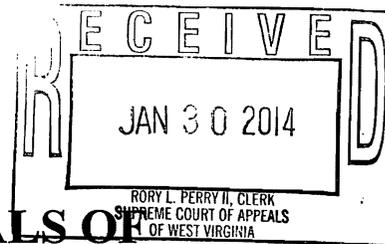


BRIEF FILED  
WITH MOTION

IN THE



**SUPREME COURT OF APPEALS OF  
WEST VIRGINIA**

**RECORD NO. 13-1179**

**(Berkeley County Circuit Court Case No. 13-C-4)**

**FIDELITY AND DEPOSIT COMPANY OF MARYLAND,**

*Defendant Below/Petitioner,*

**v.**

**FRANKLIN W. JAMES,**

*Plaintiff Below/Respondent.*

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**AMICUS CURIAE BRIEF OF THE SURETY & FIDELITY ASSOCIATION OF  
AMERICA IN SUPPORT OF THE POSITION THAT THE CERTIFIED  
QUESTION IS MOOT**

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## Statement of Interest<sup>1</sup>

The Surety & Fidelity Association of America (SFAA) is a trade association of companies licensed to write fidelity and surety bonds in the United States. SFAA collects statistics on surety premiums and losses and files those statistics with the insurance regulators of each state. SFAA is licensed by the West Virginia Offices of the Insurance Commissioner as a Rating Organization.

The members of SFAA are sureties on the vast majority of bonds written in the United States and in West Virginia, including bonds written to comply with the licensing requirements for mortgage brokers and lenders found in Article 17, Chapter 31 of the West Virginia Code. Consequently, SFAA and its members have a substantial interest in the Certified Question presented to this Court and the issues necessarily included with it. The Court is asked in this appeal to determine whether a claimant can maintain an action against a surety on a mortgage lender bond where the principal has filed for bankruptcy and no judgment has been obtained against the principal.

This issue is important to sureties for licensed mortgage lenders. By holding in Hartford Fire Ins. Co. v. Curtis, 748 S.E.2d 662 (W. Va. 2013), that a statutory mortgage lender bond is a “judgment bond,” this Court has, perhaps unintentionally, constricted the coverage offered by these bonds to apply only in situations where the claimant has obtained a judgment against the principal on the bond. Furthermore, sureties on such bonds are precluded under Curtis from holding claimants to their burden of proof. Should the Certified Question be simply answered in the positive, claimants will be permitted to recover against mortgage lender and broker bonds in situations where the

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<sup>1</sup> No part of this brief was authored by either party to this appeal or their counsel, nor did either party or their counsel provide monetary contributions toward the preparation or filing of this brief. The costs and fees relating to this brief were borne solely by the amicus curiae and its counsel.

express condition of the bond has not occurred. Such a result would be repugnant to ancient concepts of contract law by rewriting the bond terms to provide for “strict liability” against sureties. A more equitable result would be achieved by revisiting Curtis to hold that mortgage lender and broker bonds are not “judgment bonds” but “compliance bonds” or “general undertaking bonds” which provide coverage to victims of predatory lending in all cases, provided they can establish that their lenders or brokers violated the terms of the bond. The Certified Question should therefore be rendered moot.

SFAA is in a position to address the broader policy and economic implications of the Certified Question as well as the implications it has for the availability and value of mortgage lender and broker bonds in West Virginia. SFAA has notified the parties to this appeal of its intent to participate as an amicus curiae and has requested their consent to do so. However, it has not received such consent from all parties. Accordingly, SFAA files a concurrent Motion for Leave to File Amicus Curiae Brief.

### **Statement of the Case**

The plaintiff in this action sued the surety on the mortgage lender bond of Taylor Bean & Whitaker (“TBW”) without first recovering a judgment against TBW. The surety moved to dismiss the complaint, and the Circuit Court of Berkeley County certified the following question to this Court:

May a plaintiff maintain an action solely against a surety on a judgment bond made pursuant to W. Va. Code §31-17-4 without a judgment against the principal on the bond, when the principal has filed for bankruptcy, and a judgment against the principal is precluded due to a Chapter 11 Plan confirmation?

This Question arises as a consequence of the majority opinion in Curtis, holding that the bond required by the West Virginia Commissioner of Banking to comply with W.

Va. Code §31-17-4(e)(3)<sup>2</sup> was a “judgment bond” and that the surety could not contest its liability for a default judgment against its principal even though the claimants had not proven that the principal violated West Virginia statutes or regulations governing mortgage lending or that the claimants suffered any damage from such violations.

### **Summary of Argument**

Implicit in the Certified Question from the Circuit Court is the proposition that the bond on which the claimant filed suit was a judgment bond. From the point of view of the Circuit Court, that had been determined by the majority opinion in Curtis. From the point of view of this Court, however, that issue can be reconsidered. The Court should do so and hold that mortgage lender and broker bonds are “compliance” or “general undertaking” bonds.

The condition of a judgment bond cannot be breached if no judgment has been recovered against the bond principal. Thus, if the condition of the bond is to pay a judgment rendered against the principal, the lack of a judgment against the principal is fatal to a claim against the surety.

In its *amicus curiae* brief in Curtis, SFAA argued that the bond required by the Commissioner to comply with §31-17-4 was not a judgment bond. SFAA believed then and believes now that the bond is conditioned on the principal’s compliance with the requirements of the West Virginia statutes<sup>3</sup> and the rules promulgated by the Commissioner governing the business of mortgage lending.

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<sup>2</sup> W. Va. Code §31-17-4(e)(3) (2010) requires the applicant for a mortgage lender’s license to furnish a surety bond “in a form and with conditions as the commissioner may prescribe . . . .” Prior versions of the statute contained an identical requirement. Subsection (f)(3) of §31-17-4 requires substantially the same bond from applicants for a mortgage broker license.

<sup>3</sup> Article 17, Chapter 31 of the Code.

In Curtis, however, a majority of this Court held that the bond was a judgment bond. As seen in this case, the logical extensions of that holding raise problems for plaintiffs such as Mr. James who is purportedly unable to obtain a judgment against the principal for reasons beyond his control. The Certified Question, therefore, gives this Court an opportunity to consider the consequences of its holding and again examine the obligations of sureties on mortgage broker and lender bonds. SFAA respectfully urges this Court to reconsider the majority opinion in Curtis and answer the Certified Question by determining that the bond is not a judgment bond and, therefore, the Certified Question is moot.

### Argument

As the Circuit Court pointed out in its Certification Order, the purpose of the West Virginia Legislature in requiring bonds from mortgage brokers and lenders was to protect consumers victimized by illegal activities of the licensed lender or broker. That purpose is not furthered by making the consumer first prosecute its claim in the licensee's bankruptcy proceeding, or obtain permission from the bankruptcy court to sue the debtor on the condition that payment of any judgment will be sought from the bond not from the debtor's estate. Interestingly, after the bond at issue in this case was written, the Commissioner of Banking revised the required bond form by adding the following to the sentence discussing the claimant's right to maintain an action on the bond: "provided that a judgment against the principal shall not be required to maintain an action on this bond if the principal is no longer in operation or has filed for bankruptcy."<sup>4</sup>

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<sup>4</sup> The current bond form is available at <http://mortgage.nationwidelicencingsystem.org/slr/StateForms/WV3-Lender-SAFE-bond.pdf> (last accessed January 28, 2014) and is attached to this Brief as Appendix A.

In Curtis the claimants never proved they were victimized by any unlawful activity or that they suffered any damage. They argued instead that the bonds were judgment bonds and that any judgments they had obtained, even if by default, were the only predicate to the surety's liability. The majority of this Court agreed and held that the bonds were judgment bonds.

This case shows one of the adverse impacts of the holding in Curtis. Here, the claimants understandably want to pursue their claims against TBW's surety without first going to the bankruptcy court. They want to prove that they were victimized by illegal activities and that they suffered damages therefrom, as opposed to the claimants in Curtis who wanted to be paid without proving either illegal activities or damages. As between these two groups, surely the law should favor parties who want to prove their case.

Yet, it appears post-Curtis that plaintiffs who obtain default judgments are in a much better position than plaintiffs such as Mr. James. The law is clear that a claimant against a judgment bond must have an enforceable judgment against the principal in order to recover against the surety. In 1879, the Supreme Court of the United States observed:

The cases are numerous in which it has been held, and we think correctly, that if one is bound as surety for another to pay any judgment that may be rendered in a specified action, if the judgment is defeated by the bankruptcy of the person for whom the obligation is assumed, the surety will be released.

Wolf v. Stix, 99 U.S. 1, 8-9 (1879). Other courts considering an array of judgment bonds have since held that a valid, enforceable judgment against the principal is a prerequisite to maintaining an action against the surety. See Nance v. Gatlin, 2 Tenn. App. 73, 79-80 (Tenn. Ct. App. 1925) (judgment against sureties was in error where judgment against

principal might be dischargeable in bankruptcy); Clark v. Metro. Cas. Ins. Co., 142 A. 614, 615 (R.I. 1928) (bond language requiring surety to pay all final judgments obtained against its principal precluded the plaintiff from suing the surety without first proceeding against the principal); Succession of Moody, 158 So. 2d 601, 603 (La. 1963) (judgment against surety was null and void because no effort had been made to enforce the obligation against the principal); see also State v. Myers, 74 W. Va. 488, 492, 82 S.E. 270, 272 (1914) (the surety on a judgment bond “has expressly stipulated that [a judgment or fine against the principal] shall be the condition of his bond; it is the very thing which he has agreed to pay”).

The condition of a surety bond is the statement of the default by the principal for which the surety agrees to answer. In this case, the condition of the bond is the first sentence of the third paragraph as follows:

NOW THEREFORE, if the said principal [TBW] shall conform to and abide by the provisions of said Act and of all rules and orders lawfully made or issued by the Commissioner of Banking thereunder, and shall pay to the State and shall pay to any such person or persons properly designated by the State any and all moneys that may become due or owing to the State or to such person or persons from said obligor in a suit brought by the Commissioner on their behalf under and by virtue of the provisions of said Act, then this obligation shall be void, otherwise it shall remain in full force and effect.

Thus, the principal does not breach the bond if it either (1) abides by the Act and the rules issued by the Commissioner of Banking; or (2) pays any damages recovered as a consequence of a violation of the Act or rules. If the principal breaches the bond’s condition, then the surety becomes liable.

The sentence following “then this obligation shall be void, otherwise it shall remain in full force and effect” is not a part of the condition of the bond. It is procedural.

It tells the claimant how to make a claim and establishes a procedural condition precedent. It states, “If any person shall be aggrieved by the misconduct of the principal, he may upon recovering judgement against such principal issue execution of such judgement and maintain an action upon the bond . . .”

The holding in Curtis is problematic because it misidentifies the condition of the bond and will accordingly have multiple adverse consequences. It will be more difficult for legitimate, honest mortgage brokers and lenders to qualify for bonds and, therefore, more difficult and expensive for them to qualify to do business in West Virginia. It will reduce the protection afforded West Virginia consumers who did suffer damages by allowing claimants who have no damages but obtained a default judgment to take all or part of the bond penalty, thus reducing or even destroying the proceeds available for legitimate claimants.<sup>5</sup> And, under the bond form in this case, it will make consumers who did business with a broker or lender that is in bankruptcy first obtain relief from the bankruptcy stay or a judgment in the bankruptcy proceeding as a precondition to making a claim on the bond.

The fact that the Commissioner amended the required form to exempt from the judgment provision claimants against defunct or bankrupt principals shows that the bond was intended to be a compliance bond, not a judgment bond, because it allows recovery in situations other than where a judgment has been obtained against the principal. The fundamental risk of the bond must be known when it is written, not years later when the claim is made and the principal is or is not defunct or in bankruptcy. Under Curtis, if the

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<sup>5</sup> Because improper conduct by mortgage brokers is often not discovered until years after the transaction occurs, it is not unusual for a claimant to submit a claim against a broker bond long after a claim from another customer of the principal has been paid. After Curtis, the only check on the recovery that a claimant can obtain against a surety is the bond limit – and once that is extinguished as to one claimant, it is extinguished as to all.

bond is a judgment bond, the surety loses the protection of W. Va. Code §45-1-3, and will have to pay a claimant if the claimant has obtained a default judgment against a defunct principal even if the claimant has not shown any violation by the principal or any damages.

The current bond form, however, does not require a claimant against the bond of a principal that is no longer in operation to recover a judgment against the principal. The Legislature required a bond “in a form and with conditions as the commissioner may prescribe . . .”,<sup>6</sup> and the Commissioner clearly does not think that a judgment is needed against a defunct or bankrupt principal because it allows recovery where there is no judgment. Curtis should not be controlling in a case involving the current bond form. A bond that permits recovery in the absence of a judgment if the principal is no longer in operation or is in bankruptcy could not be a judgment bond as to the defunct principals in Curtis.

The bond cannot be a judgment bond for some principals and not a judgment bond for others. And, whether it qualifies as a judgment bond should not be dependent on whether the old form or new form is used. The solution is for this Court to reconsider its holding in Curtis and remove the “judgment” label from the bond as that was clearly not what the Legislature intended.

The bond required by the Commissioner of Banking simply is not and never was a judgment bond. The bond will more efficiently protect West Virginia consumers if this Court finds that it is conditioned on compliance with the laws and regulations governing mortgage lending and allows claims only by persons who suffer damages from violations of those laws and regulations. The Certified Question touches upon this issue, and the

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<sup>6</sup> W. Va. Code §31-17-4(e)(3).

Court's answer should be that upon reconsideration the bond is not a judgment bond.

Therefore, the Certified Question is moot.

**Conclusion**

SFAA respectfully urges this Court to reconsider the majority opinion in Curtis and respond to the Certified Question from the Circuit Court of Berkeley County by finding that the bond on which respondent Franklin W. James, Jr. sued petitioner Fidelity and Deposit Company of Maryland is not a judgment bond.

Respectfully submitted,

**THE SURETY & FIDELITY  
ASSOCIATION OF AMERICA**

By Counsel

  
\_\_\_\_\_  
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

Defendant Below/Petitioner,

v.

Record No. 13-1179  
(Berkeley County Circuit  
Court, Case No. 13-C-4)

FRANKLIN W. JAMES,

Plaintiff Below/Respondent.

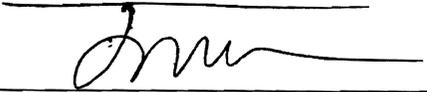
CERTIFICATE OF SERVICE

I, Thomas J. Moran, counsel for the Surety & Fidelity Association of America, do hereby certify that I have served a true and exact copy of the foregoing *AMICUS CURIAE BRIEF OF THE SURETY & FIDELITY ASSOCIATION OF AMERICA IN SUPPORT OF THE POSITION THAT THE CERTIFIED QUESTION IS MOOT* upon counsel for the parties via United States Mail, postage prepaid, this 29<sup>th</sup> day of January, 2014, as follows:

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Maryland*

  
Thomas J. Moran (WVSB No. 11856)

**WEST VIRGINIA  
DIVISION OF FINANCIAL INSTITUTIONS**

**MORTGAGE LENDER/MORTGAGE LOAN ORIGINATOR BOND**

**BOND NUMBER** \_\_\_\_\_ **EFFECTIVE DATE:** \_\_\_\_\_

**KNOW ALL MEN BY THESE PRESENTS:**

That we, \_\_\_\_\_ as principal,  
and \_\_\_\_\_, a corporation, as surety, are held  
and firmly bound unto THE STATE OF WEST VIRGINIA, in the just and full sum of:

Check Appropriate Amount:

- \_\_\_\_\_ \$100,000 if principal has annual mortgage loan originations of up to \$3 million
- \_\_\_\_\_ \$150,000 if principal has annual mortgage loan originations greater than \$3 million up to \$10 million
- \_\_\_\_\_ \$250,000 if principal has annual mortgage loan originations greater than \$10 million
- \_\_\_\_\_ \$200,000 if principal acts as a servicer of mortgage loans and has annual mortgage loan originations less than \$10 million
- \_\_\_\_\_ \$250,000 if principal services mortgage loans and has annual mortgage loan originations greater than \$10 million

to the payment whereof, well and truly to be made, we bind ourselves, our personal representatives, successors and assigns, jointly and severally, firmly by these presents.

**THE CONDITION OF THE ABOVE OBLIGATION IS SUCH THAT, WHEREAS,** the above bound principal, in pursuance of the provisions of Article 17, Chapter 31, of the Code of West Virginia, as amended, (hereinafter the "Act") has obtained, or is about to obtain, from the Commissioner of Financial Institutions of the State of West Virginia, a license to conduct a Mortgage Lender business.

**NOW, THEREFORE,** if the said principal \_\_\_\_\_ shall conform to and abide by the provisions of said Act and of all rules and orders lawfully made or issued by the Commissioner of Financial Institutions thereunder, and shall pay to the State and shall pay to any such person or persons properly designated by the State any and all moneys that may become due or owing to the State or to such person or persons from said obligor in a suit brought by the Commissioner on their behalf under and by virtue of the provisions of said Act, then this obligation shall be void, otherwise it shall remain in full force and effect. If any person shall be aggrieved by the misconduct of the principal, he may upon recovering judgment against such principal issue execution of such judgment and maintain an action upon the bond of the principal in any court having jurisdiction of the amount claimed, provided that a judgment against the principal shall not be required to maintain an action on this bond if the principal is no longer in operation or has filed for bankruptcy.

Upon the payment of any such claim, the Surety shall within ten (10) days of said payment give notice of the payment to the Commissioner of Financial Institutions by certified or registered mail, with details sufficient to identify the claimant and the judgment so paid.

This bond shall continue in full force and effect indefinitely, subject, however, to cancellation. If the Surety herein shall so elect, this bond may be canceled at any time by the said Surety by filing with the Commissioner of Banking of the State of West Virginia a thirty (30) days written notice of such cancellation, but said Surety so filing said notice shall not be discharged from any liability already accrued under this bond or which shall accrue herein before the expiration of said thirty (30) day period. Said Surety shall remain liable for all payments resulting from violations occurring or fees due during the term of this bond and prior to the date of cancellation.

IN WITNESS WHEREOF the said principal has hereunto set his hand and affixed his seal in his own proper person, and the said surety has caused its corporate name to be hereunto signed and its corporate seal to be hereunto affixed by its officer or agent thereunto duly authorized, all of which is done as of the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
(PRINCIPAL/LICENSEE)

By: \_\_\_\_\_  
Signature

[CORPORATE SEAL OF SURETY]

\_\_\_\_\_  
(SEAL)

By: \_\_\_\_\_

**ACKNOWLEDGMENTS**

**Acknowledgment by Principal if Individual or Partnership**

- 1. STATE OF \_\_\_\_\_
- 2. County of \_\_\_\_\_ to-wit:
- 3. I, \_\_\_\_\_, a Notary Public in and for the
- 4. county and state-aforesaid, do hereby certify that \_\_\_\_\_  
whose name is signed to the foregoing writing, has this day acknowledged the same before me in my said county.
- 5. Given under my hand this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_\_.
- 6. Notary Seal
- 7. \_\_\_\_\_  
(Notary Public)
- 8. My commission expires on the \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_\_.

**Acknowledgment by Principal if Corporation or Limited Liability Company**

- 9. STATE OF \_\_\_\_\_
- 10. County of \_\_\_\_\_ to-wit:
- 11. I, \_\_\_\_\_, a Notary Public in and for the
- 12. county and state aforesaid, do hereby certify that \_\_\_\_\_
- 13. who as, \_\_\_\_\_ signed the foregoing writing for
- 14. \_\_\_\_\_ a corporation/LLC,  
has this day, in my said county, before me, acknowledged the said writing to be the act and deed of the said corporation/LLC.
- 15. Given under my hand this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_\_.
- 16. Notary Seal
- 17. \_\_\_\_\_  
(Notary Public)
- 18. My commission expires on the \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_\_.

**Acknowledgment by Surety**

- 19. STATE OF \_\_\_\_\_
- 20. County of \_\_\_\_\_ to-wit:
- 21. I, \_\_\_\_\_, a Notary Public in and for the
- 22. county and state aforesaid, do hereby certify that \_\_\_\_\_
- 23. who as, \_\_\_\_\_ signed the foregoing writing for
- 24. \_\_\_\_\_ a corporation,  
has this day, in my said county, before me, acknowledged the said writing to be the act and deed of the said corporation.
- 25. Given under my hand this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_\_.
- 26. Notary Seal
- 27. \_\_\_\_\_  
(Notary Public)
- 28. My commission expires on the \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_\_.

**Sufficiency in Form and Manner  
Of Execution Approved**

**Attorney General**

This \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_\_

By \_\_\_\_\_  
(Assistant Attorney General)

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## ACKNOWLEDGMENT PREPARATION INSTRUCTIONS

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1. IF PRINCIPAL IS AN INDIVIDUAL OR PARTNERSHIP, HAVE NOTARY COMPLETE LINES (1) through (8).
2. IF PRINCIPAL IS A CORPORATION, HAVE NOTARY COMPLETE LINES (9) through (18).
3. SURETY MUST HAVE NOTARY COMPLETE LINES (19) through (28).
4. **Notaries must:**

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### ACKNOWLEDGMENT BY PRINCIPAL IF INDIVIDUAL OR PARTNERSHIP

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1. Enter name of State.
2. Enter name of County.
3. Enter name of Notary Public witnessing transactions.
4. Enter name of Principal covered by bond if individual or partnership. (Must be Owner of Sole Proprietorship or General Partner of Partnership)
5. Notary enters date bond was witnessed. Must be the same as or later than signature date.
6. Affix Notary Seal.
7. Notary affixes his/her signature.
8. Notary enters commission expiration date.

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### ACKNOWLEDGMENT BY PRINCIPAL IF CORPORATION OR LIMITED LIABILITY COMPANY

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9. Enter name of State.
10. Enter name of County.
11. Enter name of Notary Public witnessing transactions.
12. Enter name of Corporate or LLC Officer signing bond.
13. Enter Title of Officer signing bond. (Must be President or Vice President of Corporation; Manager or Managing Member of Limited Liability Company)
14. Enter name of Company or Corporation.
15. Notary enters date bond was witnessed. Must be the same as or later than signature date.
16. Affix Notary Seal.
17. Notary affixes his/her signature.
18. Notary enters commission expiration date.

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### ACKNOWLEDGMENT BY SURETY

---

19. Enter name of State.
20. Enter name of County.
21. Enter name of Notary Public witnessing transactions.
22. Enter name of person having power of attorney to bind Surety Company.
23. Enter Title of person binding Surety Company.
24. Enter name of Insurance Company (Surety).
25. Notary enters date bond was witnessed. Must be the same as or later than signature date.
26. Affix Notary Seal.
27. Notary affixes his/her signature.
28. Notary enters commission expiration date.

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### POWER OF ATTORNEY INSTRUCTIONS

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Power of attorney for surety must be attached showing that it was in full force and effect on signature date indicated on the face of the bond. A raised corporate seal must also be affixed to the Power of Attorney form.

- a. Name of attorney in fact must be listed.
- b. Power of Attorney may not exceed imposed limitations.
- c. Certificate date, the signature date of bond must be entered.
- d. Signature of authorizing official must be affixed. (Signature may be facsimile).
- e. **Raised seal must be affixed.**