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FILE NO. S-662

RACING:

Horse Racing - Right of
unnamed parties to recover
on a penal bond

Honorable Anthony Scariano
Chairman
Illinois Racing Board
160 North LaSalle Street
Chicago, Illinois 60601

Dear Mr. Scariano:

Receipt of your recent letter and accompanying file
is acknowledged. In that letter you state:

"As you may know, the new race track in East Moline, Illinois, owned and operated by East Moline Downs, Inc., has recently ceased operations in the middle of its thoroughbred meeting. At the time the track ceased to operate, approximately \$105,000 which belonged to the horsemen participating in the meeting and which was supposed to be in the possession of East Moline Downs, Inc. for the benefit of those horsemen, had been spent by East Moline Downs, Inc. in payment of other of its obligations.

The nature of the arrangement between the horsemen and the track is as follows. Each thoroughbred

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racing association maintains an account in the name of the various horsemen participating in the meeting. Moneys in that account come from two sources: moneys which the horsemen themselves deposit to cover the price of horses which they may claim, jockey fees, etc.; and purse moneys won by the horsemen and payable from the track's share of the handle. In the case of East Moline Downs, Inc., moneys deposited by horsemen were used by the track to pay purses and moneys won by the horsemen as purses and in the possession of the track were, in many cases, not deposited in the horsemen's account.

Section 37j1 of Chapter 8 of the Illinois Revised Statute provides, in part:

'Every person, association, corporation or trust licensed to conduct horse racing meetings, at least 20 days prior to the first day of each racing meet as provided in Section 2 of this Act, shall execute and file with the Board a bond, payable to the State of Illinois, with sureties approved by the Board, in the penal sum of \$200,000 conditioned for the payment of the taxes imposed by this Section and the balance of the license fee in accordance with the provisions of this Act, and for proper compliance with, and observance of, all other requirements of this Act applicable to such licensees, and the rules and regulations of the Board hereunder.'

In addition, rules 54 and 57 of the Rules and Regulations of Horse Racing provide:

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'Rule 54 Racing Secretary--

'A person appointed by the race track operator shall be the racing secretary, following approval by the board. He also shall be clerk of the course and, unless it is otherwise specified, he shall act as handicapper.

* * *

'B. He shall receive all stakes, entrance money, jockey's fees, purchase money in claiming races and other moneys that can properly come into his possession.'

'Rule 57 Receive Money--

'He shall keep complete records of all moneys received by him and within five days after the close of the meeting, render a true copy thereof to the operator.'

The moneys mentioned in these two rules to be kept by the racing secretary are the moneys in the horsemen's account referred to above.

East Moline Downs did execute and file with the Board the bonds required by Section 37j1. Copies of those bonds are enclosed herewith.

The Racing Board respectfully requests a legal opinion as to whether the approximately \$105,000 belonging to the horsemen and dissipated by East Moline Downs, Inc. is a sum covered by these bonds

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and whether the bonding company can, therefore, be required to pay that amount."

In interpreting a bond required by a statute it is necessary to consider the statute since the statute constitutes part of the bond. (People ex rel. McLaughlin v. G.H. Cross Co., 361 Ill. 405, affirmed, Hartford Accident & Indemnity Co. v. People of the State of Illinois ex rel. McLaughlin, 298 U.S. 155.) The condition of the statutory bond will be construed to have the effect intended by the statute. Sharp v. W.G. Morgan & Co., 44 Ill. App. 346, affirmed, 144 Ill. 382.

The pertinent part of section 10a of the "Illinois Horse Racing Act" (Ill. Rev. Stat. 1973 Supp., ch. 8, par. 37j1) states:

"Every person, association, corporation or trust licensed to conduct horse racing meetings, at least 20 days prior to the first day of each racing meet as provided in Section 2 of this Act, shall execute and file with the Board a bond, payable to the State of Illinois, with sureties approved by the Board, in the penal sum of \$200,000 conditioned for the payment of the taxes imposed by this Section and the balance

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of the license fee in accordance with the provisions of this Act, and for proper compliance with, and observance of, all other requirements of this Act applicable to such licensees, and the rules and regulations of the Board hereunder." (Emphasis added.)

It is settled that bonds which are conditioned upon compliance with law and are given to public bodies in connection with the grant or license or permit, are construed to be penalty bonds unless evidence of a contrary purpose appears in the governing legislation or in the bond itself.

(Clark v. Barnard, 108 U.S. 436; People ex rel. Schull v. Massachusetts Bonding and Insurance Co., 4 Ill. 2d 23; Lyman v. Perlmutter, 166 N.Y. 410, 60 N.E. 21.) This construction is based upon the view that the purpose of such bonds is to secure observance of the law, and that to limit their obligation to actual damages sustained by the public body would frustrate that purpose and reduce the requirement of a bond to a mere formality. People ex rel. Schull v. Massachusetts Bonding and Insurance Co., 4 Ill. 2d 23.

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The primary rule of construction of statutes is that the intention of the Legislature should be given effect. (Certain Taxpayers v. Sheehan, 45 Ill. 2d 75.) This intention should be sought primarily from the language used in the statute and where the language of the statute is clear, it must prevail and be given effect. (Droste v. Kerner, 34 Ill. 2d 495, appeal dismissed, certiorari denied, 365 U.S. 456.) Section 10a clearly states that the bond is penal, conditioned on payment of taxes, license fees and proper observance of the Act and regulation adopted under the Act. Given this clear language, it is apparent that the legislature intended that the bond be a penal bond given to secure compliance with the Act and regulations adopted thereunder. Violation of these conditions should cause forfeiture of the penal bond to the State. People ex rel. Schull v. Massachusetts Bonding and Insurance Co., 4 Ill. 2d 23.

The bond is between East Moline Downs, Inc., its Surety and the State of Illinois. The horsemen are strangers to the

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bond. In order for the horsemen to recover on the bond, it is necessary that they be protected parties under its terms and conditions. (Cornbelt Bank v. Maryland Casualty Co., 281 Ill. App. 387.) The language of both the statute and the bond indicates that it is a penal bond given to protect the interest of the State. There is no language in either the bond or the statute to indicate that there are protected third parties.

You have asked whether the horsemen can recover from the bonding company, for their own use, the \$105,000 which was dissipated or misapplied by East Moline Downs, Inc. It is my opinion that the horsemen cannot recover on that bond. The money payable upon forfeiture of that bond is payable in full to the State of Illinois.

Very truly yours,

A T T O R N E Y G E N E R A L