

Completing Surety Keeps Rights and Defenses, Despite Inconsistent Positions in Litigation

NELL M. HURLEY

Claims for non-payment asserted against a prime contractor and its surety by an errant asbestos abatement subcontractor were dismissed in a recent New York appellate case.¹ Notably, the court specifically rejected the sub's assertion that the surety's action against the obligee rendered the completing surety a "volunteer" precluding it from use of its principal's rights and defenses. Finding a prior material breach of the subcontract by the sub, the court not only upheld the dismissal of the subcontractor's payment claims, but permitted the affirmative claims against the subcontractor to proceed.

The matter involved asbestos abatement work as part of renovations to a state office building in Albany, New York per a contract between the Office of General Services ("OGS") and Murnane Building Contractors, Inc. ("MBC"). Travelers² issued performance and payment bonds for the project. The abatement work was later subcontracted to Classic Environmental, Inc. ("Classic").

Classic used a power washer on a building beam covered in lead-based paint with the resulting water runoff causing significant lead contamination in the area

CONTINUED ON PAGE 3

Second Circuit Affirms Surety's Broad Right to Settle Claims Without Jeopardizing Indemnity Protections

BRIAN M. STREICHER

The U.S. Court of Appeals, Second Circuit, recently reiterated that a surety has broad rights to settle bond claims and retains its ability to pursue indemnification from its indemnitors irrespective of the indemnitors' defenses against the bond obligee. In *Berkley Insurance Company v. FG-PH Corp.*,¹ the Second Circuit restated and affirmed several important tenets of contractual surety indemnification law in New York: (1) the General Agreement of Indemnity ("GAI") affords the surety exclusive discretion to settle claims arising out of a performance bond; (2) the surety is entitled to indemnification upon documented proof of payment; (3) upon such proof, the surety is entitled to summary judgment unless a triable issue of fact as to good faith or reasonableness is raised; and (4) only specific proof of unreasonableness or bad faith will prevent summary judgment for the surety.

In an unpublished summary order, the Second Circuit reviewed an order from the U.S. District Court of the Eastern District of New York² that granted summary judgment to the surety on its claim for contractual indemnification against the indemnitors under a GAI. In the case, FG-PH, the bond principal and indemnitor under the GAI, was the general contractor on an apartment renovation project in Brooklyn secured by a performance bond issued by Berkley. The owner terminated FG-PH and made a claim on the performance bond. The surety and owner reached a settlement where the surety paid the owner \$10.5 million. The surety then sued the indemnitors under a single-count complaint for contractual indemnification.

The trial court granted summary judgment to the surety, and the indemnitors appealed, arguing that FG-PH was not in default, that the termination was wrongful, and that the surety settled the claim in bad faith. On appeal, the Second Circuit issued a summary order affirming summary judgment and rejecting the indemnitors' bad faith defense because it was not supported by sufficient evidence.

The trial court had disposed of the indemnitors' bad faith argument because the indemnitors made only conclusory allegations, such as: (1) the surety abused its discretion by settling the claim "without fair warning or notice;" (2) the surety willfully, recklessly, or negligently failed to ascertain the true facts and conduct a proper due diligence investigation; (3) the principal had valid defenses to the obligee's claims which the surety failed to raise; and (4) "under the circumstances, it was imprudent and in bad faith" to settle the claims. The trial court correctly pointed out that none of this amounted to *evidence* of bad faith, i.e. collusion or fraud, or of surety unreasonableness. The Second Circuit agreed. It reasoned that the indemnitors' allegations amounted to "speculative and conclusory assertions" insufficient to defeat summary judgment.

As a summary order, the Second Circuit's determination does not have precedential effect, but it does serve as a useful tutorial on the basics of a surety indemnity claim.

CONTINUED ON PAGE 2

IN
THIS
ISSUE

**Second Circuit Affirms
Surety's Broad Right to
Settle Claims Without
Jeopardizing Indemnity
Protections**

**Completing Surety
Keeps Rights and
Defenses, Despite
Inconsistent Positions
in Litigation**

**E&D Welcomes
Associate Attorney**

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Ernstrom & Dreste, LLP is pleased to announce the addition of Associate Attorney Izabel Yurovskiy to its team of dedicated legal professionals serving clients in the construction and surety industries.

Izabel joins us with significant and varied legal practice experience and proven skills important to dispute resolution, advocacy and legal counseling. Her prior professional practice involved contract review, insurance analysis and complex litigation, case management, court hearings, alternative dispute resolution, legal research and writing, discovery, motions, and appeals.

Izabel earned her law degree at Syracuse University College of Law in 2021 where she was active in the Advocacy Honor Society, Arbitration Division, and the Jewish Law Students Association. She obtained her undergraduate degree in psychology from the University of Rochester in 2017. In addition to English, Izabel is fluent in Russian and is proficient in Spanish.

At E&D, Izabel's practice involves all aspects of construction and surety claim evaluation and management, strategy assessment, alternative dispute resolution, all phases of litigation (including pleadings, discovery, motion practice and trial preparation), and appeals.

Law Clerks Also On Board

The Ernstrom & Dreste team also includes two law clerks currently earning their Juris Doctor degrees while gaining legal experience with us, providing important services and support to E&D attorneys and clients.

Sean Miller joined E&D February 2026 and works at the firm part-time year-round as he pursues his law degree at Syracuse University College of Law through its innovative hybrid JDInteractive program. Sean previously taught Social Studies for ten years in Fairport, New York, after earning bachelor's and master's degrees at State University of New York at Geneseo.

Janelle Asandrov recently completed her second year of law school at University of Buffalo School of Law. She is a full-time summer law clerk at E&D, contributing supervised legal services in all areas of the practice. She brings to the team legal experience in real estate law, along with the leadership skills developed as a dedicated professional in the hospitality industry. Janelle earned her bachelor's degree in political science in 2021 from Rochester Institute of Technology.



Izabel Yurovskiy

CONTINUED "SECOND CIRCUIT AFFIRMS SURETY'S BROAD RIGHT TO SETTLE CLAIMS WITHOUT JEOPARDIZING INDEMNITY PROTECTIONS"

A surety proves its right to summary judgment by submitting documentation of its payment of a settlement on behalf of the principal and an itemized list of expenses paid in connection with them. Payments are deemed to be made in good faith if the surety pays the claims with the honest belief that it was liable for such claims. Whether the bond principal actually breached the construction contract is typically irrelevant to whether the surety is entitled to indemnification under the GAI. Finally, speculative and conclusory assertions will not sustain a bad faith defense. The Second Circuit reaffirmed these principles.

For the surety, *FG-PH* provides reassurance that the surety can confidently negotiate and settle bona fide claims without adjudicating the merits of the disputes between the principal and obligee. In instances where the indemnitors are solvent and their indemnity obligation is adequately collateralized, the surety can mitigate the risk of litigation with the obligee by settling claims and relying on its strong indemnification rights for its recourse. **E&D**

1 *Berkley Ins. Co. v. FG-PH Corp.*, No. 25-1053, 2026 WL 682316 (2d Cir. Mar. 11, 2026) (Summary Order).

2 *Berkley Ins. Co. v. FG-PH Corp.*, 22-CV-02109 (DG) (TAM), 2025 WL 929469 (E.D.N.Y. Mar. 26, 2025).

We're Moving

Ernstrom & Dreste, LLP will be relocating at the end of June 2026 from the 9th floor to the 5th floor within the same building downtown at the Clinton Square. We look forward to continuing to serve our clients from our new office located at **525 Clinton Square, Rochester, NY 14604**



On May 7, 2026, the E&D team came together to *spread a little kindness* by making 140 PB&J sandwiches, for 70 bagged lunches for the Open Door Mission’s meal program in Rochester, NY.



E&D rolled in with a full team to compete in the Rochester Junior Builders Exchange (JBX) Bowling Tournament on April 23, 2026, E&D was the drink sponsor for the event.

CONTINUED “COMPLETING SURETY KEEPS RIGHTS AND DEFENSES, DESPITE INCONSISTENT POSITIONS IN LITIGATION”

and infiltration of the local storm water drainage system. Shortly thereafter, as containment efforts failed, OGS terminated the prime contract with MBC and work ceased. Travelers entered into a takeover agreement with OGS in accordance with its surety obligations and the prime contract and completed the project.

The interesting twist appeared in the subsequent litigation. In another party’s action against MBC and Travelers, they impleaded Classic for breach of contract and indemnification, alleging the termination of the prime contract was due to Classic’s conduct. Classic then brought its own separate action against MBC and Travelers for breach of the subcontract, account stated and payment bond recovery. MBC and Travelers also sued OGS in the New York State Court of Claims for breach of the underlying prime contract, including improper termination of MBC.

MBC and Travelers moved for summary judgment for indemnification and for dismissal of Classic’s separate action against them for subcontract payments. In opposition, Classic argued, among other things, that due to Travelers’ position in the OGS case that MBC was wrongfully terminated, Travelers had completed the project as a “volunteer” and was foreclosed

from seeking damages from Classic or denying payment.³ The motion court found in favor of MBC and Travelers on all counts. Classic appealed.

The appellate court affirmed, finding that Classic’s actions regarding the lead paint removal “defeat[ed] the essential purpose of the [sub]contract” by violating laws, rules, regulations, and orders of the governing public authority. This material breach by Classic excused performance by MBC, including payment obligations, and prevented recovery for account stated.⁴ Further, the court held Travelers “entitled to assert any defense available to its principal...” barring Classic’s recovery under the payment bond.

The court was unpersuaded by Classic’s argument that Travelers acted as a volunteer in completing the project or was unable to use MBC’s defenses and rights to damages against Classic. Despite claims by MBC and Travelers that OGS improperly terminated the prime contract, the court concluded that Travelers acted in good faith and “in accordance with well-established obligations of a surety... on a performance bond... regardless of its belief as to what occurred or caused the claims of default.” Travelers’ takeover agreement with OGS also contained a full

reservation of the rights that Travelers and MBC had or would have regarding indemnification and recovery, noted the court, and it dismissed Classic’s motion.⁵

Sometimes sureties must take inconsistent positions in claim situations or litigation. Occasionally, the conclusion reached by the surety when a performance bond is called upon may be reconsidered as full facts become known. Thankfully, as this case shows, a completing surety is not easily deprived of its principal’s rights and defenses in doing so. **E&D**

1 SCE Envtl Grp., Inc. v. Murnane Bldg. Contrs., Inc., 242 A.D.3d 1457 (3d Dept. 2025).

2 Travelers Casualty and Surety Company of America.

3 If OGS wrongfully terminated MBC, a breach of the prime contract, Travelers was discharged from its bond obligations and thus acted as a volunteer, losing important surety rights regarding indemnification and recovery.

4 The court rejected as “speculation” Classic’s claims that OGS exaggerated the severity of the lead incident because it wanted to terminate MBC for other reasons.

5 Classic also asserted unsuccessfully that the doctrine of judicial estoppel precluded MBC and Travelers’ claims regarding the lead incident as a breach of contract. There had been no final determination on the issue in the OGS action, so the doctrine did not apply, said the court. The result here could impact the OGS suit.



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Ernstrom & Dreste, LLP also publishes the ContrACT Construction Risk Management Reporter. If you would like to receive that publication as well, please contact Jenna Ellis at jellis@ed-llp.com. Copies of ContrACT Construction Risk Management Reporter and The Fidelity & Surety Reporter can also be obtained at Ernstrom & Dreste, LLP's website (ernstromdreste.com).

This newsletter is intended purely as a resource guide for its readers. It is not intended to provide specific legal advice. Laws vary substantially from state to state. You should always retain and consult knowledgeable counsel with respect to any specific legal inquiries or concerns. No information provided in this newsletter shall create an attorney-client relationship.

FIRM NEWS

Brian Streicher and Mike Higgins attended AGC's Surety Bonding & Construction Risk Management Conference, January 26–28, 2026, at Sunseeker Resort in Charlotte Harbor, FL.

Brian Streicher recently spoke with UB Law students as a panelist at the "Plan Your Path" program on February 26, 2026, inviting industry colleagues to highlight the diversity within the legal profession and the steps required to pursue these career paths. The program's series will continue this fall with a focus on practice areas, followed by geographic markets in the spring.

E&D served up a team to compete in the Rochester Junior Builders Exchange (JBX) Volleyball Tournament on February 28, 2026.

Kevin Peartree, Martha Connolly, Brian Streicher, Mike Higgins, and Cavan Boyle led a session titled "Controlling Risk in Construction and Project Delivery Systems" for the AGC NYS Construction Leadership Academy in Rochester, New York on May 8, 2026.

Mike Higgins recently joined the Board of Rochester Accessible Adventures, a non-profit promoting inclusive wellness spaces for people of all abilities and their families.

Brian Streicher was invited to join the National Association of Surety Bond Producers (NASBP) Attorney Advisory Council and attended the annual NASBP Meeting held May 17-19, 2026 in Colorado Springs, CO.

We're Moving; E&D is moving its offices to a different floor of our current building at the end of June. Our new address will be 525 Clinton Square, Rochester, NY 14604.