

**Written Testimony of Brian Highsmith,  
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**Before New York State's Department of Financial Services, Division of Consumer  
Protection and Division of Criminal Justice Services**

**Bail Bond Reform Listening Session, New York, NY**

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Good afternoon. My name is Brian Highsmith, and I am an attorney at the National Consumer Law Center. My work aims to address the different ways that interactions with our criminal legal system result in unfair and unaffordable financial obligations for low-income families. I speak today to urge you to act aggressively to protect New York consumers from predatory practices commonly observed in the market for commercial bail bonds.

Every year, bail bond agents across the country are estimated to bring in more than \$2 billion dollars from bond premiums and fees. This lucrative industry profits from taking advantage of people at their most vulnerable: when they—or their child or loved one—face a choice between making payment under the offered terms, or staying in jail. The abuses that arise from this perverse system are entirely of our choosing: commercial bail is banned in all other countries but one, and also in several American states.

Here in the state of New York, around half a million arrests are made every year. When someone who is arrested is required to pay a set bail amount, but is unable to afford it, she faces a stark choice. She may remain in pretrial detention, away from her loved ones and life's obligations—jeopardizing her job and ability to provide for her family—until the resolution of her case. Or she can participate as a consumer in the state's market for commercial bail. Of course, this is hardly any choice at all—a dynamic that bail agents well understand, and use to secure abusive contract terms.

Commercial bail imposes heavy financial costs on low-income communities, especially communities of color. Although people of means who can post the bail set by the court can expect to receive the full amount of their posted bail back when their cases conclude, fees paid by consumers in the commercial bail market—commonly the family members and friends of individuals facing charges—are kept by bail bond companies and their corporate partners. That is true even in cases of false arrest, where the charges are dropped or the individual facing charges is determined to be innocent. As a result of this structure, heavily policed communities find

themselves trapped in a cycle of debt and fees related to the cost of commercial bail—often long after the courts have resolved their charges. Just here in New York City, an estimated \$16 to \$27 million in nonrefundable fees was extracted last year from people arrested and their family and friends.<sup>1</sup>

These heavy costs on low-income people are the inevitable consequence of any system that allows private profiteering from the bonding of bail.<sup>2</sup> But numerous studies and investigative reporting<sup>3</sup> confirm that the American bail industry is rife with illegal practices that harm low-income consumers and undermine the goals of the criminal legal system—unscrupulous business tactics that reflect a lack of accountability for corporate wrongdoing.

Those abusive practices—documented in public reports and litigation around the country—include charging undisclosed or illegal fees or excessive rates of interest; misleading consumers about the terms of their bail agreements or about their legal options; engaging in harassing and abusive collection practices, including by making threats to send arrestees back to jail without a legal basis to do so; forcing bail bond cosigners to turn over property that was used as collateral in cases where the arrestee complied with the terms of the bail; operating off-the-system without state-required licenses; and failing to comply with reporting obligations.

For example, one of NCLC’s New Orleans clients, Ronald Egana, was required to pay a variety of nonrefundable and hidden fees—including daily fees for an ankle monitor that was required not by any court, but rather by the bail company as a condition of credit. As a result of these unauthorized fees, Mr. Egana, his mother, and a family friend ended up paying more than \$6,000 over the course of a year—far beyond the \$3,275 bail bond fee the company said it would charge. When Mr. Egana couldn’t make payments on his bail bond fee, a bounty hunter arrested him at work; his mother emptied her savings account to pay the money. Even after the three had paid almost twice what the company originally said it would charge, a bounty hunter took Mr. Egana to jail, claiming that he had not paid what he owed.

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<sup>1</sup> OFFICE OF THE NEW YORK CITY COMPTROLLER SCOTT M. STRINGER, THE PUBLIC COST OF PRIVATE BAIL: A PROPOSAL TO BAN BAIL BONDS IN NYC (Jan. 17, 2018), *available at* <https://comptroller.nyc.gov/reports/the-public-cost-of-private-bail-a-proposal-to-ban-bail-bonds-in-nyc/> [hereinafter THE PUBLIC COST OF PRIVATE BAIL].

<sup>2</sup> JUSTICE POLICY INSTITUTE, FOR BETTER OR FOR PROFIT: HOW THE BAIL BONDING INDUSTRY STANDS IN THE WAY OF FAIR AND EFFECTIVE PRETRIAL (Sept. 2012), *available at* [http://www.justicepolicy.org/uploads/justicepolicy/documents/for\\_better\\_or\\_for\\_profit.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/for_better_or_for_profit.pdf) (“With the personal liberty of accused people held by a profit-driven private industry, for-profit bail bonding is systemically prone to corruption, criminal collusion, and the use of coercion against bonded people. This phenomenon is not new and has plagued the industry for decades...”) [hereinafter FOR BETTER OR FOR PROFIT].

<sup>3</sup> *See, e.g.*, Jessica Silver-Greenberg and Shaila Dewan, “When Bail Feels Less Like Freedom, More Like Extortion,” N.Y.TIMES (March 31, 2018), <https://www.nytimes.com/2018/03/31/us/bail-bonds-extortion.html>; Shane Bauer, “Inside the Wild, Shady, and Highly Lucrative Bail Industry,” MOTHER JONES (May/June 2014), <http://www.motherjones.com/politics/2014/06/bail-bond-prison-industry/>.

As described below, many of these practices—and others commonly observed—violate federal and state legislation designed to protect consumers. These protections include laws mandating truthful advertising, requiring fairness in the extension of consumer credit, barring abusive collection practices, and setting standards for the handling of security interests. But with lax regulation, frequently-disinterested public oversight, and obstacles to private litigation, these harmful practices all too frequently escape scrutiny and legal accountability. Where industry actors are able to act without meaningful oversight, bail agents who wish to carefully follow the law will see their business undercut by unscrupulous actors—and consumers will be vulnerable to abusive behavior.

Although this is the reality we face today, it can be changed. In this testimony, I will explain why commercial bail must be understood as a *consumer protection* issue—governed by laws designed to ensure fairness in financial marketplaces, and requiring specific attention from agencies charged with enforcing those basic rules. I will outline some of the federal and state consumer laws that provide important protections to consumers in the market for commercial bail, which regulators can help enforce through aggressive oversight and enforcement. And I will recommend that the New York regulatory agencies assembled here today should increase enforcement of existing laws and regulations; create a clear set of consumer rights; and design a process for placing and investigating complaints.

Finally, I would like to thank you for your offices’ focus on this issue. These convenings represent the latest sign that policymakers are recognizing that abuses associated with the creeping commercialization of our criminal legal system must be conceptualized—and addressed—as a matter of *consumer protection*. Towards that end, I urge you to continue to look for ways to use the power of your position to ensure fairness for the consumers and communities you represent.

### **Commercial bail is a consumer protection issue**

Commercial bail transactions arise in the context of people’s interactions with our criminal legal system. But the financial problems that arise from those contracts—including unaffordable debts, extensions of credit on unfair terms, and harmful collection practices—are a core focus of consumer law, which exists to ensure fairness for vulnerable families in financial marketplaces.

Indeed, it is difficult to imagine an industry where robust consumer protection oversight is more important than our commercial bail system—in which the state’s police powers are leveraged by private companies as they create the terms of their services to consumers and their families. Consumers enter into contracts for commercial bail bonds at what is likely to be among the most stressful, traumatic, and confusing moments of their lives. And in what commercial exchange could consumers be more vulnerable—what bargaining position could possibly be weaker—than one in which their very liberty, or that of a loved one, is at stake in the transaction?

Pretrial systems based on money bail lead directly to the injustice of wealth-based detention. As New York City’s comptroller has observed, “The reliance on exploitative and expensive

commercial bail bonds . . . has been one of the most prominent drivers of inequities in the [bail] system.”<sup>4</sup> According to a recent report by the New York Civil Liberties Union covering eight counties over the years 2010 to 2014, ninety thousand New Yorkers had spent at least one night in a county jail because they could not post bail—of whom 60 percent were charged only with misdemeanors or violations, and 40 percent had a bail of under \$1,000.<sup>5</sup> And it is not only individuals who cannot post bail who are removed from their communities because of money bail: about 70 percent of people who *paid* bail in New York City were incarcerated for at least some amount of time.<sup>6</sup>

Our wealth-based detention system imposes significant, ultimately senseless economic costs on vulnerable families. According to the Prison Policy Initiative, black men and women ages 23 to 39 held in local jails had median earnings of between \$568 and \$900 the month prior to their arrest.<sup>7</sup> And research has confirmed that pretrial detention is associated with significant harms for the accused, including lost employment, reduced wages, and extended time away from loved ones. All of this has been shown to result in long-term reductions in family stability and economic mobility. And of course, the over-incarceration that is created by excessive pretrial detention strains already-stressed local budgets<sup>8</sup>—crowding out investments in productive fiscal priorities while also leading many communities to expand the use of onerous fines and fees.

But importantly, the costs of money bail on vulnerable families are not avoided when community members are able to secure release through the use of commercial bail: because the fees paid to the industry are non-refundable, low-income consumers are frequently left with persistent, lingering debts. It is not just arrestees who are strapped with these unaffordable costs. Bail contracts frequently require the signature of an indemnitor—typically a family member or close

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<sup>4</sup> THE PUBLIC COST OF PRIVATE BAIL, *supra* note 1.

<sup>5</sup> NEW YORK CIVIL LIBERTIES UNION, PRESUMED INNOCENT FOR A PRICE: THE IMPACT OF CASH BAIL ACROSS EIGHT NEW YORK COUNTIES (Mar. 2018), *available at* [https://www.nyclu.org/sites/default/files/field\\_documents/bailreport\\_20180313\\_final.pdf](https://www.nyclu.org/sites/default/files/field_documents/bailreport_20180313_final.pdf). A misdemeanor is a criminal offense other than traffic infraction of which a sentence in excess of 15 days but not greater than one year may be imposed. A violation is the least serious type of proscribed activity, a non-criminal offense other than a traffic infraction for which a sentence to a term of imprisonment of up to 15 days or a fine of up to \$250 may be imposed.

<sup>6</sup> THE PUBLIC COST OF PRIVATE BAIL, *supra* note 1.

<sup>7</sup> BERNADETTE RABUY & DANIEL KOPF, DETAINING THE POOR: HOW MONEY BAIL PERPETUATES AN ENDLESS CYCLE OF POVERTY AND JAIL TIME (May 10, 2016), *available at* <https://www.prisonpolicy.org/reports/DetainingThePoor.pdf>.

<sup>8</sup> CHRISTIAN HENRICHSON, JOSHUA RINALDI, & RUTH DELANEY, THE PRICE OF JAILS: MEASURING THE TAXPAYER COST OF LOCAL INCARCERATION, VERA INSTITUTE OF JUSTICE (May 2015), *available at* [https://storage.googleapis.com/vera-web-assets/downloads/Publications/the-price-of-jails-measuring-the-taxpayer-cost-of-local-incarceration/legacy\\_downloads/price-of-jails.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/the-price-of-jails-measuring-the-taxpayer-cost-of-local-incarceration/legacy_downloads/price-of-jails.pdf).

friend—or necessitate other forms of borrowing within communities, thus extending the economic costs across entire communities.<sup>9</sup>

This is all part of a larger trend: increasingly, people who interact with the criminal justice system come away with crippling debts imposed by public and private actors in the system—often resulting in a pernicious cycle of poverty and indebtedness from which it can be nearly impossible for families to escape.<sup>10</sup> Criminal justice debt, including obligations related to commercial bail, today represents a significant source of unaffordable debt for low-income communities—debt whose harms are magnified many times over by the unusually draconian consequences for borrowers. The harms resulting from these systems are borne particularly acutely by low-income people of color—who are far more likely to be subjected, at every step in the criminal justice process, to the interactions that lead to such financial assessments and also tend to have far fewer financial resources from which payment can be made. The persistence of these debts can deepen exposure to the criminal justice system, impede successful reentry, and cause spiraling harms for individuals, their families, and their communities.

Indeed, criminal justice debt causes some of the most devastating consequences for vulnerable populations NCLC’s advocates have observed, across all of our work. The transactions that lead to these debts demand the attention of consumer protection and financial supervision bodies.

### **The Importance of Public Enforcement**

Commercial bail bonds can be conceptualized as a specialized form of insurance, replacing cash bail paid directly to the court with a promise to appear backed by a third-party surety. For this reason, commercial bail is generally regulated by state insurance commissions, as is the case here in New York. Citing this form of existing regulation, the commercial bail industry sometimes argues that laws protecting consumers should not apply to their line of work. This is generally

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<sup>9</sup> DEVUONO-POWELL, ET AL., ELLA BAKER CTR. FOR HUMAN RIGHTS, WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES (2015), *available at* <https://ellabakercenter.org/sites/default/files/downloads/who-pays.pdf> (describing the impact of collateral consequences of incarceration on family members of incarcerated people).

<sup>10</sup> Fines are frequently imposed as a penalty for a criminal conviction; fees are often assessed for specific costs incurred by public and private actors in the criminal legal system; surcharges may be imposed to fund a particular government function or a general fund; and inability to make timely payment of these obligations may incur interest, collection costs, and other penalties. These costs can total into the thousands of dollars, and are often imposed on people who cannot afford them. *See* NATIONAL CONSUMER LAW CENTER & CRIMINAL JUSTICE POLICY PROGRAM AT HARVARD LAW SCHOOL. CONFRONTING CRIMINAL JUSTICE DEBT THE URGENT NEED FOR COMPREHENSIVE REFORM (Sept. 2016), *available at* <http://www.nclc.org/images/pdf/criminal-justice/confronting-criminal-justice-debt-1.pdf>.

incorrect as a legal matter, but—as a policy argument—it also presumes a level of regulatory interest and capacity that, in practice, rarely exists.<sup>11</sup>

The experience of New Jersey is instructive. In 2014, the state’s Commission of Investigation released the findings of a lengthy investigation into the state’s bail-bond system. The investigation determined that, as a result of “poor government oversight,” the state’s industry had come to be “dominated by an amalgam of private entrepreneurs who profit from the process but are subject to weak controls easily manipulated or ignored with little or no consequence.”<sup>12</sup> Although New Jersey had a licensing and regulatory body in place, the report found that its requirements could “be ignored and circumvented with impunity . . . because scant resources are devoted to oversight [and the state banking and insurance agency’s] posture toward bail matters is predominantly reactive.”<sup>13</sup> As a result, corporate wrongdoing was widespread: “[T]his investigation has revealed that questionable and unscrupulous activity is rife within key segments of the commercial bail-bond industry—and has been for some time—and that the current system for policing that industry simply is not up to the task.”<sup>14</sup> Following the report’s release, the state overhauled its bail system—dramatically scaling back the role of money bail.

There is no reason to suspect that New Jersey is an outlier. In Minnesota, a three-year investigation by Commerce Commissioner Mike Rothman similarly found that many bail bond agents were failing to comply with state laws and court rules related to the solicitation, sale, and handling of bail bonds—including a “failure to abide by approved rate schedules.” That investigation ultimately led to a sweeping 2016 settlement with all 21 insurance companies that provide surety bonds to the bail bond agencies operating in the state, which required licensed actors to reform their business practices.<sup>15</sup> As Rothman summarized, “This enforcement action

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<sup>11</sup> See generally Mel Gonzalez, *Consumer Protection for Criminal Defendants: Regulating Commercial Bail in California*, 106 Calif. L. Rev. \_\_ (August 2018, forthcoming), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2927128](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2927128) [hereinafter *Consumer Protection for Criminal Defendants*] (noting that “the current framework regulating the commercial bail industry almost exclusively monitors the relationship between bail companies and the state, but fails to mitigate the wide-ranging variety of harms that bail agents can and often do inflict on their customers”).

<sup>12</sup> STATE OF NEW JERSEY COMMISSION OF INVESTIGATION, *INSIDE OUT: QUESTIONABLE AND ABUSIVE PRACTICES IN NEW JERSEY’S BAIL-BOND INDUSTRY* (May 2014), available <http://www.nj.gov/sci/pdf/BailReportSmall.pdf> [hereinafter, *INSIDE OUT*]. The report further concluded that the state’s commercial bail system was “highly prone to subversion by unscrupulous and improper practices that make a mockery of the public trust.” *Id.* at 1.

<sup>13</sup> *Id.* at 43.

<sup>14</sup> *Id.* at 58.

<sup>15</sup> Press Release, Minnesota Commerce Department Reaches Sweeping Agreement to Reform State’s Bail Bond Industry (Jan. 13, 2016), available at <https://mn.gov/commerce/media/news/?id=17-114183>. Under the settlement, these insurance companies must conduct annual audits of their contracted bail bond agencies (and their appointed agents) to ensure their compliance with state laws, court rules, and the requirements of the consent order.

was necessary because too many people in the bail bond industry thought they were in the Wild West and the rules didn't apply to them.”

This is only part of the reason why public enforcement is so critical. Some critical consumer protections lack a private right of action. Here in New York, for example, courts have determined that there is no private right of action to pursue violations of the Insurance Law provision that limits the premium that can be charged for issuance of bail bonds.<sup>16</sup> That is the case even though, as explained below, charging consumers for unauthorized fees is one of the most common—and most harmful—abuses that advocates encounter. And even where there is a private right of action, it is typically very difficult for the low-income individuals who have been taken advantage of by bail agents to bring litigation to enforce their rights, either because of binding arbitration agreements, limited knowledge of legal rights and the legal system, or the cost of working with a lawyer and pursuing claims.

### **Consumer abuses arising in the context of commercial bail transactions**

Where state enforcement agencies do not specifically prioritize the regulation of commercial bail in their supervision and enforcement, supported by dedicated staff resources, industry actors are able to act without meaningful oversight—leading to widespread consumer abuses. As explained in further detail below, many predatory practices that are commonly observed fall into one of the following categories:

- Charging undisclosed or illegal fees or excessive rates of interest;
- Inclusion of abusive and illegal contract terms;
- Engaging in harassing and abusive collection practices;
- Mishandling of collateral;
- Violations of privacy and credit reporting laws;
- Operating without state-required licenses; and
- Failing to comply with reporting obligations.

#### Charging undisclosed or illegal fees or excessive rates of interest

Bail contracts commonly levy fees for various (often ambiguous) expenses, beyond the bond premium itself. Sometimes the charges themselves may violate the law, as where they exceed the limits on premiums set by New York's Insurance Law. But even where the charges are authorized, consumer laws protecting fairness in extensions of credit may impose obligations on bail agents and their surety company backers.

This is particularly true in cases where bond premiums are financed and paid to bail agents over time. Many bail agents allow the defendant or a guarantor to pay the bond premium in

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<sup>16</sup> See *McKinnon v. Int'l Fid. Ins. Co.*, 704 N.Y.S.2d 774, 776 (Sup. Ct. 1999) (concerning allegations that bail bond defendants routinely charged and received fees in excess of the limits set forth in the Insurance Law, including by improperly designating these fees as “expenses”).

installments, often in return for charging financing fees and costs. Typically, the principal (i.e., the arrestee) and/or their indemnitors (i.e., family members or other loved ones who agree to take on certain responsibilities under the bail contract, including payment of various fees and the amount of a forfeited bond) will sign a financing agreement. Under that agreement, the parties agree to pay a down payment followed by some number of monthly payments. These financing transactions are distinct from the underlying bail bond (the surety product itself).<sup>17</sup> The terms and cost of this extension of credit may be murky and devoid of the types of disclosures typically required of the financing industry. In addition, the addition of financing costs may cause the premiums to exceed the jurisdiction's rate cap.

These agreements must generally comply with the Truth in Lending Act (TILA), which requires disclosures about the terms of consumer credit and standardizes the manner in which the costs of borrowing are calculated and disclosed.<sup>18</sup> The statute is Congress's effort to guarantee the accurate and meaningful disclosure of the costs of consumer credit and thereby to enable consumers to make informed choices in the credit marketplace and avoid abusive lending.<sup>19</sup> The law is implemented by Regulation Z, under which a creditor must make a number of specific disclosures clearly and conspicuously in writing, in a form that the consumer may keep. Those disclosures include the identity of the creditor; the annual percentage rate; any finance charges; the payment schedule and total of payments; and a description of total sales price and late payment penalties.<sup>20</sup> These disclosures must be "grouped together, shall be segregated from everything else, and shall not contain any information not directly related to the disclosures."<sup>21</sup>

The Truth in Lending Act is not the only federal law with which bail agents must take care to comply, where they opt to act as creditors. Under the protections of the Equal Credit Opportunity Act (ECOA), creditors are generally prohibited from taking adverse actions against prospective applicants on the basis of membership in a protected class or because the applicant's income is

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<sup>17</sup> The applicability of federal statutory claims can be complicated by the McCarran-Ferguson Act, which preserves the right of states to regulate insurance and limits the application of certain types of federal laws to insurance. Importantly, this law does not prevent the federal government from regulating the *financing* of insurance premiums, which does not constitute the "business of insurance"—including when the same company that provides insurance also finances the premium. *See, e.g.,* *Cody v. Cmty. Loan Corp. of Richmond Cty.*, 606 F.2d 499, 502 (5th Cir. 1979) (holding that "premium financing by an insurance company in connection with the sale of an insurance policy is not the 'business of insurance' for McCarran Act purposes, and that [TILA] is thus applicable to such a loan transaction."); *Egana v. Blair's Bail Bonds Inc.*, 2018 WL 2463210, at \*4 (E.D. La. June 1, 2018) (citing *Cody* and noting that "it does not make sense that Defendants' financing activities should be immune from TILA merely because they are conducted in the context of bail bonding").

<sup>18</sup> 15 U.S.C. §1601, *et seq.* 12 C.F.R. Part 226 (Regulation Z). *See also* NATIONAL CONSUMER LAW CENTER, TRUTH IN LENDING (9th ed. 2015), *updated at* <https://library.nclc.org/til>.

<sup>19</sup> 15 U.S.C. § 1601(a) (statutory purpose is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him").

<sup>20</sup> 12 C.F.R. § 1026.17(a).

<sup>21</sup> 12 C.F.R. § 1026.17(a)(1).



derived from public assistance.<sup>22</sup> Importantly, unlike the other claims that court debtors might bring relating to discriminatory practices, the ECOA allows for “disparate impact” claims. This means that regulators asserting ECOA claims might have an opportunity to challenge practices that result in significant racial disparities—even if those practices do not, on their face, concern race. Furthermore, because the ECOA covers every aspect of a credit transaction, it applies to both the terms of credit and collection procedures.

#### Inclusion of abusive and illegal contract terms

Even where bond premiums are not financed, bail contracts contain a wide array of common contractual provisions that may violate state and federal consumer protection laws, and thus may be unenforceable. For example, many commercial bail contracts include provisions warning the arrestees that they can be taken back to jail if they fail to make their premium payments. However, failing to make a premium payment is not generally a legally valid reason for returning a person to jail.

Other contract terms impose invasive, abusive, and unfair terms that are arguably unconscionable. For example, some contracts require the principal—and even, sometimes, indemnitors—to consent to any force necessary to return them to custody or to authorize the surety to enter their home without notice and at any time. In other words, contracts may even require *family members and friends* to grant the bond agent the authority to enter their homes at any moment, for any reason. Other harmful terms include pre-emptive waivers of bankruptcy rights; language purporting to give a security interest in property acquired in the future; and waiver of the right to notice and commercially reasonable sale of repossessed collateral.

Even when contract terms may not be illegal or unconscionable on their face, bail agents may mislead consumers about the content and meaning of bail agreements, or about their legal options. Agents may advertise premium rates that conceal the full price the consumer may pay, or fail to disclose material terms (for example, that premiums are not returned even if the case is dismissed). Bail contracts frequently include vague and undefined contract terms that give broad leeway to the bail agent to return the accused to jail.<sup>23</sup>

In the formation of these contracts, the consumer has almost zero bargaining power. Contracts are negotiated at the bail agent’s office—and an accused who does not sign the agreement under

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<sup>22</sup> The ECOA provides, among other things, that “[i]t shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—(1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract); (2) because all or part of the applicant’s income derives from any public assistance program.” 15 U.S.C. § 1691(a). For the purposes of ECOA, credit is defined broadly as “the right granted by a creditor to a debtor to defer payment of debt.” 15 U.S.C. § 1691a(d). *See generally* National Consumer Law Center, *Credit Discrimination* (6th ed. 2013), updated at <https://library.nclc.org/cd>.

<sup>23</sup> UCLA SCHOOL OF LAW CRIMINAL JUSTICE REFORM CLINIC, *THE DEVIL IN THE DETAILS: BAIL BOND CONTRACTS IN CALIFORNIA* (May 2017), available at [https://static.prisonpolicy.org/scans/UCLA\\_Devil%20in%20the\\_Details.pdf](https://static.prisonpolicy.org/scans/UCLA_Devil%20in%20the_Details.pdf).

the proffered terms can be taken back to jail. Bail agents have little incentive to ensure that consumers of bail bonds contracts understand the terms to which they are agreeing.

#### Engaging in harassing and abusive collection practices

Because many bail agents also act as private enforcers for defendants who violate bail agreements, the line between bail enforcement and debt collection often becomes blurred. Indeed, bondsmen are notorious for engaging in harassing and abusive practices to collect bail premiums, including placing intimidating phone calls and making threats to send arrestees back to jail without a legal basis to do so.<sup>24</sup>

Bail agents and bounty hunters sometimes use physical restraint, orchestrated arrest, and intimidation as tools to encourage the payment of financed premiums and other assessed fees. They may threaten or apprehend individuals in order to coerce clients to make payments (or coerce them into criminal or sexual behavior), including by making false threats to send arrestees back to jail without a legal basis to do so. They may deploy kidnapping and false imprisonment for extortive purposes, holding arrestees in offices until someone pays. Bail agents may try to coerce payment by contacting arrestees' friends, families, and employers.

This sort of behavior may be regulated by the Fair Debt Collection Practices Act (FDCPA)<sup>25</sup> or state debt collection laws. The FDCPA gives consumers the right to dispute alleged debts, and provides protections around how and when a debt collector may contact them. Because the FDCPA regulates the conduct of third-party debt collectors, and generally exempts original creditors, its protections may have limited application to commercial bail bonds. But that will not always be the case: for example, the FDCPA has been used to pursue abusive debt collection practices by a firm operating as an intermediary between individuals seeking immigration bonds and the bond agents.<sup>26</sup>

Other state laws—especially those that apply to original creditors collecting on their own debts—may provide relief where the FDCPA cannot. For example, a Texas bail bondsman's conduct was found to be actionable under the state's fair debt collection law, even where it would not have been under the FDCPA.<sup>27</sup> And in California, perhaps the largest commercial bail market in the world, unfair debt collection practices by bail bond companies are actionable under the state's Rosenthal Fair Debt Collection Act.<sup>28</sup>

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<sup>24</sup> *Consumer Protection for Criminal Defendants*, *supra* note 11 at 22–23.

<sup>25</sup> See generally NATIONAL CONSUMER LAW CENTER, COLLECTION ACTIONS (4th ed. 2017), updated at <https://library.nclc.org/ca>.

<sup>26</sup> See, e.g., Plaintiffs' Opposition To Defendant's Motion To Dismiss Counts V And VI Of The Second Amended Complaint at 6, Quintanilla Vasquez et al v. Libre by Nexus, Inc. (N.D. Ca.) (Aug. 1, 2017).

<sup>27</sup> *Monroe v. Frank*, 936 S.W.2d 654, 660 (Tex.App.-Dallas 1996).

<sup>28</sup> See *Consumer Protection for Criminal Defendants*, *supra* note 11.

### Mishandling of collateral

Many bail bond transactions are collateralized, both to indemnify in case of forfeiture, as well as to enforce full payment of financed premiums. Bond agents may engage in illegal and abusive practices in connection with the repossession of collateral. For example, a bond agent may illegally attempt to force bail bond cosigners to turn over property used as collateral in cases where the arrestee complied with the terms of the bail. A recent report by New York City's Comptroller found evidence that "some companies . . . fail[] to return collateral as required under contract . . . ."<sup>29</sup>

Article 9 of the Uniform Commercial Code (UCC) generally deals with disposition of collateral other than real property, and regulates the use of self-help to obtain possession of collateral.<sup>30</sup> Some irregularities in repossession can give rise to actions for damages, such as failure to give proper notices of sale or repossessions that breach the peace. Demands for collateral may also give rise to other legal responsibilities. For example, courts may find that a bail bond agent who takes collateral has a fiduciary duty arising from that agreement, which can create additional obligations to make affirmative disclosures to the principal about material terms.<sup>31</sup>

### Violations of privacy and credit reporting laws

Bail companies take a number of actions that implicate arrestees' credit as well as their privacy. Bail companies frequently pull consumers' credit reports to see how much available credit they have to pay off their debts. Many also report bail debts to credit bureaus. Additionally, bail contracts commonly have broad authorization and waiver clauses that raise both credit and privacy concerns, including through authorization conduct credit checks as well as a range of private information such as medical records, civil records, tax records, school records, employment records, and any other private or public information. Under credit reporting and privacy laws, these actions may create affirmative duties for bail agents to update or correct false information or follow certain procedures.

The Fair Credit Reporting Act (FCRA) regulates consumer reporting agencies (CRAs), as well as the entities that provide information to consumer credit reporting agencies (furnishers) and the

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<sup>29</sup> THE PUBLIC COST OF PRIVATE BAIL, *supra* note 1.

<sup>30</sup> See generally NATIONAL CONSUMER LAW CENTER, REPOSSESSIONS (9th ed. 2017), updated at <https://library.nclc.org/repo>.

<sup>31</sup> See, e.g., Cal. Code Regs. tit. 10, § 2088 (establishing that "[a]ny bail licensee who receives collateral in connection with a bail transaction shall receive such collateral in a fiduciary capacity..."). See also *Cardenas v. American Surety Company*, 2004 WL 206286, at \*8 (2004) (noting in the context of a "The failure of the fiduciary to disclose a material fact to his principal which might affect the fiduciary's motives or the principal's decision, which is known (or should be known) to the fiduciary, may constitute constructive fraud."); *People v. V.C. Van Pool Bail Bonds*, 246 Cal.App.3d 303, 306 n.2 (1988) (stating that failure of a bail bondsman who holds collateral to notify a principal about a bond exoneration hearing may be a breach of fiduciary duty).

users of consumer credit reports.<sup>32</sup> The FCRA imposes various duties on these actors; for example, furnishers must refrain from reporting information that they know or have reasonable cause to believe is inaccurate and must investigate consumer disputes promptly. Under the FCRA’s definitions, bail agents may be acting as both furnishers and as users of consumer credit information. State law also may provide additional protections against the furnishing or reporting of various criminal justice debts. The sort of overly-broad authorization clauses that many bail companies use may implicate other privacy-related laws, including the Health Insurance Portability and Accountability Act (HIPPA), the Gramm–Leach–Bliley Act, the Family Educational Rights and Privacy Act (FERPA), and state privacy laws.

#### Operating without state-required licenses and failing to comply with reporting obligations.

A report issued last year by the Brooklyn Community Bail Fund determined that out of 76 distinct bail bond companies “openly operating” in New York City, nine companies were not licensed by the State.<sup>33</sup> This illegal practice appears to be common in the commercial bail industry. For example, the 2014 investigation into New Jersey’s bail system found evidence that many bond companies were being operated by unlicensed individuals—including agents who had previously forfeited their licenses for engaging in illegal activity, but now were operating without license, through subterfuge.<sup>34</sup> Just this year, the Lawyers’ Committee for Civil Rights brought attention to one unlicensed company that has been flooding the Baltimore City and County District Court dockets with debt collection complaints, in contravention of the state’s insurance code, and winning judgments against consumers.<sup>35</sup> As of February, this single unlicensed entity was attempting to collect on over \$862,000 of bail debt in local courts.

Even though states have authority to supervise bail agents through the licensing and reporting process, it is clear that they have failed to do so. They must now aggressively use their authority to ensure bail bond companies are operating lawfully and subject to oversight.

#### **Other actors in the commercial bail and corrections industries**

Most of the above abuses involve bail agents—the companies that, in most cases, directly interact with consumers in the market for commercial bail. But there are other actors in this

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<sup>32</sup> See generally NATIONAL CONSUMER LAW CENTER, FAIR CREDIT REPORTING (9th ed. 2017), updated <https://library.nclc.org/fcr>.

<sup>33</sup> BROOKLYN COMMUNITY BAIL FUND, LICENSE & REGISTRATION, PLEASE... (June 2017), available at <https://brooklynbailfund.org/press-release-new-report-for-profit-bond-industry/>.

<sup>34</sup> INSIDE OUT at 43 (“The Commission found instances in which bail agents, despite having been caught and penalized for employing unlicensed personnel, soon resumed the same activity virtually without interruption.”)

<sup>35</sup> Letter from Lawyers’ Committee for Civil Rights Under Law to the Honorable Michel Pierson et al., February 2, 2018, available at <https://assets.documentcloud.org/documents/4384741/Lawyers-Committee-Bail-Letter.pdf>.

industry: a much wider universe of companies profiting from commercialized justice in other ways. Their conduct should also be a focus of state regulators.

In most states, bail bonds are underwritten by large corporate insurers—who contract with bail agents to receive a share of consumers’ payments. (Indeed, bail insurers have actively promoted legislation *requiring* bail agents to have insurer backing.<sup>36</sup>) Just a handful of large insurers cover the majority of bail bonds posted by the thousands of bail bond companies that operate throughout the United States. As documented by the ACLU and Color of Change, the insurance industry has received hundreds of millions of dollars in revenues related to bail bond insurance.<sup>37</sup> Even though their risk in the transactions is limited and their role largely hidden from public view, these corporations play an active role in our commercial bail system.<sup>38</sup>

The practices, policies, and actions of these insurance companies are known to have wide impact on agents, consumers, and the justice system—but they have largely escaped regulatory scrutiny. That should change. Regulators could use any number of legal theories to hold surety insurance companies accountable for unlawful acts committed by bail bond agent whose bonds they back. For example, an agency relationship between the surety and the bond agent can be created by statute (particularly where state law requires bail companies to use a surety insurer in order to conduct business) or may be held to exist under the common law. Where an insurer can be shown to be aware of a bail bond agent’s unlawful conduct and to have provided assistance, regulators could hold it secondarily liable, for example under an aiding and abetting theory.

In addition to bondsmen and the insurance companies that underwrite them, other industry players have arisen in recent years to occupy new roles in the commercial bail market. For an additional fee, these companies may operate to procure bonds (from a third-party bail agent) for defendants,<sup>39</sup> provide GPS monitoring devices,<sup>40</sup> and other consumer “services” that may be

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<sup>36</sup> See, e.g., Cal. Ins. Code § 1802.1 (requiring bail agent applicants to file with the state a notice of appointment, executed by a surety insurer, “authorizing that applicant to execute undertakings of bail and to solicit and negotiate those undertakings” on behalf of the surety insurer).

<sup>37</sup> COLOR OF CHANGE & AMERICAN CIVIL LIBERTIES UNION, SELLING OFF OUR FREEDOM: HOW INSURANCE CORPORATIONS HAVE TAKEN OVER OUR BAIL SYSTEM (MAY 2017), available at <https://www.aclu.org/report/selling-our-freedom-how-insurance-corporations-have-taken-over-our-bail-system> [hereinafter SELLING OFF OUR FREEDOM].

<sup>38</sup> Bail bonds are rarely declared forfeited; when they are, the bond agent retains the primary obligation for paying the forfeiture. And even when this happens, sureties can typically collect from funds previously paid by the agents and held in reserve. See SELLING OFF OUR FREEDOM, *supra* note 37.

<sup>39</sup> See Michael E. Miller, *This Company Is Making Millions From America’s Broken Immigration System*, WASH. POST (March 9, 2017), available at [https://www.washingtonpost.com/local/this-company-is-making-millions-from-americas-broken-immigration-system/2017/03/08/43abce9e-f881-11e6-be05-1a3817ac21a5\\_story.html?utm\\_term=.a69946ef8827](https://www.washingtonpost.com/local/this-company-is-making-millions-from-americas-broken-immigration-system/2017/03/08/43abce9e-f881-11e6-be05-1a3817ac21a5_story.html?utm_term=.a69946ef8827).

<sup>40</sup> Press Release, Southern Poverty Law Center, *SPLC Lawsuit: Bail Bond Companies Charged Illegal Fees, Used Bounty Hunters To Kidnap Clients, Extort Money* (June 19, 2017), available at <https://www.splcenter.org/news/2017/06/19/splc-lawsuit-bail-bond-companies-charged-illegal-fees-used>

required as collateral or a condition of credit. Additionally, bond agents frequently contract for bail recovery services with private bounty hunters—whose conduct is only lightly regulated in many states.<sup>41</sup>

Finally, commercial bail is not the only example of private profiteering from the criminal legal system that can give rise to consumer abuses. From supervisory monitoring<sup>42</sup> to prison services<sup>43</sup> to court-ordered rehabilitation programs,<sup>44</sup> the American corrections industry offers a range of high-cost services to low-income consumers facing extreme pressures and limited choices. The companies offering these services have worked together with state and local governments to commercialize nearly every segment of our modern punishment continuum: they are engaging in commercial transactions that transpire in the shadow of criminal law. As a result, many of the financial obligations that result from people’s interactions with the criminal legal system are owed to private companies, rather than to courts or the state.

As you consider ways to protect consumers in the commercial bail market, I urge you also to devote investigative resources to understand how these other companies impose costs on people who have interactions with the criminal legal system—and bring enforcement actions to address consumer abuses that arise in this context.

## Conclusion

There is now momentum for far-reaching reforms, here in New York and around the country. Governor Cuomo has recently called for the elimination of money bail for misdemeanor or non-violent felony charges. New York City’s Independent Commission Criminal Justice and Incarceration Reform went further, recommending prohibiting money bail entirely. And New York City’s Comptroller has called for the “immediate elimination of commercial bonds.”<sup>45</sup>

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[bounty-hunters-kidnap-clients](#) (describing a lawsuit in which the bond agent is alleged to require, as a condition of credit, principals to wear a GPS monitor on their ankle after their release from jail, even when there has been no court order mandating location monitoring).

<sup>41</sup> See Katie Bo Williams, *Does the Bounty-Hunting Industry Need Reform?*, The Atlantic (Jul. 23, 2015), available at <https://www.theatlantic.com/politics/archive/2015/07/does-the-bounty-hunting-industry-need-reform/399224/>.

<sup>42</sup> See HUMAN RIGHTS WATCH, “SET UP TO FAIL”: THE IMPACT OF OFFENDER-FUNDED PRIVATE PROBATION ON THE POOR (Feb. 20, 2018), available at <https://www.hrw.org/report/2018/02/20/set-fail/impact-offender-funded-private-probation-poor>.

<sup>43</sup> See DREW KUKOROWSK, PETER WAGNER & LEAH SAKALA, PLEASE DEPOSIT ALL YOUR MONEY: KICKBACKS, RATES, AND HIDDEN FEES IN THE JAIL PHONE INDUSTRY, PRISON POLICY INSTITUTE (May 8, 2013), available at [https://static.prisonpolicy.org/phones/please\\_deposit.pdf](https://static.prisonpolicy.org/phones/please_deposit.pdf).

<sup>44</sup> See AMERICAN FRIENDS SERVICE COMMITTEE, COMMUNITY CAGES: PROFITIZING COMMUNITY CORRECTIONS AND ALTERNATIVES TO INCARCERATION (August 2016), available at [https://www.privateci.org/reports\\_files/Profitizing%20community%20corrections%20and%20alternatives%20to%20incarceration.pdf](https://www.privateci.org/reports_files/Profitizing%20community%20corrections%20and%20alternatives%20to%20incarceration.pdf).

<sup>45</sup> THE PUBLIC COST OF PRIVATE BAIL, *supra* note 1.

All of these proposals would advance the policy goal of ending the injustice of wealth-based detention. But in the meantime, state and federal enforcement agencies must specifically prioritize the regulation of commercial bail in their supervision and enforcement—supported by high-level commitment and dedicated staff resources. As the New Jersey investigators concluded, “If the State, as a matter of policy and practice, is going to continue to allow commercial bail-bond agencies to operate within that system, it must establish appropriate and effective statutory, regulatory, and administrative controls to hold those entities accountable through proper licensing and oversight.”<sup>46</sup>

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<sup>46</sup> INSIDE OUT, *supra* note 12 at 56.