Who Is the Proper Claimant?

Union Standing to Make a Claim on a Payment Bond

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Fidelities must make individual case assessments in light of state to state variations and lack of a clear trend.

Under the Labor Management Relations Act, 29 U.S.C. §§141 *et seq.* (2006), labor unions are given the right to sue and be sued as representative entities of their membership. The extent of a union's right to sue on behalf of its aggrieved members, however, is not without limit. This article explores whether a labor union has standing to make a claim on a construction payment bond by virtue of a collective bargaining agreement it may have with a contractor on the project.

While the standing of union-associated benefit funds to make a claim on a payment bond for unpaid benefits (such as health and pension) is no longer in dispute, *see United States ex rel. Sherman v. Carter*, 353 U.S. 210 (1957), the unions themselves have not fared as well. Some courts have allowed claims for unpaid wages and dues, while some have not. Because there is no clear trend as to where the issue is heading, the surety faced with a union claim for unpaid wages and dues must assess each case individually and based on the state law of the forum where such a claim is brought.

General Authority of Unions to Sue

Under §301 of the Labor Management Relations Act, 29 U.S.C. §185(b), a labor union "may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States." However, courts have grappled with the question of whether labor unions are proper claimants on payment bonds for unpaid wages or dues.

Unions Not Given Standing to Claim on Payment Bond

In *U.S. ex rel. United Brotherhood of Carpenters Local 2028 v. Woerfel Corp.*, 545 F.2d 1148 (8th Cir. 1976), the carpenters' union sought to collect a retroactive pay increase awarded to its members based on a collective bargaining agreement that they purportedly negotiated with Woerfel. Woerfel had refused to sign an agreement after discussion with the union, but indicated that it intended to pay the wages paid by other contractors on the project who were signatory to the union's agree-

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ment. *Id.* at 1149. During the course of the project, Woerfel paid wage increases agreed to between the various unions and contractors. However, near the end of the project, Woerfel refused to pay the final retroactive wage increase. The unions filed suit against Woerfel and its payment bond surety to try to collect the retroactive wage increase on behalf of its membership. *Id.* at 1150.

The district court found in favor of the unions and Woerfel appealed. The Eighth Circuit reversed, finding that the unions lacked standing to sue on a payment bond provided in compliance with the Miller Act, 40 U.S.C. §§3131 *et seq.* (2006), at least absent an assignment of the individual employee wage claims. *Id.* at 1150. According to the court, the Miller Act was enacted to provide "an alternative remedy" to mechanic's liens to suppliers of labor to federal projects. *Id.* The Miller Act allows one to sue on a payment bond who provided labor to the project and who either (a) has a direct contract with the prime contractor, or (b) has a direct contract with a subcontractor. Reasoning that the purpose of the Miller Act "is to ensure payment for services rendered by a laborer or subcontractor on a government project," the court concluded that a collective bargaining agreement "is not a contract for the performance of services; it governs only the general rules of conduct between employer and employee. The right to the payment of money remains with the individual employee" because the employee, not the union, provided the labor. *Id.* at 1151. The court further found that §301 of the Labor Management Relations Act "does not appoint the union as the general litigating agent of its members," but rather merely defines unions as having the capacity to sue. *Id.* at 1151.

More recently, in a series of cases brought by the United Union of Roofers Local 40, the Ninth Circuit ruled that the union lacked associational standing to make a payment bond claim for unpaid wages. In the leading case of *Roofers Local 40 v. Ins. Corp. of Am.*, 919 F.2d 1398 (9th Cir. 1990), the court ruled that the union lacked associational standing based on the United States Supreme Court's holding in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 342–43 (1977). *Hunt* set forth a three part test to determine whether an association can sue on behalf of its aggrieved members. First, the members must have standing to sue in their own right. Second, the interests sought to be protected must be "germane" to the association's purpose. Finally, the claim and relief sought must not require "the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343. The focus in payment bond cases has centered on the third prong of the *Hunt* test.

In *Roofers Local 40 v. Ins. Corp. of Am.*, A-Plus Roofing failed to pay union members' wages in full. The union sought to recover the unpaid wages under a payment bond obtained by A-Plus Roofing. 919 F.2d at 1399. The Ninth Circuit affirmed dismissal (although it remanded to allow Local 40 to amend its complaint to attempt to cure the standing deficiency). The court, applying the *Hunt* factors, reasoned that no court had allowed a union standing to sue for purely monetary relief for its members. According to the court, courts have "consistently held" that such claims involve "individualized proof" of each member's loss and "thus the individual participation of association members" is required. *Id.* at 1400. The court rejected the union argument that it had a "special representative obligation[]" to the union members, reasoning that even if this were true, it did not negate the application of the *Hunt* factors to determine standing. *Id.*

In a companion case, the Ninth Circuit also rejected the union's claim that it had direct standing to make a claim on the payment bond because it suffered the "loss of initiation fees, regular dues and working dues" because of A-Plus' failure to pay wages. *Roofers Local 40 v. Union Pac. Ins. Co.*, 948 F.2d 1293 (9th Cir. 1991). The court reasoned that the payment bond, which was required under California law, covered only "the persons named in Section 3181" of the California Civil Code. Section 3181 refers to laborers, trust funds created by labor agreements, claimants making site improvements and hazardous waste contractors. Simply put, "because the Union does not fit any of these descriptions, it has no standing to sue the surety for its losses." *Id.* at 1293.

A union claim on a private project bond likewise failed because the union did not supply "labor" to the project. *Iron Workers Dist. Council v. D.R. Chamberlain Corp.*, 673 N.Y.S.2d 797 (1997). In that case, Industrial Contracting was a subcontractor to Chamberlain. Industrial Contracting also had a collective bargaining agreement with the iron workers' union. In addition to failing to pay benefit fund contributions, Industrial Contracting also failed to pay dues deductions. *Id.* at 798. The union sued on the payment bond, naming Chamberlain as

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principal. The bond defined a "claimant" as "one having a direct contract… with a subcontractor of the principal for labor, material, or both, used or reasonably required for use in the performance of the contract." The court rejected the benefit funds' claims outright because the funds did not have a contract "with a subcontractor" on the project. Because this case involved a privately negotiated bond, the court construed its terms strictly on the premise that parties to a private contract had negotiated the coverage they wanted and the court should not infer additional terms into the contract. The court found, however, that the union itself did have a "contract" with Industrial, a subcontractor. *Id.* at 800. Under the specific terms of the bond, the court nonetheless rejected the Iron Workers' claim because "the Union provided no labor in performance of the contract" and, therefore, was not a proper "claimant" under the bond. The court reasoned that "the bond's language is precise… The security extends to 'labor and material' only, 'in performance of the contract.'" *Id.* at 801.

Union Allowed Standing to Sue on Payment Bond

In essentially similar circumstances to those discussed above, courts have allowed unions standing to sue as claimants on payment bonds, under both associational standing theories and based on direct contract.

Based on Associational Standing

As previously discussed, under the *Hunt* test, courts have concluded that a union would not have associational standing to assert a claim for unpaid wages as it would not be able to satisfy the third prong, *i.e.*, neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Under the test set forth in *Hunt*, courts have consistently refused to find standing to allow a union to bring suit against a contractor. Taken to its next logical step, the union would also be unable to assert a claim against the payment bond, as the surety's liability is no greater than that of its principal. Simply stated, if the union does not have standing to sue a bond principal, it does not have standing to sue its surety. However, in some instances, courts have found otherwise and allowed a union to assert claims on behalf of its members.

At best, the union has an assignment of its members' rights to collect funds.

For instance, *Local 1035 Int'l Brotherhood of Teamsters v. Pepsi-Cola Allied Brothers, Inc.*, 83 F. Supp. 2d 301 (D. Conn. 1999), involved suit brought by twenty-five employees/union members and their union against the employer "alleg[ing] violations of the federal Fair Labor Standards Act ("FLSA") and its Connecticut State Law analog." The plaintiffs alleged that they regularly worked overtime for which they were not compensated. *Id.* at 302. The employer argued that the union lacked standing because, among other reasons, it failed to satisfy the third element of the *Hunt* test in that it was seeking to recover money damages on behalf of its members. *Id.* at 303. The court reasoned that although the "dominating motive for this action is to collect any and all wages and benefits that the plaintiffs have lost as a result of alleged illegal conduct, equitable relief is not beyond the scope of this litigation." *Id.* at 304. Looking to portions of the pleadings in which the union sought "such other legal or equitable relief as the Court deems just," the court concluded that it could assess a penalty with an "equitable component" and, "[t]herefore, the relief requested does not necessarily require the participation of individual members in the lawsuit." Thus, the court held that the elements of the *Hunt* test were satisfied and the union had standing to assert the claim. *Id.*

Similarly, in *Morin v. Empiyah & Co., LLC*, 389 F. Supp. 2d 506 (S.D.N.Y. 2005), the court found that the union had standing. In that case, the union brought suit against the contractor and its surety for unpaid wages and benefits. Although not raised or addressed by the parties, the court considered the question of whether the union had standing to bring the action under the test set forth in *Hunt*. In citing the elements of the *Hunt* test, the court concluded "that plaintiffs, who bring this action as officers and trustees of the Union and various of its trust funds, have standing to sue on behalf of the carpenters." *Morin*, 389 F. Supp. 2d at 510 n.6. In recognizing some courts' concern with the union's ability to satisfy the third prong of the *Hunt* test in similar cases, the court acknowledged that "…the only prong that could seriously be contested is the third—whether the participation of the individual carpenters is required. Although it has been suggested that in some cases suits for damages might not satisfy the third prong, [citation omitted], in this case the uncontroverted affidavits of the plaintiffs provide a sufficient basis on which to resolve the case without the individual participation of each carpenter" and "[i]n any event, the third prong is prudential, and not constitutionally required." *Id.*

Standing Based on Collective Bargaining Agreement

As noted previously, it is settled that union associated fringe benefit funds have standing to bring suit to collect unpaid fringe benefits. The issue of standing, however, becomes significantly less clear when the issue involves the union's ability to bring suit for the collection of unpaid wages on behalf of its members. Wages differ from benefits in that each member receives his or her own wages directly from the contractor, whereas the benefit funds receive the contributions directly from the contractor.

This distinction is important as it takes the union another step away from bringing suit. For example, a union benefit fund, which brings suit under the payment bond for unpaid contributions, asserts its own cause of action as a third-party beneficiary under the payment bond, *i.e.*, the contract breached is a direct contractual obligation to pay the benefit fund. Since the payment bond covers the payment bond principal's promise to pay for labor and materials on the project, the union benefit fund has standing to assert non-payment of contributions as promised by the contractor because the "benefit" portion of the wages is payable directly to the union benefit funds.

Unlike contribution payments, however, the union does not have a contractual right to receive wages from the contractor—its union members do. Therefore, at best, the union has an assignment of its members' rights to collect funds. While not involving the issue of payment bonds, the court in *Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc.*, 102 Cal. App. 4th 765 (2002), held that the union had standing to recover unpaid prevailing wages against the contractor under the California Wage Act. Based on an assignment from the statutory workers, the union sued the contractor for non-payment. Among other arguments, the contractor asserted that the union did not have standing to assert these claims. After reviewing the assignment language, the court determined that the individual employees had sufficiently assigned their statutory rights to sue the contractor for prevailing wages. *Id.* at 774–75. Given the validity of the assignment, the court held that the union did have "standing to sue [the contractor] for recovery of unpaid prevailing wages and waiting time wages." *Id.* at 780.

Similarly, in *Trustees for Mich. Laborers' Health Care Fund v. Warranty Builders, Inc.*, 921 F. Supp. 471 (1996), suit was brought against the contractor and its surety for unpaid wages and fringe benefits contributions for work performed on a school. The surety argued that the union lacked standing to sue on the payment bond as "the statute defines claimants who are authorized to sue against the bond as those who furnish labor and material in the prosecution of work a public works construction project for public educational institutions." *Id.* at 473 (citing Mich. Comp. Laws §129.027 (1986)). Like in *Roofers Local 40 v. Union Pac. Ins.*, the court was challenged with interpreting a state statute requiring certain coverage in a payment bond, here, the Michigan Public Works Act, Mich. Comp. Laws §129.201, *et seq.* In so doing, the court adopted the reasoning set forth in *Carter*. Specifically, the court held the funds' standing was appropriate for two reasons: (1) the labor agreement provided the trustees with the "exclusive right" to enforce its terms, which included contribution payments by the contractor on behalf of its members; and (2) the trustees were not enforcing its exclusive right to recover payment contributions for their own benefit. Rather, the trustees were enforcing such right for the benefit of the individuals who performed the labor and were entitled to payment from the contractor or under the payment bond should the contractor fail to remit payment. *Id.* at 474. Finding that the Supreme Court's reasoning in *Carter* was persuasive and applicable to the Michigan Public Works Act, the court concluded that the union had standing. *Id.* at 475. While the court in its analysis appeared to focus on whether the fund had standing to bring suit for unpaid fringe benefit contributions against the surety's payment bond, the fund was nonetheless seeking unpaid wages in addition to those contributions.

Unlike wages, an argument can be made that the union's collection of dues does not require individualized proof, in that dues are owed directly to the union. Support for this argument can be found in *Bernard v. Indust. Indem. Ins. Co.*, 162 Cal. App. 2d 479 (1958), in which the court, on the basis of this distinction, allowed the fund to seek monetary relief on behalf of its members. Moreover, the court in *Roofers Local 40 v. Ins. Corp.*, 919 F.2d at 140, provided additional clarification of the distinction as follows:

> The key differences are that the trust fund in *Bernard* always collected and was legally responsible for collecting the employer contributions to the fund. Further, the collected money was maintained in a lump sum and was to be used to create general health and welfare benefits to the union members. Here, however, union workers collected their own wages and individual wages were not maintained in a common pool of funds but were particular to the individual workers.

The court further stated that the "significance of these differences is that in *Bernard* the trust could have pursued the monetary relief actions of its beneficiaries without individual participation of the members," nor would it have to distribute any award among the members. *Id.*

Lastly, in Local 538 United Brotherhood of Carpenters & Joiners of Am. v. United Fid. & Guar. Co., 70 F.3d 741 (2nd Cir. 1995), remanded on appeal, affirmed on other grounds by Local 538 United Brotherhood of Carpenters and Joiners of America v. U.S. Fidelity and Guar. Co., 154 F.3d 52 (2nd Cir. 1998), the court found that a union did have standing to assert a claim against the surety under the payment bond for unpaid dues. Local 538 United Brotherhood of Carpenters & Joiners of Am., 70 F.3d at 744.

Conclusion

As shown above, union claims against payment bonds for unpaid wages and dues have fared better in some courts than in others. There is no clear trend of where the cases are going. Rather, the surety faced with such a claim must assess the factors considered by the various courts to determine whether the union itself, or the individual workers, are the proper claimants.