ALAN WILSON
ATTORNEY GENERAL

March 9, 2012

The Honorable John Richard C. King
Member, House of Representatives
309-A Blatt Building
Columbia, SC 29211

Dear Representative King:

We received your letter requesting an opinion of this office regarding 2012 S.C. Acts 155, §1 (R. 122, H. 3895) (the "Act"), which became effective on February 1, 2012, upon approval by the Governor. The Act amends S.C. Code Ann. §17-15-20 so as to provide that an appearance bond is valid for a certain time period in circuit and magistrate or municipal courts under certain circumstances, and also provides for a procedure to relieve the surety of liability when the time period has run.[1] As you note, the Act makes

[1]The Act amends §17-15-20 to read as follows:

> (A) An appearance recognizance or appearance bond must be conditioned on the person charged personally appearing before the court specified to answer the charge or indictment and to do and receive what is enjoined by the court, and not to leave the State, and be of good behavior toward all the citizens of the State, or especially toward a person or persons specified by the court.
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> (B) Unless a bench warrant is issued, an appearance recognizance or an appearance bond is discharged upon adjudication, a finding of guilt, a deferred disposition, or as otherwise provided by law. An appearance bond is valid for a period of three years from the date the bond is executed for a charge triable in circuit court and eighteen months from the date the bond is executed for a charge triable in magistrates or municipal court. In order for the surety to be relieved of liability on the appearance bond when the time period has run, the surety must provide sixty days written notice to the solicitor, when appropriate, and the respective clerk of court, chief magistrate, or municipal court judge with jurisdiction over the offense of the surety's intent to assert that the person is no longer subject to a valid appearance bond. If the appropriate court determines the person has substantially complied with his court obligations and the solicitor does not object within the required sixty days by demanding a hearing, the court shall order the appearance bond converted to a personal recognizance bond and the surety relieved of liability.

no mention of whether the amendments are to apply prospectively or retroactively. You therefore ask us whether these amendments are applicable to appearance bonds issued before February 1, 2012.

Law/Analysis

"[T]he primary purpose of statutory construction is to ascertain the intent of the Legislature." State v. Martin, 293 S.C. 46, 358 S.E.2d 697, 697 (1987). In the construction of statutes, there is a presumption that statutory enactments are to be considered prospective rather than retroactive in their operation, unless there is a specific provision in the enactment or clear legislative intent to the contrary. S.C. Dept. of Revenue v. Rosemary Coin Machines, Inc., 339 S.C. 25, 528 S.E.2d 416 (2000); Bartley v. Bartley Logging Co., 293 S.C. 88, 359 S.E.2d 55 (1987). Accordingly, it is frequently recognized that "[a] statute is not to be applied retroactively unless that result is so clearly compelled as to leave no room for doubt." American National Fire Ins. Co. v. South Grading and Paving, 317 S.C. 445, 454 S.E.2d 897, 899 (1995); see Neel v. Shealy, 261 S.C. 266, 199 S.E.2d 542, 546 (1973).

As the South Carolina Supreme Court observed in Hyder v. Jones, 271 S.C. 85, 245 S.E.2d 123 (1978):

> the party who affirms such retroactive operation must show in the statute such evidence of a corresponding intention on the part of the Legislature as shall leave no room for reasonable doubt. It is not necessary that the Court shall be satisfied that the Legislature did not intend a retroactive effect. It is enough, if it is not satisfied that the Legislature did intend such effect.

Id., 245 S.E.2d at 125 [quoting Ex Parte Graham, 47 S.C. Law (13 Rich.) 53, 55-56 (1864)]. Therefore, in the absence of anything in the Act "beyond a statement of its 'effective date,' we must follow the well-settled rule that a statute may not be applied retroactively in the absence of specific provision or clear legislative intent to the contrary." Schall v. Sturm, Ruger Co., 278 S.C. 646, 300 S.E.2d 735, 737 (1983).

"A principal exception to the . . . presumption [of prospective effect] is that remedial or procedural statutes are generally held to operate retroactively." Hercules, Inc. v. South Carolina Tax Commission, 274 S.C. 137, 262 S.E.2d 45, 48 (1980). A statute is remedial where it creates new remedies for existing rights unless it violates a contractual obligation, creates a new right, or divests a vested right. JRS Builders, Inc. v. Neunsinger, 364 S.C. 596, 614 S.E.2d 629, 631 (2005); Smith v. Eagle Constr. Co., 282 S.C. 140, 318 S.E.2d 8, 9 (1984); Hooks v. Southern Bell Telephone & Telegraph Co., 291 S.C. 41, 351 S.E.2d 900, 902 (Ct. App. 1986). However, "where a statute . . . creates new obligations [or] imposes a new duty . . . it will be construed as prospective only." Southeastern Site Prep, LLC v. Atlantic Coast Builders and Contractors, LLC, 394 S.C. 97, 713 S.E.2d 650, 655 (Ct. App. 2011) [quoting 82 C.J.S. Statutes §585 (2009)]; see also Shiflet v. Eller, 228 Va. 115, 319 S.E.2d 750 (1984) [statutes which create duties, rights and obligations are not remedial or procedural, and are not given retroactive effect].

Several important issues are presented by your letter. As the South Carolina Supreme Court noted in G-H Insurance Agency, Inc. v. Continental Insurance Company, 278 S.C. 241, 294 S.E.2d 336, 338 (1982), "[c]ontracts generally are subject to legislative regulation prospectively." In 2 Sutherland, Statutory Construction §41.07, it is stated that:

> [t]here are numerous decisions which purport to rest on an unqualified proposition that retroactive laws may not violate obligations of contract. However, the protection against retroactive impairment of contract rights is subject to the same considerations as those which apply in determining the legality of retroactive impairment of noncontract rights, under the due process clauses. . . .

In G-H Insurance Agency, an insurance agency entered a contract with an insurance company. Under the terms of the contract, termination could be made by either party at any time. Subsequently, the Legislature enacted a statute which required that no insurer could cancel its representation by an agent for certain reasons. The Court held that the legislative enactment unconstitutionally impaired the existing contract. Relying primarily upon the Fourth Circuit Court of Appeals decision in Garris v. Hanover Ins. Agency, 630 F.2d 1001 (4th Cir. 1980), and the United States Supreme Court's decision in Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978), the Court invalidated the statute, stating:

> [t]he impact of the provision was traumatic to some agents and insurance companies. There was no provision for gradual application for a grace period. No opportunity was given to renegotiate agency contracts. The impact of the proscription was immediate, irrevocable and without limit as to time.

G-H Insurance Agency, 294 S.E.2d at 340.

In an opinion of this office dated May 14, 1996, we addressed two proposed legislative bills dealing with the provision of fire protection, water and sewer services by a municipality, which would be retroactively applied to customers outside the corporate limits of municipalities. We determined that the bills, if adopted, would likely impair existing contracts between municipalities and recipients, as well as existing contracts between the recipients of the service and third parties with whom they may have contracted. We therefore advised that the bills should be reassessed. Also in this opinion, we considered the constitutional validity of the bills under the federal and South Carolina Constitutions.[2] We concluded:

> [t]he purpose of the Contract Clause of the United States Constitution is explained in Nowak, Constitutional Law (2d Ed. 1983), at page 462:
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> > This prohibition prevents the states from passing any legislation that would alleviate the commitments of one party to a contract or make enforcement of the contract unreasonably difficult. The primary intent behind the drafting of the clause was to prohibit states from adopting laws that would interfere with the contractual arrangements between private citizens. Specifically, the drafters intended to inhibit the ability of state legislatures to enact debtor relief laws. Those who attended the

[2]U.S. Const. art. I, §10 states, in relevant part: "No state shall . . . pass any . . . law impairing the obligation of contracts. . . ." S.C. Const. art. I, §4, states: "No . . . law impairing the obligation of contracts . . . shall be passed. . . ."

> Constitutional Convention recognized that banks and financiers required some assurance that their credit arrangements would not be abrogated by state legislatures.
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> While the initial emphasis of the Contract Clause of the federal constitution was on contracts between private parties, the United States Supreme Court in deciding The Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 4 L.Ed. 629 (1819), made it clear that the Contract Clause would prevent a state from abrogating contracts or agreements to which it was a party.

For our purposes here, we note that an appearance bond is a contract. State v. Boatright, 310 S.C. 281, 423 S.E.2d 139, 140 (1992). The parties to such a contract typically include the defendant; the person or company which acts as surety for the bond, if any; and the state and local government entities identified on the bond form. State v. McClinton, 369 S.C. 167, 631 S.E.2d 895, 897 (2006). The terms and conditions of these bonds are controlled by statute and the agreement of the parties. See Boatright, 423 S.E.2d at 142 (Toal, J., dissenting).

South Carolina appellate courts have routinely applied contract principles to resolve various disputes arising from these contracts. See, *e.g.*, State v. Cochran, 358 S.C. 24, 594 S.E.2d 844, 845 (2004) ["State's right to estreatment is governed by contract" and a "surety" is "one who, with the defendant, is liable for the amount of the bail bond upon forfeiture of bail"]; Boatwright, 423 S.E.2d at 140-41 ["it is the contract that provides the basis for the State's right to bond estreatment"; in upholding partial estreatment of bond, Court applied the contract principle of impossibility of performance where the defendant was extradited to another state, preventing surety from performing his obligation under the contract to deliver defendant to court]; State v. McIntyre, 307 S.C. 363, 415 S.E.2d 399, 400 (1992) ["State's right to bond estreatment arises from contract"; Court applied the Statute of Frauds to negate the circuit court's oral amendment of a contract of which surety asserted it had no notice]; State v. Bailey, 248 S.C. 438, 446, 151 S.E.2d 87, 91 (1966) ["the right of the State to estreatment of an appearance recognizance arises from contract and is, therefore, subject to the doctrine of estoppel"]; State v. Simring, 230 S.C. 49, 94 S.E.2d 9, 11 (1956) [same]; State v. Hinojos, 393 S.C. 517, 713 S.E.2d 351, 354 (Ct. App. 2011) [same]; §17-15-160 (2003) [identifying parties to bail bond contract]; accord United States v. Figuerola, 58 F.3d 502, 503 (9th Cir. 1995) ["A bail bond is a contract between the government, the defendant, and his sureties, and is governed by general contract principles"); United States v. Martinez, 613 F.2d 473, 476 (3rd Cir. 1980) [same]. Significantly, as with any contract, the general rule as it relates to bonds is that a court cannot redraft a bond so as to impose conditions or obligations not contemplated by the parties. State v. White, 284 S.C. 69, 325 S.E.2d 64, 71 (1985); Hinojos, 713 S.E.2d at 354. In White, the South Carolina Supreme Court held the magistrate erred in disposing of a charge originally covered by a bond and then continuing the bond to cover a second charge without the consent of the surety.

In this instance, the Act imposes a certain time period that an appearance bond is valid in circuit and magistrate or municipal courts. The Act also provides for a procedure to relieve the surety of liability once the time period has run. As a result of these statutory amendments, prior contractual obligations formed between the parties could be adversely affected. Therefore, it is the opinion of this office that the Act is presumed to be prospective in effect only. See Henderson v. Evans, 268 S.C. 127, 232 S.E.2d 331,

333 (1977) [a statutory construction which retroactively deprives a party from pursuing his rights pursuant to a legal contract is not only manifestly inequitable; it is an unconstitutional impairment of contractual obligations]; Federal Land Bank of Columbia v. Garrison, 185 S.C. 255, 193 S.E. 308, 311 (1937) ["Any deviation from its terms, by postponing or accelerating the performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation' "].

To further illustrate this point, we refer to the South Carolina Supreme Court's decision in American National Fire Ins. Co., supra. In this case, a general liability insurance policy was issued by Insurer on August 1, 1985, for a one-year term. The policy provided that Insurer could cancel the policy, without cause, upon ten days notice. Pursuant to this provision, Insurer sent Insured, a general contractor, a notice of cancellation effective June 9, 1986. In the meantime, new legislation had become effective on March 5, 1986, providing that no insurance policy or renewal could be cancelled by an insurer prior to expiration of the term stated in the policy, except for certain reasons set forth therein. On July 14, 1986, a building contractor was injured on property worked by Insured. The building contractor sued Insured for negligence. Insurer sought a declaratory judgment on the issue of coverage under the insurance policy. The trial court ruled the policy was cancelled before the injury was sustained. It further held that application of the new statute to the insurance policy was unconstitutional under the Contract Clause. Id., 454 S.E.2d at 898. On appeal, the Court concluded that because the statute became effective after issuance of the policy, and it did not effect a change in remedy or procedure, it did not apply to the insurance policy absent words expressly evincing legislative intent that it be applied retroactively or words necessarily implying such intent by the Legislature. Id., 454 S.E.2d at 899. The Court further agreed there was no Contract Clause violation. It explained:

> [i]t is a long-held axiom of Contract Clause analysis that there is no impairment where the statute affects only future contracts between private parties. [Citation omitted]. A non-retroactive statute affecting private contracts is, by definition, a statute that affects only future contracts and does not violate the Contract Clause. [Citations omitted]. In light of our conclusion [the statute] does not apply retroactively, we agree there is no Contract Clause violation.

Id., 454 S.E.2d at 899, n.2.

On previous occasions this office has advised against retroactive application of amendments to statutes where contractual obligations formed prior to these amendments would be adversely affected. In an opinion dated September 1, 1988, we determined that a county's swimming pool ordinance requiring fencing of swimming pools, including pools constructed before adoption of the ordinance, should be enforced prospectively only. We concluded the county's ordinance was of a substantive nature, and that it could not be said to affect only procedural rights. In an opinion dated November 17, 2000, we addressed amendments to laws governing annexation, which provided a method to modify the boundaries of a special purpose district when a municipality annexes part of a service area upon petition by either 75% of the freeholders (§5-3-150) or 25% of the freeholders (§-3-300). Before the 2000 amendments, §5-3-310 only provided for the modification of the special purpose district boundaries when the annexation occurred pursuant to the 25% method, or §5-3-300. Specifically, the opinion discussed how the

boundaries to a special purpose district were modified after an annexation pursuant to the 75% method (§5-3-150) but that occurred before the 2000 amendments were enacted. Pursuant to the principles of statutory construction cited above, we concluded that since the boundaries of special purpose districts would be reduced by retroactive application of the amendments to prior annexations, contractual obligations formed prior to the amendments would be adversely affected. We therefore advised that the 2000 amendments would apply prospectively only. See also Ops. S.C. Atty. Gen., July 13, 1989; April 16, 1985.

Conclusion

The Act amends §17-15-20 to provide that an appearance bond is valid for a certain time period in circuit and magistrate or municipal courts under certain circumstances. The Act also provides for a procedure to relieve the surety of liability once the time period has run. The Act, however, is silent as to whether the amendments apply retroactively. In the absence of words expressly evincing legislative intent that the Act be applied retroactively or necessarily implying such intent, there is a presumption the Act is to be considered prospective rather than retroactive in its operation. The amendments are not remedial or procedural in nature, and thus do not fit into any recognized exception to the rule of prospective application. In addition, an appearance bond is a contract. Contracts are generally subject to legislative regulation prospectively only. Moreover, the terms and conditions of these bonds are controlled by agreement of the parties. Indeed, we are inclined to conclude that any retroactive application of the Act to appearance bonds issued before February 1, 2012, might create new obligations or impose new duties on the parties. As a result, such an application may violate State and federal constitutional provisions to the effect that contracts may not be impaired. However, we note that this office is not authorized to make a factual determination on any particular appearance bond in a legal opinion. Ops. S.C. Atty. Gen., February 21, 2012; July 1, 2003; February 26, 2001; see also Op. S.C. Atty. Gen., February 19, 1999 ("[u]nlike a fact-finding body such as a . . . court, we do not possess the necessary fact-finding authority and resources required to adequately determine . . . factual questions"). Of course, we cannot opine with certainty whether a court will necessarily concur with our opinion. Ops. S.C. Atty. Gen., June 5, 2008; November 17, 2000. Ultimately, clarification from the appellate courts would be necessary to determine your question with finality. Op. S.C. Atty. Gen., January 10, 2012.

If you have any further questions, please advise.

Very truly yours,

N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

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