
BREAKFAST MEETING – Wednesday, April 27, 2005

8:30 AM to 10:30 AM

The Cornell Club • 6 East 44th Street • New York, New York

State of the Surety Market

MODERATOR:



JAMES E. MARRAN, JR., Senior Vice President
The Allied Group of Companies

As Senior Vice President of The Allied Group of Companies, Jim Marran is responsible for developing new account prospects, attending major construction industry functions and contributing to the firm's overall management strategies.

Prior to joining Allied, Jim was the President of All Craft Fabricators, a millwork subcontractor serving the Greater NY region, and managed the surety operations of Aetna Casualty and Surety, serving in the company's Garden City, New York and Parsippany, New Jersey offices.

A graduate of Boston College with a Bachelor of Arts Degree in English, Jim is a member of the National Association of Surety Bond Producers; General Contractors Association (GCA); Construction Industry Council (CIC); Subcontractors Trade Association (STA); New York Building Congress; Contractors Financial Management Association (CFMA); and the Associated General Contractors (AGC).

RICK CIULLO, Chief Marketing Officer
Chubb Surety

Rick has recently rejoined Chubb Surety as Chief Marketing Officer. Until January, he was the branch manager of Chubb's Kansas City office. He joined Chubb in 1981 as a surety trainee, and spent 3 years as a surety underwriter in both branch and home office roles. Beginning in 1984, he managed surety departments in Denver, San Francisco and New York City, as well as Chubb's New York zone. He became the Marketing Manager of Chubb's Downtown New York office in 1992, followed by a brief role in Pittsburg as Marketing Manager for the Northern Zone. He moved to Louisville, Kentucky in 1996 to manage Chubb's branch there and then to Kansas City in 1998.

Rick earned a BA in economics and history from Wesleyan University. He continues his education today through TEC, a worldwide organization dedicated to executive level education and development.

THOMAS J. DELUCA, Chief Underwriting Officer
Bond - Construction Services - Northeast/Midwest Region
St. Paul Travelers

Tom graduated from St. Leo's College, St. Leo, Florida, in 1972. In 1974, he began his Bond career with Continental Insurance Company. In 1976, he joined Aetna Casualty and Surety in New York City. He moved through various positions, including that of Associate Manager. In 1992, Tom moved to Aetna's home office in Hartford, Connecticut as a Director in the Contract Surety Division. In 1996, with the merger of Travelers and Aetna's Property & Casualty, he was Vice President for Travelers Property Casualty Corp., Bond Construction Services, in Hartford, Connecticut. In August 2002, he became Chief Underwriting Officer for Bond Construction Services Northeast/Midwest region, the position he currently holds today.

Tom is a member of the Construction Financial Management Association and Past President of the Surety Underwriters of New York City. He has addressed several regional meetings of the National Association of Surety Bond Producers and local chapters of CFMA on various industry issues. He has also addressed loan officers for various financial institutions on risk assessment of a contractor.

CHARLES B. SCHMALZ, Senior Vice President, Surety Operations
Arch Insurance Company

Brian's professional experience began in 1970 with Seaboard Surety in Chicago. He then moved to Hawaii as Branch Manager of the Honolulu office through 1979. He continued with Seaboard in New York from 79-80 as VP Western Operations. In 1980, Brian joined United Pacific Insurance Company as Vice President of Surety, out of Tacoma, Washington. In 1987 he moved to Philadelphia as COO of Reliance Surety and in 1995, Brian attained the position of President and Chief Executive Officer of Reliance Surety. Brian joined the Kemper organization in April, 2001 as President of Kemper Surety. In March, 2003 he was named Sr. Vice President at Arch Insurance Company after Arch acquired the Kemper surety operation.

Brian served as Chairman of the Surety Association of America from 1999-2000 and as Vice Chairman from 1998-1999. During the 1966-78 time span, he served in the U.S. Marine Corps; 4 years in active service and 6 years in the reserves attaining the rank of Major.



President's Message

The New York City Chapter is moving full steam ahead. We are well on our way to achieving the goals set forth by the Board of Directors which has developed plans for interesting and timely topics for membership meetings, recruiting new members and producing our quarterly newsletter.

One individual who has been the key to the CFMA's New York City Chapter prospering is Henry L. Goldberg, Esq. Henry has steadfastly supported the Chapter over many years. He has clearly set an example of leadership and professionalism. Henry not only gave of his time and talent, he also made the resources of Goldberg & Connolly available to CFMA for various projects. We are grateful for his consistent support.

I want to encourage our members to become actively involved in CFMA. The organization offers many opportunities for you to meet, network and establish relationships with your peers in the industry. Active involvement and a commitment on your part will enhance your professional and technical skills in addition to making your job as a financial manager in the construction industry easier and more rewarding. Make it a point to attend our April 27th meeting at The Cornell Club and listen to our panel of speakers discuss the State of the Surety Market.

See you there.

Joseph L. Sagaria, President

Your Newsletter Editor

Your newsletter editor is always looking for information about you and other chapter members as well as significant issues concerning our New York City community relative to accounting and business matters. Please forward all personal notes for possible inclusion in the newsletter to the editor:

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New Members:

Send or bring a friend or business associate to a CFMA meeting!

Your help is needed to keep our Chapter growing. Please submit the name of a prospective candidate who might be interested in CFMA membership to our Director of Membership:

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The New, Private Sector "Prompt Payment" Law Remember The "Non-Waivable" Provisions!

by Henry L. Goldberg, Esq. and Joseph J. Sisca, III, Esq.

Private sector construction contracts are now subject to the same type of "prompt payment" regulations that have long been a feature of public sector contracting. In the "Construction Contracts Act" (effective for contracts entered into on or after January 14, 2003), the New York legislature established payment procedures to limit unjustified payment delays by private sector owners, developers, contractors and subcontractors to downstream parties. The Act prescribes billing and payment cycles and outlines available remedies for non-compliance. In sharp contrast to the public sector law, however, many of the provisions of the Act can be modified by agreement between the parties. In other words, the Act provides a "default" system if the construction agreement (e.g., subcontract) is silent, but allows the parties, in certain instances, to modify payment procedures to suit the particular needs of a project and to reflect the realities of their respective bargaining positions.

Considering the economic advantage of owners and contractors to control the terms of their private sector contracts and subcontracts, this ability to "opt out" is an invitation to undermine the new statute and relax payment obligations. It is important to note, however, that there are some important provisions safeguarding lower-tier payees that can not be modified by contract.

The "Non-Waivable" Remedies

Right to Walk off the Job

The most dramatic new remedy available to unpaid parties is the ability to suspend performance for non-payment. In fact, it is hard to imagine that the legislators fully appreciated what a dramatic departure this was from business "as usual" in the construction industry. If unpaid for more than thirty days from when payment is due, unless the payment period is modified by contract, an unpaid contractor or subcontractor may actually suspend its work without fear of termination. What's more, it would be automatically entitled to an extension of time to complete the work corresponding to the length of the self-imposed suspension. This is an extraordinarily powerful self-help vehicle.

The right to suspend is contingent upon the suspending contractor's providing at least ten days' written notice to the party with whom it is in contract of its intention to suspend its work. The party owing the money may cure the default at any time during those ten days. Furthermore, the Act specifically provides that any contract clause which attempts to prevent a party from being able to suspend performance for non-payment will be deemed null and void.

Right to 12% Interest

The Act also provides that any untimely payment (whether calculated using the statute's billing cycle or any billing cycle established within the contract) will accrue interest at the rate of 1% per month. The applicability of interest also cannot be waived by contract, and the Act provides that the interest rate may only be adjusted upward.

Although billing and payment cycles may be modified,

the Act requires that subcontractors be provided with written notice, at the time the subcontract is entered into, of the dates when payments of approved requisitions will be made. In addition, subcontractors have the right to demand in writing that owners advise the subcontractors within five days after making payments to the general contractor when the payment was made. These notice rights also cannot be waived by contract. Further, failure to accurately disclose the information will void any contractually modified due dates and the billing and payment cycles will revert to those listed in the Act.

Finally, in order to prevent the "back door" avoidance of the Act's provisions by designating the law of another state, the Act requires that any contract for a construction project located in the state (except a material supply contract) must be interpreted under New York law. Further, the Act states that no contract (again, except a material supply contract) can require litigation or other dispute resolution procedures to be held in any state other than New York.

Goldberg & Connolly Commentary:

The legislature afforded owners, contractors and subcontractors the ability to "opt out" of significant portions of the Act. Payment timetables and procedures may be modified by negotiation. However, extremely potent new tools such as the right to suspend work, the subcontractor's right to demand notice of any payment made by the owner to a general contractor, and the right to 12% interest, cannot be stricken from the contract.

Lurking in the background is the landmark New York Court of Appeals decision in *West-Fair*, which held that "pay-if-paid" provisions are void as against public policy; while "pay-when-paid" provisions, if reasonable, are enforceable. The Act suggests, however, that a contractor's obligation to pay a subcontractor may be conditioned upon the owner's payment to the contractor.

The Act, in part, states:

.....the contractor shall pay to the subcontractor, and each subcontractor shall in turn pay to its subcontractors, the full or proportionate amount of funds received from the owner for each subcontractor's work and materials based on work or services provided under the construction contract, seven days after receipt of good funds for each interim or final payment, provided all contractually required documentation and waivers are received.

This language seems to contradict the *West-Fair* ruling. In order to preserve their rights under *West-Fair*, subcontractors will need to include language in their subcontracts specifically avoiding any provisions that apparently conditions payment from their general contractor on payment from the owner.

Contractors, on the other hand, may want to argue that the new legislation is entitled to be taken literally, thereby modifying the *West-Fair* decision's effect. Certainly, we have not heard the end of this apparent inconsistency between the *West-Fair* ruling of New York's highest court and the legislature's "Construction Contracts Act of 2003."

c/o Robert J. Brewer, CPA, CCFP
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**CONSTRUCTION FINANCIAL MANAGEMENT ASSOCIATION
NEW YORK CITY CHAPTER**
Cordially invites you to attend a
BREAKFAST MEETING
State of the Surety Market

Moderator: James E. Marran, Jr. – Senior Vice President
ALLIED NORTH AMERICA

Panelists: Rick Ciullo – Chief Surety Officer
CHUBB SURETY

Thomas J. DeLuca – Chief Underwriting Officer
Construction Services, Northeast/Midwest Region
ST. PAUL TRAVELERS

Charles B. Schmalz – Senior Vice President
ARCH INSURANCE COMPANY

Date: Wednesday, April 27, 2005
Time: 8:30 a.m. - 10:30 a.m.
Location: The Cornell Club
6 East 44th Street
New York, New York

Drawing for a Free Registration to
The CFMA National Conference in Boston
May 21 - 25, 2005

REGISTRATION FORM
April 27, 2005 - 8:30 a.m.

Name: _____

Company: _____

Address: _____

Telephone: _____

Email: _____

I plan to bring the following guests _____

I am unable to attend, but have an interest in future activities of CFMA

Registration fee is \$25.00 for members and non-members. Each member may bring one guest free of charge. Please mail this section, along with a check, by April 25th to Eileen Wunsch, c/o Goldberg & Connolly, 66 N. Village Avenue, Rockville Centre, NY 11570 (516) 764-2800. Please make checks payable to CFMA – NYC Chapter.