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| To:  | FLORIDA BAR CONSTRUCTION LAW COMMITTEE |
| From:  | Patricia H. Thompson  |
| Date:  | October 10, 2016 |
| Re:  | Indemnification Rights of a Construction Bond Surety  |

 |

1. **How can a surety be protected against loss before it is held actually liable or has made a payment?**
	1. Relief afforded to the surety under the common law
		1. “*Quia Timet*”
			1. Literally translated *quia timet* means, “because he fears or apprehends.”[[1]](#footnote-1)
			2. A claim for *quia timet* is filed as a bill in equity when a surety fears a future injury to its rights in property, real or personal, due to the negligence, fault, or fraud of another, and the injury cannot be avoided by a present action in law.[[2]](#footnote-2)
			3. The objective of a *quia timet* claim is to compel the principal to do the acts the principal ought to do before the surety’s liability has become fixed and absolute.[[3]](#footnote-3)
			4. *Quia timet* is not applicable if an injury has already occurred that requires any compensation or other relief.[[4]](#footnote-4)
			5. In order to successfully make a *quia timet* claim, the surety must establish that (1) the debt will become due, (2) the principal is or will be liable for the debt, and (3) absent equitable relief, the surety will be prejudiced because the surety will be forced to advance money to a creditor.[[5]](#footnote-5) It may not be enough for the surety to show that it has received a bond on the claim and the principal is insolvent.[[6]](#footnote-6) Some courts require a surety to prove that it is reasonably basing its fear of bond liability on objective facts.[[7]](#footnote-7)
				1. In *TransAmerica Insurance Co. v. Cavalary Construction Inc.*, the court held the surety was not entitled to *quia timet* relief, because it did not prove that the surety realistically faced loss under the bond and was in jeopardy.[[8]](#footnote-8) There, the surety was aware of a lawsuit filed against the contractor and alleged the contractor was being sued for over $5 million in damages.[[9]](#footnote-9) However, the surety did not present any proof of the alleged $5 million lawsuit filed against the contractor.[[10]](#footnote-10)
			6. *Quia timet* is a final remedy that requires a determination on its merits before a court can grant or deny such relief.[[11]](#footnote-11) However, there are occasions when a preliminary injunction may be appropriate.[[12]](#footnote-12) When this is the case, the surety must prove risk of irreparable harm.[[13]](#footnote-13) However, loss of a surety’s right to *quia timet* is not sufficient.[[14]](#footnote-14) The real question is whether that loss of the surety’s right to *quia timet* results in serious or irreparable harm.[[15]](#footnote-15) In other words, if losing the ability to bring a bill of *qia timet* will not cause the surety irreparable harm then a preliminary injunction is inappropriate.[[16]](#footnote-16)
				1. In *Borey v. National Union Fire Insurance Co.*, the Second Circuit held an injunction enforcing the surety’s right of *quia timet* was improperly granted because the surety’s claims are “nothing more than requests for preliminary relief to avoid a potential monetary loss; there has been no claim of impending insolvency or other irreparable consequences that would flow directly from the monetary loss.”[[17]](#footnote-17) Therefore, the denial of *qui timet* did not cause irreparable harm because the surety would still be able to collect the money afforded to it at a later date.[[18]](#footnote-18)
				2. In *Escrow Agents Fidelity Corp. v. Abelman*, the California Court of Appeals held an action in *quia timet* was proper when an escrow agent had allegedly embezzled more than $4,000,000.[[19]](#footnote-19) Here, the harm was irreparable because it was likely that the money could not be recovered later on.[[20]](#footnote-20)
			7. Remedies under *quia timet* vary. A court can order funds to be frozen in the hands of the owner, appoint a receiver, direct that the funds be paid directly to suppliers and contractors, or require the deposit of collateral to cover the surety’s anticipated loss.[[21]](#footnote-21)
				1. In *Fidelity and Deposit Company of Maryland v. McClintic-Marshall Corp*., the court held that a surety, on a bill of *quia timet*, can require the principal and its indemnitors to pay the debt or obtain a money decree against the principal in favor of a creditor instead of the surety.[[22]](#footnote-22)
				2. In *Milwaukee Construction Co. v. Glens Falls Insurance Co*., the court held a surety that was entitled to specific performance which would require the principal to comply with the indemnity contract and deposit cash collateral as determined by the agreement, where the surety knew that liability claims would be filed but did not know the amount of the claims.[[23]](#footnote-23)
		2. Exoneration
			1. Exoneration is an equitable remedy that is available only to a surety. It is the right of a surety to compel the principal to pay its own debt.[[24]](#footnote-24) Judge Learned Hand wrote, “[i]n equity, . . . before paying the debt a surety may call upon the principal to exonerate him by discharging it; he is not obliged to make inroads into his own resources when the loss must in the end fall on the principal.”[[25]](#footnote-25)
			2. The distinction between *quia timet* and exoneration is an issue of timing. Exoneration is available to a surety once the surety’s obligation to pay is absolute, where *quia timet* is available to the surety before the obligation is absolute.[[26]](#footnote-26)
			3. In order to maintain an exoneration claim, the surety does not need to show irreparable harm. Instead, the surety must show the existence of the debt, that the debt is the principal’s, and that the surety’s liability is absolute.[[27]](#footnote-27)
				1. In *Doster v. Continental Casualty Co.*, the Alabama Supreme Court affirmed the trial court’s order of injunctive relief granting exoneration which required the contractor to first, use all the cash on hand to pay bills associated with the project, then if the principal’s funds were insufficient he was required to transfer sufficient assets to the surety so the surety would be secured and indemnified prior to making payments.[[28]](#footnote-28) In *Doster*, the contractor had agreed to build an elementary school but as the job was being completed he informed the surety he was unable to pay for approximately $24,000 worth of materials used in the construction.[[29]](#footnote-29) The court found the requirements for a bill of exoneration were met because: (1) the relationship between the surety and principal was alleged, (2) the principal was in default, (3) subcontractors had made demands on the surety for payment, (4) allegations were made concerning the principal’s possession of substantial contract funds and his refusal to pay the bills, and (5) the surety would be liable to the subcontractors in place of the principal.[[30]](#footnote-30)
			4. A surety can be exonerated in two different ways. First, as in *Doster*, the surety may compel the principal to pay the debt himself. Second, the surety can direct the flow of funds in the hands of third parties.[[31]](#footnote-31) In *National Surety Corp. v. Barth*, the court considered the competing claims of the surety, the suppliers and contractors, the principal’s creditors, the state of New Jersey, and the United States, and held that under the surety’s exoneration rights the contract funds should first pay the bonded claims.[[32]](#footnote-32)
	2. Relief for the surety under the indemnity agreement
		1. The indemnity agreement is rooted in the surety’s common law rights of exoneration, indemnification, and subrogation, and supplements these rights.[[33]](#footnote-33)
		2. The usual parties to the indemnity agreement are the surety, the principal, the individual owners or members of the principal, including their spouses and any relatives or other third parties who agree to assume the obligation of the principal.[[34]](#footnote-34)
		3. Many agreements provide that the surety is entitled to reimbursement for payments made in good faith, and that “evidence of payment by the surety is prima facie or conclusive evidence of the fact and the amount of the liability of the principal and the indemnitors to the surety.”[[35]](#footnote-35)
		4. Indemnity agreements often grant the surety a right to demand a posting of collateral under what is often called a “place in fund provision.”[[36]](#footnote-36) the surety can require a principal and third party indemnitors to deposit collateral security well before the surety actually pays a claim or sustains a loss.[[37]](#footnote-37)
			1. Under an indemnity agreement, when a surety sets a reserve the surety’s right to demand collateral may trigger.[[38]](#footnote-38) A reserve is a sum of money, typically set when the surety has a real possibility of loss, that an insurer or surety is required to set aside for the liquidation of future accrued and contingent claims, and for claims accrued but contingent and indefinite in amount.[[39]](#footnote-39)
			2. California Courts employ specific performance to allow a surety to receive the benefit of the collateral security bargains even though a surety has not yet suffered an actual loss.[[40]](#footnote-40)

In *United States Surety Co. v.* *Stevens Family*, the court held a surety had a right to cash collateral because it contracted for the option of collateral in a form that was “acceptable to Surety.”[[41]](#footnote-41) Further, it did not matter that the surety’s demand of cash collateral would force the principal to liquidate assets or cause irreparable harm.[[42]](#footnote-42) The court reasoned that a contractual provision cannot be struck or altered just because its implementation will cause a party irreparable harm.[[43]](#footnote-43)

* + - 1. In Florida, an indemnity agreement’s collateral security clause may be enforced through equity, meaning “injunctive relief in the form of specific performance to compel [the principal] to post collateral. . .” is available to the surety*.[[44]](#footnote-44)* In *Liberty Mutual Insurance Co. v. Aventura Engineering and Construction Corp.*, the court held the surety was entitled to specific performance of collateralization because in the agreement, collateralization was required when, in the surety’s “sole judgement,” a potential liability exists.[[45]](#footnote-45) Since the parties contracted that provision, the court said it was immaterial that another party believed there was no potential liability.[[46]](#footnote-46)
		1. Right to create a trust
			1. Under an indemnity agreement, the surety can establish trust fund rights in contract funds the principal has already received, payments that the principal will receive in the future, and payments in hands of others. Designating these funds as “trust funds earmarks them as funds for the payment of labor and materials supplied for the bonded contract for which the surety may be responsible.”[[47]](#footnote-47)
			2. State law determines whether a trust exists.
				1. Most states require there be an intent to create a trust, trust property, a trustee, and a beneficiary.[[48]](#footnote-48)
				2. Georgia requires that the trust be in writing.[[49]](#footnote-49)
				3. New York requires actual delivery or assignment of trust property with the intent of vesting legal title in the trustee.[[50]](#footnote-50)
				4. In New York, there must be a designated beneficiary, a designated trustee who is not the beneficiary, an identifiable trust *res*, and actual delivery or assignment of trust *res* with intent of vesting legal title with trustee.[[51]](#footnote-51)

In *In re Suprema Specialties, Inc.*, the court held there was no enforceable trust because the indemnity agreement did not designate an identifiable trust *res*, the terms of the indemnity agreement did not specify that proceeds or the assets of the bonded transaction would be held in trust, and finally, there was no actual delivery of the *res* with the intent of vesting legal title in the trustee.[[52]](#footnote-52) The court found that there was no delivery of the res because the indemnity agreement sought to extend the “trust fund” label to payments that not been made, received, or come due, and therefore, had not actually been delivered.

* + 1. Deposit Right
			1. An indemnity agreement may include a reserve deposit provision, which serves as a contractual right to exoneration.[[53]](#footnote-53) This provision obligates the principal and indemnitors to exonerate the surety before the surety incurs a loss.[[54]](#footnote-54)
			2. An indemnity agreement may require a surety to provide written demand to the principal and the indemnitors.[[55]](#footnote-55)
		2. Assignment Rights
			1. An assignment is a contract between parties, by which one party transfers its right to personal property to another party.[[56]](#footnote-56) An assignment provision usually provides the surety with rights in bonded contract funds and the equipment, inventory, and materials needed to complete bonded projects, after the principal defaults but before the surety actually performs or pays a claim[[57]](#footnote-57)
			2. Indemnity agreements may also provide the surety with rights in non bonded contract funds.[[58]](#footnote-58)
			3. However, the surety secures no right or interest in the assigned personal property greater than what the principal had.[[59]](#footnote-59)
			4. A surety may receive the following assignment rights:
				1. Right to equipment and material.

Most indemnity agreements entitle the surety to the principal’s right, title, and interest in all job related supplies, tools, equipment, and materials.[[60]](#footnote-60) This often includes all materials on and around the bonded project site, all the materials the principal has purchased or ordered for the bonded project, even if they are in transit to the project site, in storage, or being manufactured.[[61]](#footnote-61)

In *Travelers Indemnity Co. v. West Georgia National. Bank*, the court held the surety was entitled to the proceeds of the sale of the principal’s equipment because under the indemnity agreement, when the principal defaulted the equipment became the property of the surety.[[62]](#footnote-62)

* + - * 1. Right to subcontracts and claims.

This entitles the surety to all claims, actions, or causes of action the principal has or may have against the bonded project subcontractors, laborers, or suppliers, as well as any claim or cause of action the principal may have against the surety of any subcontractor, laborer, or supplier.[[63]](#footnote-63) Further, this right allows the surety to use the principal’s subcontractors to complete the project.[[64]](#footnote-64)

* + - * 1. Right to settle claims involving the principal.

This includes suits both against the principal and affirmative claims by the principal over the principal’s objection.[[65]](#footnote-65)

In *PSE Consulting, Incv. v. Frank Merecede and Sons, Inc.*, the court held that in the presence of a right to settle clause in an indemnity agreement, a surety usually has a wide discretion in settling claims made upon the bond, even where the principal in not liable for the underlying claim.[[66]](#footnote-66) However, most jurisdictions have held that a surety is only entitled to indemnification of the settlement of that claim if the payment was made in good faith.[[67]](#footnote-67)

* + - * 1. Right to recover costs and expenses.

The surety can recover its costs and expenses in investigating and defending claims.[[68]](#footnote-68)

* + - * 1. Right to offset.

The surety is able to offset losses from one bonded project against profits it receives from another bonded project for the same principal.[[69]](#footnote-69)

* + - * 1. Right to license, patents, copyrights, or trade secrets.

The surety can obtain either the rights or the right to use licenses, patents, copyrights, or trade secrets of the principal and/or indemnitors.[[70]](#footnote-70)

* + - * 1. Right to other property.

Because of the broad language in the indemnity agreement, sureties have attempted to use the assignment provision against other property including the principal’s and indemnitors’ partnership interests, tax refunds, general intangibles, and insurance policy claims.[[71]](#footnote-71)

* + - * 1. Right to real property

Although rare, a surety can obtain mortgages or deeds of trusts on the principal and indemnitors real property.[[72]](#footnote-72) In order to perfect an interest in real property the surety must require that the mortgage or deed of trust be put in place and recorded as public record.[[73]](#footnote-73) The terms of the mortgage the surety is assuming in anticipation of a future loss should clearly and specifically delineate the events that trigger the surety’s ability to take the real property.[[74]](#footnote-74)

1. **How can a surety be paid after it makes a payment?**
	1. Reimbursement under the common law.
		1. The right of reimbursement exists in the absence of an indemnity agreement.[[75]](#footnote-75)
		2. A surety’s right to reimbursement is triggered once the surety has incurred a loss in the performance of a bonded obligation.[[76]](#footnote-76)
		3. The principal’s obligation to reimburse the surety is limited to the amount paid out by the surety, to the obligee, or claimants under the bond. [[77]](#footnote-77) The principal is not obligated to cover any other loss, fees, or expenses incurred by the surety.[[78]](#footnote-78)
		4. The Restatement (Third) of Suretyship and Guaranty provides that when the principal is charged with notice of the secondary obligation, it is the principal’s duty to reimburse the surety if the surety performs the principal’s obligation or settles with the obligees or claimants.[[79]](#footnote-79)
		5. In Mississippi, in order to establish a claim for reimbursement, the surety must prove that it was legally liable to an injured third party, that it paid under compulsion, and that the amount paid was reasonable.[[80]](#footnote-80)
		6. However, a principal does not need to reimburse the surety if the surety acts as a “volunteer” by performing or paying a claim under the bond without a legal obligation to do so.[[81]](#footnote-81)
			1. In *Kipp v. Paul*, the Montana Supreme Court found a principal was obligated to reimburse the surety for the payment it made on its behalf before legal proceeding were finalized.[[82]](#footnote-82) The principal had argued that because the legal proceeding was not finalized the surety’s payment was voluntary, but the court disagreed.[[83]](#footnote-83)
	2. Right to reimbursement under the indemnity agreement.
		1. The indemnity agreement is often more favorable to the surety, than the common law. The indemnity agreement allows for enforcement of the surety’s rights before the surety experiences an actual loss. Also, under a typical indemnity agreement the surety is entitled to recover attorney fees that it would not be allowed to collect under its common law right of reimbursement.
		2. Further, if the surety files suit for reimbursement it may involve separate suits against the principal and indemnitors, settlements with the principal and indemnitors, and collection of the surety’s judgment.
2. **How can the surety protect its indemnity rights?**
	1. To protect the rights the surety has contracted for under an indemnity agreement the surety should seek early specific performance of the agreement.[[84]](#footnote-84) If the surety does not seek early specific performance, it will have to seek reimbursement. Suits for reimbursement may involve the following:
		1. Separate Suits.[[85]](#footnote-85) Usually, the surety may institute a separate suit against the principal and the indemnitors to enforce the surety’s right of reimbursement under the indemnity agreement.[[86]](#footnote-86)
		2. Settlement with one or more indemnitors.[[87]](#footnote-87) The indemnity agreement may provide the surety the right to settle with one indemnitor while maintaining a separate suit against the principal.[[88]](#footnote-88)
		3. Post Judgment Collections.[[89]](#footnote-89) After a surety obtains a judgment under state law against the principal and/or the indemnitors, the surety may begin to collect for reimbursement.[[90]](#footnote-90) Collection is governed by state law and many times is in the form of a lien against real property.[[91]](#footnote-91) The surety’s collection rights may be subject to federal regulations and state laws that govern different kinds of collection methods and activities.[[92]](#footnote-92)
3. **The defenses of a principal and its indemnitors against a surety’s claims.**
	1. The principal and indemnitors have numerous defenses to surety’s claim for *quia timet*, exoneration, reimbursement, or indemnity.
		1. The principal may assert a contract defense.[[93]](#footnote-93) For instance, the principal may assert fraud or mistake occurred during the execution of the indemnity agreement.[[94]](#footnote-94)
			1. In *Old Republic Surety Co. v. Palmer*, the court held when the indemnity agreement gives the surety the right to settlement the principal is obligated to indemnify the surety unless “the principal raises and proves an affirmative defense such as fraud” that would defeat the surety’s contractual right.[[95]](#footnote-95)
			2. However, in *Standard Surety & Casualty Co. of New York v. Olson*, the Eight Circuit held the alleged fraud, on the part of the contractor’s president in attaining the Principal’s signature on the indemnity agreement, was no defense to the surety’s action on the indemnity agreement for losses sustained from contractor’s default.[[96]](#footnote-96)
		2. The principal may argue the surety waived its rights.[[97]](#footnote-97)
			1. In order to successfully assert the defense of waiver, the principal or indemnitor must prove the surety intentionally relinquished a known contractual right and the waiver must be clear and express.[[98]](#footnote-98)
			2. Courts usually reject waiver defenses where a surety reserved its rights under the indemnity agreement and the indemnity agreement required written consent for all modifications.[[99]](#footnote-99)
			3. In *Hutton Construction Company, Inc. v. County of Rockland*, the Southern District of New York held a surety does not waive its rights unless it is “clearly established and not inferred form doubtful or equivocal act or language.”[[100]](#footnote-100) In *Hutton*, the court found the surety had not waived its rights because it continuously reserved its rights in the indemnity agreement.[[101]](#footnote-101)
			4. In the state of California, the California Civil Code states

“any guarantor or other surety. . . may waive any or all of the following: (1) the guarantor or other surety’s rights of subrogation, reimbursement, indemnification, and contribution, and any other rights and defenses that are or may become available to the guarantor or other surety by reason of Sections 2878 to 2855, inclusive.”[[102]](#footnote-102)

* + 1. Third, the principal may assert, and has the burden of proving, that the surety did not act under compulsion when it made payments on behalf of the principal but acted as a volunteer.[[103]](#footnote-103)
			1. A surety must have more than a good faith belief in liability in order for payment not to be considered voluntary.[[104]](#footnote-104)
				1. In cases where a suit has not been filed against the surety, a surety may be entitled to reimbursement by his principal where it can be shown that liability was clearly established and that the suit would have been a mere formality.[[105]](#footnote-105)
			2. A surety is a volunteer when it pays a claim in which the statute of limitations has run against the principal.[[106]](#footnote-106)
				1. In *Schiltz v. Thomas*, the court held a surety was not entitled to reimbursement after it paid a note that had been extinguished by the statute of limitations. The court explained, “[t]o entitle a guarantor or surety reimbursement, contribution, or subrogation on account of payments made in behalf of his principal, it must appear that such payments were made under compulsion that is, under a legal obligation, and not as a mere volunteer.”[[107]](#footnote-107)
			3. A surety acts a volunteer when the underlying contract is void.[[108]](#footnote-108)
				1. In *Metropolitan Casualty Insurance Co. v. Stone*, the court held the surety did not act as a volunteer because the contract was not void. The court held “[p]ayments under void contracts may be said to be voluntary, but payments made under valid contracts are not so considered.”[[109]](#footnote-109)
			4. A surety may act as a volunteer when it makes payments to anyone other than the obligees under the bond.[[110]](#footnote-110)
				1. In *Ragghianti*, the court held the surety was not entitled to reimbursement when the principal had not agreed to incur liability to any party other than the obligee, but the surety paid a third party on behalf of the principal.[[111]](#footnote-111)
		2. Fourth, the principal may assert that the surety did not act in good faith.[[112]](#footnote-112) A number of jurisdictions have held a surety owes a duty of good faith to its principal and indemnitors in making payments to obligees and/ or claimants under performance and payment of bonds. The scope of what constitutes good faith differs.
			1. In *PSE Consulting, Inc. v. Frank Mercede & Sons, Inc.*, the court required a finding of “improper motive” or “dishonest purpose” by the surety in order to find bad faith.[[113]](#footnote-113)
			2. In *Hartford v. Tanner*, a Kansas court held that a surety acted in bad faith when it did not attempt to mitigate the claims against the principal.[[114]](#footnote-114)
			3. However, in Massachusetts, a court said the allegations by indemnitors that the Surety did not act in good faith when repairing a roof is not a voidable defense to an indemnity action, but it is necessary that the surety act in good faith when settling claims.[[115]](#footnote-115)
		3. Finally, although not a complete defense, the principal and its indemnitors may limit the amount of reimbursement to what is reasonable and necessary.
			1. In Mississippi, a surety is only entitled to be reimbursed for necessary expenses. Mississippi’s Supreme Court stated “it is well settled, an on sound reason, that a surety cannot charge his principal with costs and expenses unnecessarily incurred . . .”[[116]](#footnote-116)
			2. Similarly, in Alabama, the state supreme court stated, “it is everywhere recognized that the indemnitee must act in good faith. He cannot needlessly, in utter disregard of the burdens he is imposing on his indemnitor, incur attorneys’ fees, and in no case such as are excessive and unreasonable.”[[117]](#footnote-117)
			3. In *Arntz Contracting Co. v. St. Paul fire & Marine Ins. Co.*, the court held a surety is entitled to recover the expenses of completing the project, except for those expenses that were incurred without a good faith belief that it was desirable and necessary to incur the expense.[[118]](#footnote-118) The court further held that because the surety in that case incurred expenses, despite “overwhelming proof” that those expenses were unnecessary and unwarranted, the surety was not entitled to recover that “unreasonable economic waste.”[[119]](#footnote-119)
1. Marilyn Klinger et al., The Surety’s Indemnity Agreement: Law and Practice 278 (Marilyn Klinger et al. eds., 2d ed. 2008). [↑](#footnote-ref-1)
2. George J. Bachrach, *The Surety's Rights to Obtain Salvage: Exoneration, Reimbursement, Subrogation, and Contribution*, Brief, Spring 1999, at 24, 26. [↑](#footnote-ref-2)
3. Bachrach, *supra* note 2, at 26. [↑](#footnote-ref-3)
4. *See id.* [↑](#footnote-ref-4)
5. *Borey v. Nat’l Union Fire Ins. Co.*, 934 F.2d 30, 33 (2d Cir. 1991); *In re Farmland Indus., Inc*., 296 B.R. 793, 797 n\*1 (B.A.P. 8th Cir. 2003); 74 Am. Jur. 2d Suretyship § 123 (citing *Borey,* 934 F.2d at 30). [↑](#footnote-ref-5)
6. *See Borey*, 934 F.2d at 32. [↑](#footnote-ref-6)
7. Klinger, *supra* note 1, at 282−283. [↑](#footnote-ref-7)
8. *TransAmerica Ins. Co. v. Cavalary Const. Inc.,* 552 So. 2d 225, 226−227 (Fla. Dist. Ct. App. 1989). [↑](#footnote-ref-8)
9. *Id.* [↑](#footnote-ref-9)
10. *Id.* [↑](#footnote-ref-10)
11. *Borey*, 934 F.2d at 34. [↑](#footnote-ref-11)
12. *Id.*  [↑](#footnote-ref-12)
13. *Id.*  [↑](#footnote-ref-13)
14. *Id.*  [↑](#footnote-ref-14)
15. *Id.*  [↑](#footnote-ref-15)
16. *See Id.* [↑](#footnote-ref-16)
17. *Borey*, 934 F.2d at 35. [↑](#footnote-ref-17)
18. *See Id.* [↑](#footnote-ref-18)
19. *Escrow Agents Fidelity Corp. v. Abelman,* 4 Cal. App 4th 491, 496 (Cal. Ct. App. 1992). [↑](#footnote-ref-19)
20. *See id.* [↑](#footnote-ref-20)
21. David J. Krebs, *Sureties’ Equitable Remedies” The writ of quia Timet and injunctive Relief*, Ninth Annual Southern Surety and Fidelity Claims Conference, 5 (1998), <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0ahUKEwiy-cyG9srNAhXJ8CYKHRP1AIAQFggnMAI&url=http%3A%2F%2Fwww.forcon.com%2Fuserfiles%2Ffile%2Fssfcc%2F1998%2F09Krebs.pdf&usg=AFQjCNHla5FDBZo1f5Nzmqboh51N9de_2Q>. [↑](#footnote-ref-21)
22. *Fid. & Deposit Co. of Md. v. McClintic-Marshall Corp*., 115 N.J. Eq. 470, 470 (N.J. Ch. 1934). [↑](#footnote-ref-22)
23. *Milwaukee Const. Co. v. Glens Falls Ins. Co*., 367 F.2d 964, 966−968 (9th Cir. 1966). [↑](#footnote-ref-23)
24. *See* *Admiral Oriental Line v. United States*, 86 F.2d 201, 204 (2d Cir. 1936). [↑](#footnote-ref-24)
25. *Id.*  [↑](#footnote-ref-25)
26. Bachrach, *supra* note 2, at 26. [↑](#footnote-ref-26)
27. *Borey v. Nat’l Union Fire Ins. Co.*, 934 F.2d 30, 33 (2d Cir. 1991); *In re Farmland Indus., Inc*., 296 B.R. 793, 797 n\*1 (B.A.P. 8th Cir. 2003); 74 Am. Jur. 2d Suretyship § 123 (citing *Borey*, 934 F.2d at 30); Klinger, *supra* note 1, at 283. [↑](#footnote-ref-27)
28. *Doster v. Cont’l Cas. Co.*, 105 So. 2d 83, 86−87 (Ala. 1958). [↑](#footnote-ref-28)
29. *Id.* [↑](#footnote-ref-29)
30. *Id.* [↑](#footnote-ref-30)
31. David J. Krebs, *supra* note 18, at 3. [↑](#footnote-ref-31)
32. *Id.* [↑](#footnote-ref-32)
33. *See* Bachrach, *supra* note 2, at 24. [↑](#footnote-ref-33)
34. *See Id.* [↑](#footnote-ref-34)
35. *Id.* at 30. [↑](#footnote-ref-35)
36. Klinger, *supra* note 1, at 285. [↑](#footnote-ref-36)
37. *Id.*  [↑](#footnote-ref-37)
38. *Id.* at 286. [↑](#footnote-ref-38)
39. *Id.* at 286$-87$. [↑](#footnote-ref-39)
40. *U.S. Sur. Co v. Stevens Family Ltd. P’ship*, 905 F. Supp. 2d 854, 859 (N.D. Ill. 2012). [↑](#footnote-ref-40)
41. *Id.* [↑](#footnote-ref-41)
42. *Id*. [↑](#footnote-ref-42)
43. *Id.* at 861. [↑](#footnote-ref-43)
44. *Liberty Mut. Ins. Co. v. Aventura Eng’g & Constr. Corp.*, 534 F. Supp. 2d 1290, 1320 (S.D. Fla. 2008). [↑](#footnote-ref-44)
45. *Id.* at 1320−22. [↑](#footnote-ref-45)
46. *Id.* at 1322. [↑](#footnote-ref-46)
47. Klinger, *supra* note 1, at 291. [↑](#footnote-ref-47)
48. *Id.* at 294−95. [↑](#footnote-ref-48)
49. *Id.* at 295. [↑](#footnote-ref-49)
50. See *In re Suprema Specialties, Inc.*, 370 B.R. 517, 530 (Bankr. S.D.N.Y. 2007). [↑](#footnote-ref-50)
51. *In re Suprema Specialties, Inc.*, 370 B.R. 517, 530 (Bankr. S.D.N.Y. 2007). [↑](#footnote-ref-51)
52. *Id.* [↑](#footnote-ref-52)
53. Bachrach, *supra* note 2, at 29. [↑](#footnote-ref-53)
54. *Id.* [↑](#footnote-ref-54)
55. *Id.* [↑](#footnote-ref-55)
56. Klinger, *supra* note1, at 308. [↑](#footnote-ref-56)
57. *Id.* at 308, 311. [↑](#footnote-ref-57)
58. *Id.* [↑](#footnote-ref-58)
59. *Id.* at 309. [↑](#footnote-ref-59)
60. *Id.* at 311. [↑](#footnote-ref-60)
61. Klinger, *supra* note 1, at 311−312. [↑](#footnote-ref-61)
62. *Travelers Indem. Co. v. W. Ga. Nat’l. Bank*, 387 F. Supp. 1090, 1095−96 (N.D. Ga. 1974). [↑](#footnote-ref-62)
63. Klinger, *supra* note 1, at 312. [↑](#footnote-ref-63)
64. *Id.* [↑](#footnote-ref-64)
65. *Id.* [↑](#footnote-ref-65)
66. *PSE Consulting, Inc. v. Frank Merecede & Sons, Inc.*, 838 A.2d 135, 146 (Conn. 2004). [↑](#footnote-ref-66)
67. *Id.* [↑](#footnote-ref-67)
68. *Id.* at 314. [↑](#footnote-ref-68)
69. *Id.* [↑](#footnote-ref-69)
70. Klinger, *supra* note 1, at 314. [↑](#footnote-ref-70)
71. *Id.* at 315. [↑](#footnote-ref-71)
72. *Id.* [↑](#footnote-ref-72)
73. Joseph T. Getz, Collateral: *What to Take, How to Take it, and What to Do With It Once You Have It*, American Bar Association, Spring 1999, at 48. [↑](#footnote-ref-73)
74. *Id.*  [↑](#footnote-ref-74)
75. Klinger, *supra* note 1, at 194. [↑](#footnote-ref-75)
76. *See Id*. at 199. [↑](#footnote-ref-76)
77. Bachrach, *supra* note 2, at 27. [↑](#footnote-ref-77)
78. *Id.* [↑](#footnote-ref-78)
79. *Id.*  [↑](#footnote-ref-79)
80. Jeffrey Jackson Et Al., Encyclopedia of Mississippi Law §19A:61 (2d ed. 2016). [↑](#footnote-ref-80)
81. *See* *id.*; s*ee also Bush v. Laurel*, 215 So. 2d 256, 259−260 (Miss. 1968)(holding a party may only be indemnified when it paid under compulsion). [↑](#footnote-ref-81)
82. *Kipp v. Paul*, 103 P.2d 675, 677 (Mont. 1940). [↑](#footnote-ref-82)
83. *Id.* [↑](#footnote-ref-83)
84. Bachrach, *supra* note 2, at 29. [↑](#footnote-ref-84)
85. *Id. at 30* [↑](#footnote-ref-85)
86. *Id.*  [↑](#footnote-ref-86)
87. *Id.* [↑](#footnote-ref-87)
88. *Id.* [↑](#footnote-ref-88)
89. *Id.*  [↑](#footnote-ref-89)
90. Bachrach, *supra* note 2, at 30. [↑](#footnote-ref-90)
91. *Id.* [↑](#footnote-ref-91)
92. *Id.* [↑](#footnote-ref-92)
93. Justice H. Walter Croskey, California Practice Guide: Insurance Litigation, Ch. 6I-F Surety Bonds, (August 2015). [↑](#footnote-ref-93)
94. [↑](#footnote-ref-94)
95. *Old Repiblic Sur. Co v. Palmer*, 5 S.W.3d 357, 362 (Tex. App. 1999). [↑](#footnote-ref-95)
96. *Standard Sur. & Cas. Co. of N.Y. v. Olson*, 150 F.2d 385, 387 (8th Cir. 1945). [↑](#footnote-ref-96)
97. *See* Cal. Civ. Code § 2856; *see* 63 N.Y. Jur. 2d Guaranty and Suretyship §358; *Data Sales Co., Inc. v. Diamond Z Mfg.*, 74 P.3d 268, 272 (Ariz. Ct. App. 2003). [↑](#footnote-ref-97)
98. *See Hutton Constr. Co v. Indem. Ins. Co.*, No. 93 Civ. 2465(LAP), 1993 WL 535012, at \*9 (S.D.N.Y. Dec. 22, 1993). [↑](#footnote-ref-98)
99. *See id.* [↑](#footnote-ref-99)
100. *Id.* [↑](#footnote-ref-100)
101. *Id.* [↑](#footnote-ref-101)
102. Cal. Civ. Code § 2856 (West 1997). [↑](#footnote-ref-102)
103. Justice H. Walter Croskey, California Practice Guide: Insurance Litigation, Ch. 6I Surety Bonds, (August 2015). [↑](#footnote-ref-103)
104. *See* *Ragghianti v. Sherwin*, 16 Cal. Rptr. 583, 587 (Cal. Dist. Ct. App. 1992). [↑](#footnote-ref-104)
105. *Id.* [↑](#footnote-ref-105)
106. Justice H. Walter Croskey, California Practice Guide: Insurance Litigation, Ch. 6I Surety Bonds, (August 2015). [↑](#footnote-ref-106)
107. *Schiltz v. Thomas*, 216 P. 51, 52 (Cal. App. 1923). [↑](#footnote-ref-107)
108. *See* *Metropolitan Cas. Ins. Co. v. Stone*, 12 P.2d 665, 669 (Cal. Dist. Ct. App. 1932). [↑](#footnote-ref-108)
109. *Id.*  [↑](#footnote-ref-109)
110. *See* *Ragghianti*, 16 Cal. Rptr.at 587. [↑](#footnote-ref-110)
111. *Id.*  [↑](#footnote-ref-111)
112. *See* *Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.*, 54 Cal. Rptr. 2d 888, 898 (Cal. Ct. App. 1996). [↑](#footnote-ref-112)
113. *PSE Consulting, Inc.,* 838 A.2d at 146. [↑](#footnote-ref-113)
114. *Hartford v. Tanner*, 910 P.2d 872, 881 (Ct. App. Kans. 1996). [↑](#footnote-ref-114)
115. *Hartford Accident & Indem. Co. v. Millis Roofing & Sheet Metal, Inc.*, 418 N.E.2d 645, 647 (Mass. App. Ct. 1981). [↑](#footnote-ref-115)
116. *Whitworth v. Tilman*, 40 Miss. 76, 81 (Miss. 1866). [↑](#footnote-ref-116)
117. *Kilgore v. Union Indem. Co.*, 132 So. 901, 902 (Ala. 1931) [↑](#footnote-ref-117)
118. *Arntz Contracting Co.,* 54 Cal. Rptr. 2d at 899. [↑](#footnote-ref-118)
119. *Id.* [↑](#footnote-ref-119)