

The Intricacies of Underwriting Notary Bonds—

The Commercial Bonds Critical to Our Daily Business Transactions

SURETIES OFTEN ISSUE NOTARY BONDS IN LARGE BATCHES. PREMIUMS CHARGED ARE RELATIVELY NOMINAL, AS THE VAST MAJORITY OF NOTARIES WILL COMPLETE THEIR COMMISSION WITHOUT EVER RECEIVING A BOND CLAIM.



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ONE OF THE most common types of commercial bonds issued by sureties is the notary bond. However, given the relatively small penal sum (and premiums) for these bonds, they are often overlooked in the industry. However, they hold an important role in the daily transaction of business, especially real estate transfers. This article will provide a brief overview of notaries, notary bonds, and other issues relating to such bonds, including underwriting concerns.

I. Overview and Purpose of Notary Bonds

A. WHAT IS A NOTARY?

A notary public is commissioned by local governmental authorities (often, a state or county) and charged primarily with certifying the identity of a party who is signing (or has signed) a document. Any document can require notarization, but among the most frequent are real estate documents (deeds, mortgages, etc.) and legal documents (affidavits, agreements, releases, etc.).

No matter what the document, the primary purpose of the notary is to assure any party relying on a document's signature that the person signing is, in fact, the person who is supposed to be signing. In other words, the notary is involved to confirm the identity of the signing party.

Because the notary is appointed by a governmental unit, and given the requirement that a notary ensure the identity of a signing party, notaries are important in that they provide a level of comfort to parties engaged in a transaction.

B. PROCEDURE FOR BECOMING A NOTARY

While notaries are commissioned by a governmental unit, notaries are not generally governmental employees. Typically, the only requirement to become a notary is that an application be submitted and a bond be obtained. The governmental unit responsible for commissioning notaries may perform some minimal background check (for a criminal record, for example) before granting the notary commission.

In some instances, the notary is required to obtain a notary bond prior to submitting the application. In other states, the notary first applies to become a notary and, once accepted, obtains a bond. In either case, a notary must contact a local bond producer to obtain a notary bond. Those producers typically provide simple forms for the prospective notary to complete in order to obtain the bond, as well

as any necessary supplies (such as stamps and seals, along with blank notary log books).

C. PURPOSE OF BONDS

As with other bonds, the purpose of a notary bond is to compensate persons or entities incurring a loss based on the misconduct of a notary. Without a bond, aggrieved parties would likely have a very difficult time collecting any damages against notaries who may not have the financial ability to pay a judgment, which could be many thousands of dollars. Bonds are statutorily required, and it is often the case that the specific language in the bonds are set forth by statute as well.

II. Underwriting Issues

A. PENAL AMOUNT OF BONDS

Some states do not require notary bonds at all, while other states require bonds in differing penal amounts. These generally range from \$500 to \$25,000.¹ The bond amount is generally set at the state level, but notary bond amounts in Kentucky vary by county.

A surety's liability is generally limited to the penal amount of the bond over the entire length of the notary's commission, which varies by state. Typically, a notary's commission lasts four to six years.

B. ISSUANCE OF NOTARY BONDS

As opposed to many bonds that are written individually, sureties often issue notary bonds in large batches. Premiums charged are relatively nominal, as the vast majority of notaries will complete their commission without ever receiving a bond claim.

C. NO INDIVIDUALIZED UNDERWRITING

While sureties will review financial backgrounds and work history of bond applicants with respect to various contract and commercial bonds, there is not the same level of scrutiny with respect to notary bonds. Generally, sureties ensure only that

the bond applicant has been deemed a proper candidate for a notary commission by the governmental unit, and there is no further inquiry by the surety. In other words, there is no individualized underwriting that takes place prior to the issuance of a notary bond.

D. E&O COVERAGE

The business model for notary bond producers has trended toward offering the prospective notary a free errors and omission policy, which would cover the same length of time as the notary commission. The amount of coverage is typically \$10,000, but additional coverage can be purchased by the notary for an additional premium.

These policies typically provide that the insurer will pay the notary's defense costs with respect to a claim made against the notary based on a notarization within the policy period. The policy would also cover liability found against the notary with respect to such notarization. However, many policies are "burning limits" policies, which provide for a combined policy amount covering both losses and costs/expenses. Accordingly, once the insurer has spent the policy limit in expenses related to the defense of the notary, no further amount will be available to pay a loss or judgment against the notary. Note also that these policies typically exclude intentional conduct by the notary, thereby precluding coverage to the extent the notary knowingly notarizes a document in contravention of his or her statutory duties.

III. The Duties of a Notary

A. WITNESSING A PERSON'S SIGNATURE

A notary's duties are generally governed by statute.² One of those duties is to be in the presence of the signing party at the time of the notarization. Note that the notary is not necessarily obligated to witness the person actually signing the document, as long as the person acknowledges the signature to the notary, in person.

B. CONFIRMING THE IDENTITY OF THE SIGNING PARTY

In addition to being in the presence of the witness at the time of notarization, the primary role of the notary is to confirm the signing party's identity. Many states' statutes enforce this obligation through a requirement that the notary obtain "satisfactory evidence" of the person's identity. Satisfactory evidence can be obtained in one of three ways, typically:

1. Personal knowledge by the notary of the person signing the document;

2. Verification of identity through a driver's license or a similar identification card; or
3. Obtaining the sworn word of a credible third party who knows both the notary and the signing party.³

C. KNOWLEDGE OF THE DOCUMENT CONTENTS

Notaries are generally not required to read and/or understand a document prior to notarization. However, a notary could be deemed to have breached his or her duties by notarizing a document

that the notary knows to be false or contains blank spaces.⁴

D. MISCELLANEOUS REQUIREMENTS

State laws may require the notary to take other actions or precautions. For example, some states may require notaries to maintain a notary log, in which they keep specific records of each notarization. Other states might not require the log but mandate that a notary who maintains a log must not dispose of it for a certain number of years.

Additionally, some states may require that a notary maintain his or her seal/stamp or notary log in a secure location, such as a safe, locked drawer, or cabinet.

E. ETHICAL CONCERNS

While not legally binding on a notary, the National Notary Association has put together a Notary Public Code of Professional Responsibility.⁵ Because statutes do not always cover every situation a notary might face, the Code of Professional Responsibility provides further guidance to notaries in performing their duties.

IV. Claims Issues

A. NOTIFICATION OF CLAIM

A surety might receive notice of a claim in one of two ways. First, it may receive notice from a claimant directly. For example, a person who has sustained damages by virtue of an improper notarization could make a claim directly against the notary bond surety. The claimant can generally obtain a copy of the notary bond from the state or county.

The other possibility is that a claim is made only against the notary, as persons often are not aware of the existence of a notary bond. The notary then might contact the surety, seeking a defense under an E&O policy. Note that this initial contact would often come directly to the bond producer, rather than the surety itself, as the producer is the one with whom the notary first dealt to obtain the bond. Accordingly, the producer would then

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be in a position to pass the claim along to the surety itself, which will make a determination with respect to defense of the claim.

Even in the absence of an E&O policy, the notary may notify the surety (or producer) of a claim. However, in that case, the surety has no obligation to pay for the notary's defense of a claim or lawsuit.

B. WHO IS A PROPER CLAIMANT?

A claimant is typically a person, entity, or governmental agency that has suffered monetary loss through the official misconduct of the notary. This could be the person whose signature was forged on a deed, causing that person to lose possession of the property. It could also be a mortgage holder that unknowingly provided a loan to (and accepted a mortgage from) a person who obtained real estate by way of forgery. In the latter case, the mortgage would likely be deemed null and void, given that the true title holder of the property (once the forged deed is set aside) did not authorize the mortgage or receive any of the funds from the loan.

A claimant could also be a surety that relied on a signature on an indemnity agreement, to the extent the signature later proved to be a forgery, despite the fact that it was notarized.

Note also that some state statutes may require the claimant to obtain a judgment against the notary prior to making a claim on the notary bond. To the extent both the notary and the surety are named initially as parties to a lawsuit, the surety could take the position that it should be dismissed from the suit until a judgment against the notary is obtained. A surety may sometimes opt to remain in the suit, to better control the matter and ensure that the proper defenses are raised.

C. DAMAGES RECOVERABLE

Damages are limited to the penal amount of the bond. As noted above, the statutes and/or bonds usually require proof of "monetary loss." Accordingly, there may be no damages from a technical violation by the

notary, such as a failure to maintain a notary log.

In some situations, costs and attorneys' fees may be recoverable from a notary or the surety, depending on the wording of the bond and/or statute. While general litigation fees and expenses may not be recoverable, a court may find that the costs (including attorneys' fees) of quieting title constitute the damages suffered by a person whose signature was forged, causing him or her to lose title to the property.

Note that, while the surety's liability is limited to the penal amount, there is no similar limit to the amount of liability faced by the individual notary.

D. DECISION TO DEFEND

Because penal limits of notary bonds are often very small compared to the surety's exposure with respect to other bonds, a surety must decide whether and to what extent it defends a claim on a notary bond. For example, in those states that require a \$5,000 (or less) notary bond, the surety may determine that the cost of litigation will exceed that amount. Even to the extent a surety decides to defend a claim on the bond, the litigation may necessarily involve less discovery than other matters, in order to keep expenses to a minimum. A surety should be aware, though, that a decision to pay a claim over the notary's objection could result in a later assertion by the principal that the surety wrongfully paid the claim. In that case, the notary may defend a subsequent indemnity lawsuit by arguing that the surety knowingly paid an invalid claim as a "volunteer."

V. Defenses of Notary and/or Surety

A. COMPLIANCE WITH STATUTORY DUTIES

First and foremost, a notary or surety can defend on the basis that the notary's conduct conformed with statutory obligations. To the extent the notary can prove (by way of the maintenance of a notary log, or the testimony of other witnesses who were present)

that the notary obtained "satisfactory evidence" of the person's identity, the notary may have no civil liability. This may be true even if it is shown that the signature was a forgery. For example, to the extent the notary was shown false identification, the notary may be able to show that he or she nevertheless performed his or her duties in reliance on that identification.

In some cases, it may be necessary to obtain an expert handwriting analysis in order to prove that the signature is genuine despite claims to the contrary by the signing party. In any event, the best defense to a notary claim is that the notary did nothing wrong.

B. LACK OF PROXIMATE CAUSATION

Another potential defense is that, despite there being an admitted breach of duty by the notary, such breach did not "proximately cause" the injury to the claimant. For example, if a notary did not actually meet with the signing party at any time, the notary would have breached his or her duties by notarizing the document nevertheless. However, to the extent the signing party actually *did* sign the document in question, the notary's breach would not have been a "proximate cause" of any damages. In other words, the notary's job was to ensure the identity of the person signing. If the identity of the person signing is not in question, then there were no damages flowing from the breach by the notary. This provides another potential defense to a notary and his or her surety.

C. MISCELLANEOUS DEFENSES

There may be other defenses of which a notary or the surety may avail themselves. For example, to the extent the notarized document contains inaccuracies, the notary should not be responsible for the contents of the document. However, as noted above, a notary should ensure that there are no blanks in the document.

Additionally, the notary may have a statute of limitations defense, depending on when the notarization took place and when the aggrieved party

knew or should have known about the issue. Because a surety is typically entitled to assert the defenses of the principal, the surety may also have the same statute of limitations defense.

Note that the notary statutes might not contain a separate statute of limitations, in which case the general tort statute of limitations is likely the one to which a court would look with respect to claims against the notary. However, this could provide a problem because the statute of limitations relating to the surety might be the potentially longer

contractual statute of limitations, as the claim against the bond is based on a contract. In that case, the surety should still seek to apply the shorter tort limitations period for the claim against it, given that a surety should not be liable to the extent the principal is not liable.

VI. Indemnity Issues

As noted above, there is typically no individual underwriting with respect to notary bonds. Accordingly, sureties and/or bond producers typically do not obtain written indemnity agreements

from the notaries. In that case, sureties would be left to argue an entitlement to indemnification based on that state's common law of indemnification, which provides that a surety is entitled to reimbursement from its principal for any losses related to the issuance of a bond for that principal.

Note, however, that, depending on the state, common law rights may not include a right to reimbursement for costs and attorneys' fees. Accordingly, without an indemnity agreement, a surety may only be entitled to recover its actual losses, and not its expenses incurred with respect to defending a claim or a lawsuit. ●

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End Notes

- 1 For information on bond requirements in each state, see The American Society of Notaries' website at <https://www.asnnotary.org/?form=stateinfo>.
- 2 Various states have adopted the Model Notary Act, a copy of which can be found at the National Notary Association's website. See https://www.nationalnotary.org/file%20library/nna/reference-library/2010_model_notary_act.pdf.
- 3 See Model Notary Act §2-20 (2010).
- 4 See Model Notary Act §5-8 (2010).
- 5 The Notary Public Code of Professional Responsibility can be viewed or downloaded at The National Notary Association's website, at <https://www.nationalnotary.org/knowledge-center/reference-library/notary-public-code-of-professional-responsibility>

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