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BONDS, BAIL, RECOGNIZANCES AND APPEAL—INDIVIDUAL WHO EXECUTES SUCH BONDS—NOT ENGAGING IN BUSINESS OF INSURANCE—SUCH INDIVIDUAL NOT ENTERING INTO CONTRACTS "SUBSTANTIALLY AMOUNTING TO INSURANCE"—WITHIN MEANING OF SECTION 3905.42 RC.

SYLLABUS:

Where an individual engages in the business of executing bail bonds, recognizances, and appeal bonds, such individual is not engaging in the business of insurance nor is such individual entering into contracts "substantially amounting to insurance" within the meaning of Section 3905.42, Revised Code, Section 665, G. C.

Columbus, Ohio, December 7, 1954

Hon. Walter A. Robinson, Superintendent of Insurance
Columbus, Ohio

Dear Sir:

I have before me your request for my opinion which reads as follows:

"It is my understanding that a considerable number of individuals throughout the state of Ohio are engaging in the business of executing bail bonds, recognizance bonds, appeal bonds and other similar undertakings for compensation, depositing cash or other securities with the court or certifying to the court that they are possessed of certain property and are worth certain sums in excess of all debts, liabilities, and lawful claims against them and in excess of all liens, encumbrances, and lawful claims against said property. In certain instances they are licensed to do so under ordinances adopted by the cities in which they do business. I request your advice as to whether such individuals may legally do so, though not licensed by this Division, in view of the laws of this state relating to insurance and in particular view of the provisions of Sections 3905.42, 3901.15 and 3929.01 (B) (4) of the Revised Code.

"I am attaching a copy of the type of recognizance bond being executed by such individuals."

The attached copy of the recognizance reads as follows:

"IN THE MUNICIPAL COURT OF.....

RECOGNIZANCE FOR APPEARANCE

THE STATE OF OHIO, COUNTY OF.....,.....,

CITY OF.....

THE CITY OF..... Plaintiff, vs. ..... Defendant	CHARGE ....

BE IT REMEMBERED, That on this day personally appeared the above-named defendant, and the surety, whose signature appears on this recognizance with that of the defendant, and they jointly and severally acknowledged themselves to owe unto THE CITY OF.....the sum of..... .....Dollars ($.....00) to be levied of their goods and chattels, lands and tenements if default be made in the conditions following, to-wit:

The CONDITIONS OF THIS RECOGNIZANCE are such that if the above-named and bound defendant shall personally be and appear before the Municipal Court of..... at its next session following the day of the entering into of the within recognizance, and so from day to day until finally disposed of, then and there to answer unto the CITY OF..... upon the charge appearing above, opposite the name of the said defendant, and abide the judgment of the Court, and not depart without leave, then this recognizance to be void; otherwise, it shall be and remain in full force and virtue in law.

And ....., who offers ....self as surety on this recognizance, being first duly sworn, says that ....he resides at No. ..... Street, and that ....he owns in h... own legal right, real property, subject to execution, located in the County of....., State of Ohio, consisting of ..... and described as follows, to-wit: .... that the title to the same is in h.... own name; that the value of same is not less than.....Dollars, and is subject to no encumbrance whatever except.....; that ....he is not surety upon any unpaid or forfeited recognizance, and that ....he is not a party to any unsatisfied judgment upon any recognizance; that ....he is worth not less than

.....Dollars over and above all debts, liabilities and lawful claims against ..... property.

This recognizance taken, signed, subscribed, acknowledged and filed by order of Court and the surety sworn to the last paragraph thereof, this.....day of....., A. D. 19.....

.....	.....
Clerk of the Municipal Court	Defendant (Seal)
By	.....
Deputy Clerk	(Seal)
	.....
	(Seal)
	.....
	(Seal)

Section 3905.42, Revised Code, Section 665, G. C., is as follows:

"No *company, corporation, or association,* whether organized in this state or elsewhere, shall engage either directly or indirectly in this state in the business of insurance, or enter into any *contracts substantially amounting to insurance,* or in any manner aid therein, or engage in the business of guaranteeing against liability, loss, or damage, unless it is expressly authorized by the laws of this state, and the laws regulating it and applicable thereto, have been complied with." (Emphasis added.)

It will be noted that the foregoing statute speaks in terms of a "company, corporation, or association" engaging in the insurance business. That this section's prohibitions apply with equal force to an individual who proposes to issue an insurance contract or a contract substantially amounting to insurance was decided in the case of Renschler v. The State, ex rel., Hogan, 90 Ohio St., 363. See also Opinion No. 1039, Opinions of the Attorney General for 1946, page 445.

The Renschler case and the 1946 opinion of the Attorney General both involved fact situations clearly denoting the transaction of *insurance* business. The question at hand is whether a "professional" bondsman writing bail and recognizance bonds is engaging in the insurance business or is entering into contracts "substantially amounting to insurance."

One of the fundamental difficulties in this area is that the legislature has not seen fit to enact a definition of "insurance," nor has it undertaken to clarify what is meant by "a contract substantially amounting to insur-

ance." In the case of Ohio Farmers Insurance Co. vs. Cochran, 104 Ohio St., 427 (1922), the Ohio Supreme Court held, as disclosed by the first branch of the syllabus that:

> "An insurance policy is a contract between the insured and the insurer, whereby for an agreed premium one party undertakes to compensate the other for loss on a specified subject by specified perils."

"Recognizance" and "bail bond" are virtually synonymous terms for all practical purposes. The purpose of both is to secure the appearance of the accused to answer the complaint or charge, and abide the orders of the court. It must be recognized at the outset, therefore, that the undertaking of a bail bond is basically a *suretyship* transaction, involving a principal obligor, a surety, and an obligee.

It appears as though the courts have on various occasions distinguished between a contract of compensated suretyship and a contract of insurance. Your attention is directed to the following statement from 50 American Jurisprudence, Suretyship, Section 313, at page 1108:

> "While it is a rule that the courts, in construing an ambiguous provision in a compensated surety contract, apply the rules applicable to insurance contracts, and while insurance contracts are in many respects similar to surety company contracts, yet, it is said, there is a wide difference between the two contracts. Insurance has been defined as a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event; whereas a contract of suretyship is one to answer for the debt, default, or miscarriage of another, and the nature of the contract is not altered because made by a corporation for compensation. The contract creates a tripartite relation between the party secured, the principal obligor, and the surety, and the rights, remedies, and defenses of a surety cannot be disassociated from this relationship although the contract is called one of insurance."

It must therefore be determined whether for purposes of state regulation, a professional bail bondsman has been placed under the supervision of the state division of insurance, along side companies and individuals admittedly engaging in the insurance business. Evidently a distinction exists in your mind between the situation on one hand, where an individual gratuitously goes bail on another's bond or does so *occasionally for compensation,* and the situation on the other hand where an individual makes a "business" of writing bail bonds, so as to net him a business profit.

The first situation clearly is not an insurance transaction. It involves a purely private transaction, with no element of risk distribution among many insureds. Is the bondsman any more an "insurer" when he holds himself out as being engaged in the bail bond business?

Suretyship and insurance have evolved historically quite independently of each other. Suretyship, at its inception, generally took the form of one person *gratuitously* going surety for another person who owed a debt or other obligation. In the last hundred years or so companies have formed for the purpose of realizing a business profit from the writing of bonds for compensation.

It is clear that a *company* may be organized or admitted in Ohio under Section 3929.01, Revised Code, Section 9510, G. C., to "guarantee the performance of contracts other than insurance policies, and execute and guarantee bonds and undertakings required or permitted in all actions or proceedings, or allowed by law."

Companies organized for such purposes have been placed by the legislature under the supervision of the superintendent of insurance, and among other requirements they must each make a deposit of $200,000 with the superintendent for the security and protection of its policyholders. These companies' organizational structure and business methods closely parallel the structure and business methods utilized and employed by insurance companies.

As I view the matter, however, where an *individual* is engaged in the execution of bail bonds as his livelihood and business, other considerations come to the fore when it is attempted to apply to him statutes regulating insurance companies or even statutes regulating corporate sureties.

It will be noted from an examination of the attached recognizance, that the city or state is guaranteed that if the accused does not appear for trial or charges on a given date, the bondsman will pay a specified sum, and certain *listed unencumbered property of the surety* may be looked to for satisfaction. The surety's obligation is to produce the accused or to pay. There is a specific pledge of property. Thus there is no actual common insurance fund or reserve which the *insurer* ordinarily must maintain for the payment of losses. Neither are the so-called "premiums" which are charged and collected, necessarily carefully calculated so as to

bear any direct relationship to the estimated or anticipated forfeitures on the bonds written.

Furthermore, the bondsman is regulated by the *court*. In this connection, I direct your attention to Section 2937.23, Revised Code, formerly Section 13435-3, General Code, which provides:

> "One surety in each recognizance under section 2937.22 of the Revised Code, must be a resident of the county in which the prosecution is pending, and the sureties must own real property worth double the sum to be secured, over and above all incumbrances, and have property in this state liable to execution equal to that amount.
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> "When two or more sureties are offered on the same recognizance, they must have in the aggregate the qualifications prescribed in this section. Such sureties may be required to exhibit to the judge or officer taking the recognizance, satisfactory evidence of ownership of such real property. The judge or magistrate may accept as sole surety on any such recognizance a surety company authorized to do business in this state, and a judge or magistrate may accept cash, bonds of the United States or of the state of Ohio, or any subdivision thereof, or a certificate of deposit of a financial institution authorized to do business in this state, in an amount equal to said bond, in lieu of a real property bond."

It will be observed that the *court* itself exercises a good deal of control over the bondsman. The judge may require the sureties to exhibit satisfactory evidence of ownership of the real property he claims to own. The judge or magistrate may accept a surety company as sole surety on a recognizance, and he may accept cash or bonds in lieu of the real property bond.

It is readily understandable why the legislature has adopted a policy of providing for fairly stringent court control over bail and recognizance bonds executed by one or more individuals as sureties, as compared with its more lenient attitude toward court policing of bond business written by the surety companies. The reason, no doubt, lies in the fact that the financial solvency of surety companies is more adequately insured due to the supervision and regulation accorded these companies under the state division of insurance. They must submit annual statements, make financial reports, maintain adequate reserves, and must place $200,000 on deposit with the superintendent of insurance as security.

From a study of the typical bail bond transaction it becomes readily apparent that such a transaction is not basically an insurance transaction

at all, even though the legislature *has* seen fit to place *safety companies* under the general supervision of the division of insurance. First of all, the bondsman and the accused are co-obligors on the obligation owed the state. An insurer's liability arises at the time of loss; the surety's liability exists co-incidentally with the principal's liability.

Secondly, in theory at least, once the bond or recognizance is accepted, thus releasing the accused from the custody of the sheriff or police officer, the accused passes into the custody of his bail. This means that the bail has a measure of control over the occurrence or the non-occurrence of the event loosely said to be that which has become insured, namely, the appearance of the accused for trial or charges. Insurance, on the other hand, is generally thought to contain as one of its elements a risk strictly attributable to a fortuitous event.

Next, it should be remarked that insurance is very rarely, if ever, taken out with reference to such a short time peril or risk. The bail transaction is strictly a single, isolated, one-shot guarantee, directed toward one date or event.

Further, as has already been mentioned, the individual bail bondsman pledges *specific* property to answer for the default in appearance. The adequacy of the security is determined and controlled by the court or magistrate. This is in contrast to the operational methods of a bonding company which has a general insurance reserve fund comprised of premiums actually collected. The *assets* of the bonding company are the backbone of its security. In the case of the individual bail bondsman reliance must be placed upon his personal financial security and his pledged property.

There is a further factor which should not be ignored, and that is the fact that it is actually impossible under the insurance laws of Ohio (as they are presently constituted) for an individual who engages in the bail bond business to obtain a license from the division of insurance. The statutes in the bonding field envision a corporate entity, enjoying perpetual life, and utilizing the business methods employed by the ordinary insurance company. It will not do to classify a professional bail bondsman as an insurer or quasi-insurer, merely because surety companies have been placed under the supervision of the state division of insurance. Historically, the writing of bail bonds was just as separate and distinct

from executing insurance policies as almost any other business pursuit is separate and distinct from the insurance business.

You have also mentioned the writing of appeal bonds. Most of what has heretofore been said with reference to bail bonds and recognizances is equally applicable here. The purpose of an appeal bond is to secure the adverse party against loss in the event judgment is awarded against the appellant in the court in which the case is appealed. See Auditorium Realty Co. v. Hussman, 14 O.L.A. 727. The bond serves a dual purpose; it acts both as a stay of execution and as a means to give the complaining party a right to be heard in an upper court. Wood Motor Co. v. Roath, 4 O.L.A. 798.

Section 2505.13, Revised Code, Section 12223-13, G. C., provides in part, that:

> "In any case in which a supersedeas bond has been executed and filed and the surety is one other than a surety company, the court or its clerk shall upon request issue a certificate setting forth the fact that the bond has been filed, stating the style and number of the case, the amount of the bond, and the sureties thereon. Such a certificate may be filed in the office of the county recorder of any county in which the sureties may own land and when filed the bond shall be a lien upon the land of the sureties in such county. * * *"

This indicates that specific real property owned by the surety is looked to as security upon the appeal bonds written by him. I am impelled to conclude that the writing of appeal bonds as a business venture is not tantamount to engaging in the business of insurance, and therefore does not come under the supervision of the superintendent of insurance.

It has been declared that the provisions of former Section 665, General Code, now Section 3905.42, Revised Code, are reasonable and just, and were adopted for the laudable purpose of protecting the public against imposition by unreliable and untrustworthy companies and associations. See State, ex rel. Richards v. Ackerman, 51 Ohio St., 163; State, ex rel. Herbert v. Standard Oil Co., 138 Ohio St., 376. However this may be, there is no legal justification for classifying as an insurance business a pursuit which traditionally has maintained its own individual identity and which upon close analysis fails to satisfy the elements of insurance. The fact that surety and bonding companies have been placed under the supervision of the division of insurance does not in and of itself make all bonding business synonymous with the insurance business.

The public's control over *an individual* engaging in the bail or appeal bond business is exerted chiefly through the *judicial* branch of the government. In addition, many municipalities have enacted regulatory ordinances directed toward protecting the public against unreliable and untrustworthy bondsmen.

Accordingly, it is my opinion that where an individual engages in the business of executing bail bonds, recognizances, and appeal bonds, such individual is not engaging in the business of insurance nor is such individual entering into contracts "substantially amounting to insurance" within the meaning of Section 3905.42, Revised Code, Section 665, G. C.

Respectfully,
C. WILLIAM O'NEILL
Attorney General