

# When Does a Discharge of a Bail Bond Discharge the Surety?

527

---

## TABLE OF CONTENTS

I.	INTRODUCTION.....	001
II.	BACKGROUND OF BAIL BONDS.....	002
	A. <i>How Bail Bonds Work</i> .....	002
	B. <i>History of Bail Bonds</i> .....	003
III.	HOW CAN A BAIL BOND BE FORFEITED.....	004
	A. <i>Breach of a Condition of the Bond</i> .....	004
	B. <i>Breach of Bond by Failure to Appear</i> .....	005
	C. <i>Steps Needed for Forfeiture of Bond</i> .....	005
IV.	RELIEF FROM JUDGMENT.....	006
V.	REMISSION OF THE BOND.....	007
	A. <i>How to Obtain Remission</i> .....	007
	B. <i>Test for Remission</i> .....	008
VI.	HOW CAN A BAIL BOND BE DISCHARGED.....	009
	A. <i>Discharged by Statute</i> .....	009
	B. <i>Discharged by State’s Breach</i> .....	009
	C. <i>Discharged by Lack of Notice</i> .....	009
	D. <i>Discharge Under Rule 1.540 of the Florida Rules of Civil Procedure</i> .....	010
VII.	EXCEPTIONS.....	011
VIII.	WHEN DOES A DISCHARGE ACTUALLY DISCHARGE THE SURETY’S LIABILITY.....	011
	A. <i>State Drops the Defendant’s Charges</i> .....	011
	B. <i>Excuses for Breach of Bond</i> .....	012
	C. <i>Failure to Notify and Prejudice</i> .....	012
	D. <i>Statutory Cancellation</i> .....	013
	E. <i>When is the Bond Satisfied?</i> .....	014
IX.	CONCLUSION.....	014

## I. INTRODUCTION

Bail bonds play an essential role in our legal system and our country by facilitating the ability of an accused to be released pending trial.<sup>1</sup> Bail bonds meet the needs of the state in assuring a defendant will appear in court, while complying with the Eighth Amendment which says that excessive bail shall not be required.<sup>2</sup> This article examines the situations when a discharge of a bail bond actually discharges the liability of the surety and/ or its agent, the bail

---

1. 8A AM. JUR. 2D *Bail and Recognizance* § 2 (1997) (citing *State v. Washington*, 624 So. 2d 37 (La. Ct. App. 1993)). The terms “defendant” and “accused” are used interchangeably throughout this article.

2. *Id.*

bondsman, as interpreted by the courts. This article begins by discussing the history of bail and purposes of bail bonds, the different ways bonds can be forfeited, several exceptions to general bail bond rules, and when the surety escapes liability of a bond.

## II. BACKGROUND OF BAIL BONDS

Bail bonds have helped shape the American justice system. These bail bond contracts, as well as the bail bondsmen, are heavily regulated.<sup>3</sup> The bail bond process has evolved over hundreds of years into the system we have today.<sup>4</sup>

### A. *How Bail Bonds Work*

A bail bond scenario begins with an accused first arrested for allegedly committing a crime.<sup>5</sup> Due to the nature of the legal system there is a period of time between the arrest and the trial.<sup>6</sup> During this period of time, the court has several options. The court can release the accused on his/her own recognizance, which is an unsecured appearance bond; the court can set a secured appearance bond with any necessary conditions; or the court can deny the accused bond forcing the accused to remain in jail until trial.<sup>7</sup> The court can attach conditions to the bond that are reasonably calculated to assure the presence of the accused at trial.<sup>8</sup> The court will also impose conditions on the bond for the safety and security of the community.<sup>9</sup> The court may deny bail altogether.

The trial court may release a person on bail if the court finds the person: (1) Poses no significant risk of fleeing from the jurisdiction of the court or failing to appear in court where required; (2) Poses no significant threat or danger to any person, to the community, or to any property in the community; (3) Poses no significant risk of committing any felony pending trial; and (4) Poses no significant risk of intimidating witnesses or otherwise obstructing the administration of justice.<sup>10</sup>

There are certain criteria which the court looks at when presuming that the accused is either a flight risk or a danger to the community.<sup>11</sup> The court will look at the type of crime on which the accused is charged.<sup>12</sup> If it is a violent crime or capital crime, the presumption is that the accused is dangerous and bail is denied.<sup>13</sup> For most other crimes, the accused will be released on bail, with the amount of the bail calculated as reasonable to the degree of the crime and the assurance the accused will appear at trial.<sup>14</sup> Regarding the flight risk of the accused, the court will look at the defendant's roots in the community, such as citizenship, residences, employment, history of attending legal proceedings, criminal record, as well as any family or assets within the jurisdiction.<sup>15</sup> Once bail is set, the defendant can remain in jail, pay the bond and be released, or sign a bail bond contract with a surety.<sup>16</sup> In using a bail bond, the defendant can be released

---

3. *History of Bail*, (Aug. 1, 2003), at <http://www.bail.com/history.htm>.

4. *History of Bail*, at <http://www.bail.com/history.htm>.

5. 8A AM. JUR. 2D, *supra* § 2.

6. *Id.*

7. 18 U.S.C. § 3142(b) (2000).

8. § 3142(c).

9. § 3142(c)(1)(B).

10. *Ayala v. State*, 425 S.E.2d 282, 284 (Ga. 1993).

11. § 3142(c)(1)(B).

12. § 3142(f).

13. § 3142(f).

14. § 3142(f).

15. *Ayala*, 425 S.E.2d at 284. *See also*, *United States v. Vargas*, 804 F.2d 157, 160 (1st Cir. 1986).

16. *How Bail Works*, (Jul. 31, 2003), at <http://www.bail.com/how.htm>

without using his or her own capital.<sup>17</sup> The defendant must only pay the cost the surety charges for issuing the bail bond.<sup>18</sup>

“The purpose of a bail bond is assurance that the defendant will appear or be produced by the surety at all scheduled proceedings before the court.”<sup>19</sup> A bail bond is a three- party obligation among a criminal defendant, a surety, and the state.<sup>20</sup> Each party’s obligation is as follows: The state transfers technical custody of the defendant to the surety.<sup>21</sup> The surety takes technical custody of the defendant and assures the state that the defendant will appear at all scheduled proceedings before that court.<sup>22</sup> In turn the defendant pays a specified amount of the bond to the surety, which is usually ten (10) percent.<sup>23</sup> The amount of the bond is contingent upon the risk assumed by the surety; this is based on the crime accused of and the flight risk.<sup>24</sup> This is called an appearance bond.<sup>25</sup> Often the defendant’s capital is put up as collateral in case the defendant does not show up to his or her hearing and skips bail.<sup>26</sup> This failure to appear causes the bond to be estreated, or forfeited, after which the surety is required to pay the full amount of the bail bond into the registry of the court.<sup>27</sup> Collateralizing the defendant’s property would reduce the risk of loss for the surety.<sup>28</sup> The defendant is released into the exclusive custody of the surety.<sup>29</sup>

## B. *History of Bail Bonds*

The current bail laws in the United States have evolved from the old English system.<sup>30</sup> The English system contained offenses classified asailable and nonailable.<sup>31</sup> These principles were incorporated into the drafting of the state Constitutions and eventually the Bill of Rights and the Eighth Amendment.<sup>32</sup>

Judicial authority to “take bail” has long been recognized in England as a means of assuring “the orderly functioning of the judicial process.” . . . As a consequence of growing concern in the American colonies for the strengthening of the protections of persons accused of crime, a trend to limit by legislation the discretion of judges to deny bail in noncapital cases developed. Nevertheless, . . . the authority of the trial court to

- 
17. *How Bail Works*, at <http://www.bail.com/how.htm>
  18. *How Bail Works*, at <http://www.bail.com/how.htm>
  19. *Wiley v. State*, 451 So. 2d 916, 922 (Fla. Dist. Ct. App. 1984) (citing *Younghans v. State*, 90 So. 2d 308 (Fla. 1956)).
  20. *Id.* For purposes of this article, the term “surety” will refer to both the insurance company, which bears the ultimate liability if a bond is forfeited, and the agent who posts the bond.
  21. *Id.*
  22. *Id.*
  23. *Bail: Getting Out of Jail After an Arrest*, (Jul. 31, 2003), <http://public.findlaw.com/criminal/nolo/ency/EA05D2A8-0746-452F-99D3DEE0765E86E6.html>.
  24. *Bail: Getting Out of Jail After an Arrest*, <http://public.findlaw.com/criminal/nolo/ency/EA05D2A8-0746-452F-99D3DEE0765E86E6.html>.
  25. *Bail: Getting Out of Jail After an Arrest*, <http://public.findlaw.com/criminal/nolo/ency/EA05D2A8-0746-452F-99D3DEE0765E86E6.html>.
  26. *Bail: Getting Out of Jail After an Arrest*, <http://public.findlaw.com/criminal/nolo/ency/EA05D2A8-0746-452F-99D3DEE0765E86E6.html>.
  27. *Bail: Getting Out of Jail After an Arrest*, <http://public.findlaw.com/criminal/nolo/ency/EA05D2A8-0746-452F-99D3DEE0765E86E6.html>.
  28. *Bail: Getting Out of Jail After an Arrest*, <http://public.findlaw.com/criminal/nolo/ency/EA05D2A8-0746-452F-99D3DEE0765E86E6.html>.
  29. *Wiley*, 451 So. 2d at 922.
  30. *History of Bail*, at <http://www.bail.com/history.htm>.
  31. *History of Bail*, at <http://www.bail.com/history.htm>.
  32. *History of Bail*, at <http://www.bail.com/history.htm>.

grant bail remains a necessary ingredient of the court's ability to conduct judicial proceedings in criminal cases.<sup>33</sup>

Bail bonds are the only way for many criminal defendants without sufficient capital to remain free pending a trial.<sup>34</sup> This allows these defendants to help prepare their case, while under the custody of the surety.<sup>35</sup>

Bail bonds are a beneficial part of the American justice system.<sup>36</sup> They help to control the population in jails and prisons.<sup>37</sup> They also give the accused the ability to be free until convicted of the crime, thus not punishing an accused before his or her conviction.<sup>38</sup> This keeps with the basic principle of the American criminal justice system that an accused is innocent until proven guilty.<sup>39</sup> Bail bonds serve the conveniences of the defendant by allowing him/her freedom while not interfering with the court's need for justice and the presence of the defendant.<sup>40</sup>

### III. HOW CAN A BAIL BOND BE FORFEITED

Section 903.26 of the *Florida Statutes* governs how and when a bond may be forfeited.<sup>41</sup> With regard to bail bonds, the terms forfeiture and estreatment are used interchangeably.<sup>42</sup> Under this statute a bond is forfeited when there is a breach of the bond.<sup>43</sup> Bonds are breached in two ways: (1) not showing up at the required time, place, and date and (2) by violating a condition attached to the bond.<sup>44</sup> Forfeitures are not favored at law, so statutes providing for forfeitures are to be strictly construed.<sup>45</sup>

#### A. *Breach of a Condition of the Bond*

A breach of bond occurs when there is some condition on the bail bond that the defendant does not follow.<sup>46</sup> A typical breach is when the court imposes travel restrictions on the defendant.<sup>47</sup> The court may require the defendant to remain in a certain geographic area.<sup>48</sup> Should the defendant leave the court-imposed boundary without permission from the court, the bond is breached.<sup>49</sup> In cases where the defendant violated the travel conditions, the bond was forfeited, even though the government showed no prejudice, cost, or inconvenience in locating the defendant.<sup>50</sup> Another breach of bond occurs when the defendant violates a condition of the bond requiring good behavior.<sup>51</sup> If a defendant commits a crime, that bond will be forfeited, because the defendant's illegal behavior while on release on bail caused the government to incur

---

33. Yording v. Walker, 683 P.2d 788, 791 (Colo. 1984).

34. 8A AM. JUR. 2D, *supra* § 2.

35. *Id.*

36. *Id.*

37. *Id.*

38. Ayala, 425 S.E.2d at 284.

39. *Id.*

40. Am Jur § 2

41. FLA. STAT. § 903.26 (2001).

42. *Id.*

43. *Id.*

44. § 903.26(2).

45. Caivano v. State, 331 So. 2d 331, 333 (Fla. Dist. Ct. App. 1976).

46. United States v. Stanley, 601 F.2d 380, 381 (9th Cir. 1979).

47. *Id.*

48. *Id.* at 382.

49. *Id.*

50. *Id.*

51. United States v. Santiago, 826 F.2d 499, 503 (7th Cr. 1987).

significant costs and suffer inconvenience and prejudice.<sup>52</sup> A bond is also breached where the defendant violates a condition of the bond requiring payment of all costs and charges awarded against him upon the failure of his appeal.<sup>53</sup> In *Commonwealth v. Lenhart*, the defendant served his sentence, but did not pay the fine or costs, and the court ordered forfeiture.<sup>54</sup> The court stated that “when the bond stipulates distinct and independent conditions, a breach of any condition of the appeal bond works as a forfeiture of the entire bond.”<sup>55</sup>

B. *Breach of Bond by Failure to Appear*

There are many different ways in which a bail bond can be breached.<sup>56</sup> This includes failure to appear, as well as the breach of any attached condition.<sup>57</sup> If the defendant misses his or her “time, date, and place” of the required hearing the bond will also be forfeited.<sup>58</sup> The defendant must be physically present at several times during a trial.<sup>59</sup> These times include: (1) first appearance, (2) when a plea is made, (3) any pretrial conference, (4) the beginning of the trial, (5) all proceedings before the jury, (6) presentation of evidence, (7) any view by the jury, (8) the rendition of the verdict, and (9) judgment and sentencing.<sup>60</sup> The clerk of the court will automatically forfeit the bond should the defendant fail to appear.<sup>61</sup> The forfeiture of the bond will result upon any of these breaches, and the defendant must then make a showing of why the forfeiture should be discharged.<sup>62</sup>

C. *Steps Needed for Forfeiture of Bond*

In order for the court to successfully forfeit a bond there must be (1) a breach of the bond, and (2) notice.<sup>63</sup> *Wiley* distinguishes between two types of notice that must take place for a bond to be forfeited.<sup>64</sup> The first notice is given so that the surety produces a defendant at a specific time and place.<sup>65</sup> The second notice is to inform the surety that since the defendant was not produced that the bond would be forfeited.<sup>66</sup> *Wiley* concluded that failure to comply with the first type of notice will invalidate an estreatment and forfeiture, while a breach of the second type of notice should not invalidate such orders.<sup>67</sup> *Universal Bail Bonds, Inc. v. State*,<sup>68</sup> sets the standard for what constitutes adequate preforfeiture notice. The clerk must give the surety at least seventy-two (72) hours notice before the time of the required appearance.<sup>69</sup> The notice must give the date, time, and location of the hearing.<sup>70</sup> The notice must state: the nature of the hearing, that the defendant’s presence was required, and that if the defendant did not appear the bond would be

---

52. *Id.* at 506.  
53. *Commonwealth v. Lenhart*, 82 A. 777, 779 (Pa. 1912).  
54. *Lenhart*, 82 A. at 779.  
55. *Lenhart*, 82 A. at 779.  
56. § 903.26(2).  
57. *Id.*  
58. § 903.26(2)(b).  
59. FLA. R. CRIM. P. 3.180(a).  
60. FLA. R. CRIM. P. 3.180(a).  
61. § 903.26(2)(b).  
62. § 903.26  
63. *Id.*  
64. *Wiley*, 451 So. 2d at 921.  
65. *Id.*  
66. *Id.*  
67. *Id.*  
68. 830 So. 2d 230, 231-32 (Fla. Dist. Ct. App. 2002).  
69. *Id.* at 231.  
70. *Id.*

estreated.<sup>71</sup> If the notice does not meet all these criteria it is considered defective and ambiguous allowing for an estreature to be vacated.<sup>72</sup> After this breach, the clerk must mail a notice to the surety and its agent.<sup>73</sup> This is called post forfeiture notice.<sup>74</sup> The surety must either pay the forfeiture or set a motion to vacate the estreature within sixty (60) days of the date the notice was mailed.<sup>75</sup>

The bond is forfeited so long as there is “express actual notice” given to the surety.<sup>76</sup> According to *Allied Fidelity*, the notice must provide direct information of the defendant’s appearance date for the first appearance, as well as “each subsequent appearance necessitated by court continuances.”<sup>77</sup> If the surety does not pay the bond after sixty (60) days, the court must enter a judgment against the surety.<sup>78</sup>

#### IV. RELIEF FROM JUDGMENT

After judgment is entered, the surety has thirty-five (35) days to pay the bond or risk getting shut down.<sup>79</sup> After the surety pays the bond, it can then ask for relief from judgment if there was some problem with the judgment.<sup>80</sup> There is no remission if the case goes to judgment because the surety never paid the forfeiture and thus breached the bond contract.<sup>81</sup> Once judgment is entered there is a switch from the criminal courts to the civil courts because the case deals solely with money and property.<sup>82</sup>

Where the court in which the criminal case is pending orders an appearance bond forfeited, and thereafter in a separate proceeding on the forfeiture a judgment is entered on the bond, the separate proceeding has been held a civil action, separate and apart from the original case in which the bail bond was taken, and an appeal from a judgment in that separate proceeding lies as in any other cause of a civil nature.<sup>83</sup>

The “real parties in interest” also change from the state and defendant into the county and the surety.<sup>84</sup> It is the county that is the beneficiary of the forfeited bond proceeds, and the surety who is liable for the forfeited bond’s payment.<sup>85</sup> According to *Keefe v. State*,<sup>86</sup> once a bond forfeiture has been reduced to judgment, that court is without jurisdiction to set aside the bond estreature. Once a bond has been forfeited there is an interesting jurisdictional question that arises.<sup>87</sup> A bond forfeiture takes place in the criminal courts, but depending on the nature of the judgment it may take an appeal or a separate proceeding to recover the bond.<sup>88</sup> This action for the judgment is a

---

71. *Id.* at 232.

72. *Id.*

73. § 903.26(2).

74. *Id.*

75. *Id.*

76. *Allied Fid. Ins. Co. v. State*, 499 So. 2d 932, 934 (Fla. Dist. Ct. App. 1987).

77. *Id.*

78. § 903.27.

79. *Resolute Ins. Co. v. Brinker*, 338 So. 2d 861 (Fla. Dist. Ct. App. 1976). The laws have continually changed regarding the time periods in the bond statutes. § 903.27.

80. § 903.27. However under rule 1.540 of the *Florida Rules of Civil Procedure*, if the judgment was entered in error, the surety may appeal. FLA. R. CIV. P. 1.540.

81. *Hillsborough County v. Roche Sur. & Cas. Co.*, 805 So. 2d 937, 939 (Fla. Dist. Ct. App. 2001).

82. *Santacruz*, 526 So. 2d at 737.

83. E. H. Schopler, Annotation, *Appealability of Order Relating to Forfeiture of Bail*, 78 A.L.R.2d 1180 (1961) citing (*State v. Esdale*, 45 So. 2d 861 (Ala. App. 1949).

84. *Id.*

85. *Id.*

86. 188 So. 2d 868, 869 (Fla. Dist. Ct. App. 1966).

87. *Santacruz*, 526 So. 2d at 737.

88. *Isgrig v. United States*, 109 F.2d 131, 133 (4th Cir. 1940).

civil action and an appeal from the judgment must be done using the rules of the civil courts.<sup>89</sup> Therefore the trial court, which forfeited the bail bond, is without jurisdiction to affect a decision once judgment has been entered.<sup>90</sup> There are various factors, which are used to determine whether a judgment or order relating to the forfeiture of bail is appealable.<sup>91</sup> This depends on whether the judgment is final or interlocutory.<sup>92</sup> If the judgment is not final, there must be another proceeding.<sup>93</sup> Judgments or orders granting, denying, vacating, or refusing to vacate, are appealable in some jurisdictions and not in others.<sup>94</sup> Relief from the forfeiture of bail cannot be obtained by an appeal from the conviction.<sup>95</sup> Therefore the action taken by the surety to gain relief from forfeiture is dependant on the type of judgment.<sup>96</sup> This factor will determine how a surety should proceed in its case.<sup>97</sup>

## V. REMISSION OF THE BOND

If the surety pays the bond into the registry of the court, the surety then has two years to produce the defendant to possibly recover some of the money paid.<sup>98</sup> Based on the amount of time from the forfeiture until the production of the defendant, there is a decreasing scale by which the surety can reclaim a maximum percentage of the bail bond payment.<sup>99</sup>

### A. *How to Obtain Remission*

*Hillsborough County v. Roche Surety & Casualty Co.* stated that in order to obtain remission there must have been no breach of the bond and the surety must have apprehended or have substantially attempted to apprehend or procure the defendant.<sup>100</sup> In *County of Volusia v. Audet*,<sup>101</sup> the defendant failed to show up to court and the surety failed to pay the forfeiture within the specified time frame, thus breaching the bond and giving up any chance for remission. The surety then filed a motion to set aside the bond estreature, set aside judgment, exonerate the bail bondsman, and obtain remission.<sup>102</sup> However this was over sixty (60) days from the time of judgment.<sup>103</sup> Because the surety failed to pay within the statutory period and did not file a motion for remission in a timely manner, the surety was not entitled to receive remission.<sup>104</sup> This court adopted the holding in *Accredited Surety* that “section 903.28 is not available to a surety when forfeiture is reduced to judgment and no timely motion to set aside the judgment is made.”<sup>105</sup> According to Section 903.28, (1) within 90 days the surety can reclaim up to 100 percent of the money, (2) within 180 days the surety can collect up to 95 percent, (3) within 270 days the surety can reclaim up to 90 percent, (4) within one year the surety can reclaim up to 85 percent, and (4) within two years the surety can reclaim at most 50 percent of the bond.<sup>106</sup>

---

89. *Stantacruz*, 526 So. 2d at 737.

90. *Keefe*, 188 So. 2d at 869.

91. *Isgrig*, 109 F.2d at 133.

92. *Id.*

93. *Id.*

94. 78 A.L.R.2d 1180.

95. *State v. Fedder*, 285 P.2d 802, 806 (Idaho 1955).

96. *Isgrig*, 109 F.2d at 133.

97. *Id.*

98. § 903.28.

99. § 903.28.

100. *Roche*, 805 So. 2d at 939.

101. *County of Volusia v. Audet*, 682 So. 2d 687 (Fla. Dist. Ct. App. 1996).

102. *Id.*

103. *Id.*

104. *Id.* at 688.

105. 78 A.L.R.2d 1184.

106. § 903.28.

B. *Test for Remission*

The trial court has discretion to remit some or the entire forfeited bond to the surety, only if the surety can meet the remission test.<sup>107</sup> There is a two-pronged test to determine whether the surety is entitled to remission of the bond, and the surety must not have breached the bond.<sup>108</sup> First, the surety must have either apprehended and surrendered the defendant, caused the apprehension or surrender of defendant, or substantially attempted to procure the defendant.<sup>109</sup> Substantially attempt to procure means that the surety attempted to legally arrest or seize the defendant.<sup>110</sup> In *Roche*, the surety did not meet the substantially attempt to procure requirement when the surety hired an agent to find the defendant who fled to Mexico.<sup>111</sup> *Roche* held that the court will not excuse the surety's failure to surrender the defendant on time.<sup>112</sup> The surety must pay the forfeited bond unless it is excused by statute.<sup>113</sup> However in *Surety Continental Heritage*, the surety was found to substantially attempt to procure the defendant by locating him in Jamaica, promising to travel there and apprehend him, and pay the extradition expenses even though the state was not willing to accept these promises and extradite the defendant.<sup>114</sup> In *In re Santacruz*, although the State Attorney did not extradite the defendants who had fled to Columbia, the surety was still obligated under the bail bonds.<sup>115</sup> The court stated:

[t]he fact that [the principal's] presence may subsequently be obtained through extradition cannot eliminate the prejudice to the state which must be presumed as a result of the delay in bringing him to trail. Since the surety failed to perform its obligation, it must be held liable upon its undertaking.<sup>116</sup>

Second, the delay must not have thwarted the proper prosecution of the defendant.<sup>117</sup> The courts have interpreted this second prong of the test to mean that the state is not prejudiced in its prosecution against the defendant.<sup>118</sup> Therefore if there are any factors caused by this delay that will not allow the state to try the defendant in the same way it would have on the original date of appearance, the state is prejudiced and the surety cannot recover any money in remission of the bond.<sup>119</sup> Both elements of this test must be met in order for the surety to be entitled to remission of forfeiture.<sup>120</sup> The State's main concern is bringing the criminal defendant into the court for a proper prosecution.<sup>121</sup> The State will therefore award monetary incentives to the surety to bring back the defendant.<sup>122</sup>

The purpose of allowing for remission of forfeiture if the defendant surrenders or is apprehended within two years is to encourage expeditious apprehension or surrender of defendant, in that statutory grading scale calculates percentage of forfeiture remittable

---

107. 78 A.L.R.2d 1185.

108. § 903.28.

109. § 903.28.

110. *Roche*, 805 So. 2d at 939.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Sur. Cont'l Heritage Ins. Co. v. Orange County*, 798 So. 2d 837, 840 (Fla. Dist. Ct. App. 2001).

115. *Stantacruz*, 526 So. 2d at 737.

116. *Stantacruz*, 526 So. 2d at 737.

117. § 903.28.

118. *Roche*, 805 So. 2d at 939.

119. *Id.*

120. § 903.28.

121. *Leon County v. Aloi-Williams Bonding Agency*, 652 So. 2d 464, 466 (Fla. Dist. Ct. App. 1995).

122. *Id.*

according to amount of time that has passed after forfeiture until defendant is returned to justice.<sup>123</sup>

## VI. HOW CAN A BAIL BOND BE DISCHARGED

A forfeiture can be set aside for a variety of reasons.<sup>124</sup> However to obtain remission of a bail bond forfeiture the bondsman must make a timely motion for the forfeiture to be set aside.<sup>125</sup>

### A. *Discharged by Statute*

According to Section 903.26(5) of the *Florida Statutes*, the court shall discharge a forfeiture within 60 days if: (a) it was impossible for the defendant to appear beyond his/her control, (b) the defendant was adjudicated insane, or confined in an institution or prison at the time of the required appearance or (c) if the defendant has been arrested or surrendered and the delay has not prejudiced the state's case against the defendant.<sup>126</sup>

### B. *Discharged by State's Breach*

A surety can be discharged if the state breaches its bail bond contract with the surety.<sup>127</sup> This occurs when the state rearrests the defendant on the same charge.<sup>128</sup> In *Accredited Surety*, the surety's bail bond liability discharged when the State rearrested the accused on the same charge.<sup>129</sup> This is a breach of contract because the defendant is in the exclusive custody of the surety and the state may not interfere with this custody.<sup>130</sup> There would be a new obligation should the State choose to "continue bail."<sup>131</sup> Therefore, without another contract the surety was not liable when the defendant failed to appear in court.<sup>132</sup>

### C. *Discharged by Lack of Notice*

If there is no notice given or the notice is defective, the estreature can be vacated.<sup>133</sup> The court will look at the standard set forth in *Universal Bail Bonds* to determine if there is sufficient notice.<sup>134</sup> The surety is entitled to the court vacating the bond where no notice or defective notice is given, if it can prove that its case is prejudiced by the state's lack of notice.<sup>135</sup> A showing of the lack of preforfeiture notice without prejudice will not relieve the surety of its obligations under the bond.<sup>136</sup> There is no exact definition of prejudice in statute or case law.<sup>137</sup> It is determined on a case-by-case basis, but it is clear that the mere passage of time does not establish prejudice so as to entitle the surety to discharge on the bond.<sup>138</sup> In *Wiley*, the surety just alleged that because the state delayed six and a half years before prosecuting the defendant, the surety

---

123. *Id.* at 464.

124. *Audet*, 682 So. 2d at 687.

125. *Id.* at 688.

126. § 903.26(5).

127. *Accredited Sur. & Cas. Co. v. State*, 383 So. 2d 308 (Fla. Dist. Ct. App. 1980).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Accredited*, 383 So. 2d at 309.

133. § 902.26.

134. *Universal Bail Bonds*, 830 So. 2d at 231.

135. *Id.*

136. *State v. Saiz*, 547 So. 2d 208 (Fla. Dist. Ct. App. 1989).

137. *Wiley*, 451 So. 2d at 922.

138. *Id.*

was prejudiced.<sup>139</sup> This was struck down.<sup>140</sup> The surety then came back by saying that because the time had passed it became much more difficult to track down the defendant.<sup>141</sup> This argument was also not upheld as prejudice by the courts.<sup>142</sup> Some findings of prejudice are the loss of key witnesses and loss of evidence, which without damages the ability of the other side to perform. Upon vacating or setting aside the forfeiture, the surety escapes liability only if the trial court specifically determines to relieve the surety of further liability.<sup>143</sup> In *International Fidelity*, the surety did not receive proper notice so the bond forfeiture was vacated.<sup>144</sup> However, the court did not relieve the surety of its obligation to produce the defendant.<sup>145</sup> The court order placed the parties into the same position they were before the forfeiture was entered and the surety was subjected to “no higher duty or undertaking than that contemplated in original agreement.”<sup>146</sup> Therefore, the surety still had to produce the defendant overruling the order, which vacated the forfeiture.<sup>147</sup>

#### D. Discharge Under Rule 1.540 of the Florida Rules of Civil Procedure

Even if the surety does not comply with the procedures to obtain a remission of judgment, a surety may also seek relief from a forfeited bond under rule 1.540 of the *Florida Rules of Civil Procedure*, if there were something wrong with the judgment.<sup>148</sup> A bondsman may raise any reasons for setting aside a forfeiture, other than those which may discharge a forfeiture, on plenary appeal.<sup>149</sup> Rule 1.540 grants relief from judgment, decrees, or orders for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) that the judgment or decree is void; or (5) that the judgment or decree has been satisfied, released, or discharged, or a prior judgment or decree upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or decree should have prospective application.<sup>150</sup>

In *Allied Fidelity*, the clerk did not provide the defendant with “express actual notice.”<sup>151</sup> The defendant failed to appear in court and the bond was forfeited.<sup>152</sup> The defendant filed an untimely motion to vacate the bond estreature.<sup>153</sup> Under Section 903.27(5), the court would have no jurisdiction to grant relief and would have to dismiss the action.<sup>154</sup> However, under rule 1.540 of the *Florida Rules of Civil Procedure*, the trial court can grant relief of judgments when a clerical mistake has been made or the above-mentioned reasons under the statute.<sup>155</sup> Therefore the court

---

139. *Id.*

140. *Id.*

141. *Id.*

142. *Wiley*, 451 So. 2d at 922.

143. *Id.*

144. *Bush v. Int'l Fid. Ins. Co.*, 834 So. 2d 212, 214 (Fla. Dist. Ct. App. 2002).

145. *Id.*

146. *Id.* at 213.

147. *Id.*

148. *Resolute Ins. Co. v. State*, 289 So. 2d 456, 457 (Fla. Dist. Ct. App. 1974).

149. *Hammond v. Mihalko*, 455 So. 2d 529, 530 (Fla. Dist. Ct. App. 1984).

150. FLA. R. CIV. P. 1.540.

151. *Allied*, 499 So. 2d at 934.

152. *Id.* at 933.

153. *Id.*

154. *Id.* at 934.

155. *Id.*

had jurisdiction to hear the surety's motion to vacate and set aside judgment of forfeiture of bail bond because "it [was] no longer equitable that the judgment or decree should have prospective application."<sup>156</sup> The surety could obtain relief through rule 1.540 where it could not through Section 903.27.<sup>157</sup>

## VII. EXCEPTIONS

The court has some discretion in deciding forfeitures and whether a discharge should excuse the liability of the surety.<sup>158</sup> Section 903.26(2)(b) of the *Florida Statutes* states that if the defendant misses his/her time of a hearing, the court has discretion to postpone the proceeding until later that day if it is within the interest of justice.<sup>159</sup> However, although not decreed by statute, the seventy-two (72) hour notice requirement does not apply to continuances of less than seventy-two (72) hours.<sup>160</sup> As the court ruled in *Hagman*, when the continuance is less than seventy-two (72) hours it is impossible to give proper notice, and to require this notice would make these continuances effectively barred.<sup>161</sup> According to *Florida Insurance Exchange v. State*<sup>162</sup> the court also has discretion to relieve against judgment entered on bail bond forfeited for breach of conditions. The court in this case looked at the particular facts and circumstances in deciding whether to grant relief.<sup>163</sup>

## VIII. WHEN DOES A DISCHARGE ACTUALLY DISCHARGE THE SURETY'S LIABILITY

The typical way a surety's liability ends is when the defendant appears at the times and places specified in the bail bond and continues in the presence of the court until the terms of the bond are fulfilled.<sup>164</sup> There are various other ways in which a surety's liability is discharged as evidenced through both statutes and case law.

### A. *State Drops the Defendant's Charges*

"A bond will be cancelled when it is no longer necessary to look to the surety to guarantee the appearance of the accused at subsequent court proceedings."<sup>165</sup> This situation may occur if the State drops the criminal charges against the defendant, through either a "no action" or a "nolle prosequi."<sup>166</sup> *Allied Fidelity Insurance Co. v. State* held that if the state brings a "no action," the accused is released, and the surety is also released from liability of the bond.<sup>167</sup> Even if the charges are filed in the future, the bond has been discharged, and the surety is not responsible for producing the defendant.<sup>168</sup>

---

156. *Allied*, 499 So. 2d at 934.

157. *Id.*

158. § 903.26(2)(b).

159. § 903.26(2)(b).

160. *Accredited Sur. & Cas. Co. v. Hagman*, 467 So. 2d 1065, 1066 (Fla. Dist. Ct. App. 1985).

161. *Id.* at 1067.

162. 178 So. 2d 211, 213 (Fla. Dist. Ct. App. 1965).

163. *Id.*

164. *Commonwealth v. Hill*, 119 A.2d 572 (Pa. 1956).

165. *Int'l Fid.*, 834 So. 2d at 214 (citing *Wiley*, 451 So. 2d at 922).

166. *Allied Fid. Ins. Co. v. State*, 408 So. 2d 756 (Fla. Dist. Ct. App. 1982).

167. *Id.*

168. *Id.*

B. *Excuses for Breach of Bond*

A forfeiture caused by a breach of a condition of a bail bond other than appearance, can be set aside if the defendant was not actually aware of the specific condition violated and that the breach was not willful.<sup>169</sup> It must also be shown that the government incurred no expense in attempting to locate the defendant, and was not prejudiced nor damaged by the breach.<sup>170</sup> If there is an expense, the bail bondsmen must pay the costs and expenses of returning the defendant to the jurisdiction of the court before forfeiture can be discharged.<sup>171</sup> This includes the costs of the sheriff's office to transport the defendant.<sup>172</sup> The county must show the actual costs incurred for the specific defendant's transfer and not the average or estimated costs.<sup>173</sup> Certain states allow the defendant to offer mitigating circumstances in explaining why a bond should not be forfeited.<sup>174</sup> A minor defendant with no guardian ad litem has been found sufficient to return a forfeited bond, where as an incarcerated defendant in another jurisdiction will not avoid forfeiture.<sup>175</sup>

The surety may also show circumstances beyond his/her control, which made it impossible to produce the defendant on a specified date.<sup>176</sup> This impossibility must have been an act of God, and not caused by the surety.<sup>177</sup> The surety must also show the return of the defendant at the earliest possible date the impossible conditions came to an end.<sup>178</sup> The death of the defendant prior to when he or she is required to appear in court will discharge the surety.<sup>179</sup> However, most jurisdictions agree that if the defendant dies after judgment of his or her forfeiture occurs, then the surety is still responsible for the bond.<sup>180</sup> This is the common result that takes place when an even occurs that would discharge the surety's liability prior to forfeiture.<sup>181</sup> If the defendant already missed his or her hearing, the surety breached his contract with the state and will ordinarily not be excused.<sup>182</sup>

C. *Failure to Notify and Prejudice*

The trial court can set aside the forfeiture of a bail bond for failure to notify the bondsman after the defendant's presence was required at the hearing, without canceling the bond where the bondsman failed to show prejudice.<sup>183</sup> Setting aside the forfeiture and directing the bond to continue in force preserves the status quo and gives the bondsman the opportunity to secure the defendant's presence.<sup>184</sup>

---

169. United States v. D'Argento, 339 F.2d 925, 928 (7th Cir. 1964).

170. *Id.*

171. Easy Bail Bonds v. Polk County, 784 So. 2d 1173 (Fla. Dist. Ct. App. 2001). The costs do not include judicial salaries, clerical services, and juror reimbursements because no other litigant is subject to those costs. It is unfair to subject the bail bondman to these costs because the county attorney and clerk will continue to operate regardless of this case. *Id.*

172. *Id.*

173. *Id.*

174. State v. Rocha, 572 P.2d 122, 125 (Ariz. Ct. App. 1977).

175. *In re* E.H. 397 N.E.2d 571, 573 (Ill. App. Ct. 1979).

176. § 903.26(5).

177. *Id.*

178. *Id.*

179. 8A AM. JUR. 2D, *supra* § 88.

180. *Id.*

181. *Id.*

182. *Id.*

183. § 903.26.

184. Weaver v. State, 370 So. 2d 1236, 1238 (Fla. Dist. Ct. App. 1979).

Order of forfeiture and final judgment which were vacated and set aside by circuit court did not discharge surety company or cancel appearance bond of record in trial court but merely restored parties to original status quo as if bail bond had never been forfeited nor final judgment entered thereon.<sup>185</sup>

This is logical because even though the surety did not have notice of the defendant's court appearance, it still had technical custody of the defendant.<sup>186</sup> Therefore, it is not fair to penalize the surety for not producing the defendant in court and the forfeiture should be discharged or remitted.<sup>187</sup> However, the surety should have still maintained custody of the defendant regardless of the defendant missing a hearing and should still be able to produce the defendant for future proceedings.<sup>188</sup> It is equitable to continue the surety's liability for the bond, so long as the trial court determines that the surety is not prejudiced by the delay caused by the State.<sup>189</sup> "The burden . . . is clearly upon the surety to prove such prejudice by competent evidence."<sup>190</sup>

#### D. *Statutory Cancellation*

Section 903.31 of the *Florida Statutes* governs the cancellation of a bond.<sup>191</sup> A bond is cancelled if the court orders the bond cancelled within ten (10) business days after the conditions of a bond have been satisfied or the forfeiture is discharged or remitted.<sup>192</sup> "An adjudication of guilt or innocence of the defendant shall satisfy the conditions of the bond."<sup>193</sup> However, if the bond has been forfeited then an adjudication does not satisfy the conditions of the bond, and the surety is not relieved of his/her obligations.<sup>194</sup> The bond will also be cancelled thirty-six (36) months after the bond has been posted, and 365 days after the defendant's arrest if no formal charges have been brought.<sup>195</sup> Although Section 903.31 appears to say that when an estreatment is vacated the surety's liability for the bond is released, the courts have not interpreted the statute in this way.<sup>196</sup> According to *Wiley*, Section 903.31 does not include an order vacating and setting aside a forfeited bond for lack of the notice requirement unless the trial court expressly states that the surety is relieved.<sup>197</sup> In *International Fidelity*, the State failed to give notice to the surety of the defendant's required appearance.<sup>198</sup> This prevented the state from obtaining an order of forfeiture and estreatment; however, it did not invalidate the bonding agreement between the state and the surety.<sup>199</sup> The surety still maintained custody of the accused and is still responsible to produce the defendant with notice.<sup>200</sup> *International Fidelity*, in adopting *Wiley*, sets the standard for the 4<sup>th</sup> DCA by which the surety can escape liability upon a discharge or remittance of forfeiture.<sup>201</sup> The bond shall only be cancelled when the trial court specifically determines to relieve the surety or the defendant of further liability on the bond.<sup>202</sup>

---

185. *Resolute Ins.*, 289 So. 2d at 456.

186. *Wiley*, 451 So. 2d at 922.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. § 903.31.

192. *Id.*

193. § 903.31(1).

194. *Id.*

195. § 903.31.

196. *Wiley*, 451 So. 2d at 922.

197. *Id.*

198. *Int'l Fid.*, 834 So. 2d at 214.

199. *Id.*

200. *Id.* at 215.

201. *Id.*

202. *Id.*

*Wiley* adopted the argument of *Weaver*, stating that “it would be illogical to conclude that the bondsman and his surety company are automatically relieved of their obligation under the bond in every case simply because of the failure to give the statutory notice of a forfeiture which has already occurred.”<sup>203</sup>

E. *When is the Bond Satisfied?*

A major issue concerning when the surety escapes liability is at what point the bond is satisfied.<sup>204</sup> According to *Broward County v. B & B Bail Bonds*, a surety is not released from liability upon the trial court’s judgment and sentence of a defendant who fails to appear at sentencing.<sup>205</sup> According to Rule 3.180 of the *Florida Rules of Criminal Procedure*, the defendant must be physically present at several key points during a trial.<sup>206</sup> This includes the pronouncement of judgment and the imposition of sentence.<sup>207</sup> The surety remains liable until the court enters an order adjudicating the guilt of the defendant.<sup>208</sup> However, even after adjudication, the surety will still remain liable for the bond if the bond was forfeited.<sup>209</sup> In this case the defendant did not show up for sentencing even though the State agreed that the defendant could be sentenced in absentia to the maximum sentence, and the court forfeited the bond.<sup>210</sup> The court ruled that allowing sentencing in absentia was not allowing the defendant to skip sentencing but was a punishment if sentencing was missed.<sup>211</sup> Upon missing sentencing, the bail bond was forfeited, and the court reconvened for sentencing in absentia.<sup>212</sup> The court found forfeiture to be proper.<sup>213</sup>

Section 903.045, Florida Statutes (2000), declares the public policy that a criminal surety bail bond executed by a licensed agent in connection with pretrial release of a criminal defendant shall be construed as a commitment by and an obligation upon the bail bond agent to ensure that the defendant appears at all subsequent criminal proceedings and otherwise fulfills all conditions of the bond.<sup>214</sup>

Even though the entire trial took place, the defendant’s presence at sentencing is essential and guaranteed by the surety.<sup>215</sup> Therefore, since the bond was forfeited prior to an adjudication of guilt or innocence, the conditions of the bond are not satisfied and the surety remains liable for the appearance bond.<sup>216</sup>

## IX. CONCLUSION

The history of bail bonds is rich and important, and it is a very complicated area of law. It is not enough to analyze the statutes in determining when a discharge of a bond is actually a discharge of the surety’s liability.<sup>217</sup> A bond, if breached, will be forfeited or estreated.<sup>218</sup> That

---

203. *Wiley*, 451 So. 2d at 921-22 (citing *Weaver*, 370 So. 2d at 1236).

204. *Broward County v. B & B Bail Bonds*, 790 So. 2d 1224, 1225 (Fla. Dist. Ct. App. 2001).

205. *Id.*

206. FLA. R. CRIM. P. 3.180.

207. FLA. R. CRIM. P. 3.180.

208. § 903.31.

209. § 903.31(1).

210. *B & B*, 790 So. 2d at 1226.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 1225.

215. *B & B*, 790 So. 2d at 1226.

216. *Id.*

217. *Wiley*, 451 So. 2d at 922.

forfeiture can either be paid, set aside, or go to judgment.<sup>219</sup> If the bond is set aside, the surety is still liable unless the lower court expressly dismisses the surety's liability.<sup>220</sup> If the bond goes to judgment the surety can either pay the bond, move to vacate the judgment, or risk his/her business shutting down.<sup>221</sup> At this point there are several jurisdictional questions that must be answered due to the civil nature of the dispute.<sup>222</sup> If the surety pays, he/she has two years to produce the defendant in hopes of remission of some or the entire value of the bond.<sup>223</sup> With regard to bail bonds, the statute and case law are construed fairly. Both the state and the surety must follow explicit rules and procedures.<sup>224</sup> If either one fails to follow these procedures exactly, the court is generally willing to put the parties back into their position before the error, unless the error damages the other side's case.<sup>225</sup> If the State fails to give preforfeiture notice, the court will give the State another chance unless the surety's case is prejudiced.<sup>226</sup> If the surety fails to produce the defendant, it can pay the bond and return the defendant within two years to receive remission.<sup>227</sup> Bail bond law is generally fair and helps provide an essential service to our legal system

---

218. § 903.26.  
219. § 903.27.  
220. *Wiley*, 451 So. 2d at 922.  
221. § 903.27.  
222. *Santacruz*, 526 So. 2d at 737.  
223. § 903.28.  
224. § 903.26 - .31.  
225. *Wiley*, 451 So. 2d at 922.  
226. *Id.*  
227. § 903.28.