

# ◆ The Construction Report ◆

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## Government Official Bonds — Trap For the Surety

For years, sureties have issued surety bonds for Sheriffs or Constables, assuring that the elected officials would “faithfully” perform their duties. The duties include among other things execution of writs of execution following the rendition of a judgment for civil damages. Sheriffs and Constables have a duty to serve and carry out writs of execution to collect money to satisfy judgments. The money collected is turned over to the judgment creditor, less a commission for the official.

When the judgment debtor has no money or insufficient assets to satisfy the judgment, judgment creditors have recently opted to make claim against the Sheriff or Constable for failure to faithfully perform statutory duties, coupled with a claim on the official’s bond. Texas law purports to allow judgment creditors to seek to recover the full amount of the unsatisfied judgment

***The Official and his Surety are liable for the full amount of the underlying Judgment under Sections 34.064 & 34.065***

from both the official and the surety.

Such attacks against Sheriffs and Constables are based on Texas Civil Practice & Remedies Code Sections 34.064 “Improper Return of Writ” and 34.065 “Failure to Levy or Sell.” These sections appear to impose liability against both the official and the surety for the full amount of the underlying judgment. Recovery may occur on motion of the plaintiff filed with the court that issued the writ, following five days’ notice.

Judgment creditors contend that regardless the amount of the bond, the surety is liable for the “full amount of the debt,” since the statutes contain those exact words. In some cases, courts have done just that – awarded the judgment creditor a judgment against the surety in the full amount of the debt, ignoring the penal sum of bond.



This matter has serious financial ramifications for sureties. A surety on a bond with a relatively small penal sum (and even smaller premium) can theoretically be liable for a multi-million dollar uncollectible judgment. The threat of this sort of liability can occur repeatedly. To guard against this financial catastrophe, the surety has to educate and train its attorneys, the principal’s attorneys, and the judge.

The first line of defense is the language of the bond, itself. The bond typically contains limitations on the surety’s liability. For example, an American States Insurance Company bond for Constable Michael Dupree of Dallas County, Texas, states: “Provided, however, that regardless of the number of years this bond may remain in force and the number of claims which may be made against this bond, the liability of the Surety shall not be cumulative and the aggregate liability

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## Lawyer Quips and Quotes

The devil visited a lawyer’s office and made him an offer. “I can arrange some things for you,” the devil said. “I’ll increase your income five-fold. Your partners will love you; your clients will respect you; you’ll have four months of vacation each year and live to be a hundred. All I require in return is that your wife’s soul, your children’s souls, and their children’s souls rot in hell for eternity.”

The lawyer thought for a moment. “What’s the catch?” he asked.

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A barber gave a haircut to a priest one day. The priest tried to pay for the haircut, but the barber refused, saying, “you do God’s work.” The next morning the barber found a dozen bibles at the door to his shop.

A policeman came to the barber for a haircut, and again the barber refused payment, saying, “you protect the public.” The next morning the barber found a dozen doughnuts at his door.

A lawyer came to the barber for a haircut, and again the barber refused payment, saying, “you serve the justice system.” The next morning the barber found a dozen lawyers waiting for a free haircut.

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You cannot live without lawyers, and certainly you cannot die without them.

— Joseph H. Choate

The minute you read something that you can’t understand, you can almost be sure it was drawn up by a lawyer.

— Will Rogers

I don’t want a lawyer to tell me what I cannot do; I hire him to tell me how to do what I want to do.

— J.P. Morgan

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of the Surety for any and all claims, suits, or actions under this bond shall not exceed the amount stated above. Any revision of the bond amount shall not be cumulative." The "amount stated above" was \$1,500.00.

For Constables, Texas Local Government Code §86.002 requires the Commissioner's Court to set the bond in an amount not less than \$500 or more than \$1,500. Section 86.002 was enacted in 1987 (two years after Sections 34.064 and 34.065), and was most recently amended in 1995.

Section 86.002(c) provides limits on any recovery on the bond. Section 86.002(c) states: "The bond is not void on the first recovery but may be sued on from time to time in the name of an injured party until the whole amount of the bond is recovered." In other words, the first claim does not extinguish liability under the bond, and the bond remains in force until the penal sum is exhausted. If the penal sum was not a fixed limit, this language would be sur-

### ***Texas surety law generally limits a surety's liability to the penal sum of the bond***

plusage, a situation that courts strive to avoid.

Texas surety law generally limits a surety's liability to the penal sum of the bond. In *Great American Ins. Co. v. North Austin Municipal Utility District No. 1*, 908 S.W.2d 415, 426 (Tex. 1995), the Texas Supreme Court held that a surety's liability was limited to the penal sum. The Court observed that when an obligee's actual damages exceed the penal amount of a bond, a surety's liability generally is limited to the penal sum of the bond, citing *New Amsterdam Cas. Co. v. Bettes*, 407 S.W.2d 307, 314-15 (Tex.Civ.App.--Dallas 1966, writ ref'd n.r.e.) (surety not liable for actual or special damages caused by default of principal in excess of face amount of bond); *Bill Curphy Co. v. Elliott*, 207 F.2d 103, 108-09 (5th Cir. 1953) (surety not liable for actual damages necessary to complete construction contract in excess of face amount of bond because to hold other-

wise would make it "futile to state any amount of liability in the bond" and overlook "the well-established rule in Texas and elsewhere that the sole object of stating the penalty in a bond is to fix the limit of liability of the signers"). *Id.* at 426.

Texas courts adhere to the rule of *strictissimi juris* in refusing to extend the liability of sureties beyond the penal sum of their bonds. In *Standard Accident Insurance Co. v. Knox*, 184 S.W.2d 612, 615 (Tex. 1944), the Texas Supreme Court stated: A contract of suretyship will be strictly construed so as to impose on the Surety only such borders or obligations as clearly come within the terms of the contract, and such contract will not be extended by implication or presumption.

Despite such Supreme Court authority, judgment creditors, nevertheless seek judgment against sureties since Texas Civil Practice & Remedies Code Sections 34.064 and 34.065 expressly state that "the officer and his sureties are liable to the person entitled to receive the money collected on the execution for the full amount of the debt, plus interest and costs." Tex. Civ. Prac. & Rem Code §34.064 (emphasis supplied). Some courts have agreed.

To counter this argument, sureties need to stress that Section 34.064 was enacted in 1985, before the enactment of Local Government Code section 86.002, which specifies limits to the surety's exposure. Subsequent legislation tends to trump and circumscribe earlier legislation. *Texas Dept. of Mental Health and Mental Retardation v. Newbasis Central, L.P.*, 58 S.W.3d 278, 283 (Tex. App. – Fort Worth 2001).

As is common, only one surety signs the bond for an elected official. However, Sections 86.002 and 34.064 refer to two or more sufficient sureties. Those sections do not define the relationship, if any, between the "two or more" sufficient sureties. A single surety can argue that its liability is limited to the penal sum stated in its bond and the "other" surety's liability is excess above the penal sum.

A surety's right to enter a surety contract is constitutionally protected. See Tex. Const. art. 1, §16. *Traveler's*

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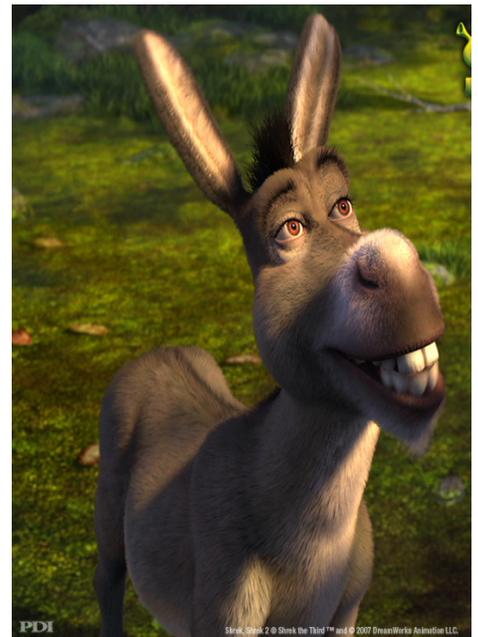
## The Editor's Corner

*The Construction Report is published periodically by Quilling, Selander, Cummiskey & Lownds, P.C., to highlight construction matters of interest to at least the Editor, Brian W. Erikson. The information we provide is a community service and is not intended to displace the legal judgment of real (expensive) attorneys. We invite your comments. Write us at 2001 Bryan Street, Suite 1800, Dallas, Texas 75201. Call us at (214) 880-1844.*

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## Donkey Makes Court Appearance Without Shrek

On April 18, 2007, Donkey appeared in court before Dallas County Justice of the Peace Steven Seider on behalf of his captor, Gregory Shamoun. Mr. Shamoun was litigating a dispute with his neighbor, John Cantrell, concerning a fence, allegations of assault and battery, and the demeanor of Donkey. Donkey was well behaved, but refused to talk, and was led away without incident. Shrek did not make appearance or otherwise come to Donkey's defense. The neighbors' dispute was settled before the jury could return a verdict.



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Shrek, Shrek 2 © Shrek the Third™ and © 2007 DreamWorks Animation LLC

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*Ins. Co. v. Marshall*, 76 S.W.2d 1007 (Tex. 1934). Courts cannot change the terms of the bond contract without impermissibly impairing the original contract. 76 S.W.2d at 1025. Such interference would violate Article 1, §16 of the Texas Constitution. *Id* at 1023-25.

In sum, there is a conflict between (1) Civil Practice and Remedies Code §§34.064 and 34.065 (officer and sureties are liable for full amount of debt); and (2) Local Government Code §86.002 (bond not void until whole amount is recovered), and the terms of the bond, itself. Some courts have imposed full liability on the surety for the original debt (ignoring the penal limit). Others have held the surety liable for the entire penal sum even though another court has already depleted the penal sum. Other courts have fully recognized the penal sum limit and not imposed any further liability on the surety once the penal sum has been paid. It appears that an appellate court or perhaps the Texas Supreme Court will have to sort out conflicts between various trial courts concerning the extent of a surety's liability.

Some counties have attempted to introduce legislation to remove the incentive for judgment creditors to pursue constables and their sureties. For example, the Tarrant County District Attorney's Office has proposed legislation to define and control the claim process against constables to permit more time for the constable to investigate and respond. However, the Tarrant County effort does not address or even mention the surety's penal sum limit concern. The Texas Surety Association may prove quite helpful in protecting sureties' rights.

Sureties who write bonds for Sheriffs and Constables need to ensure that the County (through its Commissioner's Court) will indemnify the surety for loss and expense (including attorney's fees). The cost of simply defending these claims will rapidly outweigh any premiums the surety has collected. Counties, however, have sovereign immunity under Texas law, and may raise that defense in an indemnity action. It may also be difficult for the surety to recover attorney's fees from a county (more on that in a subsequent issue).

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(Continued from "Constable" on page 4)

lished, and the only issue to be re-tried would be damages. It appears that American States would have no role in the re-trial.

#### **-Dupree v. KingVision Pay-Per-View**

This case had the first claim on American States' bond for Constable Dupree. American States had tendered the defense of its \$1,500.00 penal sum bond to Constable Dupree, who was being represented by the Dallas County District Attorney's office. The Constable and his attorneys did not adequately represent the surety or even make an appearance for the surety. Judge Woody entered a default judgment against American States for the full amount of the underlying judgment against Eduardo Ortega. (KingVision had secured a default judgment against Mr. Ortega for cable TV programming piracy. As with Mr. Melendez, Mr. Ortega had apparently not paid the subscription fee for a pay-per-view boxing event.)

Since American States had not appeared at trial, American States filed a restricted appeal to complain of error appearing on the face of the record. The Dallas Court of Appeals sustained the surety's first appellate point – KingVision had failed to introduce American States' bond into evidence. The appellate court reversed the judgment against the surety, and held that KingVision could recover nothing from American States.

Constable Dupree was not as successful on appeal. The court rejected his due diligence defense since he admitted that his office did not administer non-exempt assets belonging to the judgment debtor.

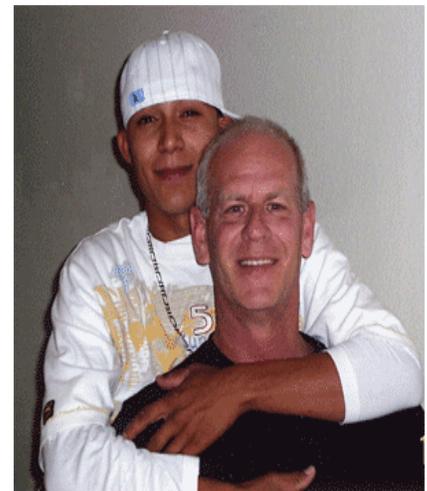
Constable Dupree also objected to Judge Woody's award of damages of the full underlying judgment. The Constable contended that if he was liable at all, it was only to the extent of the value of the non-exempt assets. However, the Constable offered no evidence of the value of all non-exempt properties owned by Mr. Ortega during the life of the writ of execution. As a result, the appellate court held that the Constable did not carry his burden on that defense.

The Dallas Court of Appeals did sustain Constable Dupree's challenge to the award of attorney's fees, holding that there was no statutory or other authority to support the award. The appellate court observed that the purported basis for the attorney's fees award as a court sanction could not be sustained, and would constitute a judicial end run around the statutory attorney fee-shifting scheme.

Aside from the deletion of the attorney's fee award, and the reversal of the judgment against American States, the court otherwise affirmed the trial court's judgment.

The court issued one statement in dicta which has application to American States. In closing, the court stated that: "American States's [sic] liability is limited to the amount of its bond." While the statement should certainly be true, the court had just gotten done declaring that the judgment against the surety was reversed due to KingVision's failure to introduce the bond into evidence, and that the court was rendering judgment that KingVision take nothing from the surety. Hopefully, the dicta does not prompt KingVision to seek to compel a second payment of the bond's penal sum, or otherwise provide fodder for further appeals.

The Dallas Court of Appeals also granted the Dallas County District Attorney's office's motions to withdraw as counsel of record for Constable Dupree. As of yet, no other attorney has enrolled for the Constable.



**Constable Dupree with friend Angel Martinez**

## Constable Dupree Appellate Cases



Constable Dupree is the Constable for

Dallas County Precinct No. 5. Dissatisfied judgment creditors who had placed writs of execution with Constable Dupree filed seven claims against the Constable and his surety, American States Insurance Company, alleging that the Constable had not faithfully carried out his duties concerning the writs. Seven times the trial courts held for the claimants and entered judgment against the Constable for some or all of the claimants' underlying judgments. The Constable appealed the judgments. This article discusses two such appeals.

### **-Dupree v. Garden City Boxing Club**

This appeal involved whether Constable Dupree was properly held liable for failing to carry out a writ of execution. At the trial court, Judge Bruce Woody found that Constable Dupree's office had failed or refused to levy on or sell real property and other property subject to execution. Judge Woody held the Constable liable for the full amount of the underlying judgment that Garden City Boxing Club had secured against Raul Melendez for cable TV programming piracy. (Mr. Melendez

had subscribed to a pay-for-view boxing match for his bar, and not paid the subscription fee. Garden City sued for non-payment, described it as intellectual property "piracy", and secured a default judgment.)

American States was not involved in the appeal. Judge Woody had ruled that Garden City could make a claim against the funds that the surety had deposited in the court's registry, and that the surety had no further liability to the claimant. This ruling was not appealed.

The Dallas Court of Appeals rejected Constable Dupree's defenses of due diligence, finding that the Constable had not carried his burden of proof. However, the appellate court agreed with the Constable that the damages Judge Woody awarded were excessive. The court held that the Constable was liable for the lesser of the full amount of the debt or the fair market value of the non-exempt properties owned by the judgment debtor. The court remanded the case for a new trial on damages. Presumably, liability has been estab-

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## **The Construction Report**

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