



### Insurance Law: Covered Events

#### Navigating Insurer Policy Limits When Securing Appeal Bonds

*By Dan Huckabay*

When an insurer is posting an appeal bond involving a judgment in excess of their policy limits, the natural concern is how to cap their exposure to their policy limits and not become jointly and severally liable for the entire judgment. In this article we will take a look at some of those situations and various ways insurers can manage their risk.

#### Background and Surety Underwriting Requirements

Before getting into the specific situations insurers encounter when posting appeal bonds, it's important to set the stage as to what appeal bonds are and how they are underwritten by surety companies. Unlike insurance, surety bonds are an extension of credit whereby the surety company is guaranteeing to pay the judgment on behalf of the insurer to the judgment creditor if the insurer does not satisfy it on their own. The surety will require the insurer to indemnify them for any loss under the bond, and the decision by the surety whether to extend credit to the insurer by issuing the bond will be dependent on the insurer's financial strength relative to the bond amount required.

Insurance companies come in all sizes and have varying financial strength. When a surety is considering whether they can provide a bond without collateral, they will review the insurers financial statements as they would any other business. Sureties will review whether the insurer has been profitable and whether they have adequate capital surplus and liquidity to easily pay the judgment if it is affirmed.

Sureties also consider third party rating agencies such as AM Best and S&P, whether the insurer has reinsurance, and any recent events such as catastrophic weather or fire events that could impact the insurers financial health.

#### Single Insurer

When there is a single insurer involved and the judgment is in excess of the policy limits, there are generally two ways we see the appeal bond structured. One option is for a single bond to be provided covering the full judgment plus whatever costs and interest are statutorily required to be added. When approaching it this way, some sureties have indemnity agreements whereby the insurer's indemnity or liability to the surety is

limited to the insurer's policy limits. The insured would then indemnify and possibly provide collateral to the surety for the portion of the bond in excess of the insurer's policy limits.

Another potential option is to issue multiple bonds. With this approach, one bond is issued for the insurer's policy limits and a second bond is issued for the excess amount that the insured is responsible for. It is important to confirm with legal counsel that this will be accepted by the court based on the local rules.

### **Multiple Insurers – One Judgment Debtor**

When there are multiple layers of insurance and a single insured as the judgment debtor, a separate bond can technically be issued by each insurer for their respective policy limits. However, if there are several insurers, that can be unwieldy. Often, we see multiple insurers get one bond and limit their indemnity to the surety up to their respective policy limits.

When there is a lead carrier, we've had insurers work out their own agreement allocating their proportional responsibility and authorizing the lead carrier to obtain the bond for the full amount on the group of insurers' behalf. In those situations, the lead carrier is the only insurer to indemnify the surety for the full amount of the appeal bond.

Lloyd's syndicates are usually structured similarly to multiple insurers where the syndicate lead will indemnify for the appeal bond on behalf of the other syndicates. However, there are only certain sureties that will accept the indemnity of Lloyd's syndicates.

### **Joint and Several Judgments with Multiple Defendants**

Joint and several judgments against unrelated defendants that carry separate insurance coverage through different insurers present some unique considerations. We recently had such a case and were working with both judgment debtors and their insurance carriers. The parties wanted to have the surety issue a single bond, but that would have created joint and several liability, meaning each party would have been required to indemnify the surety for the full bond amount instead of their respective 50 percent share. As an alternative solution, we let the parties know that the surety could issue a separate bond for each party's 50 percent share and then require indemnity for only their respective portion. The premium rate was the same whether the surety issued one bond or two separate bonds, so there was no disadvantage from a cost standpoint to issuing multiple bonds.

### **Other Considerations**

There are some situations where the insurer may want to provide an appeal bond up to their policy limits, but the insured cannot qualify for their portion of the bond in excess of policy limits. In these situations it's important to check with counsel to determine if the court will accept a partial bond for the judgment amount. Jurisdictions like California have clear case law on this matter allowing insurers to post the bond up to their remaining policy limits.

## **Conclusion**

This article has highlighted many of the most common situations that arise with insurers, but there can be many other scenarios that occur based on each case's unique circumstances. Communication among the insurer, insured, and defense/appellate counsel is key to understanding each parties' obligations and intent as it relates to the appeal bond(s). Appeal bond experts well versed in working with insurers are critical to help facilitate these discussions and help the parties understand the various considerations to avoid mistakenly structuring the bond in a way that obligates the parties to more than they intend.



*Dan Huckabay is president of Court Surety Bond Agency, and he has underwritten appeal bonds in almost every state and federal district court for clients ranging from individuals to Fortune 500 companies. In addition, he has delivered numerous presentations across the country on appeal bonds and authored dozens of published articles. He has also served as an expert witness in several cases where appeal bonds represented a central issue.*