

CHAPTER NUMBER

COMMERCIAL BAIL BONDS

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A. Introduction

Nationwide, an ever-growing number of insurance companies act as sureties on commercial bail appearance bonds in federal, state and municipal courts. Bail is the means through which our criminal justice system permits the release of an accused from custody pending trial, while ensuring his or her appearance at all required court proceedings. This chapter will focus on commercial bail, which involves the release of a defendant into the custody of a professional bail bonding agent who posts an appearance bond in lieu of the defendant principal's being held in custody.²

The inner workings of the commercial bail business can be confusing for several reasons. Bail wears two hats: criminal and civil. It is an integral part of a criminal case, yet any attempt to collect upon the bond following the principal's violation of bond conditions is strictly civil in nature.³ In addition, statutory and regulatory variations currently exist between states with respect to bail forfeiture procedures, exoneration,

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 2. Commercial bail is authorized throughout the United States. The only exceptions are Illinois, Kentucky, Maine and Oregon.
 3. *See, e.g., United States v. Plechner*, 577 F.2d 596, 597 (9th Cir. 1978) (Enforcement of a bond forfeiture, although arising from a prior criminal proceeding, is nevertheless a civil action.); *United States v. Barger*, 458 F.2d 396, 396-97 (9th Cir. 1972) (forfeiting bail compensates for damages and is deemed civil, not criminal in nature; hence, it does not implicate the Double Jeopardy Clause when the defendant is also convicted of the crime of jumping bail); *United States v. Garcia-Trevino*, 843 F. Supp. 1134, 1134-1135 (S.D. Tex. 1994) (Entry of a civil forfeiture judgment serves a remedial purpose, is not punishment and is not a bar to subsequent criminal prosecution for failure to appear based on the same conduct).

remission and fugitive recovery requirements. Significant variations can also exist between political subdivisions of the same state as well as between state and federal criminal justice systems. Local court rules, procedures, standard practices and forms also vary widely.

A persistent lack of uniformity also exists in bail agent licensing and regulation. Since commercial bail involves contracts of suretyship, the majority of states regulate bail bond producers through departments of insurance. Each state has its own unique administrative requirements, forms, licensing standards and regulatory expectations.

The diversity of bail administrative and regulatory systems presents a monumental challenge to the many bail insurance companies that conduct business in multiple jurisdictions. As a result, the commercial bail insurance industry routinely supports more comprehensive regulation, enhanced administrative clarity and operational uniformity.

Perhaps the most confusing and misunderstood aspect of commercial bail arises from the multifaceted relationships that exist between the retail seller of the bail bond (the bail bonding agent), the insurance company surety, the governmental obligee and third party indemnitors. An accurate and functional understanding of the basics and resultant dynamics of these relationships is critical to legal analysis and the effective representation of a party in a commercial bail industry dispute. This chapter will discuss these relationships.

Finally, this chapter will also address two areas around which so much media-myth has been created: the bail bond business itself, and the process of retrieving and surrendering the absconding defendant, or the “skip,” back into custody. The activities of bail bonding agents and fugitive recovery agents have been seized upon by Hollywood screen writers, crime novelists and reality television show producers to create a highly distorted picture of individuals who make important contributions to public safety and the administration of justice.

The purpose of this chapter is to make the reader more comfortable with commercial bail by addressing its basic legal principles in the context of its unique and frequently misunderstood operational details.

B. Background

Initially, appearance bonds were given to courts by individuals who pledged their own property as security. They did this for payment of a premium and came to be known as “property bondsmen.” While a limited version of the property bondsman concept still exists in an ever-decreasing number of jurisdictions in a few Southern states, it is becoming a thing of the past. The property bond business model fell out of favor for two basic reasons: First, retail bondsmen found that it was

more advantageous to affiliate themselves with corporate sureties in order to take full advantage of their financial stability and administrative capabilities. Second, courts found that they were more comfortable relying on bail underwriters who were appointed by bail insurance companies and the financial assurance that exists when the bail bond is backed by an insurance company that can comply with stringent state-imposed requirements for a certificate of authority.

This chapter will focus on the commercial bail industry which involves bonds written by local retail bail bond sellers operating as authorized agents of insurance companies qualified to act as corporate sureties. Approximately twenty such commercial bail insurance companies are currently active in the United States, with thousands of licensed and appointed bail bond agents and producers.

1. Bail's Purpose

It has become increasingly more common for local government authorities to look upon bail bond forfeitures as a means of generating revenue. To view bail in this way, however, is a complete departure from bail's fundamental purpose. The primary objective of a bail bond is to assure the defendant's appearance at trial and all court proceedings where required.⁴ Historically, the right to freedom before conviction is intertwined with the Anglo-Saxon doctrine that an accused is innocent until proven guilty.⁵ The accused's freedom before conviction "permits unhampered preparation of a defense and serves to prevent the infliction of punishment prior to conviction."⁶ Accordingly, the right to bail is a fundamental underpinning of our criminal justice system⁷ and is an essential safeguard of the presumption of innocence.⁸ Bail should never

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4. *United States v. Toro*, 981 F.2d 1045, 1049 (9th Cir. 1992); *Cohen v. United States*, 82 S. Ct. 526, 528, 7 L. Ed. 2d 518 (1962) ("The purpose of a bail bond is to insure that the accused will reappear at a given time by requiring another to assume personal responsibility for him, on penalty of forfeiture of property."); *United States v. Bass*, 573 F.2d 258, 260 (5th Cir. 1978) ("The purpose of a bail bond is not punitive; it is to secure the presence of the defendant."); see also *United States v. Nebbia*, 357 F.2d 303, 304 (2d Cir. 1966) ("It is not the sum of bail bond that society asks for, but rather the presence of the defendant. . . .").
 5. See generally *Ray v. State*, 679 N.E.2d 1364 (Ind. Ct. App. 1997).
 6. *Stack v. Boyle*, 342 U.S. 1, 4, 72 S. Ct. 1, 3, 96 L. Ed. 3, 6 (1951) (citing *Hudson v. Parker*, 156 U.S. 277, 285, 15 S. Ct. 450, 453 (1895)).
 7. *Sistrunk v. Lyons*, 646 F.2d 64, 70 (3d Cir. 1981).
 8. *Stack*, 342 U.S. at 4, 72 S. Ct. at 3, 96 L. Ed. at 6.

be used as a means of punishing a defendant before conviction⁹ or as a mechanism for public funding. When enforcing a bail forfeiture or considering a request for remission, it is improper for a court to weigh the impact of its decision upon the public treasury.¹⁰ However, while assuring the appearance of the accused at all judicial proceedings is the primary reason bail is set, it is not the court's sole consideration. A court must also take essential public interests such as the protection of witnesses and public safety into serious consideration.¹¹

2. How Bail Works

Upon probable cause of having committed a criminal offense an individual is arrested by law enforcement and incarcerated in a local detention facility. Bail is then set, meaning that conditions are established upon which the defendant can be released from custody. These conditions can be set by either a pre-arranged bail schedule or by a judicial officer at a hearing. A local bail bonding agent is contacted by the defendant, or someone acting on the defendant's behalf. Arrangements are made for the agent to post the appearance bond in consideration of a payment of premium. Collateral may or may not be required. After completion of an underwriting process, the bail bond and a power of attorney showing that the agent is duly authorized by a qualified bail insurance company are posted with the court or detention facility. After the bond is posted the defendant is released from custody. If the defendant fails to appear in court as ordered, the bond is forfeited and a warrant is issued for the defendant's arrest.

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9. See, e.g., *People v. Benmore, et al.*, 298 Mich. 701, 702, 299 N.W. 773, 775 (Mich. 1941); *Lucero v. District Ct.*, 532 P.2d 955, 957 (Colo. 1975); *McConathy v. State*, S.W.2d 594, 596 (Tex. Ct. App. 1975) (A bail forfeiture cannot be used as a means of imposing a fine).
 10. *United States v. Velez*, 693 F.2d 1081, 1084 (11th Cir. 1982) ("Enrichment of the government is not the relevant purpose of a [bail] bond"); *In re Forfeiture of Bail Bond*, 531 N.W.2d 806, 808 (Mich. Ct. App. 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.*, 349 P.2d 522, 525 (Cal. 1960) ("In matters [relating to bail bonds] there should be no element of revenue to the state nor punishment to the surety").
 11. *United States v. Solerno*, 481 U.S. 739, 752, 107 S. Ct. 2095, 2104, 95 L. Ed. 2d 697 (1987); *Bell v. Wolfish*, 441 U.S. 520, 538, 99 S. Ct. 1861, 1873, 60 L. Ed. 2d 447 (1979) ("This Court has recognized a distinction between punitive measure that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may.").

C. Agreements Critical to the Process

1. *The Bail Bond*

A bail bond is a contract of suretyship by virtue of its tri-partite nature. The obligee of a bail bond is the state holding the defendant in custody. An insurance company is the surety.¹² The defendant is the bond principal. Bail bonds are conditioned primarily upon the defendant's agreement to make all required court appearances and to pay the entire bond penalty if he fails to appear. Bail bond forms tend to differ since they must be tailored to meet the statutory, regulatory and procedural requirements of the jurisdiction holding the defendant in custody.

2. *The Power of Attorney*

A specialized power of attorney is attached to and becomes a permanent part of the bail bond. This power of attorney is essential to the commercial bail industry. It establishes that the agent executing the bond does so as an attorney-in-fact with the authority of the surety to post the bond. It binds the bail insurance company the undertaking. It also establishes a unique number for each bail transaction. This important feature creates the foundation for commercial bail's business management systems.

Unlike powers of attorney used in construction and commercial surety arenas, bail powers do not contain the pre-printed names of specific individuals who are authorized as attorneys-in-fact. A bail power can be used to post appearance bonds by any licensed bail agent holding an appointment from the issuing bail insurance company. Bail powers are issued with expiration dates in sequentially numbered sets of various denominations. They are supplied to bail agents in a tightly controlled process. Agents are contractually obligated to report the execution and status of all bonds written with powers of attorney that are entrusted to them. They must also account for unexecuted powers.

12. *State v. Weissenburger*, 459 A.2d 693, 696 (N.J. Super. Ct. App. Div. 1983) ("It is well settled that a bail bond constitutes a surety agreement in which the defendant is the principal and the creditor is the State. Consequently, the legal principle applicable to the construction and consequences of surety agreements are equally applicable to bail bonds."); *Weigand v. State*, 768 A.2d 43, 49 (Md. Ct. App. 2001); *State v. Two Jinn, Inc.*, 228 P.3d 1019, 1023 (Idaho 2010).

3. The General Qualifying Power of Attorney

General qualifying powers of attorney are filed with the clerk of the county in which the agent/attorney-in-fact will post bonds. This document “qualifies” the agent’s authority. It establishes the largest amount of single bond risk upon which the bail insurance company can be bound. It also provides that the bail insurance company has no liability on a bond if a bond execution power of attorney is not used when that bond is posted.

4. The Bail Application

This document incorporates a variety of risk control features. Executed by the defendant, it establishes certain duties to be performed by the defendant, such as setting the required office “check in” dates and times. It also captures essential underwriting personal details and contact information. The defendant must agree that breaching these conditions could result in the surety requesting the court’s permission to surrender the defendant back into custody. Bail applications typically require applicants to verify the accuracy of all information supplied and authorize the surety to obtain further information from additional sources.

5. The Indemnity Agreement

On its face an indemnity agreement is a simple contract establishing the obligations of third parties to indemnify and hold the surety harmless. Its importance in the context of commercial bail is far greater. An executed indemnity agreement, whether collateralized or not, creates commercial bail’s most fundamental and significant risk control device.

Practically speaking, third parties such as family and friends are the true “customer” of the surety, as opposed to the defendant himself. The indemnitors who are seeking his release, or who agree to assist him, are likely to be the very people the defendant least wishes to disappoint or harm. Individuals with significant long term relationships to the defendant give him an otherwise non-existent incentive to appear and meet his obligations. In the event the defendant fails to appear, the same disappointed indemnitors, now facing imminent financial loss, also tend to become the surety’s best and most reliable source of information leading to his apprehension.

6. The Surety and Agent Agreement

An agreement between the bail bonding agent and his bail insurance company defines the rights, duties and authority of the agent. It establishes, among other things: (a) that the agent is firmly bound to indemnify and hold the bail insurance company harmless from loss, costs or damages connected with bonds he writes; (b) that the agent is a true independent contractor; (c) that the customers and risks undertaken are selected by the agent; and (d) that the bail insurance company will allow the agent to use its financial standing subject to the agent's full compliance with a variety of administrative requirements.

This agreement also establishes the amount of the commission the bail agent and bail insurance company will receive. Out of the premium paid by the customer, the agent's commission will be significantly larger than the commission due the bail insurance company. This arises from the fact that the bail agent indemnifies the bail insurance company, meaning that the agent has effectively assumed the primary risk of loss in the event of a forfeiture. The fact that the bail agent has thus assumed primary liability for loss, however, is not a defense to the bail insurance company's liability in a forfeiture enforcement proceeding initiated by the bond obligee.

D. The Regulatory Framework

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.¹³ Bail insurance producers are generally licensed and regulated in the same manner as insurance producers for other standard lines of insurance.¹⁴ Prelicensure and continuing education requirements for bail bond producers are common.¹⁵

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13. 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 (2011); LA. REV. STAT. § 22:1025 (2011) ("Insurance Code").
 14. Compare with New Jersey, which allows "limited insurance representatives" to write bail. *See* N.J. STAT. § 17:22A-16.1 (2011).
 15. *See, e.g.*, WASH. REV. CODE § 18.185 (2011); COLO. REV. STAT. § 12-7-102.5 (Colorado requires only prelicensure education). Florida, Nevada and Tennessee require continuing education. *See* FLA. STAT. § 648.385 (2011); NEV. REV. STAT. § 697.230(1)(a) (2009); TENN. CODE ANN. § 40-11-401.

Bail regulations differ significantly from state to state. Retailers in New Jersey, for example, must qualify as “limited insurance representatives” whereas bail is regulated by county bail bond boards in Texas.¹⁶ Formal appointment of retail sellers by a bail insurance company with the state commissioner of insurance is required in most states.¹⁷ Some jurisdictions go one step further and require that a certified and current “qualification power of attorney” be filed with every court or county where the bail bond agent seeks to do business.¹⁸ Qualification powers are provided by a bail insurance company and certify that an agent has authority to execute bonds up to a specified amount for the surety. Arizona, California and Nevada require retailers to provide a qualification bond, termed a “bond of bail retailer,” in a specified penal sum, naming the state as obligee and conditioned upon the bail retailer’s performance of statutory obligations.¹⁹ In a limited number of jurisdictions qualified “cash” or “property” bond sellers are allowed to write a specified amount of bail liability, without the backing of an insurance company.²⁰ A separate system applies to bail bonds posted in federal courts.²¹

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16. 17.TEX. OCC. CODE § 1704-160.
 17. California requires notice of appointment for each bail agent by a surety insurer. California Insurance Code § 1802 (2011); *See* FLA. STAT. § 648.382(1). Colorado, a non-appointment state, requires bail insurance companies to maintain a list of their producers for inspection upon reasonable notice. COLO. REV. STAT. § 10-2-416.5.
 18. *See, e.g.*, IND. CODE § 27-10-3-17; NEV. REV. STAT. § 697.270; N.C. GEN. STAT. § 58-71-140 (2010).
 19. Arizona requires a \$10,000 bond of bail agent. *See* ARIZ. REV. STAT. § 20-320 (2011). California requires a \$1,000 bond. *See* CAL. INS. CODE §§ 1802, 1803.5 (2011). A \$25,000 bond is required in Nevada. *See* NEV. REV. STAT. ANN. § 697.190.
 20. Cash or Property bonding agents are permitted in Mississippi (MISS. CODE ANN. § 83-39-7), North Carolina (N.C. GEN. STAT. §§ 58-71-1, 58-71-145), Ohio (OHIO REV. CODE ANN. § 4.03 (2011)), South Carolina (S.C. CODE ANN. § 38-53-10 (2010)), Tennessee (TENN. CODE ANN. § 40-11-122 (2011)), Texas (TEX. CODE CRIM. PROC. ANN. arts. 17.01-17.02 (2009)) and Washington (WASH. REV. CODE § 18.185.010 (2011)) 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).
 21. In the federal system, a judicial officer must determine that the bail bond was executed by a solvent surety. *See* 18 U.S.C. § 3242(c)(xii) (2011).

States use a variety of means and 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.²² A bail retailer who fails to pay a forfeiture judgment will risk license revocation, along with significant fines and penalties.²³ Some jurisdictions have enacted debarment procedures. Courts and detention facilities in these jurisdictions refuse to accept bail bonds from any agent who fails to timely satisfy a forfeiture judgment.²⁴ In a debarment forfeiture enforcement system, defaulting agents are placed "on the board," which is actually a regularly updated list of bail bonding agents with unsatisfied forfeiture judgments that is readily available to all courts and detention facilities in that jurisdiction.²⁵

A bail insurance company may also find itself "on the board" if judgment against its agent remains unsatisfied. A bail bond cannot be posted using a power of attorney from an insurance company that is "on the board." This means that all agents appointed by that insurance company will be adversely affected, even those agents who have no outstanding forfeitures. Like bail agents, a bail insurance company will remain debarred until all forfeiture judgments are satisfied, exonerated or otherwise resolved.

E. The Nuts & Bolts

1. Setting Bail

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).

22. *See, e.g.,* FLA. STAT. § 648.45 (placing 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 (2011).
23. *See, e.g.,* CAL. PENAL CODE § 1308 (2011); MO. REV. STAT. § 374.763(1) (2010); N.C. GEN. STAT. § 58-71-80.
24. *See, e.g.,* FLA. STAT. § 648.44(1); NEB. REV. STAT. § 11-124.
25. 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 id.* § 12-7-109(1)(g).

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.²⁶ Excessive bail or denial of bail violates the Equal Protection Clause.²⁷ Because the practical effect of excessive bail is the denial of bail, logic compels the conclusion that the harm the Eighth Amendment seeks to prevent is the unnecessary deprivation of pretrial liberty.²⁸

The Bail Reform Act of 1984,²⁹ 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) family and community ties; (e) flight risk; (f) mental and physical condition; (g) criminal history; (h) drug and alcohol involvement; and (i) the danger posed to witnesses and the community.³⁰ The Bail Reform Act requires the release of an accused under the least restrictive conditions or combination of conditions that will reasonably assure appearance.³¹ Only under rare circumstances will an accused be denied bail in a federal proceeding.

Commercial bail is not the only option when bail is set. Current methodologies include:

- a. Financially secured release in the manner represented by commercial bail, which requires bail bonding agent, an insurance company and typically includes the indemnity of third parties.
- b. Partially secured release or "deposit bail," where no surety is required and ten percent of the penal sum of the bail amount is paid to

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

27. *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1983).

28. *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).

29. *See* Comprehensive Crime Control Act of 1984, Pub. L. 98-473, 98 Stat. 1976 (1984) (codified as amended in scattered sections of 18 U.S.C.).

30. *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"); *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) (2011).

31. *Gebro*, 948 F.2d at 1121; *see also* 18 U.S.C. § 3141 (2011).

the court. When all appearances are made a percentage of the deposit is returned.

c. Own recognizance release, where no surety is required and the defendant is released upon his promise to appear or pay the bond penalty in the event of a forfeiture.

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.³² One such study did appearance comparisons of 55,000 state case felons in the nation's 75 most populous counties over an eight year span. One finding was that courts are moving dramatically toward fully secured commercial bail release instead of deposit or own recognizance release.³³ From a public safety perspective, it is also significant that these studies demonstrate that misconduct is higher when a financially secured commercial bail release is not used.

2. Underwriting

Operating through their appointed local agents, bail insurance companies have long had an effective system to achieve financial security and profitability despite their engagement in what would appear to the uninitiated to be a particularly risky business. The system they employ, however, has worked very well through the years. This is evidenced by the fact that some insurance companies have maintained active and profitable books of bail business for nearly a century.

The primary concern of bail underwriting is assuring the defendant's appearance. Its goal is the prevention of loss arising from a bail bond forfeiture. To underwriters in more customary lines of insurance, assessment of the risk of a bail forfeiture may seem unscientific in nature. Indeed, bail underwriting has always been more an art than a science. Nevertheless, bail underwriting centers on the same concerns that are applicable to more traditional lines of suretyship: risk analysis and risk control.

a. Risk Analysis

32. *See, e.g.*, U.S. BUREAU OF JUSTICE STATISTICS, PRETRIAL RELEASE OF FELONY DEFENDANTS, NCJ-148818 (1994) 10. This study demonstrates the superior performance of commercial bonding, as compared to all other pretrial release methods, in getting persons back to court.

33. U.S. BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS, NCJ-214994 (2007) 2.

A bail underwriter must be thorough about gathering data prior to undertaking the risk that the defendant will not appear and that cannot be recovered in time to prevent paying a forfeiture. Complete information relative to several important issues is essential.

(1) The amount of the bail as set by the court (the size of the proposed bond).

A local agent is granted an "on site" underwriting authority limit in a specific amount on any individual defendant. This amount will increase depending upon the agent's financial qualifications, experience, and proven track record with the surety. If the risk being analyzed exceeds the agent's underwriting authority, express home office approval is required before the bond can be posted.

(2) Precise nature of the charges.

The incentive to avoid appearance at trial is always increased by the severity of punishment and the defendant's assessment of potential outcomes. Similarly, charges that give rise to a limited chance of future incarceration result in a greater likelihood of appearance.

(3) Complete defendant information.

The more detailed contact and personal information obtained from or about the defendant the better, all the way down to tattoos, hobbies, favorite pastimes, work and address histories and best friends. Extensive commercial bail bond application forms are aimed at capturing this critical information. It is essential for a bail underwriter to be as thorough as possible because this information will be essential should it become necessary to apprehend the defendant and return him to custody. Thoroughness also creates a favorable mind set on the part of the defendant; the more he thinks the agent knows about him the less inclined he is to abscond.

(4) Complete information on all indemnitors.

There are several good reasons for having a number of persons close to the defendant "co-sign" the risk by appearing as guarantors that the surety will be fully reimbursed on any loss or expense associated with the defendant's failure to appear. Not the least of these reasons is the fact that risk of flight decreases when a defendant understands that family and friends will bear financial losses associated with his failure to appear. In addition, third party indemnitors can be a valuable source of information regarding a fugitive defendant's whereabouts.

(5) Availability of collateral.

Collateral serves two primary purposes. It encourages appearance and can offset the surety's loss in the event of a forfeiture. The inability of a defendant or his indemnitors to post collateral enhances the risk of forfeiture. Typically, the more serious the charge the greater the need for collateral security.

(6) Identity and experience of defendant's counsel.

On very large bonds the seasoned bail underwriter will insist upon speaking with defense counsel. He will seek non-privileged information about the theory of defense and the extent to which the defendant has been apprised of potential outcomes. The better the chance of a good outcome the defendant believes exists, the less fear the trial process holds for him. Most able defense attorneys are happy to visit with the bondsman. In addition, actuarial history demonstrates that an accused with highly competent legal counsel typically makes all court appearances. Defendants who are current in paying their attorney will normally be around for trial.

(7) Peculiarities in a given case.

A variety of unusual circumstances can adversely affect the likelihood of appearance that exceed the due diligence capacity of any bail underwriter. For example, if the prospective client is released on bond and later becomes a government witness the risk of his non-appearance could be greatly increased since he will be vulnerable to intimidation by those seeking to prevent his testimony. To the extent that a bail underwriter can anticipate circumstances that impact the risk of forfeiture, they must be seriously considered.

b. Risk Control

A bail risk must continually be monitored and the ultimate appearance outcome positively influenced. Just a few of the actions necessary on the part of the local bond agent in this regard are:

(1) Requiring the defendant make regular "check-ins." These can be done by telephone on smaller bonds. On larger monetary risks the defendant should be required to appear personally at the agent's office on a weekly basis. Personal meetings give the bondsman an opportunity to stay current on important information. This includes whether the defendant: (a) is still at the same address; (b) has the same phone numbers; (c) knows his next court date; (d) is employed; (e) is paying his attorney, and (f) is fully complying with court imposed conditions of release, such as participation in drug rehabilitation.

(2) Staying in communication. Responsible bail agents stay in communication with the bond principal. They understand that forfeitures are most likely when a risk is improperly managed. Losing touch with the defendant is begging for trouble.

As was related at the beginning of this section, bail underwriting is more an art than a science. It is an art that works best when practiced well. Consider that in most jurisdictions bail premium is ten per cent of the penal amount of the bail bond. Out of this premium must come agent

commissions, overhead expenses of the surety and agent, state insurance premium taxes and fugitive recovery expenses. Thus, if more than two percent of all bail bonds posted resulted in forfeiture losses, bail underwriters and agents could not survive. But survive they do, making a profit all the while.

3. Forfeiture

A defendant's failure to appear will violate the primary condition of a bail bond. It also triggers a series of related events, including the issuance of a warrant for the defendant's arrest and a declaration that the bail bond has been forfeited.³⁴ In some jurisdictions, breach of the condition of an appearance bond will also give rise to a separate criminal offense and additional charges.³⁵ While the prompt issuance of an arrest warrant is common to all jurisdictions, bond forfeiture procedures vary widely as to timing of the entry of judgment, rules concerning stays of execution and time limits for satisfaction of the forfeiture judgment. In deference to the primary purpose of the bond, which is to assure the defendant's appearance as opposed to enriching the state treasury,³⁶ a bondsman is generally allowed a reasonable window of opportunity to apprehend and surrender the fugitive before a judgment on the forfeiture must be paid.

Under the federal system, notice to the surety is required when the government moves for an entry of judgment.³⁷ Notice of the forfeiture, the show cause hearing and the entry of judgment are generally served upon the bail bond retailer. 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

34. See, e.g., CAL. PENAL CODE § 1305 (2011); FLA. STAT. 903.26 (2)(b) (2011); *United States v. Nolan*, 564 F.2d 376 (10th Cir. 1977); 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).

35. See, e.g., *People v. Aleman*, 823 N.E.3d 1136, 1140 (Ill. App. Ct. 2005); *People v. Allen*, 33 Ca. Rptr 2d 669 (Cal. Ct. App. 1994); COLO. REV. STAT. § 18-8-212 (2011).

36. *United States v. Velez*, 693 F.2d 1081, 1084 (11th Cir. 1982).

37. See FED. R. CRIM. P. 46(e)(3); see also *United States 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).

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. The bail agent and the surety must be given reasonable notice that a forfeiture has occurred. In California, for example, the court must send notice of the bond forfeiture to the surety within thirty days. Failure to do so can result in jurisdictional impediments to the enforcement of the forfeiture judgment.³⁸

The time allotted for payment of a forfeiture judgment can be as long as one year.³⁹ Some jurisdictions enter judgment very promptly upon the declaration of a forfeiture.⁴⁰ Other jurisdictions leave forfeiture procedures to the discretion of the court.⁴¹ Typically, a show cause hearing is set to allow the bail agent an opportunity to explain why judgment should not enter, stays of execution should be granted or stays of execution should not expire. California, Nevada, Utah and Idaho allow the bail surety up to six months to surrender the defendant before payment of the forfeiture is required.⁴²

Courts understand that forfeiture issues involve far more than the financial interests of the bail agent and the bail insurance company. Collateral tendered by a defendant’s family, sometimes including the family residence, is held by the bail surety. As a result, family and friends of the defendant face significant liability for the bond forfeiture loss as well as the bail agent’s investigation and apprehension expenses. Thus, it is in the best interest of an indemnitor for a fugitive family

38. *See, e.g., County of Orange v. Lexington Nat’l Ins. Co.*, 45 Cal. Rptr. 3d 543 (2006) (surety exonerated due to lack of notice to the bail insurance company of the initial forfeiture).

39. Indiana allows the bonding agent 365 days to pay a forfeiture. *See* IND. CODE ANN. § 27-10-2-12 (2011). Hawaii and Nebraska allow thirty days. *See* HAW. REV. STAT. § 804-51 (2011); NEB. REV. STAT. § 14-227 (2011). Alabama (ALA. CODE § 15-13-136 (2011)), Idaho (IDAHO CODE ANN. § 19-2927 (2011)), Mississippi (MISS. CODE ANN. § 99-5-25), and Oklahoma (OKL. STAT. tit. 59, § 1332 (2011)) allow ninety days. Other states allow 180 days. *See, e.g.,* CAL. PENAL CODE § 1305; NEV. REV. STAT. § 178.508 (2011); TENN. CODE ANN. § 40-11-1399 (2011). Louisiana allows 210 days. LA. REV. STAT. ANN. § 15:85 (2011).

40. West Virginia gives only a ten-day notice to show cause why forfeiture should not be entered. W. VA. CODE. § 62-1C-9 (2011).

41. *See, e.g.,* ARIZ. R. CRIM. PROC. 7.6(c) (2011).

42. CAL. PENAL CODE § 1305(c)(1); NEV. REV. STAT. § 178.514; UTAH CODE ANN. § 77-20b102 (2011); IDAHO CODE § 19-2918 (2011).

member to be located and safely surrendered into custody. Indemnitors frequently provide meaningful assistance to bail agents. When courts are shown that material progress locating the defendant is being made, they tend to allow recovery efforts to proceed before compelling the forfeiture judgment to be paid.

Forfeiture judgments create civil liability that is typically enforced against bail bonding agents and insurance companies through regulatory proceedings. The forfeiture enforcement process is addressed in more detail at Section D. The Regulatory Framework, *supra*.

In some states, after all stays of execution and grace periods have expired, the names of bail agents who fail to timely pay forfeiture judgments are listed on electronic bulletin boards and detention facilities can no longer accept the bail bonds they ordinarily post.⁴³ Upon receipt of notice that an appointed agent has failed to timely pay a forfeiture an insurance company can also be placed “on the board” and barred, along with all of its appointed agents, from posting further bonds. Board systems provide a large measure of incentive and have been highly successful since non-compliant bail agents and insurance companies are placed at immediate risk. Board systems create a significant commercial incentive to comply with forfeiture orders without need of administrative intervention or civil collection proceedings.

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 soon appear and voice a time-honored excuse such as a misunderstanding the time or place of the hearing, making a clerical error, oversleeping or problems with traffic. Once a forfeiture has been ordered, however, the appearance bond cannot be reinstated without the consent of the surety.⁴⁴

Courts have wide discretion to set aside a forfeiture judgment.⁴⁵ If the defendant is promptly surrendered or if the court is satisfied that

43. In New Jersey bail agent with unpaid forfeitures are removed from the Bail Registry and prohibited from writing additional bonds. *State v. Simpson*, 839 A.2d 896, 899 (N.J. Super. 2003); *In re Preclusion of Brice*, 841 A.2d 927 (N.J. Super. Ct. App. Div. 2004). Missouri courts are supplied with an electronic list of licensed and qualified bail agents whose licenses are not subject to pending suspension or revocation proceedings. MO. REV. STAT. § 374.763(2) (2011); COLO. REV. STAT. § 16-4-112 (2011).

44. *People v. Maldonado*, 268 N.Y.S. 2d 271, (1966), *aff'd*, 295 N.Y.S. 2d 597 (N.Y. App. Div. 1968).

45. *United States v. Amwest Sur. Ins. Co.*, 54 F.3d 601, 602 (9th Cir. 1995); *see United States v. Nguyen*, 279 F.2d 1112; *see also* FED. R. CRIM. P. 46(e)(2) & (4) (2011).

appearance and surrender by the defendant is impossible and without 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: (a) the willfulness of the breach of the bond conditions; (b) the cost, inconvenience and prejudice suffered by the government as a result of the breach; (c) explanatory or mitigating factors; (d) the appropriateness of the amount of the bond; and (e) the nature and extent of participation by the surety in apprehending and surrendering the defendant back into custody.

4. Revocation

A court can order the arrest of a defendant and the revocation of a bail bond for a variety of reasons. Prior to forfeiture, revocation can be ordered when the accused violates any condition of the release.⁴⁶ For example, when court imposes conditions of release such as drug testing and home detention, breach of the bond condition will routinely result in revocation. Bail is also likely to be revoked if the accused is charged with another criminal offense while released on bail.⁴⁷ Other important reasons for revocation arise when a court finds a reasonable probability that the accused will not appear or that the defendant presents a public safety risk.⁴⁸

The term “revocation” is sometimes used to refer to the right of the bondsman to return the defendant to custody, with or without cause, in an effort to remove himself from further liability before a forfeiture occurs.⁴⁹ Although surrender of the defendant to custody may require

46. 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.

47. See, e.g., VA CODE ANN. § 19.2.135 (2011) (“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.”).

48. See, e.g., MICH. COMP. LAWS § 765.26 (2011); *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 official must consider before revoking a defendant’s pretrial release, including the issue of whether the defendant will pose a danger to the community).

49. See, e.g., *Johnson v. County of Kittitas*, 11 P.3d 862, 864 (Wash. Ct. App. 3d Div. 2000); *Kiperman v. Klenshetyn*, 35 Cal. Rptr. 3d 178, 180 (Cal. Ct. App. 2005).

return of all or part of the premium paid, courts do not require the bail bonding agent to involuntarily remain on a risk.⁵⁰

If a bail bonding agent becomes aware of circumstances giving rise to an increased risk of flight it may become necessary to return the defendant to custody so the bond can be exonerated. The defendant's indemnitors are typically the first to know that trouble is on the horizon. They are frequently the triggering mechanism of bond revocation when they seek to extinguish their own liability. For example, indemnitors may believe that the risk of flight has become too great if they receive information that a defendant is violating bond conditions or that he faces serious new charges. Indemnitors are typically the first to learn when a defendant has lost a job or become embroiled in domestic disputes that jeopardize his ties to the community and increase the risk that he will fail to appear.⁵¹ Indeed, third-party indemnitors sometime provide a critical source of intelligence to bail bonding agents that greatly enhances commercial bail's effectiveness and its ability to proactively manage risk.

5. Exoneration and Discharge

A bail surety is exonerated and relieved of further bond liability when the terms and conditions of the appearance bond are met. The ability of the agent to properly document his exoneration from liability on a bail bond is essential to the normal course of commercial bail business operations. Collateral securing bail liability cannot be released or returned to the bond principal or third party indemnitors until the surety's risk of loss has been extinguished.

Further, bail bonding agents must show their appointing bail insurance companies that existing liability written on that company has been resolved before new business can be written. Contracts between bail insurance companies and their indemnifying agents uniformly require agents to regularly and accurately report the status of bonds issued with old powers before new powers will be entrusted to the agent. Good business practice mandates that all bail insurance companies implement effective administrative controls to prevent their appointed agents from writing bail liability in excess of the agent's financial capacity to indemnify the insurance company.

50. See, e.g., *Knauf v. Cont. Bail Bonds, Inc.*, 549 So. 2d 805 (La. App. 1989); *Jordan v. Knight*, 35 So. 2d 178, 179-81 (Ala. 1948).

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

In the vast majority of criminal proceedings there is no bond forfeiture. The defendant appears at all court proceedings, the bond is discharged and the surety is exonerated when the defendant is convicted, acquitted, pleads guilty or nolo, or the charges are dropped.⁵² When a disposition of the case has been reached, a bail bond may be exonerated automatically by statute.⁵³ Many states require the entry of a court order or finding to the effect that the bail bond has been discharged and exonerated.⁵⁴ Where a bond has been forfeited and the defendant has been returned to custody, the surety may be required to take affirmative action to set aside the forfeiture and document exonerated of the bond.⁵⁵ Generally, if the bond is to be continued until sentencing, the surety must consent.⁵⁶

The defendant's compliance with the terms and conditions of a bond is not the only grounds for exoneration. Bail will be discharged or exonerated where performance of the condition is rendered impossible by the act of God, the act of the obligee, or the act of the law.⁵⁷ If the accused dies prior to the date of the scheduled appearance, the surety is

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52. *See, e.g., People v. Henry*, 308 N.Y.S.2d 245 (N.Y. App. Div. 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*, 119 A.2d 572, 573 (Pa. Super. Ct. 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").
 53. *See, e.g., N.M. STAT. ANN. § 31-3-10* (2011) (automatically exonerating all bail bonds and declaring them null, void and terminated upon a finding of guilt; *State v. Valles*, 143 P.3d 496 (N.M. 2004). *State v. French*, 945 P.2d 752, 761 (Wis. Ct. App. 1997).
 54. When the conditions of a bail bond have been satisfied, the court may be required to discharge or exonerate a bond. *See, e.g., NEV. REV. STAT. § 178.522* (2011). Documentation of the order of discharge may require obtaining certification from a court clerk. *See, e.g., FLA. STAT. 903.31* (2011).
 55. *People v. American Banker Ins. Co.*, 284 Cal. Rptr. 617 (Cal. Ct. App. 1991).
 56. *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 increased the risk of the surety have the effect of terminating the obligation. *See RESTATEMENT (SECOND) OF SECURITY § 128(b)* (1941).
 57. *Taylor v. Taintor*, 83 U.S. (16 Wall.) 366, 370, 21 L. Ed. 287, 290 (1872); *See United States v. Stephens*, 1 F. Supp. 33, 34 (S. D. Fla. 1932).

exonerated.⁵⁸ A surety is entitled to be exonerated upon payment of a forfeiture judgment.⁵⁹ A surety may also be entitled to exoneration if the bond is void because it was improperly taken by the court in the first instance.⁶⁰ Exoneration may also result from the obligee's failure to give the surety proper notice.⁶¹

Exoneration becomes significantly more complex after a forfeiture has occurred.⁶² 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 sought. 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 entry of a forfeiture judgment.

6. Remission

Upon payment of a forfeiture judgment the surety may be able to qualify for return or "remission" of all or part of the payment by returning the defendant to custody or by showing that entry of the forfeiture judgment was improper. Whether the surety qualifies for remission depends entirely upon the local statutes and rules. New Jersey permits remission if a defendant is surrendered up to four years after the bail bond forfeiture.⁶³ In Maryland, remission is allowed under

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58. *Taylor*, 21 L. Ed. at 290; 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).
 59. See, e.g., COLO. REV. STAT. § 16-4-108 (2011).
 60. See Francis M. Dougherty, J.D., Annotation, *Liability of Surety on Bail Bond Taken Without Authority*, 27 A.L.R. 4th 246, § 3 (1984).
 61. *People v. Ranger Ins. Co.*, Cal. Rptr. 3d 448, 141 Cal. App. 4th 867 (Cal. Ct. App. 2006).
 62. See, e.g., *People v. Lexington Nat. Ins. Co.*, 69 Cal. Rptr. 3d 738, 741 (Cal. Ct. App. 2007).
 63. N.J. STAT. ANN. § 2A:162-8 (2011). The burden of establishing entitlement to remission is on the bail agent who must show that it would be inequitable or that it was not in the public interest. *State v. Mercado*, 747 A.2d 785, 788, 265, 269-270 (N.J. Super. Ct. App. Div. 2000). New Jersey, among other states, evaluates entitlement to remission on multiple factors, including the effort made by the surety for recapture, whether the applicant is a commercial bondsman, the degree of surety supervision, the length of time the defendant was a fugitive, the interests of the state, whether the defendant committed a crime while a fugitive and the amount

limited circumstances for up to ten years after the bond was posted.⁶⁴ Shorter time periods are far more common. In Colorado, Connecticut, Florida, and Michigan, for example, the limit is one year.⁶⁵ Ordering remission is left entirely to the discretion of the court in many states, including Arizona, Missouri, North Carolina, Ohio and Tennessee.⁶⁶ California allows a bail bondsman six months to surrender the defendant into custody or pay the forfeiture judgment. After the forfeiture judgment is paid however, remission is not allowed.⁶⁷ Other preconditions may also apply. For example, in Florida, a surety's entitlement to remission is preserved only if there is no breach of the bond conditions.⁶⁸ Entitlement to remission may also require direct involvement by the bail surety in the apprehension and surrender of the defendant.⁶⁹

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.⁷⁰ The law is less favorable to the surety when the defendant is incarcerated in a state other than the bailing state.⁷¹ 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

of bail. *See, e.g., State v. Ramirez*, (N.J. Super. Ct. App. Div. 2006); *State v. Wilson*, 928 A.2d 851 (N.J. Super. Ct. App. Div. 2007).

64. MD RULE 4-217 (j)(1)(A) allows for remission if the surety produces evidence the defendant is incarcerated in a foreign jurisdiction and the state will not issue a detainer or extradite.
65. *See* COLO. REV. STAT. § 16-4-112 (5)(j) (2011); CONN. GEN. STAT. § 54-65a(b) (2011); FLA. STAT. 903.28(5) (2011). Mississippi permits remission up to eighteen months after bond forfeiture. MISS. CODE ANN. § 99-5-25(3) (2011).
66. *See* ARIZ. REV. STAT. ANN. § 13-4309 (2011); MO. REV. STAT. § 544.640 (2011); N.C. GEN. STAT. ANN. § 15A-544.8(c)(4) (2011); OHIO REV. CODE § 2937.39 (2011); TENN. CODE ANN § 40-11-204(a) (2011).
67. CAL. PENAL CODE § 1305 (2011).
68. FLA. STAT. 903.28(8) (2011).
69. *See, e.g.,* FLA. STAT. § 903.28(2); *see also, e.g., People v. Johnson*, 395 P.2d 19, 23 (Colo. 1964).
70. *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).
71. *See, e.g., State v. Fields*, 347 A.2d 810, 811 (N.J. Super. Ct. App. Div. 1975).

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.⁷²

Entitlement to remission may also be affected by the Uniform Criminal Extradition Act ("UCEA") which has been enacted by the majority of states.⁷³ The UCEA establishes a mandatory series of court proceedings that a foreign bondsman must follow to obtain an arrest warrant and remove a fugitive from bail from another jurisdiction.⁷⁴ In Hawaii, for example, the Court of Appeals found 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.⁷⁵

7. Recovery

A bondsman has the right and authority to take the defendant into custody for the purpose of exonerating the surety's liability on the bail bond. This authority is founded upon common law, contract and statute.

72. See generally Russ, *supra*.

73. 11 Uniform Crim. Extrad. Act 36 (1936 & Supp. 1993); see *Cuyler v. Adams*, 449 U.S. 433, 435, 101 S. Ct. 703, 705, 66 L. Ed. 2d 641, 646 (1981).

74. Under the terms of the UCEA, as enacted in New Jersey, a fugitive in an asylum state may not be delivered to the demanding state unless he is first taken before a court and advised of the extradition demand, the crime charged and asked if he desires to contest extradition. N.J. STAT. § 2A:160-1, *et seq.* Only four issues are "open for consideration before the fugitive is delivered up: (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive." *McGeachy v. Doe*, 2011 U.S. Dist. LEXIS 59686 Civ. No. 10-3342, at *10 (D. N.J. June 2, 2011); see *State v. Lopez*, 734 P.2d 778, 782 (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 31-4-30) (2011).

75. See *State v. Flores*, 962 P.2d 1008, 1015-1017 (Haw. Ct. App. 1998).

Under the UCEA the bail agent could have petitioned a judge or magistrate for an arrest warrant of a person alleged to have violated the terms of bail and upon meeting the UCEA's procedural requirements a warrantless arrest could have been made by the bail surety and the defendant promptly taken before a judge or magistrate to be held pursuant to the UCEA.

The common law basis for the surety's authority is enunciated by the United States Supreme Court in *Taylor v. Taintor*:⁷⁶

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.

The extensive common law authority of the bail agent recognized in *Taintor* is supplemented by the contractual relationship that exists between the bail surety and the defendant.⁷⁷ A bail bond agreement executed by the defendant during the underwriting process provides that, in consideration of the surety posting the bail bond, the principal agrees that the surety can retake him at any time, even before forfeiture of the bond.⁷⁸ By entering into this agreement, 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.⁷⁹ The bail contract underscores the private nature of

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76. *Taylor v. Taintor*, 83 U.S. (16 Wall.) 366, 373, 21 L.Ed. 287, 295 (1872).
77. *Ouzts v. Maryland Nat'l Ins. Co.*, 505 F.2d 547, 553 (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*, 509 S.E.2d 155 (1998); *State v. Tapia*, 468 N.W.2d 342, 344 (Minn. Ct. App. 1991).
78. *See, e.g., State v. Nugent*, 1999 Conn. 537, 543, 508 A.2d 728, 731 (Conn. 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." 760 IND. ADMIN. CODE 1-6.2-10 (2011).
79. *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"); *In re Von Der Ahe*, 85 F. 959, 960 (W.D. Pa. 1898);

the surety's right of recapture and is the basis for the expectation that the government will not interfere.⁸⁰ 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. Since the bail bonding agent is likely to be contractually obligated to satisfy any forfeiture judgment entered against the insurance company, the contractual rights of the bail insurance company as a surety flow to the bail bonding agent. State⁸¹ and federal⁸² statutes have modified and supplemented traditional common law rights of the bail surety to apprehend and return a bail jumper to custody.

The synergistic relationship between private sector fugitive recovery and the criminal justice system results in over thirty thousand apprehensions per year at no public expense.⁸³ Nevertheless, in recognition of the need for better training for bail recovery agents, the commercial bail industry has taken the lead, through its national trade association, to craft model legislation supporting initiatives for bail recovery agent licensing, better training and greater responsiveness to the needs of law enforcement.⁸⁴

Nugent, 508 A.2d at 731; *Livingston v. Browder*, 285 So. 2d 923, 925 (Ala. Civ. App. 1973).

80. *Reese v. United States*, 76 U.S. (13 Wall.) 22, 25, 19 L. Ed. 541, 544 (1869).
81. In Colorado, a bail bonding has statutory authority to seize and surrender a defendant. COLO. REV. STAT §16-4-108(1)(c). The bonding agent's common law privilege does not exist. *Oram v. People*, 255 P.3d 1032 (Colo. 2011) (holding that bail agents knew their entry into a residence was unlawful); *see, e.g.*, ALA. CODE § 15-13-162; N.C. GEN. STAT. § 58-71-30; *see Livingston*, 51 Ala. App. at 369, 285 S.2d at 926.
82. 18 U.S.C. § 3149 (2011).
83. *See, e.g.*, Adam M. Royval, *United States v. Poe: A Missed Opportunity to Reevaluate Bounty Hunters' Symbiotic Role in the Criminal Justice System*, 87 DENV. U. L. REV. 789 (2010); A. Tabarrok, *The Bounty Hunter's Pursuit of Justice*, 35 WILSON QUARTERLY 56 (2010); Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on the Public Versus Private Law Enforcement from Bail Jumping*, 47 J.L. & ECON. 93, 118 (2004) ("These findings indicate that bond dealers and bail enforcement agents (bounty hunters) are effective at discouraging flight and at recapturing defendants. Bounty hunters, not public police, appear to be the true long arms of the law.).
84. ALEC model policy, *Bail Fugitive Recovery Persons Act*, June 2000); (Adopted by ALEC's Criminal Justice Task Force at the Spring Task Force Summit May 5, 2000, approved by ALEC Legislative Board of Directors June, 2000).

A bondsman may use reasonable means to ensure that the principal appears in court.⁸⁵ 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.⁸⁶ In many states a bondsman must follow specific procedures to apprehend a fugitive bond principal. For example, in Connecticut a bondsman or recovery agent must notify local authorities of their intent to arrest a fugitive.⁸⁷ The bondsman surrendering a defendant may be required to supply the sheriff a certified copy of the bond.⁸⁸ A statute may also require that an apprehended defendant be brought before a court within a specific period of time.⁸⁹ Failure to follow statutory procedures of the state where the arrest is made can expose the arresting bondsman to civil⁹⁰ and criminal⁹¹ liability.

It is not necessary for a bondsman to use the extradition process.⁹² Although a state cannot arrest a fugitive in another state without using formal extradition proceedings,⁹³ a bail bondsman has the right to cross state lines to apprehend defendants. Under the UCEA, however, a foreign bondsman must seek a court warrant. If the fugitive is arrested without a warrant, the bondsman must produce the fugitive in court in the state of the arrest so that proceedings can be initiated to determine if the arrestee is the wanted person and whether the charges are extraditable.⁹⁴ The few cases that have directly addressed the impact of the UCEA in the context of bail fugitive recovery have diluted the

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85. See generally *State v. Nugent*, 508 A.2d 728, 732 (Conn. 1986).
86. *Kear v. Hilton*, 699 F.2d 181, 182 (4th Cir. 1983).
87. CONN. GEN. STAT. § 29-152k (2011).
88. NYCL CRIM. PROC. § 530.80(1)(A) (2011); COLO. REV. STAT. § 16-4-108 (Upon the delivery of the fugitive and a certified copy of the bail bond by a bail bonding agent, the sheriff must take custody of the defendant and acknowledge the surrender in writing.).
89. See CAL. PENAL CODE § 1301 (stating that the defendant is required to be delivered to the court without undue delay, within 48 hours).
90. See generally *O.K. Bonding Co. Inc. v. Milton*, 579 S.2d 602 (Ala. 1991).
91. See, e.g., *Oram v. People*, 255 P.3d 1032 (Colo. 2011); *Collins v. Commonwealth*, 702 S.E.2d 267 (Va. Ct. App. 2010).
92. 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).
93. See, e.g., *California v. Superior Ct.*, 482 U.S. 400, 407 107 S. Ct. 2433, 2438, 96 L. Ed. 2d. 332, 340 (1987). The extradition process is also required in federal cases pursuant to 18 U.S.C. § 3182 (1994).
94. See generally *State v. Epps*, 585 P.2d 425, 428 (Or. 1978).

common law and contractual recovery rights of the bondsman.⁹⁵ The extent to which an express waiver executed by a bond principal during the underwriting process will be enforced remains to be decided.⁹⁶

Freelance bounty hunters frequently locate and retrieve defendants on forfeited bonds.⁹⁷ They accept unilateral offers or negotiate with the bail bonding agent to surrender the absconder back into custody for an agreed price, which is typically a percentage of bond penalty. In this recovery activity the bounty hunters are viewed as acting with the authority of executing agent and with the same rights to pursue and arrest suspects.⁹⁸ The activities of bail recovery agents, however, are subject to a variety of specific state requirements and limitations over and above requirements applicable to executing agents.⁹⁹

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95. 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 a 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 due 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).
96. See *Lopez*, 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).
97. Florida and South Carolina prohibit free lance bounty hunting. FLA. STAT. § 648.30(2)(3) (2011) (It is unlawful to hold oneself out as a "bounty hunter" or "bail recovery agent"); S.C. CODE ANN. §§ 15-17-740, 38-53-50 & 60 (2010). In North Carolina, bounty hunters must work for only one bonding company and cannot act on a free lance basis. N.C. GEN. STAT. § 58-71-65 (2011).
98. Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System*, 33 HOUS. L. REV. 731, 761 (1996).
99. For example, bail enforcement licenses are required in Arizona, C Connecticut, Georgia, Iowa, Indiana, Nevada, Louisiana, Mississippi, Nevada, South Dakota, Utah and West Virginia. See ARIZ. REV. STAT. § 20-340.02 (2011); CAL. PENAL CODE § 1299.06 (2011); CONN. GEN.

E. The Administration Of Justice And Economic Benefits Of Commercial Bail

Commercial bail is an effective, functional and significant tool in our system of criminal justice. It also gives rise to several important economic advantages that are frequently overlooked. These concepts deserve additional attention.

1. The Impact of Secured Release on the Administration of Justice

The administration of justice is impossible if the means chosen for pretrial release does not assure a defendant's appearance. Secured release through commercial bail provides the most effective mechanism to achieve this goal.

Under the terms of the bail bond contract a defendant binds himself to pay the penal sum of the bond if he fails to appear. A defendant's obligation can be either secured or unsecured. When a defendant is released solely upon his promise to reappear or pay the bond penalty, but without any assurance beyond that agreement, it is an "unsecured release." In the context of commercial bail, a "secured release" is a process through which a defendant's promise to appear or pay the entire bond penalty is guaranteed by a bail bonding agent, a bail insurance company surety and in most instances, financial commitments given by one or more third party indemnitors.

STAT. (2011); GA. CODE ANN. §§ 16-11-129 and 17-6-56 to 58 (2011); IOWA CODE 80A.3; INDIANA CODE 27-10-3-6; NEV. REV. STAT. § 648.30, 697.173; L.A. ADMIN CODE §§ 4905 to 4907 (2011); MISS. CODE ANN. § 83-39-3; NEV. REV. STAT. § 178.526; S.D. CODIFIED LAWS § 23A-43-29 (2011); UTAH CODE ANN § 53-11-122 (2011); W. VA. CODE §§ 51-10A and 56-3-34. In Arkansas, only a licensed private investigator, the bail agent, or a person under the bail agent's direct supervision can arrest the fugitive. ARK. CODE ANN. §16-84-114. A recovery agent cannot be employed in Colorado without a background investigation. COLO. REV. STAT. § 12-7-105.5 (2011). 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. § 13-39885C, 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. § 648.30(2) and (3).

At first blush “secured” can be understood to mean that money or property collateralizes a defendant’s promise to appear. This understanding, however, is far too limited. It fails to appreciate that much more than tangible property is involved in a typical commercial bail release scenario. To understand this important concept requires a brief explanation of the many layers of financial commitments that are unique to commercial bail transactions where the corporate surety is not the only party assuming a financial risk if the defendant absconds.

Typically there are at least three categories of commitments in each commercial bail transaction:

(a) The undertaking of the bail insurance company as surety on the bond agreement. This commitment is straightforward and requires no further explanation.

(b) The bail bonding agent’s indemnity agreement to the bail insurance company. Through this commitment, the bail insurance company is, in effect, guaranteed reimbursement of any loss. In addition, the bail insurance company holds security in the form of a build up fund, also known as a “BUF” account, consisting of the agent’s own funds that secure the agent’s indemnity obligations. The risk of loss of his own assets significantly motivates the agent to take all necessary steps to assure defendant compliance.

(c) Third party indemnitors provide a critical third commitment in the secured release triangle. Typically, the true “customer” in a commercial bail transaction is not the defendant himself, but it is the third party, typically a family member or friend, who wants the defendant out of custody. To induce the agent to accommodate them, these third party indemnitors must agree to make the surety whole should there be a bond loss, sometimes even putting up “collateral” to secure that agreement. Immediately upon his release it is made clear to the defendant that if he fails to appear he will be directly harming these people who came to his rescue. Thus, not only the agent, but other financially interested parties become personally involved and have a vested interest in the defendant’s compliance; so much so that should the defendant abscond these indemnitors will be a recovery agent’s best source of information leading to the recovery of the defendant.

The term “secured release” in the context of a commercial bail bond refers to more than the surety’s commitment. It means all of these commitments and risk control factors operating in concert. The practical upshot of this is that in a secured release a number of parties have much to lose and thus support defendant compliance while in an unsecured release, only the defendant’s promise is at stake should he flee. Neither his conscience nor his wallet is likely to be affected.

The largest and most comprehensive study comparing secured and unsecured release methodologies for assuring the defendant's presence in court found that the failure to appear rate on secured release was 28% lower than the rate for unsecured release.¹⁰⁰ Increased recognition of the effectiveness of secured release through commercial bail has caused the four remaining states with no commercial bail (Oregon, Kentucky, Illinois and Wisconsin) to reconsider. In Kentucky, Louisville trial judges consider the statewide pretrial services program to be unworkable and are demanding changes.¹⁰¹ Oregon, Illinois and Wisconsin have commercial bail reintroduction bills in the wings.

2. Positive Economic Impact

Commercial bail results in many economic benefits to state and county governments including:

(a) Insurance premium taxes.

Just as with the sale of any other insurance product, each bail bond posted results in payment of the attendant premium tax.

(b) Forfeitures.

If the surety is unable to produce the defendant as promised a forfeiture is paid to the court. While the percentage of cases where this occurs is small, the aggregate losses paid are substantial. Counties anticipate this revenue source. Some even build forfeiture payments into their fiscal planning, allocating the anticipated monies to their road and bridge funds, school administration and the like.

(c) Savings from higher appearance rates.

Every failure to appear costs the jurisdiction money in terms of wasted personnel time, among other things. The only study ever done on the subject placed the per-failure to appear cost at \$1,750.00 (American Legislative Exchange Council Report Card on Crime, 1977). The cost would be much higher today since this study involved 1977 dollars. This translates into significant savings for local governments since commercial bail has fewer failures to appear.

(d) The "uncalculated cost" of recidivism.

Just as commercial bail has a lower failure to appear rate than unsecured release, it also has a lower misbehavior rate of its defendants pending trial. The Federal Bureau of Justice Statistics studies found that

100. ERIC Helland & Alexander Tabarrok, *The Fugitive: Evidence on the Public Versus Private Law Enforcement from Bail Jumping*, 47 J.L. & ECON. 93, 118 (2004).

101. Jason Riley, JUDGES ORDER FIXES IN PRETRIAL RELEASE, Louisville Courier Journal, April 18, 2007.

the misconduct rate of defendants released before trial on an unsecured basis was over twice as high as that of defendants whose release was secured.¹⁰² The same report showed the percentages of defendants still a fugitive after one year from release date being almost twice as high for unsecured as opposed to secured.

The effectiveness of commercial bail, coupled with its indisputable economic benefits, supports the proposition that commercial bail is a greater boon to public safety than unsecured release.

F. 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 has the lowest recidivism among its charges causes 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.¹⁰³

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 taxpayers. In addition, commercial bail 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.

Glossary

Attorney-in-Fact

Attorneys-in-fact have the authority to execute a bail bond on behalf of a qualified bail insurance company surety. In the commercial bail industry, a licensed bail bonding agent holding an authentic power of attorney from a bail insurance company with whom that agent has been

102. U.S. BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS, NCJ-214994 (2007).

103. Morgan O. Reynolds, Privatizing Probation and Parole, National Center for Policy Analysis, NCPA Policy Rep. No. 233, ISBN# 1-56808-089-1 (June 2000), *available at* <http://www.ncpa.org/pdfs/st233.pdf>.

appointed may use that power of attorney to write a bail bond in the name of that insurance company.

Bail Bond

A tri-partite agreement conditioned upon a defendant's appearance upon which the government is the bond obligee, the defendant is the principal and an insurance company is the surety.

Bond Conditions

The primary condition of a bail bond is that defendant bond principal must appear in court as ordered. Breach of a bond condition can result in forfeiture of the bail bond or revocation of bail. Typical supplemental bond conditions include orders mandating forbearance from further criminal activity, forbearance from communications with victims and witnesses, drug testing and other forms of monitoring.

Bondsman

A retailer, also known as a bail bonding agent, who sells bail bonds to the public. The bondsman selects and secures the risk, controls and monitors the defendant for court appearances. The bondsman, as attorney-in-fact, executes the bond using a power of attorney supplied by the bail insurance company. Typically, bondsmen operate as independent contractors and hold their appointing bail insurance company harmless from all loss and adjustment expense.

Consent of Surety

If the conditions of a bail bond have been met, or if the bail bond is forfeited, a surety cannot be compelled to remain liable on the appearance bond while the defendant is free. Reinstatement of a bond after forfeiture always requires surety consent. Further, after conviction or a guilty plea, defendants must ask for a consent of surety if the bail bond is to remain in effect and allow the defendant to be released from custody until sentencing.

Co-signer

A third party indemnitor of the surety's liability. Typically co-signers are friends or relatives of the bond principal who seek release of the

defendant from custody and sign an agreement to indemnify the surety from loss if the defendant fails to appear.

Discharge and Exoneration

A bail surety is discharged when the primary condition of a bond is fulfilled, the bond penalty paid, or the bond is otherwise terminated by order of court or by operation of law. Discharge of the bond is typically a condition precedent to the return of collateral and replenishment of the stock of powers the bail agent will require to write new liability.

Forfeiture

A declaration by the court, upon the defendants failing to appear as directed, that the government, as the bond obligee, may now pursue a claim under the bond.

Forfeiture Judgment

A formal order of court following the declaration of a forfeiture, entering judgment against principal and surety in the penal amount of the bail bond.

Power of Attorney

A power of attorney, also known in the commercial bail industry as a “power,” is a serially numbered and stringently controlled instrument that is issued by bail insurance companies to a licensed, qualified and duly appointed bail bonding agent. These powers of attorney authorize an agent to bind the bail insurance company as the surety on a single bail bond undertaking in a specific penal sum.

Recognizance

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

Recovery Agent

A recovery agent is an independent contractor hired to return a fugitive to custody. Terms may vary, but compensation typically includes a percentage of remission paid when the fugitive is returned to custody. A

“bounty hunter” is another term for a recovery agent, referring primarily to those working on a freelance basis.

Remission / Remittitur

A court order directing that all or part of the monies paid by the bail surety on a forfeiture judgment be returned to the bail surety. Remission is typically ordered when an absconding defendant is surrendered as a result of actions by the bail surety.

Revocation

When a defendant violates a bond condition the court can order return of the defendant to custody. A bail surety also has the right to revoke the bond and return the defendant to custody, with or without probable cause, before a forfeiture occurs.

Set-Aside

A ruling by the court at a hearing prior to the entry of a forfeiture judgment, that the defendant’s failure to appear was excusable and the forfeiture should not be enforced.