Overheated Market Factors Suggest Increased Future Bond Claims

The market has been flush with work for contractors for some time. In the last few years, contractors have been at capacity, contractors have been choosy with what work they accept, and fewer contractors and subcontractors show up to bid any given work. As a result, two things have happened: (1) there is more work available for contractors above their capacity; and (2) construction costs have gone up for owners. Both of these factors stress the market, particularly when combined with rising steel prices and rising interest rates. These factors are a recipe for disaster when it comes to potential contractor default and the potential for increased bond claims in the future.

I. Contractors Are Taking on Too Much Work

A. Pay-When-Paid Terms Hurt Subcontractors

With respect to volume of work, mid-size contractors in particular are managing larger cash flow needs (and cash flow swings) than ever before. All it takes is for a Read more on page 15
Happy New Year! I am not one who makes New Year’s resolutions, but a new year usually makes me reflect on where I am, where I have been, and where I may be going.

Looking back, more years have passed than I want to admit since I attended my first FSLC Mid-Winter Meeting. I don’t think I was even 30 at the time when I left my wife and then only child, an infant, at home to go to a conference where I would not know anyone other than the lawyers from my firm who were also attending. Upon arrival, I shuffled off to a meeting of a newly formed group, the Young Professionals Subcommittee, and started meeting people who, like me, did not know anyone but were eager to get involved in Bar work. (I never thought that getting involved meant that I would one day be writing a “Chair’s Message.”)

Knowing that I now have two children, instead of just one back then, and that both are out of the house tells me that a lot of time have passed since that first meeting. Despite that, I still look forward to the Mid-Winter Meeting with a bit of anticipation – to see friends, meet new people, share ideas with other industry professionals, and, of course, learn up-to-date information on topics that impact what I do for a living. This year is no different. I hope you will make plans to attend this year’s Mid-Winter Meeting, taking place from January 16 to 18, 2019 at the Hilton Bayfront San Diego.

The Mid-Winter Meeting is our most important conference of the year. It is the best time to meet people and get involved with the FSLC. In the brochure you have most likely received by e-mail and regular mail, you will find all of the details of the excellent fidelity and surety programming on deck for you. In short, the Fidelity Program will focus on Ponzi Schemes and Mercantile Bonds and will include a mock trial with live jury deliberations, which should be fascinating. The Surety Program will present The Law of Performance Bonds, 3d, one of the FSLC’s signature publications. Both programs promise to be excellent.

As in prior years, we will hold our various business meetings on Wednesday, January 16. Even if you are not a member of a particular sub-committee, you can attend many of these meetings. Doing so is an excellent way to become more involved in the FSLC’s activities because heavy planning for future conferences and publications occurs during these meetings. A schedule of meetings and their specific locations will be out soon.

Before looking ahead to the rest of this year, I offer congratulations and sincere thanks to Program Co-Chairs Justin Wear and Robin Segal-Gonzalez and all of the authors and speakers who made the Fall Fidelity Program in Philadelphia a
success. Attendance was excellent and the programing terrific. It was also nice to see so many people stay for the reception and dinner after the program to renew friendships and make new connections.

Looking ahead, please mark your calendars for the Spring Surety Conference, “The Complex Construction Issues Facing the Performing Surety,” set for May 8 – 10 in Austin, Texas. As the title suggests, the presentations will be chock-full of construction substance appropriate for all levels of experience. Austin is a vibrant city with a varied arts and entertainment scene. We’ve got some fun planned for the conference too and will share details in the coming months.

As you know from some of my prior messages, one of our goals for this year is to provide greater networking opportunities for all of our members. Outsiders often remark about the collegiality of the FSLC’s members. I hope you will attend the group social events we have planned in San Diego and Austin and that you make it a personal goal to meet at least one new person at each conference you attend. We all started doing that at the first conference we attended. It doesn’t take long to develop some life-long friends in this group.

I hope to see you in San Diego and/or Austin. If you cannot attend these conferences but want to get more involved with the FSLC, please let me know directly (bdivers@mpdlegal.com) and I will connect you with the right person.
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The Intersection of Suretyship and Immigration

We do not often think of immigration law and suretyship as having anything to do with one another, but, in fact, the market for miscellaneous bonds in the field of immigration law is significant and growing. Sureties looking to increase their presence in the miscellaneous bond market may consider bond sales opportunities within the context of immigration law and find an untapped market at hand.

Immigration practitioners mainly have a need for four types of bonds in representing foreign individuals and employers: custody bonds, voluntary departure bonds, material witness bonds, and employment bonds. Each type presents potential benefits and risks to the surety that considers offering these products.

Custody Determination Bonds

On January 25, 2017, President Trump signed Executive Order 13,768 defining removal priorities for the executive branch. These priorities included immigrants convicted of any criminal offense, immigrants charged with any criminal offense that has not been resolved, and immigrants who, in the judgment of an immigration officer, “pose a risk to public safety or national security.” Although the previous administration deported more individuals than any other administration in history, with the signing of Executive Order 13,768, the stage was set for increased immigrant arrests and deportations. The former Immigration and Customs Enforcement (ICE) Director, Thomas Homan, stated on December 5, 2017 in a press conference, “the President made it clear in his executive orders, there’s no population off the table. If you’re in this country illegally, we’re looking for you and we’re going to look to apprehend you.” Official figures of immigrant arrests in the country, published in the Fiscal Year 2017 ICE Enforcement and Removal Operations Report, reveal a 30% increase in administrative arrests alone from 2016 to 2017.

Upon arrest by an ICE officer, an immigrant may not be eligible for bond. Arriving aliens and immigrants with certain criminal convictions are subject to mandatory detention. Immigrants not subject to mandatory detention can request a bond hearing before an immigration judge or seek review of an ICE-established bond.

Read more on page 19

3 See FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT, at 2. An “administrative arrest” is defined as an arrest of an alien for a civil violation of immigration law.
Court of Federal Claims Clarifies Allowability of Third-Party Settlement Costs

I. Introduction

In the past, government contractors could typically recover third-party litigation costs—including settlement costs—as necessary business expenses. In 2009, the Federal Circuit began imposing a higher standard on the recoverability of these costs. Under this more recent approach, if the plaintiff’s allegations involve the contractor’s breach of any term in its contract with the government, the contractor is barred from recovering defense costs unless it can demonstrate that the plaintiff’s allegations had “very little likelihood of success on the merits.”¹ In April 2018, the Court of Federal Claims significantly limited the application of this higher standard by applying it only to suits involving breaches of contractual non-discrimination clauses. Thus, in suits involving other breaches of contract, a contractor would not necessarily be subjected to the amorphous “very little likelihood of success” standard. The court, however, acknowledged that its holding conflicted with prior Federal Circuit precedent, virtually guaranteeing continued litigation over this issue. The uncertainty in the law regarding allowability of settlement costs has made it difficult to predict what costs might be recoverable and what evidence a contractor must present to establish that a plaintiff’s allegations were unlikely to succeed.

II. Third-Party Settlement Costs Under Boeing and Tecom

A. The Boeing Court’s Standard for Recovering Settlement Costs

Federal Acquisition Regulation (“FAR”) § 31.205-47 addresses the allowability of settlement costs. It excludes certain categories of legal costs, including defense and settlement costs arising from suits brought by a state or federal governmental entity. Although there is no provision directly addressing the recovery of settlement costs in private suits, aside from private qui tam actions, boards of contract appeals traditionally allowed the reasonable costs of third-party litigation.²

In 2002, the Federal Circuit addressed the allowability of costs for third-party suits arising from fraud against the government. In Boeing North American, Inc. v. Roche,³ the federal government obtained civil and criminal convictions against a defense and aerospace contractor for committing fraud against the government. Based on these

¹ Geren v. Tecom, 566 F.3d 1037, 1046 (Fed. Cir. 2009).
³ 298 F.3d 1274 (Fed. Cir. 2002).
findings, several shareholders filed a derivative suit alleging the directors breached their fiduciary duties by failing to establish internal controls to ensure the company’s lawful compliance with the government contract. Although it denied wrongdoing, the firm settled the suit and sought to recover the defense and settlement costs from the government. The contracting officer denied the claim.4

In reviewing the contractor’s costs, the court examined federal regulations governing settlements. The court acknowledged that, although FAR § 31.205-47(b) precludes settlement costs in suits brought by the government, this provision would not apply to the private shareholder suit at issue.5 The court instead relied upon FAR § 31.205-47(c)(2), which allows settlement costs in private qui tam suits under the False Claims Act (“FCA”) if the contracting officer determines that there was “very little likelihood that the third party [plaintiff] would have been successful on the merits.”6 Because the underlying allegations in the shareholder suit involved fraud against the government, the court adopted the FAR standard governing settlements for private qui tam suits. Thus, the court held that the contractor could recover the costs for settling the shareholder suit if it could demonstrate that the allegations in the suit had very little likelihood of success on the merits.7

B. Tecom Expands the Boeing Standard

Although the holding in Boeing was initially limited to settlement costs for suits involving fraud against the government, the Federal Circuit later expanded its holding to potentially encompass settlement costs for all types of suits. In Geren v. Tecom, Inc.,8 the Federal Circuit addressed the recoverability of a contractor’s defense costs and settlement payments incurred in litigating an employee’s Title VII sexual harassment suit. While the government urged the court to apply the “very little likelihood of success on the merits” standard from Boeing, the contractor argued that Boeing did not apply because it was limited to costs relating to fraud against the government.9

The Tecom court held that Boeing established a two-step inquiry. First, the court must consider whether, if an adverse judgment were reached, the costs would be allowable. The court determined that a contractor’s violation of Title VII constituted a breach of the contract’s provisions prohibiting discrimination, thus rendering the costs unallowable. The court further cited public policy concerns with the government

4 Id. at 1276-77.
5 Id. at 1288.
6 Id.
7 Id. at 1290.
9 Id. at 1040.
appearing “complicit” by reimbursing a contractor for its discriminatory employment practices.\textsuperscript{10} In addressing the second factor, the court analyzed whether the costs of settlement would be allowable. Citing \textit{Boeing}, the court held that settlement costs were not allowable unless the contractor showed that the underlying suit had “very little likelihood of success.”\textsuperscript{11}

The dissent objected to this application of \textit{Boeing}, noting that the “very little likelihood of success” standard was only appropriate in cases such as \textit{Boeing} that involve instances of fraud against the government.\textsuperscript{12} The \textit{Boeing} court’s extension of the FAR principle governing settlement costs in private \textit{qui tam} suits relied upon the similarity between a \textit{qui tam} action under the FCA and a shareholder derivative suit asserting fraud against the government. In \textit{Tecom}, there was no such connection between a sexual harassment suit and a \textit{qui tam} action to justify imposing this same standard. The dissent feared that \textit{Boeing} would be applied to settlements of all suits—not just those involving contractor fraud.\textsuperscript{13} The dissent further noted the difficulty of determining the likelihood of success when parties have settled, particularly since parties settle precisely because neither side is fully confident of the outcome.\textsuperscript{14}

\section*{III. The Court of Federal Claims Limits Tecom}

The court’s decision in \textit{Tecom} startled many in the government contracting community as it signaled a significant departure from prior precedent addressing recoverability of settlement costs. After \textit{Tecom}, a claim that, if proven, would establish a breach of contract results in the disallowance of legal costs unless a contractor can meet the “very little likelihood of success” standard. This expansion of \textit{Boeing} placed a heavy burden on the contractor to explain why the defendant’s suit was unlikely to win using a standard accompanied by very little precedent. The Court of Federal Claims’ recent decision in \textit{Bechtel National, Inc. v. United States},\textsuperscript{15} however, would significantly cabin the reach of \textit{Tecom}.

\subsection*{A. Bechtel’s Contract}

Bechtel entered into a contract with the Department of Energy (“DOE”) to design and construct a waste treatment plant to remediate radioactive waste and contamination.\textsuperscript{16} Clause I.113 of the contract governed reimbursement for costs of

\begin{itemize}
\item \textsuperscript{10} \textit{id.} at 1044.
\item \textsuperscript{11} \textit{id.} at 1045-46.
\item \textsuperscript{12} \textit{id.} at 1048.
\item \textsuperscript{13} \textit{id.}
\item \textsuperscript{14} \textit{id.}
\item \textsuperscript{15} \textit{Bechtel National, Inc. v. United States}, 137 Fed. Cl. 423 (2018).
\item \textsuperscript{16} \textit{id.} at 424-25.
\end{itemize}
third-party litigation. It required Bechtel to give notice to DOE of any proceeding filed against the contractor arising out of the contract’s performance. Per subsection (e) of Clause I.113, Bechtel could proceed with the litigation after obtaining written authorization and later seek reimbursement for liabilities and expenses incidental to the third-party suit. This right to reimbursement, however, was subject to subparagraph (g)(1), which precluded costs that are “otherwise unallowable by law or the provisions of this contract.” Notably, the contract incorporated FAR § 52.222-26, which prohibits discrimination on the basis of race, color, religion, sex, or national origin.

B. The Discrimination Lawsuits

In September 2010, Bechtel notified DOE of potential litigation arising out of its work on the project. The government authorized Bechtel to proceed with its defense of the case, but noted that allowability of the costs would be determined at a later date. Shortly thereafter, two employees filed lawsuits against Bechtel alleging discrimination. When Bechtel informed DOE of the lawsuits, DOE again instructed Bechtel to proceed with a defense, but reiterated that its authorization to proceed was not a determination of allowable costs.

Bechtel settled both lawsuits and sought reimbursement for $500,000 in defense costs. DOE initially reimbursed Bechtel, but the contracting officer subsequently deemed the costs unallowable. Relying on Tecom, the contracting officer determined that, “in each case, the plaintiff’s claim had more than very little likelihood of success on the merits.” Bechtel filed suit against DOE, alleging that DOE breached Clause I.113(e) of the contract by disallowing the costs.

C. The Court Limits Tecom to Discrimination Suits

Bechtel did not dispute that, had it been found liable for discrimination, the costs of defending the suits would have resulted from a breach of the non-discrimination

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17 Id. at 425-26.
18 Id.
19 Id. at 426.
20 Id.
21 Id. at 425.
22 Id. at 426.
23 Id.
24 Id.
25 Id. at 427.
26 Id.
27 Id. at 427.
28 Id.
clause in its contract. It similarly acknowledged that the plaintiffs had more than very little likelihood of prevailing on their claims. Bechtel nevertheless argued that *Tecom* did not apply because the contract at issue explicitly allocated the risk of third-party claims to the government under Clause I.113(e). The Court of Federal Claims, however, rejected this argument. Although Clause I.113(e) provided that Bechtel would be reimbursed for its third-party litigation expenses, that clause was subject to subsection (g)(1) which precluded costs that are “otherwise unallowable by law or the provisions of this contract.” The contract’s incorporation of the non-discrimination clauses in FAR 52.222-26 rendered Bechtel’s costs unallowable.

Bechtel argued that this interpretation undermined subsection (e), which explicitly provided for the reimbursement of third-party expenses. According to Bechtel, almost any third-party legal action would necessarily establish a breach of contract, thus triggering the prohibition on reimbursement in subsection (g)(1). To resolve this issue, the court limited *Tecom* to its facts, holding that *Tecom* “does not necessarily extend to breaches of obligations other than the obligation not to engage in discrimination.” The court reasoned that *Tecom* rested on the public policy rationale of preventing the government from being complicit in discriminatory employment practices. The court further observed that DOE had only invoked *Tecom* to disallow costs when those costs arose from breaches of contractual non-discrimination provisions. The court also noted that the purpose of subsection (e) was to shift to the government the financial risks associated with the cleanup of nuclear facilities. A broad reading of subsection (g)(1) would undermine that purpose. Accordingly, the court limited *Tecom* to costs arising from a contractor’s discriminatory conduct. The court, however, acknowledged that its narrow reading of *Tecom* was “admittedly difficult to square” with the broad language in that decision suggesting that all legal costs resulting from a breach of contract would be deemed unallowable.

29 *id. at 429.*
30 *id.*
31 *id.*
32 *id. at 429-30.*
33 *id. at 429-30.*
34 *id. at 430.*
35 *id.*
36 *id.*
37 *id.*
38 *id.*
39 *id.*
40 *id.*
41 *id.*
42 *id. at 431 n.5.*
IV. Conclusion

In June 2018, Bechtel filed an appeal with the Federal Circuit, challenging the Court of Federal Claim’s decision. The Federal Circuit will soon have an opportunity to determine whether the Court of Federal Claims properly limited *Tecom* to breaches of non-discrimination clauses or whether the principles of *Boeing* and *Tecom* indeed apply broadly to any breach of contract. If the court continues to apply the “very little likelihood of success” standard, the Federal Circuit will hopefully provide greater clarity on how to evaluate the merits of a defendant’s suit. Contractors considering whether to litigate or settle must be able to properly evaluate whether the government will reimburse settlement costs. Until *Bechtel* is fully addressed on appeal, cautious contractors should assume that courts will continue to apply the more restrictive two-pronged approach set forth in *Tecom*.

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few of their jobs to be late paying on receivables, or to go into claim (perhaps due
to owner-driven issues), and their cash flow can be severely affected specifically
among subcontractors that are at the mercy of close-out discussions between
owners and general contractors and awaiting payment on a pay-when-paid basis.

Pay-when-paid clauses establish the timing by which a general contractor will pay
a Subcontractor after receiving payment from the Owner. In *Yamanishi v. Bailey &
Collishaw, Inc.*¹, the California Court of Appeal upheld the pay-when-paid clause as
being valid. The general contractor, however, may avoid payment for a reasonable
period of time only. To be enforceable, these types of clauses must guarantee
payment within a reasonable time regardless of whether the owner pays the general
contractor. The question of what is a “reasonable” amount of time will depend on
the situation, and subcontractors often seek to define what is “reasonable” in the
contract.² Similarly, in *Avon Brothers, Inc. v. Tom Martin Construction Co.*,³ the
Superior Court of New Jersey found a pay-when-paid clause to be enforceable
where the contract’s time period was reasonable.

What often happens, however, is that although the general contractor is still
required to pay subcontractors within a reasonable time, far more time than what
is considered “reasonable” passes. Where significant disputes exist between the
owner and general contractor, the subcontractor’s claims can easily be tied up in
litigation. What was once a $250,000-plus receivable can be held up in litigation
for years as such disputes are resolved. These receivables add up and have a
meaningful impact on the subcontractors’ cash flow, making it more likely to have to
shift funds from one project to another to manage cash flow.

**B. Contractors Stop Obeying Trust Fund Treatment**

As contractors become more cash-strapped—especially as work dries up when the
market turns and their projects are front-loaded—the impact to cash flow is likely to
be even greater. On many projects, contractors are supposed to treat each project’s
funding as trust funds for the benefit of subcontractors, suppliers, and laborers⁴.

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² By contrast, pay-if-paid clauses dictate that a general contractor is only required to pay a subcontractor for
completed work if the general contractor is paid by the owner. Under these clauses, if the owner never pays the general
contractor, then the general contractor does not have to pay the subcontractor. These types of contract clauses have
been unenforceable in California since 1997 when the Supreme Court ruled in *William R. Clark Corp. v. Safeco Ins.
Co.*, 15 Cal. 4th 882 (Cal. 1997) that “pay-if-paid” provisions in construction subcontracts were unenforceable. The
Court reasoned that enforcing such a clause would indirectly forfeit or waive a Subcontractor’s lien rights, which is
incompatible with California Civil Code § 3262’s provision governing waiver of lien rights. Pay-if-paid clauses are,
however, enforceable in over 30 states when the proper condition precedent language is used.
⁴ See CA. BUS. & PROF. CODE § 7108; CA. PENAL CODE §§ 484b, 484c, 506; COLO. REV. STAT. ANN. § 38-22-127; TEX.
PROP. CODE § 162.001.
It is no secret, however, that many contractors do in fact comingle cash flow among projects never assuming it will be a problem until the money is gone. Because a portion of each progress payment is owed to the general contractor for its own overhead and profit (and thus such portion is not a trust fund for the benefit of others), bankruptcy courts in at least the Ninth Circuit have refused to hold that such funds are trust funds at all for the purpose of a nondischargeability analysis.\(^5\) As a result, given the inconsistent enforcement of such trust fund requirements, the best protection to any general contractor or owner is to require joint checks for subcontractors and suppliers.

Further, when one job goes bad, it is likely to affect the rest of the contractor’s program as well. In addition, as contractors become more pinched in terms of cash flow, it is not uncommon for the contractor to make sure that its public works projects (which are bonded) are completed (so as to avoid personal liability for indemnity), leaving lower-tier subcontractors unpaid on private works jobs. This forces such subcontractors to chase mechanics’ lien rights that might take a year or so to realize payment after making its way through the court system. This in turn further damages the subcontractors’ cash flow, which in turn weakens public works in a vicious downward cycle.

II. Owners Run Overbudget

With respect to construction costs, the overheated market is equally a problem for owners who are paying top dollar for construction and who do not have the benefit of contractors underbidding each other. Additionally, owners have to add enticements to get contractors to even agree to the work, or to get it done on time, simply due to the volume of other opportunities available to those contractors. This in turn strains construction financing, and can result in a shortage of funds at the owner level—particularly with developers who do not finance their own projects. This results in a choking of funds paid down to the general contractor and subcontractors. This effect will be even greater as developers who are not self-financed take on future projects with even larger cash flow needs than anticipated and become cash-strapped across their entire program as interest rates continue to rise. In sum, such private developers, who are financed by others, are forced to make up cash flow short-falls or face large penalties on their projects. As a result, many developers are going to be incentivized to try to “slow pay” their contractors and cut deals rather than seek the additional funding from equity sources at large penalty rates. As those developers become cash-strapped, their nonpayment to the general contractor will be more frequent, thus further affecting cash flow of contractors across the industry.

\(^5\) In re Pedrazzini, 644 F.2d 756 (9th Cir. 1981).
III. Escalating Steel Prices Cause Additional Strain

Adding to the difficulty is the rising price of steel. Whether caused by the recent steel tariffs themselves or suppliers taking advantage of the tariffs to manipulate the market, there is no question that the cost of steel has risen substantially and continues to be volatile. For the steel fabricators, this rising cost of the steel is a direct financial loss as they are expected to furnish fabricated steel at the prices set forth in their written purchase orders and contracts that may have been locked in before prices rose. Many subcontractors and suppliers are seeking escalation costs as a result of these rising prices on the basis of *force majeure* or commercial impracticability.

The doctrine of *force majeure* is based on the concept that a party's duty to perform under a contract is excused if the contemplated contractual performance is impossible due to unforeseen events that are beyond the control of the contracting parties. Generally, the doctrine of *force majeure* can only be applied if the party’s duty to perform is commercially impracticable. Unless the parties’ fixed-price contract provides otherwise, the doctrine generally does not apply to changes in the normal market price for goods that are being acquired. This rationale is based on the fact that most parties enter into fixed-price contracts due to the very nature of the risk associated with such price changes.

The doctrine has also been embodied in the Uniform Commercial Code ("UCC") at section 2-615. Most cases that interpret that section of the UCC conclude that rises in the cost of materials in and of themselves do not make the performance of the contract commercially impracticable. The increase and decrease of material costs is the very same foreseeable risk that lead the parties to fix the price of the material in the contract. However, if there is another unforeseen factor that is outside the party’s reasonable control and which causes a severe shortage of raw materials (e.g. war or an unforeseen shutdown of major sources of supply) or a major price increase, other cases suggest that the section provides relief. In essence, if a party seeks relief under the doctrine, there must be evidence of an event that affected the price of material in a manner different than the overall swings in product prices. Whether the Trump administration’s steel tariffs could rise to such a level is unclear and speculative. In sum, when *force majeure* and commercial impracticability are raised, negotiation ensues between the contracting parties where the party seeking relief is pursuing equitable factors for relief and may be at the mercy of the other party if it seeks short-term cash flow relief.

Further, given the delays in the start date of many public and private works projects, it is not uncommon to see a situation in which a subcontractor is locked into a lump-sum or guaranteed-maximum-price contract that the general contractor is expecting the subcontractor to meet even though delays have occurred and the price of steel...
has increased. In such circumstances, the subcontractor should have the ability to seek such additional costs based upon the delay in the project. Generally, four elements must be satisfied before recovery for delay costs will be allowed. A contractor must prove that the delay was (1) excusable; (2) compensable; (3) critical; and (4) non-concurrent. Assuming that these elements are met, the affected contractor should be able to recover such material escalation damages. This, however, could be cause for negotiation between the subcontractor and general contractor, which may not be resolved until after performance is required given that delays may involve the owner. All of this means that during this time, someone—whether it be the general contractor, the subcontractor, or the owner—is financing the escalating costs of the steel and feeling the further impact on cash flow. If that party is not loaded with cash, as in the case above of the private works developer, that party may be loath to finance these costs, passing the burden back down to the contractors, subcontractors, and suppliers.

In sum, there are a range of market forces involved in the industry which could easily catch up and collide together to create contractor defaults and more frequent bond claims in the near future.

amount from an immigration judge. A grant of a bond or a reduction in a bond amount previously established by ICE depends on establishing that the immigrant is not a danger to the community or a flight risk. The determination regarding the bond amount is discretionary, with a minimum of $1,500.00 established by statute and no maximum. Bond payment can be made by any person, and the payor is referred to as the bond obligor. However, if ICE discovers the person paying the bond is not in the United States legally, ICE can arrest the obligor and place him or her in removal proceedings. This serves as a market driver for surety companies to act as the bond obligor, rather than friends and families of detainees who, if also without legal status in the country, would face the risk of being placed in removal proceedings.

As with typical bail bonds, the custody determination bond serves to ensure the presence of the detainee at all future immigration hearings. Upon resolution of the case, the bond is returned to the obligor who claims it from the U.S. Government, whether the resolution is in the form of removal or relief from removal.

**Voluntary Departure Bonds**

One form of relief available to undocumented immigrants in removal proceedings is called voluntary departure. Voluntary departure is not an order of deportation, and allows an immigrant to leave the United States without having a deportation on his or her record. Eligibility turns on several factors depending on when voluntary departure is requested. Individuals granted voluntary departure by an immigration judge are required to post a bond within five days of the order. If an individual fails to post the required voluntary departure bond within five days, an alternate order of removal goes into effect. Voluntary departure allows the undocumented individual up to 120 days to prepare to leave the country voluntarily. This time allows a person to sell possessions, make travel arrangements, arrange lodging abroad, and otherwise provides time to transition back to the country of origin. Upon return to the country of origin, and the foreign national presenting himself or herself at a U.S. Consulate or Embassy to prove return, the bond will be returned to the obligor. In the author’s experience, the penal sums of voluntary departure bonds are usually much lower than custody bonds, but with the sheer increase in the volume of immigration enforcement cases, the surety industry may take interest in this potential market.

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4 ICE’s initial custody determination happens as a matter of course, but an immigrant must proactively request a bond hearing. See 8 C.F.R. §§ 236.1, 1003.19, and 1236.1 (2018). Bond hearings may be requested at any time after the person is in ICE custody under Section 240 of the Immigration and Nationality Act.

5 Matter of Urena, 25 I. & N. Dec. 140, 141 (BIA 2009) (an immigration judge may not release a person on bond who has not met his burden of demonstrating that release will not result in danger to property or persons); Matter of Guerra, 24 I. & N. Dec. 37 (BIA 2006).

6 8 C.F.R. § 1240.26(c)(4).

7 Id. (failure to post the voluntary departure bond within five days automatically triggers the alternate order of removal); 8 C.F.R. § 1241.1(f) (an alternate order of removal becomes final “upon the failure to post a required voluntary departure bond within 5 business days”).
Material Witness Bonds

Codified at 18 U.S.C. § 3144, the United States’ material witness statute allows the United States to detain individuals for indefinite lengths of time without being charged or called as a witness. The statute also allows for the arrest and detention of grand jury witnesses as well, because grand jury proceedings have been qualified as “criminal proceedings” as that term is used in § 3144. Immigration attorneys may encounter legal situations involving the material witness statute when their clients, who are either smuggled into this country or victims of human trafficking, are held indefinitely as witnesses to testify against those accused of being responsible for the transport scheme. Fortunately, the courts have held that indigent material witnesses have a right to appointed counsel. Attorneys can request a bond on behalf of the material witnesses to allow their release from custody by the U.S. Marshals. Material witness bonds are set by the federal judge presiding over the criminal matter. They are of the same variety as any bail bond, and payment arrangements would be made in the same manner. In the author’s experience, the penal sums of material witness bonds are much higher than custody determination bonds or voluntary departure bonds, and thus, sureties may seek larger deposits of collateral prior to issuing such bonds.

Employment Eligibility Bonds

Sureties should be leery of issuing bonds in the context of immigrant employment. Under 8 U.S.C. § 1324a(b) employers must verify the identity and employment eligibility of all people hired in the United States. The Employment Eligibility Verification Form I-9 is designated as the appropriate documentation verification method under 8 C.F.R. § 274a.2. In establishing and maintaining compliance, an employer must follow strict guidelines. These pertain to 1) which I-9 forms are used; 2) how the I-9s are filled out; and 3) what documents are presented by the employee to confirm employment eligibility. ICE audits of companies’ I-9 compliance are also on the rise. In October 2017, former ICE Director Thomas Homan announced that his agency planned to increase worksite investigations of employers by “four or five times.” Homan said that ICE intends to refocus on eliminating the “magnet” of U.S. jobs considered to be a driving factor in illegal immigration.

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9 United States v. Awadallah, 349 F.3d 42 (2nd Cir. 2003).
When ICE conducts I-9 and immigration inspections of businesses, technical and substantive violations of I-9 regulations can result in steep fines for employers, ranging from several hundred dollars to nearly $20,000.00 per violation. Some unscrupulous employers try to put the onus on the employee in the event ICE conducts an audit and levies fines. This practice is made expressly illegal by 8 U.S.C. § 1324a(g), which states: "It is unlawful for a person or other entity, in the hiring, recruiting, or referring for employment of any individual, to require the individual to post a bond or security . . . against any potential liability arising under this section relating to such hiring, recruiting, or referring of the individual." Any person or entity determined to have engaged in such a practice is subject to a base-level civil penalty of $1,000.00 for each violation plus additional potential fines.

Conclusion

Due to the significant changes in efforts toward prosecution of illegal immigration by the current administration coexistent with the geopolitical factors which continue to drive illegal immigration in increasing numbers, the surety bond industry is seeing an expanding market in this space. Sureties should thus stay abreast of new and updated regulations promulgated by ICE and the administration with respect to the treatment of immigrants in the United States and the impact of these regulations when underwriting these types of bonds.
### Calendar

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<tr>
<th>Date Range</th>
<th>Event Description</th>
<th>Contact Details</th>
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<tbody>
<tr>
<td>January 16-18, 2019</td>
<td><strong>Fidelity &amp; Surety Law Midwinter Conference</strong></td>
<td>Juel Jones – 312-988-5597</td>
<td>Hilton San Diego Bayfront San Diego, CA</td>
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<td>January 17-19, 2019</td>
<td><strong>Midwinter Symposium on Insurance and Employee Benefits</strong></td>
<td>Danielle Daly – 312-988-5708</td>
<td>Hyatt Regency Coral Gables, FL</td>
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<td>January 23-27, 2019</td>
<td><strong>ABA Midyear Meeting</strong></td>
<td>Arthena Little – 312-988-5672</td>
<td>Las Vegas, NV</td>
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<td><strong>Contact:</strong> Janet Hummons – 312-988-5656</td>
<td>Danielle Daly – 312-988-5708</td>
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<td><strong>Contact:</strong> Janet Hummons – 312-988-5656</td>
<td>Danielle Daly – 312-988-5708</td>
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<tr>
<td>March 22-23, 2019</td>
<td><strong>Admiralty and Maritime Law National Program</strong></td>
<td>Arthena Little – 312-988-5672</td>
<td>Sheraton New Orleans New Orleans, LA</td>
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<td><strong>Contact:</strong> Juel Jones – 312-988-5597</td>
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<td>April 4-5, 2019</td>
<td><strong>Motor Vehicle Products Liability Conference</strong></td>
<td>Janet Hummons – 312-988-5656</td>
<td>Hotel Del Coronado Coronado, CA</td>
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<td><strong>Contact:</strong> Janet Hummons – 312-988-5656</td>
<td>Danielle Daly – 312-988-5708</td>
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<td>April 5-6, 2019</td>
<td><strong>Toxic Torts &amp; Environmental Law Conference</strong></td>
<td>Janet Hummons – 312-988-5656</td>
<td>Hotel Del Coronado Coronado, CA</td>
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<td>May 1-5, 2019</td>
<td><strong>TIPS Section Conference</strong></td>
<td>Janet Hummons – 312-988-5656</td>
<td>Westin New York Times Square New York, NY</td>
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<td></td>
<td><strong>Speaker Contact:</strong> Arthena Little – 312-988-5672</td>
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<tr>
<td>May 8-10, 2019</td>
<td><strong>Fidelity &amp; Surety Law Spring Conference</strong></td>
<td>Janet Hummons – 312-988-5656</td>
<td>JW Marriott Hotel Austin, TX</td>
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