SUPREME COURT OF APPEALS OF WEST VIRGINIA

Hartford Fire Insurance Co. v. Micah A. Curtis and Angela L. Curtis; Hartford Fire Insurance Co. v. Jerry Lee Rhodes and Bonnie M. Cochran

Hartford Fire Insurance · No. Nos. 12-0037 and 12-0522 · Decided June 21, 2013

SUMMARY

This document is a dissenting opinion by Chief Justice Benjamin in consolidated West Virginia Supreme Court of Appeals cases involving mortgage broker and lender surety bonds. The dissent argues that the bonds are performance bonds rather than judgment bonds, contending that claimants must establish the principals' statutory violations and allow the surety an opportunity to assert defenses before recovery.

CASE DETAILS

COURT	Supreme Court of Appeals of West Virginia
WRITING FOR THE COURT	Chief Justice Benjamin
JURISDICTION	West Virginia
DECIDED	June 21, 2013
DOCKET	Nos. 12-0037 and 12-0522
DISPOSITION	other
PROCEDURAL POSTURE	Hartford Fire Insurance Co. challenged circuit-court rulings permitting claimants to proceed against mortgage broker and lender surety bonds after obtaining judgments against the bond principals.
PRECEDENTIAL VALUE	Separate dissenting opinion; nonbinding
PARTIES	Hartford Fire Insurance Co. v. Micah A. Curtis, Angela L. Curtis, Jerry Lee Rhodes, Bonnie M. Cochran

TOPICS

insurance · commercial litigation · statutory interpretation · default judgment · civil procedure

PRACTICE AREAS

insurance · commercial litigation · statutory interpretation · civil procedure

QUESTIONS PRESENTED

1. Whether the mortgage broker and lender surety bonds were judgment bonds requiring the surety to pay a judgment against the principal without an opportunity to assert defenses or contest damages.
2. Whether the bond language instead created performance bonds whose liability depended on the principal's failure to comply with applicable law and regulations, followed by the contractually specified procedure for asserting a claim.

HOLDINGS

1. In Chief Justice Benjamin's view, the bonds were performance bonds rather than judgment bonds because they conditioned liability on the principal's failure to conform to the governing Act and applicable rules or to pay amounts due, and did not guarantee unconditional payment of a judgment.

KEY QUOTATIONS

> *"Thus, the procedure to be followed in asserting a claims on these bonds is to recover a judgment against the principal and, if such judgment goes unpaid, sue the surety, i.e., "maintain an action upon the bond.""*

> *"Clearly, a plain reading of the bonds at issue establishes that they do not guarantee payment unconditionally."*

FACTUAL BACKGROUND

The bonds issued for Calusa Investments, LLC and other mortgage-related principals required the principals to conform to applicable statutes, rules, and orders or pay amounts due to the State or designated persons. The bond language also stated that an aggrieved person could recover a judgment against the principal and, if the judgment remained unpaid, maintain an action on the bond. Claimants sought to collect from Hartford after obtaining judgments against the principals, although the dissent states that the principals' underlying statutory or regulatory violations and the amount of damages had not been determined on the merits.

PROCEDURAL HISTORY

The circuit courts ruled against Hartford in two matters involving claims on mortgage broker or lender bonds. The dissent states that no determination had been made on the merits that the principals violated applicable laws or regulations and that Hartford had not been given an opportunity to assert defenses or contest damages. Chief Justice Benjamin would have held the circuit courts' rulings erroneous.

DISPOSITION

other

CASES CITED

- State v. Myers, 74 W. Va. 488, 82 S.E. 270 (1914)
- Hartford Fire Insurance Co. v. iFreedom Direct Corp., 718 S.E.2d 103 (Ga. App. 2011)
- Lingo v. Hartford Fire Ins. Co., 2010 WL 1837718, at *3 (E.D. Mo. 2010)

- All Cities Privacy Class v. Hartford Fire Insurance Co., 798 N.W.2d 909 (Wis. App. 2011)

OPINION

PER CURIAM.

No. 12-0037-Hartford Fire Insurance Co., v. Micah A. Curtis and Angela L. Curtis, and No. 12-0522-Hartford Fire Insurance Co., v. Jerry Lee Rhodes and Bonnie M. Cochran FILED June 21, 2013 RORY L. PERRY II, CLERK SUPREME COURT OF APPEALS OF WEST VIRGINIA Chief Justice Benjamin dissenting: The majority's application of the exception in State v. Myers, 74 W. Va. 488, 82 S.E.

270 (1914) is based on the faulty premise that the bonds in these cases are judgment bonds. However, the express conditions of the bonds make it clear that they are performance bonds as they are conditioned upon the bond principal failing to faithfully conform to and abide by the provisions of the Act.

The condition of the bonds is found in the first sentence of the third paragraph: NOW THEREFORE, if the said principal CALUSA INVESTMENTS, LLC shall conform to and abide by the provisions of said Act and of all rules and orders lawfully made or issued by the Commissioner of Banking thereunder, and shall pay to the State and shall pay to any such person or persons properly designated by the State any and all moneys that may become due or owing to the State or to such person or persons from said obligor in a suit brought by the Commissioner on their behalf under and by virtue of the provisions of said Act, then this obligation shall be void, otherwise it shall remain in full force and effect.

Thus, the principal does not breach the bond if it either abides by the Act and the rules issued by the Commissioner of Banking, or pays any damages to the State for a violation of the Act or rules. If the principal breaches this condition, then the surety becomes liable.

The sentence immediately following the bond's condition instructs the claimant how to make a claim against the bond and establishes a condition precedent to making such a claim. That sentence states, "If any person shall be aggrieved by the misconduct of the principal, he may upon recovering judgement (sic) against such principal issue execution of such judgement (sic) and maintain an action upon the bond...." Thus, the procedure to be followed in asserting a claims on these bonds is to recover a judgment against the principal and, if such judgment goes unpaid, sue the surety, i.e., "maintain an action upon the bond." Clearly, a plain reading of the bonds at issue establishes that they do not guarantee payment unconditionally.

Here, there has been no determination that the principals failed to comply with the laws and regulations applicable to them, and the surety had no opportunity to assert applicable defenses or challenge the amount of damages.

Under the language contemplated in the bonds, the surety should have been given opportunity to defend. Other states including Georgia and Wisconsin have recently held that mortgage broker and lender bonds are not judgment bonds. See e.g., Hartford Fire Insurance Co. v. iFreedom Direct Corp., 718 S.E.2d 103 (Ga.App. 2011) ("This statutorily-created administrative remedy cannot be extended beyond its plain terms to create an additional private cause of action against a mortgage lender's bond based on a failure to pay a judgment."); Lingo v. Hartford Fire Ins.

Co., 2010 WL 1837718 at *3 (E.D. Mo. 2010) ("The bonds at issue are not judgment bonds, but rather performance bonds as they are conditioned upon the bond principal... failing to 'faithfully conform to and abide by the provisions of the... Act'"); All Cities Privacy Class v. Hartford Fire Insurance Co., 798 N.W.2d 909 (Wis.App. 2011) ("Hartford is not required to pay the judgment rendered against All Cities under the plain terms of the surety bond and WIS STAT. §224.72(4)(d)(1).").

The majority's ruling, akin to a strict liability standard, adversely impacts the surety market by allowing plaintiffs to collect up to the full amount of the bond without ever having to prove a case. Now claimants' attorneys can merely sue a defunct mortgage lender, obtain default judgment and present the judgment to a surety for satisfaction. This will undoubtedly increase the risk of writing such bonds in West Virginia and make it harder for honest, legitimate lenders to obtain the bonds.

Because there has been no determination on the merits below that the principals failed to comply with the laws and regulations applicable to them, and the surety had no opportunity to assert applicable defenses or challenge the amount of damages, I believe that the circuit courts' rulings were erroneous.

Accordingly, I respectfully disagree with and dissent to the majority's holding in this case.