No. CTQ-2016-00004

To be argued by:
ERIC DEL POZO

State of New York
Court of Appeals

KARINE GEVORKYAN, ARTHUR BOGORAZ,
INNA MOLDAVER and SAM MOLDAVER,

Appellants,

-against-

IRA JUDELSON,

Respondent.

On Appeal from the Question Certified by the
United States Court of Appeals for the Second Circuit
in Docket No. 15-3249

BRIEF FOR AMICUS CURIAE NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES

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INTEREST OF AMICUS CURIAE

The New York State Department of Financial Services (DFS), led by Superintendent of Financial Services Maria T. Vullo, submits this *amicus curiae* brief to assist the Court in answering a question of state law certified by the United States Court of Appeals for the Second Circuit. The certified question is whether an insurer or its agent must return the premium paid by or on behalf of a criminal defendant for a bail bond if bail is later denied at a sufficiency hearing and the defendant is never released. The answer is yes. Under the Insurance Law, as confirmed by well-established common-law principles governing insurance contracts, an insurer earns a premium for a bail bond only when it incurs risk on the transaction, and no risk attaches if the defendant is never released.

DFS has a direct interest in the answer to this question. As the State's insurance regulator, DFS licenses and oversees the bail bond industry in New York, and has successfully pursued enforcement activity against bail bond agents for engaging in unscrupulous practices. *See, e.g.*, *Matter of Zouvelos v. N.Y. State Dep't of Fin. Servs.*, 124 A.D.3d 416 (1st Dep't 2015). Moreover, DFS

has broad authority to promulgate insurance regulations and issue guidance governing the bail bond industry.

DFS thus has an interest in presenting this Court with the correct interpretation of the laws that DFS enforces—particularly where, as here, neither party has correctly construed New York law. This Court's reading of state law will directly affect DFS's ability to regulate bail bond premiums. The outcome here also will affect DFS's strong consumer-protection mission. *See* Financial Services Law §§ 102(j)–(l), 201(b)(2)–(7), 301(c)(1). The consumers who require protection include the families and friends of criminal defendants who put up the money for a bond that will get their loved ones out of jail. Such people are often easily exploited because they are under pressure to act quickly and have little or no leverage or understanding of the process. An erroneous answer to the certified question could seriously impair DFS's ability to protect these individuals.[1]

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[1] After receiving consumer complaints about the improper retention of bail bond premiums, DFS was considering issuing industry guidance or a proposed regulation when it learned last

QUESTION CERTIFIED TO THIS COURT

The Second Circuit has certified the following question:

Whether an entity engaged in the "bail business," as defined in Insurance Law § 6801(a)(1), may retain its "premium or compensation," as described in Insurance Law § 6804(a), where a bond posted pursuant to Criminal Procedure Law § 520.20 is denied at a bail-sufficiency hearing conducted pursuant to Criminal Procedure Law § 520.30, and the criminal defendant that is the subject of the bond is never admitted to bail.

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year that this Court had accepted the certified question in this case. In order to take account of this Court's resolution of the statutory question presented here, DFS deferred taking any such regulatory action and instead presents its interpretation of the relevant laws to this Court.

STATEMENT OF THE CASE

A. New York Law Governing Bail Bonds

1. The Department of Financial Services' regulation of bail bond sureties and agents in New York

DFS is New York's insurance regulator.[2] The Legislature has vested DFS with expansive regulatory authority over financial products and services, including bail bonds. *See* Financial Services Law § 302; Insurance Law § 301; *see also Ostrer v. Schenck*, 41 N.Y.2d 782, 785 (1977).

"A bail bond is security which seeks to assure the defendant's appearance in court in a criminal proceeding." *People v. Pub. Serv. Mut. Ins. Co.*, 37 N.Y.2d 606, 611 (1975). Bail bonds are issued by insurance companies (also known as "sureties"), but are typically sold by bail bond agents (or "bail bondsmen"), who interact directly with the criminal defendants and their supporters. "In return for the State's release of the defendant from jail, the surety has pledged

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[2] DFS was created in October 2011 by merging the New York State Banking Department and the New York State Insurance Department. For simplicity, this brief will use "DFS" throughout to refer to the State's insurance regulator.

itself to assure the return of the defendant to court." *Id.* "If the defendant 'jumps' his bail, the surety's security will be forfeited." *Id.* To insulate itself against that risk, a surety typically demands indemnification in the form of collateral. Those who put up such collateral are known as "indemnitors."[3]

DFS has long overseen the bail bond industry, including both insurance companies and their bail bond agents. No "person, firm or corporation" may engage in the bail bond business in New York without a license from DFS. Insurance Law § 6801(b)(1). The licensure requirement extends to anyone who "execute[s] as surety any bail bond" and has "given such bail" more than twice in a month. *Id.* § 6801(a). The requirement also extends to the "employees, officers and agents" of a bail bond company. *Id.* § 6802(b). DFS may pursue discipline against a bail bond agent who has engaged in "dishonest practices or other misconduct," including if such agent has "charged or received, as premium or compensation for the

[3] This brief will refer collectively to the criminal defendant, any indemnitors, and anyone who pays the premium as a bail bond's "proponents."

making of any deposit or bail bond, any sum in excess of that permitted by law." *Id.* § 6802(k)(3)–(4).

Insurance Law § 6804 regulates the "premium or compensation" for "giving bail bond." As that section provides, "[t]he premium or compensation for giving bail bond . . . shall not exceed" 10% of the amount of bonds up to $3,000, plus additional amounts for larger bonds. *Id.* § 6804(a).[4] The statute prohibits "any greater compensation for . . . giving bail" and any additional "fee or compensation . . . for obtaining [a] bail bond." *Id.* § 6804(b)(1)–(2).

Bail bond agents were made subject to state regulation in 1922 via provisions added to the Code of Criminal Procedure, which over time were moved to the Insurance Law. *See* Code Crim. Pro. § 554-b, ch. 303, 1922 N.Y. Laws 686 (eff. Sept. 1, 1922); *see also, e.g.*, Ch. 545, § 18, 1971 N.Y. Laws 1481. State regulation sought to address "the many abuses that ha[d] arisen" from "the frauds and

[4] Section 6804(a)'s payment ceiling was raised most recently in 1997, as "an incentive" for bail bond issuers "to assume more risk." Introducer's Mem. in Support, S. 114 (1997). (Addendum 38.)

machinations of professional bondsmen." Approval Mem., *reprinted in* Bill Jacket for ch. 303 (1922). (Addendum ("Add.") 11.)

As New York's Superintendent of Insurance explained at the time, the "bail bond situation" in 1922 was "a disgrace." Ltr. from Superintendent Stoddard to T. Stagg (Mar. 22, 1922), *reprinted in* Bill Jacket for ch. 303, *supra*. (Add. 16.) For example, bail bond agents would pursue "any amount that they [could] get" above their allowable commissions from insurers, such as by attempting "to keep the entire amount" of any property extracted from "the person seeking the bond." (Add. 16–17.) As New York City's chief magistrate remarked, regulation of such agents served "a great public purpose" because "there [was] no telling how far they would rob . . . poor unfortunate women"—a reference to the wives who needed to post bail for their errant husbands. Ltr. from W. McAdoo to Gov. Miller (Mar. 21, 1922), *reprinted in* Bill Jacket for ch. 303, *supra*. (Add. 13.)

2. Bail sufficiency hearings

As enacted in 1922, the legislative scheme regulating bail bond agents included a provision that empowered courts to probe the source or sufficiency of any funds or other property used to pay for a bail bond or to provide collateral for the bond. Such a proceeding has come to be known as a "bail source" or "bail sufficiency" hearing.

The 1922 law authorized a court to "examine under oath any proposed bondsman" or "the officer of any corporation proposing to execute a bail bond" to determine whether the property supporting the bond was "feloniously obtained." Code Crim. Pro. § 554-b(2). (Add. 6.) If the court was satisfied that the underlying collateral was sufficient and not tainted, then "[u]pon the allowance of bail and the execution of the undertaking," the law mandated "the discharge of the defendant" by the court. Code Crim. Pro. § 576 (in effect 1881–1971). (Add. 2.)

The statute permitting source inquiries was moved in 1971 to the Insurance Law, where it exists today in substantially similar form. *See* Insurance Law § 6803(b). Other procedures governing

bail bonds currently exist in the Criminal Procedure Law (C.P.L.), the successor to the Code of Criminal Procedure. *See* C.P.L. §§ 500.10–540.30. A brief summary of those bail procedures follows.

For the period of time when a criminal defendant is awaiting trial, the court "must, by a securing order, either release him on his own recognizance, fix bail or commit him to the custody of the sheriff." *Id.* § 510.10. A securing order fixes bail by declaring that, if a certain amount of money (or a bond reflecting that amount) "is posted on behalf of [the defendant] and approved," then the court "will permit [the defendant] to be at liberty during the pendency of the criminal action." *Id.* § 500.10(3).

As defined in the C.P.L., a bail bond is "a written undertaking" by one or more "obligors" (a term that could include the surety, its agent, and the proponents of a bond) that the defendant will appear in court "while at liberty as a result of an order fixing bail and of the posting of the bail bond in satisfaction thereof." *Id.* § 500.10(13). The C.P.L. further states that if the defendant fails to return to court, then the obligors "will pay to the

people of the state of New York a specified sum of money, in the amount designated in the order fixing bail." *Id.*

Once the criminal court has fixed the bail amount, a defendant (or others supporting his release on bail) may "post bail" by "deposit[ing] bail in the amount and form fixed by the court, with the court." *Id.* § 500.10(8). A bail bond is posted under this definition if certain documents are filed with the court, including a bond application and supporting affidavits that meet specified criteria. *See id.* § 520.20.

The posting of a bail bond does not automatically entitle the defendant to release. As a threshold matter, the court "must examine the bail" to determine whether it complies with the order fixing bail, *id.* § 510.40(3)—for example, whether the bond is "in the amount designated in the order," *id.* § 500.10(13).

In addition, at a prosecutor's request, the court may conduct a bail sufficiency hearing. *See id.* § 520.30. At such a hearing, the court examines the posted bail bond to determine "whether any feature of the undertaking contravenes public policy." *Id.* § 520.30(1).

This inquiry may extend to any "matters appropriate to the determination." *Id.*

As relevant here, a court is authorized to examine various factors associated with the bond's proponents. For example, the court may inquire into whether "any money or property" used to procure the bond (whether as collateral or premium) "constitutes the fruits of criminal or unlawful conduct." *Id.* § 520.30(1)(b)–(c). Similarly, the court may inquire into the "background, character and reputation" of anyone who has "agreed to indemnify" the surety. *Id.* § 520.30(1)(d).

In addition, the court may examine factors that are unrelated to the bond's proponents. For example, a court may reject a proposed bail bond due to concerns about "the qualifications of the surety-obligor and its executing agent," *id.* § 520.30(1)(a), or "the value and sufficiency of any security offered," *id.* § 520.30(1).

B. Judelson's Retention of a "Premium" for a Bail Bond that Never Went into Effect

The certified question arises from a dispute over $120,560 paid by appellants to respondent Ira Judelson, as a premium for a bail bond intended to secure the release of appellant Arthur Bogoraz from jail. The following summary of the underlying facts derives from trial testimony and documentary evidence in this case, as well as from information in the public record.

1. The proposed bail bond

In 2011, Arthur Bogoraz was arrested and indicted on charges of perpetrating a multimillion-dollar no-fault insurance fraud scheme. The New York Office of the Attorney General ("the prosecutor") conducted the investigation and prosecuted the case.[5] (*See* App'x (A.) 258, 261.) Bogoraz fled the country to evade the

[5] DFS's criminal investigators assisted in the fraud investigation. *See* A.G. Schneiderman Announces Conviction and Jail Time in Multi-million Dollar Insurance Scheme (June 26, 2013), https://ag.ny.gov/press-release/ag-schneiderman-announces-conviction-and-jail-time-multi-million-dollar-insurance.

charges. He was later arrested in Puerto Rico en route to reentering the United States. (A. 87–89.)

Supreme Court, Kings County, fixed bail at $2 million. (A. 91, 258.) Karine Gevorkyan, Bogoraz's spouse, sought to obtain a bail bond from two successive companies—and paid a premium to each—but each declined to post the bond and refunded the money because of concerns that Bogoraz was a flight risk. (A. 95–96, 201, 226, 258–260.) Gevorkyan then approached Judelson, a bail bond agent for International Fidelity Insurance Company. Judelson agreed to post a $2 million bond. (A. 98–107, 173–174, 216–217, 240.)

After the parties signed certain paperwork, Gevorkyan gave Judelson a check for $120,560, representing the premium for the bond.[6] (A. 106, 238.) The funds were drawn from a savings account of appellants Sam and Inna Moldaver, friends of the Bogoraz family, allegedly as "a gift." (A. 110, 130, 167.) The Moldavers and

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[6] As the federal district court observed, this amount exceeded by $300 the statutory maximum for a bail bond premium under Insurance Law § 6804. (A. 53.) The excess $300 was ordered refunded and is no longer at issue.

other proposed indemnitors also identified various real properties as collateral for the bond. (A. 128–129, 242–253, 255.)

The parties' transaction is reflected in (1) a bail undertaking signed by Judelson, on behalf of International Fidelity (A. 241); and (2) an indemnity agreement signed by Gevorkyan (A. 244–245). Judelson testified that these documents governed "[n]ot just the premium," but "everything involved in the case." (A. 205.) The indemnity agreement refers twice to the premium. In the first paragraph, Gevorkyan agreed "immediately" to pay "the premium for the bond" upon the insurer's "executing or procuring to execute, or guaranteeing, or continuing the bond." (A. 245.) In the fifth paragraph, the insurer reserved the option "at any time, and for any reason satisfactory to it, to surrender the principal [i.e., Bogoraz]" and "return the unearned premium." (A. 245.)

These documents contain no term explicitly making the premium nonrefundable in the event that bail was denied. Judelson testified that he orally explained to appellants that the premium would be "earned" when "the bond was posted" (A. 269), and that it would not be refunded if the judge chose to "deny the bail" (A. 209).

Judelson's employee, Yousef Jabr, claimed to have made this point "many times" to appellants. (A. 180–181.) Gevorkyan countered that these discussions "never" happened.[7] (A. 261.)

2. Judelson's retention of the premium after the bond's rejection

Supreme Court held a source hearing on the Bogoraz bond in March 2012. (A. 241, 253, 258.) The prosecutor argued at the hearing that the Moldavers could not account for their receipt of the funds forming the premium; that the proposed valuations and sources of the collateral properties also were questionable; and that the bond's proponents had thus failed to show that these assets were not the product of criminality. Supreme Court accepted the

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[7] In February 2015, in a regulatory communication in connection with Jabr's licensing application, International Fidelity represented to DFS that its bail bond agents will provide to indemnitors various documents including a form "Bail Bond Agreement" and "Premium Receipt" that state, respectively, that the "premium for the Bond is fully earned upon Defendant's release from custody" and that "the premium owing or paid is fully earned upon the Defendant's release from custody." Such language is consistent with DFS's interpretation of the law and contractually forbids International Fidelity or its agents from retaining a premium when a criminal defendant is not released on bail. However, those documents are not part of the transaction here.

prosecutor's arguments and, in April 2012, disapproved the bond. (A. 249.) Bogoraz was therefore not released. (A. 107, 262.) The bond denial was affirmed on appeal. *See People ex rel. Aidala v. Warden*, 100 A.D.3d 667 (2d Dep't 2012).

Bogoraz then pleaded guilty to fraud and money laundering and was sentenced to three-and-a-half to seven years' imprisonment.

C. Procedural History

After bail was denied, appellants asked Judelson to refund the premium. Judelson refused. (A. 123, 168, 255, 266.)

In November 2013, appellants filed this federal diversity action seeking recovery of the $120,560 paid to Judelson for the rejected bond application. The amended complaint asserts claims for breach of contract and unjust enrichment. (A. 57–67.) As relevant here, the complaint alleges that the criminal defendant's release from custody is a "condition precedent" to earning a bail bond premium. (A. 62, 64.)

1. The district court finds for Judelson

The federal district court conducted a bench trial in March 2015 and ruled for Judelson on all claims. (A. 26–56.)

The district court concluded that the parties' written agreement "does not specify at which point the premium is earned." (A. 41.) The court thus viewed the contract as ambiguous and resolved the perceived ambiguity with extrinsic evidence. (A. 41.) In particular, the court found "credible" Judelson's testimony that he explained to appellants that the premium would be earned when the bond was posted, "in advance of the sufficiency hearing." (A. 44.) And the court found appellants' contrary testimony to be "less credible" than Judelson's. (A. 45.)

The district court deemed New York statutes to be "not dispositive" of when a bail bond premium is earned. (A. 52.) The court located support for its contractual conclusion in a 2010 DFS Counsel Opinion, quoting language from that Opinion stating that a "'bail bond agent earns a commission'" from the insurance company "'when the bail bond is placed.'" (A. 50 (quoting DFS Off. of Gen. Counsel, Op. No. 10-11-15 (Nov. 23, 2010)).)

2. The Second Circuit seeks this Court's guidance on New York law

On appeal, the Second Circuit declined to decide the contractual issue without guidance from this Court on whether New York law addressed an insurer's ability to retain a bail bond premium. *See Gevorkyan v. Judelson*, 841 F.3d 584 (2d Cir. 2016) (reproduced at A. 4–13).

The Second Circuit opined that "New York's statutory scheme does not resolve" whether a bail bond company may "retain a premium where a bond it posted was rejected by the court." *Id.* at 587–88. According to the Second Circuit, although article 68 of the Insurance Law "controls the amount of the premium a bail bondsman may charge," the Insurance Law says "nothing" about "when that premium is actually earned." *Id.* at 587. Nor had appellants "identified any authoritative New York case law" addressing that question. *Id.*

The apparent "dearth of New York authority" made the Second Circuit "reluctant" to apply the basic insurance law principle—urged by appellants—"that the premium must follow the risk." *Id.* at 588. The Second Circuit therefore turned to this Court for

guidance. *See id*. In doing so, the court reasoned that a general state law "prohibition" on retaining a premium for a rejected bail bond would moot any case-specific question of "contract interpretation." *Id.*

ARGUMENT

THE INSURANCE LAW PROHIBITS RETENTION OF A BAIL BOND PREMIUM IF THE CRIMINAL DEFENDANT IS NOT RELEASED ON BAIL

The plain language of New York's Insurance Law requires that a court grant bail and release a criminal defendant *before* an insurer may retain the premium paid for a bail bond. This interpretation of New York's statutes reflects the fundamental principle of insurance law that no premium is earned unless and until an insurer actually assumes a risk of financial loss. In the bail context, that risk is incurred only when the criminal court approves a posted bond and the defendant is released from custody.

No party to this appeal has offered a correct interpretation of New York statutory law. Judelson erroneously argues that the Insurance Law permits charging a premium once a bail bond is

submitted to the court, even if bail is later denied and the bond never comes into effect. Br. for Respondent (Resp. Br.) 3–10. Appellants in turn wrongly assert that the Insurance Law is silent about when a premium is earned, and that this dispute therefore turns on either contract law or nonstatutory principles. Br. for Appellants 15. Contrary to both parties' assertions, the Insurance Law speaks directly to the certified question and evinces legislative intent to condition payment of a premium on the defendant's actual release on bail.

A. The Insurance Law Conditions Payment of a Bond Premium on the Criminal Defendant's Release on Bail.

As Judelson concedes (Resp. Br. 5), Insurance Law § 6804 regulates the compensation that insurers or bail bond agents may collect in New York, and strictly limits the charges that may be imposed on persons seeking a bail bond. *See McKinnon v. Int'l Fid. Ins. Co.*, 182 Misc. 2d 517, 520 (Sup. Ct. N.Y. County 1999). Two restrictions are relevant here. *First*, the statute caps the allowable amount of any premium charged by a surety to a certain percentage of the value of the bond. Insurance Law § 6804(a). *Second*—and

dispositive for this proceeding—the statute delimits the circumstances under which a premium may be collected. Specifically, a premium is due only for "giving bail bond." *Id.*; *see* Resp. Br. 3 (agreeing that a premium is earned only upon "giving bail bond"). And the statute expressly prohibits any other "fee or compensation" from being "charge[d] or receive[d]" by a surety or bail bond agent, either for "giving bail" or for "obtaining" a "bail bond." Insurance Law § 6804(b)(1)–(2).

As a textual matter, the answer to the certified question thus turns on what the Legislature meant by linking the premium to "giving bail" or "giving bail bond." *Id.* § 6804(a), (b). The dictionary definition of this phrase equates "giving bail" to releasing the defendant: to "give bail is to allow a prisoner to pay money to *leave jail* until a trial." *Merriam-Webster Learner's Dictionary* ("bail") (emphasis added).[8]

Other language in the Insurance Law's bail bond provisions confirms that the Legislature considered bail to be given only upon

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[8] http://www.learnersdictionary.com/definition/bail (visited May 4, 2017).

a defendant's release. *See Friedman v. Conn. Gen. Life Ins. Co.*, 9 N.Y.3d 105, 115 (2007) (assessing legislative intent requires "construing all parts of an act together"). In particular, the Insurance Law equates "giving bail" with "executing" bail (or the bail bond), and presumes that executing bail will result in the defendant's release. For example, Insurance Law § 6801(a) requires licensure of anyone who "execute[s] as surety any bail bond" and has "given such bail"—i.e., executed a bail bond—more than twice in a month. And Insurance Law § 6803(b) authorizes a court at a bail source hearing to examine any agent "*proposing* to execute a bail bond"—language indicating that, until the court approves bail *after* the hearing, a bail bond has only been proposed, not executed or given. Indeed, the principal legal definition of "execution" is "[t]he act of carrying out or putting into effect (as a court order or a securities transaction)." *Black's Law Dictionary* ("execution") (10th ed. 2014).[9] Under New York's procedures, no bail bond is fully

[9] One C.P.L. provision—not in the Insurance Law—appears to use the word "execute" in the narrower sense of merely signing the documents that constitute the bail bond application, including

carried out or put into effect until a court approves bail and the defendant is released.

The history of the Insurance Law's bail bond provisions reinforces this interpretation. The sections just described remain materially unchanged from the Legislature's original 1922 enactment of Code of Criminal Procedure § 554-b. (Add. 5–8.) *See Matter of Albany Law Sch. v. N.Y. State Off. of Mental Retardation & Devel. Disabilities*, 19 N.Y.3d 106, 121 (2012) (recognizing that "statutes passed at the same legislative session" should be "construed together" (quotation marks omitted)). And other provisions in existence in 1922 provided, for example, that upon "*execution* of the undertaking, the court or magistrate must make an order . . . for the *discharge* of the defendant," and that such order must note that the defendant

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the supporting affidavits. *See* C.P.L. § 520.20(1)(a). While "execute" may be used in this limited sense, *see, e.g.*, *Rodless Props., L.P. v. Westchester Fire Ins. Co.*, 40 A.D.3d 253, 254 (2d Dep't 2007) (describing "two ways" in which "execute" can be interpreted), the Insurance Law plainly uses "execute" in the distinct sense of finalizing or carrying out a transaction—as demonstrated most clearly in the provision that refers to a bail bond application (which by law must be "subscribed and sworn" under C.P.L. § 520.20) as a mere "*propos[al]* to execute a bail bond, Insurance Law § 6803(b).

had "given sufficient bail." *See* Code Crim. Pro. § 576 (emphasis added). (Add. 2.) Thus, from their inception, New York's bail bond procedures have equated bond "execution" and the "giving" of bail with the defendant's release.

This interpretation is further supported by the fact that the Legislature plainly intended the premium authorized by the Insurance Law to be compensation for an insurer's assumption of risk—risk that is incurred only when a defendant is actually released on bail. As the Second Circuit correctly observed, Insurance Law § 6804(a) makes the allowable amount of any premium "directly proportional to the size of the bond," thereby "tying the amount of the premium to the amount of risk" incurred by the insurer. *Gevorkyan*, 841 F.3d at 587; *see* 5 Couch on Ins. § 69:1 (rev. Dec. 2016) (stating that, as a rule, "[t]he amount of the premium varies in proportion to the risk assumed"). Likewise, when the Legislature in 1997 increased the maximum allowable premium for bail bonds, it did so as "an incentive [for insurers] to assume more risk." Introducer's Mem. in Support, S. 114 (1997). (Add. 38.) Allowing an insurer or its agent to retain the premium when a defendant is

never released, and no risk is ever incurred, would not promote this legislative purpose.

Still other provisions of New York law similarly presume that "giving bail" will result in a defendant's freedom from detention. For example, the C.P.L.'s extradition sections require a court to "commit [an out-of-state offender] to the county jail" pursuant to an extradition warrant "unless the accused gives bail." C.P.L. § 570.36. Other States' laws likewise consistently consider "giving bail" to be the opposite of detention and the equivalent of release. *See, e.g.*, Ala. Code § 15-4-5 (person refusing to answer question about cause of death "must be committed to jail by the coroner, unless he gives bail"); Cal. Penal Code § 985 (court "may order the defendant to be committed to actual custody, unless he gives bail"); S.C. Code § 15-17-210 (civilly detained debtor "shall be discharged . . . upon giving bail"); Tex. Code Crim. Proc. art. 24.23 (detained witness "shall be at once released upon giving bail").

All of these sources thus confirm that Insurance Law § 6804(a)'s authorization for an insurer to collect a "premium . . . for giving bail bond" requires that the bond be fully and finally

executed, and the defendant released, before the premium is earned and may be retained.[10]

B. Insurance Law § 6804's Use of the Word "Premium" Incorporates the Well-Established Principle that Premium Follows Risk.

The requirement that a defendant be ordered released before an insurer or its agent can retain a bail bond premium reflects the well-established principle of insurance law that a premium is earned only when risk of loss is incurred. Insurance Law § 6804's use of the word "premium" incorporates this firmly settled rule.

Although bail bonds are issued as part of the criminal process, the Legislature intended them to be governed as insurance

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[10] Consistent with this interpretation of New York law, the parties' own documents in this case presume that the parties' mutual obligations would arise only upon Bogoraz's release on bail. The written bail undertaking contains International Fidelity's promise to stand as surety for Bogoraz *after* his "having been duly admitted to bail." (A. 241.) The accompanying bail affidavits refer to the $120,560 premium as "consideration" for International Fidelity's "becoming such surety," and expressly describe the bond application as being offered "to *induce* the Court to accept the said surety." (A. 242 (emphasis added).) While none of this language expressly makes a prepaid premium refundable, it nonetheless reflects the parties' understanding that the bail bond would not be operative until Bogoraz's release.

products. Section 6804's predecessor was moved to the Insurance Law in 1971 upon repeal of the Code of Criminal Procedure, where that section initially resided. *See* Ch. 545, § 18, 1971 N.Y. Laws 1481; *see also Nostrom v. A.W. Chesterton Co.*, 15 N.Y.3d 502, 507 (2010) (reiterating that statute's history and context inform its interpretation). The relocation embodied legislative recognition that such a law did not "belong in a body of criminal procedure law" and was "more appropriate[ly]" included among insurance provisions. Mem. at 1, *reprinted in* Bill Jacket for ch. 545 (1971). (Add. 26.) Accordingly, New York law today deems sureties and bail bond agents to be "doing an insurance business" and subjects them to many of the substantive and procedural requirements applicable to other insurers. Insurance Law § 6801(a)(1); *see also, e.g.*, *id.* § 2302(a) (DFS's ratemaking authority).

Moreover, the parties to this proceeding all recognize that this case is about insurance, confirming that reference to insurance principles is appropriate. Both sides in this case refer to the $120,560 in dispute as the "premium" paid for a bail bond intended to secure the release of Arthur Bogoraz from jail. (A. 106, 190, 206–

207, 227.) A written receipt labels this amount the "premium on" the bond. (A. 238.) And Judelson repeatedly testified that he "earned" this alleged $120,560 "premium." (A. 203, 223, 269.)

Use of the word "premium" is significant. In the insurance context, a "premium" by definition is compensation to an insurer for assuming the risk of financial loss in an insurance contract. And where, as here, "a statute does not define a particular term, it is presumed that the term should be given its precise and well settled legal meaning in the jurisprudence of the state." *People v. Duggins*, 3 N.Y.3d 522, 528 (2004) (quotation marks omitted).

In New York, the well-established rule is that "[t]he premium paid by the insured and the peril assumed by the insurer are correlatives, inseparable from each other, since it is their union which constitutes the essence of the insurance contract." 69 N.Y. Jur. 2d Insurance § 1039 (rev. 2017). "All insurance law makes one of the elements of insurance the payment of a premium," and in exchange for this "consideration" the insurer "takes a chance or a risk of" loss and insures "against such risk." *Ollendorff Watch Co. v. Pink*, 279 N.Y. 32, 36 (1938).

An insurer thus "is entitled to recover the premiums" owed under a policy only if the insured actually "had a risk which fell within the coverage." *Home Ins. Co. v. Chang*, 41 N.Y.2d 288, 290 (1977). Where no such risk ever attaches, "obviously, no premium can be charged," *S.A.F. La Sala Corp. v. CNA Ins. Cos.*, 291 A.D.2d 228, 229 (1st Dep't 2002), and any prepaid premium must be refunded, *O'Connor Transp. Co. v. Glens Falls Ins. Co.*, 204 A.D. 56, 57 (4th Dep't 1922). The principle that premium follows risk has been applied where, as here, a bond required government approval, but that "contingency never took place," and "[t]he failure to procure the permit left the defendant without risk." *Lattarulo v. Nat'l Sur. Co.*, 119 Misc. 154, 155 (Mun. Ct. N.Y. County 1922). The key determinant of whether a premium has been earned is whether the event that "activates coverage and places the insurer[ ] at risk" of financial loss has occurred. *Matco Prods., Inc. v. Boston Old Colony Ins. Co.*, 104 A.D.2d 793, 795 (2d Dep't 1984).[11]

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[11] Some decisions suggest in dicta that, under the common law, an insurance premium may be nonrefundable if a prospective insured has engaged in fraud, presumably regarding the procurement

These principles are not unique to New York. Across jurisdictions, "[t]he risk undertaken by the insurer is an essential element of a contract of insurance, and no premium is due from the insured unless the risk attaches." 5 Couch on Ins. § 69:2. "It follows that an insurer may not charge a premium for any period of time during which insurance is not in effect." *Id.*; *accord Autumn Ridge, L.P. v. Acordia of Va. Ins. Agency, Inc.*, 613 S.E.2d 435, 438 (Va. 2005) (canvassing authority). "Similarly, if risk has never attached because an insurance policy was void ab initio, the insured is entitled to a return of all premiums paid." *In re Texas Ass'n of Sch. Bds., Inc.*, 169 S.W.3d 653, 659 (Tex. 2005).

The manner in which premium is calculated reflects the well-settled view that premium is compensation for an insurer's assumption of risk. The primary aims of insurance ratemaking (which determines the premium that insurers may charge) are to estimate "costs associated with the transfer of risk" and to set an

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of insurance. *See, e.g.*, *O'Connor Transp.*, 204 A.D. at 57; *Lattarulo*, 119 Misc. at 155. That theory is irrelevant here where there is no such claim.

appropriate "premium for that risk." Casualty Actuarial Soc'y, Statement of Principles of Property & Casualty Insurance Ratemaking (May 1988). (Add. 45.) Consistent with this principle, the Legislature increased the maximum allowable bail bond premium under Insurance Law § 6804(a) in 1997 specifically to encourage insurers to take on more risk. See *supra* at 6, 25. It would make no sense for an insurer that incurs no risk to retain a premium designed to compensate the insurer for incurring risk.

In short, under settled New York law, an insurance premium entails risk. "Nothing in the statutory language or legislative history" of § 6804 "suggests that the Legislature intended to depart from this long-standing and commonly accepted definition." *See Matter of Moran Towing & Transp. Co. v. N.Y. State Tax Comm'n*, 72 N.Y.2d 166, 171 (1988).

C. The Authority Cited by Judelson Does Not Support Retention of a Premium Paid for a Bail Bond that the Court Rejected.

Judelson's contrary interpretation of the Insurance Law is meritless.

First, Judelson offers no support for his contention that a premium is earned upon "posting" a bond, as that term is used in the C.P.L. *See* Resp. Br. 5–6. By its plain terms, the authorization in Insurance Law § 6804 to charge a premium is not attached to posting a bond, but rather to "giving" bail—i.e., executing the bail bond and thereby effecting the defendant's release. And merely posting bail is plainly insufficient to secure a defendant's release. Only if a posted bond is "approved" may the defendant "be at liberty." C.P.L. § 500.10(11)(3); *see id.* § 510.40(3) (directing court to examine whether some feature of posted bail "requires or authorizes disapproval thereof"). Moreover, a court has authority to review the source or sufficiency of a posted bond and may reject the bond on various grounds. *See* C.P.L. § 520.30. Accordingly, the posting of a bond is more accurately seen as a *proposal* to execute a bail bond, *see* Insurance Law § 6803(b)—rather than the final

execution that is required to justify the premium authorized by § 6804(a).

Second, there is no merit to Judelson's argument that a 2010 opinion letter by DFS endorsed the position that Judelson takes here. *See* Resp. Br. 6 (citing DFS Off. of Gen. Counsel, Op. No. 10-11-15 (Nov. 23, 2010)). The DFS opinion addressed a distinct question: the point at which a bail bond agent earns a *commission from the insurer* for whom the agent works. (*See* Add. 46.) DFS's answer relied on the default common-law principle that governs insurance agents' earning of commissions from insurers absent any agreement to the contrary. The opinion did not address the separate question of when an insurer earns a bail bond *premium from or on behalf of a criminal defendant*. This distinction is a meaningful one: while Insurance Law § 6804 precludes an insurer or its agents from imposing additional fees or charges on *the insured* above the statutorily permitted premium, the insurer and its agents are free to arrange between themselves how the former will compensate the latter.

As the DFS opinion explained, the agent's compensation from the insurer is controlled not by § 6804, which regulates the

premium, but rather by the contract between the bail bond agent and the insurer. (Add. 47.) The two are not necessarily identical: the agent may be entitled to compensation from the insurer even if the insurer is not entitled to receive a premium from or on behalf of the defendant. While DFS noted that, as a default rule, a commission will be a cost covered by the insurer out of the premium, DFS further noted that this default rule yields to "an agreement specifying otherwise." (Add. 47.) And the DFS opinion expressly declined to address whether a commission was owed where the criminal court, as in this case, had rejected a bond after a source hearing. (Add. 47.)

Third, the March 2012 court order (or "cut slip") directing Bogoraz's appearance at his bail source hearing does not, as Judelson argues (Resp. Br. 5), permit retention of the premium. This one-sentence order states that Bogoraz had "given Sufficient bail" to progress to a source hearing. (A. 253.) As Judelson testified, however, the cut slip simply "notifie[d] the department of corrections to produce" an imprisoned Bogoraz for that hearing, at which the court would determine whether to accept the bond and

order Bogoraz's release. (A. 270.) Nothing about this document purports to dictate when an insurer may retain a premium if (as occurred here) bail is denied at the hearing.

Finally, the legal question of when a premium is earned does not depend on whether appellants "have only themselves to blame" for the bail bond's rejection here, as Judelson asserts. Resp. Br. 18. If the premium were earned when the bond is posted, rather than when the defendant is released, the impact of that rule would fall on all proponents, however faultless. A court may inquire into *any* "matters appropriate to the determination" whether to approve a posted bond, C.P.L. § 520.30(1), and may reject the bond for, among other reasons, inconsistency with the order fixing bail, *id.* § 510.40(3); doubts about the qualifications of a surety, *id.* § 520.30(1)(a); or a concern that the bond is not sufficient to guarantee the defendant's appearance, *id.* § 520.30(1). Some of these reasons will not be attributable to conduct by the persons who paid the premium.

To be sure, a bond's proponents may share blame where they fail to persuade a court that their funds came from a legitimate

source. But even then, equity would not compel forfeiture of the premium to the *bail bond agent*. Such an outcome would reward, and thereby encourage, bail bond agents' submission of bond applications doomed to fail a source hearing—conduct that "contravenes public policy." *Id.* § 520.30(1).

The rule Judelson proposes conflicts not only with the text of Insurance Law § 6804(a), but also with the statute's policy "to protect defendants and their families," *Gevorkyan*, 841 F.3d at 589, when in the "unfortunate" position of requiring bail, Ltr. from W. McAdoo, *reprinted in* Bill Jacket for ch. 303, *supra*. (Add. 13.) The Legislature has balanced the "competing interests" at stake, and enacted a statute that requires refund of a premium when a bail bond is rejected for any reason. *See Gevorkyan*, 841 F.3d at 589.

CONCLUSION

The Court should answer the certified question in the negative and hold that a bail bond premium is not earned under Insurance Law § 6804(a) until the criminal court approves the bond and orders the defendant released from custody.

Dated: New York, NY
May 5, 2017

Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for *Amicus Curiae*
New York State Department of Financial Services

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AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Eric Del Pozo, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 6,722 words, which complies with the limitations stated in § 500.13(c)(1).

_____

Eric Del Pozo

Addendum

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LAWS

OF THE

STATE OF NEW YORK

PASSED AT THE

ONE HUNDRED AND FOURTH SESSION

OF THE

LEGISLATURE.

BEGUN JANUARY FOURTH AND ENDED , 1881,
IN THE CITY OF ALBANY.

Vol. II.

ALBANY:
WEED, PARSONS AND COMPANY, PRINTERS.
1881.

of justification, and the undertaking of bail, to be filed with the clerk of the court to which the depositions and statement must be sent, as prescribed in section 221.

On allowance of bail, and execution of undertaking, defendant to be discharged. Form of discharge.

§ 576. Upon the allowance of the bail and the execution of the undertaking, the court or magistrate must make an order, signed by him, with his name of office, for the discharge of the defendant, to the following effect:

"To the sheriff of the county of , [or, in the city and county of New York, "to the keeper of the city prison of the city of New York:"] "A. B., who is detained by you on a commitment to answer a charge for the crime of, [designating it generally,] having given sufficient bail to answer the same, you are commanded forthwith to discharge him from your custody."

If bail disallowed.

§ 577. If the bail be disallowed, the defendant must be detained in custody until lawful discharge.

ARTICLE III.

BAIL, UPON AN INDICTMENT BEFORE CONVICTION.

SECTION 578. In misdemeanor, officer to take defendant before a magistrate.
579. In felony, to deliver him into custody.
580. Taking bail, when offense is bailable.
581. Bail, how put in. Form of undertaking.
582. Sections applicable to qualifications of bail, to putting in and justifying bail, and to incidental proceedings.

In misdemeanor, officer to take defendant before a magistrate

§ 578. When the crime charged in the indictment is a misdemeanor, the officer serving the bench-warrant must, if required, take the defendant before a magistrate in the county in which it is issued, or in which he is arrested, for the purpose of giving bail as prescribed in sections 302 and 305.

In felony, to deliver him into custody.

§ 579. If the crime charged in the indictment be a felony, the officer arresting the defendant must deliver him into custody, according to the command of the bench-warrant, as prescribed in section 301.

1922
Year

303
Chapter

The New York State Library
Legislative Reference Section
Albany, N. Y.

Bill Jacket Collection

CHAPTER 30

303

No. 1124. Int. 978.

IN SENATE,

February 23, 1922.

Introduced by Mr. COTILLO — read twice and ordered printed, and when printed to be committed to the Committee on Codes.

AN ACT

To amend the code of criminal procedure, in relation to professional and corporate bondsmen.

Amendments

Notes

Jurats and Enacting Clause ✓

Compared by Killup - Morgan Bloss

Approved March 25, 1922

3RD. 726

State of New York.

Printed & Placed on
FEB 25 1922
Desks of SENATORS

No. 1124. Int. 978.

IN SENATE,

February 23, 1922.

Introduced by Mr. COTILLO — read twice and ordered printed, and when printed to be committed to the Committee on Codes.

AN ACT

To amend the code of criminal procedure, in relation to professional and corporate bondsmen.

IN SENATE
MAR

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The code of criminal procedure is hereby amended by inserting therein a new section to follow section five hundred and fifty-four-a, to be section five hundred and fifty-four-b, to read as follows:

§ 554-b. Professional bondsmen. 1. Any person, firm or corporation in any court having criminal jurisdiction or in any criminal action or proceeding who shall for another deposit money or property as bail or execute as surety any bail bond who within a period of one month prior thereto shall have made such a deposit or given such bail in more than two cases not arising out of the same transaction and shall have charged a fee or other compensa-

EXPLANATION — Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

tion therefor shall be deemed to be engaged in the business of giving bail.

2. The court or magistrate, or other public officer, concerned in the matter may examine under oath any proposed bondsman or depositor of security for bail, or the officer of any corporation proposing to execute a bail bond, or to make such deposit, as to the indemnity, if any, deposited or otherwise provided directly or indirectly against loss by reason of said deposit or bail bond and as to the fee charged for the giving of said bond, and in its discretion or his discretion may refuse to accept such bond or deposit if satisfied that any portion of such security has been feloniously obtained by the defendant, or that the provisions of this section have been in any case violated, or that the person or persons indemnifying said corporation or personal bondsman shall have within a period of one month prior thereto given indemnification or security for like purpose in more than two cases not arising out of the same transaction and who is not duly licensed by the superintendent of insurance of the state of New York in accordance with the provisions of chapter thirty-three of the consolidated laws known as the insurance law.

3. No person, firm or corporation shall engage in the business of giving bonds in criminal cases without being duly licensed by the superintendent of insurance of the state of New York in accordance with said insurance law.

4. Every corporation engaging in such business in a city of the first class, shall procure a license for each of its employees and

officers acting for it as required by the said insurance law and shall file with the district attorney of each county contained in said city or in which such city is contained, the chief city magistrate of the city of New York, and the clerks of the supreme and county courts and courts of general and special sessions of the city of New York, certified statements of the names of all persons so authorized to do such business, or to execute bail bonds in its behalf. Such license may be issued only by the superintendent of insurance of the state of New York in accordance with said insurance law, and each corporation or person engaging in such business of giving bail shall, before receiving such license, file a bond in a penalty of five thousand dollars for the faithful performance of its or his duty. No person shall be licensed as aforesaid until he has satisfied such superintendent of insurance of the state of New York that he is a person of good character and reputation and has never been convicted of any crime or offense, and to this end shall file in the office of said superintendent of insurance of the state of New York written evidence from those who know him as to character and reputation. The granting of a license in all such cases shall be discretionary with the said superintendent of insurance of the state of New York and such license shall be subject to revocation by him whenever he deems it advisable for the public interest and in accordance with said insurance law.

5. The premium or compensation for giving a bail bond or depositing money or property as bail shall in no case be greater than three per centum of the amount of such bond or deposit and any

person or corporation charging or receiving, directly or indirectly, any greater compensation for making a deposit for bail or giving bail, or who shall act in such business as aforesaid without obtaining a license, or who shall accept any fee or compensation for obtaining a bondsman or bail bond shall be guilty of a misdemeanor and in addition thereto shall in any action brought to recover any such overcharge be liable to treble damages. Any member of the bar having any financial interest by which he is to profit from the giving of bail shall be guilty of a misdemeanor.

§ 2. This act shall take effect September first, nineteen hundred and twenty-two.

State of New York
In Senate

MAR 13 1922

Ordered, That the Clerk deliver the bill entitled

SENATE

No. 1124. Int. 978.

AN ACT

To amend the code of criminal procedure, in relation to professional and corporate bondsmen.

to the Assembly and request their concurrence in the same.

By order,

ERNEST A. FAY,

Clerk.

Form No. 75

IN ASSEMBLY

MAR 17 1923

Passed without Amendments
By order of Assembly

Fred H. Hammond
CLERK

2

Add. 10

303

S.978

The Committee on the Amendment of the Law of the Association of the Bar of the City of New York

No. 67

Senate Bill, Pr. No. 1124, Int. No. 978—Mr. Cotillo.

"An Act to amend the code of criminal procedure, in relation to professional and corporate bondsmen."

This bill deals with a subject that has recently received much attention because of the many abuses that have arisen in the administration of the criminal law due to the frauds and machinations of professional bondsmen. The Association of the Bar of the City of New York has approved of a bill of substantially like as the present. It is believed that its enactment means a step in the right direction. If in its practical operation any shortcomings may be discovered, it will be an easy matter to correct them hereafter by proper amendment.

The bill is approved.

5978

CITY OF NEW YORK
CITY MAGISTRATES' COURTS
300 MULBERRY STREET

42-1

WILLIAM McADOO
CHIEF CITY MAGISTRATE

March 21st, 1922.

Hon. Nathan L. Miller, Governor,
Albany,
New York.

My dear Governor Miller:

I sincerely trust that the enclosed bill will meet with your approval. I have discussed this subject at great length on a number of occasions, as the measure has been pending for the last two years in the Legislature.

This bill has the approval of the Bar Association of this City and so far as I know, of the Insurance Commissioner. When the bill was originally drawn it was narrowed in its provisions to this City and the licensing power was lodged in the Mayor. The amendments now make it state-wide in its operations and the giving, suspension and revocation of licenses is left with the Commissioner, which I think is quite the proper thing to do.

If you desire any further information as to the evils that follow in the train of reckless giving and easily gotten bail by the criminal and vicious classes through certain agents of the surety companies, I will be glad to give you the facts. In and around these Courts and in the Criminal Courts Building they literally peddle bail as if it were merchandise. It was demonstrated by an inquiry made sometime ago that stolen goods are often taken as collateral to secure the companies that go on the bonds. Where the agent has not himself a police record it very frequently happens that he lives and has his being in and among those who frequent the underworld and to that extent is an undesirable person, facilitating and giving an encouragement to crime and vice.

4

Add. 12

If there was nothing else in the bill but the licensing of the professional cash bondsmen, it would serve a great public purpose. Over here in the Women's Court, where the bail does not exceed $500, one of these fellows will go into Court repeatedly, having cash or Liberty Bonds as security. As there is no great delay in the trial of cases he can possibly use the same $500 three or four times a week, and I am quite sure, from all I hear, that he charges nothing less than $50 each time he goes bail, and possibly more where they stand in with disreputable lawyers, - there is no telling how far they rob these poor unfortunate women.

It is to be hoped that the Commissioner will hesitate about licensing these fellows until their character and antecedents are thoroughly looked into, and that if he does, they will be held to strict accountability under the law. I can assure Your Excellency that this measure will meet with universal public approval in this City, especially from those connected with the Magistrates' Courts, who know the facts.

Trusting that this measure will meet with your approval, I am,

Very sincerely yours,

William McAdoo

Chief City Magistrate.


EXECUTIVE CHAMBER

CHAPTER 303

S. No. 1124 Int. 978

IN SENATE February 23, 1922

ntroduced by MR. COTILLO - read twice and ordered printed, and when printed to be committed to the Committee on Codes.

AN ACT

To amend the code of criminal procedure, in relation to professional and corporate bondsmen.

?

STATE OF NEW YORK

INSURANCE DEPARTMENT

ALBANY

FRANCIS R. STODDARD, JR.
SUPERINTENDENT OF INSURANCE

March 22d, 1922.

S 974

Hon. C. Tracey Stagg,
Counsel to the Governor,
Executive Chamber,
Albany, N. Y.

Dear Mr. Stagg:-

I am writing to you in support of Senate Bill Pr. No. 1124, Int. No. 978, by Senator Cotillo. For the reason that this bill was referred to the Committee on Codes, I have thought it possible that you might not regard it as an Insurance Department measure, and therefore not write to me for advice on the subject.

This bill was drawn by the Committee on Legislation of the New York County Bar Association, by the District Attorney's office, by the President of the Board of Magistrates, and with the co-operation of the Insurance Department.

The bail bond situation in New York City has been a disgrace. The companies have permitted their agents to sell bonds under a system whereby two percent of the face value of the amount is the charge made by the company. Of this amount about 30% is retained by the agent as his commission. The abuse has come from the fact that the agents in their turn have employed "runners" who receive for their remuneration any amount that they can get above the two percent. This system is an encouragement for these men to do what they are doing, namely, to try to get possession of the bank book and personal property of the person seeking the bond. In most instances, the charges have been exorbitant, and when the "runners" have obtained possession

of the bank books and other property they have tried to keep the entire amount. It has been charged that not only stolen property has been given to indemnify the bonding company, but also that criminals out on bail have been encouraged to commit new crimes in order to satisfy the demands of the "runners". The amendment of Section 142 of the Insurance Law will aid the situation somewhat, but I feel that some such legislation as is contained in the bill before you is necessary if the bail bond abuses are to be completely eradicated. While the bill may not be perfect, it nevertheless represents the best thought of those who, by constand work in the courts and an opportunity of seeing the bail bond agents and runners, are most acquainted with the situation.

Yours very truly,

F R Stoddard Jr

FRS/MTH Superintendent.

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 WEST 44TH STREET

S 9.'78

51 Chambers Street,

New York, March 23rd, 1922.

Hon. Nathan L. Miller,
Executive Chamber,
Albany, N. Y.

Matter of Bail Bond Bill.

My dear Sir:

Senate Bill (Int. 978) 1124 introduced by Senator Cotillo has passed both houses of the Legislature and now awaits your action.

The bill in its present form has received the sanction of the Committee on Law Reform of the Association of the Bar of the City of New York. While disapproving of some of the unimportant details of the bill, the Committee feels that the legislation will be a decided step forward in correcting what is a grievous evil of the administration of the Criminal Law throughout the State and particularly in New York City. The bill has been the subject of conference with Chief Magistrate McAdoo, the District Attorney's Office and the Superintendent of Insurance and our Committee.

In case you desire to have a hearing upon this bill I shall be glad to arrange for the attendance at it of a representative of our Committee or if you would like to have a formal memorandum in its support

10

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 WEST 44TH STREET

I shall be glad to undertake its preparation. I am informed by Judge McAdoo that he has already sent you such memorandum and that it covers the principal points in favor of the bill which we discussed at our conferences.

Yours very truly,

Edward J. McGuire

Chairman, Committee on
Law Reform.

11

McG:McA

303

THE PRISON ASSOCIATION OF NEW YORK

INCORPORATED IN 1846

135 EAST FIFTEENTH STREET
NEW YORK

5.978

PURPOSES OF THE SOCIETY

1. THE PROTECTION OF SOCIETY AGAINST CRIME.
2. THE REFORMATION OF THE CRIMINAL.
3. PROTECTION FOR THOSE UNJUSTLY ACCUSED.
4. PROBATION FOR FIRST OFFENDERS.
5. IMPROVEMENT IN PRISONS AND PRISON DISCIPLINE.
6. EMPLOYMENT, AND WHEN NECESSARY, FOOD, TOOLS AND SHELTER FOR DISCHARGED PRISONERS.
7. NECESSARY AID FOR PRISONERS' FAMILIES.
8. SUPERVISION FOR THOSE ON PROBATION AND PAROLE.
9. NEEDED LEGISLATION.

TELEPHONE
1470 STUYVESANT

March 27th, 1922.

Hon. Nathan L. Miller,
Governor, State of New York,
Executive Chamber, The Capitol,
Albany, New York.

RE: SENATE INT. 978, PR. 1124. By Mr. Cottillo.

Dear Sir: -

It is the feeling of the members of the Law Committee of the Prison Association of New York that some legislation is necessary to curb certain abuses relative to the giving of bail. The above bill by Mr. Cottillo is a start in the right direction. The present abuse of the bail bond system facilitates crime and encourages criminals, resulting in a docket crowded both by delays and by an increase in cases. The resulting delay is a feature which allows the lawbreaker to feel as though his immunity was guaranteed.

It is hoped that you will favor the Cottillo bill, so that a start may be made in checking flagrant misuse of the system.

Very truly yours,

E. R. Cass

ERC: KJ

Acting General Secretary.

FIFTY-SECOND ANNUAL CONGRESS AMERICAN PRISON ASSOCIATION
DETROIT, MICHIGAN, OCTOBER 12-18, 1922

SENATE BILL, Int. 978, Print No. 1124.

SENATOR COTILLO.

— — — — —

This bill amends the code of criminal procedure and seeks to control professional and corporate bondsmen. Subdivision 1 defines those who shall be deemed to be engaged in the business of giving bail. Subdivision 2 authorizes the court or magistrate to examine under oath any proposed bondsman, or the officer of any corporation proposing to execute a bail bond, or to make a deposit, and may refuse to accept such bond or deposit if satisfied that the law has been violated. Subdivision 3 provides that no person shall engage in the business of giving bonds in criminal cases without being duly licensed by the Superintendent of Insurance. Subdivision 4 provides that every corporation engaged in such business in a city of the first class shall procure a license for each of its employees and shall file with certain specified officers the names of all persons authorized to do business. A bond of $5,000. is required to secure a license. The premium for giving a bail bond shall in no case be greater than 3% of the bond.

The bill was drawn by the Committee on Legislation of the New York County Bar Association; by the District Attorney; by the President of the Board of Magistrates, with the cooperation of the Insurance Department. Attached hereto are memoranda from the Insurance Department, Chief Magistrate McAdoo, and the Chairman of the Committee on Law Reform of the Bar Association of the city of New York.

13 C 15

MARCH 27, 1922.

CHAPTER 545

6374—A

1971-1972 Regular Sessions

IN SENATE

April 5, 1971

Introduced by COMMITTEE ON RULES—(at request of Mr. B. C. Smith)—read twice and ordered printed, and when printed to be committed to the Committee on Agriculture and Marketing—committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT

Notes

To amend the agriculture and markets law, civil practice law and rules, correction law, executive law, family court act, general construction law, general municipal law, insurance law, judiciary law, labor law, lien law, penal law, uniform district court act, uniform justice court act, and vehicle and traffic law, in relation to adding thereto certain provisions substantially similar to certain laws repealed by the criminal procedure law, and to conforming and harmonizing certain provisions thereof to provisions of the said criminal procedure law

Compared by

APPROVED

JUN 17 1971

Approved

S-6374-A ✓

B-203 (6/68) BUDGET REPORT ON BILLS Session Year 1971

SENATE NO RECOMMENDATION ASSEMBLY

No. 6374-A No.

Law:

Title: in relation to adding thereto certain laws, repealing by the criminal procedure and to conforming and harmonizing certain provisions thereof to provisions of the said criminal procedure law,.

The above bill has been referred to the Division of the Budget for comment. After careful review, we find that (a) the bill does not affect State finances in any way, (b) the bill has no appreciable effect on State programs or administration, and (c) this office does not have the technical responsibility to make a recommendation on the bill.

We therefore make no recommendation.

5/10/71

Charles D. Palmer

C. D. Palmer

WD

Multiple memorandum received from the State Comptroller dated JUN 14 1971

stating the following bill is of "No Interest" to the Department of Audit and Control.

Intro. No.	Print No.
S-6374-A	

The original memorandum filed with: S-1064

S-6374-A

BERNARD C. SMITH
2ND DISTRICT
CHAIRMAN
COMMITTEE ON CONSERVATION
AND RECREATION

THE SENATE
STATE OF NEW YORK
ALBANY
12224

June 14, 1971

Honorable Michael Whiteman
Executive Chamber
State Capitol
Albany, New York 12224

Dear Mike:

I think that this is a good bill and I hope that it will receive the Governor's favorable consideration.

With kindest personal regards, I am

Sincerely,

BERNARD C. SMITH

BCS/clh

S. 6374-A

~~A. Int. 8516~~

M E M O R A N D U M

RE: AN ACT to amend the agriculture and markets law, civil practice law and rules, ... and vehicle and traffic law, in relation to adding thereto certain provisions substantially similar to certain laws repealed by the criminal procedure law, and to conforming and harmonizing certain provisions thereof to provisions of the said criminal procedure law

Purpose of the Bill:

The Code of Criminal Procedure contains a substantial number of provisions which, because they do not fit into or belong in a body of criminal procedural law, have not been carried forward into the Criminal Procedure Law. But since these provisions are of continuing utility or validity, they must be otherwise disposed of lest they fall when the repeal of the Code of Criminal Procedure becomes effective on September 1, 1971. This bill accomplishes that task. It relocates 111 Code of Criminal Procedure sections or parts thereof in other, more appropriate chapters of the consolidated laws. These relocated provisions, therefore, survive the repeal of the Code of Criminal Procedure.

Summary of Provisions of the Bill:

A brief description of some of the present Code of Criminal Procedure provisions proposed for transfer elsewhere will illustrate the purpose of this bill.

In similar circumstances on the adoption of the revised Penal Law, many sections of the old Penal Law dealing with cruelty to animals were transferred to the Agriculture and Markets Law (see Ag & Mark Law §§ 350 - 370). The Code of Criminal Procedure, too, in sections 117-a - 117-f , deals with cruelty to animals. It is therefore proposed, in sections 1-6 of this bill, to transfer these provisions, verbatim, to the Agriculture and Markets Law, to join their brethren from the old Penal Law.

The provisions of the Code of Criminal Procedure dealing with reprieves, commutations and pardons (§§ 692 - 697), are basically matters involving the exercise of executive prerogatives by the Governor. Since they appropriately belong in the Executive Law, section 12 of this

bill proposes their relocation in said law.

Such fiscal matters presently in the Code of Criminal Procedure as fees to jurors and witnesses (§731) and fees in criminal actions due to municipalities (§740-a) are proposed for transfer to the General Municipal Law (see Bill §§ 15, 16).

The Code of Criminal Procedure contains three "Titles" dealing with impeachment of public officials and removal of judicial officers (§§12-20; 118-131; 132), which are inappropriate for a body of law concerned with general criminal procedure. This bill (§§19, 24, 25) therefore proposes that these provisions be transferred to the Judiciary Law where they will be more comfortably housed.

With regard to sections 685 - 691 of the Code of Criminal Procedure, which deal with the administrative provisions for the disposal of stolen property, it is considered that they fit more appropriately into Part Four of the Penal Law, a collection of "Administrative Provisions." Accordingly, section 30 of this bill proposes their transfer to said Part of the Penal Law as a new Article 450.

Statement in Support of the Bill:

The transferral of Code of Criminal Procedure provisions to other bodies of law is almost invariably a verbatim transposition. In those few instances where there is a variance between the Code of Criminal Procedure language and that of the transferred provisions, it is occasioned solely by the necessity to conform to the language and numbering system of the CPL.

The net effect of this bill is that the sections of the Code of Criminal Procedure with which it deals survive - in new locations and with different section numbers - the repeal of the Code of Criminal Procedure on September 1, 1971.

STATE OF NEW YORK
DEPARTMENT OF CORRECTIONAL SERVICES

GOV. A.E. SMITH
STATE OFFICE BUILDING
P.O. BOX 7033
ALBANY, N.Y. 12225

RUSSELL G. OSWALD
COMMISSIONER

MEMORANDUM

SUPPORT

TO: Honorable Michael Whiteman - Counsel to the Governor

FROM: Russell G. Oswald - Commissioner

RE: SENATE 6374-A

"An act to amend the agriculture and markets law, civil practice law and rules, correction law, executive law, family court act, general construction law, general municipal law, insurance law, judiciary law, labor law, lien law, penal law, uniform district court act, uniform justice court act, and vehicle and traffic law, in relation to adding thereto certain provisions substantially similar to certain laws repealed by the criminal procedure law, and to conforming and harmonizing certain provisions thereof to provisions of the said criminal procedure law."

1. Purpose

   To make conforming and technical amendments to various laws as a result of the enactment of the criminal procedure law.

2. Summary

   Various laws would be amended to accomplish the above.

3. Justification

   With the advent of the Criminal Procedure Law on September 1, 1971 and the repeal of the Code of Criminal Procedure it is necessary that various laws be amended to conform to the provisions of the Criminal Procedure Law and to replace certain provisions of the Code of Criminal Procedure.

S-6374-A

STATE OF NEW YORK
DEPARTMENT OF MOTOR VEHICLES
504 CENTRAL AVENUE
ALBANY, NEW YORK 12206

VINCENT L. TOFA
Commissio

LEGAL DIVISION
JOSEPH R. DONOVAN
FIRST ASSISTANT COUNSEL

June 17, 1971

TO: Honorable Michael Whiteman, Counsel to the Governor

RE: Senate Bill No. 6374-A (Committee on Rules)

The above bill amends various consolidated laws, including the Vehicle and Traffic Law, by adding provisions to such laws which used to appear in the Code of Criminal Procedure. The approval of the bill is necessary in order to permit the continuation of procedures on and after September 1, 1971, the effective date of the Criminal Procedure Law.

The bill adds to the Vehicle and Traffic Law prior provisions of the Code of Criminal Procedure with respect to pleas of guilty and not guilty to a traffic infraction, arraignments for traffic violations and stay orders on appeals from convictions for traffic violations.

The failure to approve this bill would result in utter chaos in the administration of traffic courts on and after September 1st.

With respect to the Vehicle and Traffic Law provisions, it is imperative that the bill be given Executive approval.

VINCENT L. TOFANY
Commissioner of Motor Vehicles

By: Joseph R. Donovan

JOSEPH R. DONOVAN
First Assistant Counsel

JRD/ddt

S-6374-A

NEW YORK STATE POLICE
STATE CAMPUS
ALBANY, N.Y. 12226

WILLIAM E. KIRWAN
SUPERINTENDENT

June 15, 1971

SENATE	ASSEMBLY	INTRODUCED BY
6374-A		Committee on Rules

RECOMMENDATION: Approval

STATUTE INVOLVED: Agriculture and Markets Law, Civil Practice Law and Rules, Correction Law, Executive Law, Family Court Act, General Construction Law, General Municipal Law, Insurance Law, Judiciary Law, Labor Law, Lien Law, Penal Law, Uniform District Court Act, Uniform Justice Court Act and Vehicle and Traffic Law

EFFECTIVE DATE: September 1, 1971

DISCUSSION:

1. Purpose of bill:

To amend the Agriculture and Markets Law, Civil Practice Law and Rules, Correction Law, Executive Law, Family Court Act, General Construction Law, General Municipal Law, Insurance Law, Judiciary Law, Labor Law, Lien Law, Penal Law, Uniform District Court Act, Uniform Justice Court Act, and Vehicle and Traffic Law, in relation to adding thereto certain provisions substantially similar to certain laws repealed by the Criminal Procedure Law, and to conforming and harmonizing certain provisions thereof to provisions of the said Criminal Procedure Law.

2. Summary of provisions of bill:

Removes to various other laws sections of the old Code of Criminal Procedure which were not included in the Criminal Procedure Law which will become effective September 1, 1971, and which supplanted the Code of Criminal Procedure. The first six sections of the bill, for instance, transfers Code of Criminal Procedure Sections on the duties of public officers

in enforcement of laws relating to animals to the Agriculture and Markets Law. Bill Section 11 transfers a large number of Code sections dealing with capital punishment to the Correction Law, and so on. A table of these transfers is included in the back of the bill.

3. Prior legislative history of bill:

None known.

4. Known position of others respecting bill:

It is believed that this bill was prepared by or under the supervision of the persons responsible for the revision of the Penal Law or the Code of Criminal Procedure and is part of the official "conforming amendments."

5. Budget implications:

None apparent.

6. Arguments in support of bill:

See four above. These changes following routinely from the total revision of the Code of Criminal Procedure and were prepared as part of the process of re-writing the Code into the new Criminal Procedure Law.

7. Arguments in opposition to bill:

None.

8. Reasons for recommendation:

See six above.

Superintendent

DISTRICT ATTORNEYS ASSOCIATION

STATE OF NEW YORK

S-6374-A

Chap. 545

BURTON B. ROBERTS
851 Grand Concourse
Bronx, New York 10451
Tel. 212-LU 8-9500

June 29, 1971

Hon. Michael Whiteman,
Counsel to the Governor
Executive Chamber
State Capitol
Albany, New York 12224

Re: Senate No. 6374-A
An Act to amend the agriculture and markets law, civil practice law and rules, correction law, executive law, family court act, general construction law, general municipal law, insurance law, judiciary law, labor law, lien law, penal law, uniform district court act, uniform justice court act, and vehicle and traffic law, in relation to adding thereto certain provisions substantially similar to certain laws repealed by the criminal procedure law, and to conforming and harmonizing certain provisions threof to provisions of the said criminal procedure law

Dear Mr. Whiteman:

This is in response to your request for comments and recommendations concerning the captioned bill presently pending before the Governor for executive action.

Please be advised that our Association has not considered this legislation, however, I do not believe that there would be any objection to enactment of same.

[redacted]

I trust that the foregoing will be of some assistance to you.

Very truly yours,

Elliott Golden
DM

ELLIOTT GOLDEN
Secretary

EG:DMM

(NOTE: OPINIONS EXPRESSED BELOW ARE THOSE OF THE COMMITTEE PREPARING THIS REPORT AND NOT THOSE OF THE ASSOCIATION.)

Chap 545

S-6374-A

REPORT NO. 429 1971

S. 6374-A By: Rules Committee

Senate Committee: Agriculture and Marketing
Effective Date: First day of September next succeeding the date on which it shall have become a law.

AN ACT to amend the agriculture and markets law, civil practice law and rules, correction law, executive law, family court act, general construction law, general municipal law, insurance law, judiciary law, labor law, lien law, penal law, uniform district court act, uniform justice court act, and vehicle and traffic law, in relation to adding thereto certain provisions substantially similar to certain laws repealed by the criminal procedure law, and to conforming and harmonizing certain provisions thereof to provisions of the said criminal procedure law

Law and Section referred to: Agriculture and Markets Law, Civil Practice Law and Rules, Correction Law Executive Law, Family Court Act, General Construction Law, General Municipal Law, Insurance Law, Judiciary Law, Labor Law, Lien Law, Penal Law, Uniform District Court Act, Uniform Justice Court Act, Vehicle and Traffic Law.

THIS BILL IS APPROVED INSOFAR AS IT AMENDS THE CIVIL PRACTICE LAW AND RULES

The proposed bill relocates 111 sections of the Code of Criminal Procedure in other more appropriate chapters of the consolidated laws. One section of the Code of Criminal Procedure i.e. Section 22-a is to be incorporated in the Civil Practice Law and Rules as Section 6330.

Section 22-a vests the Supreme Court with jurisdiction to enjoin the sale or distribution of obscene prints and articles.

As this Committee indicated in an earlier report (No. 366), the constitutionality of Section 22-a has been upheld by the Court of Appeals and by the Supreme Court of the United States (Burke v. Kingsley Books, Inc. 208 Misc. 150, 142 N.Y.S. 2d 735, affirmed sub nom. Brown v. Kingsley Books, Inc., 1 N.Y. 2d 177, 151 N.Y.S. 2 639, affirmed sub nom. Kingsley Books, Inc. v. Brown, 354 U.S. 436, 77 S.Ct. 1325, 1 L. Ed. 2d 1469).

over

S. 6374-A

The action provided for by Section 22-a of the Code of Criminal Procedure is a civil one and can appropriately be included in the CPLR.

For the above reasons, this bill is APPROVED INSOFAR AS IT AMENDS THE CIVIL PRACTICE LAW AND RULES.

REPORT PREPARED BY THE COMMITTEE ON CIVIL PRACTICE LAW AND RULES (#76)

Scrivener for the Committee: Donald I. Strauber

C-453

Ch. 545 S-6374-A

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 WEST 44TH STREET
NEW YORK 10036

COMMITTEE ON STATE LEGISLATION

MICHAEL M. MANEY
CHAIRMAN
48 WALL STREET
NEW YORK 10005
TEL. HA 2-9100

M. BLANE MICHAEL
SECRETARY
48 WALL STREET
NEW YORK 10005
TEL. HA 2-9100

June 21, 1971

Dear Mr. Whiteman:

We have received your request for our views on the following bills: S. 54, 2033-A, 4344, 5266, 5406-A, 5680-A, 5745, 6260. 6374-A, 6488-A, 6496, 6500, 6541, 6612-A, 6632, 6820.

Please be advised that we have decided not to submit any reports on the bills.

Sincerely,

Michael M. Maney
Chairman

Hon. Michael Whiteman
Executive Chamber
State Capitol
Albany, New York 12224

S-6374-A

TO COUNSEL TO THE GOVERNOR

RE: SENATE 6374-A

ASSEMBLY

Inasmuch as this bill does not appear to involve a legal problem nor to relate to the functions of the Department of Law, I am not commenting thereon. However, if there is a particular aspect of the bill upon which you wish comment, please advise me.

Dated: June 9, 1971

LOUIS J. LEFKOWITZ
Attorney General

NEW YORK STATE SENATE
INTRODUCER'S MEMORANDUM IN SUPPORT
submitted in accordance with Senate Rule VI. Sec 1

BILL NUMBER: S114

SPONSOR: DEFRANCISCO

PURPOSE:

To provide a new sliding scale for the allowable compensation for providing bail bonds.

SUMMARY OF PROVISIONS:

This bill would amend Section 6804(a) of the Insurance Law to provide a new sliding scale for bail bonds. Under existing law, the allowable premium is 5% of the first $1,000 of bail posted, 4% for the next $1,000 posted, and 3% for any amount in excess of $2,000.

This bill would allow premiums of up to 10% of the first $3,000 of bail posted, 4% for the next $7,000 posted, and 6% for any amount in excess of $10,000.

JUSTIFICATION:

The bail bond premiums presently provided for by law have been the same for decades. Bail bond premiums in over 40 states are at least 10% and rise to 15% in certain instances. New York has the lowest bail bond premium rates in the United States.

Existing low bail bond rates provide a disincentive for bail agents to risk writing bail bonds because of the minimal premiums. A premium increase would be an incentive to assume more risk by bonding agents. More importantly, the greater availability of bail bonds will result in a decrease in the number of persons who are held in county jails pending trial, and thereby eliminate jail overcrowding. In addition, there will be a positive revenue source to the State because of the tax which is provided for on all insurance premiums.

LEGISLATIVE HISTORY: S.4643 of 1995-96 (passed Senate).

FISCAL IMPLICATIONS: Some increased revenue to the State.

EFFECTIVE DATE: Immediately.

STATE OF NEW YORK

114

1997-1998 Regular Sessions

IN SENATE

(Prefiled)

January 8, 1997

Introduced by Sen. DeFRANCISCO -- read twice and ordered printed, and when printed to be committed to the Committee on Insurance

AN ACT to amend the insurance law, in relation to the premium or compensation for giving bail bond or depositing money or property as bail

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subsection (a) of section 6804 of the insurance law is amended to read as follows:

(a) The premium or compensation for giving bail bond or depositing money or property as bail shall not exceed [~~five~~] **ten** per centum of the amount of such bond or deposit in cases where such bonds or deposits do not exceed the sum of [~~one~~] **three** thousand dollars. Where such bonds or deposits exceed the sum of [~~one~~] **three** thousand dollars, the premium shall not exceed [~~five~~] **ten** per centum of the first [~~one~~] **three** thousand dollars and [~~four~~] **eight** per centum of the excess amount over [~~one~~] **three** thousand dollars up to [~~two~~] **ten** thousand dollars and [~~three~~] **six** per centum of the excess amount over [~~two~~] **ten** thousand dollars. In cases where the amount of the bond or deposit is less than two hundred dollars a minimum premium of ten dollars may be charged.

§ 2. This act shall take effect immediately.

EXPLANATION--Matter in **italics** (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD00622-01-7

NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)

BILL NUMBER: A586

SPONSOR: Feldman

PURPOSE OF THE BILL:
To provide a new sliding scale for the allowable compensation for providing bail bonds.

SUMMARY OF SPECIFIC PROVISIONS:
This bill would amend Section 6804(a) of the Insurance Law to provide a new sliding scale for bail bonds. Under existing law, the allowable premium is 5% of the first $1,000 of bail posted, 4% for the next $1,000 posted, and 3% for any amount in excess of $2,000.
This bill would allow premiums of up to 10% of the first $3,000 of bail posted, 4% for the next $7,000 posted, and 6% for any amount in excess of $10,000.

JUSTIFICATION:
The bail bond premiums presently provided for by law have been the same for decades. Bail bond premiums in over 40 states are at least 10% and rise to 15% in certain instances. New York has the lowest bail bond premium rates in the United States.
Existing low bail bond rates provide a disincentive for bail agents to risk writing bail bonds because of the minimal premiums. A premium increase would be an incentive to assume more risk by bonding agents. More importantly, the greater availability of bail bonds will result in a decrease in the number of persons who are held in county jails pending trial, and thereby eliminate jail overcrowding. In addition, there will be a positive revenue source to the state because of the tax which is provided for on all insurance premiums.

FISCAL IMPLICATIONS: Some increased revenue to the state.

PRIOR LEGISLATIVE HISTORY: In 1996, the bill was referred to the Insurance Committee

EFFECTIVE DATE: Immediately

STATE OF NEW YORK

586

1997-1998 Regular Sessions

IN ASSEMBLY

(Prefiled)

January 8, 1997

Introduced by M. of A. FELDMAN -- read once and referred to the Committee on Insurance

AN ACT to amend the insurance law, in relation to the premium or compensation for giving bail bond or depositing money or property as bail

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subsection (a) of section 6804 of the insurance law is amended to read as follows:

(a) The premium or compensation for giving bail bond or depositing money or property as bail shall not exceed [~~five~~] **ten** per centum of the amount of such bond or deposit in cases where such bonds or deposits do not exceed the sum of [~~one~~] **three** thousand dollars. Where such bonds or deposits exceed the sum of [~~one~~] **three** thousand dollars, the premium shall not exceed [~~five~~] **ten** per centum of the first [~~one~~] **three** thousand dollars and [~~four~~] **eight** per centum of the excess amount over [~~one~~] **three** thousand dollars up to [~~two~~] **ten** thousand dollars and [~~three~~] **six** per centum of the excess amount over [~~two~~] **ten** thousand dollars. In cases where the amount of the bond or deposit is less than two hundred dollars a minimum premium of ten dollars may be charged.

§ 2. This act shall take effect immediately.

EXPLANATION--Matter in **italics** (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD00622-01-7

Statement of Principles Regarding Property and Casualty Insurance Ratemaking

(Adopted by the Board of Directors of the CAS May 1988)

The purpose of this Statement is to identify and describe principles applicable to the determination and review of property and casualty insurance rates. The principles in this Statement are limited to that portion of the ratemaking process involving the estimation of costs associated with the transfer of risk. This Statement consists of four parts:

I. Definitions

II. Principles

III. Considerations

IV. Conclusion

The principles contained in this Statement provide the foundation for the development of actuarial procedures and standards of practice. It is important that proper actuarial procedures be employed to derive rates that protect the insurance system's financial soundness and promote equity and availability for insurance consumers.

Although this Statement addresses property and casualty insurance ratemaking, the principles contained in this Statement apply to other risk transfer mechanisms.

I. Definitions

Ratemaking is the process of establishing rates used in insurance or other risk transfer mechanisms. This process involves a number of considerations including marketing goals, competition and legal restrictions to the extent they affect the estimation of future costs associated with the transfer of risk. This Statement is limited to principles applicable to the estimation of these costs. Such costs include claims, claim settlement expenses, operational and administrative expenses, and the cost of capital. Summary descriptions of these costs are as follows:

- Incurred losses are the cost of claims insured.
- Allocated loss adjustment expenses are claims settlement costs directly assignable to specific claims.
- Unallocated loss adjustment expenses are all costs associated with the claim settlement function not directly assignable to specific claims.
- Commission and brokerage expenses are compensation to agents and brokers.
- Other acquisition expenses are all costs, except commission and brokerage, associated with the acquisition of business.
- Taxes, licenses and fees are all taxes and miscellaneous fees except federal income taxes.
- Policyholder dividends are a non-guaranteed return of premium charged to operations as an expense.
- General administrative expenses are all other operational and administrative costs.
- The underwriting profit and contingency provisions are the amounts that, when considered with net investment and other income, provide an appropriate total after-tax return.

II. Principles

Ratemaking is prospective because the property and casualty insurance rate must be developed prior to the transfer of risk.

Principle 1: A rate is an estimate of the expected value of future costs.

Ratemaking should provide for all costs so that the insurance system is financially sound.

Principle 2: A rate provides for all costs associated with the transfer of risk.

Ratemaking should provide for the costs of an individual risk transfer so that equity among insureds is maintained. When the experience of an individual risk does not provide a credible basis for estimating these costs, it is appropriate to consider the aggregate experience of similar risks. A rate estimated from such experience is an estimate of the costs of the risk transfer for each individual in the class.

Principle 3: A rate provides for the costs associated with an individual risk transfer.

Ratemaking produces cost estimates that are actuarially sound if the estimation is based on Principles 1, 2, and 3. Such rates comply with four criteria commonly used by actuaries: reasonable, not excessive, not inadequate, and not unfairly discriminatory.

Principle 4: A rate is reasonable and not excessive, inadequate, or unfairly discriminatory if it is an actuarially sound estimate of the expected value of all future costs associated with an individual risk transfer.

III. Considerations

A number of ratemaking methodologies have been established by precedent or common usage within the actuarial profession. Since it is desirable to encourage experimentation and innovation in ratemaking, the actuary need not be completely bound by these precedents. Regardless of the ratemaking methodology utilized, the material assumptions should be documented and available for disclosure. While no ratemaking methodology is appropriate in all cases, a number of considerations commonly apply. Some of these considerations are listed below with summary descriptions. These considerations are intended to provide a foundation for the development of actuarial procedures and standards of practice.

Exposure Unit

The determination of an appropriate exposure unit or premium basis is essential. It is desirable that the exposure unit vary with the hazard and be practical and verifiable.

Data

Historical premium, exposure, loss and expense experience is usually the starting point of ratemaking. This experience is relevant if it provides a basis for developing a reasonable indication of the future. Other relevant data may supplement historical experience. These other data may be external to the company or to the insurance industry and may indicate the general direction of trends in insurance claim costs, claim frequencies, expenses and premiums.

Organization of Data

There are several acceptable methods of organizing data including calendar year, accident year, report year and policy year. Each presents certain advantages and disadvantages; but, if handled properly, each may be used to produce rates. Data availability, clarity, simplicity, and the nature of the insurance coverage affect the choice.

Homogeneity

Ratemaking accuracy often is improved by subdividing experience into groups exhibiting similar characteristics. For a heterogeneous product, consideration should be given to segregating the experience into more homogeneous groupings. Additionally, subdividing or combining the data so as to minimize the distorting effects of operational or procedural changes should be fully explored.

Credibility

Credibility is a measure of the predictive value that the actuary attaches to a particular body of data. Credibility is increased by making groupings more homogeneous or by increasing the size of the group analyzed. A group should be large enough to be statistically reliable. Obtaining homogeneous groupings requires refinement and partitioning of the data. There is a point at which partitioning divides data into groups too small to provide credible patterns. Each situation requires balancing homogeneity and the volume of data.

Loss Development

When incurred losses and loss adjustment expenses are estimated, the development of each should be considered. The determination of the expected loss development is subject to the principles set forth in the Casualty Actuarial Society's Statement of Principles Regarding Property and Casualty Loss and Loss Adjustment Expense Reserves.

Trends

Consideration should be given to past and prospective changes in claim costs, claim frequencies, exposures, expenses and premiums.

Catastrophes

Consideration should be given to the impact of catastrophes on the experience and procedures should be developed to include an allowance for the catastrophe exposure in the rate.

Policy Provisions

Consideration should be given to the effect of salvage and subrogation, coinsurance, coverage limits, deductibles, coordination of benefits, second injury fund recoveries and other policy provisions.

Mix of Business

Consideration should be given to distributional changes in deductibles, coverage limitations or type of risks that may affect the frequency or severity of claims.

Reinsurance

Consideration should be given to the effect of reinsurance arrangements.

Operational Changes

Consideration should be given to operational changes such as changes in the underwriting process, claim handling, case reserving and marketing practices that affect the continuity of the experience.

Other Influences

The impact of external influences on the expected future experience should be considered. Considerations include the judicial environment, regulatory and legislative changes, guaranty funds, economic variable, and residual market mechanisms including subsidies of residual

market rate deficiencies.

Classification Plans

A properly defined classification plan enables the development of actuarially sound rates.

Individual Risk Rating

When an individual risk's experience is sufficiently credible, the premium for that risk should be modified to reflect the individual experience. Consideration should be given to the impact of individual risk rating plans on the overall experience.

Risk

The rate should include a charge for the risk of random variation from the expected costs. This risk charge should be reflected in the determination of the appropriate total return consistent with the cost of capital and, therefore, influences the underwriting profit provision. The rate should also include a charge for any systematic variation of the estimated costs from the expected costs. This charge should be reflected in the determination of the contingency provision.

Investment and Other Income

The contribution of net investment and other income should be considered.

Actuarial Judgment

Informed actuarial judgments can be used effectively in ratemaking. Such judgments may be applied throughout the ratemaking process and should be documented and available for disclosure.

IV. Conclusion

The actuary, by applying the ratemaking principles in this Statement, will derive an estimation of the future costs associated with the transfer of risk. Other business considerations are also a part of ratemaking. By interacting with professionals from various fields including underwriting, marketing, law, claims, and finance, the actuary has a key role in the ratemaking process.

OGC Op. No. 10-11-15

The Office of General Counsel issued the following opinion on November 23, 2010 representing the position of the New York State Insurance Department.

Re: Earned Commissions on Bail Bonds

Questions Presented:

1. At what point in the execution of a bail bond transaction does the bail bond agent earn its commission?

2. If a bail bond agent tenders to the court a power of attorney for the execution of a pending bail bond but the bond never issues, must the court return the power of attorney documents to the bail bond agent?

Conclusions:

1. Absent an agreement to the contrary, a licensed insurance producer, such as a bail bond agent, earns its commission when the insurance policy is placed. See Office of General Counsel ("OGC") Opinion 2004-0233 (NILS) (September 23, 2004).

2. This question is outside the purview of the Department.

Facts:

The inquirer reports that the inquirer is a bail bond agent and that, while conducting the business of arranging for bail bonds for incarcerated detainees, on occasion the inquirer does not receive a commission even though the inquirer prepares all the required paper work for the court to issue the bond. The inquirer notes that despite preparing for the issuance of a bail bond, the court often does not issue a bond, usually for one of two reasons: (1) upon reconsideration of a motion for a bail bond, the court determines that no cash bond is required, and releases the detainee on his or her own recognizance; or (2) the court does not approve use of the bond after a hearing pursuant to N.Y. Crim. Law § 520.30 (McKinney 2009), which empowers a court to question and disapprove a bail bond after a hearing if the court determines from the facts that any feature of the undertaking contravenes public policy. N.Y. Crim. Law § 520.30(1) (McKinney 2009) states:

> Following the posting of a bail bond and the justifying affidavit or affidavits or the posting of cash bail, the court may conduct an inquiry for the purpose of determining the reliability of the obligors or person posting cash bail, the value and sufficiency of any security offered, and whether any feature of the undertaking contravenes public policy; provided that before undertaking an inquiry of a person posting cash bail the court, after application of the district attorney, must have had reasonable cause to believe that the person posting cash bail is not in rightful possession of money posted as cash bail or that such money constitutes the fruits of criminal or unlawful conduct. The court may inquire into any matter stated or required to be stated in the justifying affidavits, and may also inquire into other matters appropriate to the determination.

The inquirer reports that, in a particular case, the inquirer completed the inquirer's part of the transaction required to place the bail bond. As a result, the inquirer believes that the inquirer had fully earned the inquirer's commission; however, the court denied the inquirer's motion for payment of the inquirer's commission. Instead, the court returned to the indemnitor the indemnitor's funds that been had tendered to the inquirer in support of the transaction. The inquirer would like to know at what point in a bail bond transaction a bail bond agent earns a commission.

The inquirer also reports that the inquirer requested that the court return to the inquirer a "power of attorney" that the inquirer had placed in the court file in preparation for issuance of the bail bond, but the court refused to return the document, and instead tendered to the inquirer an "Order of Exoneration." See People v. Seneca Ins. Co., 711 N.Y.2d 670 (Sup. Ct. N.Y County 2000))(holding that, pursuant to N.Y. Crim. Law § 180.70(4) , when a criminal court action is dismissed due to a lack of probable cause, the court must exonerate the bail . . .). The inquirer wants to know if the inquirer can get back the "power of attorney" paperwork.

Analysis:

1. The Bail Bond Agent Earns a Commission When the Bail Bond is Placed

An insurance company pays a bail bond agent's commission out of the premium, pursuant to N.Y. Ins. Law § 6804 (McKinney 2000), which states as follows:

> The premium or compensation for giving bail bond or depositing money or property as bail shall not exceed ten per centum of the amount of such bond or deposit in cases where such bonds or deposits do not exceed the sum of three thousand dollars. Where such bonds or deposits exceed the sum of three thousand dollars, the premium shall not exceed ten per centum of the first three thousand dollars and eight per centum of the excess amount over three thousand dollars up to ten thousand dollars and six per centum of the excess amount over ten thousand dollars. In cases where the amount of the bond or deposit is less than two hundred dollars a minimum premium of ten dollars may be charged.

Thus, Ins. Law § 6804 sets the maximum premium that an insurer may charge an insured for all costs, including the commission paid to the bail bond agent. In OGC Opinion 2002-264.1 (NILS) (October 15, 2002), the Office of General Counsel of the Department (the Department) opined that:

> In *McKinnon v. International Insurance Company et al.*, 182 Misc.2d 517, 704 N.Y.S.2d 774 (Sup. Ct. N.Y. Co. 1999), the court construed N.Y. Ins. Law § 6804(a) & (b)(1) (McKinney 2000) to "clearly provide that the 'premium or compensation' may not' 'directly or indirectly' be greater than the maximum premium permitted by the statute." Id . at 777. (Emphasis added). The use of the disjunctive by the court (i.e., premium or compensation) in combination with the term compensation used in N.Y. Ins. Law § 6804(b)(1) (McKinney 2000), provides support for the conclusion that a bail bond agent is not prohibited from charging or receiving a fee for providing a service to a criminal defendant out on bail so long as the aggregate of premium and fee charged or received by the bail bond agent does not exceed the permissible "compensation" for giving a specific bail bond pursuant to N.Y. Ins. Law § 6804(a) & (b)(1) (McKinney 2000).

Thus, a commission paid to a bail bond agent is considered a cost to be covered by the insurer out of the premium, and the commission paid to an agent may not be either directly or indirectly greater than the maximum compensation permitted by Ins. Law § 6804.

Although it is not clear from the facts that the inquirer reported exactly what transpired to precipitate the inquirer's questions, the inquirer did mention the court's apparent intervention at a hearing held pursuant to N.Y. Crim. Law § 520.30(1) (McKinney 2009). The inquirer questioned the outcome of that hearing, which resulted in the criminal court judge returning to the indemnitor funds that the indemnitor had tendered to the inquirer, the bail bond agent, in support of the bail bond transaction. The inquirer requested the Department to opine on the inquirer's contractual right to a commission.

Generally, the bail bond contract between the bail bond agent and the insurer controls basic elements of the contract such as when payment is due. In regard to the issue of when an insurance producer earns his or her commission, in OGC Opinion 2004-0233 (NILS) (September 23, 2004), the Department opined:

> New York courts have generally held that, absent an agreement to the contrary, a licensed agent or broker earns its commission when it brings about the relationship of insurer and insured. . . . In accordance with this principle, absent an agreement to the contrary, the agency earned the commission pertaining to this policy, including the renewals thereof, when the policy was placed.

This same rule should apply to a bail bond agent. Because it is not clear from the facts the inquirer reports whether the inquirer had placed a bail bond contract with an insurer, or had an agreement specifying otherwise, the Department cannot advise whether the inquirer is entitled to a commission in this case.

2. Power of Attorney Documents

The Insurance Department only opines on insurance law issues. Because the "power of attorney" form about which the inquirer asked is not governed by the New York Insurance Law, the Department will not opine on this issue.

For further information, one may contact Senior Attorney Susan Dess at the New York City office.