

EDITORS' INTRODUCTION

The genesis for this publication, *THE CONTRACT BOND SURETY'S SUBROGATION RIGHTS*, originated in January, 1989 when the ABA/TIPS Fidelity and Surety Law Committee (the "FSLC") made two decisions: first, to have many FSLC members dedicate their time and effort to locating and analyzing all of the contract bond surety subrogation rights cases decided in the federal and state courts in the United States in order to create what was called the "Subrogation Database" of all such cases; and second, to put on a program in 1990 devoted solely to the issues concerning the contract bond surety's subrogation rights.

The results of those efforts were the creation of an on-line and searchable Subrogation Database of all of the contract bond surety subrogation cases that were located and analyzed and a program of papers and presentations at the ABA Annual Meeting in August of 1990 which addressed the contract bond surety's subrogation rights. A description of those papers that were subsequently published in the 1990 monograph entitled *SUBROGATION RIGHTS OF THE CONTRACT BOND SURETY* is contained in a list, along with many other listed publications, in the Appendix – Bibliography at the end of this book.

Notwithstanding those efforts, the gestation period for this book went through several additional stages over a period of years, including: the publication of a book entitled *THE SUBROGATION DATABASE: CASES CONCERNING THE SUBROGATION RIGHTS OF THE CONTRACT BOND SURETY* in 1995, and updates published thereafter; and the publication in 2000 of Chapter 23, *The Surety's Subrogation Rights*, in the second edition of *THE LAW OF SURETYSHIP*. Furthermore, in 1996, the *RESTATEMENT OF THE LAW (THIRD) SURETYSHIP & GUARANTY* was completed, and it addressed many of the contract bond surety's fundamental rights, including the surety's subrogation rights.

Thereafter, in a number of subsequent FSLC publications, bits and pieces of the issues concerning the contract bond surety's subrogation rights have appeared in FSLC books, articles and papers, which are collected and listed in the Appendix – Bibliography. However, a stand-alone publication addressing the contract bond surety's subrogation rights in detail lay dormant until Kevin L. Lybeck, FSLC Chair (2012–

2013), determined that it was time to present a program on the contract bond surety's subrogation rights at the 2013 FSLC Spring CLE Meeting. One of the results of that decision is this book.

The editors had several goals and expectations. They included:

1. The citation of as many as possible of the contract bond surety's subrogation cases dealing with the issues and topics contained in this book;
2. The citation of many of the secondary sources and materials addressing the contract bond surety's subrogation rights;
3. The presentation of statements and propositions of contract bond surety subrogation rights law supported by cited case law and secondary sources and materials; and
4. The organization of the material in this book in a cohesive and integrated manner beginning with the basics and fundamentals of the contract bond surety's subrogation rights.

The result is this comprehensive volume that flows from the general principles and required elements of the surety's subrogation rights to the application of those rights in specific situations. The chapters address: (a) the basic issues and rights of the contract bond surety's asserting its common law right to equitable subrogation, the treatment of the contract bond surety's subrogation rights in the RESTATEMENT OF THE LAW (THIRD) SURETYSHIP & GUARANTY, and the parties' rights to which the surety may assert its subrogation rights (Chapters 1-3); (b) the necessity of the principal's default, the surety's performance upon the principal's default, and the surety's notice of the assertion of its subrogation rights (Chapters 4-6); (c) the surety's assertion of its subrogation rights to the bonded contract funds and other property in competition with the obligee, the principal, the principal's subcontractors and suppliers, assignees/lenders, trustees and debtors in bankruptcy, taxing authorities and other governmental lien creditors, and the principal's general and judgment creditors (Chapters 7-13); and (d) the surety's subrogation rights to the obligee's and principal's common law and contractual setoff rights, the many issues involving the surety's subrogation rights and claims against the federal government (including jurisdictional and substantive issues), and the surety's assertion of its subrogation rights

against third parties such as design professionals, lenders, insurers and others (Chapters 14-16).

The Contents of this book essentially serve as an outline of the issues and topics addressed in each of the chapters. There are many headings and subheadings in the chapters and in the Contents to enable the reader to go right to the issues, topics and cases that may be of assistance in the reader's particular case. However, proceeding directly to one's issue and topic may mean that the reader will not absorb the very basic, necessary and critical understandings of the contract bond surety's subrogation rights that are addressed not only in detail in the first six chapters of this book, but also within the substance of the very chapter that the reader chooses to review. The editors and the authors urge all readers to spend the time necessary to become familiar with the structure of the book, the basic arguments that a surety must make in order to prevail in asserting its subrogation rights, and those instances when the surety may have a real fight on its hands with the other parties who may be asserting their own claims to the bonded contract funds.

No book or any other publication can possibly provide the reader with every case and every argument that the reader may want or need to make based upon the facts and circumstances of a particular case. As a result, the editors and authors of this book do not warrant or represent that this book is complete or accurate in every respect. This book is provided to the reader as a starting point to assist the reader in locating the relevant contract bond surety subrogation rights cases, and any relevant books, articles and papers (and any cases that are cited therein). The reader is cautioned that he or she must perform his or her own careful and thorough research, review and analysis for their particular case.

The FSLC gives its thanks and appreciation to all of those people who have provided their time and effort in contributing to the publication of this book. The editors give their special thanks and appreciation to Wendy L. Hopkins of Wright, Constable & Skeen, LLP and Pat Halseth of Brosseau Bartlett Seserman LLC for their willing and able efforts and assistance in putting together all of the final pieces of this publication to make it into the book that is now available to all.

Finally, Jim Ferrucci and Dennis Bartlett want to thank the true driving force behind this book, George Bachrach. It is not an overstatement to say that no single lawyer has spent more time and effort in learning the nuances and vagaries of the contract bond surety's subrogation rights than George. His willingness to lead the charge to pass that knowledge on to all involved in the surety industry is why this book exists.

The Editors

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