The Law of Miscellaneous and Commercial Surety Bonds

TODD C. KAZLOW & BRUCE C. KING, *Editors*

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Chapter 8 – Bail Bonds

Jerry W. Watson and L. Jay Labe

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Bail Bonds

Jerry W. Watson
and
L. Jay Labe

Introduction

Bail is the means through which our criminal justice system permits the release of an accused from custody, while ensuring his or her appearance at all required court proceedings. Bail in America began as a "carry over" from the British practice as established in 1275 with the statute of Westminister where only certain offenses were bailable, developing into our Judiciary act of 1789 which required bail for offenses not punishable by death, the progenitor of the U.S. Constitution's 8th Amendment: "There shall be no excessive bail."

This paper focuses on commercial bail, which involves the release of the defendant into the custody of a professional retail bail bond writer who has posted an appearance bond in lieu of the defendant's custody pending trial.[1] An ever-growing number of insurance companies appear as surety on these bonds in federal, state and municipal jurisdictions nationwide.

Operatively, bail can be confusing by reason of one or more of several factors.

For one, it wears two procedural faces: criminal and civil. The bond is posted as an integral part of a criminal case. But an attempt at collecting on breach of the bond's condition is strictly civil in nature

For another, there is lack of regulatory uniformity, state to state and over different jurisdictions within a given state. Some states regulate commercial bail through proactive departments of insurance, while others leave the administration of bail to the discretion of individual courts and judges. Significant statutory variation, involving bail forfeiture, exoneration, remission and fugitive recovery procedures, exist from state to state, within political subdivisions of states, and between the federal and state criminal justice systems. In addition to these statutory variations, there are a myriad of differences in local court rules, practices, forms and procedures. This diverse administrative system presents a monumental challenge to bail insurance companies operating in multiple jurisdictions.

Yet another, and perhaps the most confusing area of all, are the relationships between the retail seller of the bail bond (the bondsman), the insurance company (the surety) and the state (the obligee). A correct understanding of these relationships is absolutely critical to effective representation of the insurance company in almost any issue related to the bond.

Finally, there is that area around which so much media-myth is created; the process of retrieving and surrendering back into custody the absconding defendant, the "skip."

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1. Commercial bail is authorized throughout the United States. The only exceptions are Illinois, Kentucky, Maine and Oregon.

An attempt will be made here to accomplish two objectives: one, to provide background so the reader can be comfortable with the general concept of bail, and two, to bring some clarity to the four inherently confusing areas: procedural bifurcation, regulatory variances, roles of the parties, and the absconder recovery arena.

I. Background

Initially, appearance bonds were put up with the courts by persons who pledged their own property as security for the bond. They did this, of course, for a price (premium), and came to be known, appropriately enough, as "property bondsmen."

While this method still exists in limited fashion in a few Southern states, it is becoming a thing of the past. This is true for two basic reasons: first, these bondsmen find it advantageous to use a corporate surety's financial standings and credits as the security on their bonds, and, second, the large majority of states find the uniformity of regulation and collection certainties more desirable where an admitted corporate surety is utilized.

Therefore, we will concern ourselves here only with commercial bonding as that practice incorporates the local retail bail writer utilizing a surety company's credentials in the posting of his customer's appearance bond. There are approximately twenty insurance companies making themselves available to this practice today.

A. Basic Definitions

Bail Bond: a written contract of a tri-partite nature wherein the government is the obligee, the defendant is the principal and the insurance company is the surety.

Recognizance: the promise of the principal to appear, or pay in event of unexcused failure to appear.

Surety: the insurance company who, by way of an authorized attorney-in-fact, executes the bail bond thereby guaranteeing performance of the defendant/principal on the recognizance.

Attorney-in-Fact: the person given authority to execute the bond on behalf of the insurance company surety.

Bondsman: A retailer who sells bail bonds to the public. He selects and secures the risk, controls and monitors the defendant for court appearance purposes and, as attorney-in-fact, executes the bond for the bail surety. Generally, he operates as an independent contractor who holds the surety harmless on any loss or loss adjustment expense.

Forfeiture: A declaration by the court, upon the defendant/principal having failed to appear as directed, that the government (obligee) may now pursue its claim under the bond.

Set-Aside: ruling of the court at a hearing prior to judgment, that the failure to appear was excusable and that no collection may be had upon the forfeiture.

Forfeiture Judgment: A formal order of judgment entered against principal and surety subsequent to forfeiture.

Remittitur: an order of the court that some, or all, of the monies paid by the bail surety on a forfeiture judgment be remitted back to the surety. Typically, this occurs where, even after the payment of the forfeiture judgment, and upon the efforts of the bail surety, the absconded defendant has been recovered and surrendered back into custody.

B. The Objective of Bail

It has become more and more ordinary for local government authorities to look upon bail bond forfeiture collection as a means of generating revenue. To so focus is to depart from bail's purpose.

The primary objective of a bail bond is to assure the defendant's appearance at all required court proceedings and trial.[2] Historically, the right to freedom before conviction is intertwined with the Anglo-Saxon doctrine that an accused is innocent until proven guilty.[3] The accused's right to freedom before conviction "permits unhampered preparation of a defense and serves to prevent the infliction of punishment prior to conviction."[4] Accordingly, the right to bail is a fundamental underpinning of our criminal justice system[5] and is an essential guardian of the presumption of innocence.[6] Bail should never be used as a means of punishing a defendant before conviction[7] or as a mechanism for public funding. When considering issues of bail forfeiture or remission, it is improper for a court to weigh the impact of its decision upon the public treasury.[8]

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2. *United States v. Diaz*, 811 F.2d 1412, 1415 (11th Cir. 1987).

3. *See generally Ray v. State*, 679 N.E.2d 1364 (Ind. Ct. App. 1997).

4. *Stack v. Boyle*, 342 U.S. 1, 4, 72 S. Ct. 1, 3 (1951) (citing *Hudson v. Parker*, 156 U.S. 277, 285, 15 S. Ct. 450, 453 (1895)).

5. *Sistrunk v. Lyons*, 646 F.2d 64, 70 (3d Cir. 1981).

6. *Stack*, 342 U.S. at 4, 72 S. Ct. at 3.

7. *See, e.g., People v. Benmore, et al.*, 298 Mich. 701, 702, 299 N.W. 773, 775 (1941); *Lucero v. District Ct.*, 188 Colo. 67, 71, 532 P.2d 955, 957 (1975); *McConathy v. State*, 528 S.W.2d 594, 596 (Tex. Ct. App. 1975) (holding that the forfeiture of bail can not be used as a means of imposing a fine).

8. *United States v. Velez*, 693 F.2d 1081 (11th Cir. 1982) ("Enrichment of the government is not the relevant purpose of a [bail] bond"); *In re Forfeiture of Bail Bond*, 209 Mich. App. 540, 544, 531 N.W.2d 806, 808 (1995) ("It is well settled that the purpose of a bond is to assure the appearance of a defendant and not to collect revenue."); *People v. Wilcox Ins. Co.*, 53 Cal.2d 651, 657, 2 Cal. Rptr. 754, 757, 349 P.2d 522 (1960) ("In matters [relating to bail bonds] there should be no element of revenue to the state nor punishment to the surety").

C. How It Works

A person is arrested by law enforcement upon probable cause of having committed a criminal offense. He is incarcerated; booked into the local jail. He has bail set (the condition upon which he may be released from custody pending trial) either by a pre-arranged bail schedule or by a magistrate prior to or at an arraignment hearing. He, or someone on his behalf, contacts a retail seller of bail bonds and arranges to have them, for a price, post the defendant's bail. Upon the posting of the bail bond the defendant is released. If the defendant fails to appear, the court declares the bond forfeited and collection through civil procedural channels ensues.

II. Clearing The Confusions

As stated earlier, there are four main areas creating confusion in the commercial bail field. They are treated here in order:

A. Dual Procedures: Criminal and Civil

While the government's bringing of charges against the defendant, with all the constitutional and statutory considerations that entails, are exclusively within the criminal law and procedure domain, this is not the case once collection begins on a claim for recovery under the appearance bond. That activity is governed by rules of civil procedure.

Therefore, unless specific legislatively enacted guidelines have been established governing this collection procedure, the subject jurisdiction's ordinary rules of civil procedure as they relate to litigating any other ex contractu action will lie.

There may occasionally be attempts to abridge these standard procedures so as to streamline bail bond forfeiture collections. Care must be taken, however, to remain securely within the safeguards of the U.S. Constitution's Fifth and Fourteenth Amendments as they relate to the due process rights of one whose property is sought to be taken by the government.[9]

B. The Regulatory Arena

Commercial bail is regulated in most states as a form of insurance. A bail insurance company must qualify for admission in each state under the same standards that apply to any other insurance company.[10] In some states retail sellers of bail are licensed and regulated in the same manner as any other insurance producer.[11] Prelicensure and continuing education

9. *U.S. v. Lacey*, 778 S. Supp. 1137 Dist. Court Kansas 1991.

10. Some jurisdictions require that bail insurance companies deposit collateral security. For example, the deposit requirements are $75,000 in Indiana and $50,000 in Louisiana. Ind. Code § 27-10-3-15, La. Rev. Stat. § 22:1025 ("Insurance Code").

11. Compare with New Jersey, which allows "limited insurance representatives" to write bail. *See* N.J. Stat. § 17:22A-16.1.

requirements for retailers are common.[12] Otherwise, regulations differ, state to state. For example, retailers in New Jersey must qualify as "limited insurance representatives" and in Texas bail is regulated by "County bail bond boards." 17.Tex.Occ.Code Art. 1704-160.

Formal appointment of retail sellers by a bail insurance company with the state commissioner of insurance is required in most states.[13] Some jurisdictions go one step further and require that a current and certified "qualification power of attorney" be filed with every court or county where the retailer seeks to do business.[14] These qualification powers are provided by the bail insurance company and certify that the retailer has authority to execute bonds up to a specified amount for the surety while at the same time significantly limiting the authority of the retailer to that of merely executing bonds. That is, it is not the purpose or intent of this document to confer upon the attorney-in-fact the status of agent for any other purposes.

Federal bail postings have their own requirements.[15] Arizona, California and Nevada require retailers to provide a qualification bond, termed a "bond of bail retailer," naming the state as obligee and conditioned upon the bail retailer's performance of statutory obligations.[16] Qualified "cash" or "property" bond sellers are permitted to write a specified amount of bail liability, without the backing of an insurance company, in a limited number of jurisdictions.[17]

States use a variety of methods to ensure that bail bond forfeitures are paid. Forfeiture enforcement may be the responsibility of a state's department of insurance, its court system, or an independent regulatory entity.[18] A bail retailer who fails to pay a forfeiture judgment will risk

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12. *See, e.g.* COLO. REV. STAT. § 12-7-102.5 (requiring only prelicensure education). Florida, Nevada and Tennesee require continuing education. *See* FLA. STAT. ch. 648.385; NEV. REV. STAT. § 697.230(1)(a); TENN. CODE ANN. § 40-11-401.

13. Colorado and Arizona are the only non-appointment states. Colorado requires each insurance company to maintain a list of producers for inspection upon reasonable notice. COLO. REV. STAT. § 10-2-416.5. Arizona requires bail insurance companies to file agent lists with the director of insurance on a yearly basis. ARIZ. REV. STAT. § 20-297.

14. *See, e.g.* Indiana, IND. CODE § 27-10-3-17, Nevada, NEV. REV. STAT. § 697.270, and North Carolina, N.C. GEN. STAT § 58-71-140.

15. In the federal system, a judicial officer must determine that the bail bond was executed by a solvent surety. *See* 18 U.S.C.A. § 3242(c)(xii). Typically, federal courts will require that a bail insurance company be listed on the Department of the Treasury, Fiscal Service, List Of Companies Holding Certificates Of Authority As Acceptable Sureties On Federal Bonds (Dept. Circular 570).

16. For example, Arizona requires a $10,000 bond of bail agent. *See* ARIZ. REV. STAT. § 20-320. California requires a $1,000 bond. *See* CAL. INS. CODE §§ 1802, 1803.5. A $25,000 bond is required in Nevada. *See* NEV. REV. STAT. § 697.190.

17. Cash or Property bonding agents are permitted in Mississippi (MISS. CODE ANN. § 83-39-7), North Carolina (N.C. GEN. STAT. §§ 58-71-1, -145), Ohio (OHIO REV. CODE ANN. § 4.03), South Carolina (S.C. CODE ANN. § 38-53-10), Tennessee (TENN. CODE ANN. § 40-11-122), Texas (TEX. CODE CRIM. P. ANN. § 17.01-.02) and Washington (WASH. REV. CODE § 18.185.010) up to specified limits based upon either financial qualifications or personal security posted. Colorado allows cash agents to write an unlimited amount of aggregate liability without the backing of an insurance company based only upon the filing of a single $50,000 qualification bond with the insurance commissioner. *See* COLO. REV. STAT. § 12-7-103(8)(a).

18. *See, e.g.*, FLA. STAT. ch. 648.45 (placing the responsibility of forfeiture enforcement on Florida's state department of insurance). In Texas counties with populations of 110,000 or more, "Bail Boards," rather than the state department of insurance, are responsible for all commercial bail surety licensure and forfeiture issues. *See* TEXAS REV. CIV. STAT. ANN. art. § 2372p-3.

license revocation, along with significant fines and penalties.[19] Some jurisdictions refuse to accept any further bonds from an retailer who has failed to pay a forfeiture judgment.[20]

Under this type of forfeiture enforcement system, courts and detention facilities place defaulting commercial sureties "on the board," meaning that their names appear on a list of sureties whose bonds are unacceptable to courts and detention facilities within that jurisdiction.[21] When an insurance company is placed "on the board," it generally means that appearance bonds will not be accepted from any person using a power supplied by that company. The surety remains on the board until all unpaid forfeiture judgments are satisfied, exonerated or otherwise resolved.

1. The Setting of Bail

The Eighth Amendment's excessive bail provision is integral to our concept of ordered liberty and is binding upon the states under the Fourteenth Amendment.[22] Excessive bail or denial of bail violates the Equal Protection Clause.[23] Because the practical effect of excessive bail is the denial of bail, logic compels the conclusion that the harm the Eighth Amendment aims to prevent is the unnecessary deprivation of pretrial liberty.[24]

The Bail Reform Act of 1984,[25] state constitutions and statutes guarantee entitlement to bail in virtually all criminal cases, with the exception of capital offenses. Courts consider several factors when evaluating the amount of bail and the conditions of release that will reasonably assure both the appearance of a defendant and the safety of the community. These factors include: (a) the nature and seriousness of the charges; (b) the weight of the evidence; (c) the defendant's character; (d) the defendant's family and community ties; (e) flight risk; (f) the defendant's mental and physical condition; (g) the defendant's criminal history and involvement with drugs and alcohol; (h) the danger posed by the defendant to the community.[26] The Bail Reform Act requires the release of an accused under the least restrictive conditions, or combination of conditions that will reasonably assure appearance.[27] Only under rare circumstances will an accused in a federal matter be denied bail.

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19. *See, e.g.*, CAL PENAL CODE § 1308; MO. REV. STAT. § 374.763(1); N.C. GEN. STAT. § 58-71-80.

20. *See, e.g.*, FLA. STAT. ch. 648.44(l); NEB. REV. STAT. § 11-124.

21. Both the bail bonding agent and the bail insurance company can be placed "on the board" in Colorado if forfeiture judgments are not paid when due. *See* COLO. REV. STAT. § 16-4-112. While on the board, the agent is prohibited from writing bonds anywhere in the State. *See* COLO. REV. STAT. § 12-7-109(1)(g).

22. *Meechaicum v. Fountain*, 696 F.2d 790, 791 (10th Cir. 1983).

23. *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978).

24. *See, e.g., Sistrunk v. Lyons*, 646 F.2d 64, 70 n.23 (3d Cir. 1981); *United States ex rel. Goodman v. Kehl*, 456 F.2d 863, 868 (2d Cir. 1972).

25. *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended in scattered sections of 18 U.S.C.).

26. *See, e.g., United States v. Orena*, 986 F.2d 623, 631 (2d Cir 1993) (danger to the community as a basis for refusing to grant bail); *United States v. Gebro*, 948 F.2d 1118, 1121 (9th Cir. 1991) (discussing "flight risk"); *United States v. Bosquez-Villarreal*, 868 F.2d 1388, 1389 (5th Cir. 1989) (refusal of bail based upon drug offenses); *Ray v. State*, 679 N.E.2d 1364, 1367 (Ind. Ct. App. 1997) ("[B]oth insuring a defendant's presence at trial and community safety may be considered in setting bail for defendants . . . ."). *See also* 18 U.S.C. § 3142(g).

27. *Gebro*, 948 F.2d at 1121; *see also* 18 U.S.C. § 3141.

It should be noted, however, that while bail generally must be allowed, there may be a number of options as to what form the bail shall take, that is, what will be the nature of the guarantee of reappearance. Some examples:

a. financially secured release, as provided by commercial sureties.

b. deposit bail, where 10% of the penal sum of the bail amount is put up with the court with a percentage of the deposit being returned when all appearances are made.

c. own recognizance release, where the defendant is released merely upon his own promise to appear as directed and to pay the forfeiture should he default in his appearance.

Recent comprehensive studies demonstrate that in terms of getting persons to court for disposition of their case the commercial bond approach is by far the most effective.[28]

2. Court Revocation of Bond

A court can order revocation of a bail bond and the re-arrest of the accused for a variety of reasons. Prior to forfeiture, revocation can be ordered when the accused violates any condition of the release.[29] For example, bail will probably be revoked if the accused is charged with another criminal offense while released on bail.[30] Revocation is also likely if the court determines that there is a reasonable probability the accused will not appear or may cause harm to the community.[31] When the court imposes conditions of release, such as periodic drug testing, home detention or rehabilitation program work, a breach of such condition will routinely result in the court revoking the bond.

The term "revocation" is sometimes used to refer to the right of the retail bondsman to return the defendant to custody, with or without cause, in an effort to remove himself from further liability before forfeiture occurs.[32] Although this may require return of all or part of the premium that was paid for the bond, courts do not require the retailer to involuntarily remain on a risk.[33] If

28. See, e.q., U.S. Bureau of Justice Statistics, Pretrial Release of Felony Defendants, NCJ-148818, p. 10. This study demonstrates the superior performance of commercial bonding, as compared to all other pretrial release methods, in getting persons back to court.

29. The sole exception to this rule is violation of the primary condition of the bond, namely failure to appear. In that event, the bond will be forfeited, not revoked.

30. *See, e.g.*, VIR. CODE ANN. § 19.2.135 ("A court may, in its discretion, in the event of a violation of any condition of a recognizance taken pursuant to this section, remand the principal to jail until the case is finally disposed of, and if the principal is remanded to jail, the surety is discharged from liability"); *see also United States v. Wilson*, 820 F. Supp. 1031, 1033 (N.D. Tex. 1993) (discussing revocation when the accused violates conditions of his or her release).

31. *See, e.g.*, MICH. COMP. LAWS ANN. § 765.26; *United States v. Maack*, 25 F. Supp. 2d 586, 586 (E.D. Penn. 1998) (upholding revocation of defendant's bail because there was probable cause he would pose danger to the community); *United States v. McNeal*, 960 F. Supp. 245, 246-47 (D. Kan. 1997) (discussing the types of factors a judicial officer must consider before revoking a defendant's pretrial release, including the issue of whether the defendant will pose danger to the community).

32. *See, e.g., State v. Nugent*, 199 Conn. 537, 548, 508 A.2d, 728, 734 (1986).

33. *See, e.g., Jordan v. Knight*, 250 Ala. 109, 111-12, 35 So. 2d 178, 179-81 (1984); *State v. Pelley*, 222 N.C. 684, 687, 24 S.E.2d 635, 637 (1943).

a retailer becomes aware of circumstances giving rise to an increased risk of flight, the retailer may find it necessary to return the defendant to custody.[34]

3. Forfeiting of the Bond

Under virtually all federal and state statutes a bail bond will be forfeited when the defendant fails to appear, thus violating the primary condition of the bail bond.[35] The specific procedure through which the bond is declared forfeited, and judgment entered, varies from jurisdiction to jurisdiction. The most common framework for this process begins at the non-appearance of the defendant with the declaration of a bond forfeiture and the issuance of a warrant for the arrest of the defendant. If the defendant fails to appear or be surrendered after a specific number of days, judgment is entered on the bond. The bondsman then has an additional window of opportunity to apprehend and surrender the defendant before the forfeiture judgment must be paid.

Specific forfeiture procedures depend upon the statutes and court rules of individual jurisdictions. Some jurisdictions enter judgment very promptly upon the declaration of a forfeiture. Other jurisdictions may issue a citation for a hearing at which the retailer will have an opportunity to "show cause" why the bond should not be forfeited, or judgment should not enter.

Some jurisdictions leave procedures entirely within the discretion of the court. Procedures also vary, depending upon the court, as to when the retailer must pay the forfeiture. Some systems may require immediate payment of the face amount of the bond.

Most systems allow the bondsman some time to pay the judgment, although the time period can be as short as 10 days[36] or as long as one year.[37]

Notice of the forfeiture, the show cause hearing and the entry of judgment is generally served upon the bail bond retailer. Under the Federal System, notice to the surety is required when the government moves for entry of judgment.[38] Most states' procedures require that the court give a bail insurance company notice of the entry of judgment. In practice, however, some jurisdictions consider service of notice upon the retail seller to be "constructive notice" to the bail insurance company. When a defaulting retailer ceases business or changes insurance companies, however, "constructive notice" effectively means that the insurance company will not receive actual notice of the entry of judgment and its efforts to timely resolve the forfeiture will be impeded.

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34. *See Johnson v. Hicks,* 288 Ark. 158, 160, 702 S.W.2d 797, 798 (1986) (concluding the agent had probable cause to believe the defendant committed a felony while released on bond).

35. *See* FED. R. CRIM. P. 46(e)(1). For further discussion on this issue also see Nancy M. King, Annotation, *Forfeiture of Bail for Breach of Conditions of Release Other Than That of Appearance*, 68 A.L.R.4th 1082 (1989).

36. For example, New Mexico only allows 10 days. *See* N.M. STAT. ANN. § 31-3-2.

37. Indiana allows the bonding agent 365 days to pay a forfeiture. *See* IND. CODE ANN. § 27-10-2-12. Hawaii and Nebraska allow 30 days. *See* HAWAII REV. STAT. § 804-51; NEB. REV. STAT. § 14-227. Alabama (ALA. CODE § 15-13-136), Idaho (IDAHO CODE § 19-2927), Minnesota (MINN. STAT. ANN. § 609.907), Mississippi (MISS. CODE ANN. § 99-5-25), and Oklahoma (OKL. STAT. tit. 59, § 1332) allow 90 days. Other states allow 180 days. *See, e.g.,* LA. REV. STAT. ANN. § 15:85; NEV. REV. STAT. § 178.509; TENN. CODE ANN. § 40-11-139. California allows up to 185 days. CAL. PENAL CODE § 1305.

38. *See* FED. R. CRIM. P. 46(e)(3); *see also U. S. v. Lacey,* 778 F.Supp. 1137, 1140 (D. Kan. 1991) (setting aside the judgment against a bail insurance company when the government conceded that actual notice had not been given). *But see, United States v. Navarrete-Martinez,* 776 F.2d 887 (10th Cir. 1985) (concluding that lack of notice was harmless error when the agent had actual knowledge).

Courts have wide discretion in setting aside forfeiture judgments.[39] If the defendant is promptly surrendered or if the court is satisfied that appearance and surrender by the defendant is impossible and without his fault, the forfeiture is likely to be set aside. A court may evaluate several factors when considering whether an injustice has been done by the forfeiture, including: (1) the willfulness of the breach of the bond conditions; (2) the cost, inconvenience and prejudice suffered by the government as a result of the breach; (3) explanatory or mitigating factors; (4) the appropriateness of the amount of the bond; and (5) the nature and extent of participation by the surety in apprehending and surrendering the defendant back into custody.

In the real world, the failure of a defendant to appear does not necessarily mean the defendant has fled. More likely than not, the defendant will subsequently appear and voice one of the time-honored excuses involving: (1) clerical errors about the time and place of the hearing; (2) oversleeping; or (3) traffic problems. Once a forfeiture has been ordered, however, the appearance bond should not be reinstated without the consent of the surety.

4. Exoneration of Liability

A bail surety is exonerated from liability under the terms and conditions of an appearance bond when the terms and conditions of the bond have been met. In the majority of criminal proceedings, the defendant appears at all court proceedings and the bond is discharged and exonerated when the defendant is convicted, acquitted, pleads guilty or nolo, or the charges are dropped.[40] Generally, if the bond is to be continued until sentencing, the surety must consent.[41] However, it has been held that the surety remains bound on the risk during a period of deferred adjudication.[42] When a disposition of the case has been reached, the bond may be exonerated automatically by statute. On the other hand, some states may require that either the defendant or the bail bondsman make application for the exoneration or for documentation that the bond has been discharged.

In the normal course of business, the discharge and exoneration of bonds is important. It is important for bond principals and indemnitors who want their collateral security returned. It may be equally important to retail sellers who must show general retailers and insurance companies that liability on issued powers has been resolved before new powers will be issued. Bail insurance companies commonly require retailers to document that liability on existing

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39. *United States v. Amwest Sur. Ins. Co.*, 54 F.3d 601, 602 (9th Cir. 1995). *See also* FED. R. CRIM. P. 46(e)(2) & (4).

40. *See, e.g., People v. Henry*, 308 N.Y.S.2d 245, 33 A.D.2d 1031 (1970) (reversing lower court's order to reinstate released bail bond where the surety had performed all necessary contractual obligations and was exonerated from liability even though the judgment of conviction was reversed). *Cf. Commonwealth v. Hill*, 180 Pa. Super. 430, 119 A.2d 572, 573 (1956) (reversing the lower court's decision to release the surety because the defendant appeared as required and "[u]nder the terms of the recognizance the condition had therefore been fulfilled and the subsequent forfeiture was unwarranted").

41. *Rodriguez v. People*, 554 P.2d 291, 292 (Colo. 1976) (holding that the consent of the surety is required after a guilty plea because the risk of the surety has materially increased). Events that materially increase the risk of the surety have the effect of terminating the obligation. *See* RESTATEMENT (SECOND) OF SECURITY § 128(b) (1941).

42. *Reed v. State*, 702 S.W. 2d 738 (Tex. App. - San Antonio 1985), *Rodriguez v. State*, 680 S.W. 2d 585 (Tex. App. -Corpus Christi 1984) - After grant of deferred adjudication and expiration of 30 day period to file motion to request final adjudication.

powers has been extinguished in order to insure that retailers are not writing liability in excess of their financial capacity to indemnify.

The defendant's compliance with the terms and conditions of a bond are not the only grounds for exoneration. If the accused dies prior to the date of the scheduled appearance the surety is exonerated.[43] A surety is entitled to be exonerated upon payment of a forfeiture judgment.[44] A surety may also be entitled to exoneration where the bond is canceled by the court[45] or if the bond is void because it was improperly taken by the court in the first instance.[46]

Exoneration becomes significantly more complex after a forfeiture has occurred. The rules and procedures relating to exoneration vary widely between jurisdictions. They are greatly affected by the stage of the proceeding at which exoneration is being requested. For example, a bondsman will find that it is much easier to get a bond exonerated if the defendant is promptly apprehended and surrendered before the court enters judgment on the forfeiture. The difficulty in obtaining exoneration is likely to increase if the defendant is surrendered after a forfeiture judgment is entered.

5. Remission of Forfeiture Monies Paid

Once a forfeiture judgment is paid, the surety's entitlement to exoneration becomes entwined with the issue of "remission", which is the question of whether surrender of the defendant qualifies the surety for return of all or part of the payment. A surety's entitlement to remission depends upon each jurisdiction's statutory scheme. For example, in Florida a surety's entitlement to remission is preserved only if there was no "breach of the bond," meaning that the forfeiture was paid before judgment entered.[47] Entitlement to remission may also require direct involvement by the surety in the apprehension and surrender of the defendant.[48] Entitlement to remission may also depend upon the time that has expired between the date of forfeiture or payment of judgment and the date the defendant is surrendered. New Jersey allows a retailer to apply for remission if the defendant is surrendered up to 4 years after the forfeiture.[49] Shorter time periods are more common. In Colorado, Connecticut and Florida, for example, the limit is one year.[50] In Oklahoma, on the other hand, the defendant must be surrendered within 90 days to qualify for remission.[51] The issue is left entirely to the discretion of the court in some states,

43. *Taylor v. Taintor*, 83 U.S. (16 Wall.) 366, 21 L.Ed. 287 (1872). *See also* J. P. Ludington, Annotation, *Death of a Principal As Exoneration, Defense, Or Ground For Relief, Of Sureties On Bail Or Appearance Bond*, 63 A.L.R.2d 830, § 7[a] (1956).

44. *See, e.g.*, COLO. REV. STAT. § 16-4-108.

45. *See, e.g., State v. Gutierrez Barajas*, 153 Ariz. 511, 738 P.2d 786 (Ct. App. 1987); State v. Johnson, 92 N.E.2d 24, 27 (Ohio Ct. App. 1949).

46. *See* Francis M. Dougherty, J.D., Annotation, *Liability Of Surety On Bail Bond Taken Without Authority*, 27 A.L.R.4th 246, § 3 (1984).

47. FLA. STAT. ch. 903.28(1).

48. *See, e.g.*, FLA. STAT. ch. 903.28(2). *See also, e.g., People v. Johnson*, 395 P.2d 19, 23 (Colo. 1964); *State v. Hernandez*, 511 N.W.2d 535, 539 (Neb. Ct. App. 1993).

49. N. J. STAT. 2A:162-8.

50. *See* COLO. REV. STAT. § 16-4-112 (5)(j); CONN. GEN. STAT. § 54-65a; FLA. STAT. ch. 903.28(2).

51. OKLA. STAT. §59-1332 D(2).

including Delaware, Louisiana, Ohio and Tennessee.[52] California allows a bail bondsman 180 days to produce the defendant or pay the forfeiture judgment, but after the forfeiture judgment is paid, no remission is allowed.[53]

Appearance bond defaults and forfeitures often occur if the defendant is incarcerated on other charges when a court appearance date arrives. If the defendant is incarcerated by the bailing state, the majority rule is that the forfeiture must be set aside because the state is in a position to produce the defendant in court, while the bondsman cannot.[54] The law is less favorable to the surety when the defendant is incarcerated in a state other than the bailing state.[55] Although some states refuse to grant relief, the majority of states will grant a bail surety relief from the forfeiture depending upon the voluntary nature of the circumstances of the defendant's departure from the bailing state, the nature of the charges pending against the defendant and whether the bailing state has sought extradition.[56]

Entitlement to remission may also be affected by the Uniform Criminal Extradition Act which interjects a mandatory series of court proceedings that a foreign bondsman must follow to obtain a warrant to arrest and remove a fugitive from bail from another jurisdiction.[57] In Hawaii, for example, the Court of Appeals determined that a retailer did not show sufficient good cause to set aside a forfeiture judgment where the retailer failed to exercise any of the options available under American Samoa's UCEA to secure the defendant's arrest as a fugitive.[58]

C. The Unusual Nature and Role of the Parties

Remembering that there are three parties in the bail bond scenario (the State - obligee, the defendant - principal and the insurance company - surety), their participation and responsibilities can best be understood by examining the two contracts affecting these parties.

1. The Bond Contract

A bail bondsman generally uses an appearance bond form that is required by the jurisdiction holding the accused. State law, court rules and local practice result in a total lack of appearance bond form standardization. If there is no required form, the bondsman will use a generic form that has a history of acceptance in the jurisdiction. However it comes about, it is this bond contract that is accepted in lieu of the defendant's pre-trial custody.

The bond or undertaking may be called an "appearance bond," "bail bond," "recognizance bond," or something similar. The following elements are likely to be present, in

52. *See* Ohio Rev. Code § 2937.39; Tenn. Code Ann § 40-11-204(a).

53. Cal. Penal Code § 1305.

54. *See* Lee R. Russ, J.D., Annotation, *Bail: Effect On Surety's Liability Under Bail Bond Of Principal's Subsequent Incarceration In Same Jurisdiction*, 35 A.L.R. 4th 1192 (1981).

55. *See, e.g., State v. Fields*, 137 N.J. Super. 76, 347 A.2d 810, 811 (1975).

56. *See generally* Russ, *supra* note 58.

57. *See State v. Lopez*, 105 N.M. 538, 734 P.2d 778 (N.M. Ct. App. 1986), *cert. denied*, 499 U.S. 1092, 107 S. Ct. 1305 (1987) (addressing the New Mexico version of the Uniform Criminal Extradition Act found at N.M. Stat. Ann. §§ 31-4-1 to -30).

58. *See State v. Flores*, 962 P.2d 1008, 1015-17 (Hawaii Ct. App. 1998).

one form or another, in almost all appearance bond forms: (a) a face amount or "penal sum" payable to the state; (b) a statement of the primary condition; that the accused appear as required; (c) the general nature of the charges; (d) the name and address of the accused and the sureties; (e) the date, time and place of the next court appearance; and (f) a statement of applicable supplemental conditions, which are likely to involve prohibitions on criminal activity; prohibitions on the use or possession of firearms, drugs or alcohol; travel restrictions; reporting requirements and restrictions on personal associations or contacts.

The contract runs between the State and the defendant and has the defendant's promises (to appear/or pay) guaranteed by the surety.

It should be noted that attached to, and made a part of this contract, is another document; a bail execution power of attorney without which the surety would have no liability. Discussion of this document is necessary.

Most surety attorneys are familiar with powers of attorney that are commonly attached to commercial bonds in the civil arena. These authorize an "attorney-in-fact" to execute a surety bond in the name of the issuing company and can only be used by the individual (or individuals) whose name appears on the face of the power. Although civil powers of attorney may be sequentially numbered, the assigned number has no meaning outside of the issuing company's accounting department. The bond number established during the underwriting process uniformly takes precedence over the power number.

The term "power of attorney" has a vastly different meaning in the commercial bail industry. Bail "powers," as they are called, are issued by bail insurance companies on forms that can be executed by any licensed, and properly authorized, bail retailer. Bail powers are not restricted to a single "attorney in fact," or even a list of retailers. Blanks are provided for insertion of the name of the executing retailer. Powers are not effective unless attached to bonds with penal sums that are equal to or less than the face amount of the power.[59]

Retailers affix these powers to appearance bonds that are posted with courts and detention facilities. As the powers are used, they are reported to the bail insurance company along with the required payment to the retailer's security account and the company's share of the bond premium. Bail insurance companies issue powers to contracted retailers in a variety of denominations or "face amounts." In order to obtain an additional inventory of powers, the retailer may be asked to account for a prior inventory and to report on liability for active bonds.

Contracts between the surety and the retailer typically place the responsibility for the administration and safekeeping of powers on the retailer, who is liable to the insurance company for powers that are lost or misused.

Bail insurance companies almost universally rely upon power numbers to control and administer the stock of unused powers in the hands of retailers. They are also used to track liability on posted appearance bonds. Specialized numbering systems facilitate the process. These numbering systems also allow commercial sureties to approximate the extent of liability based solely on the power number. For example, the number XX500-0000000 may indicate that the power can be used to post an appearance bond with a face value of up to $500.00. When the bond is actually posted, however, the retailer may report to the company, for example, that the power was used to post an appearance bond with a face amount of only $400.00.

Then, there is yet another important document to the bail bond contract, and it is also a power-of-attorney, but of a different type and for a different purpose than the bond execution power-of-attorney.

This other one is denominated a General Qualifying Power-of-attorney, and it is commonly filed in the office of a local government official such as the County Clerk.

59. Powers may also contain express restrictions that prevent their use with civil bonds, appeal bonds, immigration bonds or in combination with powers from the same company or other companies ("stacking").

This document has as its purpose putting all concerned on notice that: (1) the particular retailer named in the document has the authority to execute bail bonds in the jurisdiction so as to bind the surety and (2) the authority granted is extremely limited, both executorily and monetarily.

Most important of all, perhaps, is the language in this General Qualifying Power to the effect that the company cannot be bound, even by this particular retailer, absent attachment of a proper executing power-of-attorney on each bond sought to be covered.

These three documents operate, then, to establish liability on the part of the surety.

2. The Bondsman Contract

This agreement, between the retailer bondsman and the surety defines the rights, duties and authority of the retailer.

It establishes, among other things, the following:

a. the retailer is a true independent contractor.

b. the risks undertaken are selected by the retailer, the customers are his own, and, as between the surety and himself, bonds written are the retailer's, not the surety's.

c. the retailer is firmly bound to fully indemnify and hold harmless the surety on any loss, costs or damages connected with bonds written.

d. the surety accommodates the retailer by allowing, for a price, the retailer to use the financial standings and credits of the surety as security on the retailer's bonds.

Obviously, this private arrangement would operate as no defense for the surety in an action by the State to collect on a forfeiture against the surety, but it nevertheless controls the duties between retailer and surety.

D. Retrieval of the Absconder

A bondsman has the right and authority to take the defendant into custody for the purpose of exonerating liability on the bail bond. This authority is founded upon common law, contract and statute. The common law basis for this authority is enunciated by the United States Supreme Court in *Taylor v. Taintor,*[60]

> 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 retailer. 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 rearrest by the sheriff of an escaping prisoner.

60. *Taylor v. Taintor,* 83 U.S. (16 Wall.) 366, 373, 21 L.Ed. 287, 295 (1872).

This right of the surety on the bond naturally flows down to the retail bondsman by reason of his role as indemnitor to the surety.

The extensive powers of the bondsman recognized in *Taintor* to recapture the principal also derive from the contractual relationship between the surety and the defendant.[61]

The bond agreement provides that the surety posts the bail, and in return, the principal agrees that the surety can retake him at any time, even before forfeiture of the bond.[62] By entering into this contract, not only does the principal voluntarily consent to the custody of the surety, but under common law, he also implicitly agrees that the bondsman may use reasonable force in apprehending him.[63] Further, the contract establishes that the surety's right of recapture is private in nature, with the understanding that the government will not interfere.[64] Thus, this common law right of recapture establishes that the seizure of the principal by the surety is not technically an "arrest" and may be accomplished without process of law. State[65] and federal[66] statutes have supplemented the traditional common law rights of the bail surety to apprehend and return a bail jumper to custody. In some jurisdictions, breach of the condition of an appearance bond may also give rise to a separate criminal offense and additional charges.[67]

A bondsman may use reasonable means to ensure that the principal appears in court.[68] If the principal is apprehended in the state where the bond was taken, and there are no statutes to the contrary, the defendant can clearly be apprehended without any judicial or administrative process.[69] In many states a bondsman must follow specific procedures in affecting the apprehension of the defendant. For example, in Colorado, a bondsman surrendering a defendant to a sheriff must supply the sheriff a certified copy of the bond.[70] A statute may also require that

61. *Ouzts v. Maryland Nat'l Ins. Co.*, 505 F.2d 547 (9th Cir. 1974) (holding that California's version of the UCEA abrogated a foreign bonding agent's common law right to pursue, apprehend and remove his principal from California without resort to process); *State v. Mathis*, 349 N.C. 503, 509 S.E.2d 155 (1998); *State v. Tapia*, 468 N.W.2d 342 (Minn. Ct. App. 1991), *rev. denied*, (May 23, 1991).

62. *See, e.g., State v. Nugent*, 199 Conn. 537, 543, 508 A.2d 728, 731 (1986). Indiana's specimen form of agreement between the surety and principal provides that the surety has "control and jurisdiction over the principal during the term for which the bond is executed and shall have the right to apprehend, arrest, and surrender the principal to the proper officials at any time as provided by law." IND. ADMIN. CODE tit. 1-6.2-10.

63. *Fitzpatrick v. Williams*, 46 F.2d 40, 42 (5th Cir. 1931) (holding that the surety's right to arrest is "an original right that arises from the relationship between the principal and his bail, and not one derived through the state"); *Nugent*, 199 Conn. at 543, 508 A.2d at 731; *Livingston v. Browder*, 51 Ala. App. 366, 368, 285 So. 2d 923, 925 (1973); *In re Von Der Ahe*, 85 F. 959, 960 (W.D. Pa. 1898).

64. *Reese v. United States*, 76 U.S. (13 Wall.) 22, 25, 19 L. Ed. 541, 544 (1869).

65. *See, e.g.*, ALA. CODE § 15-13-162; N.C. GEN. STAT. § 58-71-30. *See Livingson*, 51 Ala. App. at 369, 285 S.2d at 926.

66. 18 U.S.C.A. § 3149.

67. *People v. Lynn*, 89 Ill. App. 3 712, 44 Ill. Dec. 939, 412 N.E.2d 15 (2d Dist. 1980); *People v. Allen*, 28 Cal. App. 4th 575, 33 Ca. Rptr 2d 669 (1994); *McGee v. State*, 438 So. 2d 127 (Fla. Dist. Ct. App. 1983). *See also* COLO. REV. STAT. § 18-8-212.

68. *See generally State v. Nugent*, 199 Conn. 537, 508 A.2d 728, 732 (1986).

69. *Kear v. Hilton*, 699 F.2d 181 (4th Cir. 1983).

70. *See* COLO. REV. STAT § 16-4-108(1)(c).

an apprehended defendant be brought before a court within a specific period of time.[71] Failure to follow statutory procedures can expose the arresting bondsman to civil liability.[72]

Although a state cannot arrest a defendant in another state without utilizing formal extradition proceedings,[73] it has been held that bail bondsmen have the right to cross state lines to apprehend defendants and it is not necessary for a bondsman to utilize the extradition process.[74] Bail bondsmen and free lance "bounty hunters" are actors within the private sector, rather than state actors.[75] Recent federal bills (H.R. 3168 in 1999 and H.R. 2964 in 2000) sought to qualify the surety, the bondsman and the bounty hunter as state actors and thereby create federal civil rights liabilities on each of them for wrongful activities of a bounty hunter. Each of these attempts so far has been unsuccessful.

Over forty states have enacted the 1936 revision of the Uniform Criminal Extradition Act ("UCEA").[76] Under the UCEA, a foreign bondsman must seek a warrant from a court, or if the fugitive is arrested without a warrant, produce the fugitive in a court of the state where the defendant is arrested so that proceedings can be initiated to determine if the arrestee was the wanted person and whether the charges are extraditable.[77] The few cases that have directly addressed the impact of the UCEA in the context of bail fugitive recovery have diluted the common law and contractual recovery rights of the bondsman.[78] The extent to which an express waiver executed by a bond principal will be enforced remains to be decided.[79]

Free lance bounty hunters frequently locate and retrieve defendants on forfeited bonds. They then negotiate with the bondsman to surrender the absconder back into custody for an .

71. *See* CAL. PENAL CODE § 1301 (stating that the defendant is required to be delivered to the court without undue delay, within 48 hours).

72. *See generally O.K. Bonding Co. Inc. v Milton*, 579 S.2d 602 (Ala. 1991).

73. *See, e.g., California v. Superior Ct*, 482 U.S. 400, 407 (1987). The extradition process is also required in federal cases pursuant to 18 U.S.C. § 3182 (1994).

74. *See Lopez v. McCotter*, 875 F.2d 273, 277 (10th Cir. 1989); *Ouzts v. Maryland Nat'l. Ins. Co.*, 505 F.2d 547, 554 (9th Cir. 1974); *U.S. v. Goodwin*, 440 F.2d 1152, 1156 (3d Cir. 1971); *Fitzpatrick v. Williams*, 46 F.2d 40, 41 (5th Cir. 1931).

75. *See Hunt v. Steve Dement Bail Bonds, Inc.*, 914 F.Supp. 1390 (W.D. La. 1996). If a bail bondsman receives support form a police officer in apprehending the defendant, the bondsman may be said to have acted under color of state law. *See, e.g., Bailey v. Kenney*, 791 F. Supp. 1511, 1521 (D. Kan. 1992).

76. 11 Uniform Crim. Extrad. Act 36 (1936 & Supp. 1993).

77. *See generally State v. Epps*, 585 P.2d 425,428 (Or. 1978).

78. *See, e.g., Landry v. A-Able Bonding, Inc.*, 75 F.3d 200, 206 (5th Cir. 1996) (holding that the Texas UCEA required the surrender of a Louisiana fugitive to Texas court); *McCotter*, 875 F.2d at 277 (holding that a commercial surety could not reasonably anticipate that the common law rights of a bail agent were proscribed and was thus deprived of due process); *Ouzts*, 505 F.2d at 552-53 (holding that the California UCEA abrogates common law rights of bail surety); *Commonwealth v. Wilkinson*, 613 N.E.2d 914, 917 (Mass. 1993) (Common law rights of bail surety abrogated by UCEA in Massachusetts); *Epps*, 585 P.2d at 429 (recognizing that Oregon abrogates a foreign bonding agent's common law right to pursue, apprehend and remove principal from state without resort to process); *State v. Lopez*, 105 N.M. 538, 542, 734 P.2d 778, 782 (N.M. Ct. App. 1986), *cert. denied*, 499 U.S. 1092, 107 S. Ct. 1305 (1987) (holding that the UCEA must be followed in the absence of the consent of bond principal).

79. *See Lopez*, 105 N.M. at 542, 734 P.2d at 782 (holding that the UCEA must be followed in the absence of the consent of bond principal). *But see Epps*, 585 P.2d at 427 (holding that the use of force obviates "consent" as the term is used in the UCEA).

agreed upon price. It is generally considered that in this recovery activity the bounty hunters are acting as representatives of the bail surety and therefore enjoy the bail surety's broad rights to pursue and arrest suspects.[80] This activity, however, may be subject to a variety of state imposed restrictions.[81]

More and more bounty hunter sensitive legislation by the states is being seen, as this "capture for profit" practice is falling into disfavor. The National Association of Bail Insurance Companies drafted and promoted model legislation to all states that the practice be disallowed in favor of qualifying and credentialing trained bail fugitive recovery agents.

Conclusion

Bail is the least understood and most under-appreciated form of suretyship. Industry leaders calculate that well in excess of two million criminal court appearance bonds are written each year by commercial sureties. The fact that this method of release dramatically outperforms all others in reappearance rates and lowest recidivism among its charges cause it to be seen with increasing favor among judicial officers. This no doubt accounts for its steady growth both in terms of size and reputation.[82] Another significant benefit of commercial bail is that it is "user funded." The same financial incentives that drive the commercial bail industry also keep the responsibility for recovering fugitives within the private sector, placing no additional burden on the taxpayer. In addition, it is an effective means of reducing jail overcrowding at no expense to local government. A more comprehensive understanding of commercial bail will facilitate the enactment of reasonable and more uniform laws that will enhance the efficiency of the industry and augment its long record of accomplishment.

80. Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System*, 33 HOUS. L. REV. 731 (1996).

81. For example, bail enforcement licenses are required in California, Georgia, Nevada and Louisiana. *See* CAL. PENAL CODE §1299.06; GA. CODE ANN. §§ 16-11-129 and 17-6-56 to 58; NEV. REV. STAT. § 648.30, 697.173; LA. ADMIN. CODE §§ 4905 to 4907. A recovery agent cannot be employed in Colorado without a background investigation. COLO. REV. STAT. § 12-7-105.5. When a bail enforcement agent is used in Arizona, the department of insurance must be promptly notified. Annual reports are also required. *See* ARIZ. REV. STAT. § 13-3885C, D. In Florida, it is unlawful to represent oneself as a "bounty hunter" or "bail enforcement agent." No one other than a certified law enforcement officer is authorized to apprehend, detain, or arrest a principal on a bond in Florida, unless that person is qualified, licensed, and appointed as a bail bond agent in Florida, or by the state where the bond was written. FLA. STAT. ch 648.30(2) & (3).

82. Morgan O. Reynolds, Privatizing Probation and Parole, National Center for Policy Analysis, ISBN# 1-56808-089-1.