

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 1347 (Jones-Sawyer)
Version: June 16, 2021
Hearing Date: June 29, 2021
Fiscal: No
Urgency: No
AWM

SUBJECT

Bail: premiums

DIGEST

This bill prohibits the practice of charging renewal premiums on bail and immigration bonds, as specified.

EXECUTIVE SUMMARY

In recent years, the cash bail system – which allows persons to remain free while awaiting a trial or removal proceeding if they can afford the bail price or a bail bond – has come under significant criticism for the disproportionate harm it causes to lower-income arrestees and detainees. Bail and immigration bonds – which usually require a fee (generally 10 percent of the total bail amount) and a lien on property for the remainder – become even more onerous when the bail agent or surety company charges a “renewal premium,” typically another 10 percent of the cost of the bail amount charged every twelve months. These automatic renewal premiums do not reflect any change in the risk assessments or cost of maintaining the bond, and recipients often have little choice but to pay; the alternative is returning to detention, which can be economically ruinous.

This bill would prohibit licensed bail agents in California from entering into bail agreements with renewal premiums or charging renewal premiums on existing agreements starting on January 1, 2022. This bill would also prohibit licensed surety companies from entering into immigration bond agreements with renewal premiums starting on July 1, 2022. This bill creates a private right of action for any person who suffers damages as a result of the violation, including the right to recover statutory damages of \$3,000, attorney fees, and costs.

This bill is sponsored by the California Department of Insurance and supported by a number of criminal justice organizations and attorney associations. There is no known opposition. This bill was passed out of the Senate Public Safety Committee with a 4-0 vote.

PROPOSED CHANGES TO THE LAW

Existing state law:

- 1) Prohibits excessive bail. (Cal. Const., art. I, § 12.)
- 2) Requires that a person be released on bail except when charged with certain capital and felony crimes and the facts suggesting guilt are evident or the presumption of guilt is great. (Cal. Const., art. I, § 12.)
- 3) Requires a court, when setting bail, to take into consideration the protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of their appearance at the trial or hearing of the case; and permits the court, at its discretion and upon consideration of these factors, to release a person on their own recognizance. (Cal. Const., art. I, § 28.)
- 4) Requires the superior court judges in each county to prepare, adopt, and annually revise a uniform countywide bail schedule; and that, in adopting the uniform countywide schedule for bailable felony offenses, the judges shall consider the seriousness of the offense charged and assign an additional amount of required bail for each aggravating or enhancing factor chargeable in the complaint. In considering offenses in which a violation of a controlled substance offense is alleged, the judge shall assign an additional amount of required bail for offenses involving large quantities of controlled substances. (Pen. Code, § 1269b(c) & (e).)
- 5) Allows a defendant to ask the judge for release on bail lower than that provided in the schedule of bail or on their own recognizance, and authorizes the judge to set bail in an amount they deem sufficient to ensure the defendant's appearance or to ensure the protection of a victim, or family member of a victim, of domestic violence, and to set bail on the terms and conditions that they, in the court's discretion, deems appropriate, including releasing the defendant on their own recognizance. (Pen. Code, § 1269c.)
- 6) Specifies conditions for a defendant's release on their own recognizance. (Pen. Code, §§ 1318-1319.)
- 7) Provides that bail is forfeited if an on-bail defendant fails to appear for any scheduled court appearance, unless the clerk of the court fails to give proper notice to the surety or depositor within 30 days or the defendant is brought before the court within 180 days. (Pen. Code, § 1305(a) & (b).)
- 8) Regulates and licenses surety companies that write immigration bonds. (Ins. Code, div. 1, pt. 2, ch. 5, §§ 1621 et seq.)

- 9) Regulates and licenses agents that execute bail bonds. (Ins. Code, div. 1, pt. 2, ch. 7, §§ 1800 et seq.)

Existing federal law:

- 1) Prohibits excessive bail. (U.S. Const., 8th Amend.)
- 2) Authorizes a person who is not a citizen of the United States who is awaiting a decision as to whether they must be removed from the United States to be released on a bond of at least \$1,500, subject to conditions set by the Attorney General. (8 U.S.C. § 1226(a); 8 C.F.R. § 103.6.)
- 3) Authorizes an immigration bond to be posted by a surety corporation incorporated under the laws of the United States, a state, the District of Columbia, or a territory or possession of the United States, and that has registered with the Secretary of the Treasury and meets other specific requirements. (8 C.F.R. § 103.6(b).)

This bill:

- 1) Provides that, on and after January 1, 2022, no insurer, bail agent, or other bail licensee shall enter into a contract, agreement, or undertaking of bail which requires the payment of more than one premium for the duration of the agreement, and the duration of the agreement shall be until bail is exonerated.
- 2) Provides that, on and after January 1, 2022, no insurer, bail agent, or other bail licensee, shall charge, collect, or receive a renewal premium in connection with a contract, agreement, or undertaking of bail.
- 3) Provides that, on and after July 1, 2022, no insurer or insurance licensee shall enter into a contract, agreement, or undertaking to post an immigration bond that requires the payment of more than one premium for the duration of the agreement, and the duration of the agreement, and that an insurer or insurance licensee shall not charge, collect, or receive a renewal premium in connection with a contract, agreement, or undertaking to post an immigration bond entered into on or after that date.
- 4) Provides that a violation of the above by an insurer, bail agent, or other bail licensee shall make the violator liable to the person affected by the violation for all damages that person may sustain by reason of the violation plus statutory damages of \$3,000.
- 5) Provides that a person affected by the violation may, if they prevail in an action against the insurer, bail agent, or other bail licensee to enforce this section, recover court costs and reasonable attorney fees as determined by the court.
- 6) Contains a severability clause.

COMMENTS

1. Author's comment

According to the author:

As the Chair of the Assembly's Public Safety Committee, it is my priority that poverty and predatory business practices don't get in the way of justice. Socio-economic status should have no bearing on equal treatment under the law. AB 1347 is about racial and economic justice. Blacks and Latinos are far more likely than their white counterparts to remain in prison simply because these added fees make it financially impossible to post bail. Due to COVID court delays leading to much longer timelines in cases, people are now at higher risk of being charged a renewal premium. Money/Cash bail remains one of the most egregious racial disparities in our justice system. This bill will provide a small point of relief against arbitrary and predatory practices used by the bail industry.

2. This bill prohibits the practice of charging renewal premiums on criminal bail and immigration bond agreements

Existing law allows a superior court or the United States Attorney General to release certain criminal defendants or persons awaiting a determination of their removability (together, subjects) prior to their criminal case or removal proceeding.¹ (Penal Code Section 1269b.) State criminal bail amounts are determined by the court according to a schedule set by the county, subject to certain statutory restrictions;² federal immigration bond amounts are set by regulation.³ Generally speaking, criminal bail is set much higher than immigration-related bail.⁴

Because posting the full amount of bail is out of the question for most people, a bail bond is the most likely means by which a person is able to satisfy the bail price. To obtain a bail bond, a subject pays a licensed bail agent or licensed surety company a nonrefundable fee calculated as a percentage of the total bail price; according to Insurance Commissioner Ricardo Lara, the fee is typically in the range of 10 percent of the total bond amount. Bonds also typically have to be secured for the full amount with property owned by the subject or their relatives; often that means a lien on a family home. Assuming the bond is accepted, the subject is released until the trial or other proceeding; the bond is exonerated at the end of the process, unless the subject fails to appear as required. The bond issued on behalf of the subject is, in essence, an insurance policy against the person absconding before their proceedings begin; if the subject fails to appear, the county or federal government will receive the full amount of bail (and the

¹ Pen. Code, § 1269b; 8 U.S.C. § 1226.

² Pen. Code, §§ 1269b(c), 1270.1.

³ 8 C.F.R. § 103.6.

⁴ Compare, e.g., Superior Court of California, County of Los Angeles, *2021 Felony Bail Schedule* (2021) (bail amounts ranging from \$20,000 to \$1,000,000) with 8 U.S.C. § 1226 (minimum immigration bail is \$1,500).

insurer, insurance licensee, bail agent, or other bail licensee (together, bail company) recovers the property subject to the lien).

According to the author, renewal premiums are charged on some, but not all, bail and immigration bonds. Renewal premiums are generally charged annually, i.e., every 12 months after the bond's execution. Renewal premiums do not reflect any change in the risk assessment that went into the bond, or any evidence suggesting that the subject of the bond is a new flight risk. The cost of a bond can thus double, or even triple, if a trial is delayed – a factor over which the subject often has no control. Commissioner Lara reports that one study found that at least 1,300 people have been locked in county jails for longer than three years prior to trial or sentencing, and immigration court cases typically take over 1,000 days to be resolved. Trial and procedural delays have become especially acute during the COVID-19 pandemic.

For many families, the cost of a renewal premium is prohibitive. Bill supporters California Public Defenders Association – a statewide organization of public defenders, private defense counsel, and investigators – reports that they have had “clients who appeared at every court appearance but were nevertheless remanded when they were not able to pay the renewal fees on their bail bonds.”

In March of this year, the California Supreme Court held that “[t]he common practice of conditioning freedom solely on whether an arrestee can afford bail is unconstitutional.”⁵ While the Court did not address renewal premiums specifically, the fact that renewal premiums lead to subjects being detained “ ‘solely because’ [they] ‘lacked the resources’ to post bail” is exactly the phenomenon that the Court found to violate the Constitution.⁶ Arguably renewal premiums are even more offensive, because at the time the premium has been charged, the bail amount has already been set and the subject has already been free and appearing as required for a year; the premium does not appear to serve any public safety purpose, but rather only enriches the bail company.

This bill would prohibit bail and immigration bond agents and companies licensed in California from charging renewal premiums. For bail agents, the obligation would begin when this bill is set to take effect, January 1, 2022. For immigration bond companies, the obligation would take effect on July 1, 2022, in recognition of the additional federal role and regulation in immigration bonds and the relatively more complex changes that need to be made by the surety companies issuing immigration bonds. Additionally, this bill would prevent criminal bail bond companies from charging renewal premiums on existing bail bond agreements as of January 1, 2022.

To enforce the prohibition on renewal premiums, this bill provides a private right of action to the person who sustained damages as a result of the improper bail premium; it

⁵ *In re Humphrey* (2021) 11 Cal.5th 135, 143.

⁶ *Ibid.*

appears likely that any person who was improperly charged a bail premium would qualify, having suffered damages in the form of an improper payment. To incentivize enforcement suits and to prevent the cost of counsel from preventing meritorious lawsuits, the bill also provides that a prevailing plaintiff can also obtain statutory damages of \$3,000, as well as reasonable attorney fees and costs.

3. The ban on renewal premiums for existing bail bond agreements does not appear to violate the Contracts Clause of the United States Constitution

While the Contracts Clause of the U.S. Constitution is stated in absolute terms,⁷ the United States Supreme Court's interpretation of the clause is much more nuanced. Indeed, "not all laws affecting pre-existing contracts violate the Clause."⁸ Instead, the Court imposes a two-step test to determine whether a law impeding a pre-existing contract is unconstitutional. "The threshold issue is whether the state law has 'operated as a substantial impairment of a contractual relationship,' " which involves considering "the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights."⁹ If a court determines there was a substantial impairment, "the inquiry turns to the means and ends of the legislation," in particular "whether the state law is drawn in an 'appropriate' and 'reasonable' way to advance a 'significant and legitimate public purpose.' "¹⁰

Here, it seems likely that the State would prevail on this inquiry. With respect to the first prong, it is questionable whether barring a renewal premium would "substantially" impede existing criminal bail agreements. The defendant has already paid the initial premium, and because a bail company does not know at the outset which defendants will need a premium that lasts longer than a year, it cannot be said that receiving that second payment is an essential part of any particular contract. Furthermore, as noted above, renewal premiums are not related to any evidence of additional flight risk, nor do they reflect any additional costs on the part of the bail company, so it cannot be said that the renewal premium is related to the contract's risk or the bail company's expenses. It thus seems very possible that the state would prevail on the first prong of the Contracts Clause test.

Even if a court held that this law substantially impaired existing contracts, it seems likely that California would prevail on the second step. The California Supreme Court's recent holding on the unconstitutionality of detaining people solely because of their inability to pay is indicative of how dire the harm excessive bail costs can be for defendants. A renewal premium is similarly punitive, and seems to be no more than a fee imposed under circumstances approaching, if not amounting to, duress – if the defendant were to refuse, they would have no choice but to (1) return to jail, or (2) pay a

⁷ U.S. Const., art. I, § 10, cl. 3.

⁸ *Sveen v. Melin* (2018) 138 S.Ct. 1815, 1821.

⁹ *Id.* at p. 1822.

¹⁰ *Ibid.*

new bond fee to a new company. It is unquestionably a legitimate public purpose for the state to ensure that its residents are not needlessly detained and/or thrown into debt or insolvency as the result of gratuitous bail costs. The statute is drawn narrowly, and the retroactive effect is likely small, given that, according to the author, many bail companies do not charge renewal premiums, and most criminal cases are resolved in under a year.¹¹

In the event a court does hold that the provision prohibiting renewal premiums on existing bonds is unconstitutional, this bill contains a severability clauses, so the rest of the bill would not be affected or stricken.

4. Arguments in support

According to bill supporter Western Center on Law and Poverty:

Bail agents typically charge a consumer 10 percent of the total bail amount as the nonrefundable bail bond fee. For example, on a \$25,000 bail, the 10 percent fee is \$2,500. Bail agents may additionally require the bond to be secured through collateral such as a lien on a defendant's house. But some bail bond companies also charge an additional nonrefundable "renewal fee" when a defendant's case has not been resolved within 12 months.

Charging an additional nonrefundable fee after 12 months is an arbitrary practice used by the bail industry to make additional profits off unsuspecting customers. Hearing timelines and postponements have increased during this pandemic as courts balance a backlog and safety concerns. These extended hearing timelines have led to more individuals having to pay these insidious renewal fees. Renewal fees are unnecessary because bail agents and insurers are well secured against any losses and "flight risk" of the defendant does not increase after 12 months. These fees are also unfair because they penalize defendants with lengthy court proceedings.

AB 1347 would help curb predatory business practices in the bail industry which threaten the financial stability of families who often are already struggling by making it illegal for bail agents to charge bail bond renewal fees to consumers and would provide harmed consumers with the ability to collect damages for any violation. This is an essential consumer protection measure.

SUPPORT

Alliance for Boys and Men of Color
American Civil Liberties Union of California

¹¹ Judicial Council of California, *2020 Court Statistics Report, Statewide Caseload Trends, 2009-2010 Through 2018-2019* (2020), at pp. 53-54.

Anti-Recidivism Coalition
California District Attorneys Association
California Insurance Commissioner Ricardo Lara
California Public Defenders Association
Californians for Safety and Justice
Consumer Attorneys of California
Community Legal Services in East Palo Alto
Drug Policy Alliance
Ella Baker Center for Human Rights
Equal Justice Under Law
Initiate Justice
Lawyers' Committee for Civil Rights of the San Francisco Bay Area
Public Counsel
San Francisco Public Defender's Office
Western Center on Law & Poverty
Young Women's Freedom Center

OPPOSITION

None known¹²

RELATED LEGISLATION

Pending Legislation:

SB 262 (Hertzberg, 2021) adopts a statewide bail schedule that requires bail to be set at \$0 for all offenses except for specified exceptions, including serious or violent felonies, violations of specified protective orders, battery against a spouse, sex offenses, and driving under the influence. SB 262 is pending before the Assembly Public Safety Committee.

AB 329 (Bonta, 2021) is substantially similar to SB 262 (Hertzberg, 2021) and adopts the same statewide bail schedule with most offenses set at \$0. AB 329 is pending before the Assembly Appropriations Committee.

AB 38 (Cooper, 2021) requires the Judicial Council to appoint a group of judges to develop and adopt a statewide bail schedule, taking certain specified factors into account. AB 38 failed passage in the Assembly Public Safety Committee.

¹² The American Property Casualty Insurance Association removed its opposition to the bill after the June 16, 2021, amendments.

Prior Legislation:

SB 318 (Hertzberg, 2019) would have required bail licensees to provide bail contracts in specified non-English languages when the contract was negotiated in that other language and to provide a specified notice to persons before they became obligated on a contract to finance or secure a bail bond. SB 318 failed passage in the Assembly Insurance Committee.

SB 898 (Hertzberg, 2018) would have required bail licensees to provide bail contracts in specified non-English languages upon request and to provide certain specified information to the Insurance Commissioner. SB 898 died in the Assembly Insurance Committee.

SB 10 (Hertzberg, Ch. 644, Stats. 2018) revised the pretrial release system by limiting pretrial detention to specified persons, eliminating the use of bail schedules, and establishing pretrial services agencies tasked with conducting risk assessments on arrested person and preparing reports with recommendations for conditions of release. SB 10 was repealed by referendum in November, 2020.

AB 42 (Bonta, 2018) was substantially similar to SB 10 (Hertzberg, Ch. 644, Stats. 2018). AB 42 died on the Assembly Floor.

PRIOR VOTES:

Senate Public Safety Committee (Ayes 4, Noes 0)

Assembly Floor (Ayes 77, Noes 0)

Assembly Public Safety Committee (Ayes 8, Noes 0)
