

Bail in a Federal Case

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Bernard Madoff's alleged Ponzi scheme that's accused of losing approximately fifty billion dollars of investor's money gave rise to the federal government's filing of a criminal complaint alleging securities fraud. After his arrest and initial bail hearing, Madoff was released on certain conditions. After Madoff's transfer of approximately one million dollars worth of "gifts" to family and friends, the government, understandably upset, filed a motion to revoke his bail. The court denied the government's request, but a review of the court's opinion is instructive on how the Bail Reform Act applies to criminal defendants.

The Bail Reform Act, codified at 18 USC § 3142, states that a court must release a defendant on bail on the least restrictive, or combination of, conditions that will reasonably assure the defendant's appearance when required or protect the community's safety. The focus in a bail hearing is not the defendant's charge or what the appropriate punishment would be if convicted, but rather what condition or combination of conditions can be set to satisfy the aforementioned goals.

In certain cases, the government seeks detention because of the nature of the crime or because the defendant is a serious risk to flee or obstruct justice. See 18 USC § 3142(f)(1), (2). When the government seeks to detain under 18 USC § 3142(f)(2), the government must establish, by a preponderance of the evidence, a defendant presents a risk of flight or risk to obstruct justice. If the government meets its burden, the court must determine whether reasonable conditions of release can be set or whether detention is appropriate.

Generally, release is presumptive, and the court should realize that only a limited group of offenders should be denied bail pending trial. See *United States v. Friedman*, 837 F.2d 48, 49 (2nd Cir. 1988). If the court is concerned that a defendant should not be released on his personal recognizance or on execution of an unsecured bond, as set forth in 18 USC § 3142(b), then the court can impose conditions pursuant to 18 USC § 3142 (c)(1)(B) to control the defendant.

For those who practice in federal court, the result of Madoff's detention hearing is not surprising. What is important to recognize is that when practicing in federal court and facing a detention hearing, make certain that before the court orders your client to be detained that the government has established, by the appropriate quantum.