

INSURANCE
DEPARTMENT OF BANKING AND INSURANCE
DIVISION OF INSURANCE

Recovery of Fugitive Fees by Surety Companies

Adopted New Rules: N.J.A.C. 11:1-40

Adopted Amendment: N.J.A.C. 11:17B-3.2

Proposed: January 18, 2005 at 37 N.J.R. 198(a)

Adopted June 28, 2005 by Donald Bryan, Acting Commissioner,
Department of Banking and Insurance

Filed June 28, 2005 as R. 2005 d. 247, **without change**.

Authority: N.J.S.A. 17:22A-39 and 17:29AA-10 and 29

Effective Date: August 1, 2005

Expiration Date: January 31, 2006, N.J.A.C. 11:1;
June 21, 2010, N.J.A.C. 11:17B

Summary of Public Comments and Agency Responses:

The Department received three written comments on the proposal. The comments were received from Fox Rothschild LLP, Lexington National Insurance Corporation, and Richard P. Blender on behalf of International Fidelity Insurance Company, Allegheny Insurance Company and Lexington National Insurance Corporation.

COMMENT: One commenter applauded the Department for proposing a degree of uniformity in the bail bond industry by specifying the fees that may be charged in connection with the recovery of a defendant who becomes a fugitive, and by specifying the conditions under which fugitive fees may be recovered.

The commenter proposes that the Department amend the definition of a fugitive in N.J.A.C. 11:1-40.1 to include a defendant who has breached the terms of his or her surety bond agreement or who takes any action sufficient for the issuance of a bench warrant under New Jersey law. The commenter's reasoning is that this amendment will further the Department's goal of promoting the public interest in apprehending fugitives, while also preserving the solvency of surety companies and helping to improve underwriting practices.

RESPONSE: The Department appreciates the commenter's favorable remarks on the proposed new rules and amendment, however, revising the definition of a fugitive as suggested in the comment would create an impermissibly subjective standard. The Department believes it is not appropriate to amend the definition to allow for the recovery of fees based on determinations by non-judicial personnel regarding whether the terms of a bond agreement have been breached or whether a court might issue a bench warrant.

COMMENT: The commenter further suggested that the Department amend N.J.A.C. 11:1-40.3, which establishes the conditions for the imposition of fugitive fees, so as to allow authorized agents of surety companies to sign on behalf of the surety the contract specifying the amount of the fugitive fee to be charged. The commenter believes this amendment would enable the surety to delegate certain functions to their authorized bail agents in certain circumstance and that this reflects the common insurance industry practice of authorizing agents to act on the carriers behalf under these circumstances.

RESPONSE: The Department disagrees with the commenter's suggestion. The basis of the proposed new rules and amendment is to ensure that surety companies are directly involved in

and responsible for the process of recovering fugitive fees, rather than leaving control in the hands of the bail bonds agents.

COMMENT: The commenter believes that the proposed rule may impermissibly limit their contractual right to recover the full amount of any loss in connection with a particular bonding transaction and it may also deprive them of a property right, making it unconstitutional or otherwise unenforceable as exceeding the Commissioner's regulatory authority.

The commenter seeks clarification on the issue that any forfeited amount is not included in the fugitive fee definition. However, forfeited amounts can be recovered from indemnitors as part of the normal indemnification provisions of the indemnification agreement.

The commenter suggested that the definition of fugitive fee in N.J.A.C. 11:1-40.2 should be expanded to include "the discharge of exoneration of a forfeited bond on that fugitive, or for any other relief associated with any such bond on that fugitive."

Finally, the commenter seeks clarification of N.J.A.C.11:1-40.3(c), which requires that the required contract be signed by the indemnitor and a "duly authorized officer of the surety, with the name and title of said officer clearly set forth in the contract." They suggested that a signature imprint be deemed acceptable, as opposed to an actual-live signature, so as not to impose significant obstacles, costs and unnecessary burdens upon the surety. Alternatively, the commenter suggested that the signature requirement be deleted entirely.

RESPONSE: The Department disagrees with commenter's suggestion that the proposed rule may impermissibly limit their contractual right to recover the full amount of any loss in connection with any bonding transaction. Furthermore, the amendment does not amount to a deprivation of a property right of sureties and the amendment and new rules are within the

Commissioner's regulatory authority. The rationale for the amendment and the proposed new rules is not to enable sureties to recover the full amount of any loss associated with a bonding transaction but rather to make it easier for sureties to recoup the costs associated with apprehending fugitives.

On the issue of the forfeited bail amount, the Department agrees with the commenter that any forfeited bail amount should not be part of the fugitive fee. New N.J.A.C. 11:1-40.3(d), as proposed and adopted, so states. The Department, however, disagrees with the commenter with regard to a broader definition of fugitive fee. The Department believes that the additional costs associated with apprehending a fugitive should be regarded as a cost of doing business. The adopted rules, including the limitations on the maximum amount of a fugitive fee, are not intended to make sureties and indemnitors whole, but rather to enable them to recoup a portion of the fees they incur while apprehending fugitives. On the issue of the signature on the contract, the Department does not see the need to revise the proposal. The Department's intent is to ensure that sureties properly review each contract, exercising full control and taking full responsibility for their accuracy. Were the surety to choose to utilize contracts with imprinted, as opposed to "live," signatures of one of its officers, it would, nevertheless, be held to this regulatory standard.

COMMENT: The commenter seeks clarification regarding the definition of fugitive fee as provided in N.J.A.C. 11:1-40.2. Specifically the commenter is concerned that the clause "court-imposed cost related to an application" could be interpreted to mean a forfeited amount that the court occasionally retains and characterizes as a "cost" in the court order or judgment. The commenter believes that the clause is intended to prohibit the collection of filing fees and other

court costs associated with the application for remittance and is not intended to cover actual forfeited amounts, even where those amounts may be characterized by the court as “costs.” Finally, the commenter requested confirmation that any court-imposed, forfeited amount should be recoverable from an indemnitor.

RESPONSE: The definition of fugitive fee is intended to allow for recovery of any filing fees and court-imposed costs pertaining to a motion or application seeking remittance of forfeited amounts that resulted from the defendant’s failure to appear before the court and the surety’s recovery of the fugitive, whether termed as either a motion for remission or a motion for exoneration. As was noted by the commenter, N.J.A.C. 11:1-40.3(d) explicitly provides that: “... a fugitive fee shall not include the amount of any bail forfeiture assessed by a court...”

Federal Standards Statement

A Federal standards analysis is required when any State agency adopts, readopts, or amends State rules that exceed any Federal standards or requirements, and must include in the rulemaking document a comparison with Federal law.

The Department notes that the subject of these amendments and adopted new rules deals with insurance activities in New Jersey, which are exclusively subject to the laws of this State and are not subject to any Federal standards or requirements. Thus, no Federal standards analysis is required.

Full text of the adoption follows:

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