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LATENT DEFECT CLAIMS AGAINST SURETIES – PRACTICAL CONSIDERATIONS

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I. INTRODUCTION

When defaults occur in connection with the performance of bonded construction contracts, sureties often are called upon to honor obligations under performance bonds, and to take steps to have the projects completed. However, once projects are completed, certified by architects and accepted by obligees, obligees are generally barred from seeking relief for defective performance.[1] This is generally known as the doctrine of waiver.[2] Under the doctrine of waiver acceptance of the construction work bars obligees from making claims for known or reasonably discoverable defects.[3] The rationale behind this doctrine is that it would be unjust or inequitable for obligees to observe various defects during the construction of their projects but wait until the completion of the project to complain, rendering repair of the defects more difficult and costly.[4]

Where defects in workmanship or materials could not have been discovered by reasonable inspection, however, acceptance and certification may not result in a waiver. Owners/obligees generally will not be deemed to have accepted latent defects.[5] Examples of latent defects include improperly laid sewer pipes,[6] improperly installed flashings on a roof deck,[7] rupture of a sewage pipe,[8] improper lining of gutters leading to leakage,[9] failure to construct a watertight dam,[10] and roof defects.[11] Generally, the failure to discover latent defects will not constitute a waiver of the owner's ability to seek relief under performance bonds for defective performance.[12] "While certain patent defects may be

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1 *See*, *e.g.*, Laycock v. Moon, 72 N.W. 372 Wis. (1897).
2 *See*, *e.g.*, City of Osceola v. Gjellefald Constr. Co., 279 N.W. 590, 594 Iowa (1938).
3 *Id*.
4 *Id*.
5 *See* Salem Realty Co. v. Batson, 123 S.E.2d 744, 750 N.C. (1962).
6 *See* City of Seaside v. Randles, 180 P. 319 (Or. 1919).
7 *See* School Dist. No. 65R v. Universal Surety Co., 135 N.W.2d 232 (1965).
8 *See* Anne Arundel Co. v. Fid. & Dep. Co. of Maryland, 648 A.2d 193 Md. (1994).
9 *See* Newton Housing Auth. v. Cumberland Constr., 358 N.E.2d 474 Mass. (1977).
10 *See* City of Osceola, *supra* at 594.
11 *See* Elliott Cons. Sch. Dist. v. Busboom, 227 F. Supp. 858 (D. Iowa 1964); Congregation of St. Peter's Roman Catholic Church of Gueydan v. Simon, 497 So. 2d 409 (La. Ct. App. 1986).
12 *See* Stevens Constr. Corp. v. Carolina Corp., 217 N.W.2d 291, 299 Wis. (1974).

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waived by way of [...] an escrow agreement, or punch list, and the making of final payment, this is not necessarily so, nor would it have that effect on latent defects."[13] This article addresses situations wherein sureties may be liable for latent defects, recognizes the source of such liability and the limits thereof, and reviews practical considerations of which sureties should be aware to limit exposure and to defend against latent defect claims.

II. LIABILITY FOR LATENT DEFECTS

Roughly one-third of the states in the United States have addressed sureties' liability for latent defects with unanimous results. All eighteen states[14] that have addressed the issue have specifically held that performance bond sureties may be liable for latent defects in their principal's work, even where those defects were discovered after the applicable bond statute of limitations period had run.[15] Courts have used various rationales to justify imposition of liability on sureties. A common rationale is that because the surety bond incorporates the principal contract, the bond must be construed in conjunction with it.[16] Other courts have found performance bond sureties liable for latent defects by concluding that performance bonds should be strictly construed against compensated sureties and in favor of obligees:[17] "The general principles of the law involved are that the surety is bound in the manner and to the extent provided in the obligation. A builder's bond is construed most strongly against the surety and in favor of the indemnity which the obligee has reasonable grounds to expect."[18] Other courts reason that sureties' liability under performance bonds can only be released when the obligees accept and pay for the project, with knowledge of the alleged defects.[19]

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13 Quin Blair Enterprises, Inc. v. Julien Constr. Co., 597 P.2d 945, 955-6 (Wyo. 1979).

14 The one exception is the case of Board of Regents v. Fid. & Dep. Co., 416 So. 2d 30 (Fla. Dist. Ct. App. 1982) Constr. which holds that, when a construction contract is substantially completed, the performance bond surety is relieved of any further responsibility. The *Board of Regents* case, however, was effectively overruled by the case of Federal Ins. Co. v. Southwest Florida Retirement Ctr., Inc., 707 So. 2d 1119 (Fla. 1998).

15 *See* Alaska Energy Auth. v. Fairmont Ins. Co., 845 P.2d 420 (Ala. 1993); Regents of Univ. of Cal. v. Hartford Acc. & Indem. Co., 581 P.2d 197 Cal. (1978); Fed. Ins. Co. v. Southwest Florida Retirement Ctr, *supra*; School Bd. of Pinellas Co. v. St. Paul Fire & Marine Ins. Co., 449 So. 2d 872, 874 (Fla. Dist. Ct. App. 1984); McDevitt & Street Co. v. K-C Air Conditioning Serv., 418 S.E.2d 87, 93 (Ga. Ct. App. 1992); Village of Pawnee v. Azzarelli Constr. Co., 539 N.E.2d 895 (Ill. App. Ct. 1989); Board of Regents v. Wilson, 326 N.E.2d 216, 221 (Ill. App. Ct. 1975); Elliott Cons. Sch. Dist. *supra*; Congregation of St. Peter's Roman Catholic Church, *supra*; Newton Housing Auth., *supra*; Anne Arundel Co., *supra*; Hunters Pointe Partners Ltd., *supra*; School Dist. No. 65R, *supra*; Mayor of City of Newark v. N.J. Asphalt Co., 53 A. 294 (N.J. 1902); Carrols Equities Corp., *supra*; Haywood Co. Consol. School System v. U.S. Fidelity & Guaranty Co., 257 S.E.2d 670 (N.C. Ct. App. 1979); Nat'l Surety Co. v. Bd. of Educ. of City of Hugo, 162 P. 1108 Okla. (1917); City of Seaside, *supra* at 319; Altoona Area School Dist. v. Campbell, 618 A.2d 1129 (Pa. Commw. Ct. 1992); Houston Fire & Casualty Ins. Co. v. Riesel Indep. Sch. Dist., 375 S.W.2d 323, 327 (Tex. Civ. App. 1964).

16 *See* Carrols Equities, *supra* at 803. *See also* School Bd. Of Pinellas Co., *supra*. *See also* Salem Realty Co., *supra*, 123 S.E.2d at 751 and Carrols Equities, *supra* at 803 (holding that the surety is bound as the principal is bound). Indeed, the AIA A312 Performance Bond provides that "[t]he Contractor and the Surety, jointly and severally, bind themselves…to the Owner for the performance of the Construction Contract, which is incorporated herein by reference. If the Contractor performs the Construction Contract, the Surety and the Contractor shall have no obligation under this Bond." AIA Document A312, Sections 1 and 2. The predecessor to the A312 Bond is the A311 Performance Bond, which requires the Contractor to "promptly and faithfully perform [the] Contract." AIA Document A311.

17 *See* School Dist. No. 65R, *supra*, 135 N.W.2d at 236; Hunters Pointe Partners, *supra*, 486 N.W.2d at 138; Congregation of St. Peter's Roman Catholic Church, *supra* at 413-14.

18 School Dist. No. 65R, *supra*, 135 N.W.2d at 234 (citations omitted).

19 *See* City of Newark, *supra* at 296.

CONSIDERATIONS...

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III. LATENT DEFECTS VERSUS PATENT DEFECTS

Latent defects most generally are defined as those defects which manifest themselves only after completion of construction and which are "not discoverable through reasonable inspection."[20] Generally, a "reasonable inspection" is one made with ordinary care.[21] Whether an inspection is reasonable is usually a matter to be determined from the totality of circumstances of a particular case.[22] As one court explained: "[T]he reasonableness of the inspection must vary with the nature of the thing to be inspected and the nature and gravity of the harm which is sought to be averted."[23] Therefore, the critical distinction between a defect which is latent and one which is patent is the susceptibility of the defect to detection after reasonable inspection.[24]

Although most states employ this "reasonable inspection" standard, other states define a latent defect as one that is "not apparent on ordinary observation,"[25] "not apparent by use of one's ordinary senses from casual observation,"[26] "not readily observable or discoverable to any but the most searching examination,"[27] "not discoverable by visual inspection,"[28] "not readily observable,[29] or "which could not be discovered by any known or customary test."[30]

IV. TIME LIMITS ON LIABILITY

Potential liability for latent defects does not last forever. Statutes of limitation begin to run from the time a cause of action "accrues,"[31] that is as soon as a claimant has the right to institute and maintain a suit.[32] However, statutes of limitations may be equitably tolled by the discovery rule of accrual.[33] Where applicable, the discovery rule tolls the running of a statute of limitation until the plaintiff discovers or reasonably should have discovered the existence of a claim.[34]

A statute of repose acts to temporally define the right to initiate suit against a defendant after a legislatively determined time period.[35] Statutes of repose establish a definitive time during which a claim may be asserted in connection with a construction project.[36] Whereas a statute of limitations extinguishes the right to prosecute a cause of action once it has accrued, a statute of repose cuts off a claimant's right of action after a specified time, regardless of when the cause of action accrued.[37] Equitable tolling does not apply to statutes of repose.[38]

The following general rule can be derived from those cases that have addressed the issue of time limits on a surety's liability for latent defects: a surety's liability for latent defects will be time barred at the conclusion of the limitations period, as extended by the discovery rule of accrual, or the repose period, if applicable to sureties, whichever is shorter.

1. *Statutes of Limitations*

A crucial issue to address when assessing bond claims for latent defects is which limitations period should be applied. Should it be the limitations period in the bond, the statutory limitation period for bond claims and/or claims against a surety, or the statutory limitation period governing breach of contract claims? There is very little law regarding which limitations period should be applied in the context of latent defect claims and very little explanation as to why one limitations period is employed over another. A large number of courts have been completely silent on the applicable limitations period in latent defect cases,[39] although public construction projects

20 Cosmopolitan Homes, Inc. v. Weller, 663 P.2d 1041, 1045 (Colo. 1983).

21 *See* Kaminer Constr. Corp. v. United States, 488 F.2d 980, 984, 203 Ct.Cl. 182 (1973); U.S. v. Lembke Constr. Co., Inc., 786 F.2d 1386, 1387 (9th Cir. 1986).

22 At least one court has held that a claim was barred because the claimant should have known of the alleged construction defects while the work was in progress. As such, the court held that the statute of repose began to run when the certificate of completion was issued, not when the claimant discovered the defect. *See* Hanson Housing Auth. v. Dryvit System, Inc., 560 N.E.2d 1290 Mass. App. Ct. (1990).

23 Renown, Inc. v. Hensel Phelps Constr. Co., 201 Cal.Rptr. 242, 245 Cal. Ct. App. (1984).

24 *See* Renown, *supra* at 420.

25 District of Columbia v. Wood, 1913 WL 20027 at *1 (D.C. 1913).

26 Holsworth v. Fla. Power & Light Co., 700 So. 2d 705, 708 (Fla. Dist. Ct. App. 1997).

27 Board of Educ. of Maine Twp. High Sch. Dist. 207 v. Int'l, 684 N.E.2d 978, 982 (Ill. App. Ct. 1997).

28 Parker v. Ford Motor Co., 331 So. 2d 923, 924 (Miss. 1976).

29 48 Horsehill, LLC v. Kenro Corp., 2006 WL 349739 at *9 (N.J. Super. Ct. App. Div. 2006).

30 Markham v. Nationwide Mut. Fire Ins. Co., 481 S.E.2d 349, 357 (N.C. Ct. App. 1997).

31 *See* Massard v. Sec'y of Dept. of Health and Human Services, 25 Cl.Ct. 421, 425 (1992).

32 *See* Grand Island Sch. Dist. No. 2 v. Celotex Corp., 279 N.W.2d 603, 606 Neb. (1979).

33 *See* Altoona Area Sch. Dist., *supra*, 618 A.2d at 1134.

34 *See* Douchette v. Betel Sch. Dist. No. 403, 818 P.2d 1362 Wash. (1991).

35 *See* P. Stolz Family P'ship, L.P. v. Daum, 355 F.3d 92, 102 (2d Cir. 2004).

36 *See* Hudson Co. v. Terminal Constr. Corp., 381 A.2d 355, 358 (N.J. Super. App. Div. 1977).

37 *See* Universal Engin. Corp. v. Perez, 451 So. 2d 463, 463 (Fla. 1984).

38 *See* Short v. Belleville Shoe Mfg. Co., 908 F.2d 1385, 1391 (7th Cir. 1990).

39 *See* Elliott Consol. School Dist., *supra* (Iowa); Haywood Co. Consol. School System, *supra* (N.C.); Newtown Housing Auth., *supra* (Massachusetts); Hunters Pointe Partners, *supra* (Michigan); City of Newark, *supra* (N.J.); National Surety Co., *supra* (Okla.), City of Seaside, *supra* (Oregon).

are generally governed by each state's "Little Miller Act," which contain specific limitation periods for actions on the bonds.[40] However, some states hold that those limitation periods apply only to payment bonds, not performance bonds.[41]

The limitations periods to be applied to private construction projects likewise lack uniformity. In Alaska, the courts disregard the limitations periods in private project bonds unless there is some prejudice to the surety.[42] In Illinois and New York, courts have refused to uphold bond limitation periods, holding that they do not apply in latent defect cases.[43] In California, courts employ the statute of limitations applicable to claims against sureties.[44] In Florida, Georgia, Nebraska, and Texas, courts employ the statute of limitations for breach of contract actions.[45]

2. *Statutes of Repose*

Statutes of repose generally begin to run upon the happening of some statutorily defined event. In most states, the statute of repose begins to run "after substantial completion" of the project, usually coinciding with the end of the project.[46] Other states provide that the statute of repose runs after an improvement has been open to use,[47] or once the improvement has been occupied or accepted by the owner.[48] Some states extend their statutes of repose where a latent defect has been claimed, where the cause of action does not arise until the statute of repose has nearly expired, or where personal injury is claimed.[49]

Sureties cannot take advantage of the statute of repose in all states. For instance, statutes of repose do not assist sureties in Maryland, Oklahoma and Virginia, where statutes of repose do not apply to contract actions.[50] In Pennsylvania, the statute of repose may bar claims against architects, contractors, and subcontractors, but it is inapplicable to sureties. Therefore, in Pennsylvania, the discovery rule of accrual can seemingly extend the statute of limitations on performance bond claims for latent defects indefinitely.[51]

On the other hand, some states have favored increasing the protections afforded to sureties through the statute of repose. In Florida, one court treated the statute of limitations like a statute of repose, holding that the cause of action against the surety accrued on the date of acceptance of the project, and that this limitations period could not be equitably tolled.[52] A New Jersey statute only applies the statute of repose where damages are claimed from an "unsafe condition."[53] Mere defects are insufficient to garner the benefit of the state statute of repose.[54]

V. PRACTICAL CONSIDERATIONS

A. Drafting Considerations

Where a surety has the ability to negotiate the terms of its bond, it should consider shortening the applicable limitations period in the bond. Some states permit the parties to a surety bond to shorten the applicable limitations period, without limitation.[55] Other states permit the applicable limitations period to be contractually altered as long as the new limitation period is not unreasonably short,[56] is not below the state required

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40 *See, e.g.*, Anne Arundel, *supra* at 195.

41 *See* Congregation of St. Peter's Roman Catholic Church, *supra*. *See also* Anne Arundel, *supra* (finding that Little Miller Act limitation does not apply to performance bonds but providing no discussion as to which limitations period should be applied).

42 *See* Alaska Energy Auth., *supra*. *See also* Town of Pineville, *supra* (N.C. applies the limitations period in the bond to latent defect claims).

43 *See* Board of Regents v. Wilson and Carrols Equities Corp., *supra*.

44 *See* Regents of Univ. of Calif., *supra*.

45 *See* Fed. Ins. Co.; McDevitt & Street; School Dist. No. 65R & Houston Fire & Cas. Ins. Co., *supra*. Note that the *Federal Insurance* case contains no analysis as to why this statute of limitations was applied and whether there was a limitations period in the bond that was simply disregarded. The *McDevitt* court ignored the one-year limitation in the bond because the bond embodied the underlying contract requiring the principal to make good on defects up until the time prescribed by law.

46 D.C. CODE § 12-310 (2004); MASS. GEN. LAWS ch. 260, § 2B (West 2004); MINN. STAT. § 541.051(a) (2000); OKLA. STAT. ANN. Tit. 12, § 95 (West 2008); OR. REV. STAT. ANN. § 12.135 (West 2007); TENN. CODE ANN. § 28-3-202 (West 2008); TEX. CIV. PRAC. & REM. CODE ANN. § 16.009 (West 2008); WASH. REV. CODE ANN. § 18.27.040(3) (West 2008); WYO. STAT. ANN. § 1-3-105(a)(1) (West 2008).

47 MASS. GEN. LAWS ch. 260, § 2B (West 2004).

48 W. VA. CODE ANN. § 55-2-6a (West 2008).

49 *See* ARIZ. REV. STAT. ANN. § 12-552(B) (2008); COLO. REV. STAT. ANN. § 13-80-104(2) (West 2008); 42 PA. CONS. STAT. ANN. § 5536(b)(1) (2008).

50 *See* OKLA. STAT. ANN. Tit. 12, § 109 (West 2008); VA. CODE ANN. § 8.01-250 (West 2008); Delon Hampton & Assoc. v. Wash. Metro. Area Transit Auth., 943 F.2d 355 (4th Cir. 1991); President and Directors of Georgetown College v. Madden, 505 F. Supp. 557 (D. Md. 1980).

51 *See* Altoona Area Sch. Dist., *supra* (holding that although the causes of action against the architect, contractor, and subcontractor for deficiencies in the design, planning, supervision, and construction of the marble project were barred under the statute of repose, the action on the performance bond could still be viable due to the tolling of the statute of limitations by the discovery rule).

52 *See* Federal Ins. Co. v. Southwest Retirement Ctr., *supra* at 1121.

53 N.J. STAT. ANN. § 2A:14-1.1 (West 2001).

54 *Id.*

55 *See* N.Y. C.P.L.R. 213 (McKinney 2008) (New York); Biomass One, L.P. v. S-P Constr., 799 P.2d 152, 155 (Or. 1990); J.R. Hale & Sons v. R.C. Stone Engineering Co., 14 Tenn. App. 461 (1932); W. VA. CODE ANN. § 55-2-6 (West 2008).

56 *See* City of Hot Springs v. National Surety Co., 531 S.W.2d 8, 10 (1975); Brown v. Savannah Mut. Ins. Co., 1858 WL 2162 (Ga. 1858); and Quin Blair Enterprises, *supra* at 951.

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minimum,[57] is constructed in a clear and binding manner,[58] and does not violate public policy.[59] Still other states do not permit the statute of limitations to be shortened under any circumstances.[60] In one such state, where the surety prescribed a limitations period in the bond that was shorter than the state's two-year statute of limitations, the court disregarded the bond limit and lengthened the statute of limitations to the maximum residual limitation period of six years.[61] Another court simply disregarded the limitations period in the bond where it found that no prejudice had resulted to the surety due to the untimely claim.[62]

B. Claim Defense Considerations

1. *Reasonable Inspections*

It has occasionally been argued that any owner inspection automatically constitutes a waiver of the obligee's ability to assert a claim for latent defects.[63] Generally speaking, however, these arguments have not been successful, and courts have held that a general inspection and the mere acceptance of work do not constitute a waiver of latent defects.[64]

At least one court has intimated that waiver through inspection may be possible where there is a requirement of regular inspections by the obligee's agent. In the case of *City of Osceola v. Gjellefald Construction Co.*,[65] the principal failed to use the required materials and methods in constructing a dam, but the obligee made no objections and gave final approval of the work. In reviewing the contract, the court found that there was no requirement for regular inspections by the city engineer and, therefore, it was not reasonable to impute knowledge of the defects to the engineer. In imposing liability on the surety for these latent defects, the court held that "the basis of the doctrine of estoppel and waiver does not exist where the thing complained of was undiscoverable and unknown at the time of acceptance. It is a well known and recognized principle of law that there can be no waiver of a condition unknown."[66] This decision suggests that the surety's liability may have been more limited had the underlying contract required regular inspections by the city engineer.[67]

Another court upheld a waiver defense where the obligee hired consultants prior to acceptance and payment, specifically for the purpose of inspection. The consultants advised the obligee of concrete problems causing leaking and deflection in the roof.[68] The consultants nonetheless concluded that the roof was structurally sound. After acceptance of the project another consultant hired by the obligee concluded that the building was not safe. In finding in favor of the contractor, the court held "[t]he condition of the building did not change significantly, only opinion as to whether it had an adequate margin of safety changed. A change in conclusion, where no new evidence has been considered, does not create a latent defect."[69]

2. *The Doctrine of Nullum Tempus*

Statutes of limitations will generally be disregarded where claims are being asserted by public entities under the common law doctrine of *nullum tempus occurrit regi ("nullum tempus")*. The doctrine of *nullum tempus* insulates public entities from a statute of limitations defense.[70] For example, *Bellevue School District No. 405 v. Brazier Construction Co.*,[71] the court allowed the school district to bring a claim against the surety after the six-year limitations period had expired. However, there are exceptions to the doctrine of *nullum tempus*. At least one court has held that the privilege of *nullum tempus* only extends to political subdivisions that are seeking to enforce strictly public rights.[72]

57 *See* Conn. Gen. Stat. Ann. § 38a-290 (West 2007); S.D. Codified Laws § 53-9-6 Ark. (West 2008).

58 *See* Board Of Supervisors v. Sentry Ins., 391 S.E.2d 273, 275 (Va. 1990).

59 *See* Brown v. Savannah Mut. Ins. Co., 1858 WL 2162 (Ga. 1858); Nez v. Forney, 783 P.2d 471, 473 (N.M. 1989).

60 *See* Miss. Code Ann. § 15-1-41 (West 2007); 12 V.S.A. § 511 (West 2008).

61 *See* U.S. Fidelity and Guaranty Co. v. Eastern Hills Methodist Church, 609 S.W.2d 298, 300 (Tex. App. 1980).

62 *See* Alaska Energy Auth., *supra at* 422.

63 *See* City of Seaside, *supra*.

64 *Id*., 180 P. at 324. *See also* Houston Fire & Cas., *supra* at 326-7, Kaminer, *supra* at 983.

65 279 N.W. 590 (Iowa 1938).

66 *Id*., 279 N.W. at 594.

67 *See, e.g*. Houston Fire & Cas. Ins., *supra* (declining to find waiver where the contract contained no provision making the decisions of the architect "final").

68 *See* Lembke, *supra* at 1388.

69 *Id*.

70 *See*, *e.g*. Bellevue School Dist. No. 405 v. Brazier Constr. Co., 691 P.2d 178, 181 (Wash 1984) (wherein the court allowed the School District to bring a claim against the surety after the six-year limitations period had expired); State v. Roy, 68 P.2d 162, 165 (N.M. 1937); Rowan County Board of Educ. v. U.S. Gypsum Co., 418 S.E.2d 648, 653-54 (N.C. 1992); Rosedale Sch. Dist. No. 5 v. Towner Co., 216 N.W. 212 (N.D. 1927); State Dept. of Transp. v. Sullivan, 527 N.E.2d 798, 800-01 (Ohio 1988); City of Oklahoma v. HTB, Inc., 769 P.2d 131, 134 (Okla. 1988); Armour & Co. v. City of Newport, 43 R.I. 211, 110 A. 645, 648 (R.I. 1920).

71 691 P.2d 178, 181 (1984).

72 *See* Altoona Area Sch. Dist., *supra*, 152 Pa. Commw. at 618 A.2d at 1132.

Accordingly, where a school district was merely authorized to build a library, and not required to do so by any statutory mandate, the court held that the doctrine of *nullum tempus* did not insulate the school district from the statute of limitations defense.[73]

3. *Exclusive Remedy Provisions*

An exclusive remedy provision in the underlying contract may serve as a potential defense to an obligee's latent defect claim. Exclusive remedy provisions limit the remedies of the parties in the context of claims arising out of the contract.[74] However, the exclusive remedy provision must be unequivocally exclusive. In *Carrols Equities Corp. v. Villnave,*[75] the owner brought a breach of contract action against the contractor and the surety arising out of the settlement in the foundation of a restaurant. The underlying contract contained a one-year guarantee provision, during which the contractor agreed to correct any defects through supplemental performance. The court held that, absent some specific indication in the contract, this guarantee provision would not be construed as an exclusive remedy. The owner was, therefore, entitled to recover its damages without limitation in time or amount.

4. *Concealment by the Principal*

Generally, a surety will not be made to pay for the wrongful acts of its principal in concealing structural defects in the project. For example, in one such case the contractor was notified by the owner that several items of corrective work needed to be performed. Rather than perform the appropriate repairs, the contractor performed cosmetic repairs that concealed serious structural defects. The court held that the statute of limitations would be tolled as to contractor, but not as to the surety, because there was no evidence that the surety had ever made any representations to the owner.[76]

VI. CONCLUSION

Given the inclination of the majority of jurisdictions to impose liability on sureties for latent defect claims, sureties are well advised to carefully examine the underlying contract to assess potential exposure prior to bonding a project. An expansive underlying contract will in many instances preclude the surety from availing itself of otherwise available defenses. In those jurisdictions that permit the parties to contract for a shorter limitations period, sureties should attempt to avail themselves of this option and shorten the time limit for asserting claims prescribed in the bond.

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73 *Id.*

74 *See, e.g.,* BP Amoco Chemical v. Flint Hills Resources, LLC, 489 F. Supp. 2d 853, 855 (N.D. Ill. 2007); Mitsubishi Corp. v. Goldmark Plastic Compounds, Inc., 446 F. Supp. 2d 378, 385 (W.D. Pa. 2006).

75 395 N.Y.S.2d 800 (1977).

76 *See* City of Pineville, *supra*.