1992 SUNSET REVIEW

OF

COLORADO REGULATION OF PROFESSIONAL BAILBONDSMEN

SUBMITTED BY THE
COLORADO DEPARTMENT OF REGULATORY AGENCIES
JUNE 1992

STATE OF COLORADO

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Roy Romer
Governor

June 23, 1992

The Honorable Bob Schaffer, Chairman
Joint Sunrise/Sunset Review Committee
Room 348, State Capitol Building
Denver, Colorado 80203

Dear Senator Schaffer:

We have completed our evaluation of the statutes authorizing the regulation of professional bailbondsmen in Colorado and are pleased to submit this written report which will be the basis for my office's oral testimony before the Joint Legislative Sunrise/Sunset Review Committee. The report is submitted pursuant to section 24-34-104(22.1)(b), Colorado Revised Statutes, and section 24-34-104(8)(a) which states in part:

> "The Department of Regulatory Agencies shall conduct an analysis and evaluation of the performance of each division, board, or agency or each function scheduled for termination under this section..." "The Department of Regulatory Agencies shall submit a report and such supporting materials as may be requested, to the Sunrise and Sunset Review Committee, created by joint rule of the Senate and House of Representatives, no later than July 1 of the year preceding the date established for termination, and a copy of said report shall be made available to each member of the General Assembly".

This report discusses the question of whether there is need for the regulation provided under the professional bailbondsmen licensing statute pursuant to C.R.S. 12-7-101 et seq., as amended. The report also discusses the effectiveness of the regulatory program in carrying out the intention of the statute and makes recommendations for statutory and administrative changes if the program is continued.

Sincerely,

Steven V. Berson
Executive Director

EXECUTIVE SUMMARY

The Colorado Department of Regulatory Agencies has completed its 1992 Sunset Review of the regulation of Colorado bailbondsmen by the Colorado Division of Insurance. The Department recommends that the Division continue to regulate those individuals who write bailbonds in Colorado pursuant to C.R.S. 12-7-101 et. seq. At the time this report is written, there are approximately 240 people licensed as bailbondsmen in Colorado.

The Department of Regulatory Agencies also makes the following recommendations which are intended to improve the administration of the bailbondsmen's law and to assist in the fair and equitable administration of the bailbonding industry in Colorado:

1. The Division of Insurance should assist the Colorado Judicial Department in studying a bail reform program which will improve the availability of bail to all defendants.

2. A uniform bailbond instrument should be prepared for the use of Colorado courts and Colorado bailbondsmen.

3. The qualification bond for bailbondsmen should be increased to $250,000 in order to provide greater protection to the Colorado court system in the event of bailbond forfeitures.

4. The Colorado Division of Insurance should be given priority over all claimants to a bailbondsman's qualification bond in the event of a forfeiture.

5. The examination for bailbondsmen should be validated and updated.

6. A standard collateral receipt form should be prepared and required in order to address consumer complaints concerning damage to collateral held by bailbondsmen.

7. The Division of Insurance should appoint an advisory/arbitration council to assist it in administering the law.

8. The Division of Insurance should improve its recordkeeping as part of this regulatory program.

9. The General Assembly should make the bailbondsmen's law gender neutral by adopting a definition of "bonding agent" in the law.

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I. INTRODUCTION: THE CITIZEN'S RIGHT TO BAIL

THE SUNSET PROCESS

Colorado law requires that state regulation of persons holding licenses as "professional bailbondsmen" be reviewed by the Joint Legislative Sunrise/Sunset Review Committee of the Colorado General Assembly prior to July 1, 1992. The statute which authorizes regulation of professional bondsmen is found at 12-7-101 C.R.S., et. seq. The General Assembly has provided that this regulatory program will be repealed, effective July 1, 1993 unless the legislature acts to extend the program prior to that date. The purpose of this report is to review the regulatory program administered by the Colorado Division of Insurance under which professional bailbondsmen are licensed in Colorado and to make recommendations to the legislature regarding its termination, continuation or modification.

This is the first sunset review to be performed of the professional bailbondsmen regulatory program. This review included discussions with professional bailbondsmen, officials at the Colorado Division of Insurance, officials of the Colorado Judicial Department as well as attorneys and judges. The United States and Colorado Constitutions as well as state law were reviewed. Contacts with other states were made to investigate their procedures for regulation of professional bailbondsmen. Articles, informational publications, court pleadings and other documents pertaining to the regulation of bailbondsmen were analyzed. Special thanks are due to the Bailbonds Review Project of the University of Colorado Law School which provided additional information and research for this report.

REASONABLE BAIL IS A CONSTITUTIONAL GUARANTEE

The United States Constitution includes the right to reasonable bail as one of the basic human rights afforded American citizens. The Eighth Amendment, part of the Bill of Rights, states, ***"Excessive bail shall not be required nor excessive fines imposed, nor cruel or unusual punishment inflicted."***

It is apparent that the framers of the Constitution felt so strongly that the issues of freedom from imprisonment pending trial, excessive fines and cruel and unusual punishments were so central to the rights of free Americans that they were specifically guaranteed to all Americans in the Bill of Rights. If any doubt remained as to the applicability of these protections on the state level, the passage of the 14th Amendment specifically dispelled them: ***"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws."***

The result of these basic constitutional requirements has been that the availability of bail is a basic right which has become commonly accepted at all levels of the judicial system in the United States.

COLORADO CONSTITUTION MIRRORS FEDERAL BAIL GUARANTEES

The right to bail is also included in the Bill of Rights of the Colorado Constitution. Section 6 of Article II of the Colorado Constitution is entitled "Equality of Justice" and states, ***"Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay."***

In interpreting this section, the Colorado General Assembly and Colorado courts have held that the judicial system is authorized to waive payment of costs by poor persons as an aid in administering justice "without sale". (please see 13-16-103, C.R.S., for statutory authorization of such waivers and Almarez vs. Carpenter, 173 Colo. 284, 477 P.2d. 792, (1975)).

Section 20 of Article II of the Colorado Constitution specifically requires that ***"Excessive bail shall not be required nor excessive fines imposed nor cruel or unusual punishments inflicted."***

As a result of the enumeration of these specific rights in the Colorado Constitution, there are numerous Colorado cases upholding and interpreting these rights. For example, it is clear that the right to bail is not an absolute right. The court may take into account the severity of the offense and the probability of the defendant appearing for trial in setting bail. In appropriate circumstances bail may be denied. For example, in 1971, the Colorado Supreme Court held, "The right to bail does not amount to a guarantee that every defendant who is charged with a crime will be released without bail if he is indigent. (People vs. Jones, 176 Colo. 61, 489 P.2d 596 (1971)). In the appropriate circumstances, reasonable bail is required which is sufficient to secure the appearance of the defendant at trial. In interpreting what is meant by sufficient bail, the Colorado Supreme Court has held that, "It should be no more than will be reasonably sufficient to prevent evasion of the law by flight or concealment." (Palmer vs. District Court, 156 Colo. 284, 398 P2d 435 (1965)). The court is empowered to set bail at the appropriate level based on its review of the circumstances of the case. However, in the event that a court sets excessive bail there is a specific remedy at law: "If bail is set in an excessive amount, the defendant has the right to petition for reduction of bail or appeal the bail decision. (People v. Jones, 1971). "Where the bond fixed by the trial court in a criminal case is so grossly excessive as to amount to a denial of the right of the accused to be admitted to bail in a reasonable amount, the Supreme Court will direct that the accused be admitted to bail in a reasonable amount. (Altobella vs. District Court, 153 Colo. 143, 385 P2d 663 (1963))."

In Colorado law the primary statute which sets out the procedures by which Colorado courts will administer bail is found at 16-4-101 et seq. C.R.S. Regulation of those persons who may write bailbonds is vested in the Colorado Division of Insurance, part of the Colorado Department of Regulatory Agencies, and is found in the statutes at 12-7-101 et seq. C.R.S. This report will discuss the operation of the regulatory program which oversees professional bailbondsmen in Colorado as it relates to the constitutional guarantees of the right to bail of Colorado citizens.

II. CURRENT REGULATION OF BAILBONDSMEN IN COLORADO

INTRODUCTION

Colorado bailbondsmen are directly regulated through the Colorado Division of Insurance under the "bailbondsmen's law", 12-7-101 et seq. C.R.S. The key portion of this law requires that, "no person shall act in the capacity of a professional bondsman or perform any of the functions, duties or powers of the same unless that person is qualified and licensed as provided in this article." The definition of professional bondsman is currently the subject of a lawsuit. The Denver District Court is being asked to review the definition to determine whether it allows the licensing by the State of Colorado of "cash bailbondsmen" or whether only employees or agents appointed by an insurance company can execute bailbonds. That definition as currently written states, ***"Professional bondsman" means any person who furnishes bail for compensation in any court or courts in this state and who is appointed by an insurer by power of attorney to execute or countersign bailbonds in connection with judicial proceedings and who is other than a full time salaried officer or employee of an insurer or person who pledges United States currency, United States postal money order, cashiers check, or other property as security for a bailbond in connection with a judicial proceeding, whether for compensation or otherwise."***

Controversy over the interpretation of these statutory provisions has abounded over the last four years. This issue will be discussed in greater detail in several of the following sections of this report. For discussion purposes in this Sunset Review, a "cash bailbondsman" is defined as one who writes bailbonds based on a $50,000 cash qualification bond to the Colorado Division of Insurance. A "surety bailbondsman" is one who writes bailbonds as an agent for an insurance company. Both must pass an examination and be licensed by the Colorado Division of Insurance.

REGULATORY LAW

The act which authorizes regulation of bailbondsmen in Colorado places that regulation within the Colorado Division of Insurance. Aside from defining, "division" and insurance "commissioner" the only other definitions are those of "professional bondsman" as set out above and the definition of "insurer". The latter definition is crucial since, in the interpretation of the Division of Insurance, a professional bondsman must be appointed by an insurer in order to execute bailbonds. "Insurer" is defined as a company or individual engaged in the business of insurance which is qualified to operate that business in Colorado. As stated in the Colorado Insurance Code, any person or company engaged in the business of insurance in this state must be licensed and is subject to regulation by the Colorado Division of Insurance.

Finally, since there is no legislative declaration for this statute, legislative intent in setting up the state regulation of bailbondsmen is not readily apparent. Rather, it must be inferred by reading the statute.

LICENSE REQUIREMENTS AND ENFORCEMENT

This section sets out the requirements to become a professional bondsman. Only individuals may be licensed and law enforcement officials or judicial officers are specifically banned from licensure as bailbondsmen. Applicants for the bailbondsman license must be eighteen years of age, a resident of Colorado, a person of good moral character who has not been convicted of a felony or any crime involving moral turpitude within the last ten years,has not served a sentence upon conviction of a felony or crime involving moral turpitude within the last ten years and has not had a bailbond license revoked in the last five years in any state. In order to enforce the act, the Division of Insurance may investigate and may make rules and regulations as necessary.

It should be noted that the Colorado Supreme Court is currently considering whether the law requiring bailbondsmen to be free from felony conviction for ten years prior to licensure is constitutional. The key issue on appeal is the retroactive application of the law to persons licensed as bailbondsmen before the felony requirement was passed.

APPLICATION REQUIREMENTS

In addition to basic background information, applicants for a bailbond license must provide the Division of Insurance with references of good moral character, a complete set of fingerprints certified by an authorized law enforcement official and a full-face photograph. There is no requirement in the statute, however, that background checks on applicants by law enforcement agencies be performed. This section also sets out the requirements for the qualification bond which must be posted by each applicant. Each bond must be in the amount of $50,000 and must meet the Division's requirements as to form. These bonds are to insure full and prompt payment on any bailbond issued by a professional bondsman to any court in the State of Colorado ordering such bond forfeited. Bailbonds which are declared forfeited by a court can then be collected from the bailbondsman's qualification bond through the Division of Insurance. The Division is required to hold a hearing on the issue before ordering payment from the qualification bond. The Division also follows up by ordering the surety to pay the defaulted bailbond. If the amount is not made up, the Division must suspend the license of the bondsman, "until such time as all forfeitures and judgements ordered and entered against the professional bondsman have been certified as paid or vacated by order of a court of record and another qualification bond in the required amount is posted with the Division." (C.R.S. 12-7-104(4)).

This section also provides that licensed professional bondsmen may only employ individuals in their businesses who could qualify for a license under state law. In addition, the business partner or associate of any licensed professional bondsman must also be able to qualify for a license. License fees are set by statute at $200 per year.

SEMI-ANNUAL REPORTS REQUIRED

All professional bondsmen are required to file reports twice a year with the Division of Insurance. These reports must contain information which the Division may require including residence and business addresses, financial statements and information about other business activities of the professional bondsmen. The most important information contained in these reports is data concerning the bailbond business itself. The statute requires that the bondsmen list the names of persons for whom bonds have been written, the dates and amounts of the bonds issued, the court in which the bonds were issued, the fee charged for each bond and the amount of collateral or security received by the bondsmen on each bond. It is interesting to note that while this information helps the Division of Insurance to understand the nature of the bondsmen's practice, there is no requirement in the law that the amount of bonds written not exceed the amount of the qualification bond posted to ensure payment of those bonds.

GROUNDS FOR DISCIPLINE

In the 1992 Legislative Session, the General Assembly amended this section of the bailbondsmen's law to include a new basis for discipline by the Division of Insurance. The lawmakers were impressed by reports of aggressive solicitation of business by bailbondsmen in and around jails and courts. The legislators decided to add as an additional reason for which the Division of Insurance may deny, suspend, revoke or refuse to renew the license of a bondsman, the solicitation of business "in or about any place where prisoners are confined, arraigned, or in custody." (SB 92-2) In addition to this new grounds for discipline, the statute lists fourteen additional grounds which may trigger administrative action against the licensee:

* any cause for which the issuance of the license could have been refused by the Division if it had been known;

* failure to post a qualification bond as required or forfeiture or cancellation of the bond;

* fraud, material misstatement or misrepresentation in obtaining the license;

* abuse of client funds;

* dishonest practices;

* violation of the statute

* violation of section 109 of the statute, "Prohibited activities";

* default in payment to the court of any bond;

* conviction of a felony within the last ten years;

* "service of a sentence upon a conviction of felony or any crime involving moral turpitude" within the last ten years;

* revocation of a professional bondsman's license within the last five years anywhere in the United States;

* display of incompetency or untrustworthiness;

* "failure to report, to preserve and retain separately, or to return collateral taken as security on any bond to the principal, indemnitor, or depositor of such collateral";

* "conviction of an unlawful entry into a residence where the principal is not located by the bailbondsman, his agents, or his employees."

As is the case with all administrative agencies which are empowered to deny, revoke or suspend licenses to practice an occupation, the Division of Insurance must afford the "aggrieved person" an opportunity for hearing pursuant to the Administrative Procedures Act before taking any final disciplinary action. The Division of Insurance is also empowered to levy a fine, of no less than $300 and no more than $1,000 for each offense, against a licensee who violates this act. This fine, however, may only be levied in lieu of revoking or suspending a license. Only if the licensee does not pay the fine within twenty days may the Insurance Division revoke or suspend the violator's license.

REQUIRED NOTICE TO COURTS AND SURETY COMPANIES

Colorado courts are kept current on the licensure status of all professional bondsmen in the state by the Division of Insurance under the bailbondsmen's law. Lists of licensed bondsmen are provided to the courts and the bondsman is required to show the pocket identification card issued by the Division of Insurance whenever a bond is written by a professional bondsman. In the event of action against a licensee, the Division is also required to notify the courts. Furthermore, any surety company for whom a bondsman works must receive a list of all collateral taken by a professional bondsman in order to

secure a client's bond. The Division of Insurance may also receive a copy of this list on request and failure to keep this information as required by the Division of Insurance is a violation of the law and grounds for revocation of the professional bondsman's license.

PROHIBITED ACTIVITIES AND PENALTIES

This section of the act contains criminal penalties for specific activities which are illegal for bailbondsmen in Colorado. The penalty for violation of any of the following prohibited activities is a misdemeanor which includes a maximum $1,000 fine and/or one year of imprisonment in the county jail. The same criminal penalty can be levied on any person who acts or pretends to act as a professional bailbondsman in Colorado without a license.

The list of prohibited activities is enlightening in that the vast majority of the prohibitions deal with the payment or receipt of money. Under Colorado Law, the bailbondsman may charge a fee which is no more than 15% of the amount of bailbond furnished or $20.00, whichever is more. The prohibited activities section of the law indicates problems which have occurred in this industry in the past in the writing of bailbonds or in the return of collateral to a bailbond client. According to sources interviewed in the preparation of this report, these problems are continuing in the industry.

Specifically, bailbondsmen in Colorado are prohibited from the following activities:

(a) advising a client to employ a specific attorney;

(b) compensating an official of the judicial system;

(c) compensating an attorney except in the case of the defense of any action on a bailbond;

(d) compensating a client;

(d.5) (The General Assembly recently revised this section of the law, which becomes effective July 1, 1992) "Except for the fee received for the bond, to fail to return any collateral or security within ten working days after receipt of a copy of the court order that results in a release of the bond by the courts. A copy of the court order shall be provided to the bonding agent in Colorado or the company, if any, for whom the bonding agent works, whether in Colorado or out of state, or both, by the person for whom the bond was written," (It should be noted that the term "bonding agent" was not defined when this amendment was passed.)

(e) to accept compensation other than collateral or a bond fee, from a client. (The bondsman is also required to follow specific provisions of the law with respect to collateral or security in tangible or real property.)

(f) to coerce or suggest that a client commit a crime;

(g) to act as a bondsman if he is in default in securing any person's bond;

(h) to fail to inform the court of inaccuracies in any property value schedules of security involving a bond;

(i) to pledge property in securance of a bond which is already pledged for another bond;

(j) to act in the name of the surety company without authorization;

(k) failure to adequately account for all collateral security taken from a client to secure payment of a bond. In the event of the failure to return collateral as required under this section of the law, the Division of Insurance is empowered to take possession of the collateral and dispose of it as necessary to assure compliance with the law. The cost of taking this action is borne by the bondsman's qualification bond.;

(l) the signing of blank bailbonds or the execution of a power of attorney naming another to countersign bailbonds in the licensee's name;

(m) the posting of more than one bond at any one time on a single client.

TAX ON BONDSMEN'S FEES

In 1979, the General Assembly levied a tax on the fees charged by "cash" bailbondsmen in order to equalize their tax burden with that of the insurance companies which issue bailbonds. This section of the law specifically requires that bondsmen pay the Division of Insurance a tax on the fees which they charge and that the tax, "shall be the same as the tax levied on insurance companies by section 10-3-209(1) C.R.S.

COURT BONDING REQUIREMENTS

Title 16 of the Colorado Revised Statutes sets out procedures followed in the state courts in criminal matters. Article 4 discusses release from custody pending final adjudication of a case. This article is important in any discussion of professional bailbondsmen because it sets out the requirements and the standards used by Colorado courts in determining the right to bail and the different kinds of bailbond which may be used.

In 1992, the legislature amended parts of 16-4-101 et seq. in order to clarify certain matters pertaining to the kinds of bond required for pretrial release of a defendant. In particular, the specifics of bonds secured by real estate were amended to more adequately reflect real estate legal practice in Colorado. Although these amendments to the law do not change the kinds of collateral which may be accepted to secure a bailbond, they do change the processes and documents which must be used whenever real estate is involved.

Finally, it should be observed here that the provisions of 16-4-101 et seq. are administered by the Colorado judicial system and must be complied with by all professional bailbondsmen. The nature and operation of this statute is at least as important to Colorado professional bailbondsmen as is the nature and operation of the licensing statute itself.

III. THE DEVELOPMENT OF REGULATION

INTRODUCTION

Modern regulation of bailbondsmen by the Colorado Division of Insurance dates from 1963. In that year, the General Assembly adopted a law to provide for the licensing and regulation of professional bailbondsmen, which appeared at 72-20-1(5) C.R.S., 1963. "Professional bailbondsman" was defined at that time as being any person who furnished bail, whether for compensation or otherwise, in five or more criminal cases in a county with a population of 50,000 or more or any person who furnished bail in two or more counties, one of which having a population of 50,000 or more. The statute as it was written made no reference to any requirement that a bailbondsman be associated with an insurance company. However, the evolution of the statute since 1963 and its location in the Colorado Division of Insurance have combined to raise a key policy question: Should bailbonds be written by professional bailbondsmen with the support of surety companies or may any person who can afford to post a cash qualification bond be able to write bailbonds? This issue is currently under litigation in the Denver District Court and a decision is expected sometime during 1992.

EVOLUTION

Based on the 1963 statute quoted above, the Division of Insurance licensed "cash" bailbondsmen for more than twenty years. As indicated above, cash bailbondsmen, also known as "pocket" bailbondsmen, are individuals who are allowed to write bailbonds in Colorado based on their posting of qualification bonds, currently in the amount of $50,000. Other professional bailbondsmen licensed to practice in Colorado are those who have been appointed as agents by insurance companies. These "surety" bailbondsmen must also have a qualification bond, but it is written by the insurance company which they represent and is not in the form of cash. In addition, all bailbonds written by surety bailbondsmen are backed by the insurance company which they represent. If not, the insurance company may face disciplinary action under Colorado's insurance laws.

In 1965, the statutory definition of "professional bondsman" was significantly amended. For the first time, there appeared a requirement in the definition that a professional bondsman be appointed as an insurance agent by an insurance company. From 1965 until 1971, the definition of professional bondsman read as follows: ***"Professional bondsman shall mean any person who shall furnish bail, whether for compensation or otherwise, in five or more criminal cases in any court or courts in any county having a population of 50,000 or more, as determined by the latest decennial federal census, during any one calendar year; or any person who furnishes such bail in any criminal case in any two or more counties, one of which has a population of 50,000 or more; AND***

WHO, IN EITHER OF THE AFOREMENTIONED CLASSIFICATIONS IS APPOINTED BY AN INSURER BY POWER OF ATTORNEY TO EXECUTE OR COUNTERSIGN BAILBONDS IN CONNECTION WITH JUDICIAL PROCEEDINGS AND RECEIVES OR IS PROMISED MONEY OR OTHER THINGS OF VALUE THEREFORE, AND WHO IS OTHER THAN A FULL-TIME SALARIED OFFICER OR EMPLOYEE OF AN INSURER, OR ELSE WHO PLEDGES UNITED STATES CURRENCY, UNITED STATES POSTAL MONEY ORDER, OR CASHIER'S CHECK, OR OTHER PROPERTY AS SECURITY FOR A BAILBOND IN CONNECTION WITH A JUDICIAL PROCEEDING AND RECEIVES OR IS PROMISED THEREFORE MONEY OR OTHER THINGS OF VALUE."

The capitalized language quoted above, which represents the 1965 amendment to definition of professional bailbondsman, is the first indication cited by the Division of Insurance that the legislature intended professional bailbondsmen to be limited to insurance agent bailbondsmen only.

The next important change in the statute occurred in 1971. In that year, the definition of professional bondsman was changed to one which essentially mirrors the current definition. That definition held a professional bondsman to be one who ***"shall furnish bail for compensation in five or more criminal cases in any court or courts in this state during any one calendar year, and who is appointed by an insurer by power of attorney to execute or countersign bailbonds in connection with judicial proceeding whether for compensation or otherwise and who is other than a full-time salaried officer or employee of an insurer, or else who pledges United States currency, United States postal money order, or cashier's check, or other property as security for a bailbond in connection with a judicial proceeding whether for compensation or otherwise." (emphasis added)***

The Insurance Division points to the 1971 amendment quoted above as conclusive proof that the term "professional bondsman" includes only insurance agent bondsmen since the statute appears to require that only those appointed by an insurer may execute bailbonds.

The definition of professional bondsman was further refined in 1979 by the exclusion of the requirement to furnish bail in five or more criminal cases in any one year. The 1979 amendment left the statute in its current form, which reads: ***"Professional bondsman means any person who furnishes bail for compensation in any court or courts in this state and who is appointed by an insurer by power of attorney to execute or countersign bailbonds in connection with judicial proceedings and who is other than a full-time salaried officer or employee of an insurer or a person who pledges United States currency, United States postal money order, cashier's check, or other property as security for bailbond in connection with a judicial proceeding, whether for compensation or otherwise."***

INSURANCE DIVISION POLICY REVERSAL

Beginning in 1988, the Colorado Division of Insurance adopted a policy that the language in 12-7-101 (4) defining "professional bondsman" required that only individuals, "appointed by an insurer", could be licensed in Colorado. At that time, the Division began denying applications for new "cash" bailbondsman licenses. The Division also moved to revoke the licenses of the existing cash bailbondsmen based on this interpretation of the statute.

The first test of the Division's new interpretation of the statute came in December of 1989, when the Division's denial of a license application for a cash bailbondsman's license was heard by a state administrative law judge. That decision upheld the Division's denial of the application. The Division has subsequently not issued any new licenses for cash bailbondsmen.

SUPPORT FOR LIMITED INTERPRETATION

The administrative law judge found in 1989 that, "the statutory definition of "professional bondsman" is not a model of legislative clarity." Specifically, the ALJ found that there are two possible interpretations supported by the literal language of the statute.

The first interpretation holds that the statute establishes two classes of persons eligible to be professional bondsmen: those persons who furnish bail for compensation and who are appointed by an insurer; or those persons who pledge cash or other property as security for a bailbonds, whether for compensation or otherwise. This interpretation would support the existence of surety company bondsmen and cash bondsmen and is the interpretation given to the statute by the Division of Insurance prior to 1988. However, as the ALJ pointed out, reading the definition in this way would include individuals who posted bond for a friend or relative without any compensation. "Such a person would clearly be "a person who pledges United States currency... or other property as security for bailbond in connection with a judicial proceeding, whether for compensation or otherwise". The ALJ reasoned that since it was clearly the legislature's intent to regulate "professional bondsmen" meaning those who engage in this practice as part of a business, a second definition of the statute is more reasonable. It is this second definition which was adopted by the Division of Insurance in 1988 and resulted in its refusal to continue to license cash bailbondsmen.

The second interpretation is that the statutory definition establishes only one class of persons eligible to be professional bondsmen and sets out two exclusions from that class. "By this reading, the statute states that a professional bondsman is any person who furnishes bail for compensation and who is appointed by an insurer. The two exclusions are that a professional bondsman must be someone who is other than a full-time salaried officer or employee of an insurer; and who is other than a person who pledges cash or

other property as security for bailbond. The exclusion of persons who pledge cash or property was first written into the law in 1965, which was the first time the legislature required that bondsmen be appointed by an insurer. It may be inferred that the legislature specifically set out this exclusion to make it clear that a professional bondsman must now be appointed by an insurer and no longer could be a person who furnished cash bonds and was not appointed by an insurance company." (In The Matter of Juan Collazo, applicant case #89-18, December 26, 1989).

In 1990, the Division moved to revoke the licenses of the remaining cash bailbondsmen, who numbered approximately 18 at that time. The cash bailbondsmen appealed the Division's action and were upheld by a different administrative law judge in a decision dated October 18, 1990. That decision found that, although the Division could legally refrain from licensing any new cash bailbondsmen, it is "equitably estopped from revoking" the licenses of the remaining cash bailbondsmen based on its reinterpretation of the definition of "professional bondsman" as contained in section 12-7-101 (4) C.R.S. Basically, the judge held that the Division knew for many years prior to its change of position that the statutory authority for licensing cash bondsmen was in doubt. The Division licensed cash bondsmen for about twenty-four years before changing its position. Since the Division acted affirmatively in issuing licenses to cash bondsmen and given the extended period of time over which these licenses were issued, the judge held that equity demands that the Division not now be allowed to change its position and revoke the licenses of the remaining cash bondsmen. (In The Matter of Douglas F. Britten, et. al., applicant case #89-19, October 18, 1990).

The Division took exception to this administrative law judge's ruling and has filed a judicial appeal which is currently pending. In the event that the court finds in favor of the Division, it is likely that the Division would revoke the licenses of the remaining cash bailbondsmen, who now number fourteen as of June, 1992. If the court agrees with the October, 1990 ruling of the administrative law judge that the Division is "equitably estopped" from changing its position, then it is likely that the existing cash bailbondsmen licensees would continue to have their licenses renewed annually by the Division. However, the decision in this case will not affect the Division's decision not to license new applicants for cash bailbondsman licenses.

OTHER ISSUES

The legal battle over whether cash bailbondsmen should be licensed or not has overshadowed other issues relating to the regulation of bailbondsmen. The bailbondsmen's statute was last revised significantly in 1988 but those changes have not cured all the problems related to this industry. SB 92-2, passed this year, makes minor changes to the law and more significant changes to the statute which governs the

granting of bail by the courts. Attempts by cash bondsmen to amend the bailbondsmen's statute to "grandfather" themselves permanently into licensed status, as written in SB 92-57, were unsuccessful.

Other matters which continue to trouble the bailbonds industry are both general and specific. In the larger sense, there continue to be troubling questions about the fairness of the system. For example, most of the people utilizing the services of a professional bailbondsman, either cash or surety, are poor people who cannot afford to post their own bond or have a relative or friend do so. The amount charged to them for the bond, assuming they can afford it, goes to the professional bondsman as a fee and is never recovered by the defendant. Other states have adopted systems which minimize this inequality. Some of these systems will be discussed in Chapter IV of this report, The Regulatory Experience.

More specific issues which remain unresolved include development of better ways to track violations of the bailbondsmen's law, improving recordkeeping and data gathering on the issue of bailbond forfeitures and "failure to appear" in court cases, changing the amount of the qualification bond to better protect the courts of the state and making changes in the law which allow the Division of Insurance to more easily access the qualification bond in the event of death, disability, bankruptcy or abandonment of practice by the professional bailbondsmen. Some of these issues are further discussed in Chapter V of this report, which makes recommendations for reforming the bailbondsmen's law.

IV. THE REGULATORY EXPERIENCE

INTRODUCTION

The regulatory program which is charged with overseeing the operation of bailbondsmen in Colorado is small. The Colorado Division of Insurance essentially devotes the services of one full-time employee to staff this program. For a small program, however, it generates a good deal of controversy and media attention. For example, a licensed Colorado bailbondsman was featured in the cover story of the Sunday Denver Post's "Contemporary" magazine on January 26, 1992. In addition, two bills proposing significant changes to the Bail and Bailbondsmen's statutes were considered during the 1992 Session of the Legislature.

COMPLAINT EXPERIENCE

There are approximately 240 bailbondsmen who are licensed to practice in the State of Colorado. With the exception of fourteen individuals, all these persons are "surety" bailbondsmen who are agents or employees of insurance companies licensed to do business in Colorado. The remaining "cash" bailbondsmen do not represent insurance companies but operate solely on the basis of the $50,000 cash qualification bond which underwrites their operations by insuring that a pool of money is available to pay the courts in the event of a bond forfeiture. A number of the cash bailbondsmen, (six as of June, 1992), also hold licenses as "surety" bailbondsmen and therefore have the option of writing bailbonds either based on their cash bond or based on their insurance company connection.

In fiscal years 1990-1991 and 1991-1992, the 240 licensed bailbondsmen in Colorado attracted some 1,076 complaints. If anything, the trend is upward, with 557 complaints recorded for the most recent fiscal year as compared with 519 complaints recorded for fiscal year 90-91. These complaints are mostly bond forfeitures and defaults along with a number of consumer complaints. The high number of complaints lodged against bailbondsmen is remarkable when compared with other regulatory programs. In most other regulated professions, the number of complaints lodged in a given year is a relatively small fraction of the number of licensed individuals operating in the profession. In the bailbond industry, there are slightly more than two complaints for each bailbondsmen each year. Of course, many bailbondsmen go without complaints at all while other bailbondsmen have multiple complaints lodged against them.

According to the Division of Insurance, the vast majority of the consumer complaints are settled through negotiation between the complainant and the bailbondsman in question. Often, the Division of Insurance assumes the role of mediator, by contacting the bailbondsman and informing him or her that a complainant is alleging a violation of the

bailbondsmen's law which could be settled between the parties. Unfortunately, specific information on the percentage of consumer complaints received each year which are invalid and the percentage which are valid, but subsequently resolved through negotiation, are not routinely kept by the Division of Insurance. Explanations for this lack of records include the low priority of the Bailbondsmen Regulatory Program and the low staffing level.

In response to the large number of forfeiture complaints from the courts, the Division of Insurance takes about twenty formal actions per year against bailbondsmen. With few exceptions, these actions involve hearings on bond forfeitures and defaults. As previously stated in this report, Colorado Law requires a hearing to determine whether the license of a bailbondsman should be suspended or revoked in the event that a bond is forfeited. In almost of all the approximately twenty actions per year cited by the Insurance Division, the bondsman in question eventually repaid the amount of the bond forfeiture and therefore no further action was taken against the license of that individual. In addition, a number of these formal actions against one bailbondsman may well involve multiple bond defaults. Since each default is a separate complaint, this helps account for the high number of complaints compared to formal disciplinary hearings. One glaring exception however, highlights a significant weakness in the regulation of bail and bailbondsmen and deserves further discussion.

As stated previously, there is no requirement in law that a bailbondsman limit the amount of bailbonds written so that the $50,000 qualification bond is not exceeded. On the contrary, bailbondsmen commonly write bailbonds far in excess of $50,000 at any given time. Indeed, it is not uncommon for a bailbondsman to have a million dollars in bonds outstanding at one time. The Division of Insurance was forced to revoke the license of one cash bailbondsman whose abuse of this system has caused significant damage. The bailbondsman in question wrote more than half a million dollars in bailbonds, secured only by the $50,000 cash qualification bond. Most of these bailbonds ended up in forfeiture. The Division of Insurance, on behalf of the Colorado Court System, claimed the $50,000 qualification bond as a result. However, more than half a million dollars in forfeited bailbonds remain unpaid because the bailbondsman in question has declared bankruptcy.

In other cases, where insurance companies are involved in a bond default case, the Division has imposed significant discipline for failure to pay on the bond. For example, in 1990, one insurance company was fined $20,000 and subsequently repaid the defaulted bond as well.

EXAMINATION ISSUES

In addition to its licensing and disciplinary functions, the Division of Insurance conducts examinations of bailbondsmen which must be passed in order to secure a license. These examinations are given twice a month and are currently administered by a testing company which has a contract with the Division of Insurance to conduct these and other examinations of licensees of the Division of Insurance. The examination itself was written several years ago by Division of Insurance personnel and has not been recently updated.

Examination data for calendar years 1990 and 1992 were examined for purposes of this report. Examinees are allowed to take the examination as many times as necessary in order to pass. Still, the percentage of examinees failing the exam seems high. For example, in 1990, 47.4% of those taking the exam failed to pass. In 1992, the failure rate had increased to 58.4%. No data was available to determine the pass/fail rate of first time test takers vs. second and third time examinees.

ISSUES IN BAILBONDSMAN REGULATION

Each of the identifiable constituencies most involved in regulation of bailbondsmen in Colorado raised important issues during the research phase of this report. These are discussed further below. As previously stated, the Division of Insurance has expended considerable effort over the course of the last several years in an attempt to convert "cash bailbondsmen" to "surety bailbondsmen". The results of these efforts are still in doubt pending the outcome of the case discussed earlier in this report. However, the Division of Insurance's refusal to license new "cash" bailbondsmen has been sustained and has resulted in a significant decrease in the numbers of those licensees. Given the relatively small number of licensees in this program, the low funding level and the higher priority of other insurance regulatory programs within the Division, it is clear this program could be improved if greater resources were devoted to it.

From time to time, the suggestion has been raised that the regulation of bailbondsmen is more appropriately placed in the Colorado Judicial Department. Since bailbonds are uniquely creatures of the judicial system, the argument goes that it is most appropriate that judicial administrators be the ones to regulate bailbondsmen. However, the fact that most bailbonds are written by surety companies which already come under the jurisdiction of the Division of Insurance argues against moving the regulation of bailbondsmen away from the Division of Insurance. Such a move would only divide the regulation of insurance. In addition, the Judicial Department prefers to leave the regulatory program in the Division of Insurance.

Perhaps of even greater importance, the Judicial Department is interested in a major overhaul of the bailbonding system in Colorado. As will be discussed further in the next chapter of this report, the changes which the judicial branch is considering proposing will have a very significant impact on the practice of bailbondsmen in Colorado. The emphasis of the judicial branch on this new approach to bailbonding is expected to be its primary focus in this area and would likely preclude a greater contribution of its resources toward regulating bailbondsmen.

INDUSTRY CONCERNS

The concerns of the cash bailbondsmen are well known, having been the subject of much discussion during the most recent session of the legislature. Generally, the position of the few remaining cash bailbondsmen was summed up in SB 92-57, which would have required the Insurance Division to continue renewing the licenses of existing cash bailbondsmen but would not have required the Division to grant new cash bailbondsmen licenses.

However, the continued existence of the cash bailbondsmen is a source of concern for the "surety" bailbondsmen. The surety bailbondsmen feel strongly that cash bailbondsmen have an unfair competitive advantage. While the surety bailbondsman must pay a portion of the bailbond fee to the surety company, the cash bailbondsman can retain all of the bailbond fee for himself. In addition, some cash bailbondsmen can write bailbonds for an insurance company, since they are also licensed as agents of insurance companies for that purpose, or they can write bailbonds on their own "cash" authority. This allows them to take the better risks on their own authority and to write the poorer risks on the surety company's authority. The surety bailbondsmen feel strongly that there should be a "level playing field", meaning that cash bailbondsmen should be required to operate as they do: Only representatives of insurance companies should be allowed to write bailbonds in Colorado.

Finally, a number of bailbondsmen expressed concern about the way the Division of Insurance handles consumer complaints in their industry. One critic claimed that the Division too often took the side of the complainant and did not allow adequate time or flexibility for the bailbondsman to respond to settle the problem. Several licensees expressed the belief that the Division could have worked more closely with the bailbondsman in handling complaints and "cleaning up the industry". The Division responds that part of its job is to look out for the consumer. Bailbond consumers in particular may be in a vulnerable position when contracting for service.

One issue upon which there is practically no dissention, however, is the need to continue regulation of bailbondsmen. No one in the course of this study urged deregulation of the industry on the basis that regulation is not needed. On the contrary, there seems to be universal recognition that the bailbonding industry has suffered abuses and that many

problems still remain to be addressed. A number of suggestions to improve the regulation of this industry may be found in the next chapter of this report. Whether or not those recommendations are implemented, it appears clear that there will continue to be a need for state regulation of bailbondsmen in Colorado for the foreseeable future.

Recommendation 1: **The General Assembly should continue the regulation of bailbondsmen in Colorado through the Colorado Division of Insurance. A new sunset date of July 1, 1996 should be adopted in order to closely monitor the outstanding issues and trends in this industry.**

V. RECOMMENDATIONS

INTRODUCTION

The Colorado Judicial Department in cooperation with the Criminal Law Section of the Colorado Bar Association and the University of Colorado School of Law are preparing a bail reform proposal which could revolutionalize the way bailbonding is handled in Colorado. In addition to promising greater fairness and potentially a higher "appearance" rate at trial, this proposal would significantly reduce the need for traditional bailbondsmen. Because of the significant impact of this proposal on the bailbonding industry, it is important that the proposal be considered in the context of this report.

BAILBOND REFORM PROPOSAL

The goals of the bailbond reform proposal are the following:

1. To ensure that criminal defendants appear in court as scheduled.

2. To reduce the incidence of crime committed by defendants who are out on bond.

3. To ensure that defendants do not remain incarcerated solely because of their financial circumstances.

4. To eliminate or reduce problems associated with the current bailbond system.

5. To design a system that will not cost more money.

According to the proposal's authors, ***"The heart of the proposal is to substitute the court for the bondsman in most, if not all, situations in which a secured bond is appropriate. The defendant would post 10% of the amount of his bond with the court instead of hiring a bondsman to post the bond. A defendant who appeared at all court dates as ordered would receive most of his money back. A defendant who failed to appear as ordered would forfeit the amount he posted and would be liable to the state for the balance of the amount of the bond. The money retained and earned by the state under this system would be used to pay for the administration of the system and to beef up existing pretrial release services in an effort to lower the failure to appear rate."*** (Pat Furman and Mary Claire McLaughlin, Draft Bail Reform Proposal, June 1992)

The key to the attractiveness of this system over the current system is its fundamental fairness. The law already requires that bail not be excessive. Operationalizing this noble goal, however, is very difficult. The proposed system would be available to practically all defendants, regardless of their financial means, who are found to be eligible for pretrial release.

A number of other states have adopted various forms of the proposed system with notable success. Among them, states as diverse as Kentucky, Illinois and Oregon have instituted the "10% system". Studies of the performance of those systems reviewed in the preparation of this report substantiate the claim that they can be operated in order to achieve the goals discussed above. A number of states have adopted or are considering adopting some form of this system. These include Pennsylvania, Rhode Island, South Carolina, Indiana, Vermont and Wyoming.

Although still in its early stages, the bail reform proposal envisioned by the Colorado Judicial Department represents an important concentration of knowledge and effort for the purpose of reforming the bailbonding system in Colorado. Given the positive experience in other states which have adopted this reform, development of this proposal promises important benefits for Colorado citizens. The work of the Colorado organizations developing the bail reform proposal should be encouraged and supported.

Recommendation 2: **The Colorado Division of Insurance should assist the Colorado Judicial Department in studying the bail reform proposal discussed above.**

REQUIRE UNIFORM BAILBOND

Another issue which is shared by the Colorado Division of Insurance and the Colorado Judicial Department is the form of the bailbond instrument. Currently, there is no uniform bailbond instrument. This creates significant problems in reviewing the adequacy and content of bailbonds since there are so many different formats. Given the considerable number of judicial districts, (22), and the multiplicity of county and municipal courts, the variations in bailbond instruments can be very confusing.

The creation of a standard bailbond instrument which will be used in all courts in the State of Colorado is a step that would benefit judges, defendants, regulators and bailbondsmen. It would reduce paperwork, confusion, and would allow swifter administration of the judicial system. A uniform bailbond instrument could be readily drafted by the Colorado Judicial Department in cooperation with a committee of judges and other members of the bar. The instrument could then be required to be used in all appropriate courts in order to ensure that its full benefits would be fully realized.

Recommendation 3: **The General Assembly should direct the Colorado Judicial Department to prepare a uniform bailbond instrument to be used in all courts in the State of Colorado.**

INCREASE BOND REQUIREMENT

As discussed in the last chapter of this report, there is no limit on the amount of bailbonds which can be written in Colorado by an individual bailbondsman. In several cases, this has resulted in forfeitures which exceeded the amount of the qualification bond. The dollars lost to the judicial system due to this inadequacy in the law are almost never recouped, since the bailbondsman in question may have died, declared bankruptcy or simply left the state. A simple expedient which would allow the courts to cover some of these losses would be to increase the amount of the qualification bond. This would allow the courts to recover more of the amount of defaulted bailbonds and yet still allow unlimited writing of bailbonds.

Recommendation 4: **The General Assembly should increase the amount of the qualification bond required under the bailbondsmen's law to $250,000.**

GRANT BOND PRIORITY TO THE DIVISION OF INSURANCE

Sometimes the Division of Insurance encounters difficulty and delay in accessing the qualification bond of a bailbondsman in order to satisfy forfeitures. This most often occurs in the context of the death, disability or bankruptcy of the bailbondsman. It would aid in the administration of the Bailbondsmen's Law and speed the payment of forfeited bailbonds if the law were amended to specify that the Division of Insurance has priority over all other claimants to a bailbondsman's qualification bond when seeking payments to the courts for forfeited bailbonds.

Recommendation 5: **The General Assembly should amend C.R.S. 12-7-101 et. seq. to provide that the Colorado Division of Insurance has priority over all of the claimants to a bailbondsman's qualification bond in the event of a forfeiture.**

VALIDATE AND UPDATE EXAMINATION

The examination which bailbondsmen are required to pass before they can receive a license to practice in Colorado needs to be improved. To begin with, all examinations which are required for licensure need to be validated. Validation requires, among other things, a study of the profession and attention to the psychometric details of the test questions which most adequately measure competency. In the event that the resources to properly validate this examination are not immediately available, the test should at least be updated and revised. As with other regulatory programs which administer examinations, the passing level should be set at the minimum necessary level of competency. Failure to validate and update a test required for a professional license can be grounds for a legal challenge to the regulatory system.

Recommendation 6: **The General Assembly should direct the Colorado Division of Insurance to validate and update the bailbondsmen's licensure examination and to set the passing score at the minimum necessary level of competency.**

RECEIPT FOR COLLATERAL

A significant number of complaints received by the Colorado Division of Insurance regarding bailbondsmen deal with the treatment of collateral. Some defendants claim that their collateral has been abused by the bailbondsman and then returned in damaged condition. The bailbondsmen complain that the Division of Insurance often insists that they pay the defendant for the damage to the collateral, even when there is some question as to whether the bailbondsman was responsible for the damage. This situation could be readily averted if bailbondsmen were required to prepare a standard receipt for any collateral which they accept from a defendant to secure a bailbond. This standard receipt would include a description of the collateral which would be sufficient to resolve any question as to its condition when accepted by the bailbondsmen.

Recommendation 7: **The General Assembly should require bailbondsmen to prepare a standard collateral receipt to be used whenever collateral is accepted as part of a bailbond agreement. This receipt will include a description of the condition of the collateral at the time it is taken into the custody of the bailbondsman. Any bailbondsman failing to issue such a receipt would be in violation of the bailbondsmen's law.**

ESTABLISH ADVISORY/ARBITRATION COUNCIL

The Colorado Division of Insurance could be materially assisted in its administration of the bailbondsmen's law by making use of the volunteer assistance of a bailbondsmen's advisory council. This council would render advisory decisions to the Division in matters involving complaints against bailbondsmen. Such arbitration might encourage settlement of these complaints and would encourage increased cooperation and understanding between the regulators and the regulated industry. An advisory/arbitration council of three persons, appointed by the Commissioner of Insurance for one year terms, could meet periodically to consider complaints and make advisory decisions to the Division of Insurance.

Recommendation 8: **The Colorado Division of Insurance should appoint an advisory/arbitration council of three licensed bailbondsmen to consider complaints and advise the Division.**

IMPROVE RECORDKEEPING

One problem in reviewing the adequacy of this regulatory program has been the weak recordkeeping of the Colorado Division of Insurance as it relates to bailbondsmen. This lack of data on bailbonds is also a problem in the court system as well. Although this regulatory program is of low priority in the Division, particularly when compared to issues relating to insurance company solvency, it is still important to maintain adequate records. Records pertaining to examination administration and passing rates could be improved. Also, records pertaining to the disposition of complaints are necessary to determining whether the regulatory program is functioning adequately.

Recommendation 9: **The General Assembly should direct the Colorado Division of Insurance to keep adequate records of all matters pertaining to its regulation of Colorado bailbondsmen.**

DEFINE BONDING AGENT

When the General Assembly amended the bailbondsmen's law in 1992 in order to make it gender neutral, it failed to define the term "bonding agent". This definition is crucial to the law.

Recommendation 10: **The General Assembly should amend the bailbondsmen's law to make it gender neutral by defining "bonding agent" and using that term to refer to all licensees under the law.**

APPENDIX A

SUNSET STATUTORY EVALUATION CRITERIA

(I) Whether regulation by the agency is necessary to protect the public health, safety and welfare; whether the conditions which led to the initial regulation have changed; and whether other conditions have arisen which would warrant more, less or the same degree of regulations;

(II) If regulation is necessary, whether the existing statutes and regulations establish the least restrictive form of regulation consistent with the public interest, considering other available regulatory mechanisms and whether agency rules enhance the public interest and are within the scope of legislative intent;

(III) Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures and practices of the Department of Regulatory Agencies and any other circumstances, including budgetary, resource and personnel matters;

(IV) Whether an analysis of agency operations indicates that the agency performs its statutory duties efficiently and effectively;

(V) Whether the composition of the agency's board or commission adequately represents the public interest and whether the agency encourages public participation in its decisions rather than participation only by the people it regulates;

(VI) The economic impact of regulation and, if national economic information is available, whether the agency stimulates or restricts competition;

(VII) Whether complaint, investigation and disciplinary procedures adequately protect the public and whether final dispositions of complaints are in the public interest or self-serving to the profession;

(VIII) Whether the scope of practice of the regulated occupation contributes to the optimum utilization of personnel and whether entry requirements encourage affirmative action;

(IX) Whether administrative and statutory changes are necessary to improve agency operations to enhance public interest.

READER RESPONSE FORM

TO: Colorado Department of Regulatory Agencies
Office of Policy and Research
1560 Broadway, Suite 1550
Denver, CO 80202

RE: Sunrise/Sunset Report on _____
(Report Title and Date)

FROM: _____
_____
Your Name and Address

DATE: _____

I have read your report and found it:

Excellent _____ Good _____ Fair _____ Poor _____

Here are my suggestions for improving the report:

_____
_____
_____

The report was thorough in its coverage of the subject:

Yes _____ No _____

Comments:

_____
_____
_____

The report was fair in its treatment of the issues:

Yes _____ No _____

Comments:

_____
_____
_____

Thank you for your response. We hope you found our report useful.

Revised June, 1992.