Association of Louisiana Bail Underwriters

How Corporate Surety Has a Place in the Bail Industry vs. Pre-Trial Release

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The Development of Corporate Surety

Clearly the personal surety faced disasters ranging from death to financials suicide and even "losing one's shirt." Even the wisest of men were faced with the possibility of exposing themselves to financial ruin, or having to refuse the request of a friend or relative who needed a bond. Additionally, the difficult of personal suretyship was being compounded by the increasing complexity of both government and economic developments.

As early as 1720, an advertisement appeared in the London daily Post announcing the formation of a company to conduct a surety business in England. The company which offered stock subscription was apparently 120 years too early, as it collapsed shortly after its organization. It was not until 1840 that two successful London sureties were formed. The British Guarantee of Trust Company and the Guarantee Society of London.

The first surety company formed in the United States was established in 1876. Known as the Fidelity and Casualty Company, it still exists today.

Long before the inception of this company, however, the principles of bail had surfaced in the United States. In the days of settlers, circuit courts were formed where one judge had authority over many counties. He rode horseback from one county to the next, hearing all the cases from each. The consequence of this was that while the judge was traveling from county to county, there were many months that each county went without a judge. If, for example, a tenant farmer was arrested just after the circuit judge had left the county, the sheriff would be expected to jail him until the judge's return. In order to protect his farmland, the landlord would often convince the sheriff to release the tenant farmer into his custody, promising that if the defendant did not appear for trial when judge returned, he would give the county livestock, crops, or other valuable goods. This proved to be a symbiotic relationship: The landlord had his farmhand to continue making his profit, and the county did not have the expense of feeding and clothing the prisoner for months. In the event that the defendant did not appear on the judge's return, the promised goods from the landowner would feed the other prisoners or could be sold for revenue.

Other common entries into the early bond business were tavern owners and bartenders. When a customer was arrested for whatever reason, they would often call their favorite bartender to plead for bail. When the bartenders and tavern owners found that they could make a profit at this enterprise, it became a popular side business.

In the early 1950's insurance companies entered the business, capitalizing on the obvious correlation between the personal guarantee of a bail agent and a corporate guarantee: an insurance policy. With the financial backing of an insurance company, agents could write more and larger bonds. The more specialized this type of insurance became, and because of the underwriting practices brought into the business by the insurance companies, risk selection was honed and refined. Bail agents learned how to assess a risk and what information was required to do so.

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I. PROFESSION OF BAIL

a. Professional Image

i. Code of Ethics

A professional bail agent will strictly adhere to a code of ethics, whether it is his own or the one established by ALBU. No inducement of profit or instructions form clients or outside parties can every justify departure from these principles. An agent's reputation with law enforcement and court officials will be enhanced when he proves to have strong moral fiber.

ii. Personal Appearance

Because first impressions can be long lasting and negatives ones are often hard to overcome, bail agents should always try to dress for success. They should avoid flashy, gaudy clothes and excess jewelry at all costs. Appearances in court demand shirts with ties and suits or sport coats with dress slacks for men. Women should be attired in appropriate dresses or business suits, and both men and women should wear properly cleaned or shined shoes. Sleazy or unprofessional appearances should always be avoided.

ALBU, through its Pre-Licensing program, is attempting to boost the image of the professional bail agent in the eyes of the public, his clients, and the courts. Building a positive image is the responsibility of each person in the bond business.

b. Demeanor and Attitude

i. The Court System

Professional bail agents should consistently conduct themselves in a professional manner. This is especially important in a court of law where certain courtesies are required. For example, the Court (this includes the Judge) should always be addressed as "Your Honor." It is also not well advised to argue with court- if a judge's ruling is disagreeable, a bail agent must ask the court for permission to respond. If this permission is denied, any argument may cause that agent to be cited for contempt of court. If permission is granted, any response must be made in a precise, non-argumentative, and non-judgmental manner. If a request is denied, there may be other alternatives for the agent to consider. Professional bail agents protect their image by respecting the court.

ii. Forfeitures

When faced with forfeiture, a bail agent must either find the defendant or pay the forfeiture. In this highly specialized form of insurance, the bail agent's role cannot be justified when forfeitures are not paid. Some states have cash deposit programs, which let a defendant pay a percentage of

the bail in cash directly to the court. If the bail agents do not pay their forfeitures faithfully, other states may adopt this program and effectively abolish the bail agent's profession.

Agents are often advised by attorneys to fine several different pleadings or requests for jury trials to fight judgements. However, it is important for the agent to remember the fees paid to the attorneys, which may be a large part of their motivation. Attorneys often feel that they have nothing to gain by the enhanced reputation of bail agents as they are competing for the same dollars.

iii. Clients

Bail agents would not have profession without clients. However, unlike most business' clientele, a bail agent's clients have been charged with some illegal action. This does not circumvent their right to be treated as human beings. Once a fee has changed hands, the client deserves the courtesy from the agent he just hired.

A client's family members can cause as many headaches for an agent as the clients themselves. One successful agent suggests "a simple, precise, no-nonsense explanation" of the bail procedure. This usually will calm the relative, and hopefully induce their help.

A client's attorney is also a consideration; he can be a friend or adversary. Some attorneys resent bail agents because they feel that money paid for bail would be better utilized for attorney's fees. In this respect, it is better for agents to recommend that their client retain private counsel to get their bail reduced. This will lower the agent's premium, but the good faith of that attorney is well worth this investment. When an attorney sees an agent, who conducts a fair business, he will probably relate that to his colleagues.

iv. Colleagues

With few exceptions, bail agents have competitors. No matter their conduct, the professional bail agent is civil to them and, in some cases, will collaborate with them on needed legislation, recoveries, and changes in court systems.

ALBU is working to establish a committee like those in other professional organizations to investigate and report unethical practices to the proper agencies or departments and to recommend sanctions.

c. <u>Public Relations</u>

All bail agents and their associates project the image of their profession every day. By projecting a positive image, the esteem of the public and the judicial system will rise. A bail agent's public relations goal should be to emphasize his

position as one that bridges the gap between the police and the court systems. Bail agents are also the only group of these three who guarantee their performance. The service provided by a bail agent has many benefits to his community: he guarantees that his client will be in court to answer the charges against him; he frees space in the jail, thereby forcing the defendant to provide his own room and board and support his family. The constitutional right to a reasonable bail is to be encouraged on all fronts.

Organizations for bail agents have personnel trained in public relations with whom the members can consult. When questioned, agents should seize the opportunity to stress how important bail is to the rights of victims of crime and the law and order process. It is also acceptable to refer anyone to a state association for additional information. Unfortunately, the legal profession, law enforcement agencies, and the public are largely unaware of the important role bail agents play in the criminal justice system. A good public relations program can and will change the image of the entire profession.

II. DEVELOPMENT OF BAIL

a. <u>The History of Suretyship</u>

The first contract known to historians' dates from about 2750 B.C. in what used to be the ancient city-state of Sumer. The Sumerians were the first civilized inhabitants of Sumer (modern Iraq).

Since it is well-known that their advanced society pre-dates that contract by at least 2,500 years, historians believe that suretyship is probably 5,000 years old.

The more ancient contracts of surety were oral, and at least among the Jews, involved the practice of "striking hands" to seal the bargain. This practice is mentioned in the Bible with the admonishment "Be not thou one of them that strike hands or of them that are sureties for debt" (Proverbs 17:18). But the first mention of surety and bondman is in the book of Genesis. It is the story of Joseph and the famine of Egypt that Israel sends his sons once more to Egypt for food. But they have been told by Joseph not to return without the youngest brother, Benjamin. The oldest brother, Judah, speaks in Genesis 43: verses 8&9:

> 8. And Judah said unto Israel his father, Send the lad with me, and we will arise and go; that we may live, and not die, both we, and thou, and our little ones.
> 9. I will be surety for him; of my hand shalt thou require him: If I bring him not unto thee, then set him before thee, then let me bear the blame forever.

Then again after Joseph has set a plot to keep Benjamin with him Judah speaks in Genesis 44: verses 32&33:

> 32. For thy servant became surety for the lad unto my father, saying if I bring him not unto thee, then I shall bear the blame to my father forever.
> 33. Now therefore, I pray thee, let thy servant abide instead of the lad a bondman to my lord; and let the lad go to with his brethren.

The practice of executing written contracts was not firmly established until about 670 B.C. The early surety contracts were used to enhance the borrowing power of debtors. If A. did not repay the debt he owed to B, then C would pay it.

From the beginning, there has been a close relationship between suretyship and the law. So close, in fact, that one cannot discuss surety without also considering the law.

b. Surety Contracts Date Back 5000 Years

There are records of surety as far back as 5000 years ago that have a striking resemblance to modern-day bonds. The Library of Sargon I (circa 2750 B.C.) contains a record of a surety contract in which a lessee's performance was guaranteed by a local merchant, while the lessor served his military obligation.

c. The Code of Hammurabi

The code of Hammurabi, which was at once primitive and yet ahead of its time, contained the barbarous *lex talionis*, the law of retaliation. It also granted women the right to engage in business from which they had previously been banned and allowed them the same rights in those businesses as men. The Code of Hammurabi also contained a provision for fidelity bonding by the state. Each city and its governor were made sureties to the victim of any bandit unless the bandit was captured and executed.

The first written code of law was known as The Code of Hammurabi and it incorporated provisions concerning suretyship when it was drafted about 2250 B.C. in Babylon. One provision of this code made the city and the governor liable to the traveler who was a victim of robbery within the territory. The code further provided that whenever an official was captured by an enemy, his ransom could be paid by anyone and the temple was required to repay the citizen. Thus, the temple was designated as a surety. An interesting feature; however, is that the temple was forbidden to demand reimbursement form the official.

Following Babylon's lead; the Sumerians, Persians, Hebrews, and Greeks began to develop written laws, but it was not until the beginning of the Christian era that the rights of the surety began to be spelled out in addition to his duties. The romans were the first to develop a highly technical law of suretyship.

The Romans, besides being renowned warriors, were also noted for this advanced legal system. Previous surety laws had been concerned almost entirely with the

debtor-creditor relationship. The Romans made provisions for handling the estates of deceased persons and for providing guardians for orphans and incompetent persons. These Roman laws are the basis on which the fiduciary bonds of today are founded.

About 1150 B.C., they developed a curious practice of suretyship known as the "frank pledge." This system divided the entire populace into groups of then. If any of the ten misbehaved, the rest were responsible for the actions of the miscreant.

It is interesting to note that the laws regarding suretyship changed and grew in direct response to economic factors. As laws were written to govern the conduct of business affairs the role of the surety was also expanded and redefined.

Around 2500 B.C., the eastern Mediterranean countries developed a trade practice called the "exchange ideal." The economic efforts of the people were directed toward the marketing of goods in distant lands. The merchant sent his goods to the far-away markets by consigning them to sales caravans. To make certain that the transporter would not abscond with the goods or the proceeds of their sale, he was forced to leave his family with the merchant as surety. Business transactions soon became more sophisticated, of course, as did the suretyship laws.

The Anglo-Saxon English were even more vigorous than the Latin civilizations in regulating business transactions and they required suretyship also in dealings between the state and the individual. It was the English who forced their reluctant king, the tyrant John, to place himself under a form of suretyship. At Runnymede, England in 1215 A.D., he signed the Magna Carta. Known as the first great freedom document, it required that he deal with his subjects in a manner that was just and fair to all.

To this point in history, suretyship dealt almost entirely with business and financial matters. Concepts such as due process of law, the presumption of innocence, or the right to bail did not emerge until the founding of our nation.

If it is assumed that man is born to be free, then through much of history, man has been heir to a lost birthright. Governments were often established by force and violence. Oppression and tyranny were the order of the day. In the few instances in which a government of law tried to super-cede a government of force, success was only nominal. Not only were individuals seized and detained for long periods without just cause, entire societies lost their physical freedom at the whim and caprice of the sovereign.

d. <u>Hostageship: An Early Example of Surety</u>

In hostageship, the debtor secured his obligation by delivering to his creditor a hostage, who would be freed upon payment of the debt. In the event of payment default, the hostage could be put to death, mutilated, or enslaved, depending on

the agreement. However, as time passed, the system was refined and updated. For example, the hostage was no longer imprisoned, but would be under obligation to report to the creditor in the event of default. This refinement eliminated the financial burden of room and board for the creditor until the debt was repaid or the creditor exercised other options in the agreement.

e. The Constitutional Right to Bail

The men who drafted the United State Constitution were aware of the practices of unrestrained government, for they had lived under such a system. Determined to establish a government where such excesses could not exist, they began the preamble to the Constitution:

> 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 secure the blessings of liberty to ourselves, and our posterity, do ordain and establish this Constitution of the United State of America.

Not satisfied with the mere mention of liberty in the preamble, they addressed it again in Article One, Section Nine:

> The privilege of the Writ of Habeas Corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it.

Thus, they insured that nothing short of the security of the entire nation would allow even one person to be unjustly imprisoned.

This determination was reinforced in 1791 when the first ten amendments, which we call the Bill of Rights, were added to the Constitution. Amendment Four guarantees citizens the right to be source in their own homes and protects them from unlawful search and seizure. Then Amendment Five says:

> No person shall be held to answer for a capital or otherwise infamous crime unless on the presentment or indictment of a Grand Jury…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…

The possibility that the government might assume the European attitude was such a revolting idea that the Sixth Amendment was added at the same time:

> 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… and to be informed of the nature and

> cause of the accusation; to be confronted with the witnesses in his favor, and to have the assistance of counsel for his defense.

To be double certain that neither they nor their offspring would be subjected to the sort of oppression they had just fought a long and bloody war to be free of, they addressed bail directly with the Eighth Amendment:

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

Following the Civil War, the legislature realized that the governments of the states had been allowed to deny freedom to some individuals and guard against recurrence with the Fourteenth Amendment which state in Section One:

> …No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law…

f. <u>The Merging of Bail and Suretyship</u>

Despite their zeal to protect the rights of the individual, the early Americans realized that some means had to be devised to protect the rights of the community by making sure the accused was still around to face his accusers when the time came. Since the suretyship concept, was already so firmly established, it was a simple matter to extend it to bail in criminal proceedings.

At this point in history, these obligations in business had been shouldered entirely by personal sureties – individuals who pledged their own assets to guarantee the performance of another. And so, it began with bail.

The shortcomings of this type of personal surety were obvious almost from the beginning. For example:

> Article 18. The Bonding Agent should constantly strive for the highest degree of professionalism attainable,and this should be expected and demanded from all Bonding agents by all those persons involved in the bonding industry, regardless of position.
>
> Article 19. The Bonding Agent should make extensive effort to support, contribute to, and participate in local,statewide, and national Bonding Agent associations whose goals are to preserve and enhance the integrity, quality, and honor of the bonding industry.

g. <u>Concluding Sanction</u>

The Article of the Code of Ethics are combined to guarantee high integrity and dignified professionalism from those who adhere to the principles of business and moral conduct outlined within. No inducement of profit and no instructions from clients or outside parties can ever justify departure from these principles or from the injunction of this Code of Ethics.

III. HOW BAIL WORKS

a. Louisiana Statutes

i. How Bail Works Now

When an individual is arrested for a crime in the State of Louisiana, typically that person will be taken to a local law enforcement station for booking, prior to incarceration in a station lock-up or county jail. Once arrested and booked, the defendant has several options for release pending the conclusion of his or her case.

The bail system is designed to guarantee the appearance of a criminal defendant in court at the time the judge directs.

ii. Release Options

The three basic release options available to an arrestee are cash bail, surety bond, and release on his or her own recognizance (O.R.).

iii. Cash Bond

To be released on cash bail, an individual must post with the court the total amount of the bail, in cash, to secure his or her return to court on an appointed date, and thereafter until the case is concluded. Full cash bonds provided a powerful incentive for defendants to appear at trial. If the defendant shows up for his/her scheduled court appearances, the cash is returned to him/her. If she/he fails to appear, the cash bond is forfeited t the court.

iv. Surety Bond

An alternative to cash bail is the posting of a surety bond. This process involves a contractual undertaking guaranteed by an admitted insurance company having adequate assets to satisfy the face value of the bond. The bail agent guarantees to the court that they will pay the bond forfeiture if a defendant fails to appear for their scheduled court appearances. The bail agent's guarantee is made through a surety company and/or by the pledge of property owned by the agent.

For this service, the defendant is charged a premium. To be released pursuant to the posting of a surety bond, the arrestee or a relative or friend of the arrestee, typically contacts a bail agent, an individual

licensed by the State of Louisiana, to post surety bonds. Prior to the posting of a surety bond, the bail agent undertakes a detailed interview of the indeminator of the surety bond, as well as the arrestee and relatives of the arrestee, as part of the underwriting procedure for bond.

By involving the family and friends, as well as through the acceptance of collateral, the bail agent can be reasonable assured that an individual released on surety bond will appear at this or her appointed court date, as required, until the case is adjudicated.

After this procedure is concluded, if an agreement is reached, the bail agent posts a bond for the bail, to guarantee the arrestee's return to court.

With his money on the line, a bail agent has a financial interest in supervising bailees and ensuring that they appear for trial. If a defendant "skips," the bail agent has time and the financial incentive to find him/her and bring him/her in. Significantly, commercial bail bond agents profit only when the defendant shows up for trial. Judges acknowledge that bail agents have highly efficient methods to get defendants to court.

v. Property Bond

In rare cases an individual may obtain release form custody by means of posting a property bond with the court. Here the court records a lien on property, to secure the bail amount. If the arrestee subsequently fails to appear at the scheduled court date, the court may institute foreclosure proceedings against the property to obtain the forfeited bail amount.

vi. Own Recognizance (O.R.)

In the State of Louisiana, the Judges of the Court usually make the decision to release a defendant by means of the "O.R. Bond."

Another method of release pending trial (not typical of the State of Louisiana) is through a county or law enforcement administered pretrial release program. Usually, the state members of these programs interview individuals in custody and make recommendations to the court regarding release of these individuals on their own recognizance (i.e., without any financial security to insure the interviewee's return).

b. <u>The Criminal Defendant's Bonds</u>

The laws of Louisiana allow any qualified bondsman to write any of the below listed criminal defendant's bonds.

The range of criminal defendant's bonds are called "appearance bonds." They are written to guarantee the appearance of the defendant in court or at the designated place of surrender.

If the defendant leaves and the surety is not able to return him by the time of his required court appearance, the bond will be forfeited.

i. **Bail Bonds**

Bail bonds are the best known of the bonds and constitute of the bulk of the bondsman's business. They will be primary focus of this course.

The bail bond is the only true *pre-trial* bond and is the only type of criminal defendant's bond which is a matter of right to any accused person unless charged with a capital.

The bail bond guarantees the defendant will appear each time he is ordered to do so by the court. Failure to appear at any stage in the proceedings may cause a forfeiture of the bond. The bond will be satisfied when the defendant has presented himself at all require appearances and the case has been adjusted. It may also be satisfied if the case is dismissed at any time before a forfeiture has been entered.

ii. **Appeal Bonds**

Appeal bonds are the second most important in the bondsman's portfolio. When a criminal defendant has been convicted and sentenced, he may yet have recourse. If he feels that the trial court has made substantial error, that the sentence was too severe to fit the crime, or that his constitutional rights have been violated, he may file an appeal.

The Louisiana Code recognizes, however, at this point in the proceedings, the presumption of innocence no longer applies. Therefore, the defendant is not entitled to bond as a matter of right. If the trial judge feels the defendant is a danger or that he is likely to flee, release may be denied.

If the appellant qualifies, he may post an appearance bond and go at liberty while his case is under consideration by the appeals courts.

The appeals court may (1) reverse the ruling of the lower court order a new trial, (2) uphold the lower court's ruling and order the defendant to surrender himself and begin serving his sentence, or, very rarely, (3) decide that the charges were improperly brought in the first place and order a dismissal of the case.

iii. **Federal Bonds**

The State of Louisiana does not regulate Federal bonds. They differ from state, district, and municipal bonds in several very important ways:

Federal bonds are always prepared by the court and often contain provisions over and above the appearance of the defendant. In

fact, they become performance bonds in a fair number of cases. It is wise to read carefully before you sign.

There is no time frame for payment of forfeiture in the U.S. courts and the bail agent may be given as little as 48 hours to pay. The surety is entirely at the mercy of the court.

Under the Racketeer Influenced and Corrupt Organizations Act (RICO), the court can, and often does, decide that the defendant obtained his assets with ill-gotten gains. Many a surety has found his collateral security confiscated.