ROY COOPER
ATTORNEY GENERAL

State of North Carolina
Department of Justice
PO Box 629
Raleigh, North Carolina
27602

Reply to: LaShawn L. Strange
Insurance Section
Phone: 919-716-6610
Fax: 919-716-6757

---MEMORANDUM—

TO: Etta Maynard, Deputy Commissioner
Agent Services Division
North Carolina Department of Insurance

FROM: LaShawn L. Strange LLS
Assistant Attorney General
Insurance Section

DATE: October 14, 2009

RE: Request for Advisory Opinion Regarding Out of State Bail Bondsmen Entering North Carolina to Recover Principals

Agent Services has requested guidance in determining whether North Carolina law authorizes licensed out of state bail bondsmen (hereinafter "foreign bail bondsmen") to lawfully enter the State to recover their principals. The history of bail and bail bonding is long; however, the current laws surrounding this topic are changing. This memorandum will discuss the indications of current North Carolina law, the implications of federal common law, and the effect of current laws enacted in other states regarding the activities of foreign bail bondsmen.

The history of bail goes back to medieval England, well before the United States was a free nation. At that time, common law governed bail bonding and it was understood that bail agents had broad authority over their principals. However, in the late 1800's, after the United States became an independent nation, the U.S. Supreme Court recognized the common law rights of bail bondsmen and agents.

The ruling in *Taylor v. Taintor*, 83 U.S. 366, 21 L.Ed. 287(1872), became the backbone of commercial bail bonding in the United States. In *Taintor*, the State of Connecticut charged McGuire with grand larceny and bail was set in the amount of $8000. McGuire entered into a

bail agreement with his bail agent and was released. McGuire failed to appear and a forfeiture was issued. McGuire left Connecticut and went to New York. At the time the bail agents agreed to be sureties they were unaware of any other pending criminal charges other than those in Connecticut. However, the state of Maine contacted New York and requested that McGuire be requisitioned to Maine; McGuire had previously been charged with burglary in Maine. He was immediately removed to Maine. At the time of the forfeiture issued in Connecticut, McGuire was legally imprisoned in Maine.

The central issue in *Taintor* was whether the bail of the sureties should be exonerated. The parties to this action were the bail agent and McGuire as plaintiffs versus William Taylor, treasurer of the State of Connecticut. The United States Supreme Court ruled on the issue, finding that the plaintiffs are not exonerated from bail. The Court held that

> The law which renders the performance [of the surety] impossible, and therefore excuses failure, must be a law operative in the State where the obligation was assumed, and obligatory in its effect upon her authorities. If, after the instrument is executed, the principal is imprisoned in another State for the violation of a criminal law of the State it will not avail to protect him or his sureties. Such is now the settled rule.
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> *Id.* at 83 U.S. at 371, 21 L.Ed. at 290.

The Court further expounded on the relationship between the principal and bail agent. This holding would later become the backbone of the U.S. bail bonding industry. The U.S. Supreme Court held that

> When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. ***They may pursue him into another State***; may arrest him on the Sabbath; and if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the re-arrest by the sheriff of an escaping prisoner . . .. *Id.*at 83 U.S. at 371, 21 L.Ed. at 290. (Emphasis added.)

The law set in *Taintor* has not been overruled. In fact, the North Carolina Supreme Court has relied on the ruling in *Taintor* on several occasions. In *State v. Lingerfelt*, 109 N.C. 775, 778-779, 14 S.E.75, 77 (1891)(emphasis added), the North Carolina Supreme Court held that

> It is urged by the Attorney General that the right, ***when exercised in another State***, may be attended with inconvenience and trouble, but . . . be that as it may,

> the principle is firmly established by a uniform course of judicial decisions, both State and Federal, and until the Legislature sees fit to regulate the manner in which the bail from another State is to exercise his rights, we do not feel at liberty (especially in a case of life and death) to assume the exceptional position that the common law method as generally recognized in the United States does not apply in North Carolina.

Further, North Carolina has recognized the comprehensive bail bondsman powers that were set out in *Taintor*. In *State v. Mathis*, 349 N.C. 503, 510, 509 S.E.2d 155, 159 (1998), the North Carolina Supreme Court held that

> The comprehensive powers of the bondsman recognized in *Taintor* are based on the underlying source of the bondsman's authority to recapture the principal which derives from the contractual relationship between the surety and the principal . . . [f]urther the contract establishes the surety's and bondsman's right of recapture as private in nature, with the understanding that the government will not interfere . . . thus, this common law right of recapture established that the seizure of the principal by the surety is technically not an 'arrest' at all and may be accomplished without process of law.

Based on the above case law, it appears that North Carolina appellate courts recognize the common law authority of bail bondsmen established in *Taintor*. However, it is also important to point out the North Carolina Supreme Court in *Lingerfelt* held that the common law rules in *Taintor* will apply until the state Legislature passes laws to regulate bail bondsmen in some way other than outlined in *Taintor*.

In regards to your specific inquiry, it appears that North Carolina law does not specifically address foreign bail bondsmen. While N.C. Gen. Stat. §58-71-40 (a) provides that "no person shall act in the capacity of a professional bondsman, surety bondsman, or runner or perform any of the functions, duties, or powers prescribed for professional bondsmen, surety bondsmen, or runners" unless licensed by the Commissioner of Insurance, the statute does not specifically seek to regulate the actions foreign bail bondsmen. Also N.C. Gen. Stat.§58-71-1 defines bail bond as "an undertaking by the principal to appear in court as required upon penalty of forfeiting bail to the State." Arguably, Article 71 may only regulate bonds for appearance in North Carolina courts.

Further, *Taintor* provides that bail bondsman can pursue defendants in other states; *Mathis* also provides that seizure of a principal is not considered an arrest and that government should not interfere with the bail contract. North Carolina law specifically provides that the common law is enforced in this State. N.C. Gen. Stat. §4-1 (2009) states

> All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.
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> N.C. Gen. Stat. § 4-1 (2009).

Nevertheless, North Carolina federal and state courts have held that where the General Assembly has legislated with respect to the subject matter of a common law rule, the statute supplants the common law with respect to the particular rule. Where the common law has not been abrogated or repealed by statute it is still in full force and effect. *Allen v. Standard Crankshaft & Hydraulic Co.*, 210 F. Supp. 844 (W.D.N.C. 1962), *State v. Green,* 124 N.C. App. 269, 477 S.E.2d 182 (1996).

If the Department seeks to regulate foreign bail bondsmen activity in this state contrary to common law as set out in *Taintor*, it appears that legislative action is necessary. *Mathis,* as well as *Allen* and *Green,* support the premise that the legislature is empowered to overrule common law as applied to bail bondsmen.

Several other states have enacted laws that address foreign bail bondsmen. Florida's insurance statute, Fla. Stat. § 648.30(3) (2009), provides that

> A person other than a certified law enforcement officer, may not apprehend, detain, or arrest a principal on a bond, wherever issued, unless that person is qualified, licensed, and appointed as provided in this chapter or licensed as a bail bond agent or bail bond enforcement agent, or holds an equivalent license by the state where the bond was written.

Iowa criminal laws also specifically address foreign bail agents. Iowa Code §811.12(1) (a) and (2) (b) provides

> 1. A person shall not take or attempt to obtain custody the principal on a bail bond, either as a surety on a bail bond in a criminal proceeding or as an agent of such a surety, unless such person has complied with all of the following, if applicable:
>
> a. Notification or registration with a chief law enforcement officer under section 80A.3A.

2. A person other than a certified peace officer shall not be authorized to apprehend, detain, or arrest a principal on a bail bond, where issued, unless one of the following applies:

b. The person is a bail enforcement agent licensed under the laws of another state and has registered with the chief law enforcement officer under section 80A.3A.

The State of Illinois does not allow commercial bail bonding. All bail matters are handled by the local and state government. Illinois' statute, §725 ILCS 5/103-9 (2009), regarding foreign bail bondsmen activity specifically provides

> No bail bondsman from any state may seize or transport unwillingly any person found in this State who is allegedly in violation of a bail bond posted in some other state. The return of any such person to another state may be accomplished only as provided by the laws of this State. Any bail bondsman who violates this Section is fully subject to the criminal and civil penalties provided by the laws of this State for his actions.

Kentucky allows for foreign bail bondsmen to arrest a fugitive but sets out specific procedures. Kentucky statute, K.R.S. § 440.270(2) and (3)(2009) provides

> (2) No bail bondsman or his agent shall arrest, detain, imprison, or remove from the state any person having broken the terms of his bail unless a warrant for that person's arrest has been issued as provided in subsection (1) of this section.
>
> (3) Any violation of subsection (2) of this section shall be deemed as a Class D felony and punishable thereas.

In *Walker v. Commonwealth*, 127 S.W. 3d 596, 604 (2004), the Kentucky Supreme Court held that K.R.S. § 440.270 "specifically and unambiguously abrogates a bail bondsman's common law right to effect a warrantless apprehension of a fugitive from bail by designating such conduct as a criminal offense." The Kentucky Supreme Court was relying on a similar ruling issued in *Ouzts v. Maryland Insurance Company*, 505 E.2d 547 (1974). There, the United States Court of Appeals for the Ninth Circuit determined that California's previous statute regarding bail bondsman did not distinguish between California bail bondsmen and foreign bail bondsmen. In 1961, California when enacted Section 847.5 (very similar to K.R.S. §440.270), making a lawful distinction between California and foreign bail bondsman. In *Oustz*, the federal appellate court held

> Originally, in accordance with the common law, California made no distinction between California bondsmen and foreign bondsmen, *i.e.*, those who provided bail in another jurisdiction and were simply seeking their principals in California.

> Both were legally entitled to apprehend their principals pursuant to the terms of section 1301. In 1961, however, California Penal Code section 847.5 was enacted. This section totally abrogates the foreign bondsman's common law right to pursue, apprehend and remove his principal from California without resort to process. . . .[and] interjects a mandatory series of court proceedings into the arrest and removal of a fugitive from bail from another jurisdiction.
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> *Ouzts*, 505 F.2d at 552.

The decision in *Ouzts* has not been overturned.

Based on the information contained herein, it is my opinion that the common law set out *Taintor* is still in effect in North Carolina. As such, currently, it is not unlawful for foreign bail bondsmen to pursue principals into the State. The General Assembly will need to effectuate new laws to address the rights of foreign bail bondsmen in North Carolina.

This is only an advisory memorandum. It has not been reviewed and approved in accordance with the procedure for issuing and Attorney General's opinion.