

Bail Bond Litigation in Orange County

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What is a Bail Bond?

Bail bonds allow defendants who cannot afford the full bail amount to be released from jail by paying a non-refundable fee to a bail bondsman, who then posts the full bail on the defendant's behalf.

“[E]xcept for capital crimes when the facts are evident or the presumption great,” a criminal defendant has a right to be “released on bail by sufficient sureties ...” (Cal. Const., art. I, § 28, subd. (f)(3).)

Generally, bail involves two different contracts:

- 1) The defendant contracts with a surety to pay a premium for the bond and to provide collateral (often offered by indemnitors) in the event of his or her nonappearance
- 2) Surety, through a bail agent, contracts with the government to act as a guarantor of the defendant's appearance in court under the risk of forfeiture of the bond

Overview: Breach of a Bail Contract and Bail Forfeiture

Bail litigation, generally, relates to breaches of the contract between the Surety and the government.

The scope of the Surety's risk is defined by the terms of the bond agreement and applicable statutes. (*People v. North Beach Bonding Co.* (1974) 36 Cal.App.3d 663, 668.)

If Defendant makes all appearances when required, no problem. When judgment is declared, the bond is automatically exonerated. Contract is completed.

If Defendant does not appear, bail is forfeited.

A Surety has 180-day jurisdictional time limit from notice of the forfeiture ("forfeiture period") to surrender the defendant or bring a motion for relief under bail forfeiture statutes. (Penal Code § 1305, *et seq.*)

Moving for Relief from Forfeiture: Practical Considerations

Motions are filed on behalf of Bail Agents or Sureties. They can actually be filed without an attorney. (PC § 1305(j).)

- 1) Motions to extend the forfeiture period or to toll it
- 2) Motions to set aside forfeiture and exonerate bail bond
- 3) Motions to Set Aside Summary Judgment, if the Court erred in a way that voided its jurisdiction.

In Orange County, County Counsel responds to these matters. (Gov. Code, § 27642 [“Whenever the board of supervisors appoints a county counsel pursuant to this chapter, he shall discharge all the duties vested by law in the district attorney other than those of a public prosecutor”]; *People v. International Fidelity Ins. Co.* (2018) 20 Cal.App.5th 345.)

County Counsel will always file a written response or sign a written stipulation.

Procedure/Timing

Civil Motion:

While bail bond proceedings occur in connection with criminal prosecutions, they are independent from and collateral to the prosecutions and are civil in nature.” (*People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 657.) These are civil motions heard criminal court. (*People v. Wilcox* (1960) 53 Cal.2d 651, 654; *People v. Hadley* (1967) 257 Cal.App.2d Supp. 871, 877.) The Code of Civil Procedure applies. (*People v. American Contractors Indemnity Co.* (1999) 74 Cal.App.4th 1037, 1049.)

Timing:

Generally, bail motions need to be made within the 180-day forfeiture period and, unless there is a showing of good cause, need to be heard with 30 days of the expiration of the forfeiture period. (PC § 1305(j).)

16 days court notice, etc. (CCP § 1005.)

Principles in Reviewing Bail Motions

Often invoked to set aside bail forfeiture:

The purpose of bail and forfeiture statutes is to **ensure the attendance of the accused and his obedience to court orders and judgments.** (*People v. Wilcox* (1960) 53 Cal.2d 651, 656–657.) It does not have as a goal, revenue for the state or punishment of the surety. (*Ibid.*) Because the law disfavors forfeitures and statutes imposing them, the statutes are **strictly construed** in favor of the surety to avoid harsh results. (*People v. Amwest Surety Ins. Co.* (1997) 56 Cal.App.4th 915, 921.) The standard of review, therefore, compels us to protect the surety, and more importantly the individual citizens who pledge to the surety their property on behalf of persons seeking release from custody, in order to obtain the corporate bond.” (*County of Los Angeles v. Surety Ins. Co.* (1984) 162 Cal.App.3d 58.)

Often invoked to defend bail forfeiture:

A “bail bond is a contract between the surety and the government whereby the surety acts as a guarantor of the defendant's appearance in court under the risk of forfeiture of the bond. . . **when there is a breach of this contract, the bond should be enforced.**” (*People v. Am. Contractors Indem. Co.* (2004) 33 Cal.4th 653, 657-58.) The burden is on one seeking to set aside a forfeiture of bail to establish by competent evidence that its case falls within the four corners of the requirements of Penal Code section 1305. (*People v. United Bonding Ins. Co.* (1969) 272 Cal.App.2d 441, 445.) Where the record is silent, the trial court is presumed to have regularly preformed its official duties and acted in the lawful exercise of jurisdiction. (*People v. Allegheny Cas. Co.* (2007) 41 Cal.4th 704, 716.)

Penal Code § 1305.4: Extensions

Penal Code § 1305.4: Bail Agent/Surety can get an up to a 180-day extension of the forfeiture period if they provide a declaration showing that they have diligently searched for the Defendant and that s/he is likely to be caught.

- Must include a signed declaration identifying good cause. i.e., what steps they have taken to locate the Defendant and, if given more time, they are likely to apprehend the Defendant. (*People v. Ranger Ins. Co.* (2000) 81 Cal.App.4th 676, 681.)
- The motion must be filed within the 180-day forfeiture period.
- No additional extensions are allowed beyond 180 days. (*People v. Financial Casualty & Surety, Inc.* (2016) 2 Cal.5th 35, 43.)

Penal Code § 1305(a): Court's Forfeiture Requirements

Penal Code § 1305, *et seq.* identifies circumstances under which bail bond can be forfeited and provides Bail Agents/Sureties with tools to address forfeiture.

Penal Code § 1305(a): “a court shall *in open court* declare forfeited the undertaking of bail ... if, *without sufficient excuse*, a defendant fails to appear for

- (A) Arraignment.
- (B) Trial.
- (C) Judgment.
- (D) Any other occasion prior to the pronouncement of judgment if the defendant's presence in court is *lawfully required*.
- (E) To surrender himself or herself in execution of the judgment after appeal.

Court, generally, only gets one chance to get it right. Court cannot use a *nunc pro tunc* to fix a jurisdictional defect. (*People v. United Bonding Ins. Co.* (1971) 5 Cal.3d 898, 907.)

Penal Code § 1305(a): Grounds for Bail Exoneration

Timing: Because these motions go to the Court's jurisdiction over the bond, they generally can be brought at anytime.

Grounds: Failure to forfeit the bond in open court

- The phrase "open court" means the judge must make the forfeiture statement "orally ... in the courtroom, while it is open to members of the public." (*People v. Bankers Ins. Co.* (2009) 171 Cal.App.4th 1529, 1533.)
- The failure of a court to declare a forfeiture in open court, as mandated by Penal Code § 1305(a), will deprive the court of jurisdiction over the bail bond. (*People v. Amwest Surety Ins. Co.* (2005) 125 Cal.App.4th 547, 550.)

Best Practice: Use the word "forfeit" and do it on the record in open court.

Penal Code § 1305(a): Grounds for Bail Exoneration (Cont)

Grounds: Failure to forfeit bond upon first unexcused non-appearance (*People v. United Bonding Ins. Co.* (1971) 5 Cal.3d 898, 907.)

Issue: Was the appearance lawfully required?

- No loss of jurisdiction where presence at an earlier hearing was not lawfully required. (*People v. National Automobile and Cas. Ins. Co.* (2004) 121 Cal.App.4th 1441, 1448.)
- “A defendant's presence is ‘lawfully required’ when there is ‘a specific court order commanding his appearance at a date and time certain’, or . . . date and time for a mandatory appearance are set, even though the court did not specifically order his or her personal presence.” (*People v. Ranger Ins. Co.* (1992) 6 Cal.App.4th 1301, 1304.)
- Penal Code § 977 can be a complicating factor.

Penal Code § 1305(a): Grounds for Bail Exoneration (Cont)

Issue: Was there “sufficient excuse”?

- “A defendant's failure to appear without explanation is presumptively without sufficient excuse.” (*People v. United Bonding Ins. Co.* (1971) 5 Cal.3d 898, 907.) “
- Policy: “Surety must be advised at an early date of the fact of the forfeiture in order that he may institute procedures to locate and compel the appearance of the bailee.” (*Ibid.*)
- If the record is silent concerning the trial court's reasons for continuing the matter and for not immediately declaring forfeiture of bail, a reviewing court must conclude that the nonappearance was without sufficient excuse. (*People v. Allegheny Casualty Co.* (2007) 41 Cal.4th 704, 717.)

Best practice: make an explicit finding of excuse and identify it on the record. If excuse is unclear, utilize Penal Code 1305.1

Penal Code § 1305.1: When Excuse is Unclear

Penal Code section 1305.1: “If the defendant fails to appear [as lawfully required], but the court has reason to believe that ***sufficient excuse may exist*** for the failure to appear, the court may continue the case for a period it deems reasonable to enable the defendant to appear without ordering a forfeiture of bail or issuing a bench warrant.”

- It does not require courts to make an immediate determination as to whether sufficient excuse exists.
- Courts can cooperate with defense counsel's requests and rely liberally on their representations.
- Even noting that a defendant had never previously failed to appear and defense counsel was “concerned something has happened” was enough to defer forfeiture under 1305.1. (*People v. Ranger Ins. Co.* (2003) 108 Cal.App.4th 945, 949.)
- Courts must continue to the appearance date for a reasonable period.

Best Practice: explicitly make a finding of good cause (*potential* excuse) under Section 1305.1 and reference the facts relied upon.

Penal Code § 1305(b): Notice of Forfeiture

Penal Code section 1305(b): “the clerk of the court shall, within 30 days of the forfeiture, mail notice of the forfeiture. . . . The surety or depositor ***shall be released of all obligations under the bond*** if:

- (A) The clerk fails to mail the notice of forfeiture in accordance with this section within 30 days after the entry of the forfeiture.
- (B) The clerk fails to mail the notice of forfeiture to the surety at the address printed on the bond.
- (C) The clerk fails to mail a copy of the notice of forfeiture to the bail agent at the address shown on the bond.

“Surety and bail agent are entitled to separate notice under the forfeiture is declared.” (*People v. American Contractors Indemnity Co.* (2001) 91 Cal.App.4th 799, 808.)

Exceptions exist if bail was erroneously forfeited and the Court vacates the forfeiture in the same court session or if Bail Agent and Surety have actual notice. (*People v. Bankers Ins. Co.* (2019) 36 Cal.App.5th 543, 549-50; *County of Los Angeles v. Financial Casualty & Surety, Inc.* (2016) 247 Cal.App.4th 875, 882)

Best Practice: Send a notice every time bail is forfeited, even if forfeiture is immediately vacated.

Penal Code § 1305(c): Defendant's Appearance or Arrest

Penal Code § 1305(c)(1)&(2): If the Defendant *appears in court or is arrested within the County and within the 180-day forfeiture period*, “the court shall, on its own motion. . . direct the order of forfeiture to be vacated and the bond exonerated.”

- Motions generally are not required here but sometimes the Court neglects to act on its own and a motion will be filed. Because exonerated should be automatic, there is no time limit for these motions.
- **Issue:** What if Defendant makes a Penal Code § 977 appearance after forfeiture?

Penal Code § 1305(c)(3): If a Defendant is *arrested outside the county* (but within the state) in the underlying case *within the 180-day forfeiture period*, Bail Agent/Surety can move to have bail exonerated.

- “As used in this section, ‘arrest’ includes a hold placed on the defendant in the underlying case while he or she is in custody on other charges.” (PC § 1305(i).)
- Motions under 1305(c)(3) must be made within the 180-day forfeiture period.
- Late motion (within 20 days of the mailing of the notice of entry) will be considered if Bail Agent/Surety can show good cause for delay (PC § 1305.6(b).)

Penal Code § 1305(c): Defendant's Appearance or Arrest (Cont.)

Penal Code § 1305(c)(4): In lieu of exonerating the bond, the court may order the bail reinstated and the defendant released on the same bond if both of the following conditions are met:

- (A) The bail is given prior notice of the reinstatement.
- (B) The bail has not surrendered the defendant

Best Practices:

- Defense attorneys can/should advocate to have the bail reinstated to avoid forcing the Defendant pay a new premium and post a new bond.
- Even if a court elects to reinstate a bond under Section 1305(c)(4), and provides notice of reinstatement, a formal Notice of Forfeiture under 1305(b) can/should still be sent.

Penal Code § 1305(d) & (e): Defendant is Disabled from Appearing

Penal Code § 1305(d): Bail Agent/Surety can move for exoneration:

If the Defendant is “**deceased or otherwise permanently unable to appear in the court due to illness, insanity, or detention by military or civil authorities**”), and the absence of the Defendant is without the connivance of the bail.

- Must file a timely motion within the 180-day forfeiture period.
- **Issue:** What if Defendant has been deported? Depends on the Court’s view of whether the period of inadmissibility into the United States would effectively make him/her permanently unable to appear for the case. Court will look at the circumstances of the case, the charges, the statute of limitations, etc. (*County of Los Angeles v. Fin. Cas. & Sur. Inc.* (2015) 236 Cal.App.4th 37.)

Penal Code § 1305(e): If the Defendant is temporarily disabled from appearing (often when serving time somewhere else), the Bail Agent/Surety can move for tolling of the forfeiture period until the Defendant is able to reappear.

- Must file a timely motion within the 180-day forfeiture period.
- Unlike an extension of time, this stops the clock on the forfeiture period.
- Tolling can be for any period of time. There is no 180-day limit as there is for Section 1305.4 extensions.

Penal Code § 1305(f) (g) & (h): Defendant Outside Jurisdiction of the Court

Penal Code § 1305(f): If Defendant is *in custody outside the jurisdiction of the court* (arrested in another state, in federal custody, or arrested outside the country) and the prosecuting agency (usually the DA's Office) elects not to extradite, the Bail Agent/Surety can bring a motion to exonerate.

Penal Code § 1305(g): If Defendant is *outside the jurisdiction of the court and not in custody*, and the Bail Agent/Surety gets a declaration from local law enforcement identifying the Defendant and indicating that he has been detained in the presence of local law enforcement, and the prosecuting agency elects not to extradite, Bail Agent/Surety can bring a motion to exonerate.

Penal Code § 1305(h): In cases arising under Section 1305(g), where the prosecuting agency agrees that more time is necessary to apprehend the Defendant, the Bail Agent/Surety may move for tolling of the forfeiture period.

- Must file a timely motion within the 180-day forfeiture period.
- Where extradition is infeasible as a matter of policy or practice, the prosecuting agency cannot be said to have elected against it. (*County of Orange v. Ranger Ins. Co.* (1998) 61 Cal.App.4th 795, 802.)
- **Best Practice:** Contact Eya Garcia (eya.garcia@ocdapa.org) at the DA's office who handles extradition decisions with the defendant's location, as soon as possible, so that she can make an election.

Penal Code §§ 1306, 1308: Judgment & Enforcement

Penal Code § 1306 (a) & (c): If the forfeiture period expires without forfeiture being set aside, the Court must enter summary judgment against the Surety *within 90 days*.

- The 90 days is tolled if a motion to exonerate bail is pending. (*People v. Granite State Insurance Co.* (2003) 114 Cal.App.4th 758.)

Penal Code § 1306(f): the right to collect on the summary judgment expires two years after entry.

- The two-year bar is not tolled if summary judgment is challenged. (*People v. American Contractors Indemnity Co.* (2006) 136 Cal.App.4th 245)

Penal Code § 1308: Surety will be disqualified for failure to pay within 30 days of entry of summary judgment.

- This section is independent from the collectability of the forfeited bond under Section 1306(f). (*County of Orange v. Seneca Ins. Co.* (2019) 35 Cal.App.5th 194.)

Questions?

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