NORTHEAST SURETY AND FIDELITY CLAIMS CONFERENCE
SEPTEMBER 19-21, 2012

PREVENTING AND DEFENDING "STRIKE SUITS" AGAINST SURETIES AND FIDELITY CARRIERS

Duane A. Daiker, Esquire
Shumaker, Loop & Kendrick, LLP
101 East Kennedy Boulevard, Suite 2800
Tampa, Florida 33602

James Gibson, AIC, AIM
Liberty Mutual Surety
450 Plymouth Road, Suite 400
Plymouth Meeting, PA 19462

Introduction

Recent years have seen an increase in what can be described as "strike suits" against sureties—*i.e.*, lawsuits designed primarily to recover inflated attorney fees from a surety as part of an otherwise routine bond claim. This has become commonplace across the country in jurisdictions where attorney fees are recoverable by bond claimants. The question of *when* bond claimants are entitled to attorney fees is beyond the scope of this paper—which will presume at least an argument in favor of attorney fees, and will use the Florida statutory scheme as an example. *See, e.g.,* Florida Statutes §627.428(1) (authorizing attorney fee award in favor of an insured, which in Florida includes a bond claimant).

Experience has shown an easily identifiable pattern for these types of "strike suits." Early detection of potentially problematic litigation is very beneficial because steps can be taken to mitigate the abusive tactics designed to prolong and extend routine claims litigation. While much of the advice in this paper is just a reinforcement of good claims handling practices, adhering to those best practices is crucial when an aggressive plaintiff's attorney has targeted your bond.

Aggressive attorney fee claims occur across the entire range of bond types, although motor vehicle dealer bonds and other consumer-related bonds seem to be frequent targets. One explanation for this perceived phenomena is that aggressive "consumer lawyers" tend to lead this charge against sureties—as opposed to lawyers more focused on construction industry clients. However, payment bond "strike suits" are more common now, and any bond type is potentially at risk.

Recognizing the "Strike Suit"

The essential goal of a "strike suit" is to recover attorney fees. Of course the claimant's attorney wants and needs to make an affirmative recovery on the underlying bond claim, but the liability for the underlying claim is often quite clear. The strategy depends upon delaying the involvement of the surety until after litigation has been filed, performing as much discovery and other legal work as quickly as possible (often through a very generic, form-based approach), and threatening the surety with ever increasing attorney fees if they balk at the exaggerated settlement demands. As such, there are some common warning signs of aggressive attorney fee-based "strike suit" litigation:

Minimal Notice to the Surety

Strike-suit plaintiffs do not want the surety to focus on the bond claim or perform any investigation prior to being served with the complaint. Ironically, such lawyers actually fear that the surety may tender payment on a clearly established claim *too early*, and defeat any significant fee award. Targeted sureties will receive only the very most basic notice required to perfect a claim, if any. Often that notice is delivered only to the principal, and not to the surety directly—in the hopes the surety will not get timely notice.

Ironically, when confronted with a question as to why the claimant did not put the surety on notice, the plaintiff's lawyer will often blame the surety! Such lawyers generally say that "the surety always ignores those notices anyway," or "a surety never pays a claim without a lawsuit." As we know, these statements are patently false, but attempt to portray

notice to the surety as a futile process in order to justify this key aspect of the "strike suit" scheme.

Small Claim Amounts

While plaintiffs' attorneys would certainly prefer to bring larger claims because they can justify larger attorney fee awards, lawsuits for small amounts are very common—especially on consumer-oriented bonds. Even a small recovery can potentially justify a large attorney fee award. *See, e.g., Hubbel v. Aetna Cas. & Sur. Co.*, 758 So. 2d 94, 95 (Fla. 2000) (*per curiam* decision affirming $10,000 attorney fee award on $345 claim paid by surety on demand). When you see a lawsuit for $500 in damages, with no prior demand to the surety, you should immediately suspect that a sizeable attorney fee claim will driving the settlement negotiations.

Suit Filed Immediately When Ripe

Statutory schemes often provide rigid time frames to prosecute a bond claim, particularly a payment bond claim. *See, e.g.,* Florida Statutes §713.23. Aggressive plaintiffs will often file suit on the first possible day to make a claim, in order to avoid the principal or the surety tendering payment before suit is filed.

Lengthy Complaints, Voluminous Discovery, and Early Summary Judgment

A typical payment bond lawsuit could be alleged in a two or three page complaint. The relevant statutory scheme in the jurisdiction establishes the elements of a claim, and the required facts typically are not complicated or extensive. A "strike suit" complaint, however, will often total ten or more pages, with multiple counts, extensive factual allegations that are irrelevant, and numerous citations to well-established authority. The intent of a ponderous complaint is to make the issues seem more complicated, and to run up the number of "hours" sought for preparation of the complaint.

Similarly, where the civil rules permit such tactics, aggressive plaintiffs will often serve a stack of paper discovery with the complaint—interrogatories, requests for production, and requests for admissions. *See, e.g.,* Rules 1.340(a), 1.350(b), 1.370(a), Florida Rules of Civil Procedure (authorizing service of discovery with initial pleading). Although the plaintiff often has all the documents necessary to establish the claim in his or her possession (and maybe even attached to the complaint), the early discovery requests will seek exhaustive information about the underlying factual circumstances of the claim. The discovery is usually objectionable, and rarely has to be answered, but an unscrupulous attorney can potentially claim several hours of time for drafting this lengthy form-based discovery.

Although the rules of civil procedure usually have limits on how quickly a plaintiff can move for summary judgment (*see, e.g.,* Rule 1.510, Florida Rules of Civil Procedure), an aggressive lawyer will often prepare and serve a motion for summary judgment with the initial complaint, or as soon as possible thereafter. The summary judgment will be based upon affidavits of the plaintiff, or even the verified allegations of the complaint. Again, the plaintiff's lawyer has ostensibly undertaken a vast amount of work up-front and built up significant attorney fees—even before the surety knows the litigation is coming.

Immediate Demand for Fees, and Threat of More

The strategy is usually to make a quick hit on the surety for an exaggerated attorney fee award. As such, the "strike suit" lawyer will often make a quantified demand for attorney fees very quickly after the lawsuit (and discovery, and maybe a motion for summary judgment) is served. The plaintiff will hold out the "carrot" of a set amount for attorney fees if the claim is settled within a short time period—with a clear threat that the attorney fees will continue to accrue quickly.

Express or Implied Bad Faith Threats

Depending upon the jurisdiction, correspondence from the plaintiff's attorney will often include either explicit or implicit threats of a bad faith claim. If the jurisdiction permits bad faith claims, the plaintiff will often set a deadline for payment of the claim and the attorney fees in an attempt to set up a bad faith claim. *See, e.g.,* Florida Statutes §625.155 (excluding payment and performance bond sureties from bad faith claim handling practices claims, but not other sureties). Even if such a claim is not allowed by local law, the correspondence will often imply that the surety is acting in bad faith or otherwise engaged in unsavory claims practices. This is part of being a "squeaky wheel" that gets more attention and provides a bit more leverage to encourage a quick settlement.

Common Profile for Attorneys and Known Offenders

The types of attorneys that bring these claims tend to follow a pattern. They are often solo practitioners from more densely populated metropolitan areas. They are generally not lawyers known for a construction practice—but are often known as "consumer lawyers" or plaintiffs' lawyers. There are a handful of lawyers across the country that are known for exactly this type of litigation, and local counsel will often be familiar with them by name. While this may be a gross overgeneralization, such lawyers may have a spotty history of ethical misconduct and professional discipline.

Recommendations to Avoid or Limit Exposure

Good claims practices are always recommended, of course. However, the threat of excessive attorney fee liability and manipulation by bond claimants makes proper claims handling even more important. Here are a few suggestions to keep in mind when a potential "strike suit" is suspected:

Open Communications with Principal

First, keep an open line of communication with the principal. Either the surety claims professional or the attorney should encourage any principal they are working with on a regular basis to keep the surety informed of any potential bond claims. The principal is often on notice of a potential bond claim well before the surety, and can help defuse these situations quickly. Of course, situations arise with isolated claims or claims against types of bonds were there is no existing relationship with the principal—and some degree of surprise is difficult to avoid. When possible, the principal can be a key source of potential claims information at a time when the claim can be more easily managed.

Prompt Investigation and Payment with Strong Documentation

Quickly pay valid claims. A quick tender of amounts due to a potential bond claimant will go a long way toward mitigating, or even avoiding, attorney fee awards. To the extent the process takes some time, a strong trail of documentation will be very helpful. A letter acknowledging the claim and seeking additional documentation can help document a reasonable and timely response, and shift the burden to the claimant to justify an excessive attorney fee claim. Written confirmation of the commencement of an independent investigation, and ultimately a decision on the claim, can quickly take the reasonableness out of exaggerated fee claims. "Strike suits" thrive on allegations that the surety "did not respond," or delayed its investigation or payment for no documented reason.

Pay Small Claims Early

Small claims tend to be more dangerous—because the plaintiff attorney's motivation relates almost solely to the recovery of attorney fees. Paying small claims quickly can result in large savings. Aggressive plaintiffs hope that small claims will not have priority and will linger, allowing attorney fees to increase significantly over time.

Bad Faith Claims Usually Avoided

With proper handling, bad faith claims can usually be avoided. However, bad faith claims, even when unjustified under the circumstances, should not be ignored. Any attorney aggressive enough to threaten bad faith claims without legal or factual justification is likely to take other aggressive action, including complaints to insurance regulators or other actions designed to increase the pressure on the claims process. Good documentation, as discussed above, goes a long way toward demonstrating proper and timely handling of claims.

Attorney Fees Must be Reasonable

Even when bond claimants have a right to recover attorney fees, the fees sought must be reasonable. Attorney fee claims in these types of cases are generally very inflated—in both the hourly rate and the number of hours spent. The typically generic complaints and discovery may provide some support for an argument that the hours are unreasonable. Look for errors in the documents that signal the use of a form—like using improper names of the parties or incorrect facts. Also, some judges will be receptive to an argument that "front loading" all the work was an unreasonable approach—if you have the proper paper trail to show a timely acknowledgement of the claim, a reasonable investigation period, and a timely decision to pay.

In jurisdictions like Florida, where attorney fees cannot be recovered for time spent in proving up the amount of attorney fees (as opposed to the entitlement), there may be an advantage to stipulating to entitlement to fees and leaving only the amount of fees to be determined by the court. At least the incentive to prolong the litigation from that point forward will be at an end.

Proposal for Settlement

In jurisdictions that provide for a fee-shifting mechanism for rejected settlement proposals, making such a proposal can provide a strategic advantage. If the surety can set up a situation where the attorney fee responsibility could potentially be shifted to the plaintiff if a reasonable settlement offer is rejected, the power shifts dramatically. *See, e.g.,* Florida Statutes §768.79; Rule 1.442, Florida Rules of Civil Procedure. The client, whose affirmative recovery is usually not an issue, will not want to risk attorney fee liability to the surety just to increase the fee award to their attorney. Assuming the plaintiff's attorney is complying with his ethical obligations to keep his client informed of the case status, any potential to shifting of attorney fees is likely to force a settlement at or near the proposed amount.

Conclusion

"Strike suits" against sureties are becoming a cottage industry in some areas of the country. These suits can often be identified early—but sometimes not early enough. A focus on good and timely claims handling can minimize the increased exposure to the surety in individual cases. And perhaps even more importantly, a concerted effort to take the "premium" out of these types of cases may discourage this type of activity altogether.

About the Authors

Duane Daiker is co-chair of the fidelity and surety practice group at Shumaker, Loop & Kendrick, LLP and resides in the firm's Tampa office. Duane represents surety companies in connection with payment, performance, and fiduciary bond disputes throughout the State of Florida. He can be contacted at ddaiker@slk-law.com or 813-227-2329.

James Gibson is a Senior Surety Specialist with Liberty Mutual Surety handling performance bond, payment bond and commercial bond claims. James was formerly with USF&G in Baltimore, and has over twenty years of claims handling experience. He can be contacted at james.gibson@libertymutual.com or 610-832-8249.