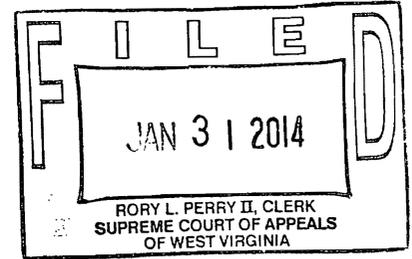


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-1179



**FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,**

Defendant Below / Petitioner,

v.

**(CIVIL ACTION NO. 13-C-4
Judge Christopher C. Wilkes)**

FRANKLIN W. JAMES, JR.,

Plaintiff Below / Respondent.

PETITIONER'S BRIEF

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I. ASSIGNMENTS OF ERROR

The question certified to this Court by the Circuit Court of Berkeley County, West Virginia is as follows:

May a plaintiff maintain an action solely against the surety on a judgment bond made pursuant to W. Va. Code § 31-17-4 without a judgment against the principal on the bond, when the principal has filed bankruptcy, and a judgment against the principal is precluded due to a Chapter 11 Plan confirmation?

The Circuit Court of Berkeley County answered the certified question as follows:

YES, the statutory purpose of the bond is to protect consumers against insolvent lenders, *see*, W. Va. Code § 31-17-4 and the public policy of this State should not allow the bankruptcy of insolvent lender to shield a surety on these bonds from liability for the principal's actions.

(JA000181-82.)

A number of points of legal error arise from the circuit court's answer to the certified question. As further discussed in the "Summary of Argument" and "Argument" sections below, the circuit court's answer to the certified question: (1) ignores controlling common law and specific contractual conditions in the subject bond; (2) ignores the controlling statute; (3) overlooks critical facts in this case; and (4) overlooks substantial policy reasons for enforcement of the bond conditions.

II. STATEMENT OF THE CASE

The matter below arises from a mortgage loan originated in 2008 for the purchase of a parcel of real estate located at 3449 Poor House Road in Martinsburg, West Virginia. (JA000001-4.) According to the Complaint, Plaintiff below and Respondent herein, Franklin W. James, Jr. ("Respondent"), purchased the parcel in 2001 for \$20,000, as well as a doublewide mobile home for \$69,000 to place on the land. (JA000003.)¹ Unfortunately, both the parcel and the mobile home were sold at foreclosure in 2006. (*Id.*) In 2008, Respondent desired to

¹ Citations to the Joint Appendix are abbreviated herein as "JA" proceeded by the applicable page number.

repurchase the property (i.e. both the parcel and the mobile home). (*Id.*) Though the home was not on the market, Respondent approached the owner of the property at the time in order to try to negotiate the repurchase. (*Id.*) Respondent and the owner agreed upon a purchase price of \$145,000.00 for the property, despite that Respondent had paid a total of only \$89,000 for the parcel and mobile home just a few years earlier. (*Id.*)

After Respondent made this agreement, he sought to obtain a home mortgage loan. (JA000003-4.) Power Mortgage & Financial Solutions, Inc. (“Power Mortgage”), a mortgage broker and Defendant below, originated a loan for Respondent on or about December 2, 2008 for \$151,000.00. (JA000004.) Taylor, Bean & Whitaker Mortgage Corporation (“TBW”) was the lender; however, it is not a party to the action below due to its prior bankruptcy.² (JA000002.) Defendant below, Bank of America, N.A. (“Bank of America”) acquired TBW’s interest in the loan at issue.³ Additionally, a “John Doe” holder was named as a defendant. (*Id.*) Respondent’s Complaint below arises from the origination and servicing of this loan.

The West Virginia Residential Mortgage Lender, Broker and Servicer Act, W. Va. Code §§ 31-17-1, *et seq.* (the “Act”), required that TBW obtain a mortgage lender bond. Accordingly, Fidelity and Deposit Company of Maryland, Defendant below and Petitioner herein (“Petitioner”), is the lender’s surety company under Bond No. LPM8606879 (the “Bond”). (JA000002, 000039.) The Bond was issued on November 1, 2001 in the amount of \$100,000. (JA000039-40.) It was increased to \$250,000 by a rider effective July 1, 2009 and later cancelled by Notice of Cancellation dated August 6, 2009. (JA000051, 000056.)

² TBW filed for bankruptcy under Chapter 11 of the United States Code in the Middle District of Florida on August 24, 2009, styled Case No. 3:09-bk-07047. (JA000184-85.) On July 21, 2011, the Chapter 11 Plan was confirmed. (JA000184.)

³ BAC Home Loans Servicing, LP was assigned the loan servicing rights. Bank of America is the successor to BAC Home Loans Servicing, LP by merger. (JA000002.)

Respondent maintained that certain of the defendants and TBW (despite not being named as a defendant in the suit) engaged in “predatory lending” practices with respect to his home mortgage loan and as a result brought his Complaint in the Circuit Court of Berkeley County, West Virginia on January 7, 2013. (JA000001-9.) Specifically, the Complaint contains counts for breach of fiduciary duty, unconscionable inducement, illegal loan and force-placed insurance against the broker, the lender, the servicer and the holder arising out of the loan transaction. (*Id.*) Petitioner is named in the Complaint solely because it is the surety on the Bond. That is, Petitioner was not involved in the origination or servicing of Respondent’s loan, and the only allegations in the Complaint against Petitioner relate to the Bond. (JA000002.) The Complaint contains no basis for an independent claim against Petitioner.

The parties exchanged pleadings and engaged in basic discovery in the matter below. Then, on July 19, 2013, Petitioner filed its *Motion to Dismiss Plaintiff’s Complaint or Alternatively Motion for Summary Judgment* on the basis that Respondent had failed to satisfy the Bond’s unambiguous conditions precedent for Respondent to maintain an action against Petitioner on the Bond. (JA000022-120.) Namely, Respondent had not, and still has not, obtained a judgment against the Bond principal, TBW, which is an express condition of the Bond. (JA000039.) As this Court recently declared, the Bond is a judgment bond created by the Commissioner of Banking pursuant to the express authority and unlimited discretion granted in W. Va. Code § 31-17-4(e)(3), and it requires a person aggrieved by the misconduct of a principal to first obtain judgment against such principal, issue an execution on that judgment, and obtain assent from the Commissioner of Banking before maintaining an action upon the Bond.

Respondent opposed Petitioner’s motion by asking the circuit court, essentially, to read the above conditions precedent out of the Bond, arguing that the purpose of the statutory

mortgage lender bond is to provide “relief for consumers that have been defrauded or otherwise harmed by a defunct or bankrupt mortgage lender from whom the consumer cannot sue or obtain relief.” (JA000121-58.)

Following briefing by the Petitioner and Respondent on Petitioner’s motion (JA000022-158), the circuit court determined that the motion presented an issue of first impression in West Virginia and, on October 30, 2013, certified the question that is now the subject of this appeal (JA000179-83).

III. SUMMARY OF ARGUMENT

A number of points of legal error arise from the circuit court’s answer to the certified question. For the reasons outlined herein and more fully discussed in the Argument section below, this Court should reject the circuit court’s answer to the certified question.

A. The circuit court’s answer ignores controlling common law and specific contractual conditions in the Bond.

The circuit court’s answer to the certified question ignores this Court’s recent decision in *Hartford Fire Insurance Company v. Curtis*, 231 W. Va. 596, 748 S.E.2d 662 (2013), as well as well-established contract principles and the unequivocal terms of the Bond. In *Curtis*, this Court recently analyzed the exact same bond form as the one issued by Petitioner in this matter (pursuant to West Virginia Code § 31-17-4) and declared the same to be a “judgment bond.” Under a judgment bond, there can be no liability of the surety without a judgment against the principal. This condition precedent is unambiguously set forth in the Bond:

If any person shall be aggrieved by the misconduct of the principal, he may ***upon recovering judgment against such principal*** issue execution of such judgment and maintain an action upon the bond of the principal in any court having jurisdiction of the amount claimed, provided the Commissioner of Banking assents thereto.

(JA000039) (emphasis added). It is undisputed in the case below that Respondent has not obtained the requisite judgment against the principal, TBW. (JA000061.)

A bond is a contract and is subject to the general laws of contract. As such, the surety's liability is governed exclusively by the terms of the applicable bond, which should be enforced as written. The Bond has clear conditions precedent—three, in fact—that must be satisfied before Respondent may maintain an action against Petitioner on the Bond. (JA000039.) This Court underscored these well-established principles when it held, in *Curtis*, that sureties like Petitioner contractually “*agree[d] to be liable for a judgment* based on a specific statutory violation covered by the bond,’ i.e. a violation of the West Virginia Mortgage Lender, Broker, and Servicer Act.” (emphasis added). In proposing that claimants may maintain direct actions against sureties without first obtaining the mandatory judgment, the circuit court’s answer to the certified question is directly contrary to the authority of this Court set forth in *Hartford Fire Insurance Company v. Curtis*, the plain language of the Bond, and the most basic and well-settled of contract principles applicable to judgment bonds.

B. The circuit court’s answer ignores the controlling statute.

The Bond at issue was required pursuant to the West Virginia Residential Mortgage Lender, Broker, and Servicer Act. Specifically, West Virginia Code § 31-17-4 provides as follows:

(e) At the time of making application for a lender’s license, the applicant therefor shall: . . . (3) File with the commissioner a bond in favor of the state for the benefit of consumers or for a claim by the commissioner for an unpaid civil administrative penalty or an unpaid examination invoice . . . *in a form and with conditions as the commissioner may prescribe* . . . [.]

W. Va. Code § 31-17-4(e)(3) (emphasis added). While the controlling statutory section *generally* provides the bond is for the benefit of consumers, it *specifically* provides unlimited

authority and discretion to the Commissioner of Banking with regard to the applicable form, terms and conditions of the mandated bond. In his broad and exclusive discretion, the Commissioner determined that a judgment and execution along with consent from the Commissioner were appropriate conditions of the Bond, without exception. This Court affirmed the Commissioner's authority in this regard, in *Curtis*, when it held that "[t]he foregoing statutes specifying that the Banking Commissioner prepare a bond form *place[] no limitations on the Commissioner's authority to prescribe the terms applicable to said bonds.*" (emphasis added). Thus, by reading out of the Bond a clear condition precedent prescribed by the Commissioner, the circuit court's answer not only ignores the express language of W. Va. Code § 31-17-4, but also ignores the unlimited authority this Court acknowledged in *Curtis*.

As noted above, the statute does contain general language providing that one of the purposes of the mandated bond is "for the benefit of consumers." Respondent hangs his hat on this generic phrase in arguing below that the prescribed bond "undermine[s] the intent of the statute requiring the bond." (JA000124, 000127.) However, Respondent has failed to pinpoint any authority or documented legislative history that support this conclusory statement. Even if this general statement of purpose could be read to conflict with the specific grant of authority to the Commissioner to prescribe the form and conditions of the mandated bond, there is no question that "specific statutory provisions take precedence over general statutory provisions when the two read together create an ambiguity."

Respondent's and the circuit court's position requires this Court to rewrite the Bond to eliminate the express conditions mandated by the Commissioner of Banking within the broad discretion specifically granted under the statute, which is inappropriate.

C. The circuit court's answer overlooks critical facts in this case.

In any event, the condition precedent of the Bond requiring a judgment before action against the surety does not actually even operate to the detriment of Respondent. The circuit court's answer misses this point by overlooking critical facts in the case.

In his brief below, Respondent repeatedly misrepresents that he has no ability whatsoever to recover for TBW's alleged wrongdoing outside of a direct action against Petitioner without first obtaining a judgment against TBW. (JA000123, 000129-30.) To the contrary, even where a Chapter 11 Plan has been confirmed, a claimant could pursue—and in this case Respondent has, in fact, pursued—a claim against the bankrupt principal's successor in interest to the loan as a means to recover the alleged loss. Bank of America is alleged to have acquired TBW's interest in the servicing rights to loan at issue. Although Bank of America is only the servicer, the Complaint asserts claims against Bank of America in Counts II and III premised on TBW's alleged misconduct with regard to the loan's origination. Respondent has reached a settlement with Bank of America, which based on the allegations in the Complaint, at least in part, settled the claims against Bank of America arising from TBW's alleged misconduct. (JA000002, 000174.)

Moreover, Respondent has asserted various claims against the John Doe holder arising from TBW's alleged misconduct. To the extent this loan was assigned to a different holder prior to TBW's bankruptcy filing, TBW's subsequent bankruptcy case and confirmed Chapter 11 plan would have no impact on any claims Respondent may assert against the holder as the assignee or successor-in-interest to TBW. Thus, Respondent not only can obtain, but in fact has already obtained, relief for the alleged wrongdoing of TBW outside of a direct action against Petitioner. As such, the condition precedent has not harmed Respondent and should be enforced. In fact,

allowing Respondent to recover against Bank of America and/or the John Doe holder and then recover against Petitioner under the Bond would be an impermissible double recovery.

Moreover, Respondent sat on his rights with regard to obtaining judgment specifically against TBW. That is, Respondent had the chance to bring his claims against TBW itself in TBW's bankruptcy proceeding, but failed to do so. The events allegedly giving rise to Respondent's suit below occurred in or around late 2008 through early 2009. (JA000003-4.) TBW did not file for bankruptcy until August 24, 2009, such that Respondent had knowledge of his potential claim before TBW's bankruptcy even commenced. (JA000185.) The Order confirming the Chapter 11 Plan in the bankruptcy expressly provides that "[t]he *notice* by publication of the Bar Date was *reasonably calculated to reach all unknown Creditors*. Furthermore, the notice reasonably *conveyed all the required information and permitted a reasonable time for response.*" (JA000208-09) (emphasis added). Once Respondent learned of TBW's bankruptcy filing, he could have filed a proof of claim to preserve his claim, filed an adversary proceeding, or moved to have the automatic stay lifted to pursue a state-court action. Instead, he did nothing. Allowing Respondent the extraordinary remedy of a direct action against Petitioner without a judgment against the principal, where the same is clearly contrary to the terms of the Bond, is not warranted where Respondent did not avail himself of the opportunity to obtain judgment against the principal.

Because the circuit court's answer is premised on the incorrect assumption that Respondent cannot obtain any relief for the alleged wrongdoing of TBW, and because it encourages claimants to sit on their rights, this Court should reject it.

D. The circuit court's answer overlooks substantial policy reasons for enforcement of the Bond conditions.

The conditions precedent of the Bond—consisting of judgment, execution and assent of the Commissioner of Banking—are grounded in sound public policy similar to that which the United States Supreme Court explained in *United States for Use and Benefit of Midland Loan Finance Company v. National Surety Corporation*, 309 U.S. 165, 60 S. Ct. 458 (1940). In that case, a unanimous United States Supreme Court found that claims made under a statutory postmaster's bond could not be permitted without the consent of the United States because of the potential for the surety to be exposed to numerous claims on the bond and the government's substantial interest. *Id.* at 173, 462 (addressing the consequences of granting a large class the right to claim against a federal statutory bond). It is for these same policy reasons that the unambiguous requirements in the statutory Bond at issue in this case—recovery of judgment, execution on the judgment and the assent of the Commissioner—are in place. (JA000039.)

Additionally, if this Court were to accept Respondent's and the circuit court's position and allow for a direct action against sureties without the judgment expressly required by the Bond, then sureties like Petitioner will be at an especially unfair disadvantage. This is because this Court also held, in *Curtis*, that sureties may not assert their principals' defenses pursuant to W. Va. Code § 45-1-3 in suits on judgment bonds. The practical effect of this holding from *Curtis*, when combined with the circuit court's position, is that sureties would be conclusively bound by a judgment bond but arguably unable to assert the principal's defenses when a consumer brings a direct action on the bond. This dilemma worsens when coupled with the fact that the circuit court's position actually encourages claimants to sit idly by during principals' bankruptcies and instead bring, more conveniently, direct actions against sureties. The increased

risk to sureties and resulting increased costs for everyone is reason enough to reject this result as against public policy.

Based on the foregoing, and for all the reasons further discussed in the Argument section below, Petitioner respectfully requests that this Court answer the certified question in the negative.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This matter presents a novel issue of West Virginia law not directly addressed by this Court. This legal issue is presented in a total of five cases currently pending, including this case, in relation to the bond of TBW.⁴ In addition to these five cases against the TBW bond, other sureties like Petitioner in civil actions involving different bond principals have an interest in the resolution of this issue regarding the mortgage lender/broker bond. Because this matter presents an important and wide-reaching issue of first impression, it is appropriate for Rule 20 oral argument under the West Virginia Rules of Appellate Procedure.

V. ARGUMENT

The standard of review applicable to the certified question in this matter is *de novo*. See Syl. Pt. 1, *Wilson v. Bernet*, 218 W. Va. 628, 625 S.E.2d 706 (2005) (quoting Syl. Pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W. Va. 172, 475 S.E.2d 172 (1996)) (“The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*.”). As such, no special deference is accorded to the circuit court’s answer to the certified question, and this Court may review and decide the issue anew. See, e.g., *State ex rel. Orlofske v. City of*

⁴ Those cases are: *Jon Staats v. Fidelity and Deposit Company of Maryland*, Civil Action No. 08-C-3407 (Circuit Court of Kanawha County); *Carol Hays v. Bank of America, N.A.*, Civil Action No. 13-C-573 (Circuit Court of Kanawha County); *Charles Kerns v. Fidelity and Deposit Company of Maryland*, 12-C-739 (Circuit Court of Berkeley County) (stayed); *Franklin W. James, Jr. v. Bank of America, N.A.*, Civil Action No. 13-C-4 (Circuit Court of Berkeley County); and *Richard E. Cotta et al. v. Fidelity and Deposit Company of Maryland*, Civil Action 2:13-cv-24894 (United States District Court for Southern District of West Virginia) (Johnston, J.) (stayed).

Wheeling, 212 W. Va. 538, 542, 575 S.E.2d 148, 152 (2002); *Pritt v. Republican National Committee*, 210 W. Va. 446, 451, 557 S.E.2d 853, 858 (2001). “When a certified question is not framed so that this Court is able to fully address the law which is involved in the question, then this Court retains the power to reformulate questions certified to it under both the Uniform Certification of Questions of Law Act found in W. Va. Code, 51-1A-1, *et seq.* and W. Va. Code, 58-5-2” Syl. Pt. 3, in part, *Kincaid v. Mangum*, 189 W. Va. 404, 405, 432 S.E.2d 74, 75 (1993).

A. The circuit court’s answer ignores this Court’s recent decision in *Hartford Fire Insurance Company v. Curtis*, 231 W. Va. 596, 748 S.E.2d 662 (2013), as well as the specific conditions of the Bond and well-established contract principles.

Pursuant to *Hartford Fire Insurance Company v. Curtis*, 231 W. Va. 596, 748 S.E.2d 662 (2013), the Bond at issue is a judgment bond. By its very terms, the essence of a judgment bond is that the surety agreed to be liable for a judgment only. Any decision which allows a direct claim against the surety without first requiring the claimant to obtain a judgment directly conflicts with the terms of the Bond and this Court’s holding in *Curtis*. (JA000039.) It is undisputed below that Respondent has not obtained the necessary judgment against the lender/principal, TBW. (JA000061.)

i. This Court’s decision in *Curtis* leaves no question that the Bond at issue is a judgment bond.

The Bond at issue provides as follows:

That we, [TBW] as principal, and [Fidelity], a corporation, as surety, **are held and firmly bound unto THE STATE OF WEST VIRGINIA**, in the just and full sum of One Hundred Thousand Dollars (\$100,000), to the payment whereof, well and truly to be made, we bind ourselves, our personal representatives, successors and assigns, jointly and severally, firmly by these presents

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH THAT, WHEREAS, the above bound principal, in pursuance of the provisions of Article 17, Chapter 31, of the Code of West Virginia, as amended (hereinafter the “Act”) has

obtained, or is about to obtain, from the Commissioner of Banking of the State of West Virginia, a license to conduct a Mortgage Lender business.

NOW, THEREFORE, if the said principal [TBW] shall conform to and abide by the provisions of said Act and of all rules and orders lawfully made or issued by the Commissioner of Banking thereunder, and shall pay to the State and shall pay to any such person or persons properly designated by the State any and all moneys that may become due or owing to the State or to such person or persons from said obligor in a suit brought by the Commissioner on their behalf under and by virtue of the provisions of said Act, then this obligation shall be void, otherwise it shall remain in full force and effect. **If any person shall be aggrieved by the misconduct of the principal, he may upon recovering judgment against such principal issue execution of such judgment and maintain an action upon the bond of the principal in any court having jurisdiction of the amount claimed, provided the Commissioner of Banking assents thereto.** Upon the payment of any such claim, the Surety shall within ten (10) days of said payment give notice of the payment to the Commissioner of Banking by certified and registered mail, with details sufficient to identify the claimant and the judgment so paid.

(JA000039) (emphasis added.)⁵

The Bond was given on a form created and approved by the Commissioner of Banking pursuant to its authority under the Act and is a statutory bond. “[A] statutory bond is a bond which is required by statute from state, county, district, or municipal officers, from fiduciaries, from parties in judicial proceedings, or from officers and agents of private corporations pursuant to authority conferred upon them by charter or by general law.” *Municipality of Cowen ex rel. Proudfoot v. Greathouse*, 130 W. Va. 587, 590-91, 45 S.E.2d 489, 492 (1947). Statutory bonds should always be “read as though given in literal compliance with the statute.” *Cecil I. Walker Machinery Co. v. Stauben, Inc.*, 159 W. Va. 563, 567, 230 S.E.2d 818 (1972). A bond, however, is a contract and is subject to the general laws of contract. *See American Home Assur. Co. v. Larkin Gen. Hosp., Ltd.*, 593 So.2d 195 (Fla. 1992).

In *Curtis*, this Court recently analyzed the bond form identical to the one at issue here and declared the same to be a “judgment bond.” *Curtis*, 231 W. Va. at ---, 748 S.E.2d at 669-70. “A judgment bond has been described as a bond ‘in which the surety agrees to be liable for a

⁵ Pursuant to a Rider effective July 1, 2009, the amount of the Bond was increased to \$250,000.00. (JA000051.) No other relevant terms and conditions of the Bond were affected by the Rider. (*Id.*)

judgment based on a specific statutory violation covered by the bond.” *Id.* at ---, 669 (internal citations omitted). Keeping this in mind, this Court explained:

Both of the Hartford bonds utilized a mandatory bond form prepared by the West Virginia Commissioner of Banking. The bonds are basically identical and state:

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH THAT; WHEREAS, the above bound principal, in pursuance of the provisions of Article 17, Chapter 31, of the Code of West Virginia, as amended, (hereinafter the “Act”) has obtained, or is about to obtain, from the Commissioner of Banking of the State of West Virginia, a license to conduct a Mortgage Lender[/Broker] business.

NOW, THEREFORE, if the said principal [specific principal named here] shall conform to and abide by the provisions of said Act and of all rules and orders lawfully made or issued by the Commissioner of Banking thereunder, and shall pay to the State and shall pay to any such person or persons properly designated by the State any and all moneys that may become due or owing to the State or to such person or persons from said obligor in a suit brought by the Commission on their behalf under and by virtue of the provisions of said Act, then this obligation shall be void, otherwise it shall remain in full force and effect. *If any person shall be aggrieved by the misconduct of the principal, he may upon recovering judgement [sic] against such principal issue execution of such judgement [sic] and maintain an action upon the bond of the principal in any court having jurisdiction of the amount claimed, provided the Commissioner of Banking assents thereto.* (Emphasis added).

The above-quoted language from the bonds requires, as Hartford contends, that the principals comply with Article 17, Chapter 31, of the West Virginia Code, which is known as the Mortgage Lender, Broker, and Servicer Act, and pay money due to the State or persons designated by the State under circumstances outlined in the bonds. Relevant to the instant cases, however, and as also quoted above, the bonds go on to specify that an aggrieved person “*may upon recovering judgement [sic] against such principal issue execution of such judgement [sic] and maintain an action upon the bond of the principal[.]*” (Emphasis added). Thus, the language of the Hartford bonds grants an aggrieved person who has obtained a judgment against the principal the right to execute said judgment through an action upon the bond. Reading this plain language in light of the definition of a judgment bond quoted above, **it is clear that the Hartford bonds are judgment bonds.** The foregoing bond language plainly demonstrates that Hartford has “**agree[d] to be liable for a judgment** based on a specific statutory violation

covered by the bond,” *i.e.*, a violation of the West Virginia Mortgage Lender, Broker, and Servicer Act.

Id. at ---, 669-70 (italicized emphasis in original; bold emphasis added).

Thus, this Court, in *Curtis*, unequivocally declared the bond issued on the form identical to the one at issue in the instant case to be a judgment bond, under which a surety is liable only for a judgment based on a violation of the West Virginia Residential Mortgage Lender, Broker, and Servicer Act. This Court emphasized that, under the plain language of a judgment bond, an aggrieved person may not maintain an action against the surety on the bond unless and until a judgment has been obtained against the principal.

ii. A bond is a contract and should be enforced as written.

While a judgment against the principal, TBW, is a mandatory requirement to trigger the Petitioner’s liability under the Bond, the unambiguous terms of the Bond require satisfaction of certain other conditions precedent once the required judgment has been obtained. In total, the Bond requires that the following three conditions precedent be satisfied before Respondent could legally maintain an action on the Bond:

- (1) obtain a judgment against TBW;
- (2) issue an execution against that judgment; and
- (3) obtain the “assent”⁶ of the Commissioner of Banking to an action on the Bond.

(JA000039.)

A bond is a contract and is subject to the general laws of contract. *See Larkin Gen. Hosp., Ltd.*, 593 So.2d at 197; *see also Robinson v. Fid. & Deposit Co.*, 181 W. Va. 463, 466,

⁶ According to Merriam-Webster online, the word “assent” means: “to agree to something especially after thoughtful consideration.” *See* <http://www.merriam-webster.com/dictionary/assent> (last visited Jan. 21, 2014). Therefore, under the terms of the Bond, the Commissioner of Banking must actually agree to allow the aggrieved party to bring the bond enforcement action *after* the party has obtained the judgment against the bond principal.

383 S.E.2d 95, 98 (1989) (deeming subject bond a contract for insurance); *Gateway Communications, Inc. v. John R. Hess, Inc.*, 208 W. Va. 505, 508, 541 S.E.2d 595, 598 (2000) (deeming subject performance bond a contract of suretyship); and *Myers v. Miller*, 45 W. Va. 595, 31 S.E. 976, 983 (1898) (deeming official bond of sheriff a contract). Thus, “[t]he liability of a surety is generally measured by his or her contract or bond.” *Curtis*, 231 W. Va. at ---, 748 S.E.2d at 668 (quoting 72 C.J.S. *Principal and Surety* § 81 at 222 (2005)). “The principal and his surety are liable under a contract expressed in definite terms and their liability cannot be carried beyond the fair meaning of those terms.” *State ex rel. Duckett v. Pettee*, 50 N.C. App. 119, 121, 273 S.E.2d 317, 319 (1980).

While it is true that, as a general rule, the liability of a surety is coextensive with that of the principal, the liability of the surety still sounds in contract, and is therefore, nevertheless governed by the terms of the bond itself:

It must be remembered, however, that “[t]he liability of a surety is a legal as distinguished from a moral one. His obligation arises out of positive contract, and the contract generally measures the extent of [the surety’s] liability.”

Gateway Communications, Inc., 208 W. Va. at 509, 541 S.E.2d at 599 (internal citations omitted). What is more, Petitioner and other sureties should be able to rely on the terms and conditions they assumed as a benefit of their bargain. *See, e.g., Hinerman v. Rodriguez*, 230 W. Va. 118, 127, 736 S.E.2d 351, 360 (2012) (“There is no ambiguity in the Agreement . . . and the buyers are entitled to the benefit of their bargain.”)

The Bond’s conditions precedent are acts or events that must be performed before Petitioner has any duty to perform as promised in the Bond. *See Adams v. Guyandotte Valley Ry. Co.*, 64 W. Va. 181, ---, 61 S.E. 341, 344 (1908) (internal citations omitted) (“That failure to perform a condition precedent prevents the vesting of title or right is elementary law.”). “[West Virginia] law provides that ‘[u]nder the broad liberty of contract allowed by law, parties may

make performance of any comparatively, or apparently, trivial and unimportant covenant, agreement, or duty under the contract a condition precedent, and, in such case, the contract will be enforced and dealt with as made.” *Wellington Power Corp. v. CNA Sur. Corp.*, 217 W. Va. 33, 37, 614 S.E.2d 680, 684 (2005) (quoting Syl. Pt. 2, *Watzman v. Unatin*, 101 W. Va. 41, 131 S.E. 874 (1926)). Thus, the “liability as surety is limited by the obligations it undertook in [the bond].” *Gateway Communications, Inc.*, 208 W. Va. at 509, 541 S.E.2d at 599; *see also Frank Powell Lumber Co. v. Federal Ins. Co.*, 817 S.W.2d 648, 651 (Mo. 1991) (“Liability of a surety is limited to the terms and conditions stated in the bond.”) Conditions precedent to the maintenance of an action on a fidelity bond or policy, ordinarily must be performed or complied with before any action may be instituted. *See* 46A C.J.S. *Insurance* § 2076 (2011); *see also* 74 Am. Jur. 2d *Suretyship* §116.

In accordance with these well-established principles, this Court declared in *Curtis* that the language of the Bond only “grants an aggrieved person *who has obtained a judgment against the principal* the right to execute said judgment through an action upon the bond.” *Curtis*, 231 W. Va. at ---, 748 S.E.2d at 670 (emphasis added). With this Bond, this Court has recognized that sureties like Petitioner contractually “*agree[d] to be liable for a judgment* based on a specific statutory violation covered by the bond,’ i.e., a violation of the West Virginia Mortgage Lender, Broker, and Servicer Act.” *Id.* (emphasis added). Based on *Curtis*, Petitioner—as the surety—is not obligated to pay a claim against the Bond until Respondent has obtained a judgment against the principal, TBW.⁷

⁷ Respondent’s counsel in the instant case, Mountain State Justice, was also counsel for the respondent in *Curtis*. This Court summarized the respondent’s position in *Curtis* regarding the bond conditions as follows: “According to Respondents, obtaining a judgment in the absence of fraud and collusion is the **only requirement** for collection on a judgment bond.” *Curtis*, 231 W. Va. at ---, 748 S.E.2d at 672 (emphasis added). Thus, Respondent’s counsel has taken wholly inconsistent positions with regard to the Bond. In *Curtis*, Respondent’s counsel not only acquiesced but, in fact, advocated that a judgment was the clear and only requirement to maintain an action on the bond. Here, Respondent’s counsel has argued that a judgment simply is not necessary to maintain an action on the Bond.

There is no such judgment in this case. (JA000061.) Respondent has placed the proverbial cart before the horse—he attempts to pursue his claims against TBW indirectly through a premature bond claim. In doing so, Respondent is forcing Petitioner to actually defend TBW’s liability and circumventing the contractual limitations of the Bond. The conditions precedent outlined in the Bond have not been satisfied. Without first satisfying the conditions precedent, Respondent has no right to maintain an action against Petitioner on the Bond.

Despite the foregoing controlling authority, the circuit court has proposed that Respondent may maintain a direct action against Petitioner without the mandatory judgment. Considering the foregoing, the circuit court’s answer to the certified question flies in the face of the authority this Court set forth in *Curtis*, basic contract principles well-established in this State, and the plain terms of the Bond.

B. By reading out of the Bond a clear condition precedent, the circuit court’s answer also ignores the express language of the statute mandating the bond, W. Va. Code § 31-17-4, which grants the Commissioner of Banking unlimited discretion in devising the form and conditions of the bond.

The Bond at issue was required pursuant to the West Virginia Residential Mortgage Lender, Broker, and Servicer Act, W. Va. Code §§ 31-17-1, *et seq.* Section 4 of the Act provides as follows:

(e) At the time of making application for a lender’s license, the applicant therefor shall: . . . (3) File with the commissioner a bond in favor of the state for the benefit of consumers or for a claim by the commissioner for an unpaid civil administrative penalty or an unpaid examination invoice in the amount of \$100,000 for licensees with West Virginia annual loan originations of \$0 to \$3 million, \$150,000 for West Virginia annual loan originations greater than \$3 million and up to \$10 million, and \$250,000 for West Virginia annual loan originations over \$10 million ***in a form and with conditions as the commissioner may prescribe*** and executed by a surety company authorized to do business in this state: *Provided*, That lender licensees who service West Virginia mortgage loans shall file with the commissioner a bond under the same conditions listed above in the amount of \$200,000.

W. Va. Code § 31-17-4(e)(3) (emphasis added). West Virginia Code § 31-17-4(f)(3) is an identical provision regarding those making application for a broker's (as opposed to lender's) license.

West Virginia Code §§ 31-17-4(e)(3) and (f)(3) require the Commissioner of Banking to issue the mandatory mortgage lender/broker bond “in a form and *with conditions as the Commissioner may prescribe.*” (emphasis added). This language granted the Commissioner broad discretion to determine the applicable form, terms and conditions of the Bond. In so doing, the Commissioner determined that a judgment and execution along with consent from the Commissioner were appropriate conditions. The Commissioner did not create any exceptions to this requirement nor does the West Virginia Residential Mortgage Lender, Broker, and Servicer Act. In *Curtis*, Hartford argued that the Commissioner of Banking had no authority to require a judgment bond that would deprive the surety of its rights under W. Va. Code § 45-1-3. *Curtis*, 231 W. Va. at ---, 748 S.E.2d at 678, n. 11. This Court rejected that argument, finding that “[t]he foregoing statutes specifying that the Banking Commissioner prepare a bond form *place[] no limitations on the Commissioner's authority to prescribe the terms applicable to said bonds.*” *Id.* (emphasis added).

Yet, Respondent has argued below that the form of the Bond (namely, the condition precedent of obtaining a judgment) prescribed by the Commissioner within his express discretion “undermine[s] the intent of the statute requiring the bond.” (JA000127.) In support of this argument below, Respondent pointed to nothing other than the generic phrase, “for the benefit of consumers,” which was added to W. Va. Code § 31-17-4 in 2001. (JA000124, 000127.) *See* W. Va. Code § 31-17-4 (1996, 2001). In the statute's current version, this phrase does not stand alone, but rather, is part of a greater provision appearing only to suggest general purposes

(plural) of the mandated bond—“. . . for the benefit of consumers *or* for a claim by the commissioner for an unpaid civil administrative penalty *or* an unpaid examination invoice” W. Va. Code § 31-17-4(e)(3) (2009) (emphasis added).

There is no documented legislative history other than the addition itself that speaks to the purpose or intended scope of this very general language. Assuming *arguendo* that the general purpose language highlighted above (the phrase, “for the benefit of consumers”) could be read to conflict with the specific grant of authority to the Commissioner to prescribe the form and conditions of the mandated bond (the phrase, “in a form and with conditions as the commissioner may prescribe”), consultation of the canons of statutory interpretation is both appropriate and helpful. “It is a commonplace of statutory construction that the specific governs the general.” 82 C.J.S. *Statutes* § 482 (2013). This Court has “consistently held that specific statutory provisions take precedence over general statutory provisions when the two read together create an ambiguity.” *Farley v. Buckalew*, 186 W. Va. 693, 696, 414 S.E.2d 454, 457 (1992) (citing *Matter of Vandelinde*, 179 W. Va. 183, 366 S.E.2d 631 (1988); *Elite Laundry Co. v. Dunn*, 126 W. Va. 858, 30 S.E.2d 454 (1944)).

Accordingly, here, the Commissioner’s specific authority and discretion to create the bond as it sees fit may not be read out of the statute or undermined by the simple fact that the statute generally provides that the Bond is for the benefit of consumers. It stands to reason that, had the Legislature intended to provide consumers with specific safeguards in the lender/broker bond context, it: (1) would have included more specific safeguards in the statute; and/or (2) would not have kept in the statute the grant of unlimited authority provided to the Commissioner with regard to these bonds. The Commissioner’s authority regarding the form and conditions of

the Bond has remained a consistent part of the statute since 1996, through three revisions. *See* W. Va. Code § 31-17-4 (2001, 2008, 2009).

Respondent's and the circuit court's position requires this Court to rewrite the Bond to eliminate the express conditions mandated by the Commissioner of Banking within the broad discretion specifically granted under the statute. Other than referring to West Virginia Code §§ 31-17-4(e)(3) and (f)(3)'s general statement that the bond is required "for the benefit of consumers," Respondent has cited no statutory authority showing that the Commissioner's bond conditions are outside the legislative mandate in §§ 31-17-4(e)(3) or (f)(3). As this Court previously recognized, the Legislature granted the Commissioner discretion without limitations under the statute. The conditions are consistent with this unlimited discretion. It would be improper for this Court to rewrite the subject Bond, eliminating the condition precedent and thereby retroactively affecting substantive rights. Rather, it is the proper place of the Commissioner of Banking or the Legislature to change the bond form or the statute and apply the same prospectively.⁸

⁸ The Commissioner of Banking did, in fact, revise the bond form in June 2012. The revised form carves out a specific exception to the condition precedent of obtaining judgment against the principal in order to maintain an action on the bond in situations where "the principal is no longer in operation or has filed for bankruptcy." *See* <http://mortgage.nationwidelicencingsystem.org/slr/StateForms/WV3-Lender-SAFE-bond.pdf>. However, the parties here are not governed by the June 2012 revised bond form, but rather by the 2001 Bond actually in effect at the time of the events at issue. Much like a revision to a statute affecting substantive rights, the revised bond form should not be applied retroactively to events that have already occurred and rights that have already vested. As this Court has repeatedly affirmed,

"A statute that diminishes substantive rights or augments substantive liabilities should not be applied retroactively to events completed before the effective date of the statute (or the date of enactment if no separate effective date is stated) unless the statute provides explicitly for retroactive application." Syllabus Point 2, *Public Citizen, Inc. v. First National Bank in Fairmont*, 198 W. Va. 329, 480 S.E.2d 538 (W. Va. 1996).

Syl. Pt. 4, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 576 S.E.2d 807 (2002) (quoting Syl. Pt. 2, *Smith v. West Virginia Div. of Rehab. Servs. & Div. of Pers.*, 208 W. Va. 284, 540 S.E.2d 152 (2000)); *see also Lester v. State Comp. Comm'r*, 123 W. Va. 516, 521, 16 S.E.2d 920, 924 (1941) (noting that legislation cannot be made retroactive "*when the effect will be to impair the obligation of contracts or to disturb vested rights*") (internal quotations and citation omitted) (emphasis added). The June 2012 revised bond form *does not* provide for retroactive application. Thus, despite that the statutory bond form has been revised, it is improper for this Court to

C. By overlooking critical facts in the case, the circuit court’s answer is premised on the incorrect assumption that Respondent cannot obtain any relief for the alleged wrongdoing of TBW.

Notwithstanding the scope or intent of the general provision providing “for the benefit of consumers,” the condition precedent of the Bond does not actually operate to the detriment of Respondent in this case. To accept the contrary assumes as true certain inaccuracies and misrepresentations.

i. Respondent can, and in fact has, obtained relief for the purported wrongdoing of TBW.

The circuit court’s answer is premised on the incorrect notion that Respondent is completely barred from obtaining any relief for the alleged wrongdoing of TBW outside of a direct action against Petitioner on the Bond without first obtaining a judgment. (JA000182.) Respondent fostered this inaccuracy, in arguing that the condition precedent of the Bond operates to the detriment of consumers where the principal is defunct or insolvent, by continually stating he has no ability to obtain relief for TBW’s wrongdoing. (JA000123, 000129-30.) Respondent would have the circuit court and this Court believe that direct suit against Petitioner is the only way to seek relief. (JA000130) (“This statutory bond, for which Fidelity is surety, provides relief for consumers that have been defrauded or otherwise harmed by a defunct or bankrupt mortgage lender from whom the consumer cannot sue or obtain relief. . . . Plaintiff should be permitted to pursue *the only relief available for TBW’s misconduct*—by maintaining this wholly proper suit against TBW’s surety, Fidelity”) (emphasis added).

However, even where a Chapter 11 Plan has been confirmed, a claimant could pursue—and in this case Respondent has, in fact, pursued—a claim against the bankrupt principal’s

retroactively apply the same to the instant case. In fact, the revised bond form clearly shows that the Bond at issue did not include or intend for an exception to the judgment condition when the principal is out of business or has filed bankruptcy. As such, the Bond in effect at the time governs and must be enforced as written.

successor-in-interest to the loan (current holder) as a means to recover the alleged loss. Bank of America is alleged to have acquired TBW's interest in the servicing rights to loan at issue. Although Bank of America is only the servicer, the Complaint asserts claims against Bank of America in Counts II and III premised on TBW's alleged misconduct with regard to the loan's origination. Bank of America has reached a *voluntary settlement* with Respondent for his claims allegedly arising out of the origination and servicing of the loan (i.e., arising out of TBW's alleged misconduct). (JA000002, 000174.) Additionally, Respondent still has claims pending against the currently unidentified John Doe holder arising from of TWB's alleged misconduct. (See JA000002, asserting claim against John Doe holder.) To the extent this loan was assigned to a different holder prior to TBW's bankruptcy filing, TBW's subsequent bankruptcy case and confirmed Chapter 11 plan would have no impact on any claims Respondent may assert against the holder as the assignee or successor-in-interest to TBW. Clearly then, Respondent not only had the opportunity to recover, but has, in fact, recovered, damages for the principal's alleged wrongdoing from Bank of America and still maintains the possibility of a recovery against the John Doe holder.

The settlement already provides Respondent with a recovery against Bank of America, as the assignee or successor-in-interest to TBW, for Respondent's claims arising out of TBW's alleged misconduct and based on the *same claims underlying* the claim against Petitioner under the Bond. (See JA000002) (alleging that Bank of America is assignee and subject to all claims and defenses). "It is generally recognized that there can be only one recovery of damages for one wrong or injury. Double recovery of damages is not permitted; the law does not permit a double satisfaction for a single injury." *Curtis*, 231 W. Va. at ---, 748 S.E.2d at 678, n. 13 (quoting Syl. Pt. 3, *State Farm Mut. Auto. Ins. Co. v. Schatken*, 230 W. Va. 201, 737 S.E.2d 229

(2012)). Allowing Respondent to recover against Bank of America as it has, and/or from the holder, and then also recover against Petitioner under the Bond would be an impermissible double recovery. This issue provides further support that a direct claim against the Bond without the mandatory judgment is not necessary to protect consumers as Respondent has claimed. If, as here, Respondent is able to recover against the successor in interest or assignee of the Bond principal for the same conduct underlying the Bond claim, Respondent has had his recovery and the Bond can be left intact for future claims. The purpose of the Bond is not to give Respondent a windfall.⁹

Eliminating the inaccuracy fostered by Respondent and accepting as true that he, indeed, has obtained relief outside of a direct action against the surety, it becomes clear that the Bond's condition precedent does not harm Respondent, and the Bond should be enforced as written.

ii. Furthermore, Respondent should not be rewarded where he sat on his rights with regard to obtaining judgment specifically against TBW.

Respondent would also have the circuit court and this Court believe that he has at all times been unable to obtain judgment specifically against TBW. (JA000123, 000126, 000130) (“Plaintiff thus has no ability to obtain relief from the defunct and insolvent TBW[;]” “. . .

⁹ Bank of America's settlement with Respondent raises a related issue not directly resolved in *Curtis*, regarding which Petitioner requests clarification from this Court. In *Curtis*, the plaintiffs obtained a default judgment in a civil action against the bond principal. Two years later, in a separate civil action against the surety and other defendants, the plaintiffs reached settlements with the other defendants. The surety, Hartford, argued that it should receive credit for the settlements involving the other defendants. In affirming the circuit court's decision, this Court held that the surety was not entitled to a credit since the settlements were not in existence at the time the judgment was obtained against the bond principal. See *Curtis*, 231 W. Va. at ---, 748 S.E.2d at 675-76. “[N]o credit can be given for a settlement that is not yet in existence.” *Id.* at ---, 676. Hartford had also argued that there should not be a double recovery. This Court rejected this argument by relying upon the circuit court's conclusion that the settlement reached with the co-defendants was “influenced, at least in part, by the existence of the default judgment.” *Id.* For these reasons, this Court denied Hartford's request for credit for the settlements. However, the instant case presents a factual scenario different than in *Curtis*. In this case, Respondent attempts to maintain an action on the Bond without any judgment against the principal. The settlement with Bank of America has occurred prior to any judgment directed against the Bond or the bond principal and, as such, the reasoning in *Curtis* is inapplicable. Thus, Petitioner requests that this Court clarify whether a surety would be entitled to credit for a claimant's settlement with another defendant where, as here, the settlement occurred prior to any judgment obtained by the claimant against the bond or the bond principal. Petitioner raised this issue below and requested that the circuit court include it as a related certified question, but the circuit court declined to do so. (JA000174-76, 000181.)

Plaintiff is barred from suing TBW by its bankruptcy[;]" “. . . requiring Plaintiff to undertake a legal impossibility (suit against TBW)”). These statements by Respondent in the case below are misleading because they hide the fact that Respondent had a chance to bring his claims against TBW in the bankruptcy proceeding, but simply did not do so.

TBW filed for Chapter 11 bankruptcy on August 24, 2009 in the Middle District of Florida. (JA000185.) The alleged events giving rise to Respondent’s Complaint in the circuit court action below involving TBW and the named defendants occurred within a narrow time frame from late 2008 into early 2009. (JA000003-4.) This is significant in that Respondent had actual knowledge of the alleged events giving rise to his purported cause of action *well before* TBW’s bankruptcy even commenced, let alone before the deadline for filing claims had passed or the date the Chapter 11 plan was confirmed.

The Order confirming the Chapter 11 Plan, entered July 21, 2011, provides as follows, in pertinent part:

42. SUFFICIENCY OF NOTICE TO BORROWERS AND CLAIMS OF BORROWERS. Borrowers under residential mortgage loans (“Borrowers”) who have not asserted or threatened to assert Claims against the Debtors are not known Creditors. To the extent that any such Borrowers are in fact Creditors of the Debtors, they are unknown Creditors because (i) their identities are neither known nor reasonably ascertainable by the Debtors through reasonably diligent efforts or, alternatively, (ii) the Debtors neither knew nor should have known that it was reasonably foreseeable that such Borrowers have Claims against the Debtors. ***The notice by publication of the Bar Date was reasonably calculated to reach all unknown Creditors. Furthermore, the notice reasonably conveyed all the required information and permitted a reasonable time for response.***

(JA000208-09) (emphasis added). According to the emphasized language above, Respondent is conclusively deemed to have received sufficient notice of the bankruptcy and an opportunity to file a creditor’s claim in the bankruptcy. Said notice and opportunity occurred *after* the alleged events giving rise to Respondent’s claims had occurred and, thus, after his cause of action had

arisen. The bottom line is that Respondent could have obtained relief even against TBW itself by participating as a creditor in the bankruptcy, but did not do so. Respondent's failure to avail himself of this relief does not warrant the extraordinary relief of now overlooking the condition precedent of the Bond and allowing a direct action against the surety.

In sum, the circuit court's answer to the certified question overlooks the forgoing facts and proposes an answer to the certified question that, in essence, unfairly rewards Respondent (and others like him) for sitting on his rights.

D. The circuit court's answer to the certified question overlooks substantial policy reasons for enforcement of the bond conditions.

By ignoring the Bond's conditions precedent, the circuit court's answer undermines a critical purpose behind the Bond's conditions. By way of illustration, *United States for Use and Benefit of Midland Loan Finance Company v. National Surety Corporation*, 309 U.S. 165, 60 S. Ct. 458 (1940) concerned a claim against an official bond for the alleged loss of mail due to the malfeasance of a postmaster. The Court found that the bond was part of a statutory scheme that did not either expressly or impliedly authorize a private action against the bond without the consent of the government:

Assuming the bond declared upon here is intended to cover the users of mail service, its beneficiaries are legion in comparison with the users of a court's depository. Moreover, the United States has a very substantial interest in a postmaster's bond. The statutory duties of a postmaster require him to act as a fiscal officer for the government at his office. He is responsible for postal savings deposits, money orders, stamps, and salary disbursements as well as for the property of the service, buildings, mail bags and other equipment. Such circumstances weigh against a holding that the Congress intended to let a private user of the mails, wronged by the principal of a postmaster's bond, sue wherever he might find defendants and gain for himself such priority on the bond as vigilance could obtain.

...

There are over 44,000 post offices under the Post Office Department and it is common knowledge that millions of items of mail go through them each year. It is rather obvious that numerous claims, many of them for small amounts, are likely to arise in the course of many transactions. Under the Department's regulations there is a fairly complete administrative formula for handling these claims from discovery to satisfaction. These facts, along with the substantial interest of the government in the bonds, convince us that the Congress intended that claims on the bonds would be handled through the government rather than through various suits by individuals

Id., 309 U.S. at 173-75, 60 S. Ct. at 462-63.

Similarly, in the case at bar, the Bond is required as part of a West Virginia statutory scheme regulating the license of mortgage lenders and brokers. West Virginia Code §§ 31-17-4(e)(3) and (f)(3) require that the Bond be filed with the Commissioner “*in favor of the state for the benefit of consumers or for a claim by the commissioner for an unpaid civil administrative penalty or an unpaid examination invoice*” W. Va. Code §§ 31-17-4(e)(3), (f)(3) (emphasis added).

The Bond language itself provides first that the surety “shall pay *to the State* and shall pay to *any such person or persons properly designated by the State* any and all moneys that become due or owing *to the State* or to such person or persons from said obligor in a suit brought *by the Commissioner on their behalf under and by virtue of the provisions of said Act*” (JA000039) (emphasis added). Then, in the next sentence, the Bond further provides for a mechanism by which other persons aggrieved by an obligor can make a claim against the Bond, once they have recovered a judgment and provided that the Commissioner of Banking consents thereto. (*Id.*)

By way of further example, West Virginia Code § 31-17-12 provides for the suspension or revocation of a mortgage broker or lender license. It further provides, in subsection (d), that:

In addition to the authority conferred under this section, the commissioner may impose a fine or penalty not exceeding \$2,000 upon any lender or broker required to be licensed under this article who the commissioner determines has violated

any of the provisions of this article. For the purposes of this section, each separate violation is subject to the fine or penalty provided in this section. Each day excluding Sundays and holidays, that an unlicensed person engages in the business or holds himself or herself out to the general public as a mortgage lender or broker is a separate violation.

W. Va. Code § 31-17-12(d).

Thus, West Virginia law provides for a statutory penalty of \$2,000.00 per violation for violations of the provisions of Chapter 31 of the West Virginia Code. The Commissioner of Banking thus has an interest in insuring that the statutorily-required bonds have assets available to satisfy fines that may be imposed, hence the reason that the Bond language first states it is for claims by the Commissioner for unpaid civil administrative penalties. To allow countless suits against mortgage lender or broker sureties without first obtaining the consent of the Commissioner would jeopardize the State of West Virginia's important interest in insuring that the bonds are not exhausted such that the State, as the primary obligee on the bonds, has no ability to recover any unpaid fines or assessments it may levy. There is, therefore, a substantial policy reason in enforcing the condition precedent of Commissioner consent in the Bond so that the Commissioner may track and keep account of claims against the Bond to insure its own interests and rights as the primary obligee are not impinged. Additionally, the conditions precedent of judgment and execution exist to ensure that an aggrieved party has attempted to collect and recover from the Bond principal so as not to prematurely deplete the Bond and prejudice other claimants in the event an aggrieved party can be made whole by the principal or its assignee or successor in interest.

Finally, if this Court were to accept Respondent's and the circuit court's position and allow for a direct action against sureties without the judgment expressly required by the Bond, then *Hartford v. Curtis* puts sureties like Petitioner at an unfair and severe disadvantage. In

Curtis, the surety, Hartford, argued that it should be entitled to assert defenses under W. Va. Code § 45-1-3. *Curtis*, 231 W. Va. at ---, 748 S.E.2d at 672. The *Curtis* respondents, represented by Mountain State Justice, argued that W. Va. Code § 45-1-3 did not apply because “obtaining a judgment . . . is the only requirement for collecting on a judgment bond.” *Id.* Ultimately, this Court upheld the holding of *State v. Myers*, 74 W. Va. 488, 82 S.E. 270 (1914), which created an exception such that W. Va. Code § 45-1-3 does not apply to judgment bonds. Therefore, reading the circuit court’s answer together with this Court’s decisions in *Curtis* and *Myers*, the surety would be conclusively bound by a judgment bond but arguably unable to assert the principal’s defenses when the consumer brings a direct action on the judgment bond.¹⁰

This inherent inequity, coupled with the fact that the circuit court’s answer actually encourages claimants to sit back during the principal’s bankruptcy and wait to bring a more convenient direct action against the surety, creates the perfect storm for sureties like Petitioner. Under this scenario, it can be reasonably expected that the increased risk associated with issuing lender/broker bonds in this state would drive up costs for everyone. This result should be rejected as against public policy.

VI. CONCLUSION

Based on all of the foregoing, the certified question should be amended to more accurately reflect the facts of this case. In that vein, Petitioner proposes the following amended certified question:

May a plaintiff maintain an action against a surety on the bond created by the West Virginia Commissioner of Banking pursuant to the authority in W. Va. Code § 31-17-4 without first recovering a judgment against the principal on the bond,

¹⁰ Though not addressed in the certified question, it is imperative for this Court to also address certain practical concerns that would arise from the Court’s ruling. For example, if this Court were to accept the circuit court’s answer and read out of the Bond the condition precedent requiring a judgment—thereby essentially eradicating its status as a judgment bond—would sureties then be permitted to assert statutory (such as W. Va. Code § 45-1-3) and common law defenses, much as they would in a performance bond scenario?

when a judgment against the principal is an express condition precedent under such bond, but when: (1) the bond principal has filed a bankruptcy case and the plaintiff's claim against the principal is subject to (a) the stay under 11 U.S.C. § 362, or (b) the discharge injunction under 11 U.S.C. § 524, or (c) a confirmed Chapter 11 plan; and/or (2) the plaintiff has obtained a settlement or judgment against the assignee or successor-in-interest to the bond principal based on the same claims asserted in support of the claims against the surety?

Petitioner respectfully requests that this Court answer the foregoing question in the negative, as follows:

NO. The terms and conditions of the judgment bond were prescribed by the Commissioner of Banking pursuant to the authority and discretion expressly granted by W. Va. Code § 31-17-4 and should be enforced as written. Even where a principal has filed for bankruptcy, a claimant has the opportunity to obtain relief against the principal pursuant to the bankruptcy or he can obtain relief for the principal's alleged wrongdoing via an assignee or successor-in-interest. Because the claimant has the ability to obtain relief for the principal's alleged wrongdoing outside of a direct action against the surety, the condition precedent of the judgment bond does not operate to the detriment of claimants.

Furthermore, in the event that this Court does not amend the certified question as requested herein, Petitioner respectfully requests that this Court nonetheless answer the original question certified by the circuit court in the negative, as specified above.

Submitted this 31st day of January, 2014.

**FIDELITY AND DEPOSIT COMPANY
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-1179

Fidelity and Deposit Company of Maryland,

Defendant Below / Petitioner,

v.

**(CIVIL ACTION NO. 13-C-4
Judge Christopher C. Wilkes)**

Franklin W. James, Jr.,

Plaintiff Below / Respondent.

CERTIFICATE OF SERVICE

I, Erin J. Webb, counsel for Petitioner Fidelity and Deposit Company of Maryland, do hereby certify that the foregoing *Petitioner's Brief* has been served upon the following counsel of record as indicated below on this the 31st day of January, 2014:

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