

Department of Legislative Services
Maryland General Assembly
2013 Session

FISCAL AND POLICY NOTE

Senate Bill 720

(Senator Ramirez, *et al.*)

Judicial Proceedings

Criminal Procedure - Alien Defendants - Nullity of Bail Bonds

This bill establishes that if a defendant who has posted a bail bond is taken into custody by U.S. Immigration and Customs Enforcement (ICE) or another agency of the federal government because of the defendant's immigration status (1) the bond posted by the defendant is null and void; (2) the bond must be returned to the surety and the surety may not have any liability with respect to the bond; and (3) if the surety is a compensated surety, the surety must refund any premium paid in connection with the bond within five business days after the bond is returned to the surety.

Fiscal Summary

State Effect: Minimal reduction in general fund revenues from bonds forfeited in the District Court. Expenditures are not affected.

Local Effect: Minimal reduction in local revenues from bonds forfeited in the circuit courts. Expenditures are not affected.

Small Business Effect: Potential meaningful impact on surety companies who, as a result of the bill, are not deemed in forfeiture of a bail bond when a criminal defendant fails to appear in a Maryland court because the defendant has been taken into custody by the federal government.

Analysis

Current Law: Bail is intended to ensure the presence of the defendant in court, not as punishment. If there is a concern that the defendant will fail to appear in court, but otherwise does not appear to pose a significant threat to the public, the defendant may be required to post a bail bond rather than be released on recognizance. A bail bond is the

written obligation of the defendant, with or without a surety or collateral security, conditioned on the personal appearance of the defendant in court as required and providing for payment of a specified penalty (the amount of the bail) upon default.

If the defendant uses a surety company, the company/bail bondsman executes a power of attorney with the court in an amount sufficient to cover the full penalty amount should the defendant fail to appear. In return, the surety company receives a premium from the defendant equal to 10% of the full penalty amount. Premiums paid to surety companies are nonrefundable.

If a defendant fails to appear in court as required, the court orders the forfeiture of the bond in the full penalty amount and issues a warrant for the defendant's arrest. If the defendant or surety can show that there were reasonable grounds for the failure to appear, a judge may strike the forfeiture in whole or in part. Where a surety executed the bond with the defendant, the surety has 90 days to satisfy the bond by either producing the defendant or by paying the penalty amount of the bond. The court may extend this period to 180 days for good cause shown.

If the surety does not satisfy the forfeiture within the court allotted time period, the clerk of the court must enter the forfeiture as a judgment in favor of the governmental entity entitled by statute to receive the forfeiture (usually the jurisdiction where the offense occurred) and against the defendant and the surety. The judgment is for the full penalty amount of the bond with interest and costs. Interest on the penalty is calculated at an annual rate of 10% dating back to the date of forfeiture.

Should the defendant be produced subsequent to forfeiture of the bond, the surety may seek a refund of any penalty paid, less expenses incurred by the State in apprehending the defendant. This right of remission only exists if the surety paid the forfeiture within the time limit prescribed by the court, unless the surety can prove that the defendant was incarcerated outside of the State when the judgment of forfeiture was entered and the court strikes out the judgment of forfeiture for fraud, mistake, or irregularity. If a surety appeals a forfeiture, does not pay the forfeiture in the time allotted, and loses on appeal, the surety must pay the forfeiture and loses its right to remission. Remission of a forfeited bond may occur within 10 years after the date the bond was posted.

Every quarter, the Chief Clerk of the District Court compiles and distributes a "List of Absolute Bond Forfeitures in Default" for each surety insurance company. This list contains all bond forfeitures that have ripened into judgments and remain unpaid or unsatisfied in the District Court and the circuit courts. The list is distributed to each surety insurance company and the company has to produce documentation that the forfeitures have been paid or stricken by the court within a certain number of days. If a company fails to satisfy all of the outstanding forfeitures on its list, the surety insurance

company and all of its agents (the bondsmen who write bonds on behalf of the surety) are precluded from writing any business in the State until all of the forfeitures have been satisfied, with the exception of forfeitures that have been appealed.

Background: ICE is the second largest investigative agency in the federal government and is responsible for the detention and removal of noncitizens. While immigration is controlled by federal law, the U.S. Department of Homeland Security (DHS) and ICE have begun to look to state and local law enforcement agencies as allies and as additional resources. While federal law does not mandate that state and local law enforcement agencies become involved in immigration efforts, the U.S. Supreme Court has ruled that state and local law enforcement officers may question criminal suspects about their immigration status. Local law enforcement agencies throughout the nation have often expressed reluctance in becoming involved in federal immigration enforcement because of a lack of resources and the need to maintain open relationships with members of the community so that they may effectively carry out their policing duties.

In March 2008, DHS launched the Secure Communities program. Under the program, participating correctional facilities submit the fingerprints of arrestees into traditional criminal databases and immigration databases, such as the U.S. Visitor and Immigrant Status Indicator Technology Program and the Automated Biometric Identification System. If the database indicates that the arrestee matches a record for an individual with an immigration violation, ICE and local law enforcement are automatically notified. ICE then reviews the case and the arrestee's immigration status and determines what action it wishes to take. In these cases, ICE will often issue a detainer, which is a notice by federal law enforcement requesting the detention of an individual to insure the individual's availability for any additional federal proceedings. All of Maryland's 24 jurisdictions participate in the Secure Communities program. Local law enforcement agencies (even agencies that do not participate in Secure Communities) may contact ICE to verify if there is an outstanding detainer of an individual if an individual self reports information relevant to the individual's immigration status.

An ICE detainer is a request to a local law enforcement agency to detain an individual for up to two business days after that person would otherwise be released (*i.e.*, when the individual is no longer subject to detention by local law enforcement, such as when a person posts bond or completes a jail sentence). If ICE places a detainer on an individual pretrial and the individual posts bail, the individual should be released if ICE does not take custody of the individual within this two-day time period. If ICE places a detainer before an individual has an opportunity to post bond and the individual posts bond, ICE has the authority to assume immediate custody of the individual.

The Maryland Court of Appeals is considering whether a bond should be released and a corporate surety released from liability when a defendant fails to appear due to actions of

the Department of Public Safety and Correctional Services and/or the federal government. The case (*Big Louie Bail Bonds, LLC v. State of Maryland, et al.*, No. 31, September Term 2012) involves a Baltimore-based corporate surety who is challenging whether it has to pay \$100,000 in bail forfeitures in Baltimore County after 10 of its clients were deported before their criminal trials. The lower courts ruled against the corporate surety on the premise that the surety knew or should have known that their clients had a high risk of deportation.

The State argued that the bail bondsman took a risk when he wrote the bonds for these defendants knowing that they were at risk for deportation and expressed a policy concern that absolving bondsmen from liability in these cases could create a predatory practice by allowing a bondsman to keep fees from a client after writing the bond knowing that the client was at risk of deportation. The State also mentioned steps defendants and bondsmen can take to prevent the deportation or allow the defendant to face trial.

Attorneys for the bail bondsman argued that (1) deportation does constitute “reasonable grounds” for a defendant’s failure to appear; (2) knowledge of a client’s immigration status is not a component of the current forfeiture statute; and (3) imposing liability in these cases will result in bail bondsmen refusing to write bonds for this population, even for minor offenses.

Additional issues presented at oral arguments include (1) the propriety of placing the onus of a bail forfeiture on a bondsmen when a commissioner sets bail knowing that the arrestee faces a risk of deportation and (2) whether it is the responsibility of the bondsman to advise defendants and communicate with the federal government to ensure a defendant’s appearance in court.

State Fiscal Effect: The Judiciary advises that (1) there is no notification system in place for the court to be notified by federal agencies when a defendant is taken into federal custody and (2) the nullification and voiding of bonds in these cases will have a significant operational and fiscal impact on the District Court. However, because of the significant financial consequences of a forfeited bond to a surety, it is assumed that the Judiciary will implement procedures whereby a surety will have to provide acceptable proof to the court that a defendant is in federal custody before being released from liability on the bail bond. Data is not available on the number of District Court defendants who are taken into federal custody prior to their trials and the amounts of bail forfeited in those cases. However, this number is not expected to represent a significant portion of the total number of forfeitures.

Additional Information

Prior Introductions: HB 551 of 2012 passed the House with amendments and received a hearing in the Senate Judicial Proceedings Committee. No further action was taken.

Cross File: HB 476 (Delegate Simmons) - Judiciary.

Information Source(s): Maryland Insurance Administration, Judiciary (Administrative Office of the Courts), U.S. Immigration and Customs Enforcement, *Baltimore Sun*, Department of Legislative Services

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