



NEW YORK STATE  
DEPARTMENT of  
FINANCIAL SERVICES

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Governor

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Superintendent

**Insurance Circular Letter No. 13**  
**August 29, 2017**

**TO: All Insurers Authorized to Write Surety Insurance in New York State and Licensed Bail Agents**

**RE: Return of Premiums and Compensation Paid for Bail**

**STATUTORY REFERENCES: N.Y. Insurance Law §§ 6803 and 6804 and Article 23; N.Y. Criminal Procedure Law 500.10, 510.10, 510.40, and 520.30**

**I. Purpose**

The purpose of this circular letter is to provide guidance to all insurers authorized to write surety insurance in New York State and licensed bail agents regarding the recent decision by the New York Court of Appeals, New York State's highest court, in *Gevorkyan v. Judelson*, -- NY3d --, 2017 N.Y. Slip Op. 05176 (June 27, 2017). This decision confirms that under the New York Insurance Law, a bail insurer or bail agent may not retain a premium paid for a bail bond when a defendant is not released from custody. Bail agents and insurers must strictly comply with the Court of Appeals' decision in *Gevorkyan* and must return to indemnitors all premiums and compensation paid for bail bonds for defendants who are not released from custody after a criminal court does not accept the bail bond as the result of a bail sufficiency hearing.

**II. Discussion**

When a criminal defendant, whose future court attendance at a criminal action or proceeding is or may be required, comes under the control of a court, 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." C.P.L. § 510.10. C.P.L. § 500.10(3) defines "fix bail" as when, having acquired control over the defendant, the court designates a sum of money and stipulates that, if bail in such 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 or proceeding.

Once the criminal court has fixed the bail amount, a defendant or someone on the defendant's behalf ("indemnitor") may post bail with the court by depositing bail in the amount and form fixed by the court. The posting of bail does not automatically entitle the defendant to release. The court must examine the bail to determine whether it complies with the order fixing bail. C.P.L. § 510.40(3). In addition, at the prosecutor's request, the criminal court may conduct a bail sufficiency hearing. *See* C.P.L. § 520.30. At such a hearing, 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 the court has reasonable cause to believe that the person posting cash bail is not in rightful possession of money posted as cash bail or that the money constitutes the fruits of criminal or unlawful conduct.

“The superintendent may authorize a property/casualty insurance company which is authorized to write fidelity and surety insurance to do a bail business in accordance with the provisions of article eleven” of the Insurance Law. See Ins. L. § 6801(b)(2). A premium, in an amount regulated by the Insurance Law § 6804 is paid to the indemnitor for “giving bail bond.” The bail bond business, as a form of surety, is subject to the principles and requirements of Insurance Law Article 23.

In *Gevorkyan*, the Court of Appeals analyzed whether an entity engaged in the bail business may retain the premium paid on a criminal defendant’s behalf when bail is denied and the defendant is never released from custody. The *Gevorkyan* decision unequivocally holds, as the Department of Financial Services argued in an amicus brief submitted to the Court of Appeals, that the premium on such a bail bond may not be retained by a bail agent or insurer and must be returned to the indemnitor.

Citing New York Insurance Law Article 68 and its legislative history, the *Gevorkyan* Court ruled that a bail agent or insurer does not earn a premium for a bail bond if a court refuses to accept the bond following a bail source hearing. According to the Court’s analysis of the statute, and as argued in the Department’s amicus brief, an insurer is entitled to the premium only upon “giving bail bond” under Insurance Law § 6804(a), and the bail bond “has not been given if the court refuses to accept the bond after the bail source hearing.” Slip Op at 5, 7. The Court noted that its determination was further supported by the Insurance Law principle that premium follows risk: “The question before us ultimately turns on when a ‘premium’ is earned.” *Id.* at 11. As the Court explained, “[t]he use of the word ‘premium’ in section 6804(a) is significant because that term connotes a consideration paid to an insurer for assuming a risk. Risk, when used ‘with reference to insurance, describes the liability assumed as specified on the face of the policy.” *Id.* In the Court’s view, the insurer does not incur risk if the criminal defendant is not released and has no opportunity to abscond. “If the court disapproves the bail bond, the surety never runs the risk it contracted to insure.” *Id.* at 12.

The *Gevorkyan* decision applies to bail agents since they act as the agents or representatives of the insurers. Consistent with longstanding Insurance Law principles, as embodied in Article 23, the *Gevorkyan* decision confirms that bail agents and insurers are prohibited from retaining the premium or compensation on a bail bond for any defendant that is not released from custody after a criminal court does not accept a bail bond as the result of a bail sufficiency hearing. Such premium or compensation must be promptly returned to the persons who provided it as soon as possible after the criminal court’s determination in the bail sufficiency hearing.

The *Gevorkyan* decision does not address the rights of the bail agent to receive compensation or commission from the bail insurer for work performed by the agent when a defendant is not released from custody after a criminal court does not accept a bail bond as the result of a bail sufficiency hearing. Whether the bail agent may receive any compensation from the bail insurer is dependent upon the contract between those parties. However, as noted above, no premium may be retained and no fee may be charged to the defendant or indemnitors for a

defendant that is not released from custody after a criminal court does not accept a bail bond as the result of a bail sufficiency hearing.

Please direct any questions regarding this circular letter to Nathaniel Dorfman, General Counsel, by mail at New York State Department of Financial Services, Office of General Counsel, One Commerce Plaza, 17<sup>th</sup> Floor, Albany, New York 12257, or by email at [Nathaniel.Dorfman@dfs.ny.gov](mailto:Nathaniel.Dorfman@dfs.ny.gov).

Very truly yours,



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