



STATE OF NEW YORK
INSURANCE DEPARTMENT
25 BEAVER STREET
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David A. Paterson
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November 23, 2010

Julio C. Pozo
AAA Bail Bonds
909 Sheridan Avenue, #5
Bronx, NY 10451

Re: Earned Commissions on Bail Bonds

Dear Mr. Pozo:

I write in response to your inquiry, which seeks clarification regarding the point at which a bail bond agent earns a commission during a bail bond transaction.

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:

You report that you are a bail bond agent and that, while conducting your business of arranging for bail bonds for incarcerated detainees, on occasion you do not receive a commission even though you prepare all the required paper work for the court to issue the bond. You note 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.

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

You also report that you requested that the court return to you a "power of attorney" that you 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 you 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 . . .). You want to know if you 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 you reported exactly what transpired to precipitate your inquiry, you did mention the court's apparent intervention at a hearing held pursuant to N.Y. Crim. Law § 520.30(1) (McKinney 2009). You questioned the outcome of that hearing, which resulted in the criminal court judge returning to the indemnitor funds that the indemnitor had tendered to you, the bail bond agent, in support of the bail bond transaction. You requested the Department to opine on your 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 (NIALS) (September 23, 2004), the Department opined:

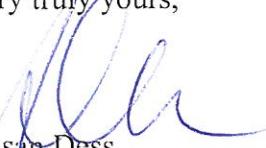
New York courts have generally held that, absent an agreement to the contrary, a licensed agent or broker earns its commission when it brings about the relationship of insurer and insured. . . . In accordance with this principle, absent an agreement to the contrary, the agency earned the commission pertaining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

This same rule should apply to a bail bond agent. Because it is not clear from the facts you report whether you had placed a bail bond contract with an insurer, or had an agreement specifying otherwise, the Department cannot advise whether you are 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 you inquired is not governed by the New York Insurance Law, the Department will not opine on this issue.

Very truly yours,



Susan Dess
Senior Attorney