WILLIAMS KASTNER™

SURETY LAW UPDATE

SPRING 2018

Williams Kastner has been serving clients in the Pacific Northwest since our Seattle office opened in 1929. With more than 60 attorneys in offices in Washington, Oregon and Alaska and affiliated offices in China we offer global capabilities and vision with a local sensibility. We are attorneys, paralegals, litigation assistants and support staff dedicated to advancing the business and personal objectives of our clients. We are focused on building bridges—combining wisdom and creativity—both in and out of the courtroom and boardroom.

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WILLIAMS KASTNER'S CONSTRUCTION AND SURETY TEAM HAS CAPABILITIES BEYOND WASHINGTON

Our Surety Team has attorneys who practice in both Washington and Oregon in our Seattle and Portland offices. These lawyers are well-versed in the surety laws in these states and understand the business needs of our clients.

STEVEN CADE
Portland Office

MEREDITH DISHAW
Seattle Office

These attorneys are admitted to practice in the following states/courts: Washington, Oregon, U.S. District Court (Western Washington), U.S. District Court (Eastern Washington), U.S. District Court (Oregon); U.S. Court of Appeals for the Ninth District

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PROPOSED AMENDMENT TO THE WASHINGTON PUBLIC WORKS STATUTE

by: William T. Hansen

In early 2018, Senate Bill 6428 and its counterpart, House Bill 2852, were introduced for consideration amending RCW 39.04.240, which provides for the awarding of attorney fees for an action arising out of a public works' project. The introduction of both SB 6428 and HB 2852 is an apparent response to the Washington State Supreme Court's holding in *King Cty. v. Vinci Constr. Grands Projets/Parsons RCI/Frontier-Kemper, JV*, 188 Wn.2d 618, 398 P.3d 1093 (2017), that attorney fees and costs were recoverable against the surety notwithstanding the claimant's failure to comply with the provisions of RCW 39.04.240.

The obligee on a performance bond and a claimant on a payment bond have numerous avenues supporting claims for reasonable attorney fees and costs against the surety. Current avenues for attorney fees include: (1) statutory fees; (2) fees provided under the bond itself; (3) fees provided by the Unfair Claims Handling Practices Act; and (4) claims supported by the equitable considerations in *Olympic Steamship* incurred in connection with coverage issues.

SB 6428 and HB 2852 limit the ability of a claimant to recover attorney fees and costs as authorized by *Olympic Steamship* and the Unfair Claims Handling Practices Act. In essence, if your claim for fees falls under either category, you must now follow the Offer of Settlement process set forth in RCW 4.84.250 through 4.84.280 which specifically requires a claimant to serve an Offer of Settlement within a designated period.

Neither of the proposed Bills sets a limit as to the amount of recoverable attorney fees and costs against the surety; rather, the proposed amendment merely requires that a claimant pursuing fees and costs supported by *Olympic Steamship* or the Unfair Claims Practices Act must follow the procedural requirements set forth above. A claimant pursuing attorney fees and costs authorized by statute (RCW 39.08 and RCW 60.28) and/or when authorized by the terms of the bond, is not required to follow the procedures outlined in Chapter 4.84 RCW. Candidly, the proposed amendment does not sufficiently reduce the availability of attorney fees and costs to a prevailing claimant. The proposed amendment would have more impact if the procedural requirements set forth in Chapter 4.84 RCW were also a precondition to claims for attorney fees and costs based upon statute and/or the bond language.

Currently, SB 6428 and HB 2852 are stalled in their respective legislative committees and, with the completion of this year's legislative session, neither Bill passed out of their respective committees. As always, the Surety and Construction Team at Williams Kastner will be tracking the progress of each Bill, as well as any other developments affecting the surety and construction industries.

WASHINGTON COURT OF APPEALS DISMISSES OREGON CONTRACTOR'S LAWSUIT FOR FAILURE TO SUBSTANTIALLY COMPLY WITH CONTRACTOR REGISTRATION REQUIREMENTS

by: Paul K. Friedrich

In a recent unpublished opinion, in *HNS, Inc., v. Eagle Rock Quarry*, No. 34695-1-III, 2018 WL 1617071, (Wash. Ct. App. Apr. 3, 2018), Division Three of the Washington Court of Appeals dismissed an Oregon contractor's lawsuit against a Washington contractor, and its license bond, because the Oregon contractor failed to substantially comply with the requirements of Washington's Contractor Registration Act, RCW 18.27, which is a prerequisite to filing suit.

HNS, Inc. ("HNS"), an Oregon contractor, with its principal place of business in La Grande, Oregon, agreed to blast, crush, and stockpile gravel for Eagle Rock Quarry, Inc. ("Eagle Rock"), a Washington contractor, at a quarry in Mesa, Washington. Although Eagle Rock made a number of payments, it stopped paying in September 2015. In January 2016, HNS sued Eagle Rock and its license bond for the amount owed under the parties' agreement.

Eagle Rock moved the trial court to dismiss HNS's complaint on the basis that HNS was a contractor doing business in Washington but was not registered under RCW 18.27.080 – a prerequisite for filing suit. The trial court granted Eagle Rock's motion to dismiss the complaint on the basis that HNS was not duly registered as required under RCW 18.27.

RCW 18.27 requires every contractor engaging or offering to engage in services in Washington to register with the Department of Labor and Industries ("L&I"). In any action to collect compensation for work or to enforce a contract, a contractor must "alleg[e] and prov[e] that he or she was a duly registered contractor and held a current and valid certificate of registration at the time he or she contracted for the performance of such work or entered into such contract." See RCW 18.27.080. In order to substantially comply with RCW 18.27.080, a contractor must:

1. Have on file with L&I the registration information prescribed in RCW 18.27.030,

2. Have at all times, in force, a current bond or surety as required by RCW 18.27.040, and

3. Have at all times, in force, current insurance as required by RCW 18.27.050.

In determining whether a contractor is in substantial compliance with the registration requirements, the court shall take into consideration the length of time during which the contractor did not hold a valid certificate of registration. See RCW 18.27.080.

HNS had formerly been licensed in Washington, but failed to renew its license in 2010. The Court stated that by virtue of its previous registration, L&I likely had on file much, but not all, of the information required by RCW 18.27.030. However, the Court found that HNS's Oregon license bond did not qualify as a bond required by RCW 18.27.040 because it named the State of Oregon, as obligee. RCW 18.27.040 requires the contractor's bond to name the State of Washington, as obligee.

Further, HNS could not demonstrate that it possessed insurance as required by RCW 18.27.050 because it provided only premium notices, rather than a copy of the policy, or other evidence that the insurance in place covered its operations with Eagle Rock in Washington.

Accordingly, while sympathetic to HNS's situation, the Court found that HNS did not substantially comply with RCW 18.27.080 in the manner required to avail itself of access to Washington courts, and affirmed the trial court's dismissal of its lawsuit against Eagle Rock and its license bond surety. This case emphasizes the importance of strict compliance with the Washington's Contractor Registration Act for both in-state and out-of-state contractors and provides surety professionals with possible defenses to claims against license and contract bonds.

WASHINGTON/OREGON DOCTRINE OF EQUITABLE SUBROGATION: ARE INDEMNITY AGREEMENTS NECESSARY?

by: Paul K. Friedrich, Steven F. Cade and Jeff H. Yusen

In recent years, some sureties have waived the need for a signed indemnity agreement usually for smaller, commercial bond accounts. This decision usually is based on underwriting and business considerations designed to make the bonding process easier for the producing agent. This article briefly discusses considerations of this industry movement and the reliance on the doctrine of equitable subrogation for recovery of the surety's loss, costs and expenses.

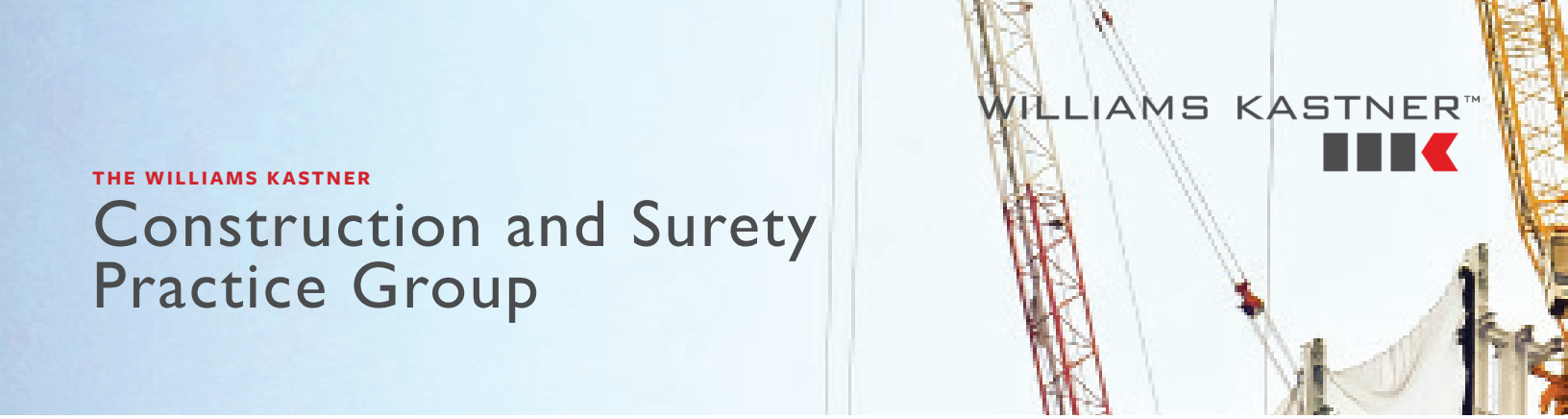
Both Washington and Oregon recognize the common law right of equitable subrogation where the surety "steps into the shoes" of its principal should a payment be made from the bond. In such cases, Washington courts have held that an "implied promise to indemnify or reimburse the surety comes into being on part of the principal, which implied obligation, as such, is enforceable by the surety against the principal". See *Leuning v. Hill*, 79 Wn.2d 396, 486 P.2d 87 (1971). Oregon courts describe such subrogation as an equitable device used "to compel ultimate discharge of a debt by the person who in equity and good conscience ought to pay it." *Maine Bonding v. Centennial Ins.* Co., 298 Or 514, 521, 693 P2d 1296 (1985); *see also Ochoco Lumber Co. v. Fibrex & Shipping Co., Inc.*, 164 Or App 769, 994 P.2d 793 (2000) (equitable subrogation applies to sureties as well as issuers of standby letters of credit). Indeed, this common law equitable right has been codified in Washington under RCW 19.72.070. Oregon's statute applies only when a surety is subject to a judgment severally with the principal. ORS 18.242. It must be noted, however, that equitable and statutory rights, are largely ineffective when the surety's principal is a corporate entity that is defunct and/or without assets. From a practical standpoint, without individual indemnity, the surety's subrogation and indemnity rights are severely limited. Although our numbers are anecdotal, we estimate that more than 50% of the commercial bonds executed under the Washington State Contractor's Registration Act involve corporate entities and, therefore, equitable or statutory subrogation is not a viable mechanism to mitigate loss.

Furthermore, under equitable subrogation, the surety does not have a separate contractual right to recover attorney's fees and costs. Finally, there is case law in the insurance context which may limit the surety's ability to enforce its equitable subrogation rights until the claimant has been fully com-

pensated on its claim. See *British Columbia Ministry of Health v. Homewood*, 93 Wash.App. 702, 712, 970 P.2nd 381, 386 (1999), *and State, by and Through Healy v. Smither,* 290 Or 827 (1981) (defrauded client's judgment against the principal had priority over the judgment of the subrogated surety).

Because equitable subrogation is less effective than contractual indemnity, we often attempt to secure an assignment of judgment in exchange for the surety's payment. The assignment of judgment, however, only secures the surety to the extent of the bond payment and does not include the surety's claims for attorney's fees and costs. Like statutory or equitable subrogation, an assignment of judgment has little value when secured against a defunct corporate entity.

We recognize that the surety industry is competitive and there is a temptation to waive the requirement for contractual indemnity to encourage producing brokers and agents to write business. As an alternative, many states authorize electronic signatures on contracts and the use of an electronic signature may expedite the bond application process for producing brokers and agents. *See* the Washington Electronic Authentication Act, RCW 19.34 *et seq, and* the Uniform Electronic Transaction Act, ORS 84.001 to 84.061. The purpose of this article is to clarify the practical limitations of "equitable subrogation" and note that it is not a viable substitute for contractual indemnity.



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