Supreme Court Copy

SUPREME COURT
FILED

DEC 1 7 2009

Frederick K. Ohlrich Clerk

DEPUTY

SUPREME COURT OF CALIFORNIA

NO. S175907

THE PEOPLE, Plaintiff and Respondent,

v.

INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY,
Defendant and Appellant

From a Decision of the Court of Appeal,
Second Appellate District
No. B208691

ANSWER BRIEF ON THE MERITS

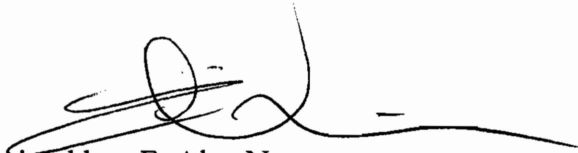
E. ALAN NUNEZ 062288
NUNEZ & BERNSTEIN
4836 N First St., Ste. 106
Fresno, CA 93726
Tel: (559)227-2373
Fax: (559)227-4585

Attorney for INDIANA LUMBERMENS
MUTUAL INSURANCE COMPANY,
Defendant and Appellant

CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

S175907 - PEOPLE V. INDIANA LUMBERMENS MUTUAL INSURANCE CO.

Full Name of Interested Entity/Person	Party/Non-Party		Nature of Interest
American Contractors Indemnity Co.	[ ]	[X]	Financial
Danielson National Insurance Co.	[ ]	[X]	Financial
Fairmont Specialty Group	[ ]	[X]	Financial
Lexington National Insurance Co.	[ ]	[X]	Financial
Lincoln General Insurance Co.	[ ]	[X]	Financial
Western Insurance Company	[ ]	[X]	Financial
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	



Submitted by: E. Alan Nunez
Attorney for Indiana Lumbermens Mutual Insurance Company

TABLE OF CONTENTS

Table of Authorities		ii
Issue Presented		1
Statement of Case and Facts		1
Argument		2
Introduction		2
I	PENAL CODE SECTION 1305, SUBDIVISION (c)(3) DOES NOT REQUIRE THAT A MOTION FOR RELIEF FROM FORFEITURE BE FILED BEFORE THE EXPIRATION OF THE 180-DAY PERIOD, SO LONG AS THE EXONERATING EVENT OCCURS WITHIN THAT PERIOD	5
	A. Forfeiture and Exoneration of Bail	5
	B. Conflicting Authorities	13
II	ENFORCEMENT OF A FORFEITURE IS AN IMPROPER WINDFALL WHEN IT IS NOT JUSTIFIED	22
III	THE *RANGER* DECISION IS A SOUND AND WELL-REASONED RULE AND DOES NOT ENCOURAGE SLOTH ON THE PART OF SURETIES	23
V	FAILURE TO FILE A MOTION BEFORE THE EXPIRATION OF THE 180-DAY PERIOD SHOULD NOT FORECLOSE RELIEF FROM FORFEITURE	24
Conclusion		25
CONCLUSION		14

TABLE OF AUTHORITIES

Cases

County of Los Angeles v. American Contractors Indemnity Co. 26
152 Cal.App.4th 661 (2007).

County of Los Angeles v. National Auto. & Cas. Ins. Co. *10*
67 Cal.App.4th 271 (1998)

County of Los Angeles v. Resolute Ins. Co. 15
22 Cal.App.3d 961 (1972).

County of Los Angeles v. Surety Ins. Co. 26
162 Cal.App.3d 58 (1984)

County of Sacramento v. Ins. Co. of the West 5
139 Cal.App.3d 561 (1983)

People v. American Bankers Ins. Co. 6
233 Cal.App.3d 561 (1991)

People v. Black 14
55 Cal.2d 275 (1961)

People v. Far West Ins. Co. 15, 17, 22
93 Cal.App.4th 791 (2001)

People v. Lexington National Ins. Co. 17, 19, 20, 21, 25
158 Cal.App.4th 370 (2007)

People v. McReynolds 9
102 Cal. 308 (1894)

People v. National Auto. & Cas. Co. 9
242 Cal.App.2d 150 (1966)

People v. Pugh 6
9 Cal.App.3d 241 (1970)

People v.Ranger Ins. Co. 5
9 Cal.App.4th 1302 (1992)

People v. Ranger Ins. Co. 13, 14, 18, 20, 21, 22, 23, 25, 27
141 Cal.App.4th 867 (2006)

People v. Rolley 4, 6
223 Cal.App.2d 639 (1963)

People v. Stuyvesant Ins. Co. 10
216 Cal.App.2d 380 (1963)

People v. United Bonding Ins. Co. 15
5 Cal.3d 898 (1971)

People v. Wilcox 9, 19, 20
53 Cal.2d 651 (1960)

People v. Wilshire Ins. Co. 3
46 Cal.App.3d 216, 219 (1975)

Statutes

Code of Civil Procedure §473(b) 21

Penal Code §1305 3, 5, 6, 10, 14, 18

§1305(c) 7, 8, 9, 10, 11, 27

§1305(c)(1) 4, 8, 14

§1305(c)(2) 4

§1305(c)(3) 1, 4, 5, 13, 14, 16, 17, 18, 20, 21, 23, 25, 27

§1305(d) 10, 25

§1305(e) 10, 11, 25

§1305(f) 10, 16, 25

§1305(g) 10, 16, 25

§1305(i) 10, 18, 19, 25, 27

	§1308	3
Vehicle Code	§14601	1
	§16028	1

SUPREME COURT OF CALIFORNIA

THE PEOPLE,
Plaintiff and Respondent,
v.
INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY,
Defendant and Appellant

NO. S175907
2DCA No. B208691

ANSWER BRIEF ON THE MERITS

ISSUE PRESENTED

Where the exonerating event occurs before the expiration of the period for exoneration, does Penal Code section 1305, subdivision (c)(3), require that a motion for relief from forfeiture be filed before the expiration of said period?

SUMMARY OF CASE AND FACTS

Robert Peter Laimbeer was charged in Los Angeles Superior Court with violating Vehicle Code sections 14601 and 16028. CT 3-4. On March 17, 2007, Bail Hotline, the agent for Indiana Lumbermens Mutual Insurance Company, posted bail bond No. US50-774096 for the release of Laimbeer from custody pending said charges. *Ibid.* At the time of his release, the defendant was ordered to appear in court on April 18, 2007. CT 3.

Laimbeer failed to appear in court on April 18, 2007, and the bail was declared forfeited. CT 2. A notice of forfeiture was mailed to the surety and bail agent on the

same day. CT 15. The 185th day after such mailing, the so-called period for exoneration, was October 21, 2007.

Some three months later, on July 16, 2007, and before the expiration of the period for exoneration, the surety's agent, Bail Hotline, arrested and surrendered Laimbeer to the Sheriff's Department of San Bernardino County. CT 17. The Sheriff's records indicate that a hold was placed on him in the underlying Los Angeles Superior Court case. CT 19. Laimbeer was sentenced to prison in the San Bernardino case and was in custody as of the time of the motion proceedings below. CT 13, 17.

On December 4, 2007, a summary judgment was entered on the forfeiture. CT 6-7. On January 2, 2008, the surety filed a motion to vacate the forfeiture and summary judgment based on the fact that Laimbeer had been arrested by the surety's agents and surrendered in San Bernardino County; that he was sentenced to prison in that county; and that he remained incarcerated in prison at all times during the proceedings below. CT 8-24.

The motion was heard on May 23, 2008, along with two other cases involving a similar issue, including *County of Los Angeles v. Lincoln General Insurance Company*, Superior Court No. OSJ-0986, in which the proceedings were reported and the trial court's reasoning applied to the other cases, including the present one. The motion was denied from the bench. CT 43. This appeal followed on June 13, 2008. CT 44-46.

ARGUMENT

INTRODUCTION

There are certain misconceptions that must be addressed at the outset, lest the

Court labor under false impressions in evaluating the issue in this case. Respondent describes appellant's action below as "a last-ditch attempt to avoid its obligation." OBM 2. The motion to vacate the summary judgment was no last ditch attempt. The summary judgment was filed December 4, 2007, and the motion was filed less than 30 days later, on January 2, 2008. CT 6, 8. It was an action which a surety is statutorily entitled to take to test the validity of the judgment.[1] The courts likewise have recognized that a surety may attack a summary judgment not entered in accordance with the consent given, that is, in accordance with the provisions of section 1305. *People v. Wilshire Ins. Co.*, 46 Cal. App.3d 216, 219 (1975). Here, the question is whether section 1305 required exoneration of bail if, within 180 days, the defendant was arrested outside the county in the underlying case. If so, as appellant argues, then the judgment was not entered in accordance with the consent given, and it was subject to attack. Thus, the surety's action below was not an attempt to avoid its obligation but an exercise of its legal and statutory right to test the validity of the summary judgment.

A second dubious statement made by respondent is that affirming the decision of the Court of Appeal "will motivate sureties to sit back and hope that bail-jumping defendants will be found by other law enforcement officers." OBM 3. The statement positions the People as a prognosticator of future conduct of sureties. No one, outside of ancient Biblical prophets, can foretell future events, and certainly not the People or its agents

---

[1] Unless otherwise stated, statutory references are to the Penal Code. Penal Code section 1308 provides in pertinent part that "an action or proceeding available at law (may be) initiated to determine the validity of the order of forfeiture or summary judgment rendered on it . . ."

from the courts on down. On the other hand, what motivates a surety is the prospect of financial loss and its obligation to its indemnitors, and these motivate it to make active and diligent efforts to locate and apprehend a bailee who has taken flight.

Along the same line, respondent states that a "surety should not simply wait in anticipation for the criminal defendant . . . to appear voluntarily or to be arrested by law enforcement officers . . ." OBM 10. First, it should be noted that the surety is entitled to exoneration of bail whether the defendant is arrested by its agents or by law enforcement authorities. The statute clearly provides that the surety is entitled to exoneration if the defendant is surrendered "or arrested." Pen. Code §1305, subdivs. (c)(1), (c)(2) and (c)(3). "Arrested" refers to an arrest by law enforcement authorities, where surrender refers to an action of the surety or its agents. In *People v. Rolley*, 223 Cal.App.2d 639 (1963), the defendant was arrested in New Mexico by federal authorities and remained in federal custody. The surety's motion for exoneration of its bond was granted by the trial court. The People appealed, but the reviewing court affirmed. Thus, an arrest by law enforcement authorities is grounds for exoneration whether or not the surety had a hand in bringing about defendant's arrest.

Finally, respondent unintelligibly states that the "record fails to reflect any attempt by LUMBERMENS or its agent to locate Laimbeer during the 180-day appearance period. OBM 7. This is unintelligible, because it was Lumbermens' agents who surrendered Laimbeer to the San Bernardino County sheriff! Of course, the record is not going to reflect "any attempts to locate Laimbeer during the 180-day appearance period," since

he had been surrendered and there was no longer any reason to make any further attempts to locate him. Laimbeer remained in custody in San Bernardino and was eventually sentenced to prison by the courts of that county. Thus, he was (and remains) in continuous custody of California authorities and available to Los Angeles County, which points out the absurdity of upholding the forfeiture, even though the surety's agents surrendered the defendant to that custody and did all they were required to do under the law to establish grounds for exoneration of the bail.

I

PENAL CODE SECTION 1305, SUBDIVISION (c)(3) DOES NOT REQUIRE THAT A MOTION FOR RELIEF FROM FORFEITURE BE FILED BEFORE THE EXPIRATION OF THE 180-DAY PERIOD, SO LONG AS THE EXONERATING EVENT OCCURS WITHIN THAT PERIOD

A. Forfeiture and Exoneration of Bail

The forfeiture and exoneration of bail in California is entirely a statutory matter. *People v.Ranger Ins. Co.*, 9 Cal.App.4th 1302, 1305 (1992); *County of Sacramento v. Ins. Co. of the West*, 139 Cal.App.3d 561, 564 (1983). Generally, the statutory scheme provides that if a bailee fails to appear without sufficient excuse, the court must immediately declare a bail forfeiture in open court, and notice of the forfeiture must be given to the surety and the bail agent. Once such notice is given, the statute provides for a period of 180 days within which bail may be exonerated on a variety of statutory grounds or during which an extension of the 180-day period may be sought.

Section 1305 has been amended many times since first enacted in 1872, but the

trend, as noted by the courts, has always been to broaden the grounds and procedures for relief from forfeiture rather than to restrict them. *See People v. Rolley*, 223 Cal.App.2d 639, *supra* at 641; *People v. Pugh*, 9 Cal.App.3d 241, 251 (1970). Over time, the Legislature provided for so-called "statutory defenses," which generally fell into two categories. The first category consisted of instances where the fugitive reappeared in court or was surrendered to the court or to custody by the bail. These were clearly instances exoneration was indicated, because the defendant was either back under the jurisdiction of the court or was available to the court due to his being in custody.

The second category covered instances where the defendant was not back under the jurisdiction of the court because of a disability to appear and circumstances dictated either exoneration, if the disability was permanent, or a tolling of the exoneration period, if the disability was temporary. The disabilities enumerated in the statute were death, illness, insanity or detention by military or civil authorities. Since these are instances of which a court would have no knowledge, logic alone suggests that the surety must bring such instance to the court's attention by timely filing of a motion for relief.

In 1985, section 1305 was amended to provide in pertinent part that "if at any time within 180 days after . . . mailing . . . notice of forfeiture, the defendant appears . . . the court shall . . . direct the forfeiture . . . to be set aside and the bail . . . exonerated immediately." *People v. American Bankers Ins. Co.*, 233 Cal.App.3d 561, 565 (1991). In that case, the defendant was arrested and returned to the court's jurisdiction before the expiration of the 180-day period, but the surety did not file a motion for relief because it was not

aware of the circumstance until after a summary judgment had been entered. The surety moved to set aside the judgment and for exoneration of bail on grounds that the statute required the trial court to exonerate bail *sua sponte* upon a defendant's reappearance. The reviewing court rejected the surety's argument, holding that the statute did not require a trial court to exonerate bail *sua sponte* and that the surety was required to make a motion before the exoneration period expired.

Following that decision, the Legislature, in 1993, amended the statute to provide expressly in subdivision (c), as quoted by respondent, that if a defendant appeared within 180 days, "the court shall, on its own motion, direct the order of forfeiture to be vacated and the bond exonerated." OBM 12. The 1993 amendment also required exoneration on the court's own motion if the defendant was surrendered to the court or to custody within 180 days. OBM 13. Thus, the Legislature had to hammer the courts over the head to make clear that relief from forfeiture is required *sua sponte*, once the exonerating event (reappearance or surrender within the 180-day period) occurs. It is not the filing of a motion within the 180-day period but the fact that the defendant is back in the jurisdiction of the court within that period that entitles the surety to relief from forfeiture.

In 1994, the Legislature expanded the grounds under which the surety was entitled to exoneration of its bond by rewriting subdivision (c) as quoted by respondent. OBM 14-15. This amendment more accurately reflected the circumstances under which a defendant might come back under the jurisdiction of the court, or the state as it were. The language was changed to provide for instances where a defendant reappears in court,

whether voluntarily or after being surrendered by the bail or after being arrested by the authorities. Pen. Code §1305(c)(1). Clearly, exoneration is in order, *sua sponte* "at the time the defendant first appears in court," so long as the defendant is back in the jurisdiction of the court before the expiration of the 180-day period. Again, it is the fact of the exonerating event that gives rise to the court's duty to exonerate.

The 1994 amendment also added two other parts to subdivision (c) relating to grounds for exoneration. Under paragraph (2), the court is required to exonerate bail *sua sponte*, if the defendant is "surrendered to custody by the bail or is arrested in the underlying case within the 180-day period" in the county where he failed to appear. Again, if the defendant is in custody in the same county where the court is located, he is directly under the jurisdiction of that court, and since he will presumably be brought before the court at some point, there is no need for any action by the surety.

Paragraph (3) of the subdivision provides that the court shall exonerate bail if the defendant is "surrendered to custody by the bail or is arrested in the underlying case" in another county. In this circumstance, a court has no *sua sponte* duty to exonerate, because it has no direct jurisdiction over the defendant who is in custody in another county. Nevertheless, it is again the exonerating event (surrender to custody by the bail or arrest by authorities on the underlying warrant) that establishes grounds for exoneration. Once the defendant is in custody, there is nothing more the surety can do to bring him within the jurisdiction of the court. Transfer of a defendant between counties is distinctly the function of those counties. The salient fact is that a defendant is under the control of

the sovereign, the State of California, and there is no longer any obligation on the part of the surety insofar as a duty to apprehend and return him to the court is concerned. The court's duty to exonerate would operate after the defendant is transferred to its jurisdiction. Once the defendant is in custody on the case, whether within or outside the county, the surety's performance is complete and its liability under the bail bond is terminated. *See People v. McReynolds*, 102 Cal. 308 (1894).

Now we get to the part of the amendment that presents the problem. The 1994 amendment placed the language relating to the making of a motion in part (4) of subdivision (c), which read in pertinent part:

> Except as provided in paragraphs (1) and (2), the court, in its discretion, may require that the bail provide 10 days' prior notice to the applicable prosecuting agency, as a condition precedent to vacating the forfeiture. . . . A motion filed in a timely manner within the 180-day period may be heard within 30 days of the expiration of the 180-day period.

The more significant language in this paragraph is the last quoted one. There was a time when courts were under the impression that a motion for relief from forfeiture had to be not only filed but heard before the expiration of the 180-day period, an impossibility in those instances where a defendant might be surrendered or arrested on the last day of the period which fell on a weekend or other day when it was not a court business day. *See e.g., People v. National Auto. & Cas. Co.*, 242 Cal.App.2d 150, 154 (1966). It was this honorable Court that first addressed the foolishness of insisting that a court loses jurisdiction to grant relief once the statutory period expires. *People v. Wilcox*, 53 Cal.2d 651, 657 (1960). The lower courts, however, continued to insist on the "guillotine action of

the operative statute." *People v. Stuyvesant Ins. Co.*, 216 Cal.App.2d 380, 381 (1963). It is for this reason that the Legislature, before 1994, added language providing for hearing of a motion after the expiration of the 180-day period.

The positioning of the 30-day-for-hearing language in subdivision (c) reared its ugly head in *County of Los Angeles v. National Auto. & Cas. Ins. Co.*, 67 Cal.App.4th 271 (1998). There, the surety, before the expiration of the 180-day period, timely moved the court for an order tolling time under subdivision (e), but hearing and the order granting the motion occurred within 30 days after the expiration of the 180-day period. The surety argued that under subdivision (c)(4), the motion could be heard within 30 days after the 180-day period expired. The reviewing court rejected the argument, pointing out that subdivisions (c) and (e) address different subjects and, therefore, subdivision (c)(4) did not apply to subdivision (e) motions. Following this decision, the Legislature promptly amended section 1305 by removing subdivision (c)(4) and adding subdivision (i), as quoted by respondent. OBM 17. Placing subdivision (i) at the end of the section indicates the intention that it apply to subdivisions (d), (e), (f) and (g), all of which relate to circumstances where an exonerating event has not yet occurred or would not be known to the court without a motion being filed.[2] These subdivisions, therefore, require a motion.

---

[2] The various grounds and relief required under these subdivisions are:
(d) Permanent disability to appear due to death, illness, insanity or detention by military or civil authorities requires exoneration of bail;
(e) Temporary disability to appear due to illness, insanity or detention by military or civil authorities requires a tolling of the the exoneration period;
(f) In-custody fugitive located outside of California and prosecuting agency elects not to extradite requires exoneration of bail;
(g) Out-of-custody fugitive located outside of California and prosecuting agency elects not to extradite requires exoneration of bail.

The abiding profit from the *National* decision was the holding that sections (c) and (e) address different subjects and that the procedures applicable to the different sections may be different. That being so, we look at subdivision (c) as a whole and find that it addresses instances where the defendant is either back before the court [paragraph (1)]; surrendered by the bail or arrested by authorities on the underlying warrant in the same county where the court is located [paragraph (2)]; and surrendered by the bail or arrested by authorities on the underlying warrant outside the county where the court is located. Each of these paragraphs require exoneration of bail, because the defendant is back in the clutches of California authorities, California being the single sovereign embodied in the courts or law enforcement authorities.

The most obvious instance for exoneration is under paragraph (1), since the defendant is back in front of the court, so the statute requires that the court act *sua sponte*. Paragraph (2) also requires that bail be exonerated *sua sponte*, because a defendant surrendered by the bail or arrested on the warrant in the underlying case by authorities in the same county is as good as before the court. The court's action under these paragraphs being *sua sponte*, no motion by the surety is required at all, and the court's action is taken at the time the defendant appears in court. It is interesting to note here the importance of the timing of the exonerating event. For example, if a defendant is arrested by county authorities on the warrant in the underlying case on a Friday which was the last day of the exoneration period but his appearance in court was not calendared until the following week, the court would be required to exonerate bail *sua sponte* on the date he appeared in

court, though that appearance were after the exoneration period expired, because the exonerating event (his arrest on the underlying warrant) occurred before the expiration of that period.

The question, however, is paragraph (3). It is a two-part question: first, whether a motion by the surety is required at all, and second, if a motion is required, whether it is required that it be made before the expiration of the exoneration period. It seems obvious that a motion is required, first, because the statute does not provide that the court's action be *sua sponte*, and second, because a court may not otherwise have any knowledge of the fact that the defendant is being held in another California county. Whether there is a time limitation on the motion can best be analyzed by considering a sobering reality. There is the distinct possibility that the surety may not be aware of defendant's arrest or may not be able to make the motion before the period expires. For example, a defendant may be timely arrested by authorities in another county, but the surety may not know of the arrest. He is eventually transferred and appears in court. Since he was arrested in the underlying case within the 180-day period, the court would be required to exonerate once he appears. Also, if the defendant was is surrendered by the bail or arrested by authorities on a Friday the last day of the 180-day period, the surety could not possibly file a motion before the expiration of the period, even though the exonerating event occurred within the period. We then ask, what is it that requires exoneration, the motion or the exonerating event? A motion timely made before the expiration of the period will not compel a court to exonerate bail, if an exonerating event has not timely occurred. It is the exonerating event that

requires exoneration. The statute nowhere provides that the timely filing of a motion is the event on which the exoneration is dependent. It is the fact that a defendant is timely surrendered by the bail or timely arrested by authorities in another county that is the exonerating event. Once that occurs, the timing of the motion is of much less importance, because the defendant is back in the jurisdiction of California authorities and available to the court.

B. Conflicting Authorities

Speaking of subdivision (c)(3), respondent states that the "plain words of the statute, however, are unambiguous." OBM 16. That there are conflicting judicial opinions and that this Court has to review the matter is hardly a sign that the statute is unambiguous. We are here precisely because the statute is not a model of clarity, which is the reason for the split in authority.

The first case to interpret section 1305, subdivision (c)(3), was *People v. Ranger Ins. Co.*, 141 Cal.App.4th 867 (2006), hereinafter "*Ranger*." In that case, the defendant failed to appear in Ventura County on November 3, 2003, and bail was declared forfeited. On November 4, 2003, he was arrested in Santa Barbara County, where he remained in custody during the entire period for exoneration. The surety did not move to vacate the forfeiture, apparently because it was not aware of the defendant's incarceration in Santa Barbara County, and after the expiration of the 180-day period for exoneration the Ventura County court entered a summary judgment for the penal amount of the bond. The surety then moved to set aside the judgment on the theory that subdivision (c)(3)

required the court to exonerate bail on its own motion if the defendant was arrested in the underlying case within the exoneration period in another county. The trial court denied the motion, and on appeal the court held that "the surety has no time constraints in which to move to exonerate the bond" under that subdivision. The reviewing court first noted that the language of subdivision (c)(3) neither requires that a motion be filed within 180 days nor that bail be forfeited when the surety makes a motion beyond the 180 days. While holding that subdivision (c)(3) does not require that a court to exonerate bail on its own motion, the reviewing court nevertheless held that the statute "does not require that a motion to exonerate the bail be brought within 180 days," because the "significant (fact) . . . is that the defendant was in custody within 180 days of the notice of forfeiture." *Ibid* at 871. The court stated further that the "surety is guarantor of defendant's presence" and "When the defendant is in custody for the case in which bail is set, that guarantee is met." *Ibid.* In other words, it is the exonerating event (arrest of defendant) and the timing of it (within the 180-day period) that requires exoneration.

This holding comports with the rules and principles governing the forfeiture and exoneration of bail. Chief among these is that the provisions of section 1305 are jurisdictional, and where the statute requires the court to exercise its jurisdiction in a particular manner or to follow a particular procedure, an act beyond those limits is in excess of its jurisdiction. *People v. Black*, 55 Cal.2d 275, 277 (1961). Here, the statute requires that bail be exonerated if within the 180-day period the defendant is arrested in another county in the underlying case, regardless of whether or when a motion to exonerate is made. One

must say "whether," because the defendant will ordinarily be transferred to the county where the case is pending and when he appears in court it becomes a (c)(1) situation that requires the court to exonerate on its own motion. Another often cited principle is the law's disfavor of forfeitures which requires strict interpretation in favor of the surety in order to avoid the harsh results of a forfeiture. *People v. United Bonding Ins. Co.*, 5 Cal.3d 898, 906 (1971).

There are other instances where courts have fashioned appropriate rules when statutory provisions have been violated or objectives have been met. In *County of Los Angeles v. Resolute Ins. Co.*, 22 Cal.App.3d 963 (1972), the trial court failed to give notice of forfeiture to the surety, a jurisdictional requirement. Understandably, the surety was not aware of the forfeiture until after it received notice of summary judgment. At that point, it moved to discharge the forfeiture and set aside the judgment. Rejecting the county's argument that the surety should have moved for relief from forfeiture before the expiration of the 180-day period, the reviewing court held that the time limit was inapplicable, because the surety was not aware of the defect until after notice of the judgment.

In *People v. Far West Ins. Co.*, 93 Cal.App.4th 791 (2001), hereinafter "*Far West,*" the court was faced with uncertainty as to the applicable statute. There, the defendant failed to appear in the Alameda County court and bail was declared forfeited. The surety's agents located the defendant, who was described by police as a dangerous criminal, in Georgia, where they surrendered him for extradition to California. The agents notified the Oakland Police Department of defendant's arrest. Thus, he was in

custody outside California, and it appeared the applicable statute was Penal Code section 1305, subdivision (f). *See* footnote 2, *supra*. In communications between the Alameda and Georgia authorities, the Oakland police mistakenly sent a teletype to the sheriff in Georgia requesting that he release the hold on the defendant, and the defendant was set free. The surety thereafter filed a motion for exoneration of bail in the Alameda court. The trial court denied the motion.

On appeal, the court rejected the surety's claim that subdivision (c)(3) was the applicable statute. Since the prosecuting agency had never been notified of defendant's location or custody as required by subdivisions (f) and (g), the People argued that there was no compliance with the statutory requirement and the surety was, therefore, not entitled to relief from forfeiture. The court declined to determine whether subdivision (f) or (g) applied. *Ibid* at 794. Instead, the court rested its ruling on the fact that the purpose of the bail had been achieved and on the ancient equitable principle that the law abhors forfeitures. *Ibid* at 796. Concluding that failure to notified the prosecuting agency of defendant's location was not fatal to the surety's right to relief from forfeiture, the court said:

> In our view, the result reached by the trial court on these facts is at odds with the purposes underlying the statutory bail scheme and contrary to the ancient equitable principle that forfeitures are abhorrent. As for the variance between the statutory command (that the "prosecuting authority" decide not to pursue extradition proceedings) and what occurred here, critical to the trial court's ruling, it is preferable to rest the outcome on principles of equity rather than to embrace a result that can fairly be termed "absurd." *Ibid* at 796.
>
> The crux of the case . . . is whether, an error having occurred that led

> to the release of a dangerous felon wanted by Alameda County authorities on armed robbery charges and the surety having done everything required of it under the statute and bond, who, as between the surety and the county, must bear the consequences of the error? . . . under the circumstances shown here–a California fugitive admitted to bail, apprehended and held in custody in another state, is released as a result of errors committed solely by officials of the demanding county government and the surety has done all that is required of it under the terms of the bond–bail is exonerated. *Ibid* at 797-798.

In short, where the purpose of bail has been met and the surety has done all required of it under the bond, it is harsh and inequitable to penalize it because the surety notified the police department rather than the prosecuting agency of defendant's location and arrest. As related to the instant case, it is equally harsh and inequitable to penalize the surety because the motion for relief was not filed before the expiration of the 180-day period, and that when the subdivision (c)(3) does not expressly require either that a motion be filed or that if one is filed it be filed before the expiration of the exoneration period. To rest the outcome on mechanical adherence to procedures not specified in the statute, one must say with the *Far West* court, is to embrace a result that can fairly be termed absurd.

The second case interpreting section 1305, subdivision (c)(3), was *People v. Lexington National Ins. Co.*, 158 Cal.App.4th 370 (2007), hereinafter "*Lexington*." In that case, the defendant failed to appear in two Yolo County cases, and notice of forfeiture was mailed to the surety on June 21, 2005, and the 180-day period would expire on December 23, 2005. On December 21, 2005, the defendant was arrested in Sutter County, and a hold was placed on the other Yolo County case. On December 27, 2005, four days after the expiration of the 180-day period, the surety filed a motion for

exoneration. The People opposed on grounds that the motion was untimely and that there was no hold placed in the case under review. The trial court denied the motion.

On appeal, the surety relied on the *Ranger* case to argue that there was no time constraint requiring the motion to be filed before the expiration of the 180-day period. The reviewing court rejected the argument and declined to follow the *Ranger* court, "because its holding is at odds with the plain language of section 1305." *Lexington* at 374. The *Lexington* court agreed with *Ranger* that subdivision (c)(3) "does not require that a motion to exonerate be brought within 180 days," but it held that such requirement is found in subdivision (i). *Ibid.* The court believed that "subdivision (i)'s reference to 'motions' generally strongly suggests that the Legislature intended that all motions to vacate forfeiture and exonerate a bond under section 1305 be filed within the statutory period." *Ibid* at 375. The language of subdivision (i) does not support the court's belief, because it is not framed in mandatory terms:

> A motion filed in a timely manner within the 180-day period may be heard within 30 days of the expiration of the 180-day period. The court may extend the 30-day period upon a showing of good cause.
>
> The motion may be made by the surety insurer, the bail agent, the surety, or the depositor of money or property, any of whom may appear in person or through an attorney. The court, in its discretion, may require that the moving party provide 10 days prior notice to the applicable prosecuting agency, as a condition precedent to granting the motion.

There is absolutely no mandatory language of any kind in this provision. At most, it seems to say that if a motion is required under any of the other subdivisions of the statute

and such motion is timely filed, it may be heard within 30 days after the expiration of the 180-day period. The provision, as discussed at pages 9 and 10 above, was intended to put an end to the erroneous belief among some courts that a motion had to be not only timely filed but also heard before the expiration of the 180-day period. That belief was rejected by this Court in *People v. Wilcox*, *supra*, and the proper rule was codified in subdivision (i), formerly contained in the now non-existent subdivision (c)(4).

The *Lexington* decision is a myopic exercise in statutory interpretation. It jumps to the conclusion that subdivision (i) makes motions mandatory when it does not. It states that the surety was not without a remedy and could have moved to extend the time, "provided it filed the motion before the original statutory period expired." *Ibid* at 375. Why in the world would the surety need to file a motion to extend when it could file a motion to exonerate? The court makes this nonsensical statement, because it completely overlooked the fact that when a defendant is arrested by authorities the surety may not have any knowledge of the arrest until after the 180-day period has expired and it would be impossible for it to file a motion before that period expired. Most importantly, the court totally ignores the fact that the purpose of bail is achieved and the requirements of the statute met once the defendant is in custody within the 180-day period. It also ignores the many cases that hold that neither revenue to the state nor punishment of the surety are the objects of bail. *See e.g.*, *People v. Wilcox*, *supra* at 657. It dismisses the inequity and impropriety of its action with the smug remark that if the Legislature finds its result unjust, "it can amend the statute." *Lexington* at 375. This is a decision that should not

have seen the light of day by its publication, and it is certainly not one that this venerable Court should give a long life to.

In the instant case, the Second District Court of Appeal recognized the conflict presented by the *Ranger* and *Lexington* decisions, noting that both decisions agree with its own observation that subdivision (c)(3) "does not require a motion to exonerate bail be brought within 180 days." Opinion, p. 7, fn. 4. Ultimately, the court resolved the matter by relying on the basic principles of the law's disfavor of forfeitures and the requirement for strict construction in favor of the surety to avoid the harsh results of a forfeiture. Opinion, p. 8. Furthermore, the fact that the defendant was in custody within the 180-day period loomed large in the equation. Citing this court's decision in *People v. Wilcox, supra,* the court said: "A forfeiture under these circumstances, in which the purpose of bail has been served, would amount to an improper windfall for the County." *Ibid.* That is, indeed, the crux of the matter, that the exonerating event (surrender or arrest within the exoneration period) occurred and the surety's obligation to the court was met and its liability was terminated. That a motion is not filed before the expiration of the period is not, and to be sure should not be, the axis upon which the surety's obligation on bail depends. The surety obligates itself to ensure the defendant's appearance and not to file motions before the expiration of the exoneration period. Once a defendant is in custody within the exoneration period, its obligation is complete.

In a civil setting, a party may seek to have a judgment taken against him by mistake, inadvertence, surprise or excusable neglect, provided he moves for such relief

within a reasonable time not exceeding six months. Code of Civ. Pro. §473(b). And this where there is no forfeiture and no disfavor of the law as that against forfeitures. One has to ask whether it is not more eminently proper for a surety to be allowed to seek relief from a forfeiture, where the purpose of bail has been served and, other than the blind insistence on a procedural practice of filing some motions for exoneration before the expiration of the exoneration period, there is absolutely no sound or substantial reason to enforce the forfeiture.

While the record here does not disclose the reason that a motion for exoneration was not filed before the expiration of the exoneration period, it must be presumed that it was at least due to mistake (belief that court would exonerate when defendant was brought back to court) or inadvertence (not being mindful of the need to file a motion). This presumption can be deduced from the fact that it was the surety's agents who surrendered the defendant to the San Bernardino sheriff, and there would have been no reason to neglect to file a motion except for mistake or inadvertence. An even more common scenario is where the defendant is arrested by authorities and the surety is completely unaware of the arrest until after the exoneration period expires or it gets notice of summary judgment. In either case, the surety should have the right to file its motion for exoneration within a reasonable time, just as is the case in the civil setting.

In short, the conflict in authority stems from the presumptuous analysis of the *Lexington* court. Two other courts (*Ranger* and the lower court here) that have considered and interpreted section 1305, subdivision (c)(3), arrived at the more informed and

erudite conclusion, that the statute does not require that a motion be filed before the expiration of the exoneration period, so long as the exonerating event occurred within the 180-day period. It is the exonerating event, and not the timing of any motion for relief from forfeiture, that dictates the result and exonerates the bond. The circumstances here are much like those in the *Far West*, in that the court there was compelled to downplay the express requirement for notice to the prosecuting agency in order to avoid an absurd and inequitable result. Here, there is no express requirement that a motion to exonerate be filed before the expiration of the 180-day period, and Court's leap to the just and equitable conclusion it that much easier.

II

ENFORCEMENT OF A FORFEITURE IS AN IMPROPER WINDFALL WHEN IT IS NOT JUSTIFIED

Respondent goes on at length about a forfeiture not being a windfall to the government. OBM 22-25. At one point, it submits that "the Legislature has seen fit to make the 180th day a deadline by which the defendant must be arrested or surrendered to custody in order for the surety to get the bail forfeiture vacated." OBM 24. Therein is the rub. If the defendant is in fact surrendered to custody before the expiration of the 180-day period as was the case here, the forfeiture should be vacated. Otherwise, enforcement of the forfeiture is an unwarranted windfall to the government, as noted by the *Ranger* court. So long as the exonerating event occurs, the surety's liability under the bond terminates, and the state is not entitled to collect the penal amount of the bond.

III

THE *RANGER* DECISION IS A SOUND AND WELL-REASONED RULE AND DOES NOT ENCOURAGE SLOTH ON THE PART OF SURETIES

The rule that section 1305, subdivision (c)(3), does not require that a motion to exonerate be filed before the expiration of the 180-day period does not encourage sloth on the part of sureties, as claimed by respondent. OBM 25. Respondent's observations are based on pure fiction. Without pointing to any evidence, it asserts that the rule will cause sureties not to make efforts or incur expenses to locate and apprehend fugitives. The cases interpreting subdivision (c)(3) [*see* Argument I, part B above] each show that the surety in fact made efforts to locate and apprehend the defendant. As noted above [Introduction, pp. 3-4], the prospect of financial loss and its obligation to its indemnitors motivate a surety to make active and diligent efforts to locate and apprehend a bailee who has taken flight. In the 25 years this writer has been litigating in the area of bail forfeitures, he has never seen a surety sit back and wait for a defendant to be captured by law enforcement agents or otherwise be slothful. On the contrary, the rule of the day is to instigate action to locate and apprehend a fugitive as soon as practically possible.

//

//

//

IV

FAILURE TO FILE A MOTION BEFORE THE EXPIRATION OF THE 180-DAY PERIOD SHOULD NOT FORECLOSE RELIEF FROM FORFEITURE

Whether a motion to exonerate is required to be filed before the expiration of the 180-day period is, of course, the issue in this case. Respondent seeks to reinforce its position on the question by claiming that "LUMBERMENS did nothing to look for Laimbeer." OBM 27. However, respondent is pitifully wrong. It must be emphasized that it was the surety's agents who surrendered Laimbeer to the San Bernardino County sheriff's department, as shown on the booking application which is part of the record in this case. CT 17. Of course, the surety and its agents did nothing further to look for the defendant once they had surrendered him to the San Bernardino authorities, because once in custody, there was no longer any reason to look further.

Respondent is likewise wrong that the surety and its agents "sat back and either intentionally or negligently waited to see if law enforcement would catch up with Laimbeer before the 180-day period." OBM 27. As stated above, it was the surety's agents who surrendered the defendant to San Bernardino authorities about three months after he failed to appear in Los Angeles County.

Whether or not the surety made efforts to locate and apprehend the defendant is not any part of the issue here. The defendant was in custody before the expiration of the 180-day period, and the only question before the court is whether the surety was required

to make a motion for exoneration before the expiration of the exoneration period. It is appellant's contention that section 1305, subdivision (c)(3), does not require that such motion be made before the expiration of the 180-day period and that so long as the exonerating event occurred before the expiration of time, the surety was entitled to exoneration despite the fact that the motion for exoneration was filed after the period expired.

CONCLUSION

There are, of course, all the reasons and arguments advanced by appellant above to compel the conclusion that the *Ranger* decision and that of the Court of Appeal in this case should be upheld. It is the better and sounder rule that the statute does not require that a motion to exonerate be filed before the expiration of the 180-day period, so long as the exonerating event, the surrender or arrest of defendant, occurred within that period. A motion filed within a reasonable time, as in the context of a civil action, should suffice.

Appellant hastens to point out, as even the conflicting decisions here agree, that by its terms subdivision (c)(3) does not require that a motion to exonerate be filed within the 180-day period. Moreover, subdivision (i), which the *Lexington* court believed suggested that such motion be filed, itself does not contain any mandatory language requiring a motion and applies in those instances where the particular subdivision, by its terms or circumstances, requires that a motion be filed. In short, subdivision (i) applies to proceedings based on subdivisions (d), (e), (f) and (g) and not to subdivision (c)(3).

Subdivision (c)(3) addresses instances where the defendant either reappears in

court, is in custody in the county where the court is situated or is in custody in another county in the underlying case, all situations where the defendant is either before the court or available for transfer to the court due to his being in custody in California. After all, California is the sovereign to whom the surety is responsible under the bail bond, and once a defendant is in its custody, the obligation of the surety under the bail bond is terminated. Under circumstances where the defendant is in custody, the purpose of bail has been fulfilled, and the obligation of the surety is satisfied. There is absolutely no justifiable reason for enforcing the forfeiture in those premises.

Another consideration, tied to the principle that the law abhors forfeitures, and a factor that courts have recognized, is that the ultimate aim of the law is to protect those innocent citizens who stand to lose valuable property, even their homes, when a forfeiture is enforced. County of Los Angeles v. Surety Ins. Co., 162 Cal.App.3d 58, 62 (1984); County of Los Angeles v. American Contractors Indemnity Co., 152 Cal.App.4th 661, 666 (2007). It is a difficult enough result when a forfeiture is justified, but it is exceedingly harsh when it is unjustified. Enforcement of a forfeiture is completely unjustified when the defendant was timely surrendered to custody or arrested in the underlying case, because exoneration should not depend on whether a motion for relief was filed before the expiration of the 180-day period but on whether the exonerating event occurred within that time. That has been the historical and entrenched requirement for exoneration under each of the statutory defenses for relief from forfeiture, that the grounds be established within the 180-day period for exoneration.

In summary, subdivision (c)(3) does not require that a motion for exoneration be filed within the 180-day period. Neither is the language of subdivision (i) phrased in mandatory terms nor does it make it clear that it applies to subdivision (c)(3). If anything, subdivision (i) applies in those instances where the particular provision under which relief is sought, by its terms or circumstances, requires that a motion be filed. Subdivision (c), as a whole, relates to a circumstance completely different from any of the other subdivisions–defendant reappears in court or is in custody in California and available to the court–and under such circumstance, exoneration is required, either on the court's own motion or by motion filed within a reasonable time after the expiration of the 180-day period.

WHEREFORE, it is respectfully requested that the decision of the Court of Appeal herein be affirmed and the opinion in *People v. Ranger Ins. Co.*, 141 Cal.App.4th 867, *supra*, be upheld.

Dated: December 16, 2009

E. ALAN NUNEZ
Attorney for Appellant

Proof of Service by Mail

I hereby declare that I am a citizen of the United States employed in the County of Fresno, over 18 years old, and not a party to this action, with a business address of 4836 N. First Street, Suite 106, Fresno, California 93726.

On the date show below, I mailed a true copy of the following documents to the parties at the addresses shown herein:

DOCUMENTS SERVED:

ANSWER BRIEF ON THE MERITS

PARTIES SERVED:

Brian T. Chu
Deputy County Counsel
500 W. Temple St. Rm. 648
Los Angeles, CA 90012

Hon. Richard Kemalyan
Judge, Superior Court
210 W. Temple St. Dept. 54
Los Angeles, CA 90012

Indiana Lumbermens Mutual Ins. Co.

Clerk
Court of Appeal
300 S. Spring St. Rm. 2217
Los Angeles, CA 90013

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 16, 2009 at Fresno, California.

____

Certificate of Counsel

Pursuant to Rule 8.204(c)(1), I hereby certify that the number of words in the foregoing brief are 7,791, based on the word count of the computer program used to prepare the brief.

Dated: December 16, 2009

E. ALAN NUNEZ
Attorney for Appellant