

Fourth Circuit Enforces Arbitration Clause In Subcontract Against Performance Bond Surety

A recent ruling by the Fourth Circuit considered an important issue for sureties, their principals, and claimants on construction projects regarding the enforceability of arbitration clauses against the surety. In *Great American Insurance Co. v. Hinkle Contracting Corp.*, No. 12-1014, 2012 WL 5936178, *1 (4th Cir. Nov. 28, 2012), a grading and drainage subcontractor, CME, defaulted on a state DOT project. CME's performance bond surety, Great American, filed a declaratory judgment action seeking a ruling that it had no obligation to complete CME's work on the basis that the general contractor, Hinkle, breached the subcontract by failing to make payment to CME. The general contractor sought to stay the declaratory judgment action and compel arbitration with the surety based on the subcontract's arbitration provision, which was incorporated into the performance bond. The district court denied Hinkle's motion, ruling that the surety's claims were unique to the surety, and therefore, outside the ambit of the arbitration clause.

On appeal, the Fourth Circuit reversed. Citing to *American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88 (4th Cir. 1996), the court noted that the provision at issue mandated arbitration for any claims of the subcontractor or its surety "arising out of or relating to" the subcontract, and therefore had an "expansive reach." In *American Recovery*, the Fourth Circuit found that a clause with an "expansive reach" required arbitration over any dispute having a "significant relationship" to the contract. Therefore, here the subcontract's arbitration provision encompassed all of the surety's claims. Even if the arbitration clause could have been interpreted as the surety contended, it was then at best ambiguous and the federal presumption in favor of arbitration would apply. For these reasons, the Fourth Circuit reversed the district court with instructions that the action between Hinkle and Great American be arbitrated.