

BUILDING DEEPER
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Agenda

- Overview of Surety Bonds
 - Types of Bonds
 - Payment Bonds
 - Lien Bonds
 - Surety Industry Update
- Mechanic's Liens
 - Lien Waivers
- Other Key Issues Affecting Payment

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How do Payment Bonds Work?

- Payment Bond vs. Performance Bond
- Required for all “public” projects. . . . Because “public” projects are exempt from mechanic’s liens.
 - More common on private projects.
- Instead of (or in addition to) filing lien on property, a claim is made on bond.
 - If amount is NOT disputed, Surety pays.
 - If amount IS disputed, likely result in lawsuit.
 - Does not guarantee automatic payment.

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Payment Bond

- The Miller Act
 - Federal Bonding Requirements
 - Contracts exceeding \$100,000
- “Little Miller Acts” - State Bonding Requirements
 - Kansas: 60-1111 Public Works Bond
 - Contracts exceeding \$100,000
 - Missouri: Section 107.170
 - Contracts exceeding \$25,000
 - Private Work
 - Lenders driving bonding requirements on private work

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Payment Bond – Common Terms

- Basics
 - Obligee
 - Not a direct claimant
 - Intent is to indemnify the owner against a duly tendered claim
 - Contract
 - Payment terms rule
 - Definitions of “Claimant”
 - 1st and 2nd tier subs/suppliers
 - Anyone who has rightfully asserted a mechanic’s lien
 - Claim Reporting Requirements
 - 2nd tier claimants must send notice to surety within 90 days of last performing work

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Payment Bond – Common Terms

- Basics
 - Surety's Response Requirements
 - Timeframe for response after receipt of claim (60 days on AIA 312 2010)
 - Example: AIA 312 1984 Version – Court Rulings
 - Statute Override
 - Definition of claimant
 - Notice requirements
 - Example: Kansas Public Works Bond on a Private Job

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Lien Bonds

- Function of a lien bond
 - When filed with the court, it removes the mechanic's lien from property
 - Bond amount determined by state and ranges from lien amount to 150%
 - Not an option in Missouri
- Typical premium is 2% of bond amount
 - Companies with existing surety relationships would often pay less
 - Reduced premium if on a project with performance/payment bonds

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Surety Company Evaluation

- AM Best
 - Financial Strength Rating: "A++" to "F" Scale
 - Financial Size Category: I to XV Scale - Policyholder's Surplus
- Department of the Treasury's Listing of Certified Companies (Circular 570)
 - Full legal name and address
 - Underwriting Limitation
 - States in which surety is currently licensed
 - <http://www.fms.treas.gov/c570/c570.html>

Universal Surety Company (NAIC #25933)

BUSINESS ADDRESS: P.O.Box 80468 , Lincoln , NE 68501. PHONE: (402) 435-4302. UNDERWRITING LIMITATION b/: \$9,728,000. SURETY LICENSES c,f/: AZ, AR, CO, ID, IL, IN, IA, KS, KY, MI, MN, MO, MT, NE, NM, ND, OH, OK, OR, SD, TX, UT, WA, WI, WY. INCORPORATED IN: Nebraska.

- Broker/Surety

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Surety Marketplace

2012 Results

Surety & Fidelity Association of America Preliminary 2012 Results

	Direct Premium Written	Direct Premium Earned	Direct Losses Incurred	Direct Loss Ratio
Total Industry	\$ 5,035,544,691	\$ 5,136,705,629	\$ 1,109,388,270	21.6%

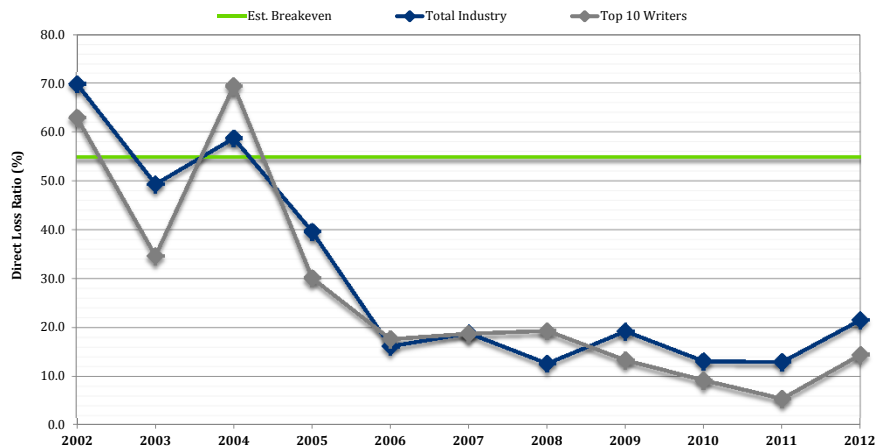
- ❖ \$5.035 Billion in Direct Written Premium
- ❖ Direct Losses of \$1.109 Billion – Direct Loss Ratio of 21.6%
- ❖ Premium volume for most major sureties flat or down
- ❖ Continued uptick in claim activity
- ❖ Loss ratios continue to grow

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Surety Marketplace

Historical Results



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Surety Marketplace—2012

Concentration of Power

2012 Top Ten Writers <i>(Preliminary Data From The Surety and Fidelity Association of America)</i>		
Surety Company	Direct Premium Written	% of Total Premium
Travelers Bond	\$ 754,242,281	15.0%
Liberty Mutual	725,674,403	14.4
Zurich	462,515,514	9.2
CNA	411,159,984	8.2
Chubb	198,597,507	3.9
International Fidelity	161,354,957	3.2
HCC	160,568,163	3.2
Hartford	159,703,913	3.2
ACE	129,113,588	2.6
RLI	110,619,407	2.2
Total	\$3,273,549,717	65.0%

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Surety Marketplace—2012

Concentration of Power

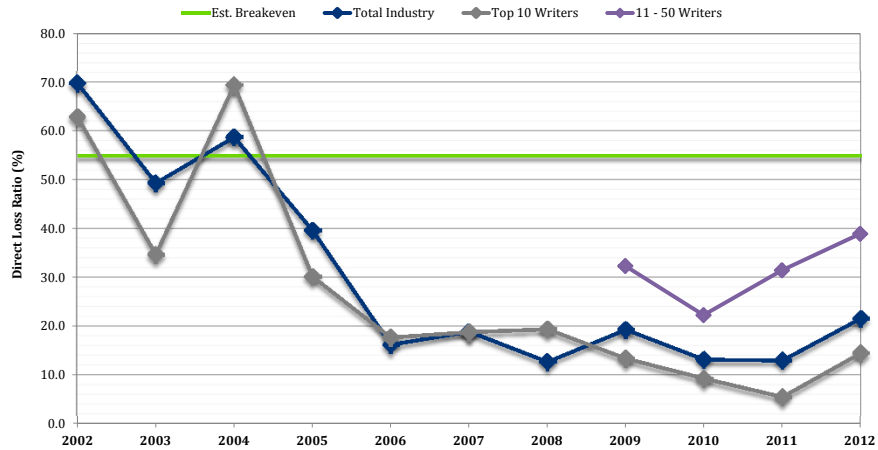
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Zurich	462,515,514	9.2
CNA	411,159,984	8.2
Chubb	198,597,507	3.9
Total	\$2,552,189,689	50.7%

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Surety Marketplace

Historical Results



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Surety Marketplace

Industry Expectations—2013 & Beyond

- Surety executives anticipate continued losses in 2013
 - Deteriorating results for sureties in the 11-50 range
- Expect slow/no growth in premium
 - Some sureties will be forced to take down reserves.
- Surety credit will be “tight” for companies with weak credit profiles
 - Strong credit profiles will enjoy ample capacity
- Sureties will use funds control, collateral, and other mechanisms where necessary to protect their balance sheets

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Mechanic's Lien Overview

- A mechanic's lien is a security interest in the property and improvements.
 -A potential source of funds to pay a debt
 - NOT a guarantee of payment
 - Priority is Key

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State Statute Specific

- Solely created and controlled by state statutes
- All states have mechanic's liens
 - All Vary
 - Notice requirements
 - Filing periods
 - ✓ Texas
 - ✓ A person claiming the lien on a non-residential construction project must file an affidavit with the county clerk of the county in which the property is located no later than the 15th day of the fourth calendar month after the day on which the indebtedness accrues.
 - Deadline to foreclose
 - Content of the Lien
 - Call your lawyer early!

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Lien Waivers

- Lien/bond claim waivers
- Issues:
 - Conditional vs. Unconditional
 - Include unpaid retainage or pending claims?
 - Does it release all rights to disputed amounts?
 - ✓ May or may not be enforceable
 - Excluded Items

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Other Key Topics

- Prompt Pay Statutes
 - Missouri Private Prompt Pay Act (RSMo. §§ 431.180 & 436.300 et seq.)
 - All payments are to be made per the contract agreements among the parties
 - Interest per contract (up to 1.5%/month) and attorney fees
 - Retainage – No more than 10%
 - Missouri Public Prompt Pay Act (RSMo. §§ 34.057 et seq.)
 - Payments from Gov't to General Contractor = 30 days from invoice
 - Payments from General Contractor to Subs = 15 days of receipt of payment from Gov't
 - Interest (1.5% per month) and attorney fees
 - Retainage – No more than 5%, if cause then no more than 10%

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Other Key Topics

- Subordination Agreements
- Contracts Control
 - As many clauses as there are contracts
 - Not always drafted fairly
 - Provisions that will affect payment
 - Pay if paid clauses
 - No damages for delay
 - Liquidated damages
 - Waiver of consequential damages

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Document, Document, Document!

- Change Orders



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Document, Document, Document!

- Emails/letters
- Daily Reports
 - Contemporaneous documentation
 - Eye toward a dispute down the road
 - What should be included:
 - Headcounts
 - Anything that delays work
 - ✓ Effect of weather
 - ✓ Other contractors
 - ✓ Materials on site
 - ✓ Unforeseen conditions
 - Inspections and visitors
 - Anything you would need to explain later

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Questions?

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