

IN THE
SUPREME COURT OF APPEALS OF
WEST VIRGINIA

RECORD NO. 12-0037

HARTFORD FIRE INSURANCE COMPANY,

Defendant Below/Petitioner,

v.

MICAH A. CURTIS

and

ANGELA L. CURTIS,

Plaintiffs Below/Respondents.

PETITIONER'S BRIEF

Archibald Wallace, III (WVSB #9587)
WALLACEPLEDGER, PLLC
The Capstone Center
7100 Forest Avenue, Suite 302
Richmond, VA 23226
Telephone: (804) 282-8300
Facsimile: (804) 282-2555
Email: axwallace@wallacepledger.com
Counsel for Defendant/Appellant

Thomas V. Flaherty (WVSB #1213)
FLAHERTY SENSABAUGH BONASSO PLLC
200 Capitol Street
Charleston, WV 25301
Telephone: (304) 345-0200
Facsimile: (304) 345-0260
Email: tflaherty@fsblaw.com

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iv
ASSIGNMENTS OF ERROR.....	1
STATEMENT OF THE CASE.....	2
SUMMARY OF ARGUMENT	4
STATEMENT REGARDING ORAL ARGUMENT AND DECISION	6
ARGUMENT	7
I. Standard of Review.....	7
II. Statutory and Regulatory Background.....	7
<u>Assignment of Error No. 1</u>	9
III. The Bond is Subject to the General Rule Set Forth in W. Va. Code § 45-1-3.	9
IV. The Exception Set Forth in <u>Myers</u> Does Not Apply.....	10
V. The Rules of Contract Construction Cited by the Curtises Are Irrelevant to this Appeal.....	16
VI. The Kanawha County Circuit Court’s Order in <u>Stayer</u> Supports Hartford’s Position Here, and Hartford is Not Estopped from Relying on its § 45-1-3 Protections Because of an Argument it Advanced and Lost in Another Case.	17
VII. The Commissioner of Banking Had No Authority to Require a Bond that Ignores a Mortgage Lender Bond Surety’s Rights Under W. Va. Code § 45-1-3.....	20
<u>Assignment of Error No. 2</u>	23
VIII. Public Policy Considerations Weigh in Favor of Ensuring that a Surety is Entitled to an Opportunity to Defend Itself on the Merits.	23

IX. Commonly Accepted Principles of Surety Law Do Not Permit a Plaintiff to Enforce a Default Judgment Awarded Against a Principal Where the Surety Was Not Given Notice and Opportunity to Defend.....26

CONCLUSION.....28

CERTIFICATE OF SERVICE30

TABLE OF AUTHORITIES

Page(s)

Cases:

<u>Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of New York,</u> 148 W.Va. 160, 133 S.E.2d 770 (1963).....	7
<u>Axess Int'l v. Intercargo Ins. Co.,</u> 183 F.3d 935 (9th Cir. 1999)	27
<u>Baldau v. Jonkers,</u> No. 35650, 2011 W. Va. LEXIS 13 (W.Va. Mar. 10, 2011)	7
<u>Bldg. & Loan Ass'n v. Sohn,</u> 54 W.Va. 101, 46 S.E. 222 (1903).....	22
<u>Boley v. Miller,</u> 187 W.Va. 242, 418 S.E.2d 352 (1992).....	21
<u>City of Mullens v. Davidson,</u> 133 W.Va. 557, 57 S.E.2d 1 (1949).....	16
<u>Commercial Bank v. St. Paul Fire & Marine Ins. Co.,</u> 175 W.Va. 588, 336 S.E.2d 552 (1985).....	14
<u>Cottrill v. Ranson,</u> 200 W.Va. 691, 490 S.E.2d 778 (1997).....	7
<u>Frederick Mgmt. Co. v. City Nat'l Bank,</u> No. 35438, 2010 W. Va. LEXIS 144 (W.Va. Nov. 23, 2010).....	7
<u>Gen. Elec. Co. v. Nat'l Labor Relations Bd.,</u> 414 F.2d 918 (4th Cir. 1969)	15
<u>Hannah v. Heeter,</u> 213 W.Va. 704, 584 S.E.2d 560 (2003).....	18, 19
<u>Keatley v. Mercer County Bd. of Educ.,</u> 200 W.Va. 487, 490 S.E.2d 306 (1997).....	22
<u>Lawson v. County Comm'n,</u> 199 W.Va. 77, 483 S.E.2d 77 (1996).....	22

Lovas v. Consolidation Coal Co.,
222 W.Va. 91, 662 S.E.2d 645 (2008).....21

Old Republic Sur. Co. v. Bonham State Bank,
172 S.W.3d 210 (Tex. App.-Texarkana 2005).....12

Pegram v. Herdrich,
530 U.S. 211 (2000).....19

Pico v. Webster,
14 Cal. 202, 204 (Cal. 1859).....13

Potesta v. United States Fid. & Guar. Co.,
202 W.Va. 308, 504 S.E.2d 135 (1998).....15

Rashid v. The United States Fid. & Guar. Co.,
No. 2:91-0141, 1992 U.S. Dist. LEXIS 22914
(S.D.W. Va. Sept. 28, 1992)4, 11, 12, 13

Respass v. Workers' Comp. Div.,
212 W.Va. 86, 569 S.E.2d 162 (2002).....21

Robinson v. Cabell Huntington Hosp., Inc.,
201 W.Va. 455, 498 S.E.2d 27 (1997).....14

Rollyson v. Jordan,
205 W.Va. 368, 518 S.E.2d 372 (1999).....24

Rowe v. W. Va. Dept. of Corr.,
170 W.Va. 230, 292 S.E.2d 650 (1982).....21

State v. Abbott,
63 W.Va. 189, 61 S.E. 369 (1907).....13, 26

State v. Duggan,
102 W.Va. 312, 135 S.E. 270 (1926).....10, 13

State v. Epperly,
135 W.Va. 877, 65 S.E.2d 488 (1951).....16

State v. Myers,
74 W.Va. 488, 82 S.E. 270 (1914).....4, 10, 11, 12

State v. Williams,
196 W.Va. 639, 474 S.E.2d 569 (1996).....22

<u>Stayer v. Litton Loan Servicing, et al.</u> , No. 08-C-3157 (Kanawha Co. Cir. Ct. Aug. 16, 2010)	17, 18, 20
<u>United Hosp. Ctr. v. Richardson</u> , 757 F.2d 1445 (4th Cir. 1985)	22
<u>W. Va. Dep't. of Transp., Div. of Highways v. Robertson</u> , 217 W.Va. 497, 618 S.E.2d 506 (2005).....	7, 19, 20
<u>Wellington Power Corp. v. CNA Sur. Corp.</u> , 217 W.Va. 33, 614 S.E.2d 680 (2005).....	14, 16
<u>Winnings v. Wilpen Coal Co.</u> , 134 W. Va. 387, 59 S.E.2d 655 (1950).....	27
 <u>Statutes:</u>	
Tex. Transp. Code § 503.033	12
West Virginia Code § 31-17-2	8
West Virginia Code § 31-17-4	8, 21
West Virginia Code § 31-17-6	8
West Virginia Code § 31-17-12	8
West Virginia Code § 45-1-3	passim
 <u>Rules of Court</u>	
Rule 8(e)(2), West Virginia Rules of Civil Procedure.....	20
 <u>Miscellaneous:</u>	
4B MICHIE'S JURISPRUDENCE <u>Contracts</u> § 40 (Repl. Vo. 1986)	24
74 AM. JUR. 2D <u>Suretyship</u> § 153 (1974)	27
RESTATEMENT (THIRD), <u>Suretyship & Guaranty</u> , § 67(3) (1995).....	26

ASSIGNMENTS OF ERROR

1. The trial court erred in disregarding West Virginia Code § 45-1-3 and holding that a surety on a statutory mortgage lender bond issued in the form and in the language established by the Commissioner of Banking is automatically responsible for paying any judgment rendered against its principal.

2. The trial court erred in holding that a default judgment against a principal on a mortgage lender bond can be enforced against the surety where the surety does not receive notice of the claim against its principal until after judgment is rendered.

STATEMENT OF THE CASE

This appeal arises from a summary judgment ruling against a surety on a statutory mortgage lender bond. Calusa Investments, LLC (“Calusa”) was a mortgage lender licensed and operating in West Virginia. Hartford was the surety on a mortgage lender bond in the amount of \$100,000 issued in strict accordance with Chapter 31, Article 17 of the West Virginia Code (the “bond”) naming Calusa as its principal and the State of West Virginia as its obligee. (App. 60). The plaintiffs, Micah A. Curtis and Angela L. Curtis (the “Curtises”), residents of Jackson County, West Virginia, filed their original Complaint in the Jackson County Circuit Court on October 1, 2008, against several defendants, including Calusa,¹ alleging that Calusa made certain misrepresentations and took certain actions which caused the Curtises to refinance the mortgage on their home on unfavorable terms. (App. 4-8). Hartford was not made a party or informed at that time of the existence of the lawsuit or a potential claim against its principal.

Calusa failed to file a timely response to the Complaint. On December 10, 2008, the Curtises obtained a default judgment against Calusa in the amount of \$99,795.05 plus post-judgment interest (the “Calusa Judgment”). (App. 9-11). Over a month later, on January 12, 2009, the Curtises finally gave first notice of their claim to Hartford. (App. 42). Upon the Curtises’ subsequent motion, the trial court granted them leave to file an Amended Complaint adding Hartford as a party defendant on March 26, 2010. (App. 23). Meanwhile, Calusa tried to enter the case late asking the trial court to set aside the default judgment, and, failing that, for a hearing on the issue of damages. The trial court refused both requests and reaffirmed the Calusa Judgment by its Orders dated December 21, 2010, and January 10, 2011. (App. 36-40).

¹ The other defendants sued by the Curtises in their original Complaint were HSBC Mortgage Services, Inc. and John Doe Holder. (App. 4).

On April 7, 2011, the Curtises filed a Motion for Partial Summary Judgment and Memorandum in Support asking the trial court to hold Hartford liable for the entirety of the Calusa Judgment without permitting Hartford an opportunity to present defenses or challenge the sum of damages claimed. (App. 41-45; App. 46-59). Hartford filed its Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment on May 9, 2011 (App. 77-88), and the Curtises filed their Reply Brief on June 1, 2011. (App. 93-101). The Curtises and Hartford argued the Motion for Partial Summary Judgment before the trial court on June 6, 2011. (App. 117-139).

On July 13, 2011, the trial court entered an Order granting the Curtises' Motion for Partial Summary Judgment and finding Hartford obligated to satisfy the default judgment awarded against Calusa. (App. 140-143). As a result, Hartford never had an opportunity to present any substantive or procedural defenses to the Curtises' allegations. The trial court entered a Final Judgment Order Regarding Count IV of the Complaint on December 5, 2011, awarding final judgment in favor of the Curtises against Hartford in the amount of \$99,795.05 plus statutory interest accrued, and rendering the judgment appealable to this Court in accordance with Rule 54(b) of the West Virginia Rules of Civil Procedure. (App. 144-147). Hartford's Notice of Appeal was timely filed on January 3, 2012.

SUMMARY OF ARGUMENT

In this appeal the Court must decide whether the obligation to pay under the mortgage lender bond issued by Hartford, as surety, was triggered when the Curtises obtained a default judgment against Hartford's principal, Calusa, in a separate action in which Hartford was never given notice.

The effect of the trial court's ruling is that the statutory mortgage lender bond required for all mortgage lenders is a "judgment bond" and concomitantly, that any surety providing such a bond is not entitled to notice of a lawsuit against its principal or to assert any defenses which would have been otherwise available to it or its principal. In so ruling, the trial court has eviscerated West Virginia Code § 45-1-3. The trial court's ruling is erroneous because the bond does not fall as a "judgment bond" under the narrow exception to § 45-1-3 set forth in State v. Myers, 74 W.Va. 488, 491, 82 S.E. 270, 271-72 (1914), which applies only where the surety "expressly agrees to pay a judgment recovered against its principal." Rashid v. The United States Fid. & Guar. Co., No. 2:91-0141, 1992 U.S. Dist. LEXIS 22914, *15 (S.D.W. Va. Sept. 28, 1992).

The Bond language does not contain an agreement to pay any judgment recovered against Calusa, and the statute requiring the Bond does not require such an agreement. But even if such an agreement could be implied in the Bond, the West Virginia Division of Banking lacked the authority to require a mortgage lender bond which permits a plaintiff to subject a surety to execution on a default judgment obtained against the principal. No such authorization appears in the West Virginia Code, and the Division of Banking may not exercise powers not expressly delegated to it under long-standing principles of West Virginia law.

Because it contains no automatic forfeiture provision appears in it – and one cannot be implied using inapplicable rules of construction – the bond is in the nature of a performance bond and Hartford is entitled to assert all the defenses that Calusa could have raised, or that might otherwise be available to Hartford as a surety. A decision in Hartford’s favor would best further the statutory scheme surrounding surety bonds in that it would preserve the expectations of sureties and their principals while disfavoring windfalls. It would also be consistent with fundamental principles of surety law which recognize a surety’s right to notice and an opportunity to be heard when its principal is accused of wrongdoing. This Court should also preserve the principle of fundamental fairness which militates against finding a party liable without an opportunity to be heard.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Hartford respectfully submits that this appeal should be orally argued before the Court. None of the criteria under Rule 18(a) of the West Virginia Rules of Appellate Procedure is met in this matter. The parties have not waived oral argument and this appeal is not frivolous. The dispositive issues in this case have not been authoritatively decided by this Court; in fact, this case appears to be one of first impression in West Virginia. The decisional process would be significantly aided by oral argument because the issues to be decided rest on fundamental questions of statutory interpretation, regulatory authority and surety law.

Hartford requests that oral argument be heard pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure. No appellate court sitting in West Virginia has ever ruled on whether a mortgage lender or broker bond is a judgment bond, or whether the surety on these bonds is entitled to the protections afforded to sureties in West Virginia Code § 45-1-3. With numerous plaintiffs now pursuing default judgments against defunct mortgage lenders and brokers after the collapse of the mortgage market, this Court has an opportunity to define the rights of sureties and consumers in cases pending in circuit courts across the state. This Court should not reach a decision on these important issues without the benefit of the maximum time of oral argument permitted by the Rules.

ARGUMENT

I. Standard of Review

A circuit court's decision to grant summary judgment is reviewed *de novo*, and this Court applies the "same standard for summary judgment that is to be followed by the circuit court." Cottrill v. Ranson, 200 W.Va. 691, 695, 490 S.E.2d 778, 782 (1997); see also W. Va. Dep't. of Transp., Div. of Highways v. Robertson, 217 W.Va. 497, 501, 618 S.E.2d 506, 510 (2005) (applying *de novo* standard in review of partial summary judgment order). It has "long held that 'a motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.'" Baldau v. Jonkers, No. 35650, 2011 W. Va. LEXIS 13, *20 n.11 (W.Va. Mar. 10, 2011) (quoting Syl. pt. 3, Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of New York, 148 W.Va. 160, 133 S.E.2d 770 (1963)). "[T]he circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Frederick Mgmt. Co. v. City Nat'l Bank, No. 35438, 2010 W. Va. LEXIS 144, *27 (W.Va. Nov. 23, 2010). This Court will "reverse a circuit court's award of summary judgment if there is a genuine issue of material fact to be resolved or if, as a matter of law, the moving party is not entitled to the judgment." Cottrill, 200 W.Va. at 695, 490 S.E.2d at 782.

II. Statutory and Regulatory Background

Chapter 31, Article 17 of the West Virginia Code, known as the West Virginia Residential Mortgage Lender, Broker and Servicer Act (the "Act"), governs entities which originate and service residential loans. To do business in West Virginia, a mortgage lender is required to maintain a license administered by the West Virginia Commissioner of Banking (the

“Commissioner”). West Virginia Code § 31-17-2(a). A lender applying for a license must comply with the applicable requirements of West Virginia Code § 31-17-4, including subsection (e), which states in relevant part:

At the time of making application for a lender’s license, the applicant therefor shall ...

(3) File with the commissioner a bond in favor of the state for the benefit of consumers or for a claim by the commissioner for an unpaid civil administrative penalty or an unpaid examination invoice in the amount of \$100,000 for licensees with West Virginia annual loan originations of \$0 to \$3 million ... in a form and with conditions as the commissioner may prescribe and executed by a surety company authorized to do business in this state[.]

The West Virginia Code contains several provisions specifically governing mortgage lender bonds, but does not expressly provide for any required language.² Nor does the Code set forth the appropriate parties or the conditions which must be satisfied to maintain an action against the bond. Significantly, the Code does not specify or imply that a mortgage lender bond is a payment, forfeiture or judgment bond.

Pursuant to the statutory authority granted by West Virginia Code § 31-17-4(e)(3), the Commissioner wrote a bond form which must be used by mortgage lenders and their sureties. The Bond here was written on the Commissioner’s mandatory form. The pertinent language in the Bond reads:

NOW, THEREFORE, if the said principal CALUSA INVESTMENTS, LLC 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

² Following is a comprehensive list of the statutory provisions dealing with mortgage lender bonds in West Virginia. Subsection (g) of West Virginia Code § 31-17-4 provides that the aggregate liability of a surety on a bond issued pursuant to subsection (e) cannot exceed the face amount of the bond. Subsection (i) gives the Commissioner the discretion to reduce or waive the bond amount for nonprofit entities. Subsection (k) gives priority to consumer restitution claims against such bonds over claims submitted by the Commissioner for a civil administrative penalty or an unpaid examination invoice. West Virginia Code § 31-17-6 requires a lender to keep the bond in full force and effect, and § 31-17-12(a)(4) permits the Commissioner to revoke or suspend a lender’s license should it fail to do so. No other provisions of the Code contain requirements relating to mortgage lender bonds.

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 will 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 judgement against such principal issue execution of such judgement and maintain an action upon the bond of the principal in any court having jurisdiction of the amount claimed, provided the Commissioner of Banking assents thereto.

(App. 60).³

Chapter 45 of the West Virginia Code, entitled "Suretyship and Guaranty," contains general provisions which apply to all surety bonds. Most relevant to this appeal is West Virginia Code § 45-1-3, which states in relevant part:

no judgment, decree or recovery rendered, entered, or had in any suit, action, prosecution or proceeding, to which the surety ... was not a party regularly served with process, shall be in any wise binding on such surety ... and, notwithstanding such decree, judgment or recovery, the surety ... shall be allowed to make any such defense in any action, suit or proceeding instituted against him, as could have been made in the suit in which such decree, judgment or recovery was had.

There is no statutory language or case law suggesting that the general surety provisions in Chapter 45 of the Code are not applicable to bonds issued pursuant to the Act.

Assignment of Error No. 1:

The trial court erred in disregarding West Virginia Code § 45-1-3 and holding that a surety on a statutory mortgage lender bond issued in the form and in the language established by the Commissioner of Banking is automatically responsible for paying any judgment rendered against its principal.

III. The Bond is Subject to the General Rule Set Forth in W. Va. Code § 45-1-3.

The plain language of West Virginia Code § 45-1-3 is directly applicable to the facts of this case and must be considered to determine the rights of the parties to the Bond. It is

³ The fully executed Bond was not made part of the record, but the parties agree that the unsigned document at App. 60 is a full and accurate representation of the operative language of the Bond.

uncontested that Hartford, a surety, was “not a party regularly served with process” at the time the Curtises obtained a default judgment against Calusa, Hartford’s principal. Hartford was unaware, until after the Calusa Judgment had been awarded, that any claim had been initiated against Calusa. Nothing in the Complaint or the Curtises’ subsequent pleadings contradicts this fact. Under the plain language of West Virginia Code § 45-1-3, Hartford is not bound by the Calusa Judgment. Notwithstanding the judgment, it should be allowed to make any defense which would have been available to Calusa, or to Hartford otherwise, had the judgment not been entered. See State v. Duggan, 102 W.Va. 312, 315-16, 135 S.E. 270, 271 (1926) (applying the precursor to West Virginia Code § 45-1-3 to permit a surety to interpose a defense which the principal failed to assert, where the surety was not made a party in the suit against the principal). Summary judgment was inappropriate here and the Curtises’ case against Hartford should be tried on the merits.

IV. The Exception Set Forth in Myers Does Not Apply.

Hartford argued orally and in its brief opposing summary judgment that West Virginia Code § 45-1-3 entitles it to present its defenses notwithstanding the Curtises’ default judgment against Calusa. (App. 78-79, 124). The trial court declined to follow West Virginia Code § 45-1-3, invoking an exception which has no application to the Bond. In ruling that a judgment creditor has a right to immediately collect against the Bond regardless of how the judgment was obtained or what defenses might have been available, the trial court misinterpreted Bond language giving an aggrieved person who obtains a judgment against the principal the right to “maintain an action upon the bond of the principal.” (App. 142). A review of Myers, 74 W.Va. 488, 82 S.E. 270, the case relied on by the trial court in holding that § 45-1-3 is not applicable to mortgage lender bonds, shows that this Court intended for the exception to be narrow. Courts

should only apply the Myers exception where the surety *explicitly* grants the right to recover against the bond immediately upon a judgment against the principal.

In Myers, the court considered a “retail liquor dealer’s license bond” which was “conditioned as required by Sec. 28, Ch. 32, serial section 1144, Code 1913.” Myers, 74 W.Va. at 488, 82 S.E. at 271. The specific language of the Myers bond is not included in the opinion; however, at the time Myers was decided, the statute mandating a liquor dealer’s license bond required compliance with the following conditions:

No county or license court nor town council shall authorize the issuing of any license to sell spirituous liquors ... until the applicant shall have given bond with good security ... in the penalty of at least [\$3,500] ... and with the further condition, that he will pay all such damages and costs as may be recovered against him by any person under any of the provisions of chapter thirty-two of the code of West Virginia, as amended. And such applicant *and his securities* in said bond *shall be liable*, in a suit or suits thereon, *for the fine and costs which may be recovered against him* for any offence under this chapter which is a violation of any of the conditions of said bond, *as well as for the damages* hereinbefore provided for, until the penalty of such bond is exhausted.

Code of West Virginia, 1913, sec. 28, ch. 32, serial section 1144 (emphasis added). (App. 92).

The verb phrase “shall be liable,” coupled with the modifier “for the fine and costs which may be recovered against [the principal],” demonstrates that a surety issuing a bond of the type discussed in Myers clearly relinquishes the right to defend its statutory right to defend on the merits granted by § 45-1-3.⁴ This Court held that inasmuch as the sureties in Myers had expressly contracted away their rights under the precursor to § 45-1-3, they were liable as a matter of law for a judgment imposed against their principals. Myers, 74 W.Va. at 493, 82 S.E. at 272; see also Rashid v. United States Fid. & Guar. Co., No. 2:91-0141, 1992 U.S. Dist. LEXIS 22914, *15 (S.D. W. Va. 1992) (“In refusing to strictly construe the statute, the court in Myers concluded

⁴ The precursor to West Virginia Code § 45-1-3 was, at the time Myers was decided, a portion of former Code Ch. 37, Acts 1907. See Myers, 74 W.Va. at 491, 82 S.E. at 271. The relevant language of the statute is not materially different today.

that the legislature had not intended to impair the right to contract”). The deciding factor in Myers was that the surety “expressly stipulated” that paying such a judgment or fine “shall be the condition of his bond; it is the very thing which he has agreed to pay.” Myers, 74 W.Va. at 492, 82 S.E. at 272.⁵ Thus, the Myers exception only applies where the surety expressly agrees to pay or to become liable for any judgment rendered against its principal. It is in only in such an instance that a surety can be said to have waived or contracted away its § 45-1-3 rights.

The Bond must be evaluated according to its plain language and the statute calling for its issuance. See Rashid, 1992 U.S. Dist. LEXIS 22914 at *17-18 n.6 (“the deciding factor in Myers is an analysis of the surety’s contractual obligation under the bond”). The clear language of the Bond establishes that Hartford never agreed to pay unquestioningly any judgment rendered against its principal, and that Hartford is entitled to the protection provided by § 45-1-3. The obligation bonded is the principal’s compliance with state law, rules and orders relating to mortgage lenders, and the principal’s payment of any moneys due to the State or persons designated by the State pursuant to a lawsuit brought by the Commissioner of Banking.⁶

According to the explicit language of the Bond, the surety has no obligation unless the principal

⁵ Similarly, the Texas Court of Appeals decided Old Republic Sur. Co. v. Bonham State Bank, 172 S.W.3d 210 (Tex. App.-Texarkana 2005) -- upon which the Curtises relied heavily in their brief in support of partial summary judgment -- based on statutory language incorporated into the bond which provided that “[a] person may recover against a surety bond ... if the person obtains ... a judgment assessing damages and reasonable attorney’s fees based on an act or omission on which the bond is conditioned.” See id. at 212, 214-15; Tex. Transp. Code § 503.033(d). No such statutory directive exists in West Virginia as to mortgage lender bonds.

⁶ The precise language of this Bond provision is contained in § II above but is reprinted here for easy reference:

NOW, THEREFORE, if the said principal CALUSA INVESTMENTS, LLC 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 will be void, otherwise it shall remain in full force and effect.

fails to comply with state law as it applies to mortgage lenders. Because the bonded obligation is Calusa's proper performance of its duties under the Act, the bond is in the nature of a performance bond: the principal must perform its work in accordance with state law.

Hartford did not make any agreement or pledge in the Bond to become summarily liable for any judgment rendered against its principal. That would have significantly expanded its obligation. See State v. Abbott, 63 W.Va. 189, 194, 61 S.E. 369, 371 (1907) ("As the sureties did not stipulate that they would abide by the judgment against the principal, or permit him to conduct the defense, and be themselves responsible for the result of it, the fact that the principal has unsuccessfully defended, has no effect on their rights") (quoting Pico v. Webster, 14 Cal. 202, 204 (1859)). In contrast to Myers, no such agreement appears in the bond issued by Hartford or the statute requiring issuance of the bond, and one cannot be created by implication.

[W]here the surety is not a party as contemplated by the statute and there is *no contractual agreement to pay a judgment*, the statute allows the surety of a principal who fails to present his own defenses to "interpose the defenses its principal might have interposed in the suit in which the decree or recovery was had."

Rashid, 1992 U.S. Dist. LEXIS 22914 at *15 (quoting Duggan, 102 W.Va. at 315, 135 S.E. at 271 (1926)) (emphasis added).

In its July 11, 2011 Order, the trial court confused the Curtises' *condition* for recovery with the *remedy* provided to them. According to the trial court, "the Bond provides that once the Plaintiffs obtain a judgment against Calusa, they can proceed against the Bond and Hartford, as surety on the bond, is obligated to pay the judgment as it contracted." (App. 142). But the Bond does not say that Hartford is obligated to pay the judgment against its principal. It merely gives the right to "maintain an action" against Hartford. There is a wide difference between the right to maintain an action and the right to summary judgment which destroys all defenses in that

action. The right to recover against the surety in an “action” is not guaranteed because a surety defendant is entitled to present its defenses at trial. See Wellington Power Corp. v. CNA Sur. Corp., 217 W.Va. 33, 40, 614 S.E.2d 680, 687 (2005) (“a surety may set up in defense to an *action* against him any matter or any act of the creditor that operates as a discharge of the principal from liability”) (emphasis added).

The right to pursue an action directly against a surety is in addition to, but not dependent upon, the aggrieved person’s right to issue execution of a valid judgment obtained against the principal. In this regard, the trial court seems to have conflated the general concepts applicable to recovery against an insurance carrier with those pertaining to a surety. A plaintiff in a typical insurance case must usually obtain a judgment against the insured before he or she can bring an action directly against the insurer. See Robinson v. Cabell Huntington Hosp., Inc., 201 W.Va. 455, 459-60, 498 S.E.2d 27, 31-32 (1997) (“As a general rule, in the absence of policy or statutory provisions to the contrary, one who suffers injury which comes within the provisions of a liability insurance policy is not in privity of contract with the insurance company, and cannot reach the proceeds of the policy for the payment of his claim by an action directly against the insurance company”). Having obtained a judgment, the plaintiff may garnish the insurance policy, and the insurer’s defenses to the garnishment are very limited because West Virginia Code § 45-1-3 does not apply to insurance policies. Commercial Bank v. St. Paul Fire & Marine Ins. Co., 175 W.Va. 588, 596-597, 336 S.E.2d 552, 559-60 (1985).

By contrast, a plaintiff with rights against a principal guaranteed by a surety has two options: a direct action against both, or an action against one or the other followed by a subsequent action against the other, if there has not been one full recovery. Recognizing this, the legislature has seen fit to provide sureties with protections under § 45-1-3, including the right to

defend an action on the merits. The Bond language in this case is consistent and harmonious with that right.

In awarding partial summary judgment to the Curtises, the trial court failed to consider whether Hartford had contracted away its § 45-1-3 rights, evidently assuming that no such rights exist unless reaffirmed or incorporated in the Bond itself. After stating that the Bond language requires a plaintiff to obtain a judgment against the principal, it wrote, “[t]here is no other language in the Bond to indicate that the Plaintiffs should first be required to try their case against Calusa, determine if Calusa will pay any judgment obtained, and then, upon Calusa’s failure to pay such a judgment, try their case a second time against Hartford.” (App. 142). There is no need for such language to appear in the bond because § 45-1-3 adequately sets forth the rights of a surety whose principal has suffered a judgment without the surety’s knowledge. See, e.g., Gen. Elec. Co. v. Nat’l Labor Relations Bd., 414 F.2d 918, 924 (4th Cir. 1969) (mere fact that an entity executed a contract which did not include a guarantee of its statutory rights did not constitute an effective waiver of those rights); Potesta v. United States Fid. & Guar. Co., 202 W.Va. 308, 315, 504 S.E.2d 135, 142 (1998) (“A waiver of legal rights will not be implied except upon clear and unmistakable proof of an intention to waive such rights”). The statutory rights guaranteed by § 45-1-3 apply to all surety bonds unless those rights are contracted away. The plain, unambiguous language of the Bond does not demonstrate any intent on the part of Hartford to waive its statutory rights. It stipulates that a judgment gives an aggrieved person the right only to “maintain an action upon the bond.” Without evidence of Hartford’s intent to waive or contract away its rights, it was error for the trial court to ignore the clear provisions of the statute and deprive Hartford of its right to defend itself on the merits.

V. The Rules of Contract Construction Cited by the Curtises Are Irrelevant to this Appeal.

While not explicitly relied upon by the trial court in ruling on the Curtises' partial summary judgment motion, the Curtises repeatedly argued in the proceedings below that the language in the Bond is to be construed against Hartford under various rules of construction. (App. 50; App. 94). Hartford's statutory rights cannot be forfeited by selective application of these rules. A rule of construction can only be applied where the language of a statute or bond is doubtful or ambiguous. See State v. Epperly, 135 W.Va. 877, 881-82, 65 S.E.2d 488, 491 (1951). "[A] valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent." Wellington Power Corp., 217 W.Va. at 37, 614 S.E.2d at 684. The language of the Bond is clear and subject to only one interpretation. There is nothing ambiguous about bond language giving an aggrieved person the right to "maintain an action" upon the occurrence of conditions precedent.

Even if the Bond's language was ambiguous, the rule cited by the Curtises – that surety bonds are to be construed against a compensated surety where the surety scripts the bond⁷ – is inapplicable. There is no evidence to suggest that Hartford had anything to do with scripting the Bond. In fact, the Curtises acknowledged in their Reply Brief in support of their Motion for Partial Summary Judgment that "[t]he language of Bond Number 14BSBCT3735 is not negotiated, but is rather set by the Commissioner of Banking." (App. 96). The Curtises cannot benefit from a rule of construction premised on circumstances which even they acknowledge are

⁷ In their Reply Brief in Support of their Motion for Partial Summary Judgment, the Curtises argued that they should receive the benefit of the rule stated in City of Mullens v. Davidson, 133 W.Va. 557, 566, 57 S.E.2d 1, 7 (1949): "As a bond executed by a surety for compensation is usually expressed in terms prescribed by the surety, it will for that reason be strictly construed in favor of the obligee." (App.94-95 (n.2)).

not present in this case. There are no grounds to construe the Bond's clear and unambiguous language against Hartford.

VI. The Kanawha County Circuit Court's Order in Stayer Supports Hartford's Position Here, and Hartford is not Estopped from Relying on its § 45-1-3 Protections Because of an Argument it Advanced and Lost in Another Case.

In reaching its decision to grant partial summary judgment, the trial court apparently placed great weight on a perceived inconsistency between the argument advanced by Hartford in this case and a position it took in Stayer v. Litton Loan Servicing, et al., No. 08-C-3157, a case in the Circuit Court of Kanawha County, West Virginia. (App. 142-143). Stayer involved a mortgage broker bond, which contains language very similar to that found in a mortgage lender bond and is governed by the same statutory provisions. (App. 102). The plaintiff brought a lawsuit directly against a mortgage broker bond without first proceeding against the principal, which had filed for bankruptcy in Maryland. (App. 102-103). Hartford, the surety on the mortgage broker bond, moved to dismiss the Complaint on the grounds that the bond language required the plaintiff to obtain a judgment against the principal before it could seek recovery against the bond. (App. 103). The circuit court disagreed and denied Hartford's motion to dismiss, stating that the legislative intent in requiring a mortgage broker bond was to provide a remedy to consumers aggrieved by insolvent brokers. (App. 104). The Stayer case is not harmful to Hartford's arguments herein for two reasons.

First, the circuit court in Stayer actually assumed the validity of the argument being advanced by Hartford in this matter: that a surety is always entitled to assert the defenses its principal could have asserted. Paragraph 14 of the Order in Stayer – an Order prepared by the same plaintiff's counsel as in this case – states:

The Court FINDS and CONCLUDES that Plaintiff should not be required to sit idle and await the conclusion of the [principal's] bankruptcy, or travel to Maryland to obtain an order from the bankruptcy court permitting the Plaintiff to pursue the claim against [the principal] notwithstanding the automatic stay with the understanding that judgment would be executed against the bond. After this delay and needless process, *Hartford would then be permitted to assert all defenses* [the principal] *could have asserted*.

(App. 106-107) (emphasis added). The Stayer court denied the motion to dismiss, rejecting Hartford's proposed two-tier approach to recovery against mortgage lender bonds and mortgage broker bonds, where judgment against the principal would be a precondition to filing suit against the bond. Placing emphasis on the legislature's intent to provide a remedial source for consumers and the need to conserve judicial resources, it instead favored a single-tier approach: the consumer, in one action, can proceed (1) only against the surety, (2) only against the principal, or (3) against both simultaneously. (App. 107). All three of these options permit a plaintiff to try his claims in one proceeding, but as the Stayer court clearly recognized, West Virginia Code § 45-1-3 provides protection to the surety if the plaintiff chooses to sue only the principal. The decision in Stayer was not appealed because under the framework recognized by the circuit court, Hartford would have an opportunity to defend itself on the merits in future cases.⁸

At the urging of plaintiffs' counsel, the trial court in this case went one step further than Stayer and approved a zero-tier approach, holding that where the principal is insolvent or unresponsive (a frequent occurrence in these cases), a plaintiff can obtain a default judgment and immediately execute on it without being held to his burden of proof. This Court should definitively close the loophole opened by the trial court to ensure that plaintiffs cannot enjoy a windfall recovery against a mortgage lender bond without being bothered to present evidence in support of their claims. See Hannah v. Heeter, 213 W.Va. 704, 715 n.10, 584 S.E.2d 560, 571

⁸ Stayer has since been resolved by the parties out of court.

n.10 (2003) (acknowledging a “defendant’s interest in not providing the plaintiff with a windfall recovery”).

Secondly, Hartford cannot be estopped from arguing that it is entitled to notice and to assert its principal’s defenses. While the trial court did not explicitly invoke estoppel, it implied that Hartford was somehow prevented from taking the position it took in this case due to its prior arguments in Stayer. Hartford will discuss the issue here in an abundance of caution, since the Court has the discretion to address judicial estoppel *sua sponte*. See Robertson, 217 W.Va. at 503-04, 618 S.E.2d at 512-13.

“[J]udicial estoppel is a common law principle which precludes a party from asserting a position in a legal proceeding inconsistent with a position taken by that party in the same or a prior litigation.” Robertson, 217 W.Va. at 504, 618 S.E.2d at 513 (citation omitted). “Under the doctrine, a party is ‘generally prevented ... from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.’” Id. (quoting Pegram v. Herdrich, 530 U.S. 211, 227 n.8 (2000)). Estoppel is “an extraordinary remedy that should be invoked only when a party’s assertion of a contrary position will result in a miscarriage of justice and only in those circumstances where invocation of the doctrine will serve its stated purpose.” Robertson, 217 W.Va. at 504, 618 S.E.2d at 513 (citation omitted). In Robertson, this Court established four threshold criteria to determine when the doctrine of judicial estoppel can be invoked.

[J]udicial estoppel bars a party from re-litigating an issue when: (1) the party assumed a position on the issue that is clearly inconsistent with a position taken in a previous case, or with a position taken earlier in the same case; (2) the positions were taken in proceedings involving the same adverse party; (3) the party taking the inconsistent positions received some benefit from his/her original position; and (4) the original position misled the adverse party so that allowing the estopped party to change his/her

position would injuriously affect the adverse party and the integrity of the judicial process.

Robertson, 217 W.Va. at 506, 618 S.E.2d at 515.

Reasonable persons can disagree as to whether the position taken by Hartford in this matter is “clearly inconsistent” with the arguments it made in Stayer.⁹ However, the second, third and fourth prongs of the Robertson analysis are obviously not met here. While they are represented by the same counsel, the Curtises are not related to or in privity with the plaintiff in Stayer. As to the third prong, Hartford did not receive any benefit from its arguments on its motion to dismiss in Stayer because it lost that motion. Finally, there is no indication whatsoever that the arguments made by Hartford in Stayer misled the Curtises such that they were injuriously affected.

In sum there is no reason to hold Hartford’s previous unsuccessful legal arguments against it here. To the extent that the trial court intended to bar Hartford from asserting inconsistent legal positions between this case and Stayer, it operated under an impermissibly broad application of this Court’s well-established rules of estoppel.

VII. The Commissioner of Banking Had No Authority to Require a Bond that Ignores a Mortgage Lender Bond Surety’s Rights Under W. Va. Code § 45-1-3.

As argued above, the Bond language does not permit a plaintiff to obtain a default judgment against a mortgage lender bond and immediately execute on it against the surety where the surety had no notice of the proceedings against its principal. But even if this Court were to agree with the trial court that the Bond is a judgment bond such that it permits a “zero-tier” approach to recovery, it should hold that the Bond language required by the Commissioner

⁹ Even if these legal arguments were mutually inconsistent, Hartford is entitled to present competing legal positions regardless of consistency, even if they were in the same case. Rule 8(e)(2), West Virginia Rules of Civil Procedure.

conflicts with the West Virginia Code and is therefore null and void. In the absence of authority to create a judgment bond, the Bond should be void insofar as it conflicts with West Virginia Code § 45-1-3 by robbing Hartford of its right to defend itself on the merits.

West Virginia Code § 31-17-4(e)(3) requires a mortgage lender to maintain a bond “in a form and with conditions as the commissioner may prescribe and executed by a surety company authorized to do business in this state.” This statutory language seems to grant wide latitude to the Commissioner in determining the appropriate parties to the Bond and the conditions under which the bond can be sued upon. As the Curtises acknowledged in their briefs filed with the trial court, however, the Commissioner cannot create conditions which conflict with clear statutory language. (App. 96). “There is no question that when the rules of an agency come into conflict with a statute that the statute must control[.]” Respass v. Workers’ Comp. Div., 212 W.Va. 86, 102, 569 S.E.2d 162, 178 (2002). “It is fundamental law that the Legislature may delegate to an administrative agency the power to make rules and regulations to implement the statute under which the agency functions. In exercising that power, however, an administrative agency may not issue a regulation which is inconsistent with ... its statutory authority.” Lovas v. Consolidation Coal Co., 222 W.Va. 91, 96, 662 S.E.2d 645, 650 (2008) (quoting Syl. pt. 3, Rowe v. W. Va. Dept. of Corr., 170 W.Va. 230, 292 S.E.2d 650 (1982)); see also Boley v. Miller, 187 W.Va. 242, 246, 418 S.E.2d 352, 356 (1992) (agency’s statutory interpretation does not apply where it is “unduly restricted and in conflict with the legislative intent”).

If the Commissioner’s bond form truly does create a judgment bond as the trial court ruled, it is in direct conflict with West Virginia Code § 45-1-3. There is no evidence to suggest that the Legislature, in enacting West Virginia Code § 31-17-4(e)(3), intended to give the Commissioner the authority to formulate and require a surety bond that contradicts the general

suretyship provisions in Chapter 45 and eviscerates the surety's right to rely on the defenses its principal could have raised. Had the Legislature intended to require a judgment bond despite § 45-1-3, it could have easily done so. That it did not suggests that the Legislature intended to preserve the rights guaranteed to all sureties elsewhere in the Code when delegating the authority to the Commissioner to create the language to be used in mortgage lender bonds.

Because the Legislature did not specifically require a judgment bond or exempt § 31-17-4(e)(3) mortgage lender bonds from the application of § 45-1-3, West Virginia law requires the statutes to be given equal effect. This Court has held for over 100 years that statutes dealing with the same subject matter must be read together and should be given equal effect where possible.

[W]here it is possible to do so, it is the duty of the courts, in the construction of statutes, to harmonize and reconcile laws, and to adopt that construction of a statutory provision which harmonizes and reconciles it with other statutory provisions to give force and effect to each, if possible.

State v. Williams, 196 W.Va. 639, 641, 474 S.E.2d 569, 571 (1996).¹⁰

Sections 31-17-4(e)(3) and 45-1-3 can be interpreted in such a way as to give equal effect to each. Simply put, the Commissioner can require a mortgage lender bond with conditions that do not infringe on a surety's statutory right to assert the defenses of its principal. A mortgage lender bond purporting to contain provisions that exceed the Commissioner's authority by taking

¹⁰ See also Keatley v. Mercer County Bd. of Educ., 200 W.Va. 487, 495 n.15, 490 S.E.2d 306, 314 n.15 (1997) (quoting Williams); Syl. Pt. 5, Lawson v. County Comm'n, 199 W.Va. 77, 483 S.E.2d 77 (1996) ("where two statutes are in apparent conflict, courts must, if reasonably possible, construe such statutes as to give effect to each"); United Hosp. Ctr. v. Richardson, 757 F.2d 1445, 1451 (4th Cir. 1985) ("Should there be some inconsistency between the two statutes ... courts, in construing the statutes, so far as it is possible, should seek to steer a middle course that vitiates neither provision but implements to the fullest extent possible the directives of each") (citation omitted); Bldg. & Loan Ass'n v. Sohn, 54 W.Va. 101, 109-10, 46 S.E. 222, 225 (1903) ("Regard must be had to all the parts of a statute, and to the other concurrent legislation *in pari materia*; and the whole should, if possible, be made to harmonize; and if the sense be doubtful, such construction should be given, if it can be, as will not conflict with the general principles of law, which it may be assumed the legislature would not intend to disregard or change").

away these rights is void as to those provisions. This interpretation best harmonizes two potentially conflicting statutes and upholds the Legislature's intent. Accordingly, even if the Bond is intended to be a judgment bond, as the trial court ruled, it is void for lack of authority.

Assignment of Error No. 2:

The trial court erred in holding that a default judgment against a principal on a mortgage lender bond can be enforced against the surety where the surety does not receive notice of a claim against its principal until after judgment is rendered.

VIII. Public Policy Considerations Weigh in Favor of Ensuring that a Surety is Entitled to an Opportunity to Defend Itself on the Merits.

In the proceedings below, the Curtises argued that the "statutory scheme" of the Act would be threatened by recognizing the rights of a surety on a mortgage lender bond under West Virginia Code § 45-1-3. (App. 55-57; App. 94-96). Hartford argued in response that public policy considerations weighed in favor of giving sureties the right to notice and the opportunity to defend themselves on the merits. (App. 85, 128). Any threat to the statutory scheme of mortgage lender bonds is posed by the Curtises, who despite their professed concerns over fairness stand to gain a windfall if the judgment in this case stands.

Nothing in the West Virginia Code suggests that there is something exceptional about mortgage lender bonds which takes them out of the ambit of § 45-1-3, or that a surety bond which is "for the benefit of consumers" is somehow exempted from the general surety provisions of the Code. The "statutory scheme" of Chapter, 31 Article 17 of the Code would not be defeated by applying the clear language of § 45-1-3 to a mortgage lender bond just as if it were any other type of bond, and there is no inconsistency between the Act and the general surety provisions in Chapter 45. If allowed to stand, the trial court's interpretation of the Bond provisions would nullify the general statutory scheme of surety bonds by disregarding § 45-1-3 in the absence of any directive or authority to do so. Such a result cannot be accomplished by

appeal to public policy when the purported “policy” is directly at odds with a statute that has existed for over 100 years – a statute whose purpose has been to prevent fraud, collusion and prejudice against sureties, and to preserve the fundamental right to notice of judicial proceedings.

A fundamental policy consideration *was* ignored by the trial court, but it does not involve vague notions of “statutory scheme.” An important policy of the State is to preserve the expectations of parties to a contract by giving full meaning to language which is plain and unambiguous.

Where parties contract lawfully and their contract is free from ambiguity or doubt, their agreement furnishes the law which governs them. It is the duty of the court to construe contracts as they are made by the parties thereto and to give full force and effect to the language used, when it is clear, plain, simple and unambiguous.

Rollyson v. Jordan, 205 W.Va. 368, 376, 518 S.E.2d 372, 380 (1999) (quoting 4B MICHE’S JURISPRUDENCE Contracts § 40, at 56 (Repl. Vo. 1986)). A surety issuing a mortgage lender bond in West Virginia expects that it will be permitted to assert defenses if a judgment is obtained against the principal without the surety’s knowledge, because it has made no explicit agreement to the contrary and the West Virginia Code guarantees that right.

Despite claiming otherwise, the Curtises would not be “forced” to “litigate their claims twice” if their motion is denied. If they wanted to avoid repetitious litigation, they had the option of suing Hartford at the same time they sued its principal – just as every other beneficiary of every other surety bond is required to do in West Virginia, and just as their counsel has done in numerous cases across the state. In truth, the Curtises have not tried their case even once. Calusa did not answer the Complaint and the Curtises took a default judgment against it without being required to introduce any proof of their allegations. They did not submit an affidavit supporting their claim for damages or any other evidence suggesting that they sustained any

injury whatsoever. By moving for and achieving summary judgment, they have been awarded a windfall without having to introduce any proof at all, after intentionally keeping Hartford in the dark about their claim until the Calusa Judgment had been entered.

If summary judgment is upheld here, it is easy to imagine an enterprising attorney seeking out a customer of a mortgage lender known to be defunct and suing the lender alone, knowing full well that no defense will be attempted. Then, after the inevitable default judgment, the surety on the bond could be made summarily liable without ever having notice of the claim or an opportunity to defend on the merits until it was too late. The effect such a practice would have on the mortgage industry is obvious and significant: when faced with near-certain forfeiture every time a principal goes out of business, sureties would likely cease to issue mortgage lender bonds. Lenders would pull out of the West Virginia market and it would become far more difficult for West Virginians to find affordable loans. The effect on the judicial system would be just as erosive, perpetuating a sham where liability is premised on a procedural shell game rather than the redress of wrongs.

It is precisely this sort of result that West Virginia Code § 45-1-3 is meant to avoid. Without an explicit, clear promise in the Bond to become liable for or to automatically pay any judgment against the principal, a surety should not be held to have waived its rights under § 45-1-3. Hartford has a clear statutory right to have its defenses heard on the merits and to hold the plaintiffs to their burden of proof. This Court should uphold the expectations of the parties to the Bond and ensure that surety contracts are to be interpreted by their clear, unambiguous language in West Virginia.

IX. Commonly Accepted Principles of Surety Law Do Not Permit a Plaintiff to Enforce a Default Judgment Awarded Against a Principal Where the Surety Was Not Given Notice and Opportunity to Defend.

Where, as here, the bond is conditioned for performance of a duty, this Court applies the majority rule that a default judgment against a principal is only *prima facie* evidence against a surety and is subject to rebuttal. See Abbott, 63 W.Va. at 192-93, 61 S.E. at 370-71 (differentiating between a bond providing that “a principal will pay a certain sum of money or satisfy a judgment,” and a bond where the surety “merely stipulate[s] that the principal will perform his duties”). The Third Restatement of Suretyship and Guaranty goes one step further and provides that a default judgment against a principal is only evidence of its rendition and creates no presumption. It states:

When, in an action by the obligee against the principal obligor to enforce the underlying obligation, a judgment in favor of the obligee is obtained by default, confession, stipulation, or the like, the judgment against the principal obligor is evidence only of its rendition in a subsequent action of the obligee against the secondary obligor to enforce the secondary obligation.

RESTATEMENT (THIRD), Suretyship & Guaranty, § 67(3) (1995). The justification for applying a less oppressive rule to a surety whose principal has suffered a default judgment is provided in Comment (c):

the probative significance of a judgment obtained by confession, default, or the like is much less than that of a judgment after trial on the merits. Moreover, the arguments of policy and efficiency against duplication of trials have little weight where there has not been a determination made by a fact finder after consideration of evidence introduced by both sides to the litigation.

Id., Comment (c). The concerns expressed in the Restatement are particularly applicable in this case, where the Curtises have not been put to their burden of proof, and an adverse decision in this appeal would force them to litigate their claims only once.

The trial court cited Axess Int'l v. Intercargo Ins. Co., 183 F.3d 935, 940 (9th Cir. 1999) for the proposition that “a default judgment is just as binding upon a surety issuing a judgment bond as it is upon a surety where judgment is rendered after a trial.” In that case, the Ninth Circuit found guidance from a treatise stating that a default judgment against a principal is enforceable against the surety “[w]here the very condition of the bond is the performance of a judgment against the principal, or that the surety will pay for all damages that may be awarded in an action brought against the principal.” Id. (citing 74 AM. JUR. 2D Suretyship § 153 (1974)). The bond in Axess stated that “the condition of this obligation is that the penalty amount of this bond [\$50,000] shall be available to *pay any judgment for damages* against the Principal...” Axess Int'l, 183 F.3d at 940 (emphasis in original). Because the bond was issued “specifically to pay any judgment for damages,” it was a judgment bond and the judgment against the principal was enforceable against the surety. Id. In other words, even if this Court were to follow the decision in Axess, the analysis is the same as it is when determining whether the Myers exception applies: does the Bond specifically provide that the surety will be liable for any judgment attained against its principal?

There is no specific agreement in the Mortgage Lender Bond at issue in this case which would compel the same result as that reached in Axess. The obligation identified by the Bond is not the payment of a judgment but the principal’s lawful performance of its activities as a mortgage broker. The Bond cannot be classified as a “judgment bond” by implication, as the trial court ruled, because only a clear election to waive a statutory right can eliminate the right. See Winnings v. Wilpen Coal Co., 134 W. Va. 387, 390-91, 59 S.E.2d 655, 658 (1950) (property right cannot be relinquished “unless it clearly appears, by express words or by necessary implication,” that the right has been released or waived). Hartford is entitled to an opportunity to

defend pursuant to the West Virginia Code, and it was error for the trial court to borrow inapposite case law from the Ninth Circuit when the statutes of this state guarantee a surety's rights.

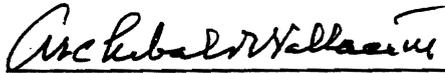
CONCLUSION

A surety's right to defend itself on the merits where a default judgment has been taken against its principal without its knowledge is guaranteed by West Virginia Code and should not be discarded lightly. In the absence of bond language clearly requiring the surety to pay any judgment rendered against the principal, and in the absence of any statutory authority to require a judgment bond, a mortgage lender bond such as the one at issue in this case is subject to the provisions of Code § 45-1-3. Hartford should have been afforded the opportunity to assert the defenses that Calusa, its principal, would have been able to assert, as confirmed by public policy considerations and general principles of surety law. The trial court's decision ignores Code § 45-1-3 and its decision awarding partial summary judgment should accordingly be reversed, and these proceedings remanded to the Jackson County Circuit Court for trial on the merits.

Respectfully submitted,

HARTFORD FIRE INSURANCE COMPANY

By Counsel



Archibald Wallace, III (WVSB No. 9587)

WALLACEPLEDGER, PLLC

7100 Forest Avenue

Suite 302

Richmond, VA 23226

Phone: (804) 282-8300

Fax: (804) 282-2555

e-mail: axwallace@wallacepledger.com

Counsel for Hartford

and

Thomas V. Flaherty (WVSB No. 1213)

FLAHERTY SENSABAUGH BONASSO PLLC

200 Capitol Street

Charleston, WV 25301

Phone: (304) 345-0200

Fax: (304) 345-0260

email: tflaherty@fsblaw.com

Counsel for Hartford

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

HARTFORD FIRE INSURANCE COMPANY, et al.

Defendant Below/Petitioner,

v.

Record No. 12-0037

MICAH A. CURTIS and
ANGELA L. CURTIS,

Plaintiffs Above/Respondents.

CERTIFICATE OF SERVICE

I, Archibald Wallace, III, counsel for the Petitioner, Hartford Fire Insurance Company, do hereby certify that I have served a true and exact copy of the foregoing **PETITIONER'S BRIEF** upon counsel for the Respondents via Federal Express overnight delivery, this 3rd day of April, 2012, as follows:

Daniel F. Hedges, Esquire
Mountain State Justice, Inc.
1031 Quarrier Street, Suite 200
Charleston, WV 25301
*Counsel for Micah A. Curtis
and Angela L. Curtis*

Scott S. Blass, Esquire
BORDAS & BORDAS PLLC
1358 National Road
Wheeling, WV 26003
*Counsel for Micah A. Curtis
and Angela L. Curtis*



Archibald Wallace, III (WVSB# 9587)