

THE SURETY & FIDELILTY ASSOCIATION OF AMERICA

MEMORANDUM

TO: Government Affairs Advisory Committee
Commercial Surety Advisory Committee

FROM: Lenore S. Marema

DATE: June 26, 2007

RE: 2007 Overview of the State Legislative Session—Commercial Surety

At this point in the state sessions, it is easier to list the states still in their regular 2007 session, as most states have adjourned for the year. California, District of Columbia, Delaware, Illinois, Louisiana, Massachusetts, Michigan, North Carolina, New Hampshire, Ohio, Oregon, Pennsylvania and Wisconsin are still in session. New Jersey and New York are in recess, and South Carolina is in its veto session.

The following summarizes key state legislation affecting commercial surety that SFAA most recently has been working on with AIA. This report updates the May 2007 overview report, which members can access on the SFAA website for reference.

Bad Faith

The trial lawyers resurrected their bad faith agenda in states that experienced a turnover in leadership as a result of the November 2006 elections.

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 was heard and held again in the House Judiciary Committee. The House Committee previously heard and held the companion bill, HB 5120. The legislature is adjourned and the bill is dead for this year.

The insurance industry and business community are working on a dual track to reverse **Washington** SB 5726, which likely has the lowest standard for bad faith in the country. The coalition currently is seeking signatures to qualify for a referendum that would put the issue on the ballot for the voters to overturn in the November elections. In the meantime, the industry is working on a Governor's task force to see if corrective language can be worked out for the 2008 session. The Governor is a trial lawyer and was one of the lead attorneys on the tobacco litigation. She does, however, have the following concerns with the new law: 1) a clear bad faith standard is needed; 2) punitive damages are unlimited and 3) health insurers are exempt. Even if the Governor's task force can agree on meaningful corrective legislation, there is no guarantee that it will pass in 2008. By mid-July, the industry will be able to gauge whether corrective

legislation is realistic or whether the referendum is the only real avenue to further address this new law.

--Defeated. A business and industry coalition turned the tide in **Minnesota**, and bad faith legislation was defeated before the session adjourned. The House and Senate passed different bad faith bills, but the industry continued with an extraordinary lobbying and public relations effort. Neither bill passed before the session adjourned.

The industry defeated **New Hampshire** Senate Bill 188. The Senate version of the bill would have subjected an insurer to the consumer protection law if a court of competent jurisdiction found that the insurer engaged in unfair claims settlement practices and would have allowed a third party to bring a direct action against an insurer for an unfair claims settlement practice, independent of any actions taken by the Commissioner. The House amended the bill by substituting provisions that would have increased the penalties for violation of the unfair claims practices law from \$2,500 to up to \$25,000 for each violation. The Senate did not concur with the House amendment and the bill went to conference, where it died when the conferees failed to reach an agreement by the June 19 deadline.

Individual Sureties

The individual surety issue has arisen in **Pennsylvania** HB 445, which is a commercial surety bill that would require dog kennels to be licensed and bonded. The bond must be issued by a surety licensed in the State or “two sufficient individual sureties approved by the Secretary” (of Agriculture). SFAA believes that this is a bad precedent in permitting individual sureties, and in fact, conflicts with the Pennsylvania Insurance Code.

The Pennsylvania Insurance Code provides that insurance companies conduct the business of insurance in the Commonwealth, and private individuals, associations and partnerships are prohibited from doing so. The Code further requires bonds to be issued by a company duly licensed by the Insurance Department. Not only is it illegal under the Insurance Code for individuals to be sureties, it also is outside of the expertise of the Secretary of Agriculture to determine whether an individual is a “sufficient surety” and to permit such individuals to act as a surety company without a license in Pennsylvania. SFAA and AIA currently are working on a strategy to address this bill.

LICENSE BONDS

Home Improvement Contractors

--Enactments. **Iowa** HB 908 requires 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.

Minnesota HB 1208/SB 998 is an omnibus package that revised numerous provisions in Minnesota’s construction, licensing, building, electrical and water codes. The new law requires manufacturers and dealers of manufactured homes to post a \$20,000 license bond. For dealers, a separate \$20,000 bond is needed for each location. The new law increases the license bond for electrical contractors from \$5,000 to \$25,000 and the license bond for residential roofing contractors from \$5,000 to \$15,000. The new law also requires all electrical inspectors to be licensed as a master or journeyman. A \$1,000 bond is required. Regarding plumbers, the new

law provides that only the \$25,000 state license bond may be required. The new law repeals a provision in the prior law that allowed the bond required by any locality to be substituted for the state license bond.

Oregon SB 62 permits claims against landscaping businesses to be filed against the bond or other security, provided the claim is for negligent or improper conduct or breach of contract. **Texas** HB 1460 increases 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.

--*Carryover.* **Vermont** HB 502/SB 172 would require installers of manufactured homes to be licensed and bonded. An Installation Standards Board will set the amount of the bond.

--*Dead.* **Alabama** SB 438 would have required dealers of manufactured homes to post a \$50,000 license bond.

Mortgage Brokers and Lenders

--*Dead.* SFAA worked with the Local Surety Association to get **Oregon** SB 965 held in committee. While not directly affecting the mortgage broker bond, the bill would have required brokers to comply with onerous new standards and to pay significant new penalties in circumstances over which they had no control. **Rhode Island** SB 104 would have increased 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 started to move in the House but the session adjourned and it failed to pass.

Check Cashing and Money Transmitters

--*Enactments.* **Georgia** SB 70 limits the maximum amount of the license bond for check sellers and money transmitters to \$1.5 million.

--*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 is on the Governor's desk for signature.

--*Recent Introductions.* **Michigan** SB 169 would require check cashing services to post a \$5,000 license bond per location.

Credit Counseling and Debt Management Services

--*Enactments.* **Colorado** SB 57 enacts 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.

--Carryover. Minnesota SB 1532 would require debt management service providers to be licensed and post a \$50,000 bond.

--Dead. Rhode Island HB 5014 would have enacted the NCCUSL Uniform Debt Management Services Act. It would require a \$50,000 license bond from an "A" rated surety. SFAA wrote a letter to the bill sponsor urging the elimination of the eligibility requirements for the surety.

Motor Vehicle Bonds

--Enactments. Colorado HB 1081 requires power sports vehicle dealers to post a \$3,000 license bond. **Colorado** SB 221 increases the amount of the motor vehicle salesperson license bond from \$5,000 to \$15,000. **Nevada** SB 452 increases the license bond for motor vehicle brokers from \$50,000 to \$100,000. The new law also revises the bond amounts for all motor vehicle manufacturers, distributors, dealers and re-builders. Prior law required a \$50,000 bond. The new law requires a \$100,000 bond for most licenses, except for licensees selling only motorcycles or horse trailers, in which case the bond is increased from \$5,000 to \$50,000. Those selling utility or other special-use trailers must post a license bond of \$10,000. 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.

--Bills on the Move. Missouri SB 82 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 is on the Governor's desk for signature.

Health Related Entities

--Enactments. Texas HB 3064 requires providers of discount health care programs to be registered and to post a surety bond of at least \$50,000.

--Bills on the Move. Connecticut SB 1213 would require preferred provider networks for health insurers to maintain financial security in an amount sufficient to make payments to participating providers for two months, the actual amount outstanding to such providers or another amount that the insurance commissioner shall determine. A bond could be posted as security. The bill is on the Governor's desk for signature. **Delaware** SB 58 would require providers of discount medical plans to post a surety bond of at least \$50,000. The bill has passed the Senate and is in committee in the House.

Other

--Enactments. Texas HB 2138 requires 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.

--Bills on the Move. New Hampshire HB 895 would require court reporters to be licensed and to post a \$1,000 license bond. The bill has passed both chambers.

PERMIT BONDS

Green Buildings—Permit Bonds

--Carryover. **South Carolina** SB 377 was substantially amended and passed the Senate. Under the revised bill, any taxpayer may receive tax credits for constructing a commercial facility that either receives three green globes under the Green Globes Rating System of the Green Building Initiative (GBI) or the LEEDS Silver Standard from the US Green Building Council (USGBC). The taxpayer must register with the GBI or USGBC prior to submitting the first application for a permit to build a green building. The taxpayer must provide an environmental performance bond with the application for the first building construction permit. Posting the bond entitles the taxpayer to a decision on its permit application within 21 days.

If the permitting agency fails to make a decision on the completeness of the permit application within the 21 days, the bond is returned to the taxpayer. If the permit application is complete, the permitting agency holds the bond until either the GBI or USGBC certifies as to whether the commercial project meets the required standards. If the project is certified, the permitting agency “refunds the bond” to the taxpayer. If the project fails to be certified, the taxpayer forfeits 20% of the bond to the permitting agency as consideration for the expedited permit process. The bond amount is 3% of the total cost of the commercial project, up to a maximum of \$3 million. In lieu of the bond, the bill now allows letters of credit or cash placed in an escrow account in the name of the permitting agency.

SFAA worked with the AIA to address the concerns of our members regarding the original version of South Carolina SB 377, which required an “environmental performance bond” in connection with permits to build “green buildings” that complied with the LEEDS standards. It was unclear under the bill what the bond would have covered and whether it would have been required to remain in effect.

PUBLIC OFFICIAL BONDS

A number of bills enacted in **Georgia** establish a charter for a new public entity in which surety and/or fidelity bonds are required for public officials. The following bills were enacted: HB 93 (City of Bainbridge); HB 477 (City of Richland); HB 496 (City of Arlington); HB 588 (City of Maysville) and HB 696 (City of Alamo).

Florida has many similar bills awaiting the Governor’s signature: HB 777/SB 1622 (Polk Transit Authority), HB 995 (Holt Fire District) and HB 1029/SB 3004 (North Springs Improvement District).

APPEAL BONDS

--Enactments. **Colorado** SB 203 permits judicial review of final orders of the Division of Real Estate regarding mortgage broker licenses, and a surety bond may be required to stay an appeal. **Connecticut** SB 1439 repealed the \$150 appeal bond in probate court. **New Mexico** SB 335 caps the appeal bond at \$100 for signatories to the tobacco master settlement agreement.

--Carryover. **Alaska** SB 48 would cap appeals bonds at the lesser of \$5 million or 10% of all appellants’ net worth.

--Dead. **Alabama** HB 695/SB 412 would have lowered the appeal bond to appeal a tax case from 200% of the amount assessed to 125%. A letter of credit or a pledge of collateral would be allowed as alternatives to the bond. **Rhode Island** SB 476 would have capped the appeal bond at \$50 million for all appellants in the tobacco master settlement agreement. The bill passed the Senate again this year.

OTHER COURT BONDS

--Enactments. **Tennessee** HB 138/SB 651 increases the amount of the notary bond from \$10,000 to \$25,000.

UPDATE ON SOME RECENT COMMERCIAL SURETY ISSUES

Boxing/ Martial Arts

--Dead. **Alabama** HB 27 would have created a state boxing commission and required promoters to be licensed and bonded for each match. The new commission would have set the bond amount. The bill passed the House but died in the Senate when the session adjourned.

Whole Distributors of Prescription Drugs

--Bills on the Move. **Illinois** SB 509 would require wholesale drug distributors to post a \$100,000 license bond. The bill passed the Senate and is the House Rules Committee, but time is running out.

--Carryover. **Kansas** HB 2392 would require wholesale drug distributors to be licensed and to post a \$100,000 bond. HB 2531 would authorize the Board of Pharmacy to adopt a regulatory system.

Residential Security Deposits

In the last two sessions, SFAA has seen a few bills that would allow renters to post a surety bond in lieu of a cash deposit. Such legislation was enacted in 2006 in **Maryland**, but the terms and conditions and the bond form, as specified in the new law, are onerous.

--Enactments. **Maine** HB 1160/LD 1651 permits a landlord to offer a tenant the option of posting a surety bond in lieu of some or all of a security deposit. The bill is similar to the Maryland law. The amount of the bond cannot exceed two months' rent. The surety bond premium is nonrefundable unless the landlord refuses to accept the bond after the tenant has purchased it or if the tenant does not enter into the rental agreement. The surety or the landlord must give the tenant notice of all the tenant's rights prior to the purchase of the bond. The surety bond must conspicuously disclose that the bond is not refundable and is not insurance. If the surety fails to comply with these requirements, the surety forfeits the right to make a claim against the tenant for recovery under the bond.

--Recent Introductions. **California** SB 482 would permit a tenant to purchase a bond or a commercial insurance policy for securing the terms and conditions of a rental agreement in lieu of posting a security deposit with the landlord.