Scribbles Squibs* #64 (August 15, 2018):

PRETRIAL SETTLEMENT OF MASSACHUSETTS PAYMENT BOND LITIGATION (PART ONE): TENDERS OF DEFENSE AND BAD FAITH ALLEGATIONS AGAINST THE SURETY PURSUANT TO MASSACHUSETTS GENERAL LAWS C.176D s.(3)(9).

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I. INTRODUCTION.

That title is a real mouthful! It might be the longest title as to anything I have ever written. And, if you have been getting Squibs for a while (and ***Scribbles*** before that), you know that I have written *a lot*!

Many of those who have presented sureties with payment bond claims have found that getting a surety to pay prior to the filing of a lawsuit or even during the pendency of a lawsuit can be difficult.

There are a variety of reasons for this, some of which go back to the late nineteenth century. At that time, there was a legal maxim to the following effect: "Equity will not assist a volunteer." As the reasoning went - and, with some legal basis - if a surety paid a claim voluntarily, and without the principal's acquiescence, this could negatively affect its indemnity rights against its indemnitors.

That is not the current law in Massachusetts and hasn't been so for quite a while.

Then, why is there any consideration of this idea at all in the modern day? There really shouldn't be. But, suretyship's DNA has more than a little touch of the arcane to be found among its twisted strands. Also, surety bonds are not insurance. Unlike insurance, there is indemnity available to the surety against the insured (called the "principal" with regard to surety bonds, the party being bonded), even if and when the principal is found in a court judgment to be right with regard to the issue of liability in the underlying dispute involving the bond. For insurance products, absent fraud, there generally is no indemnity available to the insurance company against its insured for the loss. Unlike insurance, bond premium rates are not determined actuarially or, at least, not to the same extent as insurance premiums are.

And, here's why. With insurance claims, an insurance product's past history is significant indicia of what the claims will be presently and into the future and what premium should be charged. So, in theory, at least, an insurance company that is able to pay the claims on a really bad hurricane, for example, will raise those rates after the storm and eventually become whole.

This is not so with surety bonds. That is because one of the key criteria for the underwriting of bonds is a principal's *character*[1]. But, how does one quantify or measure *character?* Accountants verify numbers. But, who can verify *character?*

And, even where surety bonds are sold through an 'insurance company', they are not, actually, insurance for a variety of technical reasons, two of which differentiating characteristics are referenced above. As we will discuss in other parts to this series, there are both positives and negatives associated with that distinction.

The purpose of this Squib will be, then, to identify two common problems/issues encountered in processing payment bond claims, particularly, those which have turned into litigations, with some suggestions as to how to handle them. (Other problems and issues will be identified and discussed in later parts to this series.)

These two problems are: (a) dealing with a tender of defense by the surety to its principal of the claim being made against the surety; (b) educating the surety as to its requirements to investigate and process claims under Massachusetts law, such requirements being contained within MGL (Massachusetts General Laws) C. 176D s. (3)(9), key provisions of which with my comments (in a different font) are set forth below.

For the purposes of this Squib, and for simplicity's sake, we will be dealing with a payment bond claim as to which there are either no defenses or only limited defenses.

Now, some of what follows is technical and the handling of a bad faith claim, particularly when the claim has gone into litigation, is something that should be handled by a lawyer. The purpose of this Squib, then, is to just give our readers the *basic idea* as to how Massachusetts bad faith law might apply to (and, hopefully, speed up resolution of your) surety claims.

In October of 2018, with the details contained within this Squib's transmittal, I will be giving seminars on two different days as to how to make a bond claim.

II. TENDER OF DEFENSE.

A. TENDER OF DEFENSE: THE PROBLEM.

Basic surety law provides that, ordinarily, a surety has the same defenses as its principal

has as to a claim. (In addition, a surety has various 'personal defenses', the most common of which are 'notice' and 'statute of limitations'.)

Now, a principal is under an obligation under its general indemnity agreement (GIA), a document all sureties require in order for a company to get bonds, to repay the surety for all loss payments (payments to claimants) and for all expense payments (payments to attorneys, accountants and other third-party entities hired by the surety to assist it with a claim) that a surety incurs.

Since the liabilities of the surety and principal are very similar, it is wasteful for the surety and the principal to both have independent counsel. Because, if a surety does engage its own counsel, the indemnitors of the principal will have to repay the surety for its costs incurred. And, with two attorneys defending the principal and the surety, they might work at cross purposes, which only benefits the plaintiff (the claimant).

So, for many sureties, they are willing to 'tender their defense' to the principal, meaning that the principal will defend the surety in court as to claims made against its bonds at no cost to the surety. Typically, the surety has to approve the principal's counsel. And, the surety will ask the principal/its attorneys for periodic updates as to the claim, which sometimes it gets and sometimes it doesn't get. The principal and its attorney, unless the principal's failure is inevitable, like to keep the surety fat, dumb and happy. And, for all intents and purposes, ignorant.

The problem becomes that this is a way for the principal to 'insulate' the surety from the claim. This tends to stop any form of claim investigation by the surety and the possible independent evaluation and handling of a payment bond claim by the surety. Since the surety is merely relying on the principal and its attorney to defend its interests, it functionally adopts the 'Sergeant Schultz Defense'.[2] The surety may ask for periodic updates from either the principal or its lawyer, which may or may not be given. Such reports may not be entirely accurate because the principal wants the surety to incur no loss or expense payments that it will have to pay back. Mostly, the principal doesn't want the surety to intervene in a dispute situation and settle a claim against its will and perceived interests. This leaves a payment bond claimant, looking to get paid, exactly *where?* And, as to how it will get paid, exactly *how* and *when?*

Sureties also like to say, in such circumstances: 'this is a disputed claim and we'll have to see how that plays out and is resolved in court.' In my view, such an attitude does not comply with Massachusetts unfair insurance claims practices law, as that law is entirely focused in on the actions and responsibilities of the surety and not on the principal.

As a practical matter, many sureties, after they have tendered their defense, cease any form of claims investigation.

B. STRATEGIES FOR HANDLING THE TENDER OF DEFENSE PROBLEM.

One has to focus in on the fact that the surety's liability to the claimant is independent of the principal's liability to the claimant. The fact that a principal might even file bankruptcy is of no force and effect as to a claimant's claim against the surety. Even if the principal's debts are completely discharged in bankruptcy, this has no effect on the validity of the bond and bond claim. In fact, the bankruptcy of the bond principal usually *improves* a claimant's chances of being paid sooner.

Therefore, within the context of a litigation, one might focus in on discovery that has to be handled and responded to just by the surety, not by the principal. In other words, one must create situations where the surety has to take independent action of its own within the litigation, not simply completely relying on the tender of defense to its principal to insulate it. This especially involves situations where the surety has to make statements under the pains and penalties of perjury, such as in answering interrogatories, responding to requests for admissions and being deposed.

So, it is usually a good idea to propound some interrogatories of the surety, questions that have to be answered by the surety under the pains and penalties of perjury, which answers should include more than simply regurgitating such factual and legal defenses asserted by the principal, as are forwarded to the surety. As we will see later in this Squib, a surety's legal obligations and contractual obligations don't cease just because there is a tender of defense. I contend that in many such situations, the very act of making a tender of defense violates the statute identified in the title to this Squib. And, under Massachusetts law, that could be an unfair and deceptive trade practice under MGL C. 93A, which could entitle a successful claimant to double or triple damages and the claimant's attorneys' fees.

Also, one can serve the surety with requests for admissions - asking the surety to either admit or deny various factual allegations and to authenticate key documents - which, again, have to be signed under the pains and penalties of perjury by the surety. Often, you will be told 'we really don't have personal knowledge of these issues, as to which you should inquire of our principal.' This most likely will not be sufficient under Massachusetts law, if you decide to push it and are willing to pay the cost of pushing it. As we will see below, Massachusetts law requires the surety itself to mount is own investigation or suffer the consequences of not doing so.

Be sure to also prepare and serve a document request upon the surety, including in your request, a request for a copy of the surety's bond claims handling manual. Having represented at least two dozen sureties, I have yet to see that any of them actually has such a document of sufficient content or substance, if they have one at all. Not having one is probably a violation of the statute discussed later in this Squib.

Then, after you have the surety's answers to interrogatories, the surety's responses to your requests for admissions and the surety's response in terms of produced documents in response to your request for production of documents, as the next step, be sure to notice the deposition of the surety. This should be phrased in the notice of deposition in such a manner that the bond claims manager will necessarily have to be tendered as a witness. All testimony at depositions is under the pains and penalties of perjury. This is something that the claims manager and the surety try to avoid, if at all possible. And, if the deposition is noticed correctly, it is not possible.

I was involved with one insurance claim at a former firm involving damaged drywall as the result of rain and wind in the construction of an office tower. This case was tried. And, then, it had gone to the Appeals Court, which remanded the case to the superior court with various instructions. At this point, this case had a lot of activity over quite a period of time. But, the deposition of the insurance company was never taken. At this point, I simply noticed the claims manager's deposition and a case that couldn't be settled at all for any number of years suddenly turned into one that could.

III. MGL C. 176D(3)(9). Unfair Methods of Competition and Unfair and Deceptive Acts and Practices in the Business of Insurance.

One has to keep in mind that many sureties have only one central claims office for bond claims. An individual claims representative will usually have various payment and performance bond claims in a variety of states. In recent years, I have seen more and more sureties who have in-house attorneys handle their bond claims, rather than using bond claims representatives who didn't have that education and training. When I began my career, it was rare to find a bond claims representative who was an attorney. Meaning, such claims representatives did not have any legal training at all.

But, even where the claims representatives (today) are attorneys, most attorneys are admitted to practice in only one state. I might be considered to be at the 'expert' level as to Massachusetts bond law and lien law. But, I don't have a clue as to such laws as there may be in the state of Vermont dealing with these subjects. Yet, the bond claims representative might be handling bond claims from any number of states.[3]

One thing to be aware of is that in issuing 'contract bonds', a surety is executing both a performance bond and a payment bond. Sureties don't address claims against payment bonds in the same way that they address performance bond claims, which they will see as requiring a maximum effort. That is where the real money to potentially lose is located. If too many owners complain to the Commonwealth of Massachusetts that a certain surety is non-responsive to performance bond claims, that company could be kicked out of the Commonwealth of Massachusetts. At one point, I represented for a number of years throughout New England Balboa Insurance Company out of Orange County, CA. This company was first fined and then

kicked out of Massachusetts not because of how it handled performance bond claims but because of how they handled claims involving taxicabs, which was a specialty insurance line.

I would say as a rough guesstimate that for any bond claims representative, they probably spend 75% of their time with performance bond claims and the remaining 25% of their time with payment bond claims.

Would individuals working in a claim department at a bonding company necessarily be aware of what any particular state's claims handling procedures are as to bond/insurance claims as are required by law? Unless they have encountered it before, chances are the answer to that question is, quite simply, 'no'.

From the lexicon of medicine is the following maxim: "Watch one, do one, teach one." Presumably, this would have application mostly with surgical procedures. Presumably - hopefully - before a surgeon has to perform a certain type of surgery for the first time, s/he has at least had the opportunity to watch a qualified surgeon perform that same surgery at least once.

In the lawyer business - and, certainly, in the claims department of many sureties - the following describes the 'training' given to any new individual, particularly with regard to smaller law firms. One starts the job on day one and someone comes into their cubicle carrying a huge stack of files. 'Here's a bunch of files,' that person might say. '*Do* something with them." When this happens in a surety company, there is a good chance that as to several of the bond claims the insurance company has been defending, someone has been dropping the ball. So, this new person may get a bunch of 'dogs', files that are in trouble or which have not been sufficiently worked. Certainly, one has to go to law school for three or four years to be trained in the law. But, learning how to actually *do* something as a lawyer is more or less on the job training, particularly in smaller firms.

This certainly was my own experience in some of the firms I worked at prior to hanging out my own shingle twenty-six years ago.

Massachusetts has very clear and somewhat stringent requirements as to how insurance claims and surety claims are to be handled. And, these are contained within MGL Chapter 176D. Specifically, they are included in Section (3)(9).

Now, it should be understood that an individual does not have the right to sue an insurance company under this statute. *However,* by case law, violations of this statute may also be violations of MGL C. 93A, which governs claims for unfair and deceptive trade practices. Under that statute, successful claimants can recover attorneys' fees and either double or triple damages. So, when one wishes to sue for issues related to MGL C. 176D (3)(9), one files a claim under MGL C. 93A, s. 11.

Now, I seldom cite cases any more in the Squibs. But, it may be that in your discussions with the surety, the bond claims representative might say that you can't sue under MGL C.

176D. The following case – and, there are probably others – says that violations of MGL C. 176D (under which one cannot sue) may also be violations of MGL C. 93A (under which one *can* sue). So, what follows is a 'case citation', something of some importance in the law biz. This might prove helpful in your discussions with any bond claims representative if this issue comes up.

As stated by the Court in Chery v. Metropolitan Property and Cas. Ins. Co. 79 Mass.App.Ct. 697,699, 948 N.E.2d 1278 (Mass.App.Ct.,2011):

"General Laws c. 176D, § 3(9), and G.L. c. 93A "were enacted to encourage the settlement of insurance claims ... and discourage insurers from forcing claimants into unnecessary litigation to obtain relief." Clegg v. Butler, 424 Mass. 413, 419, 676 N.E.2d 1134 (1997). In this case, Metropolitan's unexplained failure to settle Chery's claims, well after its liability was reasonably clear, caused her injury by forcing Chery to institute litigation to receive benefits to which she was entitled under G.L. c. 90, § 34M. See Hershenow v. Enterprise Rent–A–Car Co. of Boston, supra at 801, 840 N.E.2d 526, quoting from Aspinall v. Philip Morris Cos., 442 Mass. 381, 401, 813 N.E.2d 476 (2004) (causation established where tortfeasor's conduct "could reasonably be found to have caused a person to act differently from the way he [or she] otherwise would have acted"). See also Columbia Chiropractic Group, Inc. v. Trust Ins. Co., 430 Mass. 60, 65, 712 N.E.2d 93 (1999) (unreasonable delay in paying bills submitted under G.L. c. 90, § 34M, may violate G.L. c. 93A)."

So, one might include within a court complaint a count under MGL C. 93A (11), alleging that an insurance company has committed an unfair and deceptive trade practice by not complying with this statute. My comments concerning the applicable sections that I think have particular relevance follow the cited section and are in a different font.

As I have said many times elsewhere, most superior court lawsuits are concluded before a complete trial occurs.

When a surety pays a claim, it wants to be sure that any claim it pays is actually a claim covered by/within the bond in question. A surety would say that it accepted a premium for assuming certain risks under conditions contained in the bond or, for statutory bonds, such as the Massachusetts public payment bond statute MGL C. 149, s. 29, as are imposed by statutory law and content.

One important thing to know is that when sureties pay claims *not* based on the actual content of the bond in question, this usually means that it is paying 'extra contractual damages'. This is a cardinal sin for surety claims handling. A serious and quite large no-no. And, the payment of *just* a claimant's attorneys' fees is considered within surety circles to be the same thing as paying actual bad faith damages. Payment of multiple damages is even worse.

Paying extra-contractual damages is not the way to get promotions and raises as a surety bond claims representative! I know of one claims manager for a good-sized surety who was

fired because of the fact that there were too many payments made for extra-contractual damages by the claims department, which was under his supervision.

My own experience has been that if you *really* have them on something, such as a violation of MGL C. 176D, sureties will settle a claimant's claims for attorneys' fees fairly quickly. Within the last year, for two different claimants against the same principal and surety and for the same project, I *really* had a major insurer for bad faith as to one of the claimants but not at all as to the other claimant. Nonetheless, without my specifically saying so, the surety *may* have drawn an inference that I wouldn't settle the egregious, bad faith case without settling, also, the other claim as to which there were no bad faith elements at all. And, that claim was almost twice as large as the one I had the surety on. And, I got attorneys' fees for each of these two settlements, which, by my experience, is quite unusual.

It's important to understand that under every general indemnity agreement I can recall reading, it is not necessary for the surety to get the principal's permission to settle a claim or make a payment or incur an expense. I've seen GIA's which provide that the surety is authorized to sign the principal's name to a settlement agreement, even if the principal vehemently objected to the settlement. There was a Massachusetts appellate case some years ago which held that in an action by a surety against its indemnitors for indemnity, the indemnitors' claims that the surety had acted in bad faith didn't even constitute a legal defense in that matter. At such point as a surety wants to settle a claim, this is something that can happen quickly.

In the two matters mentioned above, the first claims representative essentially ignored anything that either I or the claimant had sent to him. When bad faith litigation was filed, he did the heroic and adult thing: he assigned the file to another claims representative! Ultimately, I got a call from a lawyer from a well-known Massachusetts firm at seven o'clock at night and both claims were settled in the full amount of the claim, with all accrued interest and some attorneys' fees. This was our very first conversation. This was done in ten minutes and the two claims with the various additions exceeded in the aggregate more than one hundred fifty thousand dollars.

Now, it should be understood that most bond claims have no real basis for the claim of unfair insurance claims handling. Alleging bad faith when there is none may only annoy the people you are dealing with and can quite likely slow down the resolution of your claim. Understanding this statute, however, may give a claimant some new grounds to allege bad faith, particularly where time passes with no tangible progress in resolving the claim. This is because complying with all of the provisions of this statute is quite difficult, particularly for a claims representative and bond claims department that is dealing with considerable volume. And, what makes this statute a significant arrow in your quiver is that most bond claims representatives you will deal with are simply unaware of what a surety's obligations are in the handling of claims under Massachusetts law. It doesn't hurt your claims process as a claimant by explaining at some point to the surety – politely, at first - what its obligations are under Massachusetts law.

By the way, the following statute references several times 'insurance policies'. Now, a bond is not an insurance policy, as briefly discussed above. A bond is, by a widely-accepted industry definition, 'an extension of unsecured credit.' It is, roughly defined, in the nature of a financial guarantee, similar in some regards to various banking functions.

But, under Massachusetts law, for these purposes, an 'insurance policy' includes surety bonds. This is provided for by MGL C. 176D (1) (c):

> "(c) "Insurance policy" or "insurance contract", any contract or insurance, indemnity, medical or hospital service, dental or optometric, **suretyship,** or annuity issued, proposed for issuance or intended for issuance by any person." (Emphasis added)

I point that out now so that if you find occasion to try this strategy, you'll have a quick response ready to any surety that says: 'This talks about insurance policies. A bond is not an insurance policy'.

The common requirements in which we have an interest, for our purposes, are as follows:

"M.G.L.A. 176D § 3. Unfair methods of competition and unfair or deceptive acts or practices . . . .

(9) Unfair claim settlement practices: An unfair claim settlement practice shall consist of any of the following acts or omissions:

(a) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;

(b) **Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies**;

This is a biggie. My experience has been that some claims representatives may take 30 days or more to respond to a letter because the insurance company's 'tickler' system is set for every 30 days. I would (and have) made the argument that responding to letters every thirty days is not 'reasonably promptly' and, thus, a possible violation of this statute.

(c) **Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;**

This one is very important. It really requires a fairly uniform system of claims investigation that each bond claims representative should use. In my view, it requires a 'bond claims manual'. My experience has been that many sureties have next to nothing in terms of uniform procedures (i.e. a bond claims manual) and those that have *some* procedures probably have procedures that are inadequate.

Having a claim for unfair and deceptive trade practices against the surety justifies requesting a copy of the bond claims manual in a document request. To the extent that sureties have *anything,* they are very loath to produce it for outsiders. Usually, they'll fight a claimant tooth and nail *not* to produce this. And, those sureties that don't have anything have probably violated this statute even before the surety has even looked at your claim.

(d) **Refusing to pay claims without conducting a reasonable investigation based upon all available information;**

Again, sureties who have tendered their defense to their principals may no longer be conducting any investigation at all. I contend that they have some obligation to conduct a reasonable investigation, particularly prior to a suit's being filed, even if they will ultimately be making a tender of defense. I would contend that for any tender of defense which will necessarily cease an insurance company's involvement in claim investigation and handling may be a *per se* statutory violation. That is because this statute makes no distinction between bond claims that are being handled as simply claims and those bond claims that are the subject of a litigation.

(e) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;

This is a big one. One notes that most bonds have to be sued within one year of some date to obtain coverage. I have seen many situations where claims representatives, perhaps unethically, essentially sit on a claim that begins with letter writing (with no suit) and then wait for the statute of limitations to expire, only to then deny the claim for failure to meet the requirements of the statute of limitations. I've seen several such situations where the denial of coverage letter is sent within a week or so of the expiration of the statute of limitations.

Now, some sureties do require claimants to fill out proof of claim forms. Others don't. There is no legal requirement for a bond claimant to submit such a form unless there is a requirement for the same in a non-statutory bond. I might add that there is no harm in filling such a form out, provided that you understand *why* the insurance company is requesting it.

It is requesting this primarily for two reasons.

First, they want the claimant to commit to the amount of a claim so that they have something to argue with should suit ensue for a larger amount (which often happens). This could be because, at the time the form was filled out, the claimant was willing to take a lesser sum just to get paid and be rid of it as a claim. Sometimes, when a claimant discusses the matter with a lawyer after the claim form was sent in, the lawyer made some suggestions as to additional claims that could be made. Since this type of form often has to be signed as a

sworn statement, at such time as a claimant attempts to submit a larger claim, the surety will waive the signed form in his face.

Secondly – and this is ***very*** important – they want the claimant to commit to the last date of performance of work on the job to see if the claim is time-barred. (If you don't know what you are doing, consult with an attorney before you sign one of these.)

But, I would argue (and have argued) that once a claimant has documented its claim to the point that the surety is no longer requesting additional claim back-up or information that it has an affirmative obligation to *do something* with the claim. Sitting on the claim hoping that the statute of limitations will run out before the claimant actually sues is probably a violation of MGL C. 176D, whether the surety (or its bond claims representative) knows it or not. And, it is for this reason (among many) that you might want to provide the claims representative with a copy of this entire statute or at least give them the citation to this statute.

(f) Failing to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;

This is a real biggie. Again, it might be the surety's practice to try not to settle bond claims as 'claims' but wait until they turn into 'litigations' (lawsuits). (An advantage of this for the sureties is that not everyone who is willing to submit a 'claim' will be willing to participate in a 'litigation'. So, the number of 'claims' have a tendency to diminish once it becomes time that the next step has to be taken.[4]) This section says that sureties don't have the right to do that. If 'liability has become reasonably clear', it is incumbent on the surety to affirmatively move forward upon its own initiative to get this claim settled as a claim and not to compel the claimant to have to file a lawsuit. Having said that, if there is a statute of limitations coming up, it's usually a pretty good idea to file suit even if you feel that you shouldn't have been forced to do so. And, keep in mind that the act of simply filing suit doesn't mean at all that you are committing yourself to some course of action that will take five expensive years. It may be that the *only* action you might have to take with a 'litigation' is simply the filing of a complaint. And, all that filing a complaint does is to simply formalize the claim that you already have. And, if it is required by statute or by the bond you are suing under, then it has to be done or you might lose your claim.

In order to put yourself into a position to make a claim that this section has been violated, get your claim to a position where the surety is no longer requesting any further information or documents. I have one or more construction law articles and various Squibs that discuss how to present a claim to the surety. **And, I'll be giving two seminars in October both *telling* you and *showing* you how to do this successfully for *free*.**

Then, make a record of that by sending a communication to the surety stating that liability has become reasonably clear and that you have produced information and documents

to the level that the surety is no longer requesting any further information and documents. And, in such communication, state that it is now incumbent on the surety to settle this claim in a fair and equitable manner. It's also a good idea to say in that communication that if you have to take further legal action to protect the claim, such as in filing suit, you will not settle your claim as a lawsuit without being fully reimbursed for such legal expenses and court costs.

It may be true that in Massachusetts, with the two exceptions, one is not *entitled* to an attorneys' fee award in the majority of cases. At the same time, while pressure can be exerted on one side to the litigation to settle – usually by a judge - you can't be *forced* to settle. Also, with a C. 93A claim, you *do* have entitlement to an attorneys' fee award if you prevail. In the final analysis, giving the surety that type of communication will help you when the surety's lawyer talks to your lawyer when it is time to have a Come to Jesus Moment. And, when your lawyer says you won't settle without recovering all of your fees, s/he can simply hand the surety lawyer a copy of that communication to the surety, which went unanswered.

(g) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds;

There is something that can be said for this section. But, I need to be clear what we are trying to accomplish in submitting a payment bond claim. We want to get in and get out as quickly as possible, hopefully recovering all or almost all of the claim, sometimes some interest and, occasionally, legal fees. That process might require a claimant to institute suit so that no one can claim down the road that the claimant failed to meet the applicable statute of limitations, for example. But, this section does not become operative unless and until one has tried a case and recovered more than was previously offered. In the vast majority of cases, this is not generally a good strategy for claimants because it commits them to trying their case, with the costs and risk of losing inherent in any court case.

However, in the rare situation where a claimant does try its case, this section might have some application, although I would say, almost without exception, that a claimant should not refuse to settle a claim as a claim because it feels it will recover bad faith damages at trial. Except in the absolutely most egregious conduct imaginable, it will be a very rare occasion that a claimant will recover bad faith damages against *anyone*, including under its contract claim against the principal, your contracting party.

(h) Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application;

(i) Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of the insured;

(j) Making claims payments to insured or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made;

(k) Making known to insured or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements of compromises less than the amount awarded in arbitration;

(l) Delaying the investigation or payment of claims by requiring that an insured or claimant, or the physician of either, submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;

(m) Failing to settle claims promptly, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage; or

This is not one of my favorite sections, in part because it isn't as clear as some of the other sections.

The best argument I could make here is that there may be portions of your claim that are clearly owed and other portions of your claim that aren't. The latter could be the fact that your claim is subject to a backcharge, for example, disputed or otherwise.

Sureties don't like cutting multiple checks on the same payment bond claim. They want to issue only one check to each claimant. However, there is nothing in the law that I am aware of that says that they have a *right* to do so. In a situation where part of the claim is clearly owed and another part is not clearly owed, I would press hard for a partial payment, claiming that a refusal to do so may be a violation of this statute.

(n) Failing to provide promptly a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement . . ." (Emphasis added as to all cited statutory sections.)

This seems fairly self-explanatory.

IV. CONCLUSION.

To facilitate a pretrial settlement of your payment bond claim where the surety has tendered its defense to the principal will require you to try to create a chasm between the two. To use a war-time expression: 'Divide and conquer'! And, make no bones about it. Litigation *is* war.

And, allegations of insurer bad faith in the settlement of claims, applied *sparingly* and only in appropriate circumstances, can contribute to an earlier conclusion to your payment bond case. Real claims of this nature are not all that frequent. Alleging bad faith where none exists could possibly boomerang against you in the settlement of your claim.

At the same time, the provisions of MGL C. 176D (3) (9) are what they are. The less any particular surety follows them, the greater chance of such a claim being successful, at least for the purposes of obtaining a settlement. Being able to quote such sections to a surety is a different matter than actually legally proving bad faith. We are, however, only looking with this Squib for how best to *motivate* a surety to settle pre-trial. Being able to demonstrate for a surety that you are aware of their affirmative obligations to work towards the settlement of your claim, with their compliance with such obligations falling short, may work towards an earlier settlement of your claim. Which is, in most cases, what we are looking for here.

What I consider to be a good settlement on a surety payment bond claim, particularly one entered into fairly early in the process, is to get all or nearly all of the actual claim with enough interest to cover some portion of the attorneys' fees. Please keep in mind that, with two exceptions, attorneys' fees are not recoverable in Massachusetts litigation.

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* A 'squib' is defined as 'a short humorous or satiric writing or speech'. Wiktionary defines a 'squib' as: "a short article, often published in journals, that introduces empirical data problematic to linguistic theory or discusses an overlooked theoretical problem. In contrast to a typical linguistic article, a squib need not answer the questions that it poses."

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[1]Travelers Insurance Company used to use – maybe, even still does – the '4 C's' as important criteria for a bond applicant to meet in order to get a bonding line. These are: Capital, Capacity, Competence and Character. Having been involved with hundreds of payment and performance bond claims and lawsuits, both representing sureties and representing contractors and indemnitors, when something hits the fan, 'Character' is often the most important of these. One remembers the old saying: "Character is what you do when no one is looking."

[2] "I see nothing. I hear nothing. I know nothing." He was a character in *Hogan's Heroes*, a popular television show of a million years ago.

[3] There is a wonderful resource, *Manual of Credit and Commercial Laws*, that is published annually by the National Association of Credit Management (NACM), which contains the bond laws and lien laws of all 50 states. Sauer & Sauer writes the section of that book on Massachusetts bond and lien law. Further information on this book can be found at http://my.nacm.org/net/Info/Store/Info/store/nacmStoreHome.aspx?

[4] One of the things I have noticed since the 'Great Recession' is that it seems to me that contractors are less willing to participate in lawsuits than they were previously.