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Takeover Agreements and Bonds

Posted in [Articles](#) by Ty Thompson on Sat Nov 22, 2014

Is it time to revise your form takeover agreement? In *Allegheny Casualty Co. v. Archer-Western/DeMaria Joint Venture III*, 2014 WL 4162787 (M.D. Fla. August 21, 2014), the United States District Court for the Middle District of Florida rejected non-binding authority that “when a surety elects to directly undertake performance of a principal’s obligations, the surety’s liability is no longer limited by the amount of the bond.”

The surety was able to avoid this outcome because the takeover agreement expressly limited the surety’s liability to the penal sum of the bond. The Middle District reasoned that “even if a performing surety’s liability can exceed the penal sum, a performing surety can limit its liability by expressly so providing in a contract with the benefitted obligee.” This case illustrates the importance of carefully drafting takeover agreements and having a full understanding of the surety’s risks when entering into them.