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Chapter 7

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Regulatory and Transactional Bonding: A Primer on Surety Bonding for the Mineral Lawyer

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Synopsis

§ 7.01. Introduction.

Although it is ancient, the law of suretyship is still an enigma to most legal practitioners outside the construction law area. There are long standing, settled principles of surety law which apply to discrete fact patterns. The law of suretyship intertwines with many legal disciplines, but much of the litigation arises out of construction disputes. Typically, the surety agrees to pay or perform the obligation of a contractor or permittee if that principal fails in its obligation. The word "sponsor" is the closest English word approximating the Latin word for surety, "securitas."

This chapter examines basic tenets of surety law and suggests how this law impacts relative risks and obligations of the parties to a bonded obligation, with special attention to some selected bankruptcy considerations.

This chapter also suggests a new concept for the mineral lawyer: the transactional bond. In some instances of merger, acquisition of mineral companies, or mineral leasing arrangements, specific bondable obligations are created, presenting the parties at risk with the opportunity of requiring additional security through a surety bond. The prudent mineral lawyer will recognize however, that not all obligations are suitable for the "sponsorship" of performance. The efficacy of using a bond instrument should be addressed early in the negotiation process.

Suretyship is a three-party relationship which guarantees the payment or performance of an agreement between two of the parties. The primary obligation is due from the principal to the obligee, and the surety assures, or sponsors the completion of the obligation.[1] Further, the surety is entitled by law and by contract of indemnity to be held harmless (exonerated) and repaid (indemnified) in the event of any loss to surety due to the principal's default.

While a surety bond is not an insurance policy, modern compensated sureties are usually insurance companies regulated by state insurance departments. However, the underwriting of "insurance," wherein risk of loss is spread over the entities comprising the risk pool, is distinguished from "suretyship," wherein the risk is based on the financial and technical facilities of the individual principal. Sometimes a bond instrument and an insurance policy provide interchangeable assurance of the payment or performance of an obligation.

§ 7.02. Bonds — An Overview.

[1] — Statutory Bonds.

Various regulated activities in all jurisdictions have requisite bonding requirements. Statutory provisions govern the scope and interpretation of statutory bonds. One or more such bonds are required for the following designated classes of activity:

a) work affecting public health or safety;

b) services which could result in loss of money or goods in trust to a licensee;

c) services which are rife with unscrupulous business practices; and

d) enterprises which require payment of special taxes such as sales or gasoline taxes, or enterprises which require payment of money to a special fund, like workers' compensation.

In most instances, where the terms of a bond vary from the provisions of a statute, the statute controls.[2]

Reclamation performance bonds are required under the Surface Mining Control Reclamation Act of 1977.[3] Performance bonds are also required for contractors performing work under contracts administered under the Abandoned Mine Lands program pursuant to federal law. Other forms of statutory bonding requirements related to mineral extraction

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1 Balboa Ins. Co. v. United States, 775 F.2d 1158, 1160 (Fed. Cir. 1985).

2 *See* State v. Easley, 299 N.W.2d 439 (Neb. 1980).

3 30 U.S.C. §§ 1201-1328; 30 C.F.R. Sec. 800.