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COURT OF APPEALS

STATE OF NEW YORK

GEVORKYAN,

Appellant,

-against-

NO. 79

JUDELSON,

Respondent.

20 Eagle Street
Albany, New York
June 1, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Good afternoon, everyone.
2 First matter on this afternoon's calendar is appeal number
3 79, Gevorkyan v. Judelson.

4 Counsel.

5 MR. BLUESTONE: Good afternoon, Your Honor. May
6 it please the court. I ask for two minutes to be held for
7 rebuttal.

8 CHIEF JUDGE DIFIORE: Yes, you may.

9 MR. BLUESTONE: Thank you.

10 In all insurance transactions, premiums follow
11 risk. Premiums are dependent upon risk. No premium is
12 earned without risk. Insurance is the ancient mechanism by
13 which risk is calculated - - -

14 JUDGE RIVERA: Is - - - is risk mentioned
15 anywhere in any of the statutes that apply to the bail
16 process?

17 MR. BLUESTONE: It is not.

18 JUDGE RIVERA: Okay.

19 MR. BLUESTONE: It's not.

20 CHIEF JUDGE DIFIORE: Counsel, what does it mean
21 to give bail bond?

22 MR. BLUESTONE: To give bail bond, as analyzed by
23 the Attorney General's brief, is to pay the money or get
24 the bond itself, money in terms of cash bail, or the bond
25 itself accepted by the court, and that the person is

1 released as a result of that acceptance by the court.

2 CHIEF JUDGE DIFIORE: And - - - and what legal
3 authority do you derive that answer from?

4 MR. BLUESTONE: Well, it seems to be inherent in
5 Insurance Law 6804(b), in which it said that the bond is
6 proposed to the court by the surety.

7 JUDGE RIVERA: What - - - so what is posting
8 bond?

9 MR. BLUESTONE: Posting bond is a term which
10 apparently has no real definition. It's taken to mean the
11 bringing of the bond to the clerk in the part where the
12 case is to be heard, which then sets up a situation where
13 there is either a sufficiency hearing to be scheduled or
14 the bond is accepted, and the person is released upon bail,
15 having given bail, and now being released, having had the
16 bill accepted by the court.

17 JUDGE RIVERA: Okay. So - - - so I'm - - - just
18 to clarify. So posting bond means to actually turn over
19 funds to the court - - -

20 MR. BLUESTONE: That's our position.

21 JUDGE RIVERA: - - - or not?

22 MR. BLUESTONE: I'm sorry. That's our position
23 in the absence of strict statutory language of what posting
24 means. Posting appears to be a conglomerate of several
25 acts. Taking the - - - having the bond prepared, signed,

1 that is executed in that sense, brought to the clerk,
2 having a cut form generated so that the person is delivered
3 by the corrections department to the courthouse or the
4 sheriff, depending on where you are, and then having the
5 court review the bond. And if there is to be a bond
6 sufficiency hearing, the hearing is held, the court grants
7 or denies the bond, and the person is released.

8 JUDGE RIVERA: So there's no definition.

9 MR. BLUESTONE: No.

10 JUDGE RIVERA: Right. Is this just the practice,
11 this is what is understood in the industry, if you will?

12 MR. BLUESTONE: It appears to be understood in
13 the industry, but there seems also to be a wide discrepancy
14 of what that understanding is.

15 JUDGE GARCIA: Counsel, could you contract this
16 away? So if this contract had provided, you know, this
17 money is due in payable and it was clear, at the stage
18 which it was - - - where it was gotten to in this case,
19 could you do that? Could you contract to have this money
20 owed?

21 MR. BLUESTONE: I believe that there is a
22 contract in the record which was proffered by the Bronx
23 Defender's brief that has that particular provision in it.
24 It says that if a bond is brought to the court and a
25 sufficiency hearing is held, and the sufficiency hearing is

1 bad for the accused, then they will not get their money
2 back.

3 JUDGE GARCIA: Right. So if you can do that, and
4 we have an interpretation from the district court here that
5 this was ambiguous as to that point, this contract, and
6 they had a hearing, and they interpreted it as, that's what
7 you meant, what provision overrides that?

8 MR. BLUESTONE: Okay. I don't think that I agree
9 with the thought of that you can do that. I think you can
10 write up a contract that says that, but - - -

11 JUDGE GARCIA: So the contract that's in the
12 record you mentioned would be void.

13 MR. BLUESTONE: I believe so. And it would be
14 void for the reason that the statute requires that bail - -
15 - that bail be given, and that includes the acceptance of
16 the bail, the providing of the bail, and the release of the
17 prisoner.

18 JUDGE STEIN: If - - - if - - - well, this type
19 of insurance policy has some differences from other types
20 of insurance policies. And one of them, to me, is that an
21 automobile insurance policy, or a homeowner's insurance
22 policy, or those types of policies that we're - - - most
23 people are used to dealing with, have a fixed period of
24 coverage, maybe a year, maybe six months, whatever it is.
25 And so that if a partial premium - - - refund - - - premium

1 refund is due, generally it's prorated in terms of that
2 time.

3 If under the law here, and I assume it's your
4 position that - - - that a partial refund would be due if
5 the defendant was returned to custody some time before the
6 case was over, how - - - how would you determine how much
7 of - - - of a refund was due?

8 MR. BLUESTONE: That's a very good question, and
9 one that's not been considered by any court or any case
10 that we are aware of.

11 Article fifth (sic) of the contract in this case
12 says exactly that. That if the bail bondsman decides to
13 turn the person back in, he has to repay the unearned
14 premium. I believe - - -

15 JUDGE STEIN: So - - - so to piggyback on - - -
16 on Judge Garcia's question, if you're saying that you can't
17 contract away the right completely, but - - - are you
18 saying you can contract to how the refund would be
19 calculated?

20 MR. BLUESTONE: I suppose you could. Certainly
21 not in this contract. It wasn't calculated, nor was any
22 calculation set forth, not even a - - - a theory of how to
23 calculate.

24 JUDGE STEIN: Okay.

25 MR. BLUESTONE: But I believe there must be a

1 wide-ranging body of law in figuring out exactly how an
2 unearned premium is calculated. I'm - - - I am sure that
3 the in the case - - - in the case world where insurance
4 companies have to account to the government for their
5 reserves and for their unearned premium reserves, they have
6 to say, we calculate that we need to get back X, under an
7 accounting or an accrual sort of a theory.

8 I'm sure there's a wide body of law that would
9 answer that question. I'm not aware of it, but there has
10 to be a method by which it can be calculated.

11 JUDGE STEIN: But that's not an issue in this
12 case.

13 MR. BLUESTONE: No, it's not.

14 JUDGE FAHEY: A defendant relies on a 2010
15 opinion from the Department of Financial Services. You're
16 familiar with that in the record?

17 MR. BLUESTONE: Yes, sir.

18 JUDGE FAHEY: And that opinion seems to be in
19 conflict with the position that DFS took as - - - as an
20 amicus, in their amicus brief before us. Do you want to
21 comment on that at all?

22 MR. BLUESTONE: Yes, sir. I don't believe is in
23 conflict at all.

24 JUDGE FAHEY: Okay.

25 MR. BLUESTONE: And I don't believe it's in

1 conflict for the reason that it deals with the
2 intra-bail-bond commercial relationship between bail
3 bondsman and their companies. It doesn't deal with the
4 customers.

5 JUDGE FAHEY: As opposed to between the carrier
6 and between the - - - the parties in this action. So would
7 they - - - so then should the carrier have been brought in
8 directly here, as opposed to the bondsman?

9 MR. BLUESTONE: I don't believe that that ever
10 became an issue, and I don't - - -

11 JUDGE FAHEY: I was curious why the carrier
12 wasn't brought in, I have to say.

13 MR. BLUESTONE: It - - - it appeared from the
14 paperwork at the time that the bail - - - that the bail
15 bond insurance company had denied that there was a bail
16 bond written. I believe that in the record there are two
17 letters from the insurance company.

18 JUDGE FAHEY: Um-hum.

19 MR. BLUESTONE: There is one that says, no, it
20 has nothing to do with us, we're not - - - we didn't write
21 it. We relied on - - -

22 JUDGE FAHEY: International Fidelity?

23 MR. BLUESTONE: I'm sorry?

24 JUDGE FAHEY: International Fidelity?

25 MR. BLUESTONE: Yes, Your Honor.

1 JUDGE FAHEY: Yeah. Okay.

2 MR. BLUESTONE: And then later on, they wrote
3 another letter that said, oh, yeah, by the way, we're
4 wrong. But we relied upon the first letter to, in our
5 assumption, or our analysis, that they were not part of the
6 case, and that the bail bondsman had retained the entire
7 premium himself.

8 And going back to your first question that - - -

9 JUDGE FAHEY: But that wasn't the case. In point
10 of fact, they were, and they were never brought in, but no
11 one ever challenged it on - - - on that basis.

12 MR. BLUESTONE: Correct. No one ever challenged
13 it.

14 And to go back to your first question, Judge
15 Fahey, the DFS also had goings on with Mr. Jabr, the
16 employee of Judelson, in which they reached an agreement
17 that this sort of thing wouldn't take place. And
18 apparently, that agreement, it's in - - - it's a footnote
19 in the Attorney General's brief.

20 JUDGE FAHEY: Um-hum.

21 MR. BLUESTONE: That agreement that Jabr signed
22 just before he testified in this case was not mentioned at
23 the trial.

24 JUDGE FAHEY: I see.

25 CHIEF JUDGE DIFIORE: Counsel, when the bond was

1 posted, did Mr. Judelson complete his work?

2 MR. BLUESTONE: Well, if you could tell me what
3 you mean by "posted", I could answer the question.

4 CHIEF JUDGE DIFIORE: Well, when - - - when - - -
5 when he was - - - made his final submission to the court.

6 MR. BLUESTONE: Well, okay. So he took the bond
7 over to Supreme Court in Kings County.

8 CHIEF JUDGE DIFIORE: Um-hum.

9 MR. BLUESTONE: He went to a clerk there, he gave
10 them the bond. The clerk then generated the cut slip - - -

11 CHIEF JUDGE DIFIORE: Um-hum.

12 MR. BLUESTONE: - - - which is in the record. If
13 that's the point that you're talking about, no. And in
14 fact, his job is never done until the case is terminated,
15 and the bail is exonerated. Under my theory, he always
16 owes an unearned premium until the bail is exonerated, the
17 person is.

18 As you - - - as you know from your own
19 experiences as district attorney, the end of the case means
20 that the action is terminated. And the court will
21 generally then say, the person is sentenced, or he's freed,
22 bail is exonerated; that's when the case is over, and
23 that's when the unearned premium should be calculated at
24 zero, and that's when his work is over, I think.

25 CHIEF JUDGE DIFIORE: And at the point at which

1 the judge determines at the bail source hearing that the
2 bill is insufficient - - -

3 MR. BLUESTONE: Yes.

4 CHIEF JUDGE DIFIORE: - - - is his work done?

5 MR. BLUESTONE: Well, his work is done to the
6 extent that he no longer has to do any more work. But it
7 is our understanding and theory that he has not earned a
8 fee either. It's the same as the attorney who's handling a
9 contingent case and loses, jury verdict is entered - - -

10 CHIEF JUDGE DIFIORE: So it's your position, no
11 compensation.

12 MR. BLUESTONE: That's correct.

13 CHIEF JUDGE DIFIORE: Okay.

14 Thank you, counsel.

15 MR. BLUESTONE: Thank you.

16 CHIEF JUDGE DIFIORE: Counsel.

17 MR. DEL POZO: May it please the court, Eric Del
18 Pozo for the State Department of Financial Services.

19 The bail bond premium in this case must be
20 refunded because the bail bond, which is an insurance
21 contract, never took effect.

22 Judge Garcia, you asked whether the parties can
23 contract around this principle; they can't. We get that
24 from Insurance Law 6804(b)(2).

25 JUDGE GARCIA: And you are in charge of enforcing

1 those rules, right?

2 MR. DEL POZO: DFS is, that's right.

3 JUDGE GARCIA: Have you brought any enforcement
4 actions in this area?

5 MR. DEL POZO: DFS has not - - - on this
6 particular issue, if first received complaints that
7 unearned bail bond premiums were being retained last year,
8 have - - - was considering taking regulatory action. This
9 court accepted the certified question, so the question - -
10 - this court squarely confronts the question, and DFS is
11 here as amicus to explain its statutory interpretation.

12 JUDGE GARCIA: So prior to last year, there had
13 been no complaints amounted on bail premiums being
14 retained?

15 MR. DEL POZO: DFS has not advised me that's
16 they'd received any complaints prior to last year. The
17 Insurance Law 6804(a), the parties agree, provides the
18 exclusive compensation for a bail bond surety in the bail
19 bond process, and that compensation arises for giving a
20 bail bond. 6804(b)(2) is a sweeping prohibition on any
21 other fee or charge for obtaining a bondsman, obtaining a
22 bail bond, anything else in the process.

23 As we've argued in our brief, giving bail bond
24 means securing the defendant's release.

25 JUDGE GARCIA: But it doesn't say that in the

1 statute.

2 MR. DEL POZO: It doesn't, Judge Garcia, but all
3 signs of legislative intent point in that direction.

4 JUDGE GARCIA: So what is the strongest sign of
5 legislative intent pointing in that direction?

6 MR. DEL POZO: The use of the word "premium" in
7 the statute would be the strongest sign. And "premium" is
8 a term averred in insurance. It means consideration for an
9 insurable risk. When there is no insurable risk, as in
10 this case, for a bail bond, that risk only arises - - -

11 JUDGE GARCIA: "Premium" is in the statute. I
12 mean, you don't have to look at the legislative history for
13 that, right?

14 MR. DEL POZO: I'm sorry, Judge Garcia?

15 JUDGE GARCIA: "Premium" is in the statute, so
16 why would we need to look at the legislative history for
17 that?

18 MR. DEL POZO: It's not legislative history so
19 much as it is the well-developed body of New York Law
20 predating the statute's passage, unbroken, up until today.
21 If the legislature had meant to do violence to this
22 well-settled principle of Insurance Law, of which
23 appellants have - - - have argued, as have we - - -

24 JUDGE GARCIA: So this really isn't in - - - it's
25 a different provision, right, it's the bail provision here.

1 And I guess your view would be in any case where there was
2 a contract which provided for the - - - any insurance
3 contract, bail, whatever it might be, where two
4 sophisticated business partners contracted for a premium to
5 be earned at a certain point before risk attached, it would
6 be void.

7 MR. DEL POZO: That is DFS's view, but this court
8 need not go that far, because we're dealing with a specific
9 set of laws in a specific industry.

10 JUDGE GARCIA: But the specific set of laws
11 you're pointing to don't say that. So we would have to
12 make it as a matter of Insurance Law, right?

13 MR. DEL POZO: But - - - but they - - - they do
14 say that when you look at all of the markers of intent.
15 There is the word "premium", there is also the plain
16 meaning of "giving bail", which we've argued - - - we've -
17 - - we've pointed to dictionary definitions, other sorts of
18 laws, the CPL extradition provision, all of those connote
19 the defendant's release.

20 There is 6801, which makes giving bail synonymous
21 with executing bail. And if you look at 6803, this is a
22 firm contextual support, that's the source hearing
23 provision, and it says that at the beginning of the source
24 hearing, a surety is just a proposed bondsman, or proposing
25 to execute a bond.

1 So all of these markers of legislative intent
2 together compel the statutory reading that DFS advances.

3 JUDGE GARCIA: What if there was a contract that
4 said, you earn this much of the premium up through the
5 sufficiency hearing, let's say twenty percent; would that
6 be okay?

7 MR. DEL POZO: It wouldn't under the statute. It
8 wouldn't be a premium either. A premium depends for its
9 existence on - - - on an insurable risk. And for a bail
10 bond, that - - -

11 JUDGE GARCIA: So could you define that as a fee
12 that equals twenty percent of the premium for - - - as a
13 fee for assembling the package for the sufficiency hearing,
14 or you just never get paid for - - - it's always a
15 contingency contract?

16 MR. DEL POZO: It's going to be a form of
17 contingency contract. The paperwork, in itself, is not
18 going to be compensable regardless of what the parties call
19 it. Now, Mr. - - -

20 JUDGE WILSON: The - - - the reason - - -

21 JUDGE RIVERA: Would it be a percentage of the
22 premium, or a percentage of the amount that the court had
23 originally set, which it may not be satisfied, can indeed
24 be put forward, based on the inquiry, based on the hearing?

25 MR. DEL POZO: I'm sorry.

1 JUDGE RIVERA: It strikes me your - - - your
2 position is, without risk, there is no such thing as a
3 premium.

4 MR. DEL POZO: That - - - that's right.

5 JUDGE RIVERA: So then you can't have a
6 percentage of a premium without risk, correct?

7 MR. DEL POZO: That - - - that's right. Now - -
8 -

9 JUDGE RIVERA: Okay. So what would be the other
10 way to calculate the percentage? Just on some amount that
11 they come up with?

12 MR. DEL POZO: No. The percentages here are in
13 the statute. The maximum percentages - - -

14 JUDGE RIVERA: No, no, no. I'm sorry, I'm not
15 being clear. Let's say when - - - we agree that premium
16 means risk. We agree that there's no risk if the person is
17 not actually released. Okay. So then how do they get paid
18 for any work they do? They would charge a fee, or they can
19 negotiate an amount?

20 MR. DEL POZO: If they - - - if the court accepts
21 the bail bond and the bail bond is given, within the
22 meaning of the statute, the paperwork and - - - and the
23 effort is folded into the amount of the premium. We're in
24 a situation here where the court has rejected the bail, or
25 that bond.

1 JUDGE RIVERA: But that's what I mean. In that
2 scenario, what would a bondsperson or the company be able
3 to charge for whatever it has done up to that point?

4 MR. DEL POZO: Whatever they were able to charge,
5 Judge Rivera, the agent would have to get that compensation
6 from the insurer; not the criminal defendant and the
7 criminal defendant's families.

8 JUDGE FAHEY: Isn't the right answer that they
9 can't charge?

10 MR. DEL POZO: They can't charge the criminal
11 defendant.

12 JUDGE FAHEY: Right.

13 MR. DEL POZO: That's right, Judge Fahey.

14 JUDGE FAHEY: Right.

15 MR. DEL POZO: And this is exactly the point of
16 DFS's 2010 counsel opinion.

17 JUDGE FAHEY: Um-hum.

18 MR. DEL POZO: The bail bond agent can protect
19 himself by contracting with the insurer, the surety
20 underwriting the bond. So that if a situation like this
21 arises, where you've put in a lot of work and you want to
22 be compensated for it - - -

23 JUDGE FAHEY: Right.

24 MR. DEL POZO: - - - you have that option.

25 JUDGE FAHEY: But they can't charge the

1 defendant. They can - - - they can bring their claim to an
2 insurance carrier and have a deal with them directly, but
3 they can't charge the defendant.

4 MR. DEL POZO: That's right, Judge Fahey. And I
5 see that my time is up, but I'd like to spend a minute or
6 two, if I could, talking about the equities of this case.

7 CHIEF JUDGE DIFIORE: We'll allow you another
8 minute.

9 MR. DEL POZO: Thank you.

10 There is no support whatsoever for the competing
11 statutory view that the premium has payable on posting.
12 There is a definition of posting. It's in the Criminal
13 Procedure Law 500.18. It's submitting the bond documents
14 to the court.

15 Now, there may be a source hearing, there may not
16 be, but the - - - the bond is not approved simply on
17 posting; the court has to take another step. That a rule
18 that the premium were payable on posting would invite
19 untoward consequences, and - - - and frankly, all sorts of
20 abuse.

21 The bond could be rejected for lots of reasons
22 that have nothing to do with the blame of the criminal
23 defendant, or his supporters, or the alleged taint of the
24 funds, the collateral could be insufficient, for example,
25 or the surety could be unreliable. And in that case, under

1 Mr. Judelson's view, the premium would still be payable.

2 That would incentivize submitting bonds that
3 would fail a source hearing, and that would be a perverse
4 resul - - - perverse result. Even if the funds are
5 tainted, there's no good reason to let the bail bond agent
6 keep those funds; the defendant never should have had them
7 in the first place. There could be criminal restitution;
8 it could go to the State.

9 JUDGE GARCIA: In the equity sense, there were
10 two companies, as I understand it, that refused to even go
11 through the process of trying to put a package together.
12 Isn't it equitable that in order to even get a company to
13 pay to put in the effort to put this bond forward, assuming
14 this was a very high risk, always - - -

15 MR. DEL POZO: Um-hum.

16 JUDGE GARCIA: - - - and that's what they
17 contracted for, to get one company. I mean, otherwise,
18 they had already been 0 for 2; no company would have done
19 this. But your rule would be they can never do that. So
20 the bail bondsmen would be, why would I put a package
21 together which has potentially a good chance of failing
22 here, because it's a high risk case, so where are the
23 equities in that?

24 MR. DEL POZO: Well, there's one set of bail
25 bonds that are going to be categorically discouraged by a

1 role that premium arises on giving bail bond when the risk
2 arises, and that is bonds with no reasonable hope of
3 success.

4 JUDGE GARCIA: But wouldn't the rule be you can
5 contract that right?

6 MR. DEL POZO: That would be in a statutory
7 vacuum, in a world where this court, both in 1938 and 1977,
8 hadn't already reaffirmed the principle that premium
9 follows risk. So if we were dealing totally on a blank
10 slate - - -

11 JUDGE GARCIA: But you're saying our rule would
12 be - - -

13 MR. DEL POZO: - - - of course the parties could.

14 JUDGE GARCIA: - - - would make it this, and it
15 attaches in, but why couldn't we make a rule that says that
16 it attaches when you contract for it to attach, and in this
17 case, Judge Berman decided it was ambiguous, and you had
18 contracted, the parties had contracted for it to attach at
19 this stage.

20 MR. DEL POZO: Well, in - - -

21 JUDGE GARCIA: Why wouldn't that be the rule?

22 MR. DEL POZO: In this case, Insurance Law
23 6804(b)(2) would bar that rule. There is another provision
24 of the Insurance Law, which is 2314, that - - - that states
25 that parties can't contract around permissible or approved

1 rates. And if this court were going to make - - - reach
2 any contractual holding, it should be that there's an
3 implied nonwaivable term in every insurance contract that
4 no premium is due until the finan - - - a risk of financial
5 loss arises.

6 If there are no other questions, I thank you.

7 CHIEF JUDGE DIFIORE: Thank you, counsel.

8 Counsel.

9 MR. SVETKEY: Thank you, Your Honor. My name is
10 Jonathan Svetkey; I represent Ira Judelson.

11 And I would like to start with the big picture
12 here, because I think it's critical for Your Honors'
13 decision here.

14 JUDGE RIVERA: What - - - what did the bails - -
15 - bondman, excuse me, do here to earn the particular
16 premium that's in dispute?

17 MR. SVETKEY: Ira Judelson - - -

18 JUDGE RIVERA: The actual steps that the person
19 took.

20 MR. SVETKEY: The actual steps involved meetings
21 with the client, the client sureties, the client's
22 obligors, there's a meeting that took place in New Jersey
23 that's documented in the record. Ira Judelson submitted
24 testimony by way of affidavit indicating that there were
25 hundreds of hours, not only by himself, but by his staff in

1 preparing the paperwork for the bond.

2 The bond requires the undertaking, the bond
3 requires a list of all the sureties, all of the people who
4 are going to be obligors on the bond, they have to sign off
5 on paperwork; all of this has to be prepared. There were
6 additional meetings. The meeting in New Jersey took place
7 over six hours. There were steps to, obviously, bring the
8 - - - the undertaking to the court. The judge signed the
9 undertaking.

10 JUDGE STEIN: What - - - what percentage of these
11 - - - do you have a general sense of how many of these are
12 refused or - - - or - - - by the court?

13 MR. SVETKEY: No. And that is the critical
14 question, and that's the big picture here. Because if you
15 decide that the certified question in the negative, that
16 the bail bondsmen cannot retain the premium, even if the
17 surety fails, or even if he posts in a situation where
18 there is a parole hold, or even if there is the situation
19 he posts and there's an INS hold, if the requirement is
20 that the defendant be released, then what you're setting up
21 here is the situation where there will be less bonds
22 issued, there will be less bondsmen, there will be more
23 people in jail under - - -

24 JUDGE STEIN: Well, why is - - - but - - - but
25 why is that? Because you say there's no risk to these.

1 This is - - - this is unlike any other insurance policy.
2 There's no risk because we don't issue it unless we have
3 enough security. Well, if that's the case, then, you know,
4 let's say one out of ten you - - - you lose, you have to
5 give back the money because the bail is in the - - - the
6 bond isn't accepted. But in the nine other ones, you're
7 collecting these fees that there's no risk you're going to
8 lose. Because even if the - - - the defendant absconds,
9 you have your security. So if that is all true, isn't it
10 still worth your while to try, because you're still going
11 to get nine out of ten of those fees, and - - - and you
12 have no risk?

13 MR. SVETKEY: Well, the problem is, we're - - -
14 we're discussing it in a vacuum. We don't know that
15 information, we don't know whether it's one of ten or nine
16 of ten.

17 JUDGE STEIN: But - - - but let's assume that's
18 true. Let's say - - - assume it's - - - it's three out of
19 ten, you know, that - - - that doesn't make it.

20 MR. SVETKEY: Then - - - then you have a bail
21 bondsman in a situation, specifically in this one, where
22 you have the big picture and the small picture, but in the
23 big picture, you have bail bondsmen who are confronted with
24 the situation where they're going to have to go through
25 work expense to post the bond - - -

1 JUDGE STEIN: But - - - but I'm saying is - - -

2 MR. SVETKEY: - - - and a particular - - -

3 JUDGE STEIN: - - - isn't that a balance, doesn't
4 - - - don't - - - don't they have to determine whether they
5 can make more money, you know, how much effort really goes
6 into this compared with how much money they can earn on the
7 ones that go through?

8 MR. SVETKEY: And I can tell you, based on my
9 information, that - - - that a decision that prohibits them
10 from taking the bail bond in that situation would - - -
11 would reduce the number of bails issued. I'm - - - I'm
12 talking about just, you know, I happen to speak with a bail
13 bondsman before I came up here.

14 But I think it illustrates the point that in
15 order for you to determine whether or not the statute as
16 written prohibits a bail bondsman from keeping this fee,
17 there has to be some sort of investigation. There has to
18 be some sort of information gathering to find exactly
19 what's going on with the bail bond proceedings.

20 JUDGE RIVERA: Well, why isn't DFS right in - - -
21 in their approach, which is to ensure you're properly
22 compensated? Apart from the premiums, if there is no risk,
23 no premium. But if you want to ensure that you're getting
24 some compensation, that's what you arrange with - - - with
25 the business entity. But you can't turn to the defendant

1 or whoever other people on behalf of the defendant who
2 approach the bailman - - - the bondsman.

3 MR. SVETKEY: It's - - - it's the same - - - it's
4 the same problem for the business entity. The business
5 entity is - - -

6 JUDGE RIVERA: Well, there's money to be made.
7 You cannot deny that. Otherwise you wouldn't be in it
8 anyway.

9 MR. SVETKEY: Right. But they - - - they are in
10 it because, under the current statute, under the current
11 circumstance - - -

12 JUDGE RIVERA: It's not out of goodwill; it's to
13 make money.

14 MR. SVETKEY: It's to make money and it's - - -

15 JUDGE RIVERA: So the question is - - -

16 MR. SVETKEY: - - - it's a - - -

17 JUDGE RIVERA: - - - just who's going to pay this
18 particular portion. If the money is to be made, they'll
19 pay it, because they're going to make more money out of it.

20 MR. SVETKEY: I - - - I don't think - - -

21 JUDGE WILSON: If - - -

22 MR. SVETKEY: - - - you can determine that on
23 this record without additional information. There is a
24 risk/reward analysis that has to be made by any business.
25 And my - - -

1 JUDGE WILSON: But back to your - - - back to
2 your - - -

3 JUDGE STEIN: But let's - - -

4 JUDGE WILSON: Back to your - - -

5 JUDGE STEIN: Let's assume you're right and that
6 they - - -

7 JUDGE WILSON: Sorry.

8 JUDGE STEIN: - - - stop issuing these - - -
9 these bonds because they - - - they don't like the risk, I
10 mean, can't we assume that - - - that the legislature would
11 then ask, because the legislature obviously wants this to
12 be available, and - - - and they would act to - - - to
13 change the rules.

14 MR. SVETKEY: Well, I'd - - - I would argue it in
15 the reverse. I would think that if it is - - - it's become
16 such a problem, that the statute in the first instance does
17 not restrict the bail bondsman from retaining the premium
18 under the circumstances in this case.

19 JUDGE WILSON: If you - - - if you disassociate
20 the risk from the price - - - from - - - from the premium,
21 why aren't you setting the wrong price?

22 MR. SVETKEY: I'm not sure - - -

23 JUDGE WILSON: Don't we - - - don't we want the
24 risk to follow the premium so that the price for any
25 particular person's bond measures that risk accurately?

1 MR. SVETKEY: I think that's one element of it.
2 But I think because you have a unique product here, which
3 involves not only the - - - the - - - the fee for the
4 assuming some sort of risk involved in ensuring the
5 defendant's return to court, you also have attendant
6 circumstances involving the work that's required in order
7 to post the bond. So - - -

8 JUDGE WILSON: Why don't you build that into the
9 price? That's - - - that's part of what you're paying for.

10 MR. SVETKEY: I think that's what the statute
11 contemplates, and that's why - - - that's - - - that's part
12 of why the statute does not allow for any charges for fees
13 or services, expenses. It's a one-set fee that not only
14 measures the risk involved in the bond, but also measures
15 the amount of work and the amount of expenses - - -

16 JUDGE WILSON: But that's - - -

17 MR. SVETKEY: - - - that the bail bondsman has.
18 - - - that's a type of risk as well.

19 MR. SVETKEY: But - - - absolutely, yes.

20 JUDGE FAHEY: That just seems like a - - - to
21 follow up on Judge Wilson's question, it seems just like
22 part of doing business. It's the cost of doing business in
23 a risk. If you have - - - if you write a hundred a year,
24 maybe three you'll - - - you'll end up getting nothing on.

25 MR. SVETKEY: Yes, but they've been operating

1 this business for twenty years - - -

2 JUDGE FAHEY: Um-hum.

3 MR. SVETKEY: - - - the bail bondsman, under the
4 - - - under the current statute which has been interpreted
5 and which they've been operating under as allowing for them
6 to keep the premium even if the surety fails, even in a
7 situation where you have somebody who is going to post for
8 somebody who has parole hold or an - - -

9 JUDGE RIVERA: Again, all - - -

10 MR. SVETKEY: - - - INS hold. They - - - and you
11 can't get - - -

12 JUDGE RIVERA: Well, isn't that - - - yes.

13 MR. SVETKEY: I'm sorry.

14 JUDGE RIVERA: But isn't that resolved, again, as
15 DFS suggests, you're just shifting who is going to pay, and
16 it's not going to be the defendant. You're just shifting
17 the payment.

18 MR. SVETKEY: But if - - -

19 JUDGE RIVERA: The money will be there.

20 MR. SVETKEY: If you - - - but I don't - - - I -
21 - - if you're shifting the payment to the insurance company
22 itself as opposed to the - - - the bondsman - - -

23 JUDGE RIVERA: They're certainly better heeled
24 than the defendant.

25 MR. SVETKEY: Yes, but it's certainly, if they're

1 going to make a benefit risk assessment as to whether or
2 not it's worth going forward, they're not going to do it.

3 JUDGE FAHEY: Let me ask this.

4 MR. SVETKEY: You know, and I - - - I'm sorry, go
5 ahead.

6 JUDGE FAHEY: Suppose we disagree with you, and
7 suppose we - - - we agree with your opponent. What effect
8 does that have financially on the cost of bail?

9 MR. SVETKEY: Where I - - -

10 JUDGE FAHEY: Would it have any effect? Because
11 I haven't sat in city court for a few years, I have to say,
12 I saw very few bail-sufficiency hearings, they were
13 relatively rare. And usually came up in - - - in large
14 drug cases, cases like that. But they - - - they seem to
15 be very, very rare. And so this seems to me to be, in
16 point of fact, from - - - from an economic point of view, I
17 saw nothing in the record that would make me think that
18 this would have a real effect on the industry or your
19 ability to write.

20 MR. SVETKEY: Two points on that. One is that
21 this is New York - - - was a New York City bail bonds - - -

22 JUDGE FAHEY: Um-hum.

23 MR. SVETKEY: - - - and the numbers - - - I don't
24 know the numbers.

25 JUDGE FAHEY: Neither do I.

1 MR. SVETKEY: There's nothing in the record - - -

2 JUDGE FAHEY: That's what - - - I'm asking you
3 because I don't know.

4 MR. SVETKEY: Yeah. I don't - - - I don't know
5 the numbers.

6 JUDGE FAHEY: Yeah.

7 MR. SVETKEY: And that's why, again, I think that
8 this is type of issue that has to be kicked back to the
9 legislature.

10 JUDGE GARCIA: But counsel, usually, it would
11 seem if you have something like this come down, and it's
12 not going to be in the insurance company; it's going to be
13 a bail bondsman. And in an ordinary world in insurance, it
14 would be passed along to the people who pay the premiums.

15 But as I understand it, your premiums are capped
16 here, right? So it's either - - - it's not going to be a
17 question of passing along a higher cost to the consumer
18 here; it's going to be a question of writing or not writing
19 in certain cases, right?

20 MR. SVETKEY: That's a hundred percent correct.
21 Yes, Judge, and that's - - - that is the point I'm trying
22 to make in terms of the big picture.

23 JUDGE FAHEY: But if everything is capped, you
24 have - - - so over ten thousand dollars, it's six percent,
25 right? Is that the cap we're talking about?

1 MR. SVETKEY: I - - - I believe so, yes.

2 JUDGE FAHEY: Yeah. All right.

3 MR. SVETKEY: I mean, you're talking about - - -

4 JUDGE FAHEY: So it's the evaluation of the risk.

5 And that's - - - that's what - - - that's the business
6 decision that the carrier makes; would you say that's
7 correct?

8 MR. SVETKEY: Yes. In terms - - -

9 JUDGE FAHEY: All right. So if it's an
10 evaluation of the risk, then therefore, in that
11 calculation, that's a pure business calculation.

12 MR. SVETKEY: Right.

13 JUDGE FAHEY: What's my risk.

14 MR. SVETKEY: And now - - - and now, they're
15 going to have to calculate - - - assuming the court rules
16 in favor of appellants, they're now going to have to
17 calculate. I see my time is up, but I do have - - - I want
18 to finish on this point. And if I could add something for
19 the court as well.

20 CHIEF JUDGE DIFIORE: You can, but I have a
21 question for you. Who received the premium here?

22 MR. SVETKEY: The - - - the premium was received
23 by Ira Judelson.

24 And if - - - if the - - - when - - - if the
25 premium is - - -

1 I'm sorry, Your Honor, I forgot the - - -

2 JUDGE FAHEY: It's okay. That's all right.

3 That's all right.

4 MR. SVETKEY: Okay. The point I - - -

5 JUDGE FAHEY: Make your - - - go ahead, make your
6 point.

7 MR. SVETKEY: - - - just wanted to - - - the
8 final point I wanted to make was that the - - - when you go
9 back to 1997, when this legislation was first enacted here,
10 you had input from the Department of Financial Services,
11 New York State Department of Insurance at that time,
12 there's the two-page letter there, there's nothing about a
13 risk following premium, in that there was the decision that
14 was mentioned here which was interpreted by a United States
15 district court judge to lending some credence or some
16 support for my client's position here that the premium is
17 earned at posting.

18 You had evidence in the record that my client was
19 contacted by two attorneys who were seeking to get the
20 money back. He gave them the number for the New York State
21 Department of Insurance. They called there, they were told
22 that the - - - once the bond is posted, that they - - - the
23 bondsman is entitled to retain the premium.

24 Mr. Judelson, himself, called the New York State
25 Department of Insurance, all the time while they were

1 asking for the premium bac, was told that he could retain
2 the premium. And he also spoke with the Attorney General's
3 office, the prosecutors who prosecuted the case and were in
4 charge of overseeing the surety hearing.

5 What I'm talking about here is there's another
6 element of reliance that Mr. Judelson and his - - - his
7 colleagues in the bail - - - who issue bail bonds relied on
8 this history. And to now penalize him for that reliance, I
9 think, would be unfair, and that's the small - - - small
10 picture of this case.

11 Thank you.

12 CHIEF JUDGE DIFIORE: Thank you, counsel.

13 Counsel.

14 MR. BLUESTONE: Thank you, Your Honor.

15 In a far greater industry, far more attorneys are
16 willing to take cases on contingencies. And you don't hear
17 them say, well, I had to investigate and I should get a
18 portion of the case even though I lost the verdict. It's a
19 cost of doing business, and it's well understood by
20 contingent fee attorneys that they're not going to win
21 every case. They're going to win some, and they, in the
22 same sense that the bail bondsman have, are given a guild
23 entry.

24 Bail bondsman who are licensed are able to sell a
25 product at a set fee, which apparently is quite a bit of

1 money, 120,000 dollars - - -

2 JUDGE GARCIA: But isn't the contingency, is a
3 contract. To me, the analogy then would be, I - - - I'm a
4 lawyer, I sign up for an hourly rate, and at the end of the
5 day, a court comes in and tells me, you know, I actually
6 can only do this on a contingency basis, and you lost.

7 MR. BLUESTONE: No, sir, I don't think so. I
8 think - - -

9 JUDGE GARCIA: Because there's no contract here
10 that says this is a contingency. In fact, the contract has
11 been interpreted to say it means what your opponent says it
12 means. So there has to be some law coming down from above
13 on top of that contract that says, what you agreed to isn't
14 effective.

15 MR. BLUESTONE: And I think there is, Your Honor.
16 I think - - -

17 JUDGE GARCIA: But that's where I lose - - -

18 MR. BLUESTONE: - - - 6804 - - -

19 JUDGE GARCIA: - - - your contingency analysis,
20 because there's no law in the legal profession that says
21 every time I take a case, a civil case, I have to do it on
22 a contingency basis.

23 MR. BLUESTONE: No, but there are Appellate
24 Division rules in each of the four departments that say, if
25 you take it on a contingency, your fee is capped, the same

1 as - - -

2 JUDGE GARCIA: Right.

3 MR. BLUESTONE: - - - 6804 caps the fee for the
4 bail bondsman. And the bail bondsman who knows that the
5 only fee he's going to get is set by statute, knows he is
6 not - - -

7 JUDGE GARCIA: Well, then it's more analogous to,
8 I take on a case and I have a cap. You know, you can bill
9 an hourly rate up to 500,000 dollars. And then you turn it
10 into a contingency fee. You say, yeah, but then you lost.

11 MR. BLUESTONE: I disagree with analysis, Judge.
12 I think that this is the same as an attorney who takes on a
13 case for one third, because that's what the Appellate
14 Division says you can get for a personal injury, wrongful
15 death, condemnation case.

16 JUDGE GARCIA: But I - - -

17 MR. BLUESTONE: They know that when they start.
18 The - - -

19 JUDGE RIVERA: Well, is your point going to, that
20 this will not be the end of the industry?

21 MR. BLUESTONE: It will not - - -

22 JUDGE RIVERA: This won't dry up the availability
23 of bails - - -

24 MR. BLUESTONE: It shall not dry up the
25 availability. Because on the cases the take, they can get

1 as much security as they want before they agree to write
2 the bond. If it's a two-million-dollar bond, they can get
3 ten million dollars' worth of security from the criminal
4 defendant before they take it to the court. They are
5 totally covered by for any eventuality at all.

6 I also wondered why bail bondsman are writing
7 bonds for people who cannot leave jail. We've heard about
8 parole holds, INS holds, we've heard about extradition
9 holds. It's like going into court and offering ROR to a
10 defendant who can't get out of jail. Not only is it
11 worthless, but they lose their good-time credit while
12 they're sitting in jail.

13 Why are they writing bonds for people who can't
14 leave? Is there any reason for that at all?

15 CHIEF JUDGE DIFIORE: Thank you, counsel.

16 MR. BLUESTONE: Thank you.

17 (Court is adjourned)

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C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Gevorkyan v. Judelson, No. 79 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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