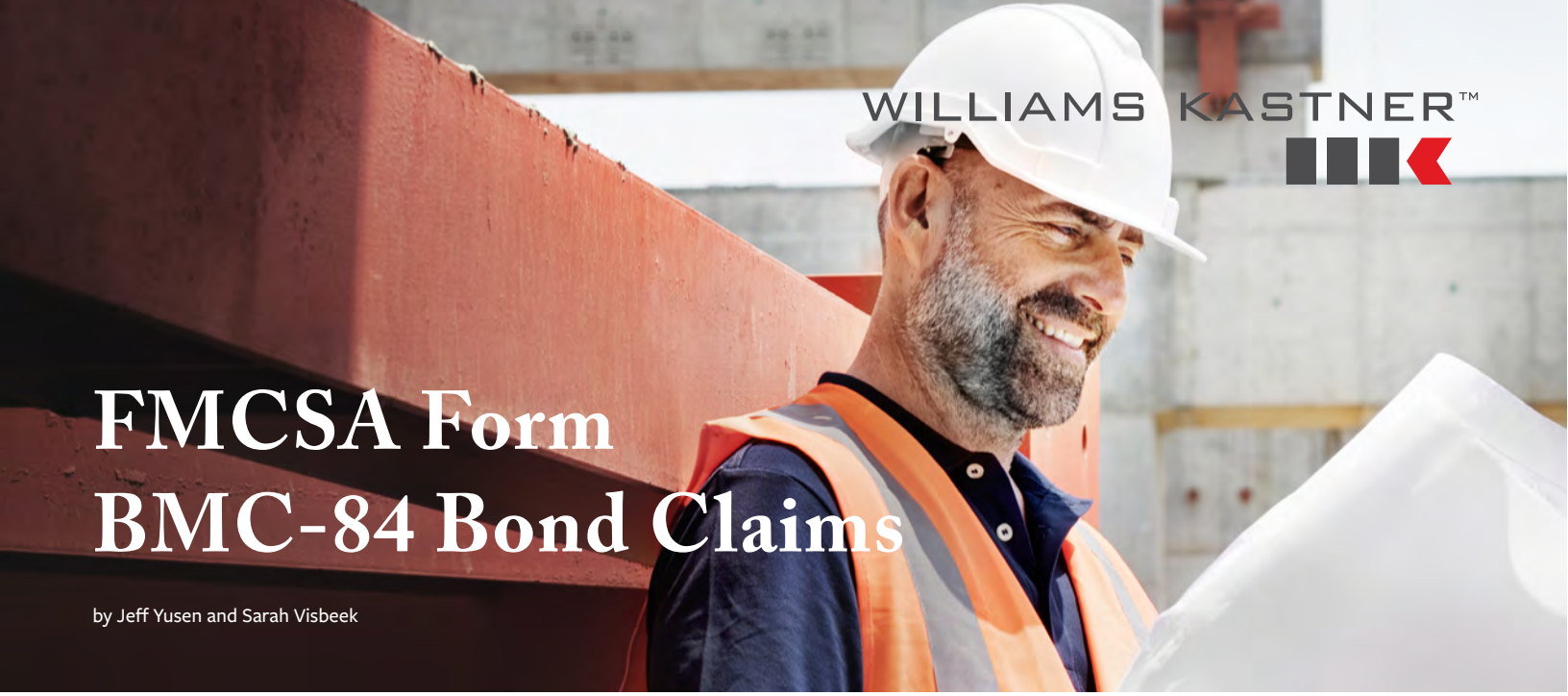

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FMCSA Form BMC-84 Bond Claims

by Jeff Yusen and Sarah Visbeek

In October 2013, Public Law 112-141 (commonly known as "Moving Ahead for Progress in the 21st Century Act" or "MAP-21") went into effect under the auspices of the Federal Motor Carriers Safety Administration (FMCSA) which, among other things, increased the security requirement for Freight Forwarders and Freight Broker from $10,000.00 to $75,000.00. See 49 U.S.C.A 13906 (b) (3). Under the statute, Brokers are required to provide minimum security to protect the public with whom they contract, mainly carriers and transportation companies. What follows is a brief discussion of the statute and a proposed rough guideline for evaluating and paying claims under the FMCSA Form BMC-84 Bond.

In general, 49 U.S.C.A. 13501 establishes jurisdiction for the Secretary of Transportation and the Board over transportation and the procurement of that transportation in interstate commerce. Various exemptions from such jurisdiction are set forth under Sections 13502 through 13508 with the surety needing to pay particular attention to the miscellaneous exemptions of Section 13506. Chapter 139 of Title 49 U.S.C.A. pertains to registration requirements for freight forwarders (Section 13903) and brokers (Section 13904), among others. Section 13906 is of particular interest to the surety in that it is the enabling provision for the security requirement for registered carriers, freight forwarders and brokers. Broker financial security requirements are found under 49 U.S.C.A 13906 (b) and require a broker to provide security either in the form of a bond (FMCSA Form BMC-84 Bond) or in the form of a financial trust fund (FMCSA Form BMC-85) (such as a cash deposit through an approved financial institution) or other approved financial security. See 49 U.S.C.A. 13906 (b) (1) (B and C). Note that claims through the trust fund agreement are adjusted through the Federal Services Corporation (FSC) which is an entity authorized by the FMCSA to handle and adjust claims for the financial institution. The focus of this discussion, however, is on the surety bond authorized by Section 13906.

Both clearly would authorize a pro-rata payment should the value of valid claims exceed the amount available or remaining amount available on the bond.

As indicated above, Section 13906 requires brokers to provide financial security and authorizes the security to be in the form of a surety bond with an approved company in the amount of $75,000.00. 49 U.S.C.A. 13906 (b) (3). The statute also sets out a rough scope of financial responsibility and methodology for the assessment and payment of claims under the bond. For purposes of claim handling there appear to be two separate scenarios which roughly track each other but are sufficiently different to require discussion. Which scenario applies depends on whether or not there has been a finding by the surety of financial failure or insolvency by the broker.

Scenario A: Where no finding of a broker's financial failure or insolvency has occurred, the surety will follow requirements of financial responsibility found under Section 13906 (b) (2) (A –C). Under these provisions, the bond is available to a claimant for the broker's failure to pay "...freight charges under its contracts, agreements, or arrangements for transportation..." if (1) the broker consents to payment, (2) the broker fails to respond to the notice of claim and the surety determines that the claim is valid or (3) the claim is not resolved within a "reasonable" period of time following a "reasonable" attempt and the claim is reduced to a judgment. See U.S.C.A. 13906 (b) (2) (A) (i-iii). If the surety receives notice of a claim under subparagraph (A) then subparagraph (B) requires that the surety will respond to the claim within thirty days of receipt and, in the case of a denial, deny the claim in writing setting forth the grounds for the denial. See U.S.C.A. 13906 (b) (2) (B). Subparagraph (C) authorizes an award of reasonable costs and attorney's fees to the prevailing party of a claim brought under subparagraph (A) presumably in the form of a lawsuit. It is important to note that the surety has 30 days to adjust any claim received under subparagraph (A) and should respond in writing with a confirmation of receipt, denial or payment.

Scenario B: In the event of the broker's financial failure or insolvency, a different set of obligations are established under 49 U.S.C.A. 13906 (b) (6) and the surety is required to cancel the bond in the manner and form required under the statute, publicly advertise for claims for a period of 60 days commencing on the date of publication of the cancellation notice on the DOT website and proceed with payment in full or on a pro-rata basis of uncontested claims within 30 days of the expiry of the 60 day window available for the submission of claims.

As can be seen, there is a distinct difference in the method of claims handling by the surety for claims involving or not involving the financial failure or insolvency of a broker. With both scenarios, however, certain factors for evaluating the claims remain the same and both clearly would authorize a pro-rata payment should the value of valid claims exceed the amount available or remaining amount available on the bond.

In evaluating the claims, the surety should weigh several factors of the claim including but not limited to:

(1) Whether or not the claim accrued during the effective dates of the bond;

(2) Whether or not the property hauled is subject to exemption under 49 U.S.C.A. 13506 (or any other exemption provision under Subchapter 135);
(3) Whether or not the claim involved an "interstate" haul versus and "intrastate" haul;
(4) Whether or not the broker has or has not had a "reasonable" period of time to resolve the claim (based on the underlying contract between the claimant and the broker); and
(5) Whether or not the broker has experienced a "financial failure or insolvency".

If there is a basis for denial of a claim, the denial should be sent to the claimant in writing along with the basis for the denial. Otherwise, the surety will need to move forward with payment on the bond according to one of the two scenarios described above and within the timeframe indicated by the statute. While a case can be made for the surety to make its payments by way of a statutory or rule interpleader, the cheaper and more efficient manner in which to make payment on the bond appears to be through a direct payment by check (with the appropriate release) either of the full amount of the claim or a pro-rata portion of the claim.

The exemption provisions of Subchapter 135 (and in particular, Section 13506 which sets forth miscellaneous exemptions) should be reviewed in connection with each claim. Examples of exempt commodities that would not be subject to a bond claim include "ordinary livestock", "agricultural or horticultural commodities (other than manufactured products thereof)" and decorative rock and wood chips. There are a number of other exemptions listed so familiarization with the exemptions in the section is recommended.

There are a couple of other issues that are not precisely answered by the statute which should be mentioned. One glaring issue is what is meant by the "publicly advertise" requirement of Section 13906 (b) (6) (B). It is unclear from the statute whether or not meeting the bond cancellation requirement of Section 13906 (b) (6) (A) is, of itself, the required publication. One could argue that the two provisions (the bond cancellation provision and the publication provision) are separate and distinct obligations and would require actual publication in some format to meet the publication requirement. Inquiry has been made with the FMCSA but no response has been received as of the date of the publication of this discussion. A second issue is whether or not a claimant that chooses to file suit rather than submit a claim by letter or e-mail automatically is entitled to costs and attorney's fees or only is entitled to such fees and costs in the event that suit is filed due to a failure of the surety either to respond to a claim in a timely fashion or if the claimant is a prevailing party on a claim that previously has been denied. The statute is silent on this issue and it is unclear as to when and how the attorney's fees and costs provision is triggered.

There are other questions that remain open for discussion in claims handling including the publication requirement and what constitutes a reasonable period of time to resolve a claim against the broker.

While on one hand the claims procedure for these bonds is direct and straight forward with specific date requirements set forth in the statute, there are other questions that remain open for discussion in claims handling including the publication requirement and what constitutes a reasonable period of time to resolve a claim against the broker. In addition, documentation of the claim will always be an issue for the surety since it is incumbent on the claimant to establish its claim, and the failure to do so should result in a denial of the claim without prejudice.

Judgment Lien May Survive A Chapter 7 Discharge

by Shawn Rediger

In general, a Chapter 7 bankruptcy results in a discharge of pre-petition debts owed by an individual debtor. Certain obligations, however, may survive the Chapter 7 discharge order. One example is a perfected judgment lien. Even though the underlying claim for damages against an individual debtor may be discharged, a perfected judgment lien will remain attached to debtor's real property without further court order to avoid the lien. If the lien impairs an exemption (i.e., the homestead exemption), the debtor may file a motion with the court to fully or partially avoid the judgment lien (the extent of the avoidance depends on the facts and jurisdiction). Otherwise, the judgment lien remains on title and the lienholder may pursue its lien foreclosure. Such lien claims may result from the sureties' general indemnity agreement which may contain language sufficient to grant it a security interest in the debtor's real property. The surety should timely perfect its security before the bankruptcy is filed (if the lien is perfected within 90 days of the bankruptcy filing during the preference period, it may be set aside as a preference). If you have any questions about bankruptcy or judgment liens, feel free to contact Shawn Rediger at Williams Kastner (srediger@williamskastner.com).

Washington's New Uniform Power of Attorney Act: Surety Underwriters Beware

by Paul Friedrich

A power of attorney is an incredibly powerful document that permits an individual (the "principal") to appoint someone (the "agent" or "attorney-in-fact") to act on the principal's behalf. In the context of the surety-principal/indemnitor relationship, sureties rely heavily on power of attorney clauses included in general indemnity agreements ("GIA") in order to protect their financial and legal interests in the principal/indemnitor's property.

The clause typically grants the surety, or its designated representative, the power to execute all necessary agreements and documents to secure the surety's property interest with regard to monies, properties, and other rights assigned under the GIA. In addition, it also permits the surety to execute lien documents against the assets of the principal/indemnitors, including UCC-1 financing statements and deeds of trust.

Powers of attorney in Washington are subject to certain legal requirements. Since 1985, powers of attorney have been governed by Washington's Power of Attorney Act, RCW 11.94 et seq. Effective January 1, 2017, the Washington State Legislature enacted the Uniform Power of Attorney Act. This article examines some of the relevant changes in Washington's new Uniform Power of Attorney Act.

EXECUTION REQUIREMENTS

The key change to the Act is that either: (a) notarization or (b) two witnesses are required to validate a power of attorney. Under the old Act, there were no execution requirements, other than the signature of the principal. Under the new law, the principal must sign before either a notary or two disinterested witnesses. The witnesses cannot be related to the principal by either blood or marriage, and cannot be healthcare providers for the principal.

TAKEAWAY: While most GIAs containing power of attorney clauses already comply with the new Act's execution requirements, surety underwriters should adjust GIAs containing power of attorney clauses to require either a notary's signature or the signatures of two disinterested witnesses.

AN AGENT'S DUTY

Because the attorney-in-fact often has broad powers to make important financial decisions for the principal, the new Act has imposed certain duties upon those who wield this power, whereas the old Act was silent as to the duty imposed on the attorney-in-fact. The new Act imposes a specific list of duties upon the attorney-in-fact, including the duties to act in accordance with the expectations of the principal, in the principal's best interest, in good faith, loyally, with care, competence and diligence, etc. The new Act also provides that an agent will always face liability if: (a) the attorney-in-fact acted dishonestly or with an improper motive or with gross negligence to the purposes of the power of attorney or the best interest of the principal.

TAKEWAY: Ensure that agents acting under a power of attorney understand their duties.

DURABILITY

If a power of attorney is "durable," it means that an agent's power will survive the incapacity of the principal. Washington's old Act and new Act disfavor a presumption of durability and, therefore, if the document is silent as to duration, the power of attorney will terminate by default when the principal becomes incapacitated. Washington law still requires that the language of the document indicate durability—that is, durability will not be presumed by law. A power of attorney document that is silent as to duration will therefore be presumed to terminate upon the incapacity of the principal.

TAKEAWAY: Surety underwriters should make sure that power of attorney clauses expressly state that they are for an indefinite duration and/or survive the incapacity of the principal.

CATEGORICAL GRANTS OF AUTHORITY

The old Act leaves the scope of authority granted to the agent to be mostly determined by the language of the document, meaning that many documents contained lengthy provisions discussing the agent's powers. The new Act attempts to alleviate the need for such careful drafting by establishing categorical grants of authority for a variety of topics. Thus, the principal may grant broad authority under the categories by general reference to each one.

TAKEAWAY: While a detailed description of the powers granted the document are best practice, surety underwriters can take a more broad-based approach in drafting power of attorney provisions.

For those interested in learning more about Washington's New Uniform Power of Attorney Act, please do not hesitate to contact Williams Kastner's Construction & Surety Practice Team.

[1] See generally "Washington's New Uniform Power of Attorney Act." Reutter, Eric. King County Bar Bulletin October 2016: Volume 35, Issue 2, pp.1,8. Print.
[2] See The Law of Performance Bonds (Lawrence R. Moelmann, Matthew M. Horowitz, & Kevin L. Lybeck eds., 2d ed. 2009) at 304.

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