle & Burch, LLC's Surety, Fidelity, and Construction practice in 1989 as an associate. He became a member of the firm in 1996.

Tim has written and frequently presented subjects, including a chapter in the ABA Torts and Insurance Practice Section's *The Law of Probate Bonds* (William A Downing & Jeffrey Franks Editors 2001). He also prepared a chapter on Georgia law in *The Law of Motor Vehicle Bonds* (William Downing, Lisa Jennings-Baroun, James Kearner, and Aaron McKee, Editors 2006) Since Bovis, Kyle and Burch, LLC's charter membership in the Southern Surety and Fidelity Claims Association, Tim has prepared papers and topics for publication and discussion at many of the Association's annual conferences held during the past 19 years.

Tim received his law degree at The University of Alabama School of Law (J.D. 1985). He served as a member of the John A. Campbell Moot Court Board through which Tim was also a teaching assistant/instructor in Legal Bibliography and appellate writing courses. He served as an editor on the University's *Law and Psychology Review* 1983-85. He was a member and officer of the Bench and Bar Legal Honor Society. Tim served as an Honor Court Justice as a law student and co-chaired the orientation program for first year law students in 1984. He received the Dean Thomas A. Christopher Leadership Award in his final year at Alabama. He earned "Best Paper" law school exam awards in Civil Procedure, Torts, Real Property Securities, and Food and Drug Law.

Tim is admitted to a number of courts to serve the firm's surety and fidelity clients: The State Bar of Georgia (1990); The Louisiana State Bar (1986); The United States Court of Appeal for the Eleventh Circuit; The United States Court of Appeal for the Fifth Circuit; United States District Court-Western and Middle Districts of Louisiana, Northern District of Texas, Northern and Middle Districts of Georgia; The United States Claims Court. Tim has also been admitted on a *pro hac vice* basis in Alabama, North Carolina, South Carolina, Tennessee, Texas, Virginia, and the District of Columbia.

Tim was born in Birmingham Alabama 10/27/58. He is active in a number of Southern Baptist Convention programs for Royal Ambassadors-a Certified National Trainer, a member of the Georgia Baptist Convention's Royal Ambassador Advisory Council, and the Royal Ambassador Coordinator for Noonday Baptist Association. Tim has three sons (Jonathon-24, John-20, Davis-11) and a daughter (Claire-2). Tim and Melody Burson are celebrating their 17th year of marriage.