



TESTIMONY OF THE STATE ATTORNEY GENERAL TWENTY-FOURTH LEGISLATURE, 2008

ON THE FOLLOWING MEASURE:

S.B. NO. 1961, S.D. 1, RELATING TO BAIL.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Tuesday, March 11, 2008 **TIME:** 2:00 PM

LOCATION: State Capitol Room 325
Deliver to: Committee Clerk, Room 302, 5 copies

TESTIFIER(S): Mark J. Bennett, Attorney General
or Lance M. Goto, Deputy Attorney General

Chair Waters and Members of the Committee:

The Department of the Attorney General opposes this bill.

The purpose of this bill is to require that bail bonding agents be licensed, and it authorizes the Department of Commerce and Consumer Affairs to adopt rules for the process of obtaining a bail bonding agent license. This bill creates a number of prohibited activities for bail bonding agents and provides for civil and criminal penalties. And a very significant part of this bill provides numerous provisions to exonerate bail bond agents and sureties from bond liability.

The Department has numerous concerns about this bill. To begin with, while the bill appears to provide comprehensive measures for bail bond agents, sureties and the bail bond process, it actually does not make any effort to consider and work with the existing law in chapter 804, Hawaii Revised Statutes (HRS). In fact, it proposes provisions that are completely inconsistent with existing law.

For example, section 804-51, HRS, provides procedures for the forfeiture of bail bonds. When a criminal defendant out on bond fails to appear in court as required, the court forfeits the bond and immediately enters judgment in favor of the State and against the principal or surety on the bond. The surety on the bond is served notice of the judgment. Thirty days after notice is served,

the judgment is immediately executed, unless the surety on the bond files a motion to set aside the judgment. At a hearing on the motion, the surety must show **good cause** why the judgment should not be executed. If the showing is not made to the satisfaction of the court, judgment is executed forthwith.

The Hawaii Supreme Court, in State v. Flores, 88 Haw. 126 (1998), discussed the application of section 804-51, and made the following statements about the meaning of "good cause":

[T]he supreme court has observed that generally, sufficient cause to set aside a forfeiture is a showing that the party did not break his or her recognizance intentionally, with the design of evading justice, or without a sufficient cause or reasonable excuse, such as unavoidable accident or inevitable necessity preventing his or her appearance.

The Court also confirmed that "good cause" would also be if the defendant was surrendered within the thirty-day period.

In S.B. No. 1961, S.D. 1, from pages 16 to 30, numerous provisions are proposed that are inconsistent with section 804-51 and the current bond forfeiture law. These proposed provisions are confusing, inconsistent, and redundant at times, but they are clearly intended to allow sureties far greater opportunities to avoid bond liability.

On page 22, line 8, the surety is required to show "cause," not "good cause," why the judgment should not be entered for the State. There appears to be a lower and more ambiguous level of proof needed by the surety. It also appears that, unlike section 804-51, the entry of judgment is not immediate, but delayed.

On page 23, lines 6-11, the wording is unclear, but it appears that depending on the timing of the hearing, there is an automatic stay of the execution of the judgment.

Paragraph (8), on page 25, provides further automatic stays of the execution of the judgment.

There are numerous other provisions that appear to exonerate the surety from liability even after the entry of judgment if the

defendant appears in court, is surrendered by the surety, or is found to be in custody in another jurisdiction within the State.

Paragraph (15), on page 28, appears to give the surety one year after payment of the bail forfeiture to locate the defendant and thereby get the judgment vacated and get remission of the amount previously paid.

Subsection d, on page 19, provides that if a defendant is imprisoned in another state at the time the defendant's case is called for trial in Hawaii, the surety can be relieved of liability. This would be so even though the defendant probably fled the State in violation of conditions of bail.

The Department also has concerns about some of the inappropriate terminology being used in the bill. For example, on page 10, line 11, the term "district attorney" is used although we have "prosecuting attorneys" not district attorneys, in Hawaii. On page 17, line 22, the term "sheriff of the county" is used although we have no county sheriffs in Hawaii.

The Department would like to point out an inconsistency in the licensing provisions as well. On page 7, lines 1-4, paragraph (7) provides that the Insurance Commissioner **may** take license action based on a felony conviction involving moral turpitude. On page 8, lines 11-15, however, paragraph (4) provides that the Insurance Commissioner must take license action based on any felony conviction.

Bail is intended to address a defendant's danger to the community and risk of flight. It is intended to assure a defendant's appearance in court when required. When a defendant fails to appear for trial, the court's schedule is impacted and may result in a waste of court time, staff and resources. The prosecutor's time and schedule would also be impacted. The subpoenaed witnesses would have to be cancelled and resubpoenaed. The witnesses work schedules would also be impacted. A defendant needs to appear when required.

When a bail bond agent assists a defendant with a bond to obtain the defendant's release, the bail bond agent is taking responsibility for that defendant's appearance. The bail bond agent assumes the risk that the defendant will not appear and that there will be a bond forfeiture. In this bill, provisions are being proposed to allow sureties to avoid responsibility. There will be a detrimental impact on the criminal justice system.

The Department respectfully requests that this measure be held.



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TO THE HOUSE COMMITTEE ON JUDICIARY

TWENTY-FOURTH LEGISLATURE
Regular Session of 2008

Tuesday, March 11, 2008
2:00 p.m.

TESTIMONY ON SENATE BILL NO. 1961, S.D. 1 – RELATING TO BAIL

TO THE HONORABLE TOMMY WATERS, CHAIR, AND MEMBERS OF THE
COMMITTEE:

My name is J. P. Schmidt, State Insurance Commissioner (“Commissioner”), testifying on behalf of the Department of Commerce and Consumer Affairs (“Department”). The Department has concerns with portions of this version of the bill and offers the following comments. The Department defers to the Judiciary as to the provisions under its jurisdiction.

The purpose of this version of the bill is to add eight sections in a new part to Hawaii Revised Statutes (“HRS”) chapter 804 titled “Bail Bond Agents; Sureties” and to add two new sections to HRS chapter 804. Specifically, this measure: (1) clarifies that the Commissioner has jurisdiction over the new part; (2) adds seven new statutory definitions; (3) establishes licensing requirements for “bail agents”; (4) allows the Commissioner to adopt rules on fictitious business names and treatment of premiums; (5) adds provisions for mandatory and discretionary licensing denial, suspension, and revocation; (6) specifies prohibited acts of bail agents; and (7) adds provisions for exoneration from bond liability and enforcement procedures for compensated sureties.

The S.D. 1 deleted the provisions regulating bail fugitive recovery persons, added a provision on fiduciary responsibilities of bail agents, clarified that the new part is to be administered and enforced by the Commissioner, and added two new sections on exoneration from bond liability and enforcement procedures for compensated sureties.

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The bill raises a number of issues relating to legislative intent and administrative implementation.

The Department's Insurance Division currently licenses and regulates surety producers as insurance producers (formerly called "insurance agents") under the Insurance Code, HRS chapter 431. Surety producers are required to take an insurance licensing exam and to be appointed by the surety company. HRS § 804-10.5(b)(3) refers to sureties who are licensed under HRS chapter 431:9A. There are also provisions pertaining to surety insurance in HRS chapter 431:10F.

It is unclear whether this bill is intended to replace or supplement the current regulatory scheme in the Insurance Code. Where this bill is intended to supplement the Insurance Division's current regulation of bail agents, the Department respectfully recommends incorporating by reference the existing Insurance Code provisions that regulate bail agents, rather than create another licensing scheme in HRS chapter 804. This will lead to regulatory efficiency as it will eliminate duplicative and potentially conflicting statutes and promote uniform licensing and enforcement among all types of insurance producers.

As currently drafted, section 804-A on pages 2-3 of the bill defines "bail agent" or "bail bond agent" as "any person who furnishes bail for compensation...and who is *appointed by an insurer...to execute or countersign bail bonds*". "Compensated surety" is defined as "any person in the business of writing bail appearance through bonding agent and is *subject to regulation by the director of commerce and consumer affairs*."

The distinction between the two terms is unclear. It is also unclear whether these terms are intended to mean an insurance producer licensed under HRS chapter 431:9A. This will need to be clarified, as this new part in HRS chapter 804 may conflict with the licensing and enforcement statutes in HRS chapter 431:9A governing insurance producers. It would be problematic for the Insurance Division to have two different licensing schemes: one for bail agents as defined in HRS chapter 804 and one for all other insurance producers and licensees in HRS chapter 431.

Although "bail insurance company" is defined in section 2 of the bill on page 3, lines 5-8, the term used in section 804-G on pages 14-15 of the bill refers to "insurers". The term "bail insurance company" is used in section 3 of the bill. The Department respectfully suggests defining the term by referring to the Insurance Code, which defines an "insurer" in HRS § 431:1-202, defines "surety insurance" in HRS § 431:1-210", and defines bail bond insurance in HRS § 431:1-210(1).

The term "compensated surety" is not used in the new part and should be deleted from section 2 of the bill.

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As an alternative, it may be helpful to place all definitions in a new definitions section in Part I of HRS chapter 804 and to make the definitions applicable to the entire chapter. This would avoid the drafting problems outlined above.

Sections 804-C(a) and (b) on page 4 of the bill require bail bond agents to be licensed and specify the license renewal date. Since HRS chapter 431:9A already requires bail agents to be licensed and addresses renewal date, this section is duplicative. These sections may be replaced with an express reference to the licensing in HRS chapter 431:9A.

Section 804-C(c) on page 4 of the bill requires the Commissioner to issue an identification card to each licensed bail bond agent. Currently, the Insurance Division issues to each insurance producer a license and maintains a website of licensed insurance producers. Requiring the issuance of ID cards may be burdensome. Therefore, the Department respectfully requests the deletion of this subsection.

Section 804-C(d) requires the Commissioner to annually notify in writing each bail agent of any changes to State law. The Department has concerns about this requirement because it presents a significant administrative burden. There is no similar requirement in the Insurance Code for insurance producers. Although producers are statutorily required to update their mailing address, many neglect to do so. A significant number of mailings are returned as undeliverable when notices and orders are mailed. The Department is required to expend a great deal of time, effort, and postage to research and to re-send notices. Therefore, the Department respectfully requests the deletion of this subsection.

Section 804-D on page 5 of the bill requires a bail agent to register any fictitious business names with the Commissioner. Currently, HRS §§ 431:9A-106 and 431:9A-110 require insurance producers to notify and submit an application for use of any name other than the producer's legal name. Therefore, the Department respectfully requests: (1) the addition of language in subsection (a) to reference the Insurance Code; and (2) the deletion of subsections (b) through (d) on page 5, lines 9-19, as these provisions are duplicative of existing insurance licensing statutes.

Section 804-E(a) and (b) on pages 6-9 of the bill govern discretionary and mandatory license denial, suspension, revocation and termination. Currently, HRS § 431:9A-112 governs producer licensing actions. The language in section 804-E(a) is substantially similar to HRS § 431:9A-112, except paragraph (7) refers to conviction of a felony or misdemeanor involving moral turpitude. The Insurance Code currently prohibits the licensing of convicted felons, except where an applicant has requested and obtained the Commissioner's written consent, pursuant to HRS § 431:2-201.3. Therefore, the Department respectfully requests an amendment to HRS § 431:9A-112 that expressly references this new section in HRS chapter 804.

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Section 804-E(b) states grounds for mandatory licensing action. There is no comparable section in the Insurance Code, although some of the grounds are included in HRS § 431:9A-112. To provide for uniformity, the duplicative grounds should be deleted.

Section 804-E(c) states that licensing hearings are subject to judicial review. This provision is duplicative of HRS § 431:2-308(e) and should be deleted.

Section 804-E(d) allows the Commissioner to assess administrative penalties, in lieu of or in addition to any other disciplinary action permitted in this section, and fixes administrative penalties ranging from \$300 to \$1,000 per violation, with the fines to be deposited into the State general fund. Currently, HRS §§ 431:9A-112 and 431:2-203 govern fines and penalties imposed against producers. Fines are currently deposited into the compliance resolution fund, which is the funding source for the Insurance Division, pursuant to HRS § 431:2-215. For these reasons, the Department respectfully requests the deletion of this subsection.

Section 804-F on page 10-13 of the bill specifies prohibited activities that are deemed unlawful and subject to criminal penalties, in addition to any other applicable penalty. For violations of any penal provision (other than motor vehicle insurance fraud), the Commissioner is authorized to certify the facts to the Attorney General or the Prosecutor's Office, pursuant to HRS § 431:2-203(b)(2). These prosecuting agencies may have limited time and resources to enforce these criminal penalties.

Section 804-G outlines the fiduciary responsibilities of bail agents with respect to premiums received and collateral taken. Currently, HRS §§ 431:9A-123 and 431:9A-123.5 require insurance producers to keep a record of all insurance transactions, to maintain funds in a segregated account, and to account for all premiums received or collected. Therefore, this section should be deleted.

Section 3 of the bill in subsection (c)(18) on page 29, lines 7-20, requires the court to order the Commissioner to suspend the bail agent's license until all forfeitures and judgments have been certified as paid or vacated by the court, where the bail agent's name has remained "on the board" for 45 consecutive days. Where the bail forfeiture judgment is not paid within 15 days, the Commissioner is required to order the surety company to pay the judgment after notice and hearing. These provisions would appear to violate the doctrine of separation of powers. The Department respectfully requests amending this paragraph with generalized language that allows the court to refer matters pertaining to bail agents and sureties to the Commissioner for appropriate action.

Section 6 on page 30 of the S.D. 1 provides that the Department is required to "adopt rules as provided in section 1 of this Act and files rules with the office of the lieutenant governor as provided in chapter 91." There is no reference to rulemaking in

section 1 of the bill. Therefore, the Department respectfully requests the deletion of this language in section 6 of the bill on page 30, lines 7-11.

In sum, the Department respectfully suggests the following amendments:

- (1) Delete the definitions of "bail agent" or "bail bond agent" and "compensated surety" on page 2, lines 11-20, and page 3, lines 9-11, by referring to sureties as defined in HRS § 804-10.5(b)(3).
- (2) Delete provisions that appear to be duplicative of HRS chapter 431 such as sections 804-C, 804-D, and 804-E(a), (c), (d).
- (3) Amend the language in section 3 of the bill in subsection (c)(18) on page 29, lines 7-20, such that the court refers the matter to the Commissioner for appropriate action.
- (4) Delete the language in section 6 of the bill on page 30, lines 7-11, such that this Act takes effect on approval.

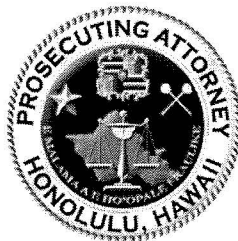
The Department is willing to work with the various interested stakeholders to attempt to develop a workable solution.

We thank the Committee for the opportunity to testify on this measure.

DEPARTMENT OF THE PROSECUTING ATTORNEY
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THE HONORABLE TOMMY WATERS, CHAIR
HOUSE COMMITTEE ON JUDICIARY
Twenty-fourth State Legislature
Regular Session of 2008
State of Hawai'i

March 11, 2008

RE: S.B. 1961, S.D. 1; RELATING TO BAIL.

Chair Waters and members of the House Committee on Judiciary, the Department of the Prosecuting Attorney submits the following comments on S.B. 1961, S.D. 1.

The purpose of this bill is to propose statutory regulations for bail agents and bail bond agents. In addition, this bill adds provisions regarding statutory procedures for bail forfeiture as well as provisions delineating when principals or sureties are to be exonerated.

We take no position on the portion of the bill up to page 16 line 15, which deal with regulation and licensing of bail agents and bail bond agents. However, we do have serious concerns that this bill from page 16 line 15 conflicts with certain existing sections of Hawaii Revised Statutes (HRS) which are not amended, repealed or conformed by this bill. In particular, we note that HRS section 804-51 already provides a procedure for the forfeiture of the bond and that the bond forfeiture provisions of S.B. 1961, S.D. 1.

We also have concerns about the scope of provisions which seek to limit the liability of the principal or surety. For example, S.B. 1961, S.D. 1, provides that the surety is exonerated when a defendant in a criminal case is imprisoned in another state for more than ninety days and the time the case is called for trial and cannot appear and the State has refused to extradite the defendant. Since bondsmen are contracting to take a risk in bailing out a defendant, who would otherwise be in custody and therefore available for court proceedings in this state, we feel the bondsman should remain financially responsible if the defendant violates his or her conditions of bail and leaves the state and the bondsman cannot present him or her in court within the current thirty days. In short, the defendant would and could not have been in the other state if the surety had not bailed him or her out; the surety has contractually agreed to assume the risk that the defendant will appear in court.

In addition, we note that there are portions of the bill whose statutory purpose are unclear. For example, the section entitled "Exoneration from bond liability" that begins on page 16, line 19 includes in paragraph (g) on page 20, lines 1-3 that the enriching of the public treasury is not part of the object at which a forfeiture proceeding is aimed. We find

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that a non sequitur since the conditions under which a bond may or may not be forfeited are spelled out and have nothing to do with whether the public treasury is or is not enriched.

Finally, we believe that the changes in the setting of bail or forfeiting of bond proposed by this bill, could have a significant the impact on the criminal justice system and its stakeholders and that these impacts have not yet been thoroughly been explored or discussed with the affected parties. For this reason, if the committee were inclined to pass this bill, we would ask that the portions of the bill from page 26 line 19 to page 29 line 20 be deleted.

Thank you for this opportunity to testify.

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JUDtestimony

From: chuck fisher [REDACTED]
Sent: Tuesday, March 11, 2008 5:32 AM
To: JUDtestimony
Subject: Testimony 1961

AAA Local Bail Bonds Statement in opposition to SB1961.

Page 4. States that the insurance division may revoke a license if the insurer cancels an appointment. One has nothing to do with the other unless there has been evidence of foul play by the bond agent. Some people have many appointments from multiple sureties. This would take a persons license for appointment termination by any insurance company.

Page 6 (7) this paragraph conflicts with another part of the bill that puts time line on felony convictions.

Page 6 (8) unfair trade practice should be clearly defined with examples as to not allow for ignorance by a company or loose interpretation by the court.

Page 7 should be no time limit on a felony conviction or should strike all such language referring to felons.

Page 8 804-f (1) if a bondsman cannot refer an attorney an attorney cannot refer a bondsman. If a bondsman can be criminalized for a referral then an attorney should suffer the same consequences.

Page 8 and 9 (2) they should expand this to include an attorney's immediate family or officer of the court or police force immediate family.

Page 9 (6) doesn't allow anything above the premium for travel or other expenses in reference to service.

Page 9 (a) seems to say that I cannot sell collateral if person defaults on bond. Why take collateral?

Page 10. Twenty four hours should be expanded to state day court is next opened. If I enter into a deal on Thursday evening for a person in the correctional center and it is a four day weekend the jail does not accept after hour bail so the earliest a person could post is 96 hours.

Page 13 allows insurance commissioner to take possession of Collateral and makes the state liable for the collateral once they taken possession.

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The problems with bail in Hawaii and easy remedies as we see it are as follows:

1. **Unlicensed activity** -At night any person posting bail must show their license. During business hours anyone who approaches the clerk with a bond may post it. **Remedy** -Simply mandate the clerks qualify each person posting a bond just as they do after hours.

2. **Solicitation** -Unlicensed agents spend their entire day at the courthouse tapping shoulders and handing out business cards. There are no soliciting signs all over the courthouse yet even bailiff's hand out information to people and assist in unlicensed activity. **Remedy** -Have the bailiff read the signs, and throw these people out of the court house and fine any company that is using the solicitor.

3. **Referral of Bail Company via officer of the court** - Sheriff's deputies have actually approached our clients and handed them business cards of bail bonds. Correctional officers who bounty hunt for bail bonds call their bail bond agency and give them contact information off of the booking report so that the company can cold call the family and secure the bond. I have personally been approached and asked for a bird dog fee for such information. I turned the officer in to his superiors and nothing happened. **Remedy**- Let the warden know that this is illegal and hold the officer and the facility accountable.

4. **Attorneys profiting from bail** -**Remedy**. Enforce rule 26.
5. **Churn and burn**. Some companies bail high risk client today, take their money, and return them to custody days later rather than properly underwriting a bond. **Remedy**- stop warrantless arrest in Hawaii. Force the company to go before the court to get a warrant signed before arrest can be made. It wont take the court long to figure out who is acting inappropriately.

6. **After hour bail at the correctional centers**- Currently bail can only be posted at the court during court hours due to a discrepancy between the court and the Sheriff's department. **Remedy**- Mandate a 24 hour clerk to allow people the right to post bail at any time.

7. **Complaints**- The Department of Insurance states it does not regulate bail bondsmen. When a person files a complaint, it gets discarded. **Remedy**- Clear up the misunderstanding and let the insurance commissioner know that his office governs bail bonds and he does have the power to take a license and investigate wrong doing.
Simply put, there are laws on the books in Hawaii that can solve most every problem that this bill seeks to address.

The problem is there is absolutely no enforcement.

If the insurance division would carry out its duty of enforcement, the officers of the court mandated to stop referring business, the courts would stop allowing solicitation, and the judiciary would enforce rule

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26 in regards to attorneys. The majority of these problems would be solved. The state could merely do these things before trying to reinvent the wheel.

Having said this we understand that this bill cannot solve everything and there is some merit and good intent contained within.

Regards
Charles Fisher
Hawaii Bail Agent

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JUDtestimony

From: Darrell Horner [REDACTED]
Sent: Monday, March 10, 2008 4:52 PM
To: JUDtestimony
Subject: Testimony

A comment on bill number 1961.

Section 808B sub section c pertaining to qualifications for bail bond agents, it states; no person engaged as a law enforcement officer shall be licensed as a bail bond agent. In my case I have a part time agent who is also a game warden and I feel he should not lose his license and the wording of "retroactive effect" should be added. I can see a police officer of a court clerk as being forbidden.

Your consideration is appreciated

Darrell Horner
Horner Bail Bonds

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3/10/2008