

COMMITTEE NEWS



Fidelity & Surety Law

Studco Building Systems Shows Banks May Be Liable For Social Engineering Frauds

In *Studco Building Systems US, LLC v. 1st Advantage Federal Credit Union*,¹ the United States District Court for the Eastern District of Virginia entered a \$558,868.71 judgment against a credit union that had processed misdirected commercial ACH transfers through a member's personal checking account. In doing so, the court expanded the scope of possible recovery targets for victims of social engineering frauds and business email compromises, and their insurers.

The Facts

The fraud at issue in *Studco* followed a standard vendor impersonation pattern. However, in contrast to many such schemes, where a company is tricked into wiring a vendor payment to the vendor's "new" overseas bank account, this one involved a U.S.-based money mule. Money mules play a role in various types of financial fraud schemes, including those involving phishing, romance scams, and other

[Read more on page 20](#)



Anne Juntunen
Chirag Pate
Myriah Jaworsk
Clark Hill PLC

¹ No. 2:20-CV-417, 2023 WL 1926747 (E.D. Va. Jan. 12, 2023).



In This Issue

- *Studco Building Systems Shows Banks May Be Liable For...* 1
- Chair Message 2
- Past Chair Message 5
- Subrogation Notice: Did The Surety Trigger The Owner? 11
- The Ever-Growing And Expanding World Of Commercial Surety 12
- Discovery Fights: Protecting Your Work Product In The Case... 13
- The Surety's Legal Defenses Against Claims For Breach... 14
- Case Note: Surety's Contractual Right To Settle Indemnitors'... 15
- License Status As A Defense To Payment Claims 16
- Two-And-Out, Eh? Canadian Fraud Recovery For American Fidelity... 17
- Member Profile 18



Case Note: Surety's Contractual Right To Settle Indemnitors' Claims Recognized

The surety's contractual right to settle Indemnitors' claims continues to be recognized and enforceable, and the surety's role to the Indemnitors does not rise to the level of a fiduciary duty, according to a recent decision in the U.S. District Court Eastern District of Louisiana.

The case was *Fucich Contracting, Inc., et al. v. Shread-Kuyrkendall & Associates, Inc. et al.* (Civil Action No. 18-2885, E.D. La. Nov. 15, 2021) with the opinion written and signed by U.S. District Judge Barry W. Ashe on Oct. 31, 2022.

Judge Ashe ruled that Travelers had the contractual right to settle the Indemnitors' claims: "A surety's right to resolve claims by and against its principals under an indemnity agreement is well settled, and here, the Indemnitors authorized Travelers to be their attorney-in-fact to settle any claims by or against them in the event of "Default" as defined by the GAI [General Agreement of Indemnity]."

As a surety assumes the responsibility of paying a debt in a situation where the borrower defaults, a surety plays a vital role on a construction project. Although a surety and its principal are initially aligned at the start of a project, they can quickly become adverse parties if a bond claim is made. As such, the GAI remains an important tool for the surety in taking preemptive measures to ensure that the principal and its indemnitors indemnify the surety. In this case, Judge Ashe's opinion reminds sureties that the indemnity agreements may include strong attorney-in-fact provisions, which may allow the surety to settle the principal's claims on its behalf.

A Closer Look at the Ruling

This matter involves claims between Fucich Contracting, Inc. ("Principal"), and Clayton and Kathleen Fucich ("Indemnitors"), on the one hand, and Travelers Casualty and Surety Company of America ("Travelers"), on the other hand, arising out of a construction dispute and a settlement agreement to resolve the dispute.

St. Bernard Principal Government ("Owner") hired Principal as the contractor and Shread-Kuyrkendall & Associates, Inc. as the engineer ("Engineer") for the Principal's hurricane preparedness project - Lake Borgne Basin Levee District Pump Station #1 & #4 Pump Upgrade ("Project"). The contract required the Principal to procure, furnish, and install the new replacement engines. Pursuant to the Louisiana Public Works Act, Travelers issued a performance and payment bond on behalf of the Principal and in favor of the Owner for the Project ("Bonds"). In exchange for the



Christopher Joseph, Jr.
Adams and Reese, LLP

Chris Joseph practices primarily in the intersection of business and government, construction litigation, surety litigation, commercial industry contracts and litigation, insurance defense, and property litigation.

Chris analyzes construction claims and defenses for commercial and residential contractors, sureties, subcontractors, and owners. He represents clients in commercial and residential construction, suretyship, zoning, and real estate matters. He litigates commercial construction cases in Louisiana state and federal courts, handling all the various stages of litigation. He drafts appellate briefs, motions for summary judgment, and other substantive pleadings.

Chris is recognized by his peers among Louisiana Super Lawyers' "Rising Stars" in Construction Litigation.

[Read more on page 45](#)



Case Note... continued from page 15

Bonds, the Indemnitors entered into a general agreement indemnity (“GAI”) with Travelers for the Project.

During the Project, the Principal discovered a conflict between two items within its scope of work. As such, the Principal submitted a cost estimate to remedy the issue. The Owner and the Engineer offered to pay only a portion of that cost estimate, but the Principal rejected said offer. Shortly thereafter, the Owner issued a termination letter to the Principal and Travelers, citing the Principal’s failure to perform, and made a formal demand upon Travelers to respond under the bond claim.

After investigating the Owner’s claims and determining that the Principal was not responsible for the conflict, Travelers denied the bond claim. Travelers notified the Owner that its investigation revealed that (1) the conflict arose because of a mistake in the plans and specifications drafted by the Engineer and provided to the Principal; and (2) the Principal performed in accordance with the plans and specifications. As the Owner was unwilling to pay the amount demanded by the Principal, the Principal filed the original complaint against the Owner and the Engineer, which prompted a counterclaim against Travelers.

After several years of litigation, Travelers, acting on its own behalf and as attorney-in-fact for the Principal and the Indemnitors pursuant to the GAI, reached a settlement with the Principal, the Engineer, and other parties (“Settlement Agreement”). Pursuant to the Settlement Agreement, the parties agreed to settle (1) the Principal’s claims against Travelers and the Engineer; (2) the Principal’s claims against the Engineer; and (3) the Engineer’s claims against the Principal. In the wake of the Settlement Agreement, the Indemnitors filed a supplemental counterclaim against Travelers, asserting that Travelers owed them a duty to act in their best interests in confecting the Settlement Agreement.

At the bench trial, the Court ultimately found in favor of Travelers and against the Principal and the Indemnitors. In so doing, the Court heavily relied upon the terms of the GAI.

“By executing the GAI, the Indemnitors obligated themselves as indemnitors to Travelers and agreed that they would exonerate, indemnify, and save Travelers harmless from and against any loss it incurred on a bond issued on behalf of [the Principal].”

The attorney-in-fact clause makes clear that Travelers had the authority to exercise all assigned rights and to execute documents in the name of the Indemnitors as their attorney-in-fact. The U.S. Fifth Circuit has long recognized that similar right-to-settle



provisions in indemnity agreements “often have been upheld and are not against public policy.”

“[W]here a surety has exercised its powers under an indemnity agreement by executing a settlement agreement releasing its principal’s affirmative claims against another party, that settlement agreement is binding on the principal.... This Court finds that, in negotiating and entering into the Settlement Agreement, Travelers acted in fairness to the Indemnitors.”

Additionally, the Court reasoned that Travelers did not breach any duty of good faith to the Indemnitors. The rights granted to Travelers under the GAI, specifically the right of Travelers to act as attorney-in-fact, did not establish a mandate under Louisiana law. A mandate confers authority on another to transact business for the principal, but the attorney-in-fact provision of the GAI allows Travelers to carry out the rights assigned to it by the Indemnitors for the benefit of Travelers.

“In other words, the attorney-in-fact provision cannot be considered a mandate under Louisiana law since it does not require Travelers to undertake any performance. The GAI grants Travelers the right, in its sole and absolute discretion, to settle FCI’s claims, and, thus, Travelers owed no fiduciary duty to the Indemnitors in carrying out that right. Because Travelers owed no fiduciary duty to the Indemnitors in entering into the Settlement Agreement, the Indemnitors failed to state a claim against Travelers for bad faith breach of a fiduciary duty.”

The GAI is an essential tool that governs the rights and obligations of the surety, principal, and indemnitors. As such, those parties should thoroughly review the GAI and understand the legal implications before the project begins to avoid exposure. 