PBUS News Update

This informative newsletter provides the bail industry with the latest up-to-date issues of concern and articles. The newsletter is distributed weekly and includes timely news on legislative issues, bail industry happenings and PBUS conference updates.

PBUS Conferences

Two annual conferences are hosted by PBUS each year; one in February and one in July. At each conference, a membership meeting is held to update members on the status of the association. A MCBA orientation session is also held to inform members about the enhanced educational certification and how to receive it.

Both conferences are designed to keep members abreast of current trends and provide forums and opportunities to network with peers across the country.

PBUS Legislative Action

PBUS works on many levels to positively impact public policy and legislation whenever it concerns the bail bond profession. PBUS members have testified as expert witnesses in court hearings and have appeared before various legislative bodies concerning the benefits the bail industry provides to taxpayers and the important role the industry plays in the criminal justice system.

PBUS Code of Ethics

PBUS has established a Code of Ethics for its members. The articles of this Code of Ethics are designed to guarantee the integrity and dignified professionalism of all PBUS members. Membership in PBUS assumes compliance with the Code of Ethics.

THE HISTORY OF BAIL

Society's Need vs. Government Solutions

As with many aspects of our society, the needs of the people are dictated through an evolutionary process. Society, through a natural process, recognizes need and implements measures to meet the need. All too often this natural process is redefined by an act of government usurping nature and reaching beyond the intent of the original, natural and logical solution. The right to bail is no exception to the proverbial dilemma we face in our society and the world today.

The Roots of Suretyship

Gaining its roots in early biblical days in ancient Babylonia (where we know as Iraq today), the earliest recordings of a surety relationship date back as far as 2500 BC. Contracts in ancient times were exclusively oral agreements and suretyship was no exception. The Bible refers to a practice known as "striking of hands" ('let's shake on it') to "seal the deal," and became a common practice among men of integrity. In those early years the concept of suretyship usually arose as a need to guarantee the payback of a loan. If one party were not totally comfortable with another party repaying a debt, often a third party, who was trusted, would vouch for the borrower. If the borrower did not pay back the loan, then the third party would be obligated to. This usually took place as the result of one trusted friend or family member assisting another.

Nonetheless if there was a breach, the third party was held liable and was expected to pay the loan in full. This expectation often created ill will within families and among friends. Eventually, perhaps as early as 700 BC, written agreements would become the accepted norm. Its origin is credited to the Romans who had developed a well-defined legal system. Not until the Christian era, however, did the actual rights and duties of a surety become part of a formalized Roman law.

English Introduction to Commercial Surety

It was during the 14th century that English law required agreements to be implemented in written from. After literally thousands of years of inter-personal surety relationships and the breakdown of countless family and friend relationships, the idea of commercial surety evolved.

In England in the early 1700's the first surety company was formed. Apparently business was not brisk, as the demise of the early surety company was recorded a short time later. Another century would pass before it was again attempted. In mid-1800 in England, a company was formed for the purpose of becoming a surety for compensation. Legend has it that an ancestor of the failed company of one hundred years earlier formed the British Guarantee Trust Company. It has been said that both companies were motivated by the tragic breakdown of family relationships due to breach of surety agreements.

United States Inception of Suretyship

The United States boasts the establishment of its first surety company in 1876, when the Fidelity and Casualty Company was formed. This company is still in existence today, well over one hundred years later.

Surety relationships in biblical days and in the early European days were paralleled in the United States during the days of early settlements. Generally, and for the same reasons for example as to secure a debt, the need carried over into our criminal courts. During those early days our judicial system was much unsophisticated and judges would sit on circuits that would frequently only allow them to be in a certain locale once every several months.

Considering that our system of government, more specifically our Constitution, is based on the presumption of innocence, it was often an injustice for someone to sit in jail for months waiting for a judge to arrive to hear their case.

Thus the idea of a bail bond was implemented. In the early days when someone was accused of a crime, a third party would promise to pay the sheriff an amount of livestock or grain products if the accused failed to show for court at a time and place certain. This system was advantageous to the defendant who could continue to work his homestead. It was also an advantage for the sheriff and the local budget as they did not have to support the accused for months while waiting for the judge to arrive.

The Constitution of the United States

The concept of release before trial was an inherent right given to all citizens of the United States by the framers of our Constitution. They contrasted the "abhorrent" idea of the English being guilty until proven innocent. These early pioneers, men of Christian beliefs and convictions, were also men of history. They were aware of the tendency of men in power to use the sovereignty given to them by the government to abuse their authority and in turn abuse the very people they were leading. This was not isolated to any area but to government in general and was the beneficiary of all it could acquire from power and abuse.

The framers of our Constitution were determined not to govern in the same fashion. Liberty was thus treated as sacred and became the most important theme in the development of early settlements and its laws. This fact was illuminated in the Preamble of the Constitution of the United States:

> ***"We the people of the United States, in order to form a more perfect union, establish justice, ensure domestic tranquility, provide for the common defense, promote the general welfare, and to secure the blessings of liberty to ourselves and to our posterity, do ordain and establish this Constitution for the United States of America."***

The Bill of Rights

Amendments 1 to 10 of the Constitution

The conventions of a number of the states, having at the time of adopting the Constitution expressed a desire that in order to prevent misconstruction or abuse of its powers that further declaratory and restrictive clauses should be added. Extending the ground of public confidence in the government would best ensure the beneficent ends of its institution.

Resolved by the Senate and the House of Representatives of the United States of America, in Congress assembled with two-thirds of both Houses concurring, that the following articles be proposed to the legislatures of the several states as amendments to the Constitution of the United States; all or any of which articles, when ratified by three-fourths of the said legislatures, to be valid to all intents and purposes as part of the said Constitution:

Amendment I
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment II
A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

Amendment III
No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment VII
In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Amendment VIII
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX
The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people**.**

Amendment X
The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

The entire reasons for these Amendments were to guarantee the liberty and un-interrupted freedom without due process for all citizens. Our forefathers specifically chose to establish this country with this as the foremost function, along with protection for its citizens.

Amendment VIII is specific in not allowing excessive bail to be required of its citizens. Again, this is in harmony with the theme of the "innocent until proven guilty" philosophy established by our forefathers.

Rights Under Surety Law

Rights under surety law evolved from the premise that a surety agreement is a preconceived guarantee. The principle of the contract is promising and guaranteeing fulfillment of the obligations that are stated in the contract. The principle is making representations that are an inducement to the third party (the surety) to enter into the contract in the first place. It is natural and proper to expect the principle to live up to this commitment. The courts and the system should stand on the side of commitment and do everything in its power to see that the principle is made to uphold the agreement and commitment that was entered into. Thus the laws of subrogation are born and broad powers and inherent rights under suretyship are made into law, all garnering the idea that one must live up to their commitments.

Surety vs. Insurance

There is clear distinction between surety and insurance. With insurance there is an anticipated loss and the concept is, spreading the losses of the few among the many. Therefore, insurance companies set up reserves based on actuarial calculations and they pay their losses (insurance policy claims) from those funds. On the other hand, a Surety will not suffer a loss. When the principle violates the conditions of the bond, after having guaranteed not to, it is right and proper for the Surety to take measures to recover the loss or force the Principle to live up to the commitment previously made in an attempt to mitigate the loss.

PURPOSE OF BAIL

The purpose of bail is inherent; our approach is not. When a person is charged with a crime and guaranteed the presumption of innocent until proven guilty, that person has a right to "non-excessive bail," according to the Eighth Amendment to the Constitution. The purpose of bail is to guarantee that the individual admitted to bail will appear in court to answer to the charges until full discharge of the matter(s) pending.

It is a state's responsibility to present a case that will show a defendant guilty beyond a reasonable doubt. Since a state will be bringing witnesses and evidence to show guilt, the defendant is considered better able to prepare a case to counter a state's case if the defendant is free during the pretrial process. The presumption of innocence is guaranteed by our Constitution. One would be hard pressed to find a prosecuting attorney that believed the defendant they are prosecuting is truly innocent of the crime. It is their position to represent the state and the citizens against persons charged with a crime. It is their duty to follow the outline of the law with the eventual goal of having the evidence to convict the person charged. It is an adversarial system and the defendant is not without the knowledge that capable prosecutors will be effective in producing evidence for a conviction. It is imperative that we have a criminal justice system that will assure the appearance of all defendants.

Today we also realize there can be a serious overcrowding situation in our jails. This has caused many government leaders to seek alternatives to relieve the problem. Unfortunately, the problem has historically been approached in an illogical manner that has made our jails into a breeding ground for crime and the decay of any respect for our judicial system.

Secured vs. Non-Secured Release

To gain a better understanding on the concept of secured vs. non-secured release, consider the idea of accountability. If a small child deliberately broke his sister's favorite toy the parents would invariably take some form of action. The approach of the parents to the problem will depend on the age of the child and the child's level of understanding of their actions. It is safe to say that not one single responsible parent would choose to say or do nothing since it would not be in the best interest of the child. The offending child would learn that there are no consequences to such behavior and could adopt a belief system that the authority figures (the parents) could care less about inappropriate behavior. What if the scenario of breaking a toy happened a second time? Inappropriate behavior is likely to happen a second and even a third time if there are no consequences or sanctions imposed the first time. The same principle of accountability applies within our criminal justice system.

We as a collective society have made it extremely easy for an accused person to obtain release following an arrest. In fact, we have designed the pretrial release process in such a fashion there is little incentive for a defendant in a criminal matter to appear in court where they would face accountability for their actions. This easy release procedure can send a clear message that society does not care about inappropriate behavior because there is no follow-up when a defendant does not appear in court.

This situation has created a growing and serious problem, which is not easily solved. What may have been unacceptable behavior years ago is acceptable behavior today and the trend continues to move steadily downward. Judges have been quoted as saying, "Things are out of control." It is all contributable to those in authoritative positions condoning the deviant behavior of criminal offenders. The very people who are in a position to make changes, i.e. the judiciary and the legislators, should send a clear message to criminal offenders that they will be held accountable for inappropriate behavior.

In many instances, there is no one to actively seek dangerous felons who are released pretrial at the taxpayer's expense that then fail to appear for court or create a new criminal offense. Even though a warrant may be issued for a failure to appear, most large cities in America have literally thousands of open unserved warrants, as over-burdened law enforcement is focused on closing criminal cases. Taxpayer-funded pretrial release programs have neither the legal authority nor any incentive to bring defendants back to jail for failure to appear or a new criminal offense. Most taxpayer-funded pretrial release programs in the Untied States were designed in the 1960's as an alternative to assist in the release of indigent first-time offenders accused of non-violent crimes. Over the past thirty years, these programs have outgrown their original purpose and today are releasing serious and repeat offenders, many of whom are not indigent, on the taxpayer's money. These taxpayer-funded programs often state one of their main functions is to serve as a mechanism for relieving over-crowded jails.

However the release of an offender accused of a serious or violent crime, without requiring a secured bond to be posted to guarantee their appearance in court, shows disrespect for law enforcement, our justice system and our society on the whole.

A defendant released on unsecured bail poses no financial responsibility for their behavior with little to no penalty for a failure to appear. With secured financial release on a bail bond, a third-party professional, the licensed bail agent, assumes the financial responsibility for ensuring the defendant appears at all required court proceedings or is required to pay the full amount of the bond to the court. Bail agents assess risk on every defendant and often take additional collateral to ensure court appearance. Indemnitors are also often required on a bail bond as an added level of financial security. Indemnitors provide a critical source of knowledge to bail agents, which enhances commercial bail's effectiveness and ability to proactively manage risk.

The next section reviews the various pretrial release options available to judges and magistrates. As you learn about each option ask yourself these three questions;

- Does the means of release encourage family involvement?
- Is there any incentive for a defendant to appear in court?
- Is there any inherent means to hold the defendant accountable?

It is imperative to answer all of these questions in the affirmative if society is to hold criminal defendants accountable for their actions and to maintain respect for the judicial system.

TYPES OF BAIL

Pretrial Release Options

Note: Each state has its own laws governing pretrial release. At this point the instructor would inject state appropriate laws into the curriculum.

Unsecured Release:

- **Release on own recognizance (commonly referred to as ROR):**
  This release is a personal promise by the defendant to appear in court as directed. The court may also impose conditions with such release (no contact with victim, curfew etc.). However there is no one to find the defendant if they fail to appear for court.
- **Release on unsecured financial bail:**
  Defendant promises to appear for court and upon a failure to appear, he/she is obligated to pay the full amount of the bond to the court.

It is common knowledge that some courts view the deposit bail system, or ten percent system, as revenue generating, since the court retains ten percent of the bond upon a failure to appear. The reality is that the court in the end collects approximately one percent vs. ten percent when taking into account the payment of administrative and court fees. More importantly, a bond is supposed to be for guaranteeing the appearance of a defendant and not revenue for a state. In a Michigan appeals case, People vs. Kang, the writer of the majority opinion stated:

> ***"It is well settled that the purpose of a bond is to assure the appearance of a defendant and not to collect revenue"***

Who is responsible for the apprehension and extradition of an absconded defendant on unsecured release?

For release on ROR, it is the responsibility of the police and/or the sheriff to apprehend a defendant who has failed to meet a court appearance. If the defendant is apprehended out-of-state, it is then the responsibility of the State Attorney's office to initiate proceedings relative to the state laws for interstate extradition. It is usually the responsibility of the sheriff to transport a fugitive back to the applicable jurisdiction with the cost beard by the taxpayer.

Release on a ten percent bond again burdens the responsibility of apprehension on the police and/or the sheriff to apprehend a defendant who has failed to meet a court appearance. The cost is borne primarily by the county with a small reimbursement from the ten percent bond that was posted and was subsequently forfeited. Unless the bond is large enough, the ten percent forfeiture payment is not enough to reimburse that county for costs, especially if extradition is required from another state.

Unfortunately, many criminal defendants who have an active warrant and are found in another jurisdiction are not extradited to the original jurisdiction. Despite that fact a valid warrant mandates a defendant to be brought before the court, many warrants are literally ignored because of expense to the state to extradite. This situation has continued to erode judicial respect and accountability on the part of the criminal offender.

*Secured release***:**

- **Release on a property bond:**
  This type of release involves pledging to the court property owned by the defendant and/or family and friends to secure the defendant's release and appearance at all required court proceedings.
- **Release on cash bail:**
  Defendant posts the full amount of the bond in cash with the court, which is returned for appearance at all required court appearances.
- **Release on surety bail:**
  Defendant is released via a private party, typically a qualified insurance company called a "surety," which guarantees the appearance of the defendant in court. If there is a failure to appear, the surety pays the court the full amount of the bond.

This type of release involves the use of a professional bail agent. In the instance of a $5,000.00 bond, the bail agent would charge a fee (the fee is set by state law, usually ten percent of the amount of the bond) as a consideration for posting the entire $5,000.00 bond. The bail agent posts the bond in the form of a surety contract with the court. In most cases, the family and/or friend will be involved in the process and will act as an indemnitor to secure the $5,000.00 bond. If the defendant fails to appear, the indemnitor will pay the $5,000.00 to the bail agent to be paid to the court.

Since the bail agent generally does not personally know the defendant, a responsible third-party that does know that defendant signs a contract thereby being responsible for the entire amount of the bond. The obvious logic is if a family member or close friend of the defendant is willing to stand behind the bond agreement monetarily, it is safer to conclude that the defendant will probably meet the court obligations. Conversely, if those close to the defendant are not willing to engage in a monetary commitment, it would be safe to conclude that the defendant cannot be trusted to meet his/her court obligations. This method has proven to be a reliable means of establishing whether or not a defendant will appear for court.

Who is responsible for the apprehension and extradition of an absconded defendant on a secured release?

For release on a property bond, the family member and/or friend stand to lose in the forfeiture process if the defendant fails to appear. This produces a lot of incentive on the part of the individual that pledged the property to assist the bail agent in locating the missing defendant so an apprehension can be affected. Some states do not provide any statutory authority for the apprehension of an absconding bail jumper. In such situations reliance once again falls on the police and sheriff. The court generally does not forfeit the property but does try to collect any costs incurred.

For release on a cash bond, the situation is the same as above. The only difference being is that the court already has possession of the full amount of the bail. If the bail is large enough, the court can cover the costs incurred by the county.

For release on a surety bond, it is the responsibility of the surety (the bail agent) to locate, apprehend and usually transport or arrange to extradite the defendant back to the jurisdiction from which he fled. The entire amount of cost is borne by the bail agent or his/her bail agency. The taxpayer is not responsible.

MITIGATING LOSSES BY THE SURETY

The release of an accused to his/her surety is considered to be an extension of the original incarceration. This manner was brought forth in a Supreme Court case under Taylor vs. Taintor, 83 U.S. 366 (December Term 1872), which reads, in part:

> **"*When bail is given, the principle 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 in their discharge; 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 agent. 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. That seizure is not made by virtue of new process. None is needed. It is likened to the re-arrest by the sheriff of an escaping prisoner."***

There has been a shift to the 'left' regarding universal acceptance of this old ruling. Since the Miranda case developed, it is clear that the rights of the defendant have become paramount. This has created problems and resentment amongst proponents of victims' rights who have, in recent years, accused the judicial system of being more concerned with criminal rights than with victims' rights.

The shift to a defendant's rights at the pretrial stage in regards to absconding has in various parts of the country caused problems for the surety in fulfilling its obligations to the courts they serve. There have been incidents in which bail agents or enforcement agents have been arrested for apprehending defendants who have absconded and then subsequently charged with kidnapping. Although these are isolated cases, it is yet another example of the erosion of respect for the original commitment entered into by the defendant.

Statistical Effectiveness in the Pretrial Options

There are several comprehensive studies that show the effectiveness of each pretrial release option. They all have surprising results that clearly depict the most effective means of release at the pretrial stage. The results are surprising because of a premise that is logical, yet proven to be invalid in all three studies. The premise is:

> *Criminal defendants that have shown an element of responsibility and/or who have community ties are considered to be a good risk when considering their likeliness to appear in court, therefore the least burdensome means (to the defendant) of release should be granted.*

Unfortunately, the jail overcrowding problem has caused a re-assessment of the processes within the criminal justice system. Pretrial release methods are no exception; what was once a temporary solution to the overcrowding jail problem has exacerbated and created new problems.

Many academic studies show that the most trusted defendants failed to appear in excess of twenty-five percent of the time throughout major cities. This means that defendants who were released on an unsecured bond simply failed to appear as directed. Defendants that were deemed un-reliable to appear in court were forced to post some type of secured bail, which resulted in an appearance rate of over ninety-five percent of the cases studied. This equates to a less than five percent failure to appear rate for defendants who were considered to be a high-risk for release and a twenty-five percent failure to appear rate for defendants who were considered to be a low-risk.

It should be noted that the state of California banned the use of "easy release" in the form of a ten percent bond due to the fact that sixty-five percent of defendants were failing to appear in various areas for minor crimes. This is an interesting phenomenon and thus the need to understand why such was happening. For example, defendants who are believed that they can be trusted to appear are given easy release options yet then fail to appear in court when scheduled. Defendants who are believed will not appear in court are appearing after posting a more difficult form of release (such as with surety and cash bonds). What is causing this reversal in anticipated effectiveness during the pretrial release process?

Remember the example used of children not being held accountable for their actions? Well the same concept holds true whether dealing with a child or with an adult. However in the criminal justice system, most people know there will be consequences for not adhering to conditions of release under a secured release method. Neither the defendant nor a defendant's family wants to lose any money, so the defendant will frequently appear for all court hearings. Even a high-risk defendant will appear in court when a bond is secured and the family is involved.

This fact is proven by three academic studies conducted on pretrial release methods: one by the Bureau of Justice Statistics, the second by the National Center for Policy Analysis and the third by the American Legislative Exchange Council. The results of these studies clearly cite the effectiveness of *secured release* by a surety as opposed to *unsecured release* by the government. The studies are comprehensive and the methodology used varies only slightly from each study. Each study came to the same conclusion: significant superior performance results when private secured release is utilized.

The two main areas that the studies clearly reinforce include the greater effectiveness of using the private secured release method and the significant effect on the appearance rate and the recidivism rate. With private secured release, the appearance rate is significantly higher and the recidivism rate significantly lower. This is a critical aspect of our criminal justice system that is repeatedly ignored by liberal bureaucrats. It is not difficult to understand why these studies substantiate the in-effectiveness of liberal release procedures and clearly shows the effectiveness of the private sector release process.

Effectiveness vs. Cost of Each Pretrial Release System

In the History of Bail section, the process leading to suretyship was discussed. Our criminal justice system in the early days was unsophisticated and the needs of society were met through relationships and interaction. As time progressed and agreements became more formalized, so did the need to guarantee commitments. This led to the establishment of the commercial surety system, which was a user-funded system. Through time and the need for government to address programs to assist the indigent in the criminal justice system, coupled with a defendant's rights mandated by the Miranda Rule, the stage was set for government to exceed its original intent in the pretrial release arena.

As indicated earlier, pretrial release programs were originally set up with the mission creating a fairer criminal justice system and to assist individuals who were truly indigent and charged with non-violent crimes to be released from jail. Today taxpayer-funded pretrial release programs are being established all over the country and have exceeded their original intent.

As noted, there is a direct contrast between the various means of releasing defendants during the pretrial process and the effect on failure to appear and recidivism rates. The private surety bail system has time and time again been shown to be the most effective and efficient means of pretrial release and use no taxpayer funds.

Professionalism in the Bail Industry

Many professions have stereotypes attached to it. Used car salesmen are the most prominent example of a profession that is portrayed as someone who is a "fast talking shyster." So too, the profession of a bail agent, or bail bondsman, has had a stigma attached to it through years as someone who is like a "flashily dressed mobster." In reality, nothing could be further from the truth. Bail agents are regulated and licensed by each state's Department of Insurance, must be appointed by a bail surety company to write bail, are required to take continuing education courses to maintain their bail license, must keep meticulous records years after a bail transaction and undergo market conduct exams to review the bail agent's risk assessment procedures and ensure the defendant's financial rights are protected.

Another area that has produced detrimental influences on the image of the bail industry is the fugitive recovery aspect. In recent years there has been an influx of in-experienced individuals desiring to be a recovery or bail enforcement agent without comprehensive training and experience. Liability factors are often too great for a bail agent to utilize such individuals unless they are personally known to the bail agent.

Facts and Fallacies of the Bail Industry

Parts of the criminal justice system, namely those parts that support a non-secured taxpayer-funding release process, portray the private bail industry and bail agents as being "greedy" and "preying" on defendants within the system.

In reality, the private bail system has been proven again and again to be the most effective and efficient means of pretrial release. The private bail system offers many layers of financial commitment from the surety on the bond, the agent's contract with the surety, the bail agent's own funds housed within the surety and third-party indemnitors on the bond. Economic savings results to the taxpayer's from lower failure to appear and recidivism rates and increased fugitive recovery. Each bail bond written results in payment of insurance premium taxes back into county and state coffers. Most importantly, the private bail system is user-funded and not taxpayer-funded.

Bail agents believe that the pretrial release process should not be the responsibility of the state, but the responsibility of the user. Additionally, family involvement introduces the single most important element in securing a defendant's appearance in court; the potential of monetary loss to the family. Any unsecured release system eliminates this element and places the entire burden of apprehension and extradition on the taxpayers.

THE BONDSMAN'S RIGHT TO ARREST

By: Inspector Charles A. Donelan, Federal Bureau of Investigation (taken from the FBI Law Enforcement Bulletin, December 1972 and January 1973) and reprinted with permission.

An odd byway of arrest law, which arouses the curiosity of the professional law enforcement officer is the right of bondsmen to arrest a person who has been admitted to bail pending trial. The reason it stirs his interest is plain. In the words of the Supreme Court of the United States:

> ***"No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference, unless by clear and unquestioned authority of law***

To find the origin and nature of the bondsman's right to arrest under authority of law, we must go back, as in so many other aspects of arrest law, and the Common Law of England.

Purpose of Bail

The principle of bail is basic to our system of justice and its practice, as old as English law itself. When the administration of criminal justice was in its infancy, arrest for serious crime meant imprisonment without preliminary hearing and long periods of time could occur between apprehension and the arrival of the King's Justices to hold court. It was therefore a matter of utmost importance to a person under arrest to be able to obtain a provisional release from custody until his case was called. This was also the desideratum of the medieval sheriff, the local representative of the Crown in criminal matters, who wore many hats including that of bailing officer. He preferred the conditional release of persons under arrest to their imprisonment for several reasons.

It was less costly and troublesome; the jails were easy to breach and under then existing law the jailer was hanged if a prisoner escaped; the jails were dangerous to health and, as there was no provision for adequate food, many prisoners perished before the trial was held. Influenced by factors such as these, the sheriff was inclined to discharge himself of the responsibility for persons awaiting bail by handing them into the personal custody of their friends and relatives. Indeed, in its strict sense, the word bail is used to describe the person who agrees to act as surety for the accused on his release from jail and becomes responsible for his later appearance in court at the time designated.

As surety, the bail was liable under the law for any default in the accused's appearance. Between the 13th and 15th centuries the sheriff's power to admit to bail was gradually vested, by a series of statutes, in the justices of the peace. In the case of a person committed for a felony, the justices of the peace had authority to require, if they thought fit, his remaining in jail until the trial took place, but, on the other hand, a person committed for trial in a misdemeanor case could, at common law, insist on being released on bail if he found sufficient sureties. Writing in the mid-1700's, Blackstone described the arrest-bail procedure of his day in the following passage:

"When a delinquent is arrested…he ought to regularly be called before a justice of the peace…if upon…inquiry it manifestly appears that either he be committed to prison or give bail; that is, put in securities for his appearance to answer the charge against him. This commitment, therefore, being only for safe custody, wherever bail will answer the same intention it ought to be taken…Bail is…a delivery or bailment of a person to his sureties, upon their giving (together with himself) sufficient security for his appearance; he being supposed to continue in their friendly custody, instead of going to gaol."

The notion of bail pending trial has not changed over the centuries. Justice Robert I. Jackson of the Supreme Court in discussing its purpose said:

"The practice of admission to bail, as it evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Without this conditional privilege, even those wrongfully accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense…Admission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the price of our system of justice."

The possibility that the accused may flee or hide is squared with the traditional right to freedom pending trial. In order to reconcile these conflicting interests, therefore, his release on bail is conditioned upon his giving reasonable assurance in one form or another that he will appear at a certain time to stand trial. In this regard, the Supreme Court has remarked:

"Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as an additional assurance of the presence of the accused."

Modern statutes, which regulate bail procedures in detail today and vary from jurisdiction to jurisdiction, provide that an accused may be set at liberty pending trial in several ways. For example, he may be released without security by agreeing in writing to appear at a specified time and place, i.e., "on his own recognizance" or he may execute a bond with a deposit of cash or securities in an amount equal to or less than the face amount of the bond; or he may execute a bail bond which requires one or more sureties.

The Bail Bond

A bail bond is a three-party contract between the government, the defendant, and his sureties. Under the contract the accused is released into the custody of the sureties on their promise to pay the government a stated sum of money if the accused fails to appear before the court in accordance with its terms.

Historically, the contract of bail, traced to a gradual increase of faith in the honor of a hostage and the consequential relaxation of actual imprisonment, constitutes one of the first appearances of the concept of contract in our law. The early contract of bail differed from the modern bail bond in its mode of execution, as it was simply a solemn admission of liability the sureties made in the presence of an officer authorized to take it. No signature on the bail was required, and it was not necessary for the person bailed to bind himself as a party. The undertaking to forfeit a particular sum in a written bail bond came later in the course of time.

The purpose of a bail bond with sureties is to insure that the accused will appear in court at a given time by requiring others to assume responsibility for him on penalty of forfeiture of their property. In times past, especially, when the sureties were friends and relatives of the accused, it was assumed that due to this personal relationship the threat of forfeiture of the surety's property would serve as an effective deterrent to the accused's temptation to break the conditions of the bond by flight. On the other hand, it was assumed that this threat would also inspire the surety to keep close watch on the accused to prevent his absconding.

On a bail bond, the accused and the sureties are the obligors, the accused being the principal, and the government is the obligee. In the event the conditions of the bail bond are satisfied the obligation is void. The accused and his sureties are exonerated; and any cash or other securities deposited are returned to them. If there is a breach of the bail bond's conditions, however, the obligation remains in full force, and the accused and his sureties are liable to the government for the sum stated. A forfeiture of the bond will be declared on default; but in the interests of justice the forfeiture may be set aside or, if entered, its execution may be stated or the penalty remitted. For example, the surrender of the principle after the forfeiture does not discharge the surety but nevertheless the court may receive the surrender and remit the penalty in whole or in part.

As in the past, the sureties on a bail bond in England are still friends and relatives of the accused. Consequently the relationship between them remains personal and the accused natural sense of moral obligation to satisfy the conditions of the bond is strong. As a result the English experience has been, on the whole, that very few persons admitted to bail fail to appear for trial.

In the United States, however, this close relationship has generally yielded to a distant impersonal connection and the moral obligation has become in the main a financial one. More often than not the sureties on a bail bond are surety companies and professional bail bondsmen who operate on a broad scale and charge fees for their services which may not only be large but also irretrievable regardless of whether the accused appears.

Under the traditional view taken in England, bail is not a mere contract of suretyship and the accused is not allowed to indemnify the bail. In fact it has been held that any arrangement between the accused and its sureties to the affect that he will indemnify them if he absconds is so contrary to public policy that it is void as an arrangement and, moreover, is indictable as a conspiracy to pervert the course of justice. This view contrasts with that taken in the United States where an express agreement by the principle to indemnify the surety on forfeiture of a bail bond is not so regarded. Thus, in a Supreme Court case, where the argument was made that it was contrary to public policy to authorize a principle to contract to indemnify his surety in a criminal case since it would destroy the effective safeguards provided by the watchfulness of the bail, Mr. Justice Oliver Wendall Homes stated:

> ***"The ground for declaring the contract invalid rests rather on the tradition than on substantial realities of the present day. It is said that…nothing should be done to diminish the interest of the bail in producing the body of the principle. But bail no longer is the 'mundium', although a trace of the old relation remains in the right to arrest. The distinction between bail and suretyship is pretty near forgotten. The interest to produce the body of the principle in court is impersonal and wholly pecuniary. If, as in this case, the bond was for $40,000, that sum was the measure of the interest on anybody's part and it did not matter to the Government what person ultimately felt the loss, so long as it had the obligation it was content to take."*** **(emphasis added)**

Despite the tenor of the foregoing passage, courts still stress the need for a moral as well as financial assurance of the accused appearance in court. For example, in a case where the bail offered was a certified check from an individual, the Federal Court of Appeals for the Second Circuit in requiring disclosure of the source of the funds on which the check was drawn declared:

"The giving of security is not the full measure of the bail's obligation. It is not the sum of the bail bond that society asks for, but rather the presence of the defendant… If the court lacks confidence in the surety's purpose or ability to secure the appearance of a bailed defendant, if may refuse its approval of a bond even though the financial standing of the bail is beyond questions."

Origin, Basis, and Scope of Right to Arrest

What is the origin and basis in the law for the bondsman's right to arrest a person admitted to bail pending trial – in Justice Holmes' phrase this "trace of the old relation" between accused and surety which still remains? It is bottomed on the common law principle that the accused is transferred to the friendly custody of his sureties and is at liberty only by their permission.

At the time of the Norman Conquest of England, the sureties for the accused were compared to his jailers and were said to be "the Duke's living person." This relationship between them has been described in the cases since those days in picturesque language. For example, it has been said: "(The principle is, in the theory of the law, committed to the custody of the sureties as to jailers of his own choosing," "The bail have their principle on a string, and may pull the string whenever they may please." Thus, in legal contemplation, when the accused is released on bail, his body is deemed to be delivered to his sureties. The contract of bail, "like debt as dealt with by the Roman Law of the Twelve Tables…Looked to the boy of the contracting party as the ultimate satisfaction."

In early times, bail implied a stringent degree of custodial responsibility and the sanction of the law for any failure on the part of the sureties was harsh. When the accused was released on bail he and his sureties were said to be bound "body for body." As late as the 14th century an English judge, after noting that bail were the accused's keepers, declared that it had been maintained that the accused escaped the bail would be hanged in his place. But, on the other hand, it seems that during the previous century sureties who failed to produce their man in court got off with a fine, all their chattels theoretically being at the King's mercy.

In a modern case the responsibility of the sureties has been described as follows: "If the defendant had been placed in the jail, he could at any time on the call of the case have been brought into court for trial. The bondsmen are as the four walls of the jail, and in order to fully discharge their obligations they are obliged to secure their principal's presence and put him as much in the power of the court as if he were in the custody of the proper officer." As to the modern sanction of the law, of course, if the accused flees and fails to appear in court at the required time, the bail bond is forfeited and the surety is absolutely liable to the government as a debtor for the full amount of the penalty.

With such a stern responsibility of safe keeping too insure that the accused answered the call of the court, it followed in reason that the law would afford the means to carry it out, as the practical common law did, by recognizing a right of arrest in the bondsman. Although the right arises from the theory of the sureties custody - i.e., the principal is "so far placed in their power that they may at any time arrest him upon the recognizance and surrender him to court," for exoneration - it also bears a resemblance to the right of arrest which existed under the medieval frank-pledge system of law enforcement. That system designed to keep the King's Peace, was one of mutual suretyship with each man responsible for the good conduct of the other nine members of his tithing, and with each having the duty to aid in the capturing of fugitives from justice. The resemblance is close, for up to the early decades of the 13th century prisoners were often handled over to a tithing, and sometimes a whole township was made responsible for their appearance before the court.

The scope of the bondsman's right to arrest the accused, based on the metaphysical link that binds them, was viewed by the Supreme Court of the United States in the course of its opinion in the interesting case of Taylor vs. Taintor. In this case, which will be discussed below, the court said:

> ***"When bail is given, the principle 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 agent. 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 re-arrest, by the sheriff, of an escaping prisoner."*** **(emphasis added)**

As to the above mentioned right of a surety to arrest by means of an agent, it has been held in that surety, in the absence of statutory limitations, may deputize others of suitable age and discretion to take the prisoner into custody, but the latter authority may not be delegated. Where there are statutes that provide the manner in which the power of arrest may be delegated by the bail bondsman, that provision must be followed or the arrest is invalid. In some jurisdictions, a statute provides for an arrest by the sheriff on a direction of the bail endorsed on a certified copy of the recognizance.

Where the surety on a bail bond procures the re-arrest of his principal by a sheriff or other peace officer, it is the general rule that the officer is empowered to make the arrest as an agent of the surety and not as an officer "per se." Where a statute prescribes the formalities to be followed before an arrest may be made by a peace officer as an agent of a surety, compliance with the statue is necessary for a lawful arrest.

As to the above mentioned right of a surety to pursue his principle into another state, it has been held that, just as the surety can arrest the and surrender the principal without resort to legal process when the latter remains within the jurisdiction, he can pursue him into another State to arrest him, detain him, and return him to the State whence he fled and where the bail bond was executed, and his presence is required. A surety has the right at any time to discharge himself from liability by surrendering the principal before the bail bond is forfeited and can arrest him for that purpose.

His right to seize and surrender the principal is an original right, not a right delivered through the state, which arises from the undertaking in the bail bond and the relationship between the principle and the bail. It is a private right and is not a matter of criminal procedure, jurisdiction does not enter into the question; and there is no obstacle to its exercise wherever the surety finds the principal. The surety's right in such a case differs from that of a state who desires to reclaim a fugitive from its justice in another jurisdiction. In default of a voluntary return, the state can remove a defendant from another state only by the process of rendition (extradition) and must proceed by way of extradition, which can only be exercised by a government.

The case of Taylor vs. Taintor, noted above, which was decided by the Court in 1873, dealt with the problems raised by the interstate travel of the principal on the bail bond and the liabilities on the surety agent in that regard. The holding of the court was that where a principal was allowed by his bail to go into another state, and while there, was delivered upon a requisition from a third State upon a criminal charge committed in that state, such proceedings did not exonerate the bail.

The case arose in the following manner: A man named McGuire was charged, by information, with the crime of grand larceny in Connecticut and arrested upon a bench warrant. The court fixed the amount of bail to be given at $8,000. McGuire was released from custody on a bail bond in that sum, with the two sureties, conditioned that he appear before the court on a set day the following month.

After his release on bond, McGuire went to New York where he lived. While he was there however, he was seized by New York officers upon the strength of a requisition made upon the Governor of New York by the Governor of Maine charging McGuire with a burglary, alleged to have been committed by him in the latter State before the Connecticut bail bond was taken. Subsequently, McGuire was delivered to Maine officers who removed him against his will to that State where he was later tried and convicted on the burglary charge.

When, due to the New York arrest and removal, McGuire failed to appear before the Connecticut court on the appointed day, his bail bond was forfeited. Neither of his sureties knew when they entered on the bond that there was any criminal charge against McGuire other than the Connecticut grand larceny. The treasurer of the State of Connecticut successfully sued to recover the amount of the bail bond and the State high court, and ultimately the Supreme Court of the United States, affirmed the judgment.

In reaching this conclusion, the Court declared at the outset that according to settled law the sureties will be exonerated when the performance of the condition of a bail bond is rendered impossible by the act of God, the act of the obligee (The State), or the act of the law. On the other hand, it is equally settled that if the impossibility is created by the sureties, the right of the State are in no way affected.

As to exoneration by "the act of the law" the Court explained, the sureties will be exonerated if the principal is arrested in the state where the obligation is given and is sent out of that State by the Governor upon the requisition of the Governor of another State. In so doing, the Governor represents the sovereignty of the State; the State can no longer require the principal's appearance before the court, and the obligation it has taken to secure his appearance loses its binding effect. But if the principle is imprisoned in another State for the violation of the law of a criminal law of that State, the principal and his sureties will not be protected.

The law, which renders the performance impossible, and therefore excuses failure, must be a law operative in the state where the obligation was assumed and which is obligatory in its effect upon her authorities. The Court stated that where a demand is properly made by the Governor of one state upon the Governor of another, the duty to surrender a fugitive is not absolute and unqualified. It depends upon the circumstances of the case. If the laws of the latter state have been put in force against the fugitive, and he is imprisoned there, the demands of those laws may first be satisfied. The court noted that bail might doubtless permit the principal to go beyond the limits of the State within which he is to answer. But it is unwise and imprudent to do so because if any evil ensues, the bail must bear the burden of the consequences and cannot case them upon the state.

After laying out the foregoing principles, the Court declared that the sureties in this case were not entitled to be exonerated because:

1. When the Connecticut bail bond was forfeited for the nonappearance of McGuire, the action of the Governor of New York, pursuant to the requisition of the Governor of Maine, had spent its force and had come to an end. McGuire was then held in custody under the law of Maine to answer to a criminal charge pending there against him, a fact that, as explained above, cannot avail the sureties.

2. If McGuire had remained in Connecticut, he would probably not have been delivered over to the Maine authorities, and would not have been disabled to fulfill the condition of his obligation. If the demand had been made upon the Governor of Connecticut, he might properly have declined to comply until the criminal justice of his own State had been satisfied. It is not to be doubted that he would have exercised this right, but had he failed to do so, the obligation of the bail bond would have been released. But here, the sureties were at fault for McGuire's departure from Connecticut, and they must take the consequences. Indeed, their fault reached further for, having permitted McGuire to go to New York, it was their duty to be aware of his arrest when it occurred, and to interpose their claim to his custody.

3. When McGuire was arrested in New York the original imprisonment under the Connecticut information was continued. The prosecution in Connecticut was still pending and any other tribunal could not suspend its court's jurisdiction. Though he was beyond the jurisdiction of Connecticut, McGuire was still, through his bail, in the hands of the law of that state and held to answer for the offense with which he was charged. Had the facts been made known to the Governor of New York by the sureties at the proper time, it is to be presumed that he would have ordered McGuire to be delivered to them and not the authorities of Maine.

4. The act of the Governor of New York in making the surrender was not "the act of the law" within the legal meaning of those terms. In the view of the law, it was that act of McGuire himself. He violated the law of Maine, and thus puts in motion the machinery provided to bring him within the reach of the punishment for his offense. But for this, such machinery, so far as he was concerned, would have remained dormant. McGuire cannot be allowed to avail himself of an impossibility of performance thus created. What will not avail him cannot avail his sureties. His contract is identical with theirs. They undertook for him what he undertook for himself.

5. The constitutional provision and the law of Congress, under which the arrest and delivery of McGuire to Maine were made, are obligatory upon every state and are a part of the law of every state. Every Governor, however, acts separately and independently for himself. In the event of refusal, the state making the demand must submit. There is no alternative. But in McGuire's case no impediment appeared to the Governor of New York, and he properly yielded obedience. The Governor of Connecticut, if applied to, might have intervened and by a requisition have asserted the claim of Connecticut. It would have then been for the Governor of New York to decide between the conflicting demands.

The Court concluded by noting that the State of Connecticut was not in any sense a party to what was done in New York and that if McGuire had been held in custody in New York at the time fixed for his appearance in Connecticut, it would not in any way affect the obligation of the bail bond.

Statutes Declamatory of Common Law Right

Modern statutes provide for the right of a surety to arrest an accused on a bail bond, thus preserving by legislation the authority first granted by the medieval common law. Under the Federal Statute declatory of this right, any accused charged with a criminal offense who is released on a bail bond with sureties may be arrested by the surety, delivered to the U.S. Marshal, and brought before any judge or officer empowered to commit for such offense. At the request of the surety, such judicial officers may recommit the accused to the custody of the Marshall and endorse on the bond the discharge and exonerator of the surety. There the accused may be held in custody until discharged in due course of law.

In regard to the bondsman's ancient right of arrest, it is noted that when the State of Illinois enacted new bail statutes in 1963, aimed at rectifying abuses of the professional bail bondsman system and reducing the cost of liberty to accused persons awaiting trial, the primary argument advanced in favor of retaining the system was that the bondsman would, at his own expense, track down and recapture a defendant who jumped bail. The Illinois Legislature, however, found that this argument had only tenuous support as its "Committee Comments" included the following statement:

> ***"As to the value of bondsmen being responsible for the appearance of accused and tracking him down and returning him at the bondsman's expense – the facts do not support this as an important factor. While such is accomplished occasionally without expense to the county, the great majority of bail jumpers are apprehended by the police of this or other states…"***

Bail Jumping Statutes

The penalties of the common law designed to insure the appearance in court of an accused out on bail and to deter him from absconding were limited to forfeiture of the bail bond and contempt of court. These traditional sanctions, however, have been supplemented and bolstered in some jurisdiction through the power of the criminal law legislative enactment of so-called bail jumping statutes. Under these laws the accused is subjected to the criminal punishments of fine and imprisonment for breaching the conditions of his release by willful failure to appear.

Such statutes are of comparatively recent vintage. For example, the New York law, said to be the first in the country, was passed in 1928, and the Federal Statute was enacted in 1954. The purpose of these penal laws is to improve the administration of justice by creating a personal deterrent to the flight of those who may prefer to forfeit bail; for example, those who desire to purchase their freedom for the price of a bail bond, or those who feel no financial deterrent as they expect the ultimate loss to fall on impersonal sureties.

Under these statutes aimed at the bail jumper and the general elements are: That a person has been admitted to bail; that he willfully failed to appear; and that he did not appear and surrender himself within the specified period after the forfeiture. The offense may be a felony or a misdemeanor in grade depending upon that of the original offense for which the bail was given.

Thus, the Federal statute provides that anyone released on bond that willfully fails to appear as required shall incur a forfeiture of any security given or pledged for his release. In addition, if he was released in connection with a charge of felony, he shall be fined not more than $5000.00 or imprisoned not more than 5 years, or both. If he was released in connection with a charge of misdemeanor, he shall be fined or sentenced to not more than 1 year, or both.

Conclusion

Since the flight of the accused condemned by the bail jumping statutes is a criminal offense, the offender is subject to arrest by the professional law enforcement officer just like any other person who violates the penal code of jurisdiction. But whether the arrest of a person released on bail, who willfully fails to appear in court when required, is made by an officer of the law pursuant to the provisions of the foregoing type of criminal statute, or under the traditional command of the court, or is effected by a bondsman under the ancient right of arrest at common law, the apprehension of the absconded serves the same vital end. Like any proper arrest, it is the initial step in the administration of justice ultimately "intended to vindicate society's interest in having its laws obeyed."

GLOSSARY OF TERMS

- **Abscond:** To travel covertly out of the jurisdiction of the courts, or to conceal oneself in order to avoid their process.
- **Actuarial:** Computation of various insurance and property cost.
- **Adversarial:** The party on the opposite side of litigation.
- **Breach:** Violation of a legal obligation, promise, contract term, etc.
- **Indemnitor:** A person that agrees to make good to another for loss caused by a third party.
- **Mitigate:** Action taken by one party in an attempt to reduce damages caused by another.
- **Personal Bond:** (Release O**N** Own Recognizance, ROR) a condition under which an individual is released in lieu of bail i.e., upon his or her promise to appear in answer to a criminal charge.

- **Pretrial Release:** The process involved in releasing a defendant charged in criminal court prior to trial.
- **Recovery Agent/Bail Enforcement Agent:** An individual charged with the responsibility of apprehending an absconded defendant.
- **Subrogation:** One's payment or assumption of an obligation for which another is primarily liable.
- **Surety:** A party (usually an insurance company) that guarantees performance on a contract
- **Surety Bond:** A bond issued by one party, the Surety, guaranteeing performance of certain acts promised by another. In a criminal case the surety bond assures the appearance of the defendant or the repayment of bail forfeited upon the defendant's failure to appear in court.
- **Ten-Percent (10%) Bond:** A provision allowing the defendant to deposit ten percent of the full bail amount with the court.