

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 REPLY BRIEF

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I. ARGUMENT

A. Respondent's argument regarding joint and several liability and, in turn, direct liability ignores the clear conditions of the subject Bond and is premised on law not specific to judgment bonds.

Respondent's argument that Petitioner, as the surety, is jointly and severally liable and that he can maintain this claim directly against Petitioner ignores the specific language of the Bond, relies upon case law not applicable to judgment bonds, and ignores the application of this Court's decision in *Hartford Fire Insurance Company v. Curtis*, 231 W. Va. 596, 748 S.E.2d 662 (2013). While the Bond includes the words "jointly and severally liable" in the opening lines, that liability is expressly conditioned upon the remaining terms of the Bond. (JA000039). As this Court held in *Curtis*, the specific bond at issue in this civil action is a judgment bond. *Curtis*, 231 W. Va. at ---, 748 S.E.2d at 669-70. The key condition of the Bond is that the aggrieved person must first have obtained a judgment against the principal. *See id.* Therefore, the Bond language itself only creates joint and several liability for a judgment rendered against the principal. The Bond not only conditions this joint and several liability on obtaining a judgment, but also requires that an execution be issued on that judgment and that Respondent obtain consent from the Commissioner of Banking before maintaining an action on the Bond. (JA000039).

In support of the argument that he can maintain a direct action on the Bond without first obtaining the requisite judgment, Respondent relies on general suretyship law principles, citing several cases from West Virginia and other jurisdictions—none of which involve judgment bonds. (Resp. Brief at pp. 11-13, 15) (citing cases dealing with performance bonds or personal guarantees rather than judgment bonds). These general suretyship principles do not control since "[l]iability of a surety is generally measured by his or her contract or bond." *Curtis*, 231 W.

Va. at ---, 748 S.E.2d. at 668. Moreover, judgment bonds are different than performance bonds because, in a judgment bond, the surety agrees and obligates itself to be liable for a judgment only. *See id.* at 668-69.¹

In fact, *Gateway Communications, Inc. v. John R. Hess, Inc.*, 208 W. Va. 505, 541 S.E.2d 595 (2000), cited by Respondent, actually supports Petitioner's position. In that case, this Court emphasized:

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). With these principles in mind, this Court held that the surety was not liable under the performance bond based on the specific contractual language of the bond at issue. Therefore, the language of the bond controlled the surety's liability, not its status as a surety.

Here, the Bond is a judgment bond with a judgment against the principal being a prerequisite to maintaining an action on the Bond against the surety. As this Court recognized in *Curtis*, under the Bond, the surety only "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." *Curtis*, 231 W. Va. at ---, 748 S.E.2d. at 670. 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." *Id.* at ---, 670. Since the liability of the surety is measured by the terms of the Bond, which expressly require a judgment as a condition of

¹ Respondent relies on similarly inapplicable cases in footnote 5 of his brief, asserting that "courts have recognized that the bankruptcy of the principal does not discharge the surety from liability because the purpose of the surety is to protect a party from a bankrupt and judgment proof principal." (Resp. Brief at p. 14, fn. 5.) The cases Respondent cited therein deal with appeal bonds and therefore do not have the same critical condition precedent as a judgment bond—that is, a *judgment* against the principal. In cases such as these, where a judgment is not a condition precedent to recovery under the bond, courts can be understandably more lenient regarding, or dismissive of, the effects of a principal's bankruptcy on the liability of the surety.

recovery, a judgment is the sole event that triggers Petitioner's liability under the Bond. *See Curtis*, 231 W. Va. at ---, 748 S.E.2d at 668-70. *See also State v. Nutter*, 44 W. Va. 385, 30 S.E. 67, 69 (1898) (stating that the "judgment is the event on the happening of which the surety agrees to pay"); *State v. Myers*, 74 W. Va. 488, 82 S.E.270, 272 (1914) (the surety on a judgment bond "has expressly stipulated that [a judgment or fine against the principal] shall be the condition of his bond; it is the very thing which he has agreed to pay"); *In re Microwave Prods. of Am. Inc.*, 118 B.R. 566, 570 (W.D. Tenn. 1990); *State ex rel. Duckett v. Pettee*, 273 S.E.2d 317, 319 (N.C. 1980). Because Respondent has not obtained the mandatory judgment, he should not be permitted to maintain an action on the Bond.²

Respondent further relies upon several decisions from West Virginia circuit courts and at least one federal district court for support of a direct action against Petitioner. (Resp. Brief at pp. 12, 17.) However, these cases were decided before this Court, in *Curtis*, declared the subject Bond to be a judgment bond, and they also mistakenly relied upon general surety law principles rather than enforcing the unambiguous terms of the Bond. Additionally, many of these courts mistakenly held that the surety had drafted the bond and that it was to be construed against the surety. *See Curtis*, 231 W. Va. at ---, 748 S.E.2d at 678 fn.7 (acknowledging that Hartford did not draft the bond and the bond was issued on mandatory form prepared by the Commissioner of Banking). Because these other court cases were decided before *Curtis* and rely on general surety law not applicable to this judgment bond, this Court should disregard those decisions and reject the circuit court's answer to the certified question here. Instead, this Court should enforce the plain terms of the Bond.

² Respondent cites *Howze v. Surety Corp. of Am.*, 584 S.W.2d 263, 265 (Tex. 1979), (*see* Resp. Brief at pp. 13, 15), as authority to support a direct action against the surety without a judgment. However, *Howze* provides that in such instance the surety and the principal can be sued together in the same action. Even if this is the case under the Bond, Respondent has not sued TBW along with Petitioner in this case.

In proposing that claimants may maintain direct actions against sureties under the subject Bond 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. Respondent cherry picks language from West Virginia Code § 31-17-4(e)(3) to create an overstated legislative intent that is not actually evidenced by the statute or supported by legislative history.

The "legislative mandate" requiring the Bond is found at West Virginia Code § 31-17-4(e)(3). In his brief, Respondent continually emphasizes the general phrase "for the benefit of consumers" embedded in the opening lines of § 31-17-4(e)(3) to the exclusion of other, more specific language appearing later in § 31-17-4(e)(3).

Specifically, Respondent ignores that part of the legislative mandate that gives the Commissioner of Banking unilateral and unbridled discretion and authority to prescribe the terms and conditions of the mandated bond. *See* § 31-17-4(e)(3) (specifically mandating the bond "in a form and with conditions as the commissioner may prescribe . . .").³ Those terms and conditions prescribed by the Commissioner in his sole authority included, with regard to the subject Bond, a clear prerequisite of obtaining judgment against the principal. (JA000039.) The plain language of the subject Bond, prescribed in strict conformity with the express authority granted in the statute, cannot be ignored or overlooked.

³ Respondent relies heavily on *Becker v. Four Points Inv. Corp.*, 708 N.E.2d 29 (Ind. App. 1999) for its holding that "a consumer could file suit directly against a mortgage broker surety when the broker was defunct." (Resp. Brief at p. 18.) However, the Indiana statute mandating the bond at issue in *Becker* is missing the express grant of authority to the Commissioner to prescribe the terms of the mandated bond that is contained in the West Virginia statute. *See* Ind. Code § 23-2-5-5(d). The Indiana statute and, in turn, *Becker* are critically distinguishable for that reason. Additionally, the court in *Becker* indicated an interest in protecting consumers "who are harmed by a loan broker and have no other recourse due to a loan broker's inability to pay due damages to bankruptcy, dissolution or other events." *Becker*, 708 N.E.2d at 31 (emphasis added). This policy interest is inapplicable here, where Respondent had the opportunity to obtain, and in fact has obtained, relief for TBW's alleged wrongdoing. (*See* Pet. Brief at pp. 21-25; *see also* Argument Section C herein, *infra*, addressing Respondent's claim that he did not sit on his rights).

Yet Respondent argues that “neither Fidelity nor the Division of Banking may contravene the clear intent of the West Virginia Legislature through reference to the language of the bond.” (Resp. Brief at p. 17.) In support of this argument, Respondent cited several foreign cases standing for the general proposition that a bond should be construed in conformity with its legislative mandate. (*Id.* at pp. 17-18.) However, the language of the Bond cannot contravene the “clear intent” of the legislature where the legislature specifically granted the Commissioner the express authority to devise the very language Respondent claims contravenes the legislature’s intent. Respondent is essentially arguing that the legislature enacted law in contravention of its true intent, which is completely disingenuous.

A more plausible explanation is that Respondent is overstating the legislative intent. Other than referring to West Virginia Code § 31-17-4(e)(3)’s general statement that the bond is required for the “benefit of consumers,” there is no documented legislative history actually evidencing the purpose behind the inclusion of this general, introductory language, or its intended effect or scope.⁴ Respondent’s characterization of the legislature’s benevolent intent is unsupported conjecture, especially where it requires this Court to overlook or undermine other specific language contained in the legislative mandate.⁵

⁴ There is also no proof that the Bond as drafted does not protect consumers, or that it operates to their detriment. For example, even in cases where the lender files for bankruptcy, the same does not automatically preclude relief against the lender. A claimant can file a proof of claim to preserve his or her claim, file an adversary proceeding, or move to have the automatic stay lifted to pursue a state court action. Furthermore, a claimant also has the ability to obtain relief against parties, other than the lender or the surety, who are alleged to have engaged in common misconduct with the lender and/or have joint liability for the lender’s alleged wrongdoing. This is precisely the scenario in this case. Respondent cannot show that the Bond has operated to his detriment, as he had the opportunity to obtain, and in fact has obtained, relief for TBW’s alleged wrongdoing. (*See* Argument Section C herein, *infra*; *see also* Pet. Brief at pp. 21-25.)

⁵ Respondent also overlooks the fact that the right of action authorized in W. Va. Code § 31-17-17 does not apply to sureties; rather, such claims are properly brought against lenders or brokers. If the parties are reduced to surmising about legislative intent, then it can just as easily be argued that § 31-17-17 evidences the legislature’s intent that sureties not be directly liable for violations under the Act.

In sum, Respondent's and the circuit court's position requires the 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 record plainly shows that Respondent had knowledge of the facts giving rise to his claims against TBW before TBW's bankruptcy began, yet sat on his rights, which should not be rewarded.

Respondent maintains that he had no ability to obtain relief for the alleged misconduct of the lender, TBW, because TBW's Chapter 11 plan was confirmed "well before Mr. James discovered the facts underlying his legal claims." (Resp. Brief at p. 21.) However, Respondent's own Complaint discredits this argument. (JA000001-9.)

On their face, the facts alleged in Respondent's Complaint and forming the basis of his legal claims were apparent to Respondent at the time they allegedly occurred (i.e. in late 2008 or early 2009, well before TBW even filed for bankruptcy, let alone before its Chapter 11 plan was confirmed years later). These facts include the following:

- In Paragraph 11(b), Respondent alleged that "Defendant never provided to the Plaintiff written disclosure of the brokering agreement, charges or a brokering agreement with the right to cancel." (JA000003.) Not receiving this key document would have been apparent to Respondent at the time. That is, a person would know whether he receives something or not at the time of receipt (or lack thereof), not years later.
- In Paragraph 13, Respondent alleged that "[n]o copy of the appraisal was ever provided to the Plaintiff." (JA000003.) Again, Respondent would have known at the time whether or not he received this key document, not years later.
- In Paragraph 16, Respondent alleged that "[n]otwithstanding the agreed upon sales price, the lender set the contract purchase price at \$151,000, not \$145,000 . . ." (JA000004.) As a party to the contract, this would have been apparent to Respondent immediately at the time a price was allegedly set different than that to which he had agreed.
- In Paragraphs 19 and 20, Respondent alleged that "[w]ithin a few short months of closing this loan, the lender force-placed insurance, misrepresenting to Plaintiff that Plaintiff did not have hazard insurance in place. Plaintiff complained and sent copies of the HUD1 settlement statement showing that \$60.05 had been paid outside of closing and \$630.72 was paid at the closing to Plaintiff insurer, Allstate Insurance." (JA000004) (emphasis

added). As emphasized above, the force-placed insurance was apparent to Respondent at the time because he complained about it. This allegedly occurred, and therefore was apparent to Respondent, admittedly just “a few short months” after closing the loan.

- In Paragraph 21, Respondent alleged that “Defendant Servicer obtained servicing rights in the loan *around this time* and continued to charge Plaintiff for this force-placed insurance, even though Plaintiff had in place from the date of closing a hazard insurance policy meeting the requirements of the lender and even though *Plaintiff so informed the Servicer.*” (JA000004) (emphasis added). As emphasized above, Respondent had knowledge of these events at the time they were happening (i.e. that he allegedly had in place his own insurance and that the servicer was allegedly force-placing insurance). The nature of these facts is not latent, but rather would be fully known to Respondent at the critical time. Respondent was so aware of these events that he even purportedly informed the servicer of his own alleged insurance policy.

As shown above, not only were these facts clearly apparent to Respondent at the time they occurred, but they obviously also raised red flags in Respondent’s mind, as he had complained about or reacted to certain of the alleged acts at the time they were occurring. Thus, once Respondent learned of TBW’s bankruptcy filing (*see* JA000208-09, establishing notice to all unknown creditors), 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. (*See* Pet. Brief at pp. 8, 24-25.) Respondent could have taken any of these steps because he had knowledge *at that time* of the above facts forming the basis of his claims.

Furthermore, Respondent’s counsel’s argument that taking these steps is too difficult for a “poor” and/or “unsophisticated” consumer such as Respondent both overcomplicates Respondent’s role in securing representation and oversimplifies Respondent’s own intelligence. (*See* Resp. Brief at pp. 2, 9, 22.) It would have been no more difficult for Respondent to call a lawyer to intervene on his behalf in TBW’s bankruptcy than it was for Respondent to call a lawyer to bring the instant suit. In both scenarios, representation is a phone call away.

Additionally, Respondent continues to gloss over the fact that he has, in fact, obtained relief for TBW’s alleged wrongdoing. Respondent attempts to refute this fact by arguing that

there was separate wrongdoing by Bank of America and TBW resulting in separate injuries to Respondent, such that the Bank of America settlement does not provide him with complete relief. (*Id.* at pp. 23-24.) This argument is squarely discredited, however, by Respondent's own Complaint.

Specifically, Respondent argues that "Count IV arises from a separate injury to Mr. James that does not involve the misconduct of TBW. [Bank of America]'s settlement relates to this separate misconduct." (*Id.* at p. 24.) Respondent paints his claims in black and white, with Bank of America liable for force-placing insurance and TBW for the loan origination. (*Id.*) What Respondent glosses over is the fact that undeniably Count III and arguably Count II of his Complaint alleged *common misconduct* against *both* TBW and Bank of America. (JA000006-8.) Indeed, Count III, entitled "Illegal Loan (Lender, Holder, Servicer)," unquestionably deals with the loan origination and pleads common misconduct by TBW, Bank of America and the holder.⁶ (JA000007-8.) Thus, it is impossible to assert that Bank of America's settlement with Respondent only compensated Respondent for misconduct committed by Bank of America alone or that it did not in any way relate to the origination claims.

Because the circuit court's answer to the certified question 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 as Respondent has done here, this Court should reject it.

⁶ In fact, in his written response in opposition to Bank of America's partial motion to dismiss filed in the case below, Respondent asserted that "Plaintiff has established that Defendant [Bank of America] takes liability to the origination claims pursuant to its role as assignee or successor." Accordingly, Respondent has expressly admitted its position that Bank of America shares liability with TBW for the loan origination.

D. Notwithstanding that a new bond form has recently been approved, and though this Court may adopt the SFAA's position *going forward*, the parties here must abide by the express conditions of the Bond at issue.

Respondent mischaracterizes the new bond form approved in June 2012 as a “clarification.” Specifically, he asserts that “the Commissioner of Banking has issued a bond form *clarifying* that neither her assent nor a judgment against the principal is required to pursue claims against the bond.” (Resp. Brief at p. 25) (emphasis added). This is misleading, as the new bond form is simply that—new. It does not alter, amend, clarify, or otherwise retroactively affect bonds in place under the prior form. Thus, notwithstanding the fact a new bond form has recently been approved, the bottom line in this case remains that the parties are not governed by the new bond form, but rather by the 2001 Bond actually in effect at the time of the events at issue. The subject 2001 Bond expressly requires a judgment before maintaining an action on the Bond. (See Pet. Brief at pp. 20-21 fn. 8; JA000039.) As long as there are outstanding bonds issued on the old form, 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).

This Court should properly reject the circuit court's answer by applying the controlling authority, *Hartford Fire Insurance Company v. Curtis*, holding that the subject Bond is a judgment bond under which Respondent may not recover unless and until he or she obtains a judgment against the principal. In which case, Petitioner is not permitted to raise the defenses of its principal under W. Va. Code § 45-1-3. See *Curtis*, 231 W. Va. at ---, 748 S.E.2d at 672-73. It is for this reason that the condition precedent of a judgment is so critical. Alternatively, if this Court adopts the Surety & Fidelity Association of America's (SFAA's) position, overturning *Curtis* and ruling that the mandated mortgage lender and broker bonds are compliance bonds,

sureties should be free to assert the statutory and common law defenses of their principals. However, if the Court adopts SFAA's position, Petitioner submits that it should do so prospectively, as *Curtis* was the controlling authority at the time the parties' rights were being decided in this case.

II. CONCLUSION

Based on the arguments previously set forth in Petitioner's Brief and as further discussed herein, 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, 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:

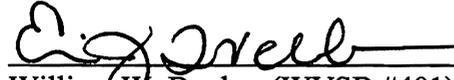
NO. The terms and conditions of the judgment bond were prescribed by the Commissioner of Banking pursuant to the authority and discretion expressly granted by W. Va. Code § 31-17-4 and should be enforced as written. Even where a principal has filed for bankruptcy, a claimant has the opportunity to obtain 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 18th day of March, 2014.

**FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,**

By Counsel,

A handwritten signature in black ink, appearing to read "W. Booker", is written over a horizontal line.

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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 Reply Brief* has been served upon the following counsel of record as indicated below on this the 18th day of March, 2014:

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