



December 2014

Connecticut Supreme Court Rejects Effort to Read Default Liability Provision into Public Works Payment Bond Law

In a unanimous decision, the Connecticut Supreme Court¹ has declared that a public works payment bond surety does not forfeit its substantive defenses to a bond claim by failing either to pay or deny a claim within the statutorily prescribed 90-day period. The ruling was made in a lawsuit brought by a subcontractor and defended by Robinson+Cole on behalf of the payment bond surety to the prime contractor.



The Court rejected the subcontractor's attempt to read a judicial default provision into the terms of Connecticut's "Little Miller Act," Conn. Gen. Stat. § 49-41, *et. seq.*, which would have deprived a surety of its substantive defenses to a payment bond claim in the event it failed to make payment or issue a denial within 90 days. Based on the absence of an express statutory penalty for noncompliance, its finding that the 90-day response period is not related to the statute's essential purpose, and a consideration of the unwarranted windfall such a rule would create, the Court declined to read "such a draconian penalty" into the statute. Instead, the Court held that a surety's failure to make payment or issue a formal denial within 90 days "is tantamount to a denial of the claim," thereby entitling the claimant to bring suit to enforce its claim for payment. In so holding, the Court characterized the 90-day statutory period as a brief window of time during which both parties are encouraged to seek to resolve the claim without the need for litigation rather than as a strict deadline for the surety's response. The Court's opinion maintains an orderly and logical claims process, avoids an unwarranted windfall, and ensures that the rights of all players, including sureties, contractors, and subcontractors/suppliers, are protected.

The Court's decision was well supported by important public policy considerations. A contrary ruling could have been harmful to the entire construction industry by potentially requiring sureties to pay fraudulent or inflated claims, thereby reducing the penal sum available for the payment of legitimate subcontractor claims. In addition, contractors would have been faced with potential indemnity liability to their sureties for the reimbursement of amounts paid to satisfy such claims.

In reaching its holding, the Court noted that the statute provides sureties with a relatively short period to investigate claims and that sureties are heavily dependent on the cooperation of the claimant and the bond principal, both of whom possess superior knowledge of the project. The Court reasoned that, if a surety was forced to prematurely deny a claim to comply with the 90-day period, it could open itself to liability for statutory attorney's fees for denying the claim without substantial basis in law or fact. On the other hand, a surety that prematurely pays a claim will likely face litigation with its bond principal. Thus, the Court found it is unreasonable to hold a surety liable by default merely because it is unable to

complete its good-faith investigation of the claim within 90 days.

Significantly, the Court did hold open the possibility that a surety's failure to pay or deny a claim within 90 days could, under certain circumstances, be a factor in determining whether to make an award of attorney's fees under the statute, but only to the extent that the surety is found to have failed to promptly and diligently investigate the claim. Finally, the Court found that a judicial default could be warranted in the event that a surety's failure to comply with the 90-day response period results in "substantial prejudice" to the claimant; however, because the claimant's recourse is to bring suit after the expiration of the 90-day period, the Court held that in most cases it will be "difficult, if not impossible," for a claimant to establish prejudice.

In taking up this issue, the Connecticut Supreme Court resolved a longtime split in decisions at the Superior Court level, helped clarify the rules of the road for both sureties and bond claimants, and avoided an illogical and unjust result. *The case was argued by Todd R. Regan of Robinson+Cole's Construction and Surety Group.*

WHAT DOES THIS MEAN FOR YOU?

A subcontractor/material supplier asserting a bond claim on a public project that has not received payment or a formal denial of its claim from the surety within 90 days may treat its claim as having been denied and may bring suit to enforce its right to payment. A surety that receives a payment bond claim would be best served by promptly and diligently investigating the claim, using information received from the claimant and its bond principal, and endeavor to issue its decision on the claim within 90 days or as soon as reasonably practicable. Both parties may make use of the 90-day statutory period to seek to resolve the claim by agreement, without either party incurring potentially unnecessary legal expense.

¹ *Electrical Contractor's Inc. v. Insurance Company of the State of Pennsylvania*, SC 19105 (2014).

For a more detailed analysis of the Court's holding, [click here](#). If you would like to discuss this matter further, please contact:

[Todd R. Regan](#)
860.275.8293
tregan@rc.com

[Dennis C. Cavanaugh](#)
860.275.8211
dcavanaugh@rc.com

Boston | Hartford | New York | Providence | Stamford | Albany | Los Angeles | Miami | New London | [rc.com](#)

© 2014 Robinson & Cole LLP. All rights reserved. No part of this document may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without prior written permission. This document should not be considered legal advice and does not create an attorney-client relationship between Robinson+Cole and you. Consult your attorney before acting on anything contained herein. The views expressed herein are those of the authors and not necessarily those of Robinson+Cole or any other individual attorney of Robinson+Cole. The contents of this communication may contain attorney advertising under the laws of various states. Prior results do not guarantee a similar outcome.