Miscellaneous Surety Bonds and the Restatement

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MISCELLANEOUS SURETY BONDS AND
THE RESTATEMENT

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I. INTRODUCTION

The purpose of this Article is generally to discuss miscellaneous surety bonds and specifically to relate issues raised by the Restatement (Third) of Suretyship currently being drafted by the American Law Institute (ALI). For the purposes of this Article, all references to the Restatement will be to Tentative Draft Number Two, dated April 2, 1993. This draft covers Chapter 3, Incidences of Suretyship Status, and includes sections 18 to 45. It should be noted that this draft, at the time of this writing, has not been considered by the membership of the ALI and therefore does not represent the position of the Institute.

In discussing miscellaneous surety bonds, one must necessarily first define the scope of what is being considered as a "miscellaneous surety bond." For the purposes of this Article, miscellaneous surety bonds will include court bonds, that is, both court fiduciary and court guaranty bonds, as well as license and permit bonds. Public official bonds, which are sometimes classified as miscellaneous surety bonds, will not be treated herein. Other examples of miscellaneous surety bonds include customs bonds, trustees bonds, lost instrument bonds, and livestock, market agency, and packers' bonds. Obviously, this Article cannot deal in detail with all these bonds; however, some general information concerning these bonds and the unique problems they present will be useful prior to a discussion of the proposed Restatement provisions that will have an impact upon these matters. Because the term "miscellaneous" implies a grouping together of bonds that may have little or nothing

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in common—other than the fact that they each represent a subclass too small to warrant an entire treatise of its own—this Article will deal with bonds that vary greatly in their purposes and terms.

II. MISCELLANEOUS SURETY BONDS

A. License and Permit Bonds

Probably the greatest number and widest variety of bonds fall within the general category of license and permit bonds. A license bond has been defined as being “usually conditioned on compliance with a statute or ordinance and permit[ting] the conduct and business as a whole.” A permit bond has been defined as being “conditioned on satisfaction of the terms of the permit under which permission is granted to perform certain acts incidental to the conduct of a business.” Notwithstanding this distinction, most people and most commentators use the terms interchangeably. These bonds not only ensure compliance with statutes and regulations, but also quite often provide a remedy to private persons who may have been harmed by the lack of faithful performance by the licensee. Further, these bonds frequently protect the financial interest of governing bodies by guaranteeing the collection and payment of taxes.

A typical license or permit bond is displayed in Appendix A. The terms of the bond are quite simple. The principal, the surety, and the penalty amount are set forth on the face of the bond. The license or permit is described, and the term of the bond is clearly noted. The bond states the condition of the obligation:

3. Frank Keech and Price Hayden list over 309 types of license and permit bonds. See Frank B. Keech et al., Miscellaneous Bonds, in HANDLING FIDELITY, SURETY AND FINANCIAL RISK CLAIMS § 10.1, § 10.2, at 201-04 (Robert F. Cushman et al. eds., 2d ed. 1990). Even that extensive listing of bonds, which includes such esoteric things as bonds for entomological services, vaults under sidewalks, and shooting gallery operators, does not pretend to be an exhaustive listing of every kind of bond that may be required. Id. at 201. In fact, to attempt to develop such a list would be impossible, for practically every day some jurisdiction—federal, state, or local—places into effect a requirement for such a bond. These bonds may be required of various trades, professions, or businesses to ensure compliance with a statutory regulation or to protect consumers and other public or private interests.

4. Id. § 10.1, at 199.

5. Id.

6. See id. at 200.

7. Id.
If the above bounden Principal as such licensee or permittee shall indemnify said Obligee against all loss, costs, expenses or damage to it caused by said Principal's non-compliance with or breach of any laws, statutes, ordinances, rules or regulations pertaining to such license or permit issued to the Principal, which said breach or non-compliance shall occur during the term of this bond, then this obligation shall be void, otherwise to remain in full force and effect.\textsuperscript{8}

In order to determine just what this obligation entails, one must examine the regulation, statute, or ordinance that provides for the bond. Such regulations can be quite voluminous and often provide a direct action by third-party beneficiaries against the bond.\textsuperscript{9}

One of the problems that frequently arises in claims on license and permit bonds is that the amount of the bond is relatively low in proportion to the potential number of claimants and damages on the bond. Thus, the surety may be faced with claims that exceed the penalty of the bond. Even if known claims are less than the bond penalty, undisclosed claimants may arise after payments, in which event the total liability might exceed the bond penalty. Sometimes the bonds will provide for a first come, first served determination of a liability. However, frequently the bond is silent on this point and the surety may be forced to bring an interpleader action, or an action in the nature of an interpleader, to preserve its defense of limiting its loss to the bond penalty.

Even though additional parties are often given rights under these bonds, the bonds remain three-party contracts among the principal, the obligee, and the surety.\textsuperscript{10} A surety customarily uses an application for the bond that contains indemnification language by which the principal, and sometimes additional indemnitors, agree to hold the surety harmless from any loss, cost, or expense incurred as a result of having written the bond.\textsuperscript{11} The indemnification provision often gives the surety the right to settle any disputed claims in good faith and to recover such payments along with any interest and collection costs, including expenses incurred.

\textsuperscript{8} License and/or Permit Bond, Fidelity and Deposit Company of Maryland. A sample bond is displayed infra Appendix A.

\textsuperscript{9} Keech et al., supra note 3, \S 10.2, at 206.

\textsuperscript{10} 9 JOHN A. APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE \S 5273 (1981).

\textsuperscript{11} See id. \S 5276.
in investigating the claim. As a practical matter, very few claims arise on these bonds unless the principal is, in fact, insolvent. This is a matter of common sense—a principal will not normally allow a dispute with an agency or customer that could threaten his license or put him out of business to arise. Thus, most of these matters are taken care of in the early stages, unless the business is failing, at which time large numbers of claims typically arise. As I have indicated previously, a close reading of the statute, regulation, or ordinance governing these bonds is necessary to determine the liability and extent of liability on the bonds.\textsuperscript{12}

B. Court Bonds

The term "court or judicial bond" usually refers to bonds that can be further subdivided into either court guaranty bonds or court fiduciary bonds. Court guaranty bonds usually take the form of financial guaranties that are required in connection with lawsuits and, depending on the circumstances, may be required of either the plaintiff or the defendant.\textsuperscript{13} Thus, a plaintiff who is seeking a prejudgment attachment may be required to file an attachment bond, while a defendant who seeks to have an attachment released may be required to furnish a release of attachment bond.\textsuperscript{14} There are other court bonds, such as injunction bonds and dissolution-of-injunction bonds, which may be required in various circumstances.\textsuperscript{15} Probably the most common court bond is the supersedeas, or appeal, bond, which guarantees the payment of a judgment plus costs should an appeal be unsuccessful.\textsuperscript{16} Due to the financial guaranty nature of these bonds, the principal or some interested third party often must provide collateral in order to ob-

\begin{thebibliography}{9}
\item[12] See supra text accompanying note 9.
\item[13] See Keech et al., supra note 3, § 10.27, at 229-32 (discussing the uses of judicial bonds); see also Fed. R. Civ. P 56(c) (providing for the posting of a bond in certain circumstances).
\item[14] See Keech et al., supra note 3, § 10.27, at 229-32.
\item[15] See id. at 231.
\item[16] See Michael I. Less et al., Fiduciary Bonds and Appeal/Supersedeas Bonds, in Handling Fidelity, Surety, and Financial Risk Claims, supra note 3, § 4.1, §§ 4.7-.14. It is important to note the slight distinction between an appeal bond, which is intended to cover only court costs, and a supersedeas bond, which is intended to satisfy judgment against appellant if the appeal is unsuccessful. Id. § 4.7, at 69; see also Fed. R. App. P 7 (permitting a district court to require an appellant to file a bond to ensure payment of costs on appeal).
\end{thebibliography}
tamin suretyship. Additionally, it is customary to obtain the indemnity of a strong third party to protect the surety from loss.

One must remember that a surety bond is deposited with the court in place of a cash deposit; therefore, the court will treat it as such. Courts consider the placement of a bond as submission to the jurisdiction of the court, and although notice to the surety is required, usually little or no recourse is available when an action to surcharge a bond occurs, often with just a summary notice and hearing. Thus, when faced with a demand under a court bond, the surety needs to move quickly to determine whether the asserted liability is due and either make quick arrangements to have the principal pay the judgment or pay the judgment itself and seek recovery later from the principal, indemnitors, or collateral. Obviously, time is of the essence, and the surety must move speedily to notify the principal, the indemnitors, and the collateral owners.

As a practical matter, the principal and obligee will often agree to a settlement, or sometimes even to the full amount of the judgment, with the principal intending that the collateral posted with the surety be used to satisfy the judgment or obligation. Agreements as to the amount and the timing of the payments are often made without any notice to the surety. Typically, the surety’s first notice will consist of a call from the principal’s attorney stating that he is coming over to pick up the collateral in order to satisfy the judgment. Because the principal’s attorney may have already made other commitments, such as payment of the judgment that afternoon, this can cause some consternation to the surety who never intended that the collateral be used to pay the judgment, but rather, intended that the collateral secure the surety in the event that the principal was unwilling or unable to satisfy the judgment.

If the surety were to release the collateral without release of the accompanying judgment, the surety would be exposed to liability should something go wrong. Furthermore, should a bankruptcy petition be filed, the possibility remains that the payment might

17. See 11A Appleman & Appleman, supra note 10, § 6685.
18. See id. § 6662.
20. See 11A Appleman & Appleman, supra note 10, § 6688 n.1 (stating the general rule that the surety need not return the security until discharged from liability to the obligee).
be considered a preference, in which case it would have to be returned.\textsuperscript{21} Thus, when faced with this situation, the best practice for the surety is to make a cash payment from its own account and then to reimburse itself from the collateral. If possible, a surety will obtain a letter of direction from the principal that instructs the surety to pay the loss and simultaneously authorizes the surety to reimburse itself from the collateral. The letter should specify the amount of the payment and to whom it is payable, and it should acknowledge that the principal (or its attorney) is responsible for obtaining all the necessary releases and satisfaction of judgment. The letter is good practice, but not necessary. The terms of the indemnity and collateral agreements will allow the surety to so act.

When one confronts an attorney who has agreed to make delivery within the next hour, convincing him that he needs to follow all of these steps can be very difficult. Although these matters may be unpleasant from time to time, one must remember that sooner or later, unless these procedures are followed strictly, the surety will have released the collateral while remaining obligated on the bond.

One final word of caution: quite often, a principal will assert that because an appeal was successful, the bond, by its terms, is no longer in effect and the principal may seek return of its collateral. In these cases, the surety must be very careful to ascertain that the judgment has in fact been overturned, that such action is final, and that there can be no further reinstatement of the action that might give rise to liability under the bond.\textsuperscript{22}

The other classification of court bonds is court fiduciary bonds. These bonds are written on behalf of administrators, executors, guardians, trustees, and receivers, guaranteeing their faithful performance and proper accounting for estate assets.\textsuperscript{23} Once again,


\textsuperscript{22} See 10 Appelman & Appelman, supra note 10, §§ 6015-6016 (discussing the effects of affirmance or reversal of a judgment against the principal/appellant and the effects of successive appeals); Less, supra note 16, §§ 4.13-.14 (discussing the discharge of the surety and liability of the surety on successive appeals).

\textsuperscript{23} See generally 9A Appelman & Appelman, supra note 10, §§ 5450 (discussing guardians), 5464 (executors and administrators), 5479 (receivers), 5482 (trustees); Less, supra note 16, §§ 4.3-.6 (discussing fiduciary bonds).
these bonds are normally required by statute, and the statutes requiring them are diverse. When dealing with any of these bonds, one must examine the statute very closely to determine how and by whom a claim can be made against the bond. In the majority of cases, the determination of liability—both its existence and its amount—is made in the very court that required the bond. Such actions are normally filed by a successor, and the actual finding of liability is deemed a “surcharge of the bond.” As with any other bond, it is incumbent upon the surety to investigate promptly any asserted claim because, once again, the surety is usually deemed to have submitted to the jurisdiction of the court and can expect matters to move quickly once a claim or demand has been made.

In some cases, especially those involving administrators or guardians and mostly cash assets, a joint-control account may be established which allows the withdrawal of funds by the administrator or guardian only upon the countersignature of the attorney or other representative of the surety. Because expenditures are supposed to have court approval, sureties are often willing to allow the principal’s attorney to be a signatory to the joint-control account, relying on the attorney to make sure that the unsophisticated administrator or guardian has proper court approval before making any expenditures. From time to time, sureties have been able to recover from the attorney if a loss subsequently occurs as a result of the attorney’s failure to obtain the proper approval. A few states have passed legislation prohibiting an attorney from indemnifying or becoming liable on joint-control accounts in these circumstances, unless he is also the administrator or guardian.

C. Customs Bonds

Customs bonds are another specialized type of bond ordinarily included within the miscellaneous bonds category. Generally, these bonds guarantee the payment of customs duties, fines, penalties,

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25. See supra note 19 and accompanying text.
26. See, e.g., OHIO REV. CODE ANN. § 2111.091 (Baldwin 1993).
and damages to the United States Bureau of Customs (Bureau).\textsuperscript{27} Because of the volume of business covered by these bonds and the difficulty in administering the collection of duties, fines, penalties, and damages, the Bureau has developed very structured procedures for billing both the principal and surety for alleged amounts due. The person receiving notice of these claims would do well to follow very closely the procedures set forth by the Bureau.

Typically, the first notice of a claim is a demand by the Bureau on Customs Form 5955A for fines, penalties, or liquidated damages.\textsuperscript{28} This form is normally sent first to the principal, with a copy going to the surety.\textsuperscript{29} If the demand goes unanswered, the Bureau will then send a demand to the surety with a copy going to the principal. The purpose of Form 5955A is to place the principal and the surety on notice of the Bureau's demand and to provide specific information concerning the infraction by identifying and specifying the port where the infraction occurred, the amount of the demand, and, in some cases, by setting forth a mitigation amount offered by the Bureau.\textsuperscript{30} Normally, the surety will set up a file to monitor the receipt of any demands, advise the principal that it has received the demand, and obtain information concerning the principal's response and proposed solution to the matter.

When the matter has progressed to the point that a demand notice has been addressed and delivered directly to the surety,\textsuperscript{31} it should be clear to the surety that the principal has not responded adequately to the initial notification. At this point, the surety needs to take further action concerning the claim. The first step is for the surety to ascertain that the information received from the Bureau is complete and correct. It is not uncommon to receive in-

\textsuperscript{27} See generally 19 C.F.R. §§ 113.0-.73 (1992) (setting forth general Bureau requirements applicable to customs bonds); 10A Appleman & Appleman, supra note 10, §§ 6164-6174 (discussing customs duties bonds); Ruth F. Sturm, Customs Law and Administration § 3.3 (1980) (discussing when and of whom customs bonds may be required).

\textsuperscript{28} Notice of Penalty or Liquidated Damages Incurred and Demand for Payment, Customs Form 5955A. A sample Form 5955A is displayed infra Appendix B.

\textsuperscript{29} See 19 C.F.R. § 172.1(a).

\textsuperscript{30} Id. § 172.12(b)(2).

\textsuperscript{31} See infra Appendix B.

\textsuperscript{32} This scenario is distinguishable from that in which the surety merely receives a copy of the demand notice sent to the principal. See supra notes 29-30 and accompanying text.
complete or incorrect information; it is even possible that the surety is incorrectly named on a particular bond.

Once Form 5955A is mailed to the principal, the time begins to run for a response. Within thirty days of the issuance of the demand, the principal has the right to file a petition for relief requesting cancellation or mitigation of the demand. Within ten days of the expiration of the petition period, the Bureau will make demand on the surety. The surety will then have an additional thirty days from the date of this notification to file its own petition for relief. The surety is entitled to use any and all defenses available to the principal and is also entitled to the same mitigations. If relief afforded to the principal subsequent to its filing a petition remains unpaid, the surety is notified and given an additional thirty days to file a petition on its own behalf or pay the mitigated amount.

If the principal or surety does not successfully contest the 5955A or if the mitigated amount is not paid, the Bureau will issue a Form 6084. This is not a notification to the surety or principal of a demand; it is a bill delivered to the surety with the expectation that the surety will remit payment to the Bureau.

The surety must respond promptly to demands made by the Bureau and take immediate action to investigate and resolve the claims. Because it has so little time to determine whether a claim is valid, the surety should establish good lines of communication with the principal so that it can meet the various deadlines.

III. MISCELLANEOUS BONDS AND THE Restatement

The real purpose of this Article is not to describe in detail all of the types of miscellaneous bonds, but rather to examine these bonds as they relate to the most recent draft of the developing Re-

33. See 19 C.F.R. § 172.12(b)(1).
34. Id. Filing deadlines can be extended at the discretion of the Bureau's district director. Id. Some ports will allow as much as an additional ninety days to file, but thirty days should be regarded as the rule.
35. Id. § 172.12(b)(2).
36. Id.
38. United States Customs Service Bill, Customs Form 6084.
statement (Third) of Suretyship. The remainder of this Article will examine some of the proposed provisions of the Restatement to see how well they work within the context of miscellaneous surety bonds. Specifically, Tentative Draft Number Two of the Restatement deals with Chapter 3, entitled “Incidents of Suretyship Status,” topics 2 and 3. Topic 2 is the “Secondary Obligor’s Recourse Against Principal Obligor” with respect to reimbursement, restitution, and subrogation. Topic 3 is the “Obligee’s Rights Against Secondary Obligor—Generally, and as Affected by Acts of Obligee” and includes sections covering general principles, suretyship defenses, and the obligee’s enforcement of the underlying obligation.

Before elaborating on the specifics of these sections and how they relate to miscellaneous bonds, I must note that I will address these questions from the standpoint of a corporate surety, rather than that of a personal gratuitous surety. Often a corporate surety’s practice is to require the principal and/or other interested parties to agree to indemnification of the surety in the event that the surety is called upon to answer for the principal’s default. Additionally, the surety may require the posting of collateral. In any event, whether collateral or additional indemnity is required, these agreements generally give the surety the right to settle any claims and recover its losses, costs, and expenses from the principal and the indemnitors.

Importantly, the obligations of these bonds vary in scope from the general statement contained in a trustee bond requiring “the faithful performance by the undersigned principal of his official duties as trustee” to the agreement in a supersedeas bond to pay a final judgment. Thus, the obligation may be as simple as the payment of money, or as complex as compliance with various laws and regulations. From the corporate surety’s standpoint, it is irrelevant

39. Restatement (Third) of Suretyship (Tent. Draft No. 2, 1993). As one must necessarily conclude, there are far too many different types of surety bonds to describe them all in detail in just one article.
40. Id. at xi-xiii.
41. Id. at xi.
42. Id. at xii-xiii.
43. 11 Appleman & Appleman, supra note 10, §§ 6515-6526, 6675-6679.
44. See generally id. §§ 6662-6667.
whether the obligation requires payment of money or responsibility for damages flowing from noncompliance with a regulation. The surety is dependent upon the principal to fulfill the underlying obligation. If the obligation is satisfied, the surety has no further obligation. If it is not, the surety must satisfy the obligation and look to its remedies against the principal or others.

Turning to the Restatement, under section 18, which imposes a duty on the principal obligor to reimburse the secondary obligor when the principal obligor has notice of the secondary obligation, a corporate surety will be little concerned with whether the principal obligor is charged with notice of the obligation. This is because the principal obligor will have signed the surety bond, and thus will not only be charged with notice, but will in fact have actual notice of his obligation under the bond. In some jurisdictions, when dealing with a court or appeal bond, the notation may be made on the court record and the principal may not actually sign the bond; however, the notation will be entered by the principal's attorney, thus there can be no question of notice of the obligation.

A matter of much concern to the surety is the fact that the obligation to reimburse does not arise until the time for performance pursuant to the underlying obligation. First of all, the surety should not be called upon to perform its secondary obligation prior to the time for performance of the underlying obligation. If the surety must perform first, it will be then forced to look to the principal obligor for reimbursement. Although this duty of reimbursement is an important aspect of the suretyship status, it does not sufficiently protect the surety from loss because, by its nature, it

45. Duty of Principal Obligor to Reimburse Secondary Obligor

(1) Except as provided in § 20, when the principal obligor is charged with notice of the secondary obligation it is the duty of the principal obligor to reimburse the secondary obligor to the extent that the secondary obligor:

(a) performs the secondary obligation; or

(b) makes a settlement with the obligee that discharges the principal with respect to the underlying obligation.

(2) The duty of the principal obligor to reimburse the secondary obligor does not arise until the time for performance pursuant to the underlying obligation.

Restatement (Third) of Suretyship § 18 (Tent. Draft No. 2).

46. See id. § 18(1).

47. See id. § 18(2).
requires the surety first to suffer a loss. Therefore, the surety will be very interested in those rights which it has or may acquire that it can assert to avoid suffering a loss. For example, indemnity agreements and collateral agreements enable the surety to call upon the principal or others and utilize such collateral to protect itself from sustaining a loss.\textsuperscript{48}

Section 19 deals with the measure of reimbursement to which the secondary obligor is entitled.\textsuperscript{49} Although the general law set forth by the \textit{Restatement} is that the surety is entitled to reimbursement of the reasonable cost of performance,\textsuperscript{50} including expenses incurred in the investigation and assertion of defenses to the action,\textsuperscript{51} the cost of an action necessary to collect the reimbursement from the principal obligor is not included as a "reasonable cost."\textsuperscript{52} The Reporter for the \textit{Restatement} cites the case of \textit{Burr v. Lichtenheim}\textsuperscript{53} as authority for this generally recognized principle. Thus, once again, sureties normally include the right to be reimbursed for collection costs in their indemnity and collateral agreements.

Section 20 deals with situations in which the duty to reimburse does not arise.\textsuperscript{54} The surety undoubtedly is interested in this sec-

\begin{itemize}
\item \textsuperscript{48} See 11A Appleman & Appleman, \textit{supra} note 10, §§ 6662-6667.
\item \textsuperscript{49} Measure of the Reimbursement to Which Secondary Obligor is Entitled
\begin{enumerate}
\item When the principal obligor has a duty to reimburse the secondary obligor (§ 18), that duty is to reimburse the secondary obligor for the reasonable cost of performing the secondary obligation, including incidental expenses.
\item If satisfaction of the principal obligor's duty to the obligee pursuant to the underlying obligation is limited to a particular fund or property, satisfaction of the duty of reimbursement is limited to the same fund or property.
\end{enumerate}
\item \textsuperscript{50} \textit{Restatement (Third) of Suretyship} § 19 (Tent. Draft No. 2).
\item \textsuperscript{51} Id. § 19 cmt. a.
\item \textsuperscript{52} Id.
\item \textsuperscript{53} 460 A.2d 1290 (Conn. 1983), cited in \textit{Restatement (Third) of Suretyship} § 19 reporter's note (Tent. Draft No. 2).
\item \textsuperscript{54} When the Duty to Reimburse Does Not Arise
\begin{enumerate}
\item Notwithstanding § 18, the principal obligor has no duty to reimburse the secondary obligor to the extent that:
\begin{enumerate}
\item that duty is discharged in insolvency proceedings;
\item if the underlying obligation is contractual, the principal obligor lacked capacity to enter into that obligation;
\item the principal obligor had a defense to the underlying obligation that, pursuant to the terms of the secondary obligation, was not available to the secondary obligor;
\end{enumerate}
\end{enumerate}
\end{itemize}
tion, especially subsection 20(1)(d), which provides that the principal obligor has no duty to reimburse the secondary obligor to the extent that the obligee’s release of the principal obligor has released the principal’s duty to reimburse the secondary obligor pursuant to section 35 of the Restatement. 55 This provision is of great concern to the surety because in simple terms, the surety does not anticipate remaining liable for an obligation that its principal has satisfied or from which the principal has been released.

Other provisions of the Restatement of particular interest to the surety are subsections 20(1)(e) and (f), which appear to set forth an exception to the rule that the principal has no duty to reimburse the surety if the surety had notice of a defense to the underlying secondary obligation. 56 Despite the notice, if the surety was under business compulsion to perform, or if its business decision to

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(d) pursuant to § 35, the obligee’s release of the principal obligor with respect to the underlying obligation has released the principal obligor’s duty to reimburse the secondary obligor; or

(e) at the time of performance or settlement of that obligation the secondary obligor had notice of a defense of the principal obligor to the underlying obligation that was available to the secondary obligor as a defense to the secondary obligation (§ 30), unless the secondary obligor was under business compulsion to perform the secondary obligation; or

(f) at the time of performance or settlement of the secondary obligation, the secondary obligor had notice of a defense to the secondary obligation that was not available to the principal obligor as a defense to the underlying obligation, unless it was a reasonable business decision to perform or settle the secondary obligation despite that defense or the secondary obligor was under business compulsion to perform the secondary obligation.

(2) For purposes of subsection (1)(e):

(a) a secondary obligor has notice of a defense of the principal obligor to the underlying obligation available to the secondary obligor as a defense to the secondary obligation if that defense would be revealed to the secondary obligor by making such inquiry of the principal obligor as is reasonable under the circumstances to ascertain whether the principal obligor claims any defenses; and

(b) if the secondary obligor gives the principal obligor notice of the obligee’s claim and an opportunity to defend against it, the principal obligor is bound by the resolution of the obligee’s claim and, therefore, performance by the secondary obligor, upon either judgment obtained by the obligee or a reasonable settlement, is not performance with notice of a defense available to the secondary obligor.

Restatement (Third) of Suretyship § 20 (Tent. Draft No. 2).

55. Id. § 20(d)(1).
56. Id. § 20(1)(e)-(f).
perform or settle the secondary obligation despite those defenses was reasonable, then the principal has a duty of reimbursement.\textsuperscript{57} This is of concern to the surety because very often the surety may be placed under considerable pressure by claimants or obligees under the threats of debarment or bad faith actions.

Under subsection 20(2)(a), the surety is deemed to have notice of any defense of the principal which reasonable inquiry would have revealed.\textsuperscript{58} The Reporter in comment f to section 20 notes that "the rule in subsection (2)(a) rejects the view stated in many cases that the secondary obligor is entitled to assume the enforceability of the underlying obligation and, therefore, that the burden is on the principal obligor to make certain that the secondary obligor has notice of a defense."\textsuperscript{59} Although the surety would want to make a reasonable inquiry, the determination of what is reasonable under the circumstances is likely to be the subject of many lawsuits. Because the reasonableness of an inquiry will likely be a factual question, the outcome will more often than not depend on a jury's factual determination—a situation apt to place the corporate surety at peril.

From the surety's point of view, anything that could lead to more litigation, and to factual rather than legal issues at trial, is not only likely to increase the expense but is also a very dangerous development. The practical effect of such rules is to 1) increase the costs of suretyship; 2) force sureties to amend collateral and indemnity agreements so as to eliminate these duties; and 3) ultimately make it more difficult for principal obligors to obtain suretyship. Therefore those who are able to obtain suretyship will be forced to do so at a higher cost. In order to minimize the cost of litigation it is important for the surety to attempt to have these reimbursement/indemnity matters resolved by summary judgment as a matter of law, rather than having the outcome turn on the determination of complex factual matters decided by a jury In addition to minimizing the costs and likelihood of litigation, the outcome of any dispute will be more readily predicted. Both of these

\textsuperscript{57} Id.
\textsuperscript{58} Id. § 20(2)(a).
\textsuperscript{59} Id. § 20 reporter's note, cmt. f.
factors will significantly affect the availability and cost of surety bonds.

Some are concerned with the need to protect an unsophisticated principal obligor from a surprising result. One can understand such a concern in connection with negotiable instruments. The various rules developed under Article 3 of the Uniform Commercial Code, in fact, seek to protect the unsophisticated principal obligor of a negotiable instrument. With respect to surety bonds, however, these concerns do not seem to be significant. The principal obligor usually seeks out, signs, and then delivers the bond to the obligee. Thus, it is hard to conceive of a situation in which the principal obligor can legitimately claim to have been surprised by the application of normal suretyship principals in the bond arena.

In fact, in those states where surety bonds are deemed covered under unfair claim practices acts, the obligations of the surety to the obligee are treated the same as the obligations of an insurer to its insured. Although the surety undoubtedly would want to inquire of its principal and give notice the day it receives a claim, the surety has a much stricter duty of good faith and fair dealing to the obligee than does the principal obligor. The reasonableness of defenses being asserted and the time limitations imposed upon a surety are much more stringent. The changes suggested by the proposed Restatement further increase the dangers to the surety and the likelihood that a principal obligor will sit back and take pot shots at the surety challenging its payment and right to reimbursement.

Section 22 provides for restitution to the surety in those circumstances when the surety may not be entitled to reimbursement. The theory is that to the extent the principal obligor is relieved of

60. See U.C.C. § 3-605 (1990).
62. Restitution

The secondary obligor is entitled to restitution from the principal obligor to the extent that the secondary obligor’s performance of the secondary obligation, or settlement with respect to it, relieves the principal obligor of its duty pursuant to the underlying obligation, if either:

(a) the principal obligor was not charged with notice of the secondary obligation; or

(b) the secondary obligor was not under a business compulsion to perform and, at the time of performance, the secondary obligor had notice of a
his obligation, he has been enriched by the surety’s performance.\textsuperscript{63}

This section covers two events, the first of which is when the principal obligor was not charged with notice of the secondary obligation,\textsuperscript{64} and the second is when the secondary obligor was not under a business compulsion to perform and had a defense that was not available to the principal obligor.\textsuperscript{65}

As previously stated, it is highly unlikely that the principal obligor of a surety bond will not be charged with notice of the secondary obligation. However, the surety is more likely to be involved in the second situation, in which the secondary obligor was not under a business compulsion and had a defense to the secondary obligation that was unavailable to the principal obligor. Clearly, as pointed out in the comments and illustrations to section 22, the secondary obligor’s performance is not likely intended to be a gift to the principal obligor.\textsuperscript{66} Therefore, even if a court does not agree that avoidance of the cost and uncertainty of litigation and other circumstances amounts to a business compulsion, the surety will still be entitled to restitution.\textsuperscript{67} This result is in accord with the standard terms of most indemnity agreements, which provide for the surety’s right to make settlements when it deems such a course of action to be “expedient.” These indemnity agreement provisions have been upheld by the courts.\textsuperscript{68} The only exception to their enforcement arises when the payment has been made through fraud or lack of good faith on the part of the surety.\textsuperscript{69}

In dealing with license and permit bonds, for which there can be many claimants, the surety should, by way of subrogation under section 23, succeed to the rights of each of the claimants that it pays.\textsuperscript{70} Illustration 3 to section 23 states that the surety is not enti-
tled to subrogation unless all claims are satisfied, but when there are multiple claims by multiple beneficiaries of the bond, the surety would acquire the rights of those claimants who were paid in full. When the duty of the surety is conditioned upon the default of the principal on the underlying obligation, performance by the surety in the absence of the principal’s default will not entitle the surety to subrogation. However, once again, the standard indemnification agreements give the surety the right to make settlement of the claim in good faith, so that indemnification rights are obtained by the surety in settlement of a claimed default as long as such settlement was made in good faith and without regard to whether such default is ultimately approved. *Fidelity & Deposit Co. v. Bristol Steel & Iron Works, Inc.* and *Fidelity & Deposit Co. v. Fleischer* both dealt with the application of the indemnity agreement to such situations, and both are instructive. Both cases held that the rights of the principal to contest the default were preserved notwithstanding the settlement of the surety.

IV Suretyship Defenses

The defenses available to the surety are, of course, of the utmost importance in connection with any type of bonding obligation. Before looking at the various sections on suretyship defenses in the *Restatement*, whether it be “Impairment of Secondary Obligor’s Recourse” under section 33, “Release of Underlying Obligation”

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71. Id. cmt. b, illus. 3.
72. Id. cmt. c.
73. 722 F.2d 1160 (4th Cir. 1983).
74. 722 S.W.2d 809 (Mo. Ct. App. 1989).
75. See *Bristol Steel*, 722 F.2d at 1163; *Fleischer*, 722 S.W.2d at 818.
76. Impairment of Secondary Obligor’s Recourse.

(1) The duty of the secondary obligor to perform the secondary obligation is subject to the condition that the obligee refrain from impairing the recourse of the secondary obligor against the principal obligor.
under section 35," or "Burden of Persuasion" under section 43," we need to consider whether there is a difference between types of surety obligations and the business circumstances under which the

(2) Acts that impair the recourse of the secondary obligor against the principal obligor include:
   (a) release of the principal obligor with respect to the underlying obligation, as further described in § 35;
   (b) extension of time granted to the principal obligor to perform the underlying obligation, as further described in § 36;
   (c) other modification of the underlying obligation, as further described in § 37;
   (d) impairment of collateral, as further described in § 38; and
   (e) any other act that impairs the principal obligor's duty of performance (§ 17), the principal obligor's duty to reimburse (§§ 18-21), or the secondary obligor's right of restitution (§ 22) or subrogation (§§ 23-27), as further described in §39.

(3) If the obligee impairs the recourse of the secondary obligor against the principal obligor, the secondary obligor is discharged from any unperformed portion of the secondary obligation to the extent set forth in §§ 35-39.

(4) If the obligee impairs the recourse of the secondary obligor against the principal obligor
   (a) after the secondary obligor performs that portion of the secondary obligation; or
   (b) before the secondary obligor performs a portion of the secondary obligation, if the secondary obligor performs:
      (i) without knowledge of such act;
      (ii) for the benefit of an intended beneficiary who can enforce the secondary obligation notwithstanding the impairment of recourse; or
      (iii) under business compulsion; then the secondary obligor has a claim against the obligee with respect to any portion of the secondary obligation that has been performed to the extent that such impairment would have discharged the secondary obligor with respect to that performance.

Restatement (Third) of Suretyship § 33 (Tent. Draft No. 2).

77. Release of Underlying Obligation
To the extent that the obligee releases the principal obligor from its duties pursuant to the underlying obligation:
   (a) if the principal obligor is charged with notice of the secondary obligation (§ 16), the principal obligor is also released from the corresponding duties, owed to the secondary obligor, of performance and reimbursement unless the terms of the release effect a preservation of the secondary obligor's recourse (§ 34);
   (b) the secondary obligor is discharged from any unperformed duties pursuant to the secondary obligation unless:
      (i) the terms of the release effect a preservation of the secondary obligor's recourse (§ 34); or
      (ii) the language or circumstances of the release otherwise show the obligee's intent to retain its claim against the secondary obligor;
obligations are given. As noted previously, with miscellaneous

(c) if the secondary obligor is not discharged from its unperformed duties pursuant to the secondary obligation by operation of paragraph (b), the secondary obligor is discharged from those duties to the extent:

(i) of the value of the consideration for the release;

(ii) that the release of a duty to pay money pursuant to the underlying obligation would otherwise cause the secondary obligor a loss by increasing the difference between the cost to the secondary obligor of performing its duties pursuant to the secondary obligation and the amount recoverable by the secondary obligor pursuant to its recourse incident to suretyship status (§§ 17-27) and

(iii) that the release discharges a duty of the principal obligor other than the payment of money, except to the extent that the obligee establishes that the discharge of that duty does not increase the difference between the cost to the secondary obligor of performing its duties pursuant to the secondary obligation and the amount recoverable by the secondary obligor pursuant to its recourse incident to suretyship status (§§ 17-27);

(d) the secondary obligor has a claim against the obligee to the extent provided in § 33(4).

Id. § 35.

78. Burden of Persuasion

(1) A secondary obligor claiming discharge from a secondary obligation due to the obligee's impairment of recourse (§ 33) has the burden of persuasion with respect to the occurrence of the act constituting the impairment of recourse.

(2) Except as provided in subsection (3), the burden of persuasion with respect to loss or impairment caused by the act impairing recourse is allocated as follows:

(a) the burden of persuasion is on the secondary obligor if:

(i) the secondary obligor is in the business of entering into secondary obligations, received a business benefit for entering into the secondary obligation, or otherwise was induced to enter into the secondary obligation by separate consideration that directly benefits the secondary obligor; or

(ii) the act impairing recourse is a modification of the underlying obligation and the modification is not material;

(b) otherwise, it is presumed that the act impairing recourse caused a loss or impairment equal to the secondary obligor's liability pursuant to the secondary obligation and the burden of persuasion as to the non-existence or lesser amount of such loss is on the obligee.

(3) Notwithstanding subsection (2)(a), if:

(a) the secondary obligor demonstrates prejudice caused by the impairment of recourse and

(b) the circumstances of the case indicate that the amount of loss is not reasonably susceptible of calculation or requires proof of facts that are not ascertainable, it is presumed that the act impairing recourse caused a loss or impairment equal to the secondary obligor's liability pursuant to the sec-
bonds, one is not dealing with a situation in which the principal is unaware of the existence of the surety. The principal has sought out and obtained the bond from the surety for the furtherance of some business or other purpose. The deal or the business relationship that is the basis of the underlying obligation is one to which the surety is a stranger. The principal and the obligee set forth their relationship and the bond guarantees that obligation. This obligation may be the payment of funds or the actual performance of some other obligation that may itself be expressed in terms of money damages. Thus, the fact that one might be dealing with the payment of money in the event of default, as opposed to the performance of some other act as part of the underlying obligation, should not be a determinative factor.

Article 3 of the Uniform Commercial Code, which deals with obligations on negotiable instruments, is based on a strong policy favoring negotiability. Thus, the rules for suretyship in those situations have evolved in a way that enhances negotiability. The situation is entirely different when one is dealing with a surety bond. Negotiability is not a factor even if the underlying obligation is a financial guaranty requiring the payment of money. Further, the parties have a very specific understanding and expectation that the underlying obligation is to be performed only once. If the obligee were to accept something less than full performance by the principal obligor in full satisfaction of that obligation and were to execute a release, then the secondary obligation would also be released. It is hard to imagine the circumstances in which the obligee would release the principal on a surety bond while expecting that the surety would still be obligated to perform the underlying obligation.

For example, consider under what circumstances the Bureau of Customs would release the principal on a customs bond from duties and penalties owed with a reasonable expectation that it could

-id. § 43.
79. See supra text accompanying note 46.
still proceed against the surety to enforce the obligation. In the first place, the Bureau procedures are set up to make demand upon the surety very quickly. In the same context, consider whether the obligee on a supersedeas bond or a court in connection with a court fiduciary bond would discharge the principal and seek to recover from the surety. Even if the principal is insolvent, there is no commercially practical reason for taking such action. The obligee would have to be very certain that it was not in some way prejudicing the surety's subrogation rights. Even more importantly, the commercial practicality of the matter is that if the principal is not paying, the obligee merely proceeds against the surety. That is the purpose of the bond, and it would not be in the obligee's interest to engage in negotiations that would result in a release of the principal with money still owed to the obligee.

On the other hand, if the principal obligor and the obligee were involved in a dispute concerning the underlying obligation, and it was likely that the principal would be unable to satisfy the obligation, the principal and obligee might enter into an agreement whereby they agreed on the amount owed and the principal was released from all obligations. The surety would be bound by their agreement and would be responsible for paying it. Even if such a collusive settlement were not reached, the mere fact that the rule exists under the provisions of section 35 of the Restatement makes it likely that a desperate principal would be able to leverage the surety to his own advantage.

For example, let us assume that we are dealing with a utilities bond and a utility bill of $1,000 is disputed by the principal. Further, assume that the principal is unable to pay anything beyond $500 but can, through his books, records, and testimony, establish that the bill should be reduced by $500. The principal and the obligee might reach an agreement in which the principal would pay the $500 to the obligee, who would then release the principal while preserving its rights against the surety. The obligee would have rights against the surety because as part of its agreement with the principal, the principal would concede that the entire $1,000 bill

83. Se supra notes 33-38 and accompanying text.
was due and payable. Because the surety is a stranger to the underlying transaction, it would be very difficult to develop and prove the facts necessary to support the surety's contention that the bill should be reduced to the proper $500 amount. Further, it is unlikely that the surety would ever even find out that the principal had valid defenses.

Under the rules of section 35, the principal would be able to avoid the surety's subrogation rights, and the surety, to its prejudice, would have to pay $500 which, in fact, is not due.85 The difficulty in establishing the defense is compounded by section 43, which places the burden of persuasion in such circumstances upon the surety.86

Because the principal obligor is in financial distress and has nothing to lose and much to gain—i.e., forgiveness of debt without the stigma of bankruptcy—the application of the rules under section 35 would seem to encourage collusive settlements and fraud on the surety. Absent a collusive settlement, why would the obligee not merely reject such an offer and make demand for $1,000 from the secondary obligor, who could then proceed against the principal obligor for reimbursement to the extent possible? The secondary obligor under the circumstances might be willing to allow the release of the principal, but there is no reason why it should not decide for itself.

In the real world, insolvent principals will seize upon any leverage against those to whom they have obligations. This may include threatening to confess judgment, or threatening to waive good defenses to the underlying obligation that would be known to or provable only by the principal. The difficulty of proving and successfully asserting such defenses in litigation will make suretyship more difficult and expensive to obtain. The policies of protecting unsophisticated principals from surprising results and minimizing litigation are not advanced either by allowing the release of the underlying obligation without also releasing the surety or by imposing a burden of persuasion upon the surety. Both rules are apt to increase litigation and as indicated previously, are contrary to the expectations of all the parties to a bond.

85. See Restatement (Third) of Suretyship § 35(a) (Tent. Draft No. 2, 1993).
86. Id. § 43(1).
As stated in the comments to section 34 of the Restatement, allowing an obligee who takes an action that would otherwise discharge the surety by reason of impairment of recourse to prevent the discharge by simply announcing that it is reserving its rights against the surety does not make sense and is not good policy. The problem with allowing such a reservation of rights in the surety bond context is that the principals would be surprised that the secondary obligor still had an obligation, because it is reasonable for the principal to expect that its release discharged the underlying obligation and, thus, the secondary obligor's obligation also. Further, with the execution of a standard indemnity agreement, any agreement signed by the principal obligor that preserves recourse against the surety will have the effect of keeping alive the surety's rights under the indemnity agreement.

Again, it would seem that, other than to encourage fraud against the surety, there is no reason to allow the preservation of recourse against the secondary obligor when the principal obligor no longer has an obligation. In one of the illustrations in section 34, a principal obligor cancelled his plans to obtain a job that would have provided funds to pay back the secondary obligor. In this situation, the surety arguably may be discharged from its secondary obligation to the extent that the decision to forego the job caused the surety a loss. Although this is a theoretical possibility, in the real world and especially in the surety bond arena, this loss would be difficult or impossible to prove. There is no compelling reason to encourage the release of the principal obligor without the concurrent release of the secondary obligor unless the secondary obligor specifically consents.

With respect to section 35, although I do not wish to belabor the points already raised, I must emphasize that the traditional rule that the secondary obligor is discharged by the obligee's release of the principal obligor should not be in any way impaired in the surety bond arena. Article 3 of the Uniform Commercial Code ap-

87. See id. § 34 cmt. a.
89. See id. at 304-06.
90. Restatement (Third) of Suretyship § 34 cmt. a, illus. 2 (Tent. Draft No. 2).
91. Id.
plies a different rule.\textsuperscript{92} The Article 3 policy of encouraging and not impairing negotiability certainly warrants such a result. In the surety bond arena, however, the entire undertaking, the formality of the documentation, and the business context dictate that if the obligation of the principal ceases, then the obligation of the surety ought to cease also. Again, remember that indemnity agreements are formulated to assure that this result is reached, notwithstanding a purported reservation or preservation of recourse against the surety. If the Restatement promulgates a policy of allowing discharge of the principal without concurrent discharge of the surety, it will tend to create difficulties for the surety and may actually promote fraudulent conspiracies between the obligee and the principal to the detriment of the surety. The reason given for the Restatement’s blanket rule is that the release of the principal obligor is unlikely to harm the secondary obligor.\textsuperscript{93} This reasoning avoids the fact that the obligee is entitled to only one performance, and if the obligee grants a release of that obligation, then he should be barred from pursuing the surety.

A final word should be added concerning proposed Restatement section 43, “The Burden of Persuasion.” Again, unless there is a good reason for allowing the release of the principal without the release of the surety (as in the case of a negotiable instrument), placing the burden of proving impairment of recourse upon the surety will result in commercial impracticability. Although subsection 43(3) provides some relief to the surety when the secondary obligor can demonstrate prejudice “caused by the impairment of recourse” and “the circumstances of the case indicate that the amount of loss is not reasonably susceptible of calculation or requires proof of facts that are not ascertainable,”\textsuperscript{94} these provisions do not adequately address the problems faced by the surety on a surety bond.

Since miscellaneous surety bonds often guarantee underlying obligations to pay money which are obviously susceptible to calculation, subsection 43(3) does not address adequately the surety’s

\textsuperscript{92} U.C.C. § 3-605(b) (1990) (“Discharge of the obligation of a party to pay an instrument does not discharge the obligation of an indorser or accommodation party having a right of recourse against the discharged party.”).
\textsuperscript{93} See Restatement (Third) of Suretyship § 35 cmt. e (Tent. Draft No. 2).
\textsuperscript{94} Id. § 43(3)(a)-(b).
concerns. The section does not recognize the fundamental differences between a bond and a negotiable instrument and the formalities of their execution and the expectations of the parties. Relief under subsection 43(3) would require very difficult proof and would likely result in little relief. In the practical business situations involved in the miscellaneous bond arena, we could expect this section to be a fertile ground for litigation.

Although, as indicated in the comments to section 43, the courts have articulated the difference between gratuitous and compensated sureties, and despite the fact that the compensated surety needs no special assistance, the mere fact that the surety has received a business benefit does not change the fact that the surety is a stranger to the primary obligation and should not be placed at undue risk for the benefit of the principal obligor. The surety bond enables the principal obligor to enter into its business arrangement with the obligee, and the fact that the surety is compensated should be relevant as to the rights and duties between the surety and the obligee only; compensation is not relevant to the question of the surety's rights and remedies against the principal. Further, to allow a discharge of the secondary obligor as a result of the discharge of the principal does not constitute a windfall for the secondary obligor. If the release acts as a windfall for anyone, it is the principal obligor. If such a windfall is the purpose and desire of the obligee, it should not be allowed to accomplish such a result at the expense of the surety. After all, the business relationship between the principal and the obligee is what gave rise to the suretyship in the first place.

V Conclusion

As has been indicated throughout, it is impossible to classify miscellaneous surety bonds. The very name indicates that a wide variety of obligations are being guaranteed by these bonds. In the foreword to Tentative Draft Number Two, Geoffrey C. Hazard, Jr., Director of the American Law Institute, points out "how account has been taken of differences between suretyship transactions when the underlying obligation is to pay money—the commercial

95. Id. § 43 cmt. b; Equitable Sav. & Loan Ass'n v. Jones, 522 P.2d 217 (Or. 1974).
context—and those when the underlying context is performance of the task—the construction industry context."96 By now, the reader should understand that dividing suretyship into two worlds—the commercial context and the surety bond context—cannot be done on the basis of the dichotomy of the obligation to pay money versus the performance of a task. As miscellaneous surety bonds demonstrate very vividly, the surety bond obligation is often the payment of money, yet the expectations of the parties to a surety bond are vastly different from those of the parties involved in a commercial transaction governed by Article 3 of the Uniform Commercial Code. Thus, the provisions which would be written to give protection to the construction bond surety must necessarily be extended to the miscellaneous bond surety What miscellaneous surety bonds do have in common, however, is the tripartite relationship of principal obligor, secondary obligor, and obligee, and the expectation that once the underlying obligation has been fulfilled to the satisfaction of the obligee, the secondary obligor/surety has no further obligation. In the language of the surety claim attorney, the release of the principal constitutes the release of the surety

96. Restatement (Third) of Suretyship ix (Tent. Draft No. 2).
MISCELLANEOUS SURETY BONDS

APPENDIX A

Fidelity and Deposit Company
OF MARYLAND
BALTIMORE, MD. 21203

License and/or Permit Bond

KNOW ALL MEN BY THESE PRESENTS:

That we, ................................................................., as Principal, and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, incorporated under the laws of the State of Maryland, with principal office P.O. Box 1227, Baltimore, Maryland 21203, as Surety, are held and firmly bound unto ................................................................., as Obligee,

in penal sum of ................................................................. Dollars, lawful money of the United States, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly, by these presents.

WHEREAS, the above bounden Principal has obtained or is about to obtain from the said Obligee a license or permit for ................................................................. , and the term of said license or permit is as indicated opposite the block checked below:

☐ Beginning the ................................................................. day of ................................................................. , 19........, and ending the ................................................................. day of ................................................................. , 19.........

☐ Continuous, beginning the ................................................................. day of ................................................................. , 19.........

WHEREAS, the Principal is required by law to file with ................................................................. a bond for the above indicated term and conditioned as hereinafter set forth.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, That if the above bounden Principal as such licensee or permittee shall indemnify said Obligee against all loss, costs, expenses or damage to it caused by said Principal's non-compliance with or breach of any laws, statutes, ordinances, rules or regulations pertaining to such license or permit issued to the Principal, which said breach or non-compliance shall occur during the term of this bond, then this obligation shall be void, otherwise to remain in full force and effect.

PROVIDED, that if this bond is for a fixed term, it may be continued by Certificate executed by the Surety hereon; and

PROVIDED FURTHER, that regardless of the number of years this bond shall continue or be continued in force and of the number of premiums that shall be payable or paid the Surety shall not be liable hereunder for a larger amount, in the aggregate, than the amount of this bond, and

PROVIDED FURTHER, that if this is a continuous bond and the Surety shall so elect, this bond may be cancelled by the Surety as to subsequent liability by giving thirty (30) days notice in writing to said Obligee.

Signed, sealed and dated the ................................................................. day of ................................................................., 19........

Principal

By .................................................................

FIDELITY AND DEPOSIT COMPANY OF MARYLAND

By .................................................................

Attorney-in-Fact
No. ........................................

License and/or Permit Bond

Effective .................................................. 19.....

On ..........................................................

To ..........................................................

..........................................................

Fidelity and Deposit Company
OF MARYLAND
OFFICE OF CUSTOMS SERVICE
NOTICE OF PENALTY OF LIQUIDATED DAMAGES INCURRED
AND DEMAND FOR PAYMENT

DEPARTMENT OF THE TREASURY
UNITED STATES CUSTOMS SERVICE

ID: 200220059

TO: [Blank]

ID: [Blank]

DEMAND IS HEREBY MADE FOR PAYMENT OF $59,794.00, representing
assessed against you for violation of law or regulation, or breach of bond, as set forth below:

FAILURE TO FILE ENTRY SUMMARY AND/OR PAY PROPER DUTY AMOUNT.
THE ENTRY SUMMARY FOR ENTRY NUMBER 11300101201
WAS NBR ON 05/25/88
BUT HAS NOT BEEN FILED.

MITIGATION WILL NOT BE CONSIDERED UNTIL THE ENTRY SUMMARY HAS BEEN ACCEPTED.

RELIEF - NONE TO PRINCIPAL

EXHIBIT 3
FORM 5955A - Addressed to Surety
Form 5955A

LAW OR REGULATION VIOLATED

19CFR142.12

BOND BREACHED

19CFR142.12

DESCRIPTION OF BOND
(If any)

398735385

BASIC IMPORT AND ENTRY BOND

398735385

Form Number

Amount

$200,000

Date

11/25/87

Name and Address of Principal

INSURANCE CO.

SURY Claims:

Name and Address of Surety

INSURANCE CO.

SURETY IDENTIFICATION NO.

7411

If you feel there are extenuating circumstances, you have the right to object to the above action. Your petition should explain why you should not be penalized for the cited violation. Write the petition as a letter or in legal form; submit in duplicate (triplicate), addressed to the Commissioner of Customs, and forward to the Director of Customs at

DISTRICT DIRECTOR PLAZA NINE BLDG. 55 ERIEVIEW PL 6TH FL. CLEVELAND, OH 44114

Unless the amount owed remains unpaid or a petition for relief is filed within the district

TIME LIMIT FOR PAYMENT OR FILING OF PETITION FOR RELIEF IS 180 DAYS FROM THE DATE OF THE NOTICE

Date

09/27/90

Customs Form 5855A (01/2385)