

## Workshop T5

Tuesday, October 28, 1:30–3:00 p.m. and 3:30–5:00 p.m.

### EMERGING BONDING ISSUES FOR CONTRACTORS AND SURETIES

Presented by

Panel:



**Kevin W. Adams**  
Vice President  
The Travelers Cos., Inc.,  
Bond & Financial  
Products,  
Construction Services



**Mark D. Herbert**  
Shareholder  
Watkins Ludlam  
Winter & Stennis, P.A.



**Robert G. Kelly**  
Vice President  
Surety Marketing  
Manager  
Chubb & Son



**David Pesce**  
Assistant  
Vice President  
Berkley Surety Group

A distinguished panel of surety experts will discuss a variety of timely bonding issues of concern to contractors, owners, and surety professionals. Find out what your surety underwriter and broker require to help you obtain your needed bonding capacity, and what issues are coming down the road in the near future.

- Describes changes in financial reporting requirements and the corresponding impact on contractors and subcontractors.
- Examines current challenges for contractors and sureties, including compliance with diversity requirements, immigration laws, and problems surrounding the AIA 312 payment bond.
- Reviews early concerns and requirements for contractors participating in projects utilizing newer techniques, such as green building and building information modeling.

Moderator:



**Lynn M. Schubert**  
President  
The Surety & Fidelity  
Association of America

Workshop T5



*Do what you do best...  
we do all the rest.*

# DBH Resources, Inc.

**Experts in Wrap-Up Administration**

Risk Management, WC & GL Wrap-Up Administration, & Long-Term Liability Protection

- All Builders
- All Brokers
- All Projects
- All Coverages  
including workers comp



[www.dbhresources.com](http://www.dbhresources.com) | 877.222.4777

**Kevin W. Adams**  
**Vice President**  
**The Travelers Companies, Inc.,**  
**Bond & Financial Products, Construction Services**

Mr. Adams is one of the panelists for Workshop T5, "Emerging Bonding Issues for Contractors and Sureties," on Tuesday afternoon. A second generation surety underwriter, he began his career with Seaboard Surety Company as a trainee in 1984 in its home office in New York City. He then progressed through various assignments of increasing responsibility in both the field and home office, including Texas, New Jersey, and Washington State.

In 1998, Mr. Adams joined a small, women-owned general contractor in the Seattle area as manager of Operations. In this role, he was responsible for managing and directing the sales, marketing, and risk management functions of the company. He also was involved with estimating/bidding and project management.

In 1999, Mr. Adams returned to the surety industry by joining Travelers in its home office in Hartford, CT. His current role is regional underwriting officer with responsibility for the New England and Great Lakes regions. Mr. Adams has also taken a lead role in developing and facilitating the training programs of Construction Services. Mr. Adams is active within the local community in the Hartford area as both a volunteer and serving on various committees, including the Connecticut AGC Diversity Committee, INROADS, Junior Achievement, and Habitat for Humanity.

**Mark D. Herbert**  
**Shareholder**  
**Watkins Ludlam Winter & Stennis, P.A.**

Mr. Herbert is on the panel for Workshop T5, "Emerging Bonding Issues for Contractors and Sureties," on Tuesday afternoon. He is a shareholder and is chairman of the firm's Construction and Surety Practice Group. He is a graduate of Millsaps College (B.A. 1975) and the University of Mississippi School of Law (J.D. 1978).

During his 29-year career representing the construction and surety industries, Mr. Herbert has litigated most every type of construction, performance, and payment bond issues. As an active member of the Executive Committee of the Surety Association of Mississippi, he has advised the surety industry on legislative and legal issues it faces. Mr. Herbert has lectured extensively on construction and surety matters and has authored a number of publications on construction and surety law.

**Robert G. Kelly**  
**Vice President, Surety Marketing Manager**  
**Chubb & Son**

Mr. Kelly is on the panel for Workshop T5, "Emerging Bonding Issues for Contractors and Sureties," on Tuesday afternoon. He is presently the Surety Marketing manager for Chubb Surety. He started his surety career in New York City upon completion of his bachelor's degree in Business Administration from St. Peter's College. Mr. Kelly spent his first 2 years in the industry as a bond underwriter for the New York office of Fidelity and Deposit Company. In 1978, he moved on to Aetna C. & S. in New York for 2 years as a bond underwriter. In 1980, he joined Reliance Surety Company as a senior bond underwriter and was there for 14 years in its New York City office. From 1984 to 1992, Mr. Kelly managed the Reliance New York office. In 1992, he joined AIG's surety operation as divisional vice president, with responsibility and oversight for underwriting, marketing, and administration of the Midwest, Northern California, and Northwest regions.

In August 2002, Mr. Kelly joined Chubb Surety as Surety Marketing manager. His responsibilities include distribution management, business & market intelligence, pipeline management, product development, and strategic development.

**David Pesce**  
**Assistant Vice President**  
**Berkley Surety Group**

Mr. Pesce is on the panel for Workshop T5, "Emerging Bonding Issues for Contractors and Sureties," on Tuesday afternoon. He is a 1986 graduate of Lafayette College in Easton, PA, with a B.S. in mathematics. Upon graduation he began his surety career with Seaboard Surety Company in its home office and NJ branch offices. He then worked as assistant branch manager for Reliance Surety Company in Orlando, FL. In 1996 he began working for Liberty Mutual's surety department in New York City, becoming the regional vice president for the Mid-Atlantic Region. From 2001 through July 2005 he was in the home office of Crum & Forster as underwriting manager in charge of underwriting for various regions in the country. He was also involved with Crum & Forster's Reinsurance Treaty and underwriting systems and design. After serving as assistant vice president for Surety Underwriting at AIG in New York, with primary underwriting responsibility for the eastern third of the country, he is currently an assistant vice president for Berkley Surety Group in its home office in Morristown, NJ, where he is responsible for numerous branch offices as well as leading the Environmental Surety Practice. Mr. Pesce has served as president of the Florida Surety Association where in 1995 he was awarded the Surety Information Office Silver Award for excellence in Surety Bond Promotion. He is a member of AGC, GCA, CFMA, Surety Association of America, and an associate member of the National Association of Surety Bond Producers. He has given numerous presentations on various surety-related issues to contractors, architects, lawyers, bankers, and accountants associated with the construction industry.

**Lynn M. Schubert**  
**President**  
**The Surety & Fidelity Association of America**

Ms. Schubert is moderating the panel discussion for Workshop T5, "Emerging Bonding Issues for Contractors and Sureties," on Tuesday afternoon. She is president of The Surety & Fidelity Association of America (SFAA), a trade association of over 500 member companies that write fidelity and surety insurance. The SFAA is licensed as a rating or advisory organization in all states, as well as in the District of Columbia and Puerto Rico, and it has been designated by all state insurance departments as a statistical agent for the reporting of fidelity and surety experience. The SFAA represents its member companies in matters of common interest before various federal, state, and local government agencies.

Prior to joining the SFAA, Ms. Schubert was counsel in the Law and Regulatory Affairs Department of Aetna Life and Casualty Company with responsibility for all legislative and regulatory developments in the Mid-Atlantic and Southeast Regions for all property/casualty and life insurance and annuity issues, and nationwide for fidelity and surety issues. Previously, Ms. Schubert was Corporate Secretary and Assistant General Counsel with the American Insurance Association in Washington, D.C., in charge of the issues of fidelity and surety bonds and insurance access and availability ("redlining"), and all coordination with the National Association of Insurance Commissioners.

She received her undergraduate degree *magna cum laude* in Business Administration from East Carolina University in 1977 and her law degree from the University of Notre Dame in 1980. She is admitted to the bar in Georgia and the District of Columbia.

Ms. Schubert coauthored "Damages Beyond the Limits of Fidelity Policies," presented to the Fidelity and Surety Law Committee of the Torts and Insurance Practice Section of the American Bar Association, August 8, 1982; "Public Regulation of Insurance Law: Annual Survey," XXV, Number 2 *Tort and Insurance Law Journal* 402 (Winter 1990); "Annual Survey of Fidelity and Surety Law," XXVIII, Number 2 *Tort and Insurance Law Journal* 251 (Winter 1993); "Annual Survey of Fidelity and Surety Law," XXIX, Number 2 *Tort and Insurance Law Journal* 412 (Winter 1994); "Annual Survey of Fidelity and Surety Law," XXX, Number 2 *Tort and Insurance Law Journal* 394 (Winter 1995), and "Annual Survey of Fidelity and Surety Law," XXXI, Number 2 *Tort and Insurance Law Journal* 269 (Winter 1996). She authored "The Surety's Obligations Are Not Always Co-Extensive With Those of Its Principal," presented to the Fidelity and Surety Law Committee and the Forum Committee on the Construction Industry of the Torts and Insurance Practice Section of the American Bar Association, January 22, 1987; "Legislative Trends Affecting Sureties," presented to the Fidelity and Surety Law Committee of the Torts and Insurance Practice Section of the American Bar Association, August 13, 1991; "Regulation of Surety and Financial Guaranty Insurance: Today and Tomorrow," *The State of Insurance Regulation*, American Bar Association (1991); "Legislative Solutions to an Unfavorable Court Decision," 15 *Suretyscope* 11 (Winter 1991); and "Chapter Two: An Overview of Modern Contract Bonds," *The Law of Suretyship*, American Bar Association (1993); "Current Surety Trends In The United States And Canada," presented to the Fidelity and Surety Law Committee of the Torts and Insurance Practice Section of the American Bar Association, August 2, 1998; "Chapter Three: Why Obligees Buy Bonds," *The Law of Suretyship*, Second Edition, American Bar Association (2000), "Using Surety Bonds To Protect Your Construction Projects," IRMI.com (International Risk Management Institute), March (2000); "Be Sure Your Surety Bond Isn't a Fraud!", IRMI.com, June (2000); and "Surety Industry Addresses Increases in Surety Losses" IRMI.com, July (2001). She was editor, *Hazardous Waste on the Construction Site: Who is Liable?*, American Bar Association (1992).

Ms. Schubert currently is a member of the *Construction Business Review* Editorial Advisory Board; the State Bar of Georgia; the District of Columbia Bar; Board of Directors, Surety Claims Institute; the Construction Group Advisory Board for Federal Publications; the National Bond Claims Association; and the Forum Committee on the Construction Industry and Public Contract Sections of the American Bar Association, and an Expert Commentator for IRMI.com. She is a Past Chair of the Torts and Insurance Practice Section—Fidelity and Surety Law Committee and a member of the Council of the Torts and Insurance Practice Section of the American Bar Association, and formerly a member of the Board of Directors of the Atlanta Council of Young Lawyers. She is a recipient of the Women Builders Council 2008 Champion Award.

Prior to joining the AIA, Ms. Schubert was a partner with an Atlanta, Georgia, law firm specializing in fidelity and surety law, and a supervising bond claims attorney for the Continental Insurance Companies.

Ms. Schubert is a frequent lecturer on the topics of grass roots and corporate lobbying, in addition to the substantive areas of fidelity and surety law.

# Emerging Bonding Issues for Contractors & Sureties



## Moderator:

Lynn Schubert, FSAA

## Panelists:

- + Kevin W. Adams, Travelers
- + Mark D. Herbert, Watkins  
Ludlam Winter & Stennis, P.A.
- + Robert G. Kelly, Chubb & Son
- + David Pesce, Berkley Surety Group

# Welcome and Introduction



Lynn Schubert  
President  
Surety and Fidelity Association of America  
Washington, DC



## Introduction

- Four hot topics for contractors and sureties
- How do these impact you?
- How do they fit together?
- What else is out there?



# Recent Accounting and Auditing Standards and Your Bond Line

Presented By:  
David Pesce  
Assistant Vice President  
Berkley Surety Group  
Florham Park, NJ



## Overview

- FIN 46R
- SAS 112
- SAS 103
- FAS 157 & 159
- FIN 48
- Proposed FIN 5 Change

## Consolidation of Variable Interest Entities (VIE)

- What is a VIE?
  - A legal entity that is thinly capitalized
  - Cannot survive without other financial support
  - Does not have to come from the owners
- Primary beneficiary
  - The entity that absorbs the majority of the expected gains or losses or both  
(Think in terms of losses as “tie goes to the loser”)

6

- How can this affect a bond line?
  - Now a consolidated statement
  - Add debt, new notes, but no working capital or equity
  - Surety ratios change dramatically or a violation of loan covenants

7

## FIN 46R



	Operating Company	Real Estate Company	Consolidated Totals
Current Assets	\$ 3,000,000	\$ 100,000	\$ 3,100,000
PP&E	\$ 2,000,000	\$ 2,000,000	\$ 4,000,000
Total Assets	\$ 5,000,000	\$ 2,100,000	\$ 7,100,000
Current Liabilities	\$ 1,000,000	\$ 600,000	\$ 1,600,000
Long-Term Liabilities	\$ 2,500,000	\$ 2,400,000	\$ 4,900,000
Total Liabilities	\$ 3,500,000	\$ 3,000,000	\$ 6,500,000
Equity	\$ 1,500,000	\$ (900,000)	\$ 600,000
Total Liabilities & Equity	\$ 5,000,000	\$ 2,100,000	\$ 7,100,000
Debt to Equity Ratio (<3:1 Required)	2.33:1		10.83:1
Working Capital Ratio (>2.00:1 Required)	3.00:1		1.94:1

8

## SAS 112



- Communication of internal control related matters identified in an audit
- The auditor must evaluate identified control deficiencies and then determine whether those deficiencies, individually or in combination, are significant deficiencies or material weaknesses.

9

## SAS 112 (cont.)



- The auditor must communicate, in writing, significant deficiencies and material weaknesses to management and those charged with governance. This communication includes significant deficiencies and material weaknesses identified and communicated to management and those charged with governance in prior audits but not yet remediated.

10

## SAS 112 (cont.)



- Your bonding company knows these letters must be produced and that only the contractor gets a copy
  - Note the auditor cannot send this to a third party without authorization
- They should be requesting a copy with each audit
- Could lead to questions, concerns, or if significant enough, a change in terms

11

## SAS 103



- Revises the dating of the auditors report
  - In the past, it was the completion of the field work
  - Now it is “the date on which the auditor has obtained sufficient appropriate audit evidence to support the opinion.”
- Time between field work and obtaining the audit evidence is the key
  - Auditor will now need to evaluate subsequent events that may have occurred during this time
- In practice, sureties expect CPAs to apply this to reviews as well as audits

12

## SAS 103 (cont.)



- In practice, the date of the report and date of release should be within a few days if this is properly followed
- The new requirements will cause additional delays in getting the final draft
- Bonding companies will be pressing for receipt of the statement, even if it's not done
- Bonding companies will be comparing the auditors date with the date they receive the statement (significant delays can't be blamed on the field work date as in the past)

13

## FAS 157 & 159



- Both deal with the use of fair market value in GAAP compliant financial reports
- FAS 157 defines fair value and provides the framework for measuring fair value
- FAS 159 provides the fair value option for financial assets and financial liabilities
  - Eligible items include investment ownership in an entity, contracts to receive cash or other financial instruments from a second entity, and contracts to exchange other financial instruments

14

## FAS 157 & 159 (cont.)



- For contractors, ownership in an entity is where this may apply
  - Putting equipment or building in an LLC, then using fair value accounting on the value of the LLC
    - Tricky as the entity cannot be a VIE under FIN 46R, a wholly owned subsidiary, or other type of entity that would require consolidation under GAAP
  - Contractor's financial statement could show a large equity increase through the fair value of the new entity holding the equipment against the significantly depreciated book value
    - Cannot forget tax and other ramifications for doing this

15

## FIN 48



- Accounting for uncertainty in income taxes
- If an aggressive tax position has been taken, and it is “more-likely-than-not” that under examination, this position could be negated, then this potential must be accounted for in the statement
- FIN 48 implementation for private companies has been deferred till 12/15/08 for now, but is under further FASB review
- It is now effective for public companies

16

## FIN 48 (cont.)



- Concerns for construction companies
  - Is this a simple way for the IRS to see if you need to be audited?
  - Will deferring profit increases on jobs be grounds for a FIN 48 note and adjustment?
  - Tie this back to SAS 103 and the subsequent event review
  - What about smaller entities with different tax reporting methods?
    - Cash and completed contract methods

17

## What's Next??



- Proposed changes to FASB Statements 5 and 141(R)
- Would affect disclosure of certain loss contingencies
  - Increases threshold from “at least reasonably possible” to full population of contingencies except those “that the likelihood of loss is remote”
  - Would require a financial amount, tabular reconciliation, and background details

18

## What's Next??



- Concerns for contractors are:
  - Contractual exposures
  - Subcontractor liability
  - “Pay if Paid” language
  - Increased scrutiny and disclosure on guarantees

19

# Mega Projects and Bundling



**Presented By:**  
Robert G. Kelly  
V.P. – Surety Marketing Manager  
Chubb & Son  
Warren, N.J.

## Mega-projects



- Agenda
  - The Surety Perspective
  - Credit Evaluation
  - Resource Constraints
  - Food for Thought



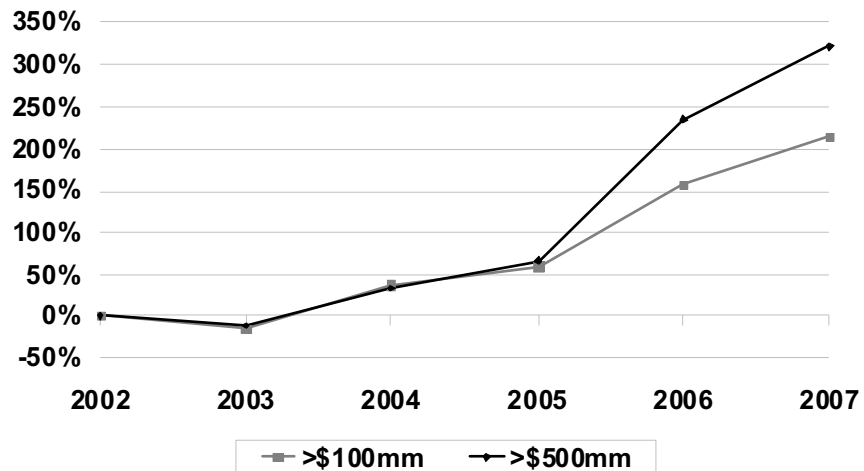
## The Surety Perspective

- Definition
  - Contract Value > \$500mm
  - Duration four to five years or greater
  - Increased scope and risk
  - Usually joint ventures or consortiums

22



## Bond Requests 2002 – 2007





## Surety Perspective (cont.)

- Surety Capacity
  - Predicated on strength and experience of contractor/consortium with the right contract, terms & owner
  - Handful of sureties participate in this arena
  - Individual surety single project limitation
  - Restrictions on counter-party guarantees
  - Success dictates capacity

24



## Bonded Mega-Projects

Project Description	Owner	Cont. Price	P&P Bond Requirement
Fulton St. Renov.	N.Y.C.T.A.	\$800,000,000	100%
Willis Ave. Bridge	N.Y. City D.O.T.	\$612,467,522	\$612,467,522
Metro Gold Line Eastside Ext.	L.A. County M.T.A.	\$600,449,000	\$600,449,000
Tom Bradley Int'l Terminal Impvs.	L.A. Dept of Airports	\$503,500,000	\$503,500,000
McCarren Airport New Terminal	McCarren Airport	\$1,200,000,000	\$600,000,000 (50%)

25



## Credit Evaluation

- Larger more complicated projects
- Contractor team
  - Financial strength – “weather the storm”
  - Performance & experience track record
  - Compatibility – philosophy, culture & risk appetite
  - Technical capabilities, systems, engineering
  - Subcontractor relations & mitigation
  - Labor pool
  - Owner experience/relationship

26



## Credit Evaluation (cont.)

- Contract risk
  - Financing exposure
  - Consequential & actual damages with no cap
  - Broadly defined force majeure
  - Long-term warranties
  - Long-term operations & maintenance
  - Commodity inflation
  - PPPs – construction performance only

27



## Credit Evaluation (cont.)

- Owner
  - Fully dedicated funded project
  - Stable, sophisticated & experienced
  - Good reputation – prosecution & payment
  - Understands the construction process
  - Fair & equitable contract
  - Owners representatives reasonable – project managers, architects, attorneys, etc.

28



## Resource Constraints

- Personnel Elasticity
  - All constituents strained – project management, field supervision, labor
  - Projects bundled due to owner limitations
  - Workforce experience levels being pushed

29

## Resource Constraints (cont.)



- Commodity pressures
  - Predictability over extended period of time
  - Cost escalations
  - Availability
  
- Equipment stress
  - Cranes, trucks, machinery

30

## Resource Constraints (cont.)



- Subcontractor capacity
  - Limited pool of experienced specialties
  - Greater coordination of activities
  
- Cash flow
  - Managing greater expenditures over longer period of time

31



## Food for Thought

- Safety
  - Increased trade activity and coordination in one area
  - High profile focus as larger projects give rise to increased opportunity of frequency of claim incidents
  - Equipment utilization, repair, and stress
  - Increased frequency will eventually give rise to catastrophe
  - Safety management & risk control imperative

32



## Final Thought

With a good owner, fair contract, the right joint venture/consortium and surety team, mega-projects can be profitable and successful for all parties involved.

33

## Small and Emerging Contractor Requirements



**Presented By:**  
Kevin W. Adams,  
Vice President  
Travelers Bond & Financial Products  
Construction Services  
Hartford, CT

## Construction Industry Overview



- “The American Dream”
- Approximately \$1.2 trillion industry (2006)
- 8.5% of U.S. GDP for 2006
- 2nd largest economic sector in terms of revenue and employment
- Roughly 75% private/25% public sector

35

## Demographics



- Shift in construction company ownership toward minority and women
- By 2010 more than 50% of new construction companies will be minority- or women-owned

## Demographics (cont.)



- Hispanic contractors are one of the fastest growing sectors of the construction industry and women now account for about 10% of all workers in construction
- Minority contractors represent 12-15% of firms in construction, account for 3-5% of industry revenue

## Why Is this Important?



- Economic inclusion - reflective of contractors' markets
- Compliance - customers' diversity requirements
- Demographic imperative - population alignment
- Availability - excellent pool of quality MBEs/WBEs

38

## The Challenges



- Barrier of entry?
- Contracting opportunities?
- Bonding and financing?
- Creating successful businesses

39



## The Opportunities

- Mentor/protégé programs - more involved than just “adopting a program”
- National vs. local initiatives - matching local laws, requirements, and conditions
- Industry involvement - SFAA, SIO, AGC, ABC, CFMA

40



## The Opportunities

- Goal - creating viable businesses that are bondable
- Result - allows contractors to align with their markets, develop more diverse subcontractor base, conform with diversity requirements, and grow the future leaders of the construction industry

41

# “IMMIGRATION REFORM”



## HOW ARE SURETIES IMPACTED?

### **Presented By:**

Mark D. Herbert

Watkins Ludlam Winter & Stennis, P.A.

Jackson, Mississippi

### A Sample of

## “Immigration Reform” Nationwide



- What has stimulated the “Movement”?
- Samples of the Statutes

43



Georgia:  
“Gwinnett County Purchasing Ordinance”

Where a contractor or subcontractor is found to have employed an unauthorized alien, the Purchasing Division may order the contractor to terminate or require its subcontractor to terminate that person’s employment immediately and to report same to the Department of Homeland Security. The contractor’s failure to terminate the employee, require its subcontractor to terminate the employee, or otherwise to cooperate with the investigation may be sanctioned by termination of the contract, and the contractor shall be liable for all damages and delays occasioned to the County thereby.

44



Oklahoma: “Oklahoma Taxpayer and  
Citizens Protection Act of 2007”

- No public employer shall enter into any contract for services with a contractor unless contractor complies with E-Verify

45

## Oklahoma: “Oklahoma Taxpayer and Citizens Protection Act of 2007”



- Consequences

If an individual independent contractor, contracting for the physical performance of services in this state, fails to provide to the contracting entity documentation to verify the independent contractor’s employment authorization, pursuant to the prohibition against the use of unauthorized alien labor through contract set forth in 8 U.S.C. §1324a(a)(4), the contracting entity shall be required to withhold state income tax at the top marginal income tax rate as provided in Section 2355 of Title 68 of the Oklahoma Statutes as applied to compensation paid to such individual for the performance of such services within this state which exceeds the minimum amount of compensation the contracting entity is required to report as income on United States Internal Revenue Service Form 1099.

46

## Arizona:



### “Legal Arizona Workers’ Act”

- Prohibits “intentional” employment of unauthorized aliens
- Upon first violation, court will order suspension of all licenses until employer files affidavit that offending employee has been terminated and that it will not “intentionally” repeat offense
- Upon second violation, court will order permanent revocation of all licenses
- Use of E-Verify creates rebuttable prescription of no violation

47

## How Have the Legal Challenges Fared?

### Georgia:

- Complaint filed on November 29, 2007, by Georgia Utility Contractors Assn. and Georgia AGC
- Challenged on basis of preemption and due process and sought injunctive relief
- December 21, 2007, USDC ND Georgia denied injunction because of lack of irreparable harm
- But in dicta, found favor with preemption argument
- Gwinnett County agreed to rewrite its ordinance
- Suit voluntarily dismissed April 4, 2008

48

## How Have the Legal Challenges Fared?

### Oklahoma:

- Complaint filed on February 1, 2008, by Chambers of Commerce
- Challenged on basis of preemption and sought injunctive relief
- June 2, 2008, USDC WD Oklahoma granted preliminary injunction
- Found plaintiffs were “substantially likely” to establish preemption
- June 16, 2008, defendants appealed to 10th Circuit

49

## How Have the Legal Challenges Fared?

### Arizona:

- Complaint filed on December 9, 2007, by coalition of chambers of commerce, contractors associations
- Challenged on basis of preemption, due process and violation of commerce clause and sought preliminary injunction
- February 2, 2008, court dismissed action, finding against plaintiffs on all counts
- February 8, 2008, plaintiffs filed appeal to 9th Circuit
- Trial court denied injunction pending appeal

50



## The Mississippi Experience

- Immigration Reform: Hurricane Katrina's Latest Impact
- The "Mississippi Employment Protection Act"
- Provides:
  - Requires all "employers" to hire only citizens or legal aliens
  - Requires every "employer" to utilize E-Verify
  - Grants a cause of action for discrimination to any citizen or legal alien who is discharged while an illegal alien is retained

51



- Any violation of Act results in:
  - Automatic cancellation of any public contracts
  - Debarment from public contracts for up to 3 years
  - Loss of all licenses to do business for 1 year
  - Contractor responsible for additional costs incurred by public body to complete project
  - Provides limited exemption if employer hires through state or federal work program that provides for E-Verify or hires an employee referred by state employment agency
    - and lawn workers at private homes

52



## The Mississippi Experience

- Arguably, makes prime contractor liable for non-compliance by subcontractors, suppliers
- Governor called special session to, among other things, amend Act
  - Session adjourned with no action

53



## How Are Sureties Impacted?

- No cases yet
- But consider:
  - Is it a “default”?
  - Has the principal failed to perform?
  - Is a “performance bond” a “fidelity bond”?
    - *U.S. v. Seaboard Surety Co.*, 817 F.2d 956 (2nd Cir. 1987)
  - Has the surety’s obligation been affected?

54



## Where Do We Go from Here?

55