THE PAYMENT BOND SURETY'S RESPONSES AND DEFENSES TO CLAIMS FOR BENEFIT FUND CONTRIBUTIONS ON UNION AND PREVAILING WAGE CONSTRUCTION PROJECTS

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For the Chicago Surety Claims Association, February 2010

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A recurring problem for surety claims handlers is the claim for labor fringe benefit fund contributions made against a contract surety payment bond. Unions for the construction industry and unionized companies typically establish separate trusts to handle pension/medical and other types of fringe benefits. When the union employer issues a weekly paycheck, the employer is supposed to "check off" and forward a separate payment to this trust to cover the payment of fringe benefits. A union member applies to the trust for medical and pension payments. The trusts are governed by the ERISA statutes and the trusts are entitled under law to bring federal actions to collect delinquent payments and to assess liquidated damages and attorney's fees. As contributions stagnate, union membership grows older (and more likely to claim pension benefits) and perhaps, as taxes on healthcare "Cadillac" plans are passed, the trustees are more and more likely to bring such collection actions to ensure adequate funds exist to satisfy benefit claims.

Employee fringe benefit funds are governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Sec. 1001 *et seq*. Union fringe benefit funds are trusts authorized by Section 302[c] of the Labor Management Relations Act, 29 U.S.C. Sec. 186[c], administered pursuant to a trust fund agreement with the trustees consisting of both labor union and management representatives. Employers' obligations for fringe benefit contributions are set forth in the Collective Bargaining Agreements ("CBA's") with the unions and the amounts of contributions are among the clauses negotiated. The fund trustees have the right to audit the wage and other records of participating employers to verify that all labor hours and contributions have been accurately reported as to all of the union workers, compared with the shop steward and other reports maintained by the unions.

What is often forgotten is that the benefit funds are independent entities, and the trustees are obligated to ensure that a benefit plan receive all funds to which it is entitled for the benefit of participants and beneficiaries. Thus, an employer may agree with a union representative that certain classes of workers or certain kinds of work would not be "covered work" within the collective bargaining agreement (*i.e.*, within the scope of work that could only be done by union members as defined in the CBA). The fund trustees, however, are not bound by such handshake agreements, and will act aggressively to obtain fund contributions for all union members performing hourly work even arguably within the CBA's "covered work" definition. In fact, Congress and the Courts have specifically provided that the trustees can pursue contributions, regardless of whether the union has waived them.

Typically, union agreements (or CBA's) require the employer both to make payments for its own employees carrying out "covered work" and to ensure that its subcontractors make contribution payments for its employees. They often also call for the employer to make fringe benefit contributions for employees carrying out "trade" work, even for those employees who are not actually members of the union. Therefore, sometimes claims are made simply because the bonded principal failed to send in the check for the fringe benefit. The most complex cases are ones where the bonded principal did not believe that any fringes were owed. For instance, often the trustees will claim for fringe benefits not forwarded by the bonded principal, or fringe benefits owed by a subcontractor. In other common scenarios, the employer will have failed to make payments to cover fringes for non-union employees in a so-called prevailing wage project. In many of these cases, the employer has unsuccessfully argued that the union business agent promised that if the employer agreed to take on a few union members, or use union workers only on a single project, the employer would not have to make benefit contributions for all employees on all projects.

This argument has arisen so many times, one has to conclude that the union's business agents did propose such deals, in order to find jobs for its members. Such agreements usually contradict the written terms of the Union Agreement, which typically require the fringes be paid for all employees engaged in the trade, even those employees who do not wish to join a union. In such instances, it does not matter what the *sub rosa* deal with the business agent was. As will be discussed below, the Courts will not still require the employer to make a contribution for each employee, under the written terms of a CBA. The surety, therefore, will find itself in a position where typical contract defenses will not work, since there are very few defenses which the principal can assert.

Section 515 of ERISA provides: "Every employer who is obligated to make contributions to a multi-employer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with the law, make such contributions in accordance with the terms and conditions of such plan or such agreement." 29 U.S.C. § 1145. This language was added to ERISA 'to simplify delinquency collection' by freeing pension and welfare funds from defenses that pertain to the unions' conduct." *Cent. States, Se. & Sw. Areas Pension Fund v. Behnke, Inc.*, 883 F.2d 454, 460 (6th Cir.1989) (quoting *Robbins v. Lynch*, 836 F.2d 330, 333-34 (7th Cir.1988)). This is why the conversations or oral agreement with the business agent do not create a defense for the employer who thought that he had worked out an exception to onerous contribution requirements when that employer thought it was only hiring (and becoming liable for fringes) for a single member. The statute deliberately "frees" the pension fund from such defenses. The pension fund is a separate legal entity in any event, not bound by "understandings" made with business agents.

For the surety, the question presented by such claims has two aspects: (1) are such claims proper against the standard payment bond as "labor and materials"? and (2) assuming it is okay to assert such claims against the standard payment bond, what kind of contributions can be claimed? In most states, a union pension fund may make a claim directly upon a public works payment bond, but must comply with the notice requirements that any other beneficiary must follow.

Many, but not all union CBA's require that employers post specific ERISA contribution bonds, as do certain prevailing wage rules. Where no ERISA bond exists, a public works surety can also be liable for contribution claims. Since 1957, even before the passage of ERISA, benefit plans and their trustees could make claims against a Miller Act bond. *U.S. for Benefit and on Behalf of Sherman v. Carter,* 353 U.S. 210, 77 S.Ct. 793 (U.S. 1957). Most Courts have found trustees are also entitled to make claims against public works payment bonds issued under state "Little Miller Act" statutes. *See e.g., Southern California IBEW-NECA Trust Funds v. Standard Indus. Elec. Co.* 247 F.3d 920, 926 (9th Cir.,2001)(ERISA Benefit Plans may make claims on public works bonds under Arizona and California "Little Miller Acts"); *Carpenters Local Union No. 26 v. U.S. Fidelity & Guar. Co.*, 215 F.3d 136, 145 (1st Cir.2000)(Benefit Plans may make claims against Public Works bond under Massachusetts' "Little Miller Act" law). Therefore, the answer to the first question is usually yes, claims for unpaid fringe benefit contributions can be made against a standard payment bond as "labor" on a bonded project.

This latter question includes standard claim issues such as timeliness, consequential damages like interest and counsel fees, and contract interpretation. However, sureties may find themselves surprised by how few defenses they have in such matters. Sometimes the issue is the extent to which fund contribution claims may encompass employees who are not union members, such as occurs on "prevailing wage" public works jobs.

In a Sixth Circuit case, the Union actually discontinued a grievance action because it had not served the correct notice on an employer to establish that fringe payments were due. The trustees of the benefit plan, nevertheless, filed suit. The employer tried to argue that since the union could not prove the fringes were unpaid, there were no funds due and the trustees were estopped from trying to enforce payment. The Sixth Circuit, rather than regarding the discontinued grievance as a failure to prove payments were due, regarded it as proof that the union had breached its contractual duty to give notice before collecting funds, a failure which provided no protection against the plan itself suing to enforce the payment because a breach of contract claim against a union can not be used as an offset to the Plans right to receive contributions. *Laborers' Pension Trust Fund-Detroit and Vicinity v. Rocwall Co.* 2009 WL 4885272, 2 (6th Cir.2009).

Also, in a New Jersey case, the court found that masonry workers' union and the unions' pension funds were not "beneficiaries" of the general contractor surety's payment bond, within the meaning of New Jersey's Public Works Bond Act. The unions and pension funds alleged that a masonry *subcontractor* had failed to remit fringe benefit contributions to the unions' pension funds, pursuant to CBA's with the subcontractor. The general contractor, who was the principal under the bond, was not a party to the CBA's, and the subject matter of the claims did not involve labor or materials. *Laborers Local Union No. 779 Pension v. American Cas. Co. of Reading, Pa.*, 339 N.J.Super. 345, 771 A.2d 712 (Law Div.2000). Fringe benefit contributions due from the bonded general contractor, however, are "labor and materials" and can be claimed from the surety. *Board of Trustees Local 825 v. LBS Constr. Co.*, 148 N.J. 561, 691 A.2d 339 (1997).

I. The Law Is Extremely Favorable To Union Benefit Funds

A. The Law Strictly Limits The Defenses Available To An Employer

Union benefit trust funds are extremely favored in law. They are protected by statute and case law from most of the usual defenses which would apply in contract law. Breaches by the union and individual union employees do not relieve an employer from its duty to make the benefit payments to the trust funds. The Third Circuit in particular recognizes only three defenses that an employer may assert against employee benefit funds seeking contributions: (1) the fund contributions themselves are illegal; (2) the CBA is void *ab initio;* and (3) the employees have decertified the union as its bargaining representative." *Residential Reroofers Local 30-b Health and Welfare Fund of Philadelphia and Vicinity v. A & B Metal and Roofing, Inc.* 976 F.Supp. 341, 347 (E.D.Pa. 1997) *citing Agathos v. Starlite Motel,* 977 F.2d 1500, 1505 (3d Cir.1992).

The *Agathos v. Starlite Motel* case is worth reviewing the case in some detail. *Agothos* involved an employer with a largely non-union work force who signed the CBA, but only hired a few union employees. The union benefit funds, subsequently, took the position that fringe benefit payments should have been forwarded for all employees, union and non-union. The employer tried to argue that it had only signed the CBA under the "duress" of having its building picketed. The Third Circuit rejected this defense. It held that ERISA precludes:

> "employers from raising a variety of contract defenses as a means of avoiding the obligation to contribute to employee benefit plans. [...] Our research has uncovered only three recognized defenses: (1) the pension contributions themselves are illegal, ...; (2) the collective bargaining agreement is void *ab initio,* as where there is fraud in the execution, and not merely voidable, as in the case of fraudulent inducement; and (3) the employees have voted to decertify the union as its bargaining representative, thus prospectively voiding the union's collective bargaining agreement. ..."
> *Id.* at 1505.

The Third Circuit rejected the "duress" defense that Starlite had signed the CBA under duress to avoid pickets as having any validity. However, the Court noted that:

> "ERISA imposes a number of fiduciary obligations on multi-employer funds. A fund has in the first instance a duty of determining who is in fact a plan participant.... In upholding the contractual right of a fund to conduct field audits of an employer's records, the Supreme Court in *Central Transport* stated: "ERISA clearly assumes that trustees ... will take steps to identify all participants and beneficiaries, so that the trustees can make them aware of their status and rights under the trust's terms." ... . Funds

must also provide all participating employees with certain materials describing the employees' rights and obligations under the plan." *See, e.g.,*29 U.S.C. §§ 102, 1022, 1024(b) (1988 & Supp. II 1990). We have also held that, "[a]t a minimum, the fiduciary obligations of a pension fund trustee require that he notify the pensioner of his employer's failure to contribute to the fund as required by the pension agreement *Rosen v. Hotel and Restaurant Employees & Bartenders Union,* 637 F.2d 592, 599-600 (3d Cir.), *cert. denied,*454 U.S. 898, 102 S.Ct. 398, 70 L.Ed.2d 213 (1981).

Agathos v. Starlite Motel, 977 F.2d at 1507 (Some Citations omitted).

"There is no evidence that the Funds ever demanded either a certification from Starlite setting forth the names of its employees or a copy of payroll information. Either document would have readily enabled the Funds to identify and contact the employees for whom Starlite failed to make contributions. Nor did the Funds attempt to conduct an audit of Starlite's records at any time during the ten years prior to 1989, even though the pension and welfare agreements clearly authorized the Funds to do so."

Id.

Therefore, the Third Circuit held that it was:

"unable to discern from the record which employees, if any, presently could bring a valid claim for benefits accruing during the period for which contributions are now sought. If the employees cannot assert such claims, then a judgment for the Funds would compel Starlite to contribute to plans from which its employees obtained no benefits in the past and are powerless to derive any future benefits. A judgment for the Funds under these circumstances would be a pure windfall."

Id.

None of these three defenses approved by the Third Circuit would have any kind of traction in most cases. Instead, it might be more useful to dispute the funds' claims by arguing that the benefit funds failed to notify or to treat the non-union employees as beneficiaries of their funds.

B. The Law Limits The Contractual Arguments An Employer May Make

The employers' obligations to make payments are generally enforced according to the strict language of the written CBA and any benefit fund trust agreement incorporated in it. This policy has been expanded to ensure that the benefit trust funds are entitled to rely on the plain language of the CBA, even where that "was the result of the mistake or negligence of the contracting parties."

The rationale is that "rigid adherence to this rule helps prevent union corruption," such as kickbacks to business agents for oral "waivers" of benefit payments. *Central Pennsylvania Teamsters Benefit Funds v. Bean, Inc.*, 2006 WL 2620151 (E.D. Pa.).

Therefore, one cannot defend a benefit collection action by arguing that a "mutual mistake" was made between the employer and the union in agreeing to CBA language regarding the eligibility of employees for benefits under a multi-employer welfare fund is not defense to delinquency action, and the fund engaged in misconduct by failing to notify employers when language it suggested for inclusion in new CBA's differed from language used in the employers' past CBA's. *Central Pennsylvania Teamsters Pension Fund v. McCormick Dray Line, Inc.*, 85 F.3d 1098 (3rd Cir. 1996).

Therefore, the primary analysis of any defense to such a benefit funds claim should lie in the *written* terms of the CBA and the extent to which a defense would serve to show that the union fund contributions, if paid, would be a "windfall" unrelated to potential claims of the beneficiaries in whose name those contributions were paid. This argument has particular force when a contractor has established a pattern of paying the fringe benefits directly to the non-union workers, as prevailing wage rules often state, without objection from the union. As noted below, however, an oral "understanding" between an employer and a union business agent, without more, is insufficient.

II. Is There A Contractual Duty To Make Fringe Benefit Payments To The Union Benefit Funds For Non-Union Employees On Public Projects?

Given that neither the principal nor its surety will be successful in defeating a claim by arguing that the union breached or waived the contractual terms, the best hope (and it is a narrow one) to defeat a claim is to argue that no fringes are due under the CBA.

The LMRA (Labor Management Relations Act) authorizes Federal Courts to fashion a federal common law for the enforcement of CBA's. "[A]s to the substantive content of this federal common law, traditional rules of contract interpretation provide a plenteous resource, but will be mined only when compatible with federal labor policy." *United Steelworkers of America v. Rohm and Haas Co.*, 2006 W.L. 2671919 (E.D. Pa. 2006). With these thoughts in mind, the details of the CBA should be examined as to the work covered for which contributions are due, and what the rules are for calculating fringe benefit contributions and to whom they are to be paid.

A. The Union Official's Oral Agreement To Exempt The Employer From Fringe Benefits For Non-Union Employees

The contract may contemplate that employers can hire their own "key employees" subject to the union's rights to insist that they become union members. The union business agent may be aware that there are non-union employees. Sometimes the argument is that the union never exercised its right to demand they become union members or for the employer to fire them if they refused. The union, therefore, knew and tolerated the employer having a mixed work force.

Such toleration, however, does not answer the question of whether the union contract allowed the employer to avoid paying fringe benefits to the trust funds for the non-union employees. The Agreement in *Agathos* expressly covered "all workers" and, therefore, "unambiguously" included both union and non-union employees. 977 F.2d at 1506-1507.

If the CBA designates the union as the sole bargaining agent for employees covered by the agreement itself, then the union would only be the exclusive agent for those already designated as being part of the agreement, *i.e.* present and future union members, and not those employees who never joined the union. If, however, the CBA is interpreted to designate the union as the bargaining agent for all employees *who are engaged in the work which is covered within the agreement*, then the contract would apply to both union and non-union members. Occasionally, however, a CBA may have some ambiguity with respect to the scope of work, or some language which offers limited opportunities for employers to exempt themselves from the obligation to pay fringe benefits for union employees in *quasi* management functions or for non-union employees.

In cases of ambiguity, it is proper to look at the subsequent conduct of the parties, in order to determine what the employers' obligations are. *International Brotherhood of Electrical Workers Local Union No. 380 Health and Welfare Trust Fund v. State Electric*, 2006 W.L. 2228863 (E.D., Pa.) (Joyner) *citing Teamsters Indus. Employees Welfare Fund v. Rolls-Royce Motor Cars, Inc.*, 989 F.2d 132, 138 (3rd Cir.1993).

B. Past Practice And Acceptance Of The Employer's Payment System

The employer's certified payrolls should specifically contain the different pay and fringe benefit payments for the union employees and direct fringe benefit payments to the non-union employees. Anyone who looks at them should see that the employer made fringe benefit contribution payments directly to the non-union employees and to pay the "Check-off" fringe benefits to the trust funds for the union employees.

This is sufficient to meet the obligations of the prevailing wage rules, and should be sufficient to stave off any claim that fringes are to be paid to the benefit funds on behalf of non-union employees. This interpretation, and business practice, will be upheld if there is no evidence that anyone found this practice objectionable. The CBA usually specifies that the Trustees of the Funds notify and demand payments for delinquent employers within a set time; say a month.

Another defense may arise on public projects under prevailing wage statutes. Under most such statutes, the workers are entitled to challenge the wages being paid as insufficient, but must do so within several months or the wages paid are deemed sufficient. If neither the employees, nor the union, nor the benefit funds challenge the employer's system of payments, including paying prevailing wage benefits directly to non-union employees to the Secretary of Labor, that failure could be deemed to establish "a pattern of performance" indicating that the employer's system of payment was exactly what the contract called for. If the union accepts this practice without appeal to the Secretary of Labor, a surety can argue that this system of payments became administratively binding. As a matter of administrative law, the Courts cannot substitute their own judgment for the agency's determination that the employer complied with the prevailing wages. *See Henkels & McCoy, Inc. v. Department of Labor and Industry, Prevailing Wage Appeals Bd.* 143 Pa.Cmwlth. 264, 598 A.2d 1065, 30 Wage & Hour Cas. (BNA) 1012 (1991).

If a CBA provides that the wages are controlled by the wages set out in the public bid documents on a public project, the surety has an even stronger argument. The Benefit Funds cannot complain about these determinations because their own contract recognized and expressly provided that the public contracts would be controlled by the wage rates set out in the rules, or in the bids.[1] Ultimately, this harkens back to the "windfall" portion of the *Agothos* analysis. The benefit funds take certain fiduciary responsibilities, including the most basic duties of determining who is a true plan participant, and keeping them informed. See if there is language in the contract and the conduct of the parties indicating that the prevailing wage system would govern over other contract provisions. The surety's position is even stronger if there is no evidence that the Funds ever considered the non-union employees to be covered by the CBA or plan documents. These contribution claims will also likely fail where the Fund never disagreed with the general contractor's practice that the non-union employees were properly paid "standard" prevailing wages and direct benefits, rather than "union wages" and check-off benefits paid to the union benefit trust funds.

III. The Personal Defenses of the Surety

A. The Surety's Statute Of Limitations Defenses

The case law cited above only dealt with claims directly against the employer to the agreement, not the surety. The obvious point, though, is that the payment bond surety should expect to hear similar arguments regarding its obligations to pay such fund contributions in place of its principal, if the principal refuses to do so.

ERISA does not contain a limitations period for suits against employers to recover contributions owed to a multi-employer plan. 29 U.S.C. § 1145. The closest is 29 U.S.C. § 1451(f), which does cover suits by multi-employer plans, but only suits for withdrawal liability, a wholly separate topic. *See* Jay Conison, *Employee Benefit Plans in a Nutshell* 19-20 (2d ed.1998). When a federal statute fails to specify a limitations period for suits, it will "borrow" a state's analogous statute of limitations, and that is what courts have done in the case of ERISA suits for the recovery of employers' delinquent contributions. There are two statute of limitations relevant to the claims against the surety.

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[1]In *Keystone Chapter, Associated Builders and Contractors, Inc. v. Foley,* 37 F.3d 945 (3rd Cir. 1994), the Third Circuit ruled that the Pennsylvania Prevailing Wage Act and its implementing regulations were not preempted by ERISA, even though it was necessary to strike a Declaratory Order by the Pennsylvania Secretary of Labor, which was deemed to be preempted by ERISA by unduly favoring union benefit plans. Most states so hold, though a handful do not. The Third Circuit held under, at least one reasonable interpretation, that the Act and regulations could be seen as merely requiring that the Secretary of Labor and Industry set a prevailing wage that consisted of cash components and might consist of benefits components to be paid in benefits or cash. Any benefits paid, whether ERISA or non-ERISA, would count toward benefits components, then there was no preemption problem. IF the CBA incorporates prevailing wages as controlling on public projects, then the union has agreed, as a contractual matter, to accept the prevailing wage system, and this should eliminate any arguments about ERISA preemption.

The first is the statute of limitations contained within the bond, which is a statement of the limitations established by a statute for all claims on a public labors and material bond: one year from the last date of work or supply of materials. *See, e.g.*, 42 P.S. §5523, N.J.S.A. 2A:44-143 *et seq.* This, of course, varies from state to state so the surety must ascertain whether the asserted claim is timely or any statutory notices prior to asserting a claim have been timely made, so as to be within the statute of limitations. Another example of this is the *Laborers Local Union No. 779* case from New Jersey discussed above.

The surety may well have been prejudiced as a result by the lack of notice. If either the union, or the benefit funds, or a worker had made such a claim in a timely manner, the remaining contract balances would have been retained to satisfy the claims either to the claimant or to repay the surety, and a definitive ruling could have been made. Even if the ruling favored the benefit funds, the surety and the principal both would have been able to assure compliance for the subsequent years or would have been in a position to alter their decisions to the subsequent contract and bond.

B. Laches

Closely related to statutes of limitations is the concept of "laches" which enables a party being sued to argue that even if the statute of limitations does not strictly apply, the plaintiff culpably delayed so long in bringing in its claim, that the plaintiff should be disentitled to pursue it.

The Third Circuit discussed the general application of laches where beneficiaries sued the benefit funds for wrongfully delaying or refusing to pay claims in *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124 (3rd Cir. 2000):

> Under Pennsylvania law, the doctrine of laches has two elements: (1) inexcusable delay; and (2) prejudice. *See, e.g.*, Jacobs v. Halloran, 551 Pa. 350, 710 A.2d 1098, 1102 (1998) ("Laches arises when a defendant's position or rights *are so prejudiced* by length of time and inexcusable delay, plus attendant facts and circumstances, that it would be an injustice to permit presently the assertion of a claim against him.") (emphasis in the original); *DiLucia v. Clemens,* 373 Pa.Super. 466, 541 A.2d 765 (1988) ("In order to prevail on his assertion of the equitable defense of laches, [the defendant] must establish both undue delay from [the plaintiff's] failure to exercise due diligence and prejudice resulting from the delay."). See also *Burke v. Gateway,* 441 F.2d 946, 949 (3d Cir.1971) (noting that before a district court can apply the doctrine of laches, it must find "inexcusable delay in light of the equities of the case and prejudice to the defendant.")

However, laches claims <u>against</u> union benefit funds are generally disfavored. An example is the Seventh Circuit case, *Teamsters & Employers Welfare Trust of Illinois v. Gorman Bros. Ready Mix,* 283 F.3d 877(7th Cir. 2002). In that case, Gorman signed a CBA which required Gorman to contribute to a Teamsters welfare trust a specified dollar amount weekly (rising to $105.00 in the last

year of the latest successor agreement) for any employee who drove a ready-mix concrete truck during the week. Even if only a small a fraction of his work week was spent driving, Gorman would have to contribute the same dollar amount, as if he had spent his whole work week in that activity. As the Court of Appeals noted, "This was an expensive proposition (imagine having to make a $105.00 weekly contribution for a $10-an-hour employee who worked one hour a week)."*Id.* at 779. Gorman failed to make the required contributions. He claimed that the business agent, who was also the representative of the benefit funds, promised to make "one audit go away." Gorman then continued not to pay the benefits in subsequent years. When sued again, he claimed he relied upon the alleged business agent/benefits official's oral comment that he need not worry about the additional payments.

The Seventh Circuit held for the benefit funds. It found that Gorman had not made out a defense for laches. The employer relied on the alleged statement by the chairman of the trust that, as a favor, he had made audits revealing lack of contributions to "go away." The court held that the employer's reliance was not reasonable. The trust chairman's conduct, which was not to the trust's advantage and was at worst careless, could not have reasonably led an employer to believe that any delinquent contributions under future agreements were likewise forgiven.

However, it may be that the Court would be more ready to recognize a defense of laches in favor of the *surety* than an employer. The surety, like the benefit funds, is not a direct signatory to the CBA and, in this case, it appears that the surety did not even know there was a CBA. It certainly knew, however, that the projects were public works projects and expected the usual public works contract law (including the agency's ability to withhold contract funds pending a timely claim) would apply. As discussed above, the benefit funds failure to make timely claims or challenges to the prevailing wage certifications meant no balances were withheld. Further laches can be argued by the benefits direct failure to follow their own contract terms to enforce payments; notifying the employer within a month and requiring the posting of a fringe benefit bond. The benefit funds *on-going* disregard of these *written* contract provisions is on an entirely different footing than the claimed assertion of a one time oral statement to forgive past transgressions.

C. Discharge Of The Surety

A public works bond surety may have a defense where the CBA requires the employers to post a specific ERISA fringe benefit bond, but this obligation is often not enforced. A material modification to a compensated surety's risk discharges the surety accordingly. *Continental Bank v. Axler*, 353 Pa. Super. 409, 415-416, 501 A.2d 726 (1986). In *Reliance Ins. Co. v. Penn Paving Inc.*, 557 Pa. 439 (Pa. 1999), the "estranged wife" and former corporate secretary of a paving company was held to be discharged from indemnity obligations on the basis that by raising the bonding capacity from $200,000.00 to $5,000,000.00, without specific notice to her, *Reliance* had increased materially her risk un der the indemnity agreement. Although this decision went against a commercial surety, the legal analysis may work to a payment bond surety's advantage. The argument would be that the signing of the CBA was unknown to the surety, and it materially raised the surety's risks of claims. This argument depends upon the surety's not being aware that the employer had signed the CBA.

As noted above, the contract required the employer to post a fringe benefit bond, unless it

had a satisfactory record of prompt payments of fringe benefits, and the union apparently never verified the bond was secured. Pennsylvania recognizes if a creditor surrenders or impairs the collateral, which serves as the security for the debt, then the surety is discharged to the extent that the collateral would have produced funds to pay the debt in whole or in part. *First Federal Savings and Loan Ass'n. of Pittston v. Reggie*, 376 Pa. Super 346, 546 A.2d 62 (1998). This form of argument is supported by several Pennsylvania cases which hold that when someone signs a surety agreement with the expectation that there will be co-sureties, his agreement to act as surety is conditional. If those who were expected to be co-sureties decide not to go through with the agreement, the first signer is discharged. *Columbia Avenue Trust Co. v. King,* 227 Pa. 308, 76 A. 18 (1910);*Bruch v. Schafer,* 45 Pa. Super. 612 (1910). These cases would be more relevant if the surety <u>was</u> aware of the CBA.

D. The "Windfall Defense"

The surety could assert a defense that payment of fringe benefits to the unions for the non-union employees would constitute a "windfall" because such employees are not beneficiaries of the plan. This defense can be strengthened by obtaining affidavits from the employees that they have not and will not seek benefits under the plans.

In *Central Pennsylvania Teamsters Health and Welfare Fund v. Scranton Building Block Company*, 882 F. Supp. 1542 (E.D.Pa. 1995), the court ruled that employee contributions had to be made even for an employee who wanted to "opt-out" of the plan where the written agreement did not allow for an opt-out. If it can be shown the union truly has not regarded or treated the non-union employees as participants in the plans, then the windfall argument may prove successful.

A written statement, precedent or plan language to support, or to preclude non-union employees claims for benefits, therefore, is extremely important because whatever the view of the union's counsel or current belief of the trustees could change over time. Subsequent counsel or trustees might, in time, view their duty as limiting benefits to clearly eligible members. Plan sponsors such as benefit funds have wide discretion in fashioning benefit plans, including to provide coverage, modify coverage or even terminate plans, and where the plans, provide, wide discretion to interpret plans. *See Falcone v. Teamsters Health and Welfare Fund*, 489 F.Supp.2d 490 (E.D.Pa. 2007). Therefore, a clear written statement, one way or the other on whether non-union employees of an employer who signed a CBA would be beneficiaries, could be critical to both the "windfall" argument and to the general equitable position of a surety.

E. Lack Of Proof

A final possible defense would be to challenge the accuracy of the "audit" as using unsound methods. So far, the audits have not described the methodology or principles which the auditor has used. Federal case law and court rules now have very tough standards for admission of "expert" testimony, which a union audit is, usually done and certified by a CPA. Any challenge to the audit would require close work with the surety's consultant to develop a better understanding of what methodologies should be used and explained in an audit of this nature. Of course, many such arrearage cases are arbitrated, where the evidence standards are more lax. Even so, if the audit does not comply with accountancy standards, or cannot be supported by the certified payrolls, its credibility can still be successfully challenged, using these strict evidence rules as a guide for attacking its credibility.

IV. Steps A Surety Can Take To Prevent Claims Problems

Since the defenses to a Benefit Fund claim are limited, sureties would do their best to prevent potential fund claims from arising. During the underwriting process, sureties can inquire if the principal has signed any CBA, regardless of whether the principal thinks of itself as a union contractor, or a regular contractor who "agreed" to take one or two employees on, and who may not realize it has any liability for payment of fringe benefit funds. On public projects, sureties typically inquire about whether there are any lien claims or assertions by subcontractors and suppliers who assert they have not been fully paid. It may be wise to inquire whether there are any outstanding union audits or benefit fund claims as well. Benefit fund claims on behalf of workers other than those of the bonded principal are most likely not the general contractor surety's responsibility. Have counsel check the law in the project jurisdiction, though, as a particular state may see the issue differently.