

THE SURETY & FIDELITY ASSOCIATION OF AMERICA

MEMORANDUM

TO: Government Affairs Advisory Committee
Contract Bonds Advisory Committee

FROM: Lenore S. Marema, Vice President-Government Affairs

DATE: May 21, 2007

SUBJECT: 2007 Overview of the State Legislative Sessions—Contract Surety

Twenty-nine states and the District of Columbia that are still in session. States that have adjourned are Alaska, Arkansas, Colorado, Florida, Georgia, Hawaii, Iowa, Idaho, Indiana, Kentucky, Maryland, Mississippi, Montana, North Dakota, New Mexico, South Dakota, Utah, Virginia, Vermont, Washington, West Virginia and Wyoming. The following summarizes key state legislation affecting contract surety that SFAA most recently has been working on with AIA and NASBP. This report updates the April 2007 overview report, which can be accessed on the SFAA website for reference.

Bad Faith

Rhode Island SB 192 would permit any obligee, principal or claimant under a payment or performance bond to bring an action against the surety when it is alleged that the surety wrongfully and in bad faith refused to pay or settle a claim or refused to perform its obligations under the bond. Compensatory and punitive damages are permitted, as well as reasonable attorneys' fees. The bill passed the Senate, but SFAA, AIA and NASBP are cautiously optimistic that our efforts to defeat the bill in the House will be successful again this year. Each trade has contacted and written the House leadership in opposition to the bill. SFAA and NASBP have urged their members to write letters of opposition as well. SFAA also has written to the President of the National Conference of Insurance Legislators (NCOIL) as he is on the Rhode Island House Judiciary Committee. The same bill passed the Senate last year, but was defeated in the House.

There is bad faith legislation aimed at the insurance industry in general in several states as part of the agenda of the trial bar. There are statewide coalitions in each state fighting these bills, which include the insurance industry and the business community.

--Enacted Laws. **Maryland** HB 425/SB 389 was signed into law promptly, as the new Governor actively supported it in the legislature. The new law applies to first party claims and creates a new administrative process in the Maryland Insurance Department to determine if an insurer failed to act in good faith. In this administrative proceeding and in a subsequent court proceeding, any damages awarded are limited to the contractual amount plus attorneys' fees and

interest. The Maryland Insurance Department is given new authority to impose a civil penalty of up to \$125,000 for a single violation. The term of current Maryland Insurance Commissioner Stephen Orr ends on May 31, 2007. A new insurance commissioner, appointed by the Governor who supported this bill, will implement the new law. Of note, however, is that the Maryland insurance unfair claims settlement practices law follows the model legislation of the National Association of Insurance Commissioners (NAIC) and specifically exempts surety.

Washington Governor Christine Gregoire signed SB 5726 on May 16. It creates a first party bad faith action, but the bill defines a first party claimant as “as anyone asserting a right to payment as a covered person under an insurance policy.” Treble damages and attorneys’ fees can be awarded in first party bad faith suits against insurers and also for violations of the state insurance unfair claims settlement practices act and regulations. Unlike Maryland and other states, Washington does not exclude surety from regulation under its unfair claims settlement practices law. The new law also contains what is likely the lowest standard for bad faith in the country.

The industry sought a veto of this bill and the Governor gave mixed signals about the bill in taking her time to sign it into law. The Washington Liability Reform Coalition has filed a referendum to overturn SB 5726. The AIA is drafting amendments for the referendum prior to next year or for corrective legislation in 2008. SFAA has asked that an exemption for surety be included in any such effort, but AIA will not make a decision on whether to pursue a surety exemption from the new bad faith law until the situation evolves further and a course of action can be charted. If the SFAA does not pursue a surety exemption, the SFAA will explore other avenues to achieve an exemption.

--Bills on the Move. The **Minnesota** House and Senate passed different bad faith bills, but the industry continued with an extraordinary lobbying and public relations effort. The onerous bad faith language was stripped from HB 829 under threat of a veto, and SF 2173 stalled with some similar provisions. The industry turned the tide on this issue and remained united in opposition to any bad faith bill, and the session adjourned without any action.

State Bond Thresholds

--Enacted Laws. **Indiana** SB 211 raises the state bond threshold from \$100,000 and \$150,000 to \$200,000 for all public entities. As originally drafted, the bill would have increased the threshold to \$500,000. The bill also permits state contracting entities to require bonds for projects below the threshold and requires the Department of Administration to annually offer education on bonding for small businesses and minority- and woman-owned businesses. SFAA has contacted the Department about a statewide forum for our Model Contractor Development Program. One of our partners, The Veterans Corporation, also has a strong interest in a bonding program in Indiana. **Georgia** HB 192 raises the state bond threshold from \$50,000 to \$100,000. **Nebraska** LB 208 increases the bond threshold for counties, cities, villages, schools districts and public boards from \$5,000 to \$15,000.

--Bills on the Move. **Louisiana** SB 280 would require any DOT contract in excess of \$50,000 to be accompanied by a bid bond. The alternatives to a bid bond under existing law – a certified check, cashiers check, postal money order, bank money order or company check – would no longer be permitted.

--New Introductions. Companion legislation has been introduced to **Rhode Island** HB 6335. SB 972 also increases the state bond threshold from \$50,000 to \$200,000. Neither bill has been scheduled for a hearing. SFAA is working with AIA to develop a strategy to defeat the bills.

--Dead for 2007. Two bills were defeated in **North Carolina** that would have raised the bond threshold to \$500,000. HB 73/SB 93 would have raised the state bond threshold, and HB 749 would have raised the threshold for the University of North Carolina.

Individual Sureties

Connecticut HB 7053 would have amended the State's dram shop act, which imposes liability on sellers of alcohol, to permit the financial responsibility requirements to be met with cash, an insurance policy, a surety bond from a surety company or an individual surety who owns real estate. SFAA drafted amendments to allow sellers of liquor to post their own property in case the bill could not be defeated, but the problems with the bill were obvious; and it did not get out of committee.

Retainage

--Enacted Laws. **New Mexico** SB 604 repealed the existing Retainage Act in its entirety. The new law also includes a prohibition against withholding retainage. The law is applicable to all public and private projects, except residential construction with fewer than four units. In other recent enactments, **Kentucky** HB 490 sets retainage at no more than 10% until the project is 50% completed, after which retainage could be no more than 5%. **Kansas** SB 333 permits an owner, contractor or subcontractor to hold no more than 10% retainage in public construction projects. Prior law in **Kansas** did not specify a retainage amount.

--Bills on the Move. Under **California** SB 593, the Department of Transportation (DOT) would withhold no retainage until 75% of the days allotted to the project have passed. At that point, the DOT can require retainage only if the percentage of working days elapsed exceeds the percentage of work completed by at least 15 percent. Once the difference between these two amounts is less than 15%, any retainage held must be returned in the next progress payment. The bill is starting to move among committees in the Senate. California SB 619 would provide that the Department of General Services may not withhold more than 5% of the contract price until final completion and acceptance of the project. Existing law provides that it cannot withhold less than 5% of the contract price. SFAA opposes these bills and has been in contact with the California local surety associations.

Connecticut HB 7202 would reduce retainage on commercial construction contracts from an amount that does not exceed 7.5% to 5%. In all public projects, other than DOT projects, retainage would be reduced from 10% to 5%. Under existing law, retainage on DOT projects is 2.5%. The bill is being heard in several committees in the House and SFAA and AIA are working to oppose the change.

North Carolina SB 1245 has passed the Senate and is in the House where SFAA and AIA are working to defeat it. The bill would significantly limit the ability of a public owner to hold retainage. Owners would be required to release retainage to the general contractor when they

receive either a certificate of completion, a certificate of occupancy or beneficial occupancy. The fact that there are claims against the contractor or change orders in existence would not be reasons to deny full release of retainage. The bill also would prohibit retainage from being withheld on contracts under \$300,000 and would limit retainage to 5% until the contract is 50% complete. At 50% completion, no further retainage would be allowed. SFAA has given the AIA state counsel an analysis of the bill and priorities for amendments, as well as talking points on the benefits of retainage.

Texas HB 2074 would have repealed the retainage law applicable to DOT projects. This bill passed the House, but the Senate substitute bill for HB 2074 provides that the DOT may retain up to 5% for the entire length of the project or may release it at any time before the project is completed. The House concurred and the bill is on the Governor's desk for signature.

--Dead for 2007. **Colorado** House Resolution 1041 would have created a special joint legislative committee to consider prompt payment measures, including retainage. **Maryland** HB 342 would have limited retainage on private construction contracts to not more than 5%.

Bonding on Mega Construction Projects

--Bills on the Move. **Florida** HB 985 would increase the bond threshold for DOT projects from \$150,000 to \$250,000 and would permit the DOT to waive 100% bonds on contracts in excess of \$250 million. For such large projects, the DOT would be permitted to set the bond amount at some portion of the total contract price and accept other forms of security for amounts in excess of the bond. Florida HB 1489 requires a 100% performance and payment bond for all other public projects, except for projects over \$250 million, for which the public owner can require the largest bond reasonably available, but not less than \$250 million. The existing statute was silent as to whether the bond had to be for 100% of the contract price. Both Florida bills are on the Governor's desk for signature.

--Carryover. **Washington** SB 5208 would have permitted the state DOT to set the amount of the bond on projects of \$80 million or greater to cover the State's maximum probable loss, but the bond could not be less than \$80 million. The bill passed the Senate but did not pass the House by the time the legislature adjourned. The DOT intended to increase the number of contractors that could bid on some upcoming mega projects by lowering the bond amount to cover the State's maximum exposure to loss rather than the total contract price. Although SFAA was unable to defeat the concept or raise either the threshold or the bond amount required, SFAA and AIA were successful in having the bill amended to require the DOT to develop risk assessment guidelines to show how it will measure the State's exposure to loss and how the bond amount that they set protects 100% of the State's loss, which will increase transparency in the process. Travelers provided excellent testimony when the Senate bill was heard in the House Committee. The bill carries over to 2008

Public Private Projects (PPPs).

--Texas SB 792 is on the Governor's desk for signature. The bill would permit PPPs in specified toll way projects. The bill would require the private entity to provide payment and performance bonds, or alternate security, for the cost of constructing and maintaining the project. If the toll

way authority finds it impracticable for the private entity to bonds or security in the amounts required, the authority will set the amount of the bonds or alternative security. The bill would also provide that the authority may require alternative security in lieu or in addition to performance and payment bonds. Under the bill, the design and planning services, among other non-construction items, do not have to be bonded.

SFAA worked with the Texas Surety Federation, which was active in proposing amendments to assure a maximum amount of bonding on any PPPs authorized. The PPP concept had a lot of support and the DOT wanted flexibility in the amount of security required. The major debate on the PPP bills centered on the terms and conditions of PPPs other than surety bonding. The bills were hard to amend and SB 792 was the result of compromise.

--Vetoed. The **Texas** Governor vetoed HB 1892, which started out as the companion bill to SB 792. The bonding provisions in the bill were similar to SB 792.

--Dead for 2007. **Hawaii** HB 70 would have permitted the DOT to allow less than 100% bonding on any public private project. **Texas** SB 965 would have permitted regional toll way authorities to enter into agreements with private entities for turnpike projects. The bill would have required the private entity to provide payment and performance bonds or an alternative form of security in an amount equal to the costs of constructing and maintaining the project. If the toll way authority determined that it was impracticable for the private entity to provide the 100% security required, the authority would have been permitted to set the amount of the bonds or the alternative forms of security. SFAA has been coordinating with the Texas Surety Federation, which has been active in proposing amendments to assure maximum surety bonding. In the end, while the bill had a lot of support, the House amended the Senate bill and the session adjourned without a compromise being reached.

Bond Guarantee Programs and Technical and Other Assistance for Small and Emerging Contractors

--Enacted Laws. **Colorado** HB 1209 requires the Director of the Minority Business Office (Director) to establish a program that would provide surety technical assistance services for the benefit of historically underutilized businesses (HUBs). The Director is authorized to contract with insurance companies, surety companies, agents or brokers for the purpose of implementing the program. The Director also must compile a centralized directory of all historically underutilized businesses that have obtained the contract performance and payment bonds required for the award of a government procurement contract.

--Bills on the Move. **Florida** HB 1283/S 2860 would create financial assistance programs for black business enterprises, including a new program offering assistance in obtaining surety bonds. The bill would create the Florida Black Business Investment Board, which would be authorized to guarantee bonds. The bill is on the Governor's desk for signature.

Illinois SB 1511, as originally drafted, would have permitted the Capital Development Board (Board) to waive bonds for small and emerging contractors, subject to some limitations. As the bill passed the Senate, the bond waiver was removed and the amended version of the bill would authorize the Board to accept a "second party bond" if the contractor is a small business. A "second party bond" is one that "designates as principal, guarantor or both, a person or persons

in addition to the person to whom the contract is proposed for award.” The bill is an attempt to add parties to a surety bond, probably with the intent of making bonds for small contractors more attractive for sureties to write.

Illinois SB 1511 was heard in the House Executive Committee this morning and was passed out as amended with a provision that SFAA drafted and AIA took to the bill sponsor for inclusion into the bill. As amended and sent to the House floor, SB 1511 would permit the Capital Development Board to accept cash, letters of credit, U.S. debt obligations or debt obligations backed by the full faith and credit of the State of Illinois from small and minority businesses in lieu of surety bonds. If the bill passes the House this week, it will have to go back to the Senate for concurrence. Time is running short in Illinois; and, based on the AIA state counsel’s conversations with the Senate and House sponsors, this bill is not high on their lists for enactment.

SFAA and AIA both testified briefly today in the House in support of the amended bill. After the testimony we met with representatives of the Capital Development Board who attended the hearing. The original Senate bill was an initiative of the Board. The bill would have permitted the Board to waive bonds for small and minority contractors under limited circumstances. In the eleventh hour, SB 1511 was substituted to permit the Board to accept bonds guaranteed by the federal Small Business Administration and “second party bonds,” which were defined as bonds signed by a person in addition to the general contractor, as principal or guarantor. The Board took a neutral position on the final version of SB 1511 that came out of the Senate, because it did not require the Board to accept SBA-guaranteed or second-party bonds; and they did not intend to accept them. There is no evidence that individual surety interests were behind SB 1511.

The hearing and contact with the Capital Development Board gave SFAA an opportunity to both support the SBA program and promote our Model Contractor Development Program. SFAA just kicked off an eight week contractor program in Chicago pursuant to our MOU with the U.S. Department of Commerce Minority Business Development Program. We are hopeful that the Capital Development Board will tap contractors participating in this program for future construction work.

Oregon HB 2776 would extend the exemption for small and emerging contractors from one to five years from the requirement to file the new public works bond. This new bond requirement was enacted in 2005. The bill has passed the House and is in the Senate.

--Recent Introductions. **New York** AB 8108/SB 5199 would permit payment and performance bonds to be waived for small-, minority- and women-owned businesses on contracts under \$500,000.

--Dead for 2007. **Washington** HB 2221 would have created and funded a Contractor Assistance and Bond Guarantee Program Fund. The Program would have been authorized to guarantee surety bonds for qualified disadvantaged contractors or qualified small business contractors on public contracts of \$500,000 or less.

Surety Eligibility Requirements

New York AB 870 would require performance and payment bonds on all public projects in New York. The bill would also require that the surety be a company licensed in New York with a rating of A- or better from Best's or an equivalent rating service certified by the New York Superintendent. SFA has seen some instances in New York in which public entities have taken the position that they can set their own requirements and required an "A" rated surety. If enacted, this bill arguably preempts such other local eligibility requirements. This is an AGC bill and SFAA has discussed it with the AGC. It is not necessarily high on AGC's list for action this year, but if they have a chance to move the bill, SFAA has suggested inclusion of language that would more clearly preempt all other surety eligibility requirements.

Prevailing Wages

Iowa HB 810, the onerous prevailing wage bill, did not move much this year, but does officially carryover into 2008.

Immigration Issues

--*Dead for 2007.* **Nevada** AB 219 would have required monthly demographic reports from contractors and subcontractors.

Anti-Directed Surety

Hawaii HB 1833 would enact an anti-directed surety provision applicable to any public or private project on which bid, payment and performance bonds are required. The bill is on the Governor's desk for signature.

Veteran Owned Businesses

--*Recent Introductions.* **New York** AB 7733 would give a 3% bid preference to service disabled veteran owned businesses. AB 7734 would add service disabled veteran owned businesses to the Urban Development Corporation Act, which is a state bonding guarantee assistance program.

Other

Illinois HB 634 would give a 5% bidding preference to bidders using bio-based products. The bill has now passed both Houses.

New York SB 5716 would provide that the Wicks Act, which requires multiple prime contracts, would not apply to contracts in which the contractor entered into a project labor agreement. Unions in New York support this bill, as it encourages the use of union labor. The Governor is vocally supporting this bill, as is the Senate Majority Leader. The bill also would raise the threshold for application of the Wicks Act from \$50,000 to \$250,000. Also, in cities with a population in excess of one million, the bill would set the threshold for the Wicks Act at \$1 million. SFAA has spoken to the AGC of New York and the AGC opposes this bill. It provides little help for contractors.

2007 Overview of the State Legislative Session—Commercial Surety

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Bad Faith

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LICENSE BONDS

Home Improvement Contractors

--Enacted Laws. **Washington** HB 1843 expands the scope of home service contractors that must be licensed and bonded to include installation or repair of roofing or siding, tree removal services and cabinet or similar installation.

--Bills on the Move. **California** SB 1047 increases the bond required of the “qualifying individual” from \$7,500 to \$12,500. The qualifying individual is a specifically-defined owner or other employee who can take the examinations and otherwise qualify an individual owner, co-partnership or corporation for a contractor’s license in the State. The bond amount is consistent with the contractor’s license bond. The bill passed the Senate and is in committee in the Assembly. **Iowa** HB 908 would require plumbers, HVAC, refrigeration and hydronic contractors to be licensed. Those seeking a license as a master would have to post a bond in an amount to be determined by regulations. The bill is on the Governor’s desk for signature. **Texas** HB 1460 would increase the bond amount for installers of manufactured housing from \$10,000 to \$25,000 and from \$30,000 to \$50,000 for a rebuilder. A retailer would need a \$50,000 bond for its principal location and \$50,000 for each branch location. The bill passed the House and is moving in committee in the Senate.

--Recent Introductions. **New York** AB 7744/SB 5410 would require specialty contractors to post a \$5,000 license bond. The New York State Consumer Protection Board has concluded a series of three hearings in the State to investigate the home improvement industry, which is the source of a majority of complaints the Board receives. SFAA worked with CNA Surety on this issue and presented testimony at two of the hearings in favor of a license bond to prequalify home service contractors. SFAA used the California contractor license bond requirement as an example of what another large state has done to help eliminate abuses in the home improvement industry. In response to concerns expressed about some contractors being unable to obtain bonds, SFAA noted that the \$12,500 bond has not been problematic in California and also suggested a tiered bond amount similar to the New York motor vehicle bond. It is possible that a statewide contractor’s license bond may be possible this year. New York City may be carved out of the bill, as it has a recovery fund.

--Carryover. **Iowa** SB 317 would require home improvement contractors to post a \$75,000 bond, which would respond to any person damaged by the contractor’s breach of contract or violation of law. **Washington** SB 5047 would require residential contractors to be licensed and bonded.

Mortgage Brokers and Lenders

--Enacted Laws. **Indiana** HB 1717 creates a new appeals process regarding final orders from the Secretary of State against those in violation of the mortgage broker and lender laws. A surety bond in the amount of \$500 is required for the appeal process. **Mississippi** SB 2350 extends the application of the licensing and bonding requirements for mortgage lenders to correspondent lender companies. The bond amount is \$150,000, unless the person or entity was otherwise required before July 1, 2007, to be licensed and bonded at an amount of \$50,000. In that case, the \$150,000 bond is not required until the 2007 license renewal. **Montana** HB 69 requires

residential mortgage lenders to be licensed and to post a bond in an amount to be determined by regulation. **Texas** HB 1716 permits financial services companies to act as mortgage brokers through exclusive agents and requires the company to post a \$1 million bond to cover the activities of each exclusive agent.

--Bills on the Move. Rhode Island SB 104 would increase the amount of the license bond required from mortgage brokers from \$10,000 to \$20,000 and the bond required from mortgage lenders from \$25,000 to \$50,000. The bill passed the Senate and has been sent to the House.

Check Cashing and Money Transmitters

--Enacted Laws. Mississippi HB 362 makes the license and bonding requirements for check sellers permanent. The existing law was due to sunset on July 1.

--Bills on the Move. Alaska SB 116 would enact the Uniform Money Services Act of the National Conference of Commissioners on Uniform State Law (NCCUSL). Money transmitters would be required to be licensed and to post a bond of \$25,000, plus \$5,000 per location, up to an additional \$125,000. The total maximum bond would be \$150,000. The Department of Commerce, Community and Economic Development, would be able to increase the bond up to \$500,000 if the financial condition of the licensee required such an increase. The bill is on the Governor's desk for signature. **Delaware** SB 81 would allow check sellers and money transmitters to post a letter of credit in lieu of a surety bond. The bill passed the Senate and is in committee in the House.

Credit Counseling and Debt Management Services

--Bills on the Move. Colorado SB 57 would enact the NCCUSL (National Conference of Commissioners on Uniform State Law) Uniform Debt Management Act. Providers of debt management services would have to be licensed and post a \$50,000 bond. Although SFAA wrote the sponsor a letter, the bill contains the requirement for an "A" rated surety licensed in the State. NCCUSL is supposed to consider SFAA's comments and request for an amendment to the Uniform Act after the bill has been introduced in the legislatures for a two-year period. The bill is on the Governor's desk for signature. **Minnesota** SB 1532, which would require debt management service providers to be licensed and post a \$50,000 bond, is moving through committees in the Senate.

--Recent Introductions. California AB 69 would require providers of debt management services to be licensed and to post a \$25,000 bond to guarantee faithful observance of the provisions of the law and faithful performance of the written agreement with the consumer. Debt management services are defined as receiving money from a consumer for the purpose of distributing that money among the consumer's creditors in accordance with a plan administered by the provider. The bill has some provisions that are similar to the NCCUSL Uniform Debt Management Act, but it is not the Uniform Act in its entirety. AB 69 does not contain the NCCUSL requirements for an "A" rated surety. AB 69 would require credit counselors to be licensed and to post a \$25,000 bond under the same terms and conditions as debt management service providers. AB 69 also contains provisions requiring providers of debt settlement services to be licensed. This means persons or entities that serve as an intermediary between an individual and creditors for the purpose of obtaining concessions without receiving money from

the individual with the intent to distribute it to the individual's creditors. Such providers would have to be registered and provide evidence of aggregate umbrella insurance against the risk of dishonesty, fraud, theft and of misconduct on the part of employees or agent of the provider. Such insurance must be from an "A" rated insurer licensed in the State.

Pay Day Lenders

--Dead for 2007. **Georgia** HB 163 would have required payday lenders to be licensed and bonded. The amount of the bond would have been \$25,000 per location with a \$250,000 maximum. The bill was substituted in committee; and the bond amount was increased to \$50,000, although the maximum cap remained the same. The bill got out of committee but failed to pass the House.

Debt Collectors

As originally drafted, **Rhode Island** SB 34 would have required debt collectors to be licensed and bonded. The amount of the license bond is \$15,000. In the bill that was passed by the Senate, however, the bonding provisions were removed and civil actions against debt collectors for violations of the law were substituted. One of the bill sponsors in the Senate also is the sponsor of the surety bad faith bill.

--Recent Introductions. **New York** AB 8153 would require debt collection agencies to be licensed and bonded. The bond amount would be based on the number of persons employed by the licensee. A \$10,000 bond is required for one to four employees; a \$25,000 bond is required for five to seven employees and a \$50,000 bond is required for more than 10 employees.

Motor Vehicle Bonds

--Bills on the Move. **Colorado** HB 1081 would require power sports vehicle dealers to post a \$3,000 license bond. The bill is on the Governor's desk for signature. **Colorado** SB 221 would increase the amount of the motor vehicle salesperson license bond from \$5,000 to \$15,000. The bill is on the Governor's desk for signature. **Missouri** SB 82 and 239 would raise the motor vehicle dealer bond from \$25,000 to \$30,000 and additionally require power sports and trailer dealers to be bonded. The bill passed the Senate and the House and is in conference committee. As originally drafted, **Oregon** HB 2438 would have reduced the motor vehicle bond from \$40,000 to \$35,000. The bill was gutted and substituted and now is on the Governor's desk for signature without the reduction in the bond amount.

--Dead for 2007. **Florida** SB 2488 would have required RV distributors and importers to post a \$10,000 license bond. **Nevada** SB 263 would have required private entities that register motor vehicles to be bonded.

Other

Texas HB 2138 would require property tax lenders to be licensed and bonded. The bond amount is \$50,000 for the initial license and \$10,000 for each additional license required. The bill passed the House and is in committee in the Senate.

APPEAL BONDS

--*Vetoed.* **Oklahoma** SB 507 would have capped the appeal bond at \$25 million and provided that the bonds for small businesses cannot exceed \$1 million. The appeal bond provisions were part of a greater tort reform package that the Governor vetoed for reasons unrelated to the appeal bond provisions.

UPDATES ON SOME RECENT COMMERCIAL SURETY ISSUES

Amendments to the Uniform Commercial Code

In its Restatement of the Law on Surety, the American Law Institute (ALI) referred to sureties as “secondary obligors” even though ALI restatements generally summarize an existing body of law rather than break new ground. This new terminology has caused states to amend their versions of the Uniform Commercial Code to contain the reference to surety as “any other secondary obligor.” These changes to the law have no substantive impact on surety. **Florida** SB 252 is the most recent bill to be sent to the Governor’s desk for signature. **Iowa, Indiana, Kansas** and **Utah** enacted similar legislation so far this year.

Boxing/Martial Arts

--*Bills on the Move.* **Alabama** HB 27 would create a state boxing commission and require promoters to be licensed and bonded for each match. The new commission would set the bond amount. The bill has passed the House and is in the Senate.

Private Investigators

--*Enacted Laws.* **Indiana** SB 506 changes the private detective license law to the private investigator firm license law. The firm must post a \$7,000 license bond.

--*Carryover.* **Alaska** HB 158 would require a \$15,000 license bond or E&O insurance.

Whole Distributors of Prescription Drugs

--*Enactments.* **Maryland** HB 1030 requires wholesale distributors to post a \$100,000 bond.

--*Bills on the Move.* **Illinois** SB 509 would require wholesale drug distributors to post a \$100,000 license bond.

2007 State Legislative Sessions—Fidelity

Twenty-nine states and the District of Columbia that are still in session. States that have adjourned are: Alaska, Arkansas, Colorado, Florida, Georgia, Hawaii, Iowa, Idaho, Indiana, Kentucky, Maryland, Mississippi, Montana, North Dakota, New Mexico, South Dakota, Utah, Virginia, Vermont, Washington, West Virginia and Wyoming. The following summarizes key state legislation affecting fidelity that SFAA most recently has been working on with AIA and NASBP. This report updates the April 2007 overview report, which can be accessed on the SFAA website for reference.

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As part of the trial bar's agenda, there is bad faith legislation aimed at the insurance industry in general in several states. There are statewide coalitions in each state fighting these bills, which include the insurance industry and the business community.

--Enacted Laws. **Maryland** HB 425/SB 389 was signed into law promptly, as the new Governor actively supported it in the legislature. The new law applies to first party claims and creates a new administrative process in the Maryland Insurance Department to determine if an insurer failed to act in good faith. In this administrative proceeding and in a subsequent court proceeding, any damages awarded are limited to the contractual amount plus attorneys' fees and interest. The Maryland Insurance Department is given new authority to impose a civil penalty up to \$125,000 for a single violation. Of note, however, is that the Maryland insurance unfair claims settlement practices law follows the model legislation of the National Association of Insurance Commissioners (NAIC) and specifically exempts surety.

Washington Governor Christine Gregoire signed SB 5726 on May 16. It creates a first party bad faith action, but the bill defines a first party claimant as "as anyone asserting a right to payment as a covered person under an insurance policy." Treble damages and attorneys' fees can be awarded in first party bad faith suits against insurers and also for violations of the state insurance unfair claims settlement practices act and regulations. Unlike other states that follow the model legislation of the National Association of Insurance Commissioners (NAIC) Washington does not exclude surety from regulation under its unfair claims settlement practices law. The new law also contains what is likely the lowest standard for bad faith in the country.

The industry sought a veto of this bill and the Governor gave mixed signals about the bill and took her time in signing it. The Washington Liability Reform Coalition has filed a referendum to overturn SB 5726. The AIA is drafting amendments for the referendum prior to next year or for corrective legislation in 2008. SFAA has asked that an exemption for surety be included in any such effort, but AIA will not make a decision on whether to pursue a surety exemption from the new bad faith law until the situation evolves further and a course of action can be charted. If the SFAA does not pursue a surety exemption, the SFAA will pursue other avenues to achieve an exemption..

--Bills on the Move. The **Minnesota** House and Senate passed different bills, but the industry continued with an extraordinary lobbying and public relations effort. The onerous bad faith language was stripped from HB 829 under threat of a veto, and SF 2173 now is stalled with some similar provisions. Discussions continue among the interested parties to develop a "compromise" bill. The industry turned the tide on this issue and remained united in opposition to any bad faith bill and the session adjourned without any action.

UPDATE ON FIDELITY ISSUES IN THE STATES

Condo Associations

Hawaii SB 1704 would permit a community association unable to obtain the required fidelity bond to apply to the Real Estate Commission for an exemption, deductible or bond alternative. Existing law requires associations with five or more units to post a fidelity bond in the amount of \$500 multiplied by the number of units, but not less than \$20,000 and not more than \$200,000.

SB 1704 is on the Governor's desk for signature. **Illinois** HB 1071 would require managers of community associations to be licensed and bonded. A fidelity bond would be required in an amount not less than all the funds of the association and must cover the manager and all partners and employees of the firm in which the manager is employed. The bill passed the House and is on the Senate floor.

Professional Employee Organizations

--*Enacted Laws.* **North Dakota** SB 2036 provides that an employee is not, solely as the result of being an employee of a PEO, an employee of the PEO for purposes of general liability insurance, employment practices liability insurance, fidelity bonds, surety bonds, employer's liability which is not covered by workers' compensation or liquor liability insurance carried by the professional employer organization, unless the covered employee is included by specific reference in the PEO agreement and applicable prearranged employment contract, insurance contract or bond.

Pharmacy Benefit Managers

--*Dead for 2007.* **Maine** SB 450 would have required pharmacy benefit managers to post a bond of at least 10% of the funds handled or managed annually. The bond may have been required to be in excess of \$500,000 but not in excess of 10% of the funds handled or managed annually.

OTHER RECENT ENACTMENTS

Iowa SB 502 repealed the requirements that the Division of Savings and Loans provide a \$20,000 bond for each of the Department's examiners.

MORE BILLS ON THE MOVE

Georgia HB 477 would enact a charter for the City of Richland and require that city officers and employees post a surety or fidelity bond in an amount and with terms and conditions that the city council would approve. The bill has passed the House. HB 496 is similar except that it is for the City of Arlington. This bill is on the Governor's desk for signature.

Iowa SB 557 would require the new Superintendent of Credit Unions to post a bond and would require state credit unions to obtain fidelity bonds for credit union employees and officials in an amount sufficient to indemnify the credit union for losses caused by fraud, dishonesty, forgery, theft, larceny, embezzlement, wrongful abstraction, misappropriation, misapplication or any other wrongful act of the employees or officials. The bill is on the Governor's desk for signature.

Iowa SB 559 would require the sellers of pre-need funeral contracts to post a \$50,000 fidelity bond or insurance policy, which must remain in place for one year after the ownership of the business is sold or transferred. There also are new notices to the consumer that must be on the bond or insurance. The bill is on the Governor's desk for signature.

Missouri HB 426 would create the Propane Safety Commission and permit the Chairman of the Commission to obtain a blanket bond covering all members of the Commission and the employees in lieu of individual bonds. The bill has passed both Houses.

New Hampshire HB 256 would require officials and employees to whom the town treasurer delegates certain treasury functions to be covered under the town's blanket bond. The bill has passed the House. The Senate amended the bill, which did not affect the surety bond provision. The bill is on the Governor's desk for signature.

DEAD FOP 2007

Iowa SB 77 would have created a Department of Environmental Protection and required the Department to obtain an adequate public employees fidelity bond to cover officers and employees.