HB 32

Department of Legislative Services
Maryland General Assembly
2015 Session

FISCAL AND POLICY NOTE

House Bill 32 (Delegate Schulz)
Judiciary

Criminal Procedure - Bail Bonds - Minimum

This bill prohibits a surety from providing a bail bond to a defendant for less than 10% of the penalty amount of the bond.

Fiscal Summary

State Effect: Minimal increase in special fund revenues for the Maryland Insurance Administration in FY 2016 from filing fees ($125 each) if surety insurers need to change their rates as a result of the bill. Increase in general fund expenditures for pretrial detentions in Baltimore City if (1) the bill as written eliminates the practice of installment contracts and (2) fewer defendants are able to afford bail bonds due to higher down payments under the bill. Potential increase in operational expenditures for the Office of the Public Defender (OPD) if the bill increases the number of individuals who are eligible for OPD representation at judicial bail reviews because they are unable to afford to post bail following an initial appearance before a District Court commissioner.

Local Effect: Increase in local expenditures for pretrial detentions if (1) the bill as written eliminates the current practice of installment contracts and (2) fewer defendants are able to afford bail bonds due to higher down payments under the bill.

Small Business Effect: Potential meaningful impact on small business sureties that are able to collect higher down payments from clients. However, this may also correspond to a loss in volume of business if clients cannot afford higher down payments on bail bonds.

Analysis

Current Law/Background: 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.

Once the bail has been set, the defendant may secure release by posting cash or other collateral with the court, such as a corporate surety bond, a certified check, intangible property, or encumbrances on real property, in an amount required by the judicial officer. If authorized by the court, a defendant may be released after posting cash equal to 10% of the full penalty amount or $25, whichever is greater. However, security for a greater percentage of the penalty amount, up to the full amount of the bail, may be required by the judicial officer. When the defendant is unable to post the amount required, as is often the case, the defendant may seek the assistance of a bail bondsman to obtain a corporate surety or lien on the bondsman's real property to secure the bond with the defendant. The bail bondsman typically charges a fee equal to 10% of the required bail bond amount for this service. If a defendant deposits cash with the court and complies with his/her pretrial release, the deposit is refundable. Fees paid to bail bondsmen are not refundable.

A surety bail bond is a financial guarantee to the court that the defendant will appear in each and every court appearance as the court directs. A corporate surety bail bondsman (corporate bondsman) must be licensed by the Maryland Insurance Administration and have an appointment from an insurance company (Insurance Article § 10-304). Like other licensees, the Insurance Commissioner may deny a license or discipline a corporate bondsman for a variety of reasons, including the willful violation of a State insurance law or any fraudulent or dishonest practice in the insurance business (Insurance Article § 10-126). Once licensed and appointed, a corporate bondsman acts as an agent on behalf of the insurance company and pays a small premium to the insurance company for each surety bond. A corporate bondsman charges the defendant 10% of the bail bond, an amount which must be filed with and approved by the Insurance Commissioner.

The 10% premium is an industry standard and is not set by the Insurance Commissioner. However, because some consumers are unable to pay the entire 10% premium up front, a corporate bondsman may finance the premium by allowing the consumer to make installment payments. This practice often amounts to a marketing tool for corporate bondsmen. In an industry where the premiums are the same, a corporate bondsman is able to draw business in by advertising down payments as low as 1%. Some members of the Judiciary have expressed concern over the release of defendants for such a small initial amount of money.

Accepting installment payments for a surety bail bond was the subject of *Insurance Commissioner for the State v. Engelman*, 345 Md. 402 (1997). In *Engelman*, the Maryland

Court of Appeals held that a bondsman is not prohibited from accepting promissory notes or other types of credit arrangements, with or without interest. The Maryland Insurance Administration had alleged that by failing to collect the entire amount of surety bond premiums at the time the bonds were written, Engleman, a bondsman, had violated several provisions of the Insurance Article (At the time of the decision, the relevant statutes were found at Article 48A, §§ 226(a), 230(b), and 242(e); however, the statutes are now located at Insurance Article §§ 27-212 and 27-216(b)(1).) The provisions in question prohibit insurance rebates and the collection of an insurance premium different than the rate filed with the Insurance Commissioner. The court reasoned that there was no violation as long as a bondsman attempts to collect the unpaid portion of the premiums. In other words, the statutes require that a bondsman collects the approved rate filing but not the method of collecting a premium.

While the court's decision solidified a bondman's ability to set up installment payments, by basing its opinion on the assumption that the bondsman "used every effort to collect the balances due under the notes," it made clear that a bondsman must make attempts to collect the entire amount to avoid violating the provisions of the Insurance Article. Unfortunately, a bondsman does not always make legitimate attempts to collect this remaining portion. Industry competition has created a situation where some bondsmen make under-the-table deals with defendants where it is agreed upon that the defendant will only pay a portion of the 10% premium. The bondsman then fabricates a paper trail to indicate the establishment of an installment contract. The bondsman makes a lower percentage than he or she normally would but the practice provides for a competitive edge, which allows for greater volume to counteract the lower collected premium. This greater volume also allows the corporate bondsman to negotiate a lower percentage of commission paid to the insurance company and make a profit.

In Maryland, a bondsman must "maintain records of all bail bonds executed, in sufficient detail to enable the Insurance Commissioner to obtain all necessary information concerning each transaction." The bondsman must make these records available for inspection by the Insurance Commissioner for at least one year after the end of the surety liability. The difficulty lies in proving that a bondsman did not make legitimate attempts to collect any unpaid portion.

In response to these issues, Senate Bill 489/House Bill 742 of 2012 (Chapters 243 and 244) specifically authorize bail bondsmen to accept installment payments. In the event of an installment agreement, the statute requires a bondsman to (1) include specified information in an installment agreement; (2) secure a signed affidavit of surety by the defendant and provide it to the court; (3) take all necessary steps to collect the total amount owed; (4) keep and maintain records of all collection attempts, installment agreements, and affidavits of surety; and (5) certify to the Insurance Commissioner the veracity of these records.

State Expenditures: The Baltimore City Detention Center, a State-operated facility, is used primarily for pretrial detentions. General fund expenditures increase for the Department of Public Safety and Correctional Services to the extent fewer defendants are able to afford bail bonds and must continue to be detained.

A defendant who is denied pretrial release by a District Court commissioner or who for any reason remains in custody for 24 hours after a commissioner has determined conditions of release must be presented immediately to the District Court if the court is in session. If the court is not in session, the defendant must be presented at the next session of court. The District Court must review the commissioner's pretrial release determination and take appropriate action. OPD provides legal representation to indigent defendants at judicial bail reviews.

If the bill reduces the number of individuals who are able to post a bail bond following an initial appearance before a District Court commissioner, and increases the number of bail review clients for OPD, general fund expenditures for OPD may increase depending on the volume of additional clients generated by the bill. The magnitude of this increase cannot be reliably determined at this time, and can only be determined following actual experience under the bill.

Local Expenditures: Local detention facilities provide pretrial detentions in jurisdictions other than Baltimore City. As noted above, expenditures may increase if installment contracts are reduced or eliminated. The extent to which this may occur cannot be reliably predicted at this time.

Additional Comments: It is unclear whether the bill as written would eliminate the use of installment contracts. The bill prohibits a surety from providing "…a bail bond to a defendant …for less than 10% of the penalty amount of the bond." However, an argument can be made that an installment contract *does* provide a bail bond for 10% of the penalty amount of the bond, except that instead of requiring the 10% as a down payment, the 10% is paid in installments over a prescribed period of time.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Maryland Insurance Administration, Judiciary (Administrative Office of the Courts), Office of the Public Defender, Department of Public Safety and Correctional Services, citypaper.com, Department of Legislative Services

Fiscal Note History: First Reader - February 27, 2015
mel/kdm

Analysis by: Amy A. Devadas

Direct Inquiries to:
(410) 946-5510
(301) 970-5510