

## Clear as Mud: Pennsylvania District Court Rejects Surety's Liability for Prompt Payment Act Penalties and Attorneys' Fees

March 18, 2009

On an issue that has confounded several federal courts in Pennsylvania, the U.S. District Court for the Middle District of Pennsylvania recently weighed in on the subject of a surety's potential liability for penalty and attorneys' fees under one of Pennsylvania's two prompt payment acts in *Structural Group, Inc. v. Liberty Mutual Insurance Company*, 2009 WL 577619 (M.D. Pa. March 5, 2009). While the ultimate conclusion appears to be straightforward, this case offers little clarity on an issue that will continue to require strong and precise advocacy.

At issue in *Structural Group* was a subcontractor claim asserted against Liberty Mutual Insurance Company ("Liberty Mutual") on a payment bond supplied by the general contractor on a project located at Shippensburg University Student Recreation Center. What is unclear from the court's decision, although suggested within the factual recitation, is that the subcontractor's claims were for additional compensation for delays, inefficiency, extra work and other costs incurred due to alleged differing site conditions. Without embarking on an analysis of whether there were grounds for withholding payment of these claims, the court focused on whether, under a motion to dismiss standard, the subcontractor could even state a claim against Liberty Mutual for recovery of penalty payments and attorneys' fees, among other things, pursuant to the Pennsylvania Contractor and Subcontractor Payment Act ("Contractor and Subcontractor Payment Act").

The first issue raised by the court's approach is whether the Contractor and Subcontractor Payment Act was applicable. Some of the court's uncertainty may have stemmed from some unclear pleading identified by the court in a footnote in its decision. The statutory citation referenced by the court, 62 Pa. Cons. Stat. Ann. §§ 3931–3939, is actually a reference to the Commonwealth Procurement Code ("Procurement Code"), as opposed to the Contractor and Subcontractor Payment Act, which has its statutory residence at 73 P.S. §§ 501–516. Adding to the apparent confusion is the court's conclusion that Liberty Mutual was not responsible for attorneys' fees and penalties, among other things, under the Procurement Code, because the statute does not refer to sureties within its language. On this specific point, it appears the court did not take into account section 3939 of the Procurement Code, which generally was within the realm of the court's scope of discussion, and specifically references a "surety" as a party who may, under certain circumstances, be excused from the obligation to pay lower-tiered subcontractors.

In fairness to the court, there is an apparent split of authority on the ultimate question presented relating to an analogous provision found in the Contractor and Subcontractor Payment Act. At least two other federal courts have concluded that sureties are not responsible for penalty payments, interest and attorneys' fees under the Contractor and Subcontractor Payment Act. See *R.W. Sidley v. United States Fidelity & Guaranty Co.*, 319 F. Supp. 2d 554, 561 (W.D. Pa. 2004) and *LBL Skysystems USA, Inc. v. APG-America, Inc.*, 2005 WL 2140240 (E.D. Pa. Aug. 31, 2005). However, in one case, *National Fire Ins. Co. v. Sippel Development Co., Inc.*, 2006 U.S. Dist. LEXIS 39635 (W.D. Pa. 2006), the federal court refused to vacate an arbitrator's award of attorneys' fees and penalties against a surety, because it believed the law in Pennsylvania on this issue is unclear.

The apparent conflict between the *Structural Group* and *National Fire* cases indicates that some difference of views on surety liability under Pennsylvania's prompt payment statutes remains. Future results are likely to depend upon effective advocacy regarding the enforcement or deflection of these additional payment relief mechanisms.

### For Further Information

If you have any questions regarding this Alert or would like more information, please contact [Edward B. Gentilcore](#), any [member](#) of the [Construction Group](#) or the attorney in the firm with whom you are regularly in contact.