

**IN THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF WEST VIRGINIA**

**HUNTINGTON DIVISION**

INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL NO. 132 HEALTH AND  
WELFARE FUND, et al.,

Plaintiffs,

v.

CIVIL ACTION NO. 3:13-0537

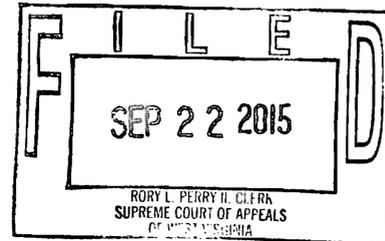
L.A. PIPELINE CONSTRUCTION COMPANY, INC.,  
an Ohio Corporation,

Defendant,

and

United Bank, Inc.,

Intervenor.



**CERTIFICATION ORDER  
FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
CIVIL ACTION NO. 3:13-00537**

Pursuant to the West Virginia Uniform Certification of Questions of Law Act, W. Va. Code § 51-5A-1 *et seq.*, as amended, the United States District Court for the Southern District of West Virginia presents the following question for certification to the West Virginia Supreme Court of Appeals:

Does “[a] letter of credit that states that it is perpetual expire[] five years after its stated date of issuance, or if none is stated, after the date on which it is issued” as provided by the 1996 version of West Virginia Code § 46-5-106(d), or does such letter remain in effect outside the five-year time period until “terminated” by the Commissioner of the Division of Labor pursuant to West Virginia Code § 21-5-14(g)?

This Court acknowledges that the West Virginia Supreme Court of Appeals may reformulate all or any part of this question.

On January 10, 2013, Plaintiffs International Union of Operating Engineers, Local No. 132 Health and Welfare Fund; International Union of Operating Engineers, Local No. 132 Pension Fund; International Union of Operating Engineers, Local 132 Apprenticeship and Skill Improvement Fund; International Union of Operating Engineers, Local No. 132 Annuity and Savings Fund; and International Union of Operating Engineers, Local No. 132, AFL-CIO filed an action in this Court against Defendant L.A. Pipeline Construction Company, Inc., (L.A. Pipeline) an Ohio Corporation, for failing to pay contributions and administrative dues for its employees to Plaintiffs. On April 8, 2014, Plaintiffs and Defendant entered into an Agreed Judgment in which Defendant agreed it owed \$129,273.90 in unpaid employee benefit contributions. Thereafter, Defendant failed to pay the Judgment, and a Writ of Execution was issued, which remains unpaid and unsatisfied.

As a result, Plaintiffs had filed a Writ of Suggestion on March 12, 2015, with the West Virginia Division of Labor. On April 2, 2015, the Division of Labor filed an Answer to Suggestion, stating that Defendant posted a Perpetual Irrevocable Letter of Credit/Wage Bond in the amount of \$500,000 issued by United Bank, Inc. on January 13, 2009. The Division of Labor found that the Bond had not been approved for termination by the Commissioner pursuant to West Virginia Code § 21-5-14(g) and, therefore, it remained in effect.<sup>1</sup> In addition, the Division of

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<sup>1</sup>The balance of the bond was \$382,500.00 due to a prior payout in a different action.

Labor quoted Syllabus Point 6 of *Leary v. McDowell County National Bank*, 522 S.E.2d 420 (W. Va. 2001) for the position that “[t]o the extent that W. Va. Code § 46-5-106 (1963) conflicts with W. Va. Code § 21-5-14 (1989), the provisions of the latter are controlling with regard to the termination of an irrevocable letter of credit serving as a wage bond. In other words, an irrevocable letter of credit serving as a wage bond pursuant to W. Va. Code § 21-5-14 (1989) can only be terminated with the approval of the Commissioner of the Division of Labor.” *W. Va. Div. of Labor’s Answer to Suggestion*, at 2, ECF No. 27 (quoting Syl. Pt. 6 of *Leary*). Therefore, the Division of Labor determined the suggested amount of \$129,273.90 was eligible for release from the bond, provided it was for “unpaid wages; unpaid fringe benefits; [or] damages or expenses incurred or arising out of actual injury[.]” *Id.* (quoting W. Va. Code § 21-5-14a, in part).

On April 7, 2015, Defendant filed a Motion to Quash Suggestion on the grounds that the letter of credit was a “perpetual” letter of credit and had expired five years after it was issued as provided by West Virginia Code § 46-5-106(d). This section provides “[a] letter of credit that states that it is perpetual expires five years after its stated date of issuance, or if none is stated, after the date on which it is issued.” W. Va. Code § 46-5-106(d). Defendant argues that the Division of Labor’s reliance on West Virginia Code § 21-5-14 is erroneous because that section only requires the Commissioner’s approval if the bank or a customer attempts to “terminate” the letter within the five-year term.<sup>2</sup> However, in this case, Defendant asserts the letter of credit

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<sup>2</sup>The current version of West Virginia Code § 21-5-14 provides, in part:

Termination of bond.--The bond may be terminated, with the approval of the commissioner, after an employer submits a statement, under oath or affirmation lawfully administered, to the commissioner that the following

“expired” as contemplated in West Virginia Code § 46-5-106(d) and, thus, approval was unnecessary. In addition, Defendant claims that the Division of Labor’s reliance on *Leary* is misplaced because the West Virginia Supreme Court expressly stated its decision was limited to the 1963 version of § 46-5-106, and not the 1996 version which is applicable here. *See Leary*, 552 S.E.2d at 427 n.9 (stating “[w]e note that our decision today is limited in that it was not necessary for us to address W. Va. Code § 46-5-106 (1996)”<sup>3</sup>).

Plaintiffs objected to the Defendant’s Motion to Quash Suggestion, and argue the reasoning of *Leary* should be applied to the 1996 version of West Virginia Code § 46-5-106 to protect workers and allow them to collect unpaid wages and benefits. Defendant and United

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has occurred: The employer has ceased doing business and all wages and fringe benefits have been paid, or the employer has been doing business in this state for at least five consecutive years and has paid all wages and fringe benefits. The approval of the commissioner will be granted only after the commissioner has determined that the wages and fringe benefits of all employees have been paid. The bond may also be terminated upon a determination by the commissioner that an employer is of sufficient financial responsibility to pay wages and fringe benefits.

W. Va. Code § 21-5-14(g) (1991). The West Virginia Supreme Court noted in *Leary* that the 1989 version of this statute was amended in 1991, but those amendments were minor and did not impact the outcome. *Leary*, 552 S.E.2d at 422 n.2.

<sup>3</sup>The 1963 version of West Virginia Code § 46-5-106 provided, in part, “[u]nless otherwise agreed once an irrevocable credit is established as regards the customer it can be modified or revoked only with the consent of the customer and once it is established as regards the beneficiary it can be modified or revoked only with his consent.” W. Va. Code § 46-5-106(2) (1963).

Bank, Inc., which has intervened in this matter, disagree and insist that Plaintiffs' position will expand liability of the insurer (the Bank) and any other party who may be adversely impacted by a reimbursement claim from the insurer. As a result, it would create uncertainty for any financial institution that issues a letter of credit for wage bonds, making it difficult for employers to get such bonds. In addition, United Bank, Inc. asserts that L.A. Pipeline has threatened a legal action against it if it honors any drafts drawn on the letter of credit.<sup>4</sup>

Upon review of the parties' briefing, the Court finds that the question presented has not been directly addressed by the West Virginia Supreme Court with respect to the 1996 version of West Virginia Code § 46-5-106, but resolution of the issue is important to give certainty and predictability to the financial industry, employers, and employees. Given the significance of the issue, this Court finds the matter is best left to the discretion of the West Virginia Supreme Court and, therefore, **CERTIFIES** the question for resolution. The Court also **STAYS** this matter until a decision by the West Virginia Supreme Court is rendered and **DIRECTS** counsel for the parties to contact the Court within seven days of such decision and inform the Court as to how they intend to proceed.

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<sup>4</sup>On May 20, 2015, West Rental and Service, L.L.C. filed a Complaint for Declaratory Judgment Relief in the Court of Common Pleas, Washington County, Ohio against United Bank, Inc. and Plaintiffs in this case. Neither L.A. Pipeline, nor the West Virginia Division of Labor were named as parties. In its Complaint, West Rental asserts "L.A. Pipeline is effectively insolvent and West Rental is the real party in interest with respect to the cash funds securing the reimbursement obligations of L.A. Pipeline to United under the Letter of Credit arrangement." *Compl. for Dec. J. Relief*, at 3, ECF No. 33-1. West Rental seeks a declaration from the Ohio court that the letter of credit expired under West Virginia law and that United Bank, Inc. has no obligation to pay.

The Court **DIRECTS** the Clerk to send a copy of this Order to the West Virginia Supreme Court of Appeals, counsel of record, any unrepresented parties, and John R. Junkins, Acting Commissioner of the West Virginia Division of Labor, Building 6, Room B-749, 1900 Kanawha Boulevard, East, Charleston, WV 25305.

ENTER: September 17, 2015

  
ROBERT C. CHAMBERS, CHIEF JUDGE

APPEARANCES:

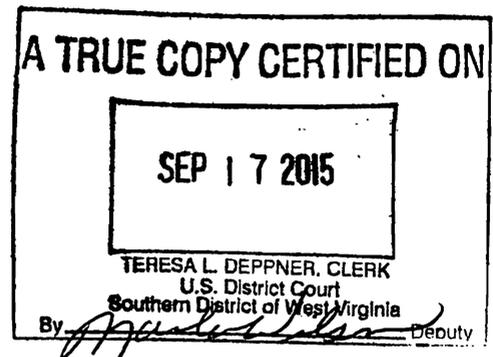
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