

Hinshaw Secures Precedent-Setting Decision in Second Circuit on Issue of Performance Bond Obligations

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Jonathan C. Burwood, Brad R. Carver and CharCretia V. DiBartolo, attorneys in the Boston office of Hinshaw & Culbertson LLP, represented a performance bond surety facing \$10+ million in claims for incomplete, defective and delayed work on a private condominium project in Stonington, Connecticut. The surety denied the claim on the grounds that the obligee had failed to satisfy certain conditions precedent set forth in the performance bond. Hinshaw secured summary judgment on behalf of the surety in the U.S. District Court for the District of Connecticut.

On appeal, the obligee argued that the surety had suffered no prejudice, and that a complete discharge of the performance bond was inequitable and would result in an unwarranted forfeiture. Hinshaw argued that the conditions precedent set forth in the performance bond must be satisfied before any obligation arises, and the obligee's failure to comply rendered the bond null and void. The U.S. Court of Appeals for the Second Circuit agreed, and affirmed the judgment of the District Court. In the context of this particular type of performance bond (the AIA A312 Bond) the U.S. Court of Appeals for the First Circuit had previously held that an obligee's actions that deprive a surety of its performance options under Paragraph 4 of the bond constitute prejudice, sufficient to warrant a discharge of the surety. The Second Circuit adopted that premise, thereby expanding a consistent line of authority in many jurisdictions favoring the surety's rights.

Mr. Burwood focuses his practice primarily in the areas of surety bond, construction, environmental and commercial litigation. He represents sureties, contractors and commercial property owners in the context of counseling, negotiation, litigation, arbitration, mediation and bankruptcy.

Mr. Carver focuses much of his practice on surety, fidelity and construction litigation, products liability and toxic torts. He began his legal practice in 1980 as an attorney for a major surety company. He moved into private practice several years later and developed a reputation for top-quality representation in the areas of surety, construction, fidelity, commercial litigation, toxic torts and products liability.

Ms. Di Bartolo focuses much of her litigation practice on fidelity and surety matters. She represents sureties in payment, performance and miscellaneous bond matters, and insurance carriers and their policyholders in the defense of wrongful death and personal injury lawsuits, and discrimination and harassment claims. Ms. Di Bartolo has also advised carriers with respect to insurance coverage for all types of policies, including fidelity, general liability, professional liability and excess coverages.

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