

# Avoiding Indemnity Agreement Surprises

## Background

Unlike insurance companies, sureties do not issue bonds with the expectation that they will incur a loss on that policy. Before sureties will agree to post a construction bond, they usually require the contractor to sign an indemnity agreement containing multiple terms and promises to secure the surety's recovery from the contractor of any losses the surety may pay under the bonds. That is a key difference between insurance policies and surety bonds. In *Cagle Construction, LLC v. The Travelers Indemnity Co.*, 305 Ga. App. 666, 700 S.E.2d 658 (2010), the Georgia Court of Appeals affirmed a trial court's entry of summary judgment in favor of the surety that sued its contractor under the terms of such an indemnity agreement. The Supreme Court of Georgia declined to hear the contractor's further appeal in *Cagle*. *Cagle* should reinforce the principle that contract terms matter, even if they may not fully be understood by the signing party. The point is especially true for indemnity agreements, which may have many, complex provisions, as illustrated by the ruling in *Cagle* that the surety had twenty years to file suit under the indemnity agreement, while the contractor argued that a one -year period applied.

In *Cagle* the surety sought summary judgment against the contractor under the indemnity agreement, for the surety's losses on bonds it wrote for the contractor on four public works (Georgia Department of Defense) projects in Georgia. Summary judgment is proper when there is no genuine dispute over the material issues in a case. The contractor argued that there were several material issues in dispute making summary judgment for the surety improper. The contractor asserted that: it was not actually in default on the four bonded projects; the surety paid too much to complete the bonded projects after the surety took over the work; and, the surety had no claim because it failed to file suit within the one -year statute of limitations period that the contractor argued applied in the case.

## The Indemnity Agreement Resolved All Issues

Despite the contractor's assertions that there was no default and that the surety paid too much to complete, the court of appeals ruled unanimously in favor of the surety, holding that the surety proved that a default occurred and that it paid losses, as required by the indemnity agreement, while the contractor offered no actual evidence contradicting the surety's proof. The court of appeals rejected the contractor's argument that the surety had to file suit within one year, ruling instead that the six-year period for filing suit on a written contract under Georgia law applied to the indemnity-agreement claim, and that the period was extended to twenty years by the terms of the indemnity agreement, because the contractor signed the indemnity agreement "under seal."

## Default and Damage Issues

Based on the indemnity agreement's language, the court of appeals rejected the contractor's argument that the trial court improperly entered summary judgment on the default and damages issues. The appellate court held that the indemnity agreement "plainly provides" that, if the project owner declared the contractor in default, the surety was permitted to treat the contractor as in default and to take over and complete the work at the contractor's expense. The court further noted that, even though the contractor's manager swore that the contractor was not validly declared in default by the owner, he admitted that the owner had declared the contractor in default. The court of appeals ruled that a default was proven, because the indemnity agreement provided that a default occurred whenever the owner declared the contractor in default. Thus, even if the contractor denied the validity of the default, the issue was resolved for the purposes of the indemnity agreement.

The court of appeals similarly rejected the contractor's argument that the surety paid too much to complete the work, finding that the contractor agreed in the indemnity agreement to accept and be bound by the surety's evidence of the losses paid, unless the contractor provided direct evidence that the surety did not incur the costs it claimed or that it paid losses in bad faith.. Although the contractor's manager alleged that too much was paid to complete the projects, it supplied no direct evidence to prove overpayment. The indemnity agreement required direct evidence to raise a triable issue of overpayment. Therefore, a trial was unnecessary on contract damages, because the contractor offered no direct evidence as required by the indemnity

agreement.

### **The Agreement Gave Twenty Years to Sue**

Finally, the contractor argued that the surety had no claim where the surety did not file suit within one year as required under Georgia's public works bond statute. The *Cagle* case clearly involved bonds required under Georgia's public work bonds statute, OCGA §13-10-65 (sometimes referred to as Georgia's "Little Miller Act"); but the appellate court held that statute did not apply to the claims made by the surety in *Cagle*. The surety in *Cagle* sued the contractor "not on the construction surety bonds," but separately under the indemnity agreement signed by the contractor in favor of the surety.

The Georgia Court of Appeals noted that Georgia's six -year period of limitation for filing suit on a written contract usually applied to indemnity agreements. A term in the body of the indemnity agreement in *Cagle*, however, stated that the parties "set their hands and affixed their seals" to the indemnity agreement. Further, the letters "L.S." were pre-printed after each signature line on the indemnity agreement.

The letters "L.S." stand for "the place of the seal" in Latin. Those letters serve as a legal indication that the party whose signature precedes those letters signed the document under seal. The Georgia Court of Appeals noted in *Cagle* that, when a party signs an agreement containing a term stating a party affixed their seals to that agreement and the party signs with the mark "L.S." following its signature, the agreement "constitutes a contract under seal as to which the six -year statute of limitation is extended to twenty years" under Georgia law.

Although signing a document "under seal" involves a somewhat archaic rule of law, which is recognized only in Georgia and a few other states, signing under seal can significantly expand the time for bringing suit under a sealed agreement in those states. The legal rules for signing under seal, therefore, point out the impact that contract terms can have on signing parties – whether or not the parties understand those terms. The contractor in *Cagle* evidently did not understand the legal impact of the indemnity agreement. A detailed review of that indemnity agreement might have allowed the contractor to identify terms to which the contractor was unwilling to agree, and to take steps to avoid the risks associated with those contract terms. For example, the contractor might have been able to avoid the risk of signing the indemnity agreement "under seal" by striking the letters "L.S." after his name. Thus, a careful review and assessment of the contract terms before signature may pay dividends in the long run.