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## In Pennsylvania, Sureties are Protected by a Principal's Right to Cure

by Patrick R. Kingsley and Benjamin E. Gordon

In a pair of recent decisions, the U.S. District Court for the Middle District of Pennsylvania clearly held that a surety in a construction dispute is protected by a notice-to-cure provision in the principal's underlying construction contract. In **Milton Regional Sewer Authority v. Travelers Casualty & Surety Co. of America, 2014 WL 2865442 (M.D. Pa. June 24, 2014) (Milton I)**, the court held that the notice-to-cure provision set forth in the construction contract constituted a condition precedent to a valid contract default termination and, therefore, a valid bond claim. In the subsequent decision of **Milton Regional Sewer Authority v. Travelers Casualty & Surety Co. of America, 2014 WL 5529169 (M.D. Pa. Nov. 3, 2014) (Milton II)**, the court rejected the owner's argument that the contractor's breach was so severe so as to excuse it from compliance with such a condition precedent.

In **Milton I**, the project owner engaged a contractor to refurbish a sewer. The underlying construction contract required that if the owner saw fit to terminate the contractor, it first had to provide the contractor 30 days' notice and an opportunity to cure. The owner failed to do so when it simultaneously notified the contractor of a litany of alleged performance deficiencies while, at the same time, expelling the contractor from the project. It made a performance bond claim at that time. On a motion to dismiss, the surety argued that this violated the terms of the construction contract, which were incorporated into the bond. The court agreed and held that the notice-to-cure provision set forth in the construction contract constituted a condition precedent to the owner's bond claim. Since the owner failed to meet the notice-to-cure provision by not allowing the contractor 30 days to attempt to cure, the court held that the owner could not assert a bond claim. However, the court left one issue open: whether the owner was excused from its failure to follow the notice-to-cure provision due to the severity of the contractor's alleged deficiencies.

In **Milton II**, the court answered this question in the negative. Pennsylvania allows a party to disregard a notice-to-cure provision only where the counterparty commits an "egregious" breach of the underlying contract that cannot be cured. The owner argued that the contractor's deficiencies constituted just such an egregious breach. The owner alleged many serious performance deficiencies, including failing to properly install sewer pipes, failing to use adequately skilled workers, and damaging a gas line, as well as numerous scheduling failures. The court held that, *as a matter of law*, these numerous alleged deficiencies did not constitute an "egregious" material breach sufficient to excuse the owner from ignoring the notice-to-cure provision. Rather, the court held that "What [the owner] has alleged is poor performance of the contract, which is *precisely within the contemplation of the cure provision in the contract.*" Consequently, the court found that the owner had no valid excuse for ignoring the condition precedent and dismissed the owner's complaint against the surety with prejudice.

The owner has appealed, so stay tuned.



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