

## Opinion No. 23-3736

October 12, 1923

**BY:** MILTON J. HELMICK, Attorney General

**TO:** Requested by: Hon. Warren R. Graham State Treasurer, Santa Fe, New Mexico.

### **The State is Unconcerned With the Question of Contribution Between Various Sureties on Depository Bonds, and the State May Make Good Its Loss Out of Any or All of the Sureties.**

There is no Compulsory Pro Rata Between Surety Company Depository Bonds and Personal Depository Bonds.

There is no Compulsory Pro Rata Between Pledged Securities and Depository Bonds.

Note: This opinion was sustained as to the first two propositions above, and denied as to the third proposition in the case of Gregg, Receiver, vs. Finance Board.

### **OPINION**

{\*95} The State Treasurer inquires as to the method of determining liability on depository bonds for the security of state moneys on deposit in banks where surety company bonds cover a deposit jointly with personal depository bonds.

In this connection a representative of one of the surety companies doing business in this state has contended to me that in case of a loss of state monies by reason of the failure of a bank, where the state holds both corporate and personal bonds, the state is bound to pro-rate the loss and cannot collect from the surety company more than its proportion. My attention has been called to Sec. 9 of Chap. 76 of the Laws of 1923, the Public Monies Act, where the following language occurs:

"In case any bank, upon proper demand therefor, shall fail to pay any public monies so deposited with it, if the payment of such monies is secured in part by a depository bond or bonds, and in part by the deposit of bonds of the United States, of this State, or of any county or counties or other legal subdivision of this State, or Federal Farm Loan Bonds, such depository bond or bonds and such other security shall be liable pro rata for the entire amount of such default."

{\*96} I think that this language has no reference whatever to prorating between personal and surety bonds but it refers merely to pro-rating between the two classes of securities namely, indemnity bonds and negotiable securities. I think this portion of the Public Monies Act merely announces a rule of contribution which would doubtless be true in any event, whether contained in the statute or not.

Deposits of state monies in the various banks are continually fluctuating -- a fact of which the surety companies and everyone else have knowledge and notice. Where there is more than one indemnity bond there is no possible way of segregating the portion of the deposit which is covered by any particular bond at any particular time, and it was never the intention of the law or of the state that any such segregating should be considered. All bonds cover all deposits up to the amount of the bond and all sureties are co-sureties whether on the same or different instruments. The law is very clear that co-sureties may be on different instruments so long as the suretyship is directed to the same obligation. The state is not concerned with the question of contribution between co-sureties.

"Where the bond of sureties is joint and several, each is bound for the whole and the right of contribution between them is a matter with which the creditor has no concern." -- 21 Ruling Case Law. 1086.

It has been suggested to me that the taking of additional bond by the state is a reduction of liability on existing bonds. Nothing could be further from the truth. This surety company which writes a bond in the sum of \$ 10,000 and collects a premium based upon said sum is liable to the State of New Mexico, in case of loss, for the full amount of the bond. When the state takes a \$ 10,000 state surety bond, the state expects to collect \$ 10,000 in case of a loss of that amount and the surety company may expect to pay \$ 10,000, no matter what the form of security the state may hold. If the state holds other security, the surety company, on payment of its bond, may be subrogated to the rights of the state and may have contribution from the other forms of security, but the state has no concern therein. The state may make good its loss out of one or part or all of the forms of securities it holds. It seems to me a novel doctrine that a surety company may plead a benefit to it; namely, additional security against which it has a right of contribution, as a release of its obligation. I do not find any law to support such a contention.

In cases where there are no complications, I think it is the better practice for the treasurer to call upon each form of security for its proportionate share of the loss, but the treasurer is not bound to do this. I recall one instance where, on the failure of a certain bank, the state held liberty bonds and two surety bonds. In that case, the treasurer figured the pro-rata share of the liberty bonds and each of the surety bonds and called upon each of the surety companies for their exact share knowing that the companies would pay and that the liberty bonds would bring more than their share. This was done as a matter of convenience and expediency, but, nevertheless, the state would have had the right to demand the full amount from such items of security as it saw fit. In a case of the sort I have just mentioned, I think the treasurer will be glad to figure the pro-rata share as a matter of convenience and courtesy to the companies.

{\*97} But the state, in any event, may pursue any class or form or item of security to the limit of its obligation. For instance, if the state had \$ 15,000 of liberty bonds and a \$ 10,000 depository bond, and the loss is \$ 20,000, the fair ratio of the loss to be borne by each security would be 3/5 or \$ 12,000 for the liberty bonds and 2/5 of \$ 8,000 for the

depository bond. But the law requires the sale of the liberty bonds at public auction and they would, of course, bring par. Now, if the depository bond, by reason of insolvency of the surety or otherwise, did not pay its full \$ 8,000 does anyone imagine that the treasurer would return \$ 3,000 of the amount realized from the sale of the liberty bonds? Certainly, the treasurer would apply the entire proceeds of the sale of the liberty bonds to the loss.

I have written the above from a consideration of the law of principal and surety applied to individuals generally, and under the ordinary rules of law, I feel sure that the state may pursue any or all of its securities to the limit. There are two additional factors which enter into this case which are lacking in the ordinary contract of suretyship; namely, the fact that surety companies are compensated sureties, and, second, that the obligation is a debt due the state. Debts due a sovereign state are subject to summary collection. In fact, if a surety company did not pay its bond, the state could seize, without court process, the deposit which it has put up in order to do business. In regard to the second factor, it should be borne in mind that the law of principal and surety is undergoing a great change owing to the development of the surety business. Individual sureties have always been favorites of the law and the rule of **Strictissimi Juris** has always been applied to their undertakings, but this rule does not apply to compensated surety companies, and instead of their contracts being construed most favorably to them, the courts now construe their contracts most strongly against them. In fact, a surety bond nowadays is rather a contract of insurance than of suretyship.

From all of the foregoing I feel that there is no great difficulty in this situation. In all cases the state will insist on collecting the full amount of indemnity from any or all securities it holds. If I am mistaken in this opinion, the Public Monies Act is virtually unworkable and the state will have to decline to take more than one single form and kind of security for any bank, because the state cannot assume the burden of having to settle questions of contributions between sureties at its peril or run the risk of losing the benefit of apparently good and subsisting security because the state also happens to hold bad security.