



**National
Consumer Law
Center**

*Fighting Together
for Economic Justice*

COMMERCIALIZED (IN)JUSTICE LITIGATION GUIDE:

**APPLYING CONSUMER LAWS
TO COMMERCIAL BAIL, PRISON
RETAIL, AND PRIVATE DEBT
COLLECTION**

**By Ariel Nelson, Brian Highsmith, Alex
Kornya, and Stephen Raher**

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ABOUT THE NATIONAL CONSUMER LAW CENTER

Since 1969, the nonprofit National Consumer Law Center® (NCLC®) has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, in the United States. NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services; and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state governments and courts across the nation to stop exploitive practices, help financially stressed families build and retain wealth, and advance economic fairness.

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I. INTRODUCTION

A. The Problem of Consumer Abuses by Companies Profiting off the Criminal Legal System

Increasingly, Americans who have contact with the criminal legal system find themselves deprived not only of their liberty but also of their property, as the system imposes onerous fines and fees on criminal defendants and their loved ones. Today, the resulting criminal justice debts often are owed not only to the state, but also to a vast network of private companies profiteering from the criminalization of poverty and communities of color.

This newer form of criminal justice debt stems from financial charges levied throughout a person's contact with the criminal legal system. From commercial bail agents to prison retailers (the private companies—including telecommunications providers, technology companies, commissary operators, and money transmitters—that charge incarcerated people and their families for basic or essential goods and services), the American corrections industry imposes a range of high-cost services on low-income consumers facing extreme pressures and limited or no choices. Individuals forced to choose between high-cost bail bonds or time in jail, between using the exorbitantly high-cost phone calling company to which the county has granted a prison monopoly or not talking to a child, or between getting their money upon release on a specific debit card or not at all often are involuntary or painfully exploited consumers.

How did we get here? States and local governments have increasingly offloaded core functions of their criminal legal systems—traditionally public services—onto private corporations operating to maximize profit for their owners and shareholders. The companies offering these “services” have worked with state and local governments to commercialize nearly every segment of our modern punishment continuum.

The burden of paying the inflated costs resulting from exploitative practices in the criminal legal system is concentrated on a much smaller group (those who have contact with the criminal legal system), compared to the broad group of taxpayers who pay for government operations under public financing models. And people in this smaller group are far more likely to be (1) people of color, due to discriminatory policing and sentencing practices, as well as racial wealth disparities that leave people of color with fewer options to avoid financial exploitation, and (2) poor, in part because economically depressed communities are frequently targeted by law enforcement and tend to have limited options to avoid predatory services.

B. Bringing a Consumer Protection Lens to Litigation and Regulation of Companies Profiting off the Criminal Legal System

This litigation guide builds on the exploration of these problems in the National Consumer Law Center's 2019 report, [*Commercialized \(In\)Justice: Consumer Abuses in the Bail and Corrections Industry*](#), by deepening the analysis of industry misconduct and illuminating

potential litigation and regulatory enforcement approaches to address some of the commercial abuses occurring in the shadows of the criminal legal system.¹ It focuses in particular on the application of consumer protection statutes to the bail bond industry, the prison retail industry, and the private debt collection industry. Advocates are just beginning to challenge aspects of the criminal legal system through consumer laws. As a result, this area of law is in its nascent stages and this guide does not always point to concrete examples of how certain theories have been successfully deployed. Instead, it highlights potential claims for advocates and regulators to consider and flags issues for additional research.

Many advocates, quite reasonably, approach problems involving companies involved in the criminal legal system through a criminal justice and civil rights lens. This can and should continue. But thinking about these companies' practices through a consumer protection lens opens a new and complementary set of possibilities for litigants. For example, if bail bond companies, prison retail companies, and private debt collectors are routinely engaged in abusive, predatory behavior with respect to individuals who have contact with the criminal legal system, then those businesses should be held accountable through the same laws that would apply were they operating in any other corner of the marketplace. Otherwise, the legal system permits, and may even encourage, these abuses. Holding bail bond agents, prison retailers, and debt collectors to account through consumer laws such as the Truth in Lending Act, the Fair Debt Collection Practices Act, or state Unfair and Deceptive Acts and Practices laws means that some of the most vulnerable consumers in our society will have access to these basic protections against abusive and exploitative practices, while advocates simultaneously work to end mass incarceration and criminalization in the United States through other avenues.

C. Overview of This Litigation Guide

This litigation guide focuses on the application of consumer laws to three industries in particular: the bail bond industry, the prison retail industry, and the private debt collection industry.

This guide begins with the commercial bail industry. This section:

- Provides an overview of the commercial bail system and how commercial bail bonds are structured and regulated;
- Examines problematic practices in the bail bond industry that may warrant consumer protection responses;
- Discusses how specific consumer protection laws may apply to commercial bail bond transactions; and
- Explores theories of liability for how to reach the companies (known as “sureties”) that typically underwrite the bonds sold by bail bond agents.

¹ This guide relies and builds on the following sources by the authors and their colleagues: BRIAN HIGHSMITH, [NATIONAL CONSUMER LAW CENTER, COMMERCIALIZED \(IN\)JUSTICE: CONSUMER ABUSES IN THE BAIL AND CORRECTIONS INDUSTRY \(2019\)](#), Stephen Raher, *The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jails*, 17 HASTINGS RACE & POVERTY L.J. 3 (2020); Alex Kornya, Danica Rodarmel, Brian Highsmith, Mel Gonzalez, & Ted Mermin, *Crimsumerism: Combating Consumer Abuses in the Criminal Legal System*, 54 HARV. C.R.-C.L.L. REV. 107 (2019); Abby Shafroth, David Seligman, Alex Kornya, Rhona Taylor, & Nick Allen, [NATIONAL CONSUMER LAW CENTER, CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR LITIGATION \(2016\)](#).

Next, the guide turns to the prison retail industry. This section:

- Describes the parties typically involved in prison retail transactions;
- Provides an overview of prison communications and a brief history of prison communications regulation;
- Provides an overview of correctional banking and the types of money transfers and payment services that incarcerated people and their families must use;
- Discusses examples of and unique considerations for litigation concerning specific prison retail areas; and
- Explores the potential use of state Unfair and Deceptive Acts and Practices laws, state laws relevant to site commissions, and antitrust laws to challenge exploitative practices across the prison retail industry.

The guide then examines the private debt collection industry. This section:

- Discusses the outsourcing of the collection of criminal justice debts to private contracts;
- Describes how the Fair Debt Collection Practices Act may apply to private debt collection companies, and potential limitations; and
- Provides an overview of the range of deceptive, abusive, and unfair practices that the Fair Debt Collection Practices Act may protect against in the criminal justice debt context.

The final section of the guide highlights two obstacles that may arise when litigating claims against private companies involved in the criminal legal system: arbitration clauses and the filed-rate doctrine.

II. COMMERCIAL BAIL

The commercial bail industry operates as part of the pretrial process—the period between arrest and the resolution of the criminal case.² As described below, individuals who cannot afford bail typically must turn to the commercial bail market. Commercial bail bonds are, at their core, a specialized form of insurance, replacing cash bail paid directly to the court with a promise to appear backed by a third-party surety. The commercial bail industry profits from taking advantage of people at their most vulnerable: when they—or their loved ones—face a choice between paying a bail agent under the offered terms or staying in jail.

This section explores various ways to hold players in the commercial bail industry liable through consumer laws.³ It provides an overview of the commercial bail system, discusses problematic practices that may give rise to consumer protection responses, and explores how specific consumer laws may apply to commercial bail bond transactions. It also delves into theories of liability for how to reach the large insurance corporations (known as “sureties”) that typically underwrite the bonds sold by smaller bail bond businesses. Although this area of law is still very

² See generally [Criminal Justice Policy Program, Moving Beyond Money: A Primer on Bail Reform](#), Harvard Law School (Oct. 2016).

³ Portions of this section were originally published as Kornya, et al., *Crimsumerism*, *supra* note 1.

much in development, a significant amount of successful litigation already has occurred, and this section highlights successful cases to illustrate how advocates may bring certain consumer law claims in the bail context. Because substantial uncharted territory still exists in applying consumer law to the commercial bail system, this section also goes beyond existing case law to consider other potentially viable consumer claims and theories of liability.

A. Overview: The Cost of Commercial Bail for Low-Income Families

Most jurisdictions allow commercial bail. In these jurisdictions, accused persons generally have two options for posting bail. First, they can post the entire bail amount themselves with the court, in which case the court generally will return their money if they attend their required court appearances and meet any other bail conditions, which may include periodic check-ins or not being charged with additional crimes.⁴ Second, accused persons can pay a private bail bond agent a non-refundable premium, typically in the range of 10% of the bail amount. In exchange, the bail agent posts a bond with the court and promises to pay the full bail amount if the bond is forfeited. The accused person's failure to appear or meet other bail conditions generally triggers the forfeiture of the bond. These commercial bail bonds are, in essence, a specialized form of insurance.

This basic structure of commercial bail ensures that people who do not have access to enough money to post bail will have to pay non-refundable fees to a bail bond agent to avoid jail. Although people who can afford to post the bail themselves typically can expect to receive the full amount back when their case concludes,⁵ people who cannot afford to pay and thus turn to the commercial bail market never get back the substantial amount of money paid to bail bond agents and their corporate partners that underwrite the bonds. That is true even in cases of false arrest, where the charges are dropped, or where the individual facing charges is found not guilty. And when consumers of commercial bail bonds—low-income accused persons and often their family members and friends⁶—cannot afford to pay the full amount of the bond up front, they enter financing agreements and are frequently left with persistent, lingering debts. Further, bail contracts often require the signature of an indemnitor—typically a family member or close friend—who can be held financially liable. The requirement to pay the bond also may

⁴ Advocates should note that in some jurisdictions, accused persons may not get all of their bail money back. Some jurisdictions practice “bail offset,” which typically allows the posted bail money to be taken to pay off criminal justice debts. See, e.g., FLA. STAT. § 903.286 (“The clerk of the court shall withhold from the return of a cash bond posted on behalf of a criminal defendant by a person other than a bail bond agent . . . sufficient funds to pay any unpaid costs of prosecution, costs of representation . . . , court fees, court costs, and criminal penalties.”); IND. CODE § 35-33-8-3.2(a)(2) (“If the court requires the defendant to deposit cash or cash and another form of security as bail, the court may . . . [r]equire the defendant to execute[] an agreement that allows the court to retain all or a part of the cash or securities to pay fines, costs, fees, and restitution that the court may order the defendant to pay if the defendant is convicted.”); IOWA CODE § 602.8103(6) (“The clerk may . . . [e]stablish and maintain a procedure to set off against amounts held by the clerk of the district court and payable to the person any debt which is in the form of a liquidated sum due, owing and payable to the clerk.”)

⁵ *But see supra* note 4.

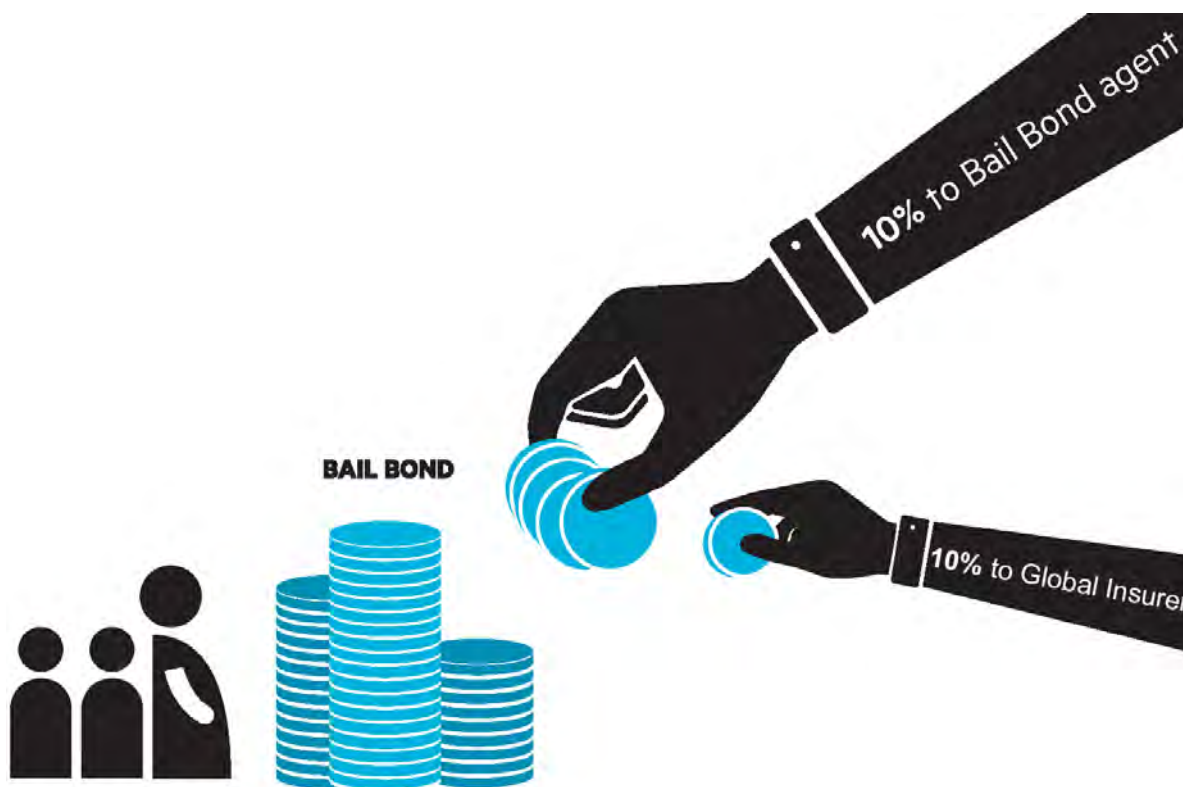
⁶ Research indicates that bail bond deposits are disproportionately paid by women of color. See ISAAC BRYAN, ET AL., [THE PRICE FOR FREEDOM: BAIL IN THE CITY OF L.A.](#) (2017); Joshua Page, et al., *A Debt of Care: Commercial Bail and the Gendered Logic of Criminal Justice Predation*, 5 Russell Sage Foundation Journal of the Social Sciences 150, 165 (2019); see also SANETA DE VUONO-POWELL, ET AL., [ELLA BAKER CENTER, FORWARD TOGETHER, RESEARCH ACTION DESIGN, WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES, ELLA BAKER CENTER FOR HUMAN RIGHTS](#) (2015), (describing the impact of collateral consequences of incarceration on family members of incarcerated people; stating that of the family members primarily responsible for court-related costs associated with conviction, 83% were women).

necessitate other forms of borrowing within the accused person's social circle, thus extending the economic costs across communities.⁷

Numerous studies and investigative reporting 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.⁸ These abusive practices 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 threats to send accused persons 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 accused person complied with the terms of bail; operating without state-required licenses; and failing to comply with reporting obligations.⁹

The American bail industry is rife with illegal practices that harm low-income consumers and undermine the goals of the criminal legal system.

B. The Structure and Regulation of Commercial Bail Bonds



Credit: Color of Change and the American Civil Liberties Union, [Selling Off Our Freedom: How Insurance Corporations Have Taken Over Our Bail System](#) (2017) (graphic edited).

⁷ DeVUONO-POWELL, ET AL., *supra* note 6, at 7–9, 12; see also COLOR OF CHANGE & AM. CIVIL LIBERTIES UNION, [SELLING OFF OUR FREEDOM: HOW INSURANCE CORPORATIONS HAVE TAKEN OVER OUR BAIL SYSTEM](#) 31–32 (2017).

⁸ See, e.g., Jessica Silver-Greenberg & Shaila Dewan, [When Bail Feels Less Like Freedom. More Like Extortion](#), N.Y. TIMES (March 31, 2018); Shane Bauer, [Inside the Wild, Shadowy, and Highly Lucrative Bail Industry](#), MOTHER JONES (May/June 2014).

⁹ See generally Mel Gonzalez, *Consumer Protection for Criminal Defendants: Regulating Commercial Bail in California*, 106 CALIF. L. REV. 1379, 1397–99 (2018).

Understanding the application of consumer laws to commercial bail bonds requires some familiarity with how the system works. As noted above, an accused person who cannot afford to post the full amount of the bail set by the court often turns to a commercial bail bond agent. The bail bond agent writes the bond contract and collects a non-refundable bond premium from the accused person or any loved one who cosigns as an indemnitor (the person obligated to pay when the accused person seeking the bond does not or cannot). After receiving payment, the bail agent files a bond with the court to obtain the accused person's release and guarantee their appearance in court or the payment of the bond in full. Although these bail bond agents and their storefronts—which are often lined up near courthouses—are the public face of the industry, they are only the front end of a larger network of actors.

Most bail bond agents are backed by a large insurance company, known as a surety.¹⁰ Bail agents pay a percentage, typically around 10% of the premium they charge the person seeking the bond, to an insurance company for underwriting.¹¹ Although the bail agents guarantee to their surety company that they will be responsible for any forfeiture of the bond, they also usually pay an additional 10% into a "build-up fund" held by the surety company to ensure that funds will be available.¹² While about 25,000 bail bond businesses exist across the country, just a few insurance companies—which are increasingly part of major global finance companies—back the majority of bail bonds.¹³ Even though the insurance companies' risk in the transactions is limited and their role is largely hidden from public view, these companies play a crucial role in the commercial bail system.¹⁴

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The commercial bail industry is regulated primarily at the state level.¹⁵ One of the key ways that states regulate the industry is by establishing the rates that bail bond agents may charge consumers. All states that allow commercial bail bond agents regulate the maximum and minimum premium amounts—typically expressed as a percentage of the amount of the bond and referred to as a "rate"—bail agents are allowed to charge.¹⁶ However, states take different

¹⁰ COLOR OF CHANGE & AM. CIVIL LIBERTIES UNION, *supra* note 7, at 11 ("With surety bonds, the insurance company guarantees to a third party that the person or entity seeking the bond can fulfill their obligations. They require the person seeking the bond to indemnify the insurer, guaranteeing payments and costs, and leaving the insurer on the hook only as a last resort."); *see also id.* at 14, 22–25.

¹¹ *Id.* at 14.

¹² *Id.* at 14, 24.

¹³ *Id.* at 6–7. The Color of Change and the ACLU have calculated that "just nine insurance companies back a significant majority of the \$14 billion in bail bonds issued each year." *Id.* at 7.

¹⁴ Note that bail insurers have actively promoted legislation requiring bail bond agents to have insurer backing. *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).

¹⁵ As sureties, commercial bail bond producers and underwriters generally are regulated by state insurance commissions along with most other forms of insurance. Citing this form of existing regulation, the commercial bail industry sometimes argues that laws protecting consumers should not apply to their line of work.

¹⁶ Some state laws also address fees and surcharges. *See, e.g.,* COLO. REV. STAT. § 10-23-109 (2012) ("A professional cash-bail agent . . . shall not assess fees for any bail bond posted by the agent with the court unless the fee is for payment of a bail bond filing charged by a court or law enforcement agency, the fee is for the actual cost of storing collateral in a

approaches to rate regulation: the states are roughly equally split between those that set maximum premium rates by statute¹⁷ and those that operate on the “filed-rate doctrine.”¹⁸ Filed-rate states require surety companies to submit a proposed maximum rate. Subject to the approval of the insurance commissioner, those proposed rates are adopted on a company-by-company basis as binding on the surety.

The documents setting out the approved rates are generally available from state insurance commissions, the majority of which use a public records system called the System for Electronic Rates and Form Filing (“SERFF”). These databases can be a treasure trove of information for exploring the business practices of bail bond producers and surety companies. However, documentation may be limited because some states do not require filings predating the advent of SERFF in that jurisdiction to be re-filed in the electronic database.¹⁹

Although rate regulation is the primary way that states have acted to protect consumers from exploitation by the commercial bail industry, states have the authority to do much more. States generally are permitted and expected to regulate businesses to protect consumers, and the McCarran-Ferguson Act, which was intended to preserve states’ regulatory domain over insurance matters,²⁰ reflects that states have significant authority to regulate insurance matters, including those involved in commercial bail.

In addition to critical state law regulations and consumer protections that may apply to the commercial bail industry, federal consumer protection law can provide targeted sources of protection. This guide explores potential application of some of these federal consumer protection laws, including the Fair Debt Collection Practices Act, Truth in Lending Act, the Communications Act of 1934 (as amended by Telecommunications Act of 1996), the Electronic Fund Transfer Act, and the Gramm-Leach-Bliley Act.²¹

However, advocates should be aware from the outset that the McCarran-Ferguson Act can complicate the applicability of federal statutory claims to bail bond transactions. The Act invalidates the application of federal law to the insurance industry when the federal law conflicts with state regulation of the business of insurance, unless the federal law specifically relates to

secure, self-service public storage facility, or the fee is for premium financing.”); GA. CODE ANN. § 17-6-30 (2010) (“States on criminal bonds in any court shall not charge or receive more than 12 percent of the face amount of the bond set in the amount of \$10,000 or less, which includes the principal and all applicable surcharges . . .”).

¹⁷ See e.g., ARK. CODE § 17-19-301 (2014); COLO. REV. STAT. § 10-23-109 (2012), GA. CODE ANN. § 17-6-30 (2010); LA. STAT. ANN. § 22:1443 (2011); MICH. COMP. LAWS § 750.167b(3) (2006); MISS. CODE § 83-39-25 (2013); NEV. REV. STAT. § 697.300 (2013); N.Y. INS. LAW § 6804 (McKinney 1997); N.C. GEN. STAT. § 58-71-95 (2015); N.D. CENT. CODE § 26.1-26.6-08 (2015); S.C. CODE § 38-53-170 (2012); TENN. CODE ANN. § 40-11-316 (2010).

¹⁸ In states with a commercial bond industry, the standard rate is generally 10% of the amount of the bond. This is true across states that set their maximum rates by statute and “filed rate” states. However, several states, including Colorado, Georgia, Nevada, North Carolina, and South Carolina, set their maximum rates at 15%. See COLO. REV. STAT. § 10-23-109; GA. CODE § 17-6-30; NEV. REV. STAT. § 697.300; N.C. GEN. STAT. § 58-71-95; S.C. CODE § 38-53-170. North Dakota allows as much as 20%. See N.D. CENT. CODE § 26.1-26.6-08.

¹⁹ In Iowa, for example, any rate documents that were filed before 2010 are not included in the SERFF database. Unfortunately, the Insurance Division also destroyed paper filings after the transition to SERFF, which means that in that state the only source of approved rate information for pre-SERFF rate documents often is the surety company itself.

²⁰ 15 U.S.C. § 1011.

²¹ Other federal consumer protection laws not addressed in this guide also may apply to the commercial bail industry, including the Equal Credit Opportunity Act, see Kornya, et al., *Crimsumerism*, *supra* note 1, at 144–47.

the business of insurance.²² In the context of consumer claims against bail bond companies, the Act has three major ramifications. One is that state law claims may be more feasible in situations where the conduct at issue clearly constitutes “the business of insurance” (see pages 17, 22).²³ Another is that care must be taken to distinguish between matters pertaining to the business of insurance and related but separate transactions—for example, the services of a middleman, or the separate financing of a premium (see pages 14, 17, 22).²⁴ Finally, the McCarran-Ferguson Act can be used to argue that other consumer-unfriendly federal laws, notably the Federal Arbitration Act, do not apply to certain disputes involving bail bonds.²⁵

C. Problematic Practices That May Give Rise to Consumer Protection Solutions

There are three typical scenarios in which commercial bail bonds create problems for consumers that may give rise to consumer protection law claims. The first is the collection of bonds that were forfeited due to an alleged violation of the bond agreement; for example, if the accused does not appear for a required hearing.²⁶ The second involves the financing and collection of premiums. The third situation, often intertwined with one or both of the previous two, involves abusive contract provisions. In these three contexts, the following broad categories of problematic practices may arise that may violate consumer protection laws.

1. Conduct during Collection

Many bail bond agents act as private law enforcement agents. They thereby blur the line between enforcement of the terms of the bond agreement, such as ensuring the accused person’s appearance for hearings, and mere debt collection. In particular, bail agents routinely use tools not available in other debt collection contexts, including physical restraint, orchestrated arrest, and intimidation, to encourage the payment of installments for financed premiums.²⁷ Bail agents also may engage in illegal and abusive practices in connection with the repossession of collateral or may enter onto private property without clear authority to do so.²⁸ Many bail bond contracts purport to give bail agents the right to contact third parties or to enter

²² 15 U.S.C. § 1012.

²³ *Id.* By negative inference, state laws are not be subject to the reverse preemption of the McCarran Ferguson Act. See James O. Pearson, Jr., Annotation, *Financing of Insurance Premiums as Constituting “Business of Insurance” Within § 2 of McCarran-Ferguson Act (15 U.S.C.A. § 1012), Excluding Application of Truth in Lending Act (15 U.S.C.A. § 1601 et seq.) to Such Financing*, 51 A.L.R. FED. 743 (1981).

²⁴ See James O. Pearson, Jr., Annotation, *Financing of Insurance Premiums as Constituting “Business of Insurance” Within § 2 of McCarran-Ferguson Act (15 U.S.C.A. § 1012), Excluding Application of Truth in Lending Act (15 U.S.C.A. § 1601 et seq.) to Such Financing*, 51 A.L.R. FED. 743 (1981).

²⁵ See *McKnight v. Chicago Title Ins. Co., Inc.*, 358 F.3d 854, 856–59 (11th Cir. 2004); *Standard Sec. Life Ins. Co. of New York v. West*, 267 F.3d 821, 823 (8th Cir. 2001); *Mutual Reinsurance Bureau v. Great Plains Mut. Ins. Co.*, 969 F.2d 931, 933–35 (10th Cir. 1992).

²⁶ Bail bonds are rarely declared forfeited; when they are, the bail agent retains the primary obligation for paying the forfeiture. Even when this happens, sureties can typically collect from funds previously paid by the agents and held in reserve. COLOR OF CHANGE & AM. CIVIL LIBERTIES UNION, *supra* note 7, at 14; see also Gonzalez, *supra* note 9, at 1422.

²⁷ See Jessica Silver-Greenberg & Shaila Dewan, [When Bail Feels Less Like Freedom, More Like Extortion](#), N.Y. TIMES (March 31, 2018).

²⁸ See, e.g., Complaint at 2, *Cason v. 1 Bail Bonds*, No. CVCV053198 (Iowa Dist. Ct. for Polk Cnty. Mar. 10, 2017).

into private homes without warning or permission, and these aggressive collection tactics sometimes involve violence or weapons.²⁹

2. Financing and Collection of Premiums

Financed bail bonds raise additional concerns and opportunities for abusive financing terms and acts of collection.³⁰ Also called “financed premiums” (or “credit bail,” or “credit bonding”), the financing of bail bonds refers to the practice of allowing the accused person or their indemnitor (a person who guarantees to the bail agent that they will be responsible for paying the entire bail amount if the accused person does not appear in court or otherwise violates the terms of the contract) to pay the bond premium in installments, often in return for financing fees and costs. For example, a person may be arrested and have bail set at \$10,000. The accused person seeks out a commercial bail bond agent, who charges the maximum premium amount permitted in that state—say 10%, or \$1,000. The accused person cannot afford to pay the bail agent’s \$1,000 fee in its entirety upfront, so she puts down \$500 and finances the remaining \$500 plus interest and fees to be paid to the bail agent in installments.

The availability of and restrictions on financed premiums vary across jurisdictions. Only a small minority of states explicitly disallow financed premiums. For example, in Arkansas, the practice was prohibited via judicial rulemaking, surviving a 42 U.S.C. § 1983 challenge by the bail bond industry on immunity and abstention grounds.³¹ And Indiana law makes it a felony to fail to collect the entire premium at the time the bond is executed.³² In contrast, some states, such as Connecticut and Maryland, explicitly allow financed premiums, but regulate their terms.³³ Other states generally prohibit the collection of anything beyond the premium itself, or any sum exceeding a maximum fee set by statute.³⁴

Understanding the procurement of the bond as a transaction distinct from the *financing* of the bond premium is critical for two reasons. First, the act of financing the premium may trigger liability under a variety of consumer laws that regulate lending. Second, to the extent that issues related to financing are distinguishable from issues involving the underlying insurance product,

²⁹ See, e.g., MacKenzie Elmer, [Throwing punches, waiving guns: tactics of Iowa bail bondsmen raise questions](#), DES MOINES REGISTER (April 27, 2017); *Mitchell v. First Call Bail & Sur., Inc.*, 412 F. Supp. 3d 1208, 1214–15 (D. Mont. 2019) (owner of the bail bond agency hired a paramilitary group to arrest the accused person; paramilitary group members engaged in violent tactics, including kicking down door of accused person’s home and pointing guns at family).

³⁰ The practice is controversial even within the industry. See [From the OBA President’s Desk](#), THE BONDSMAN (Okla. Bondsman Ass’n, Okla. City, Okla.), Oct. 2010, at 1. Within the industry, proponents of the practice discuss the difficulty of competing in a market where others use financed premiums, complain of being unfairly singled out when compared to other insurance products, and point out that many other bail bonds are being externally financed via credit cards. Opponents generally focus on public safety concerns, including release of accused people without sufficient security; some more clear-eyed bail agents point out the potential trouble involved with getting into the “loan shark business.” Comments, Michael J. Whitlock, [No Payment Terms for Criminals Some Say](#), AMERICAN SURETY COMPANY BLOG (December 11, 2013, 12:00 AM), [archived](#).

³¹ See *John Chism Bail Bonds Inc. v. Pennington*, 656 F. Supp. 2d 929, 938–39 (E.D. Ark. 2009), *aff’d* 411 Fed. Appx. 927 (8th Cir. 2011).

³² IND. CODE § 27-10-4-5 (2014); see also *State v. Bigbee*, 292 N.E.2d 609, 611 (Ind. 1973).

³³ See CONN. GEN. STAT. § 38a-660c (2018) (mandating a minimum 35% down payment, a promissory note that requires all payments to be made within 15 months, and a civil action if any payment remains outstanding for more than 60 days); MD. CODE REGS. § 31.03.05.09 (requiring the financed premium to be evidenced by a state-generated form, and a good faith effort by the bail agent to collect).

³⁴ See *Stillman v. Goldfarb*, 431 N.W.2d 247, 252 (Mich. Ct. App. 1988).

federal claims relating to financing the premium may be able to escape reverse preemption under the McCarran-Ferguson Act.

3. Abusive Contract Provisions

Bail bond agent and surety contracts generally are available on almost any given state's SERFF database. A review of these contracts reveals a wide array of provisions that may be unenforceable or violate various consumer protection laws. These include preemptive waivers of bankruptcy rights; failure to provide proper disclosures to cosigners; language purporting to give security interests in property acquired in the future; waivers of rights to notice and commercially reasonable sale in regard to repossessed collateral; consent to entry onto private property of the accused and third parties and GPS tracking; illegal attorney's fees clauses; and authorizations to obtain judgments by confession.³⁵

D. Application of Consumer Law to Commercial Bail Bond Transactions

This section explores how specific consumer protection laws may apply to commercial bail bond transactions. First, this section discusses the Fair Debt Collection Practices Act ("FDCPA"), concluding that although the FDCPA may have limited application to the commercial bail context, state analogs may provide relief where the federal statute cannot. Second, it explores how advocates can use state Unfair and Deceptive Acts and Practices Laws ("UDAP") laws, which provide a private cause of action for consumer fraud and other types of misconduct, to address abusive practices by bail bond agents. It also notes that some states have specific consumer laws that may protect consumers from unfair bail bond agreements. Third, this section discusses the application of the Truth and Lending Act ("TILA") to financed bail bond premiums and also addresses the primary barriers to bringing TILA claims. Fourth, it explores how the manner in which collateral (property that bail bond agents often require the accused person or their loved ones to sign over to cover the full bail amount) is repossessed may give rise to actions for damages under Article 9 of the Uniform Commercial Code ("UCC"). This section also notes that a bail bond agent's receipt of collateral in connection with the bail transaction may give rise to a fiduciary duty and create additional obligations to make affirmative disclosures about material facts. Finally, it describes how antitrust laws may provide a mechanism to protect consumers from unfair and abusive bail industry practices.

1. Fair Debt Collection Practices Act and State Analogs: Protection against Unfair Debt Collection Practices

Bail agents are notorious for engaging in harassing and abusive practices to collect bail premiums and other charges. These practices include placing intimidating phone calls³⁶ and making threats to send the accused person back to jail without legal basis to do so.³⁷ They may

³⁵ A comprehensive overview of such provisions in California-based contracts reveals similar patterns. See [The Devil in the Details: Bail Bond Contracts in California](#), UCLA SCHOOL OF LAW CRIMINAL JUSTICE REFORM CLINIC 1 (2017).

³⁶ See, e.g., *Monroe v. Frank*, 936 S.W.2d 654, 657 (Tex. App. 1996).

³⁷ See, e.g., Brian Highsmith, [Testimony before New York State's Department of Financial Services, Division of Consumer Protection and Division of Criminal Justice Services, Bail Bond Reform Listening Session](#) (June 11, 2018).

try to coerce payment by contacting and even threatening the accused person's friends, families, and employers.³⁸ And they may attempt to detain their customers until someone pays, conduct that may amount to kidnapping or false imprisonment for extortive purposes.³⁹ Federal and state fair debt collection laws address precisely this type of conduct, but as discussed below, there are complications in applying these statutes in the bail bond context.

i. Fair Debt Collection Practices Act

The FDCPA, the primary federal statute that protects consumers from abusive behavior by debt collectors, gives consumers the right to dispute alleged debts, and regulates how and when a debt collector may contact debtors.⁴⁰ Yet, for three reasons, the FDCPA may have limited application to the commercial bail bond context.

First, because the FDCPA only regulates the conduct of third-party debt collectors, creditors who originate a debt generally are excluded from the FDCPA's purview under the statute's "original creditor" provision.⁴¹ In much of the reported case law regarding bail bond collection abuses, the objectionable conduct is primarily conducted by bail agents acting to collect debts they originated, so their conduct is not covered by the FDCPA.⁴² Note, however, that the original creditor exclusion often does not exist in state law analogs to the FDCPA.⁴³ State laws regulating debt collection, therefore, are a potential avenue for regulation of bail bond agents.

Second, the FDCPA exempts from the definition of "debt collector," and therefore from coverage under the statute, any person who collects or attempts to collect a debt owed or due to another "to the extent that such activity is . . . incidental to a bona fide fiduciary obligation."⁴⁴ Some courts have determined that for this fiduciary exception to apply, (1) the defendant must have a "fiduciary obligation" and (2) the defendant's collection activity must be "incidental to" that fiduciary obligation.⁴⁵ Although the law on this exemption is unsettled, a guarantor of an obligation likely satisfies at least the first requirement because the guarantee establishes a fiduciary relationship.⁴⁶ At its core, a bail bond surety is a guarantee by the bail agent to the

³⁸ See, e.g., *London v. Gums*, No. CIV.A. H-12-3011, 2014 WL 546914, at *2 (S.D. Tex. Feb. 10, 2014).

³⁹ But see *Egana v. Blair's Bail Bonds, Inc.*, No. 17-5899, 2018 WL 2463210, at *6 (E.D. La. June 1, 2018) (dismissing claims for false imprisonment).

⁴⁰ See 15 U.S.C. § 1692 *et seq.*

⁴¹ 15 U.S.C. § 1692a(6)(F)(ii) (the term "debt collector" excludes "any person collecting or attempting to collect on a debt owed or asserted to be owed or due another to the extent such activity . . . concerns a debt which was originated by such a person"); see also National Consumer Law Center, *Fair Debt Collection* § 4.3.9 (9th ed. 2018).

⁴² See, e.g., *Buckman v. Am. Banker's Ins. Co. of Florida*, 924 F. Supp. 1156, 1158 (S.D. Fla. 1996), *aff'd*, 115 F.3d 892 (11th Cir. 1997); *Egana v. Blair's Bail Bonds, Inc.*, No. 17-5899, 2018 WL 2463210 (E.D. La. June 1, 2018); *London v. Gums*, No. CIV.A. H-12-3011, 2014 WL 546914 (S.D. Tex. Feb. 10, 2014); *Monroe v. Frank*, 936 S.W.2d 654 (*Tex. App.* 1996).

⁴³ See National Consumer Law Center, *Fair Debt Collection* § 16.2.3.3.1 (9th ed. 2018) (citing California, Connecticut, Florida, Maryland, Michigan, New Hampshire, New York, North Carolina, Oregon, Pennsylvania, Texas, West Virginia, and Wisconsin as states with state debt collection statutes that go beyond the FDCPA and apply to creditors collecting their own debts); see also IOWA CODE § 537.1301; 940 CMR 7.03 (debt collection regulations issued by Massachusetts Attorney General apply to original creditors).

⁴⁴ 15 U.S.C. § 1692a(6)(F)(i); see also National Consumer Law Center, *Fair Debt Collection* § 4.3.8 (9th ed. 2018).

⁴⁵ *Lima v. United States Dep't of Educ.*, 947 F.3d 1122, 1127 (9th Cir. 2020).

⁴⁶ Advocates should note that there is conflicting law on the scope and meaning of the fiduciary exemption. The Fourth, Fifth, and Eleventh Circuit decisions have held that student loan guarantee agencies are exempt under the fiduciary exemption because of the federal requirements for the agency's handling of reserve funds in a fiduciary manner. The Ninth Circuit, on the other hand, has rejected this position, holding that while a student loan guarantee agency may have a fiduciary obligation, where its sole function was a post-default assignment to collect, the collection function was central,

court that the accused person shall appear, and thus a forfeiture resulting from a default of an appearance bond agreement may be excluded from the FDCPA under this provision (assuming the second requirement also is satisfied). Note, however, that bail bond premium financing and other transactions related to bail bonds would not be so excluded, because they do not directly involve a guarantor relationship.

Third, the McCarran-Ferguson Act may be invoked as a barrier to applying the FDCPA. However, FDCPA may be viable if the challenged practice is sufficiently removed from the “business of insurance.” For example, advocates may be able to argue successfully that acts undertaken exclusively to *collect* financed premiums are separate from the insurance product represented by the premium itself.⁴⁷

A federal district court decision, *Buckman v. American Bankers Insurance Company*, which involved the application of the FDCPA to a bail bond transaction, illustrates how the invocation of these limitations may play out in litigation. The plaintiff in *Buckman* was an indemnitor who executed a mortgage as collateral for a bail bond on behalf of her daughter.⁴⁸ The district court determined, with little explanation, that because the debt involved (the bond forfeiture) was incidental to a bona fide fiduciary obligation,” the bail bond company was not a debt collector, and thus was excluded from FDCPA coverage.⁴⁹ In support of its conclusion, the district court emphasized only that the debt was originated by the bail bond company and that under Florida law, “a bail bondsman receives collateral security in his fiduciary capacity.”⁵⁰ On appeal, the Eleventh Circuit upheld the district court, but relied on a different and simpler rationale—that the bail agent was an original creditor, and thus excluded from the FDCPA.⁵¹

The Eleventh Circuit’s decision in *Buckman* differs from a later decision in *Barlow v. Safety National Casualty Corporation*,⁵² in which a federal district court allowed an FDCPA challenge to a bail collection practice. In *Barlow*, which, like *Buckman*, involved collection of a forfeited bond rather than a financed premium, the defendant had purchased the debt from the original creditor after default. The case also named a debt collection agency as a second defendant. The court held that *Buckman* was distinguishable because neither defendant was an original creditor.⁵³

rather than incidental, to its fiduciary duty, and it was subject to the FDCPA. National Consumer Law Center, [Fair Debt Collection](#) § 4.3.8 (9th ed. 2018).

⁴⁷ See Pearson, *supra* note 24.

⁴⁸ *Buckman v. Am. Banker’s Ins. Co. of Florida*, 924 F. Supp. 1156, 1157 (S.D. Fla. 1996), *aff’d*, 115 F.3d 892 (11th Cir. 1997).

⁴⁹ *Id.* at 1158.

⁵⁰ *Id.*

⁵¹ *Buckman v. Am. Bankers Ins. Co. of Fla.*, 115 F.3d 892, 894–95 (11th Cir. 1997).

⁵² *Barlow v. Safety Nat’l Casualty Corp.*, 856 F. Supp. 2d 828, 836–37 (M.D. La. 2012).

⁵³ The *Barlow* court did not address issue of whether the underlying debt was a fiduciary obligation.

ii. State Analogs to the Fair Debt Collection Practices Act

State analogs to the FDCPA may provide relief where the FDCPA cannot.⁵⁴ These laws often do not exclude original creditors or fiduciaries.⁵⁵ For example, in *Monroe v. Frank*,⁵⁶ a Texas bail bond agent's conduct was found actionable under the state's FDCPA analog, even though the FDCPA did not provide protection, because the state statute lacked an original creditor exclusion and featured a more expansive definition of "debt."⁵⁷ In California, too, unfair debt collection practices by bail bond companies are actionable under the state's Rosenthal Fair Debt Collection Practices Act.⁵⁸

2. State Unfair and Deceptive Acts and Practices Laws and Related State-Based Consumer Protections: General Protections against Unfair, Deceptive, and Abusive Practices

Beyond protecting against unfair and abusive debt collection practices, states have a varied array of consumer laws that may provide useful protections against commercial bail bond industry abuses. Every state has a type of Unfair and Deceptive Acts and Practices ("UDAP") law that provides broad protections against misconduct that harms consumers. This section also flags other, more targeted, consumer laws adopted in some states that may provide protection against certain bail bond agreement terms.

i. Unfair and Deceptive Acts and Practices Laws

State UDAP laws provide a private cause of action for consumer fraud and other types of misconduct against consumers. These laws can be a powerful mechanism to address abusive practices by bail agents.

State UDAP laws provide a private cause of action for consumer fraud and other types of misconduct against consumers.⁵⁹ These laws can be a powerful mechanism to address abusive practices by bail agents. UDAP laws can allow a creative advocate to connect conduct that may "feel wrong" to a cognizable cause of action, provided that the conduct can be demonstrated to be deceptive or unfair in some way. At least 21 states exempt insurance companies from the reach of their UDAP statutes, however. These exemptions will insulate some practices of bail agents and surety companies.⁶⁰

⁵⁴ See *supra* notes 41–47 and accompanying text. See generally National Consumer Law Center, *Fair Debt Collection* § 16 (9th ed. 2018).

⁵⁵ See generally National Consumer Law Center, *Fair Debt Collection* § 16.2.3.3.1 (9th ed. 2018) (citing California, Connecticut, Florida, Maryland, Michigan, New Hampshire, New York, North Carolina, Oregon, Pennsylvania, Texas, West Virginia, and Wisconsin as states with state debt collection statutes that go beyond the FDCPA and apply to creditors collecting their own debts); see also Iowa Code § 537.1301; 940 CMR 7.03 (debt collection regulations issued by Massachusetts Attorney General apply to original creditors).

⁵⁶ *Monroe v. Frank*, 936 S.W.2d 654 (Tex. App. 1996).

⁵⁷ *Id.* at 660; see also *London v. Gums*, No. CIV.A. H-12-3011, 2014 WL 546914, at *10 (S.D. Tex. Feb. 10, 2014).

⁵⁸ See *Gonzalez*, *supra* note 9, at 1402 n.94; see also Complaint, *Merizier v. Nexus Services, Inc.*, No. CGC-19-580618 (Cal. Super. Ct. Nov. 7, 2019).

⁵⁹ See CAROLYN CARTER, NATIONAL CONSUMER LAW CENTER, *CONSUMER PROTECTION IN THE STATES: A 50-STATE EVALUATION OF UNFAIR AND DECEPTIVE PRACTICES LAWS* 1, 19 (2018).

⁶⁰ See National Consumer Law Center, *Unfair and Deceptive Acts and Practices* § 2.3.1.2.1 (9th ed. 2016); CARTER, *supra* note 59, at 19.

Newer Industry Players: Private Guarantors of Immigration Bonds

In addition to bail bond agents and the surety companies that underwrite them, other industry players have cropped up in recent years to occupy new roles in the commercial bail market. For an additional fee, these companies may operate to procure bonds for accused persons, provide GPS monitoring, or provide other supervision services. For the consumer, these new actors may simply represent a source of yet more unaffordable debt that must be shouldered to secure personal liberty.

Typical of this newer kind of industry player is Libre by Nexus, a company that procures immigration detention bonds from third-party surety companies (what it calls “immigration bond securitization”) and provides GPS monitoring services to individuals being held in federal immigration detention subject to money bail, all while charging substantial additional fees.⁶¹ Libre brands itself as a champion of immigrants and a reuniter of families.⁶² Over the course of many months, however, individuals that use Libre’s services may end up paying a sum greater than the amount of their bond just in recurring GPS fees.⁶³ The company has also been accused of making false and misleading statements and failing to disclose required terms. And it has reportedly used threats and misrepresented its affiliation with federal immigration authorities to extort payments from its customers.⁶⁴

Litigants have used the FDCPA to pursue abusive debt collection practices by Libre.⁶⁵ In denying Libre’s motion to dismiss, one federal district court rejected Libre’s argument that because it did not collect debts that are owed or due to another, it did not satisfy the FDCPA’s definition of a debt collector.⁶⁶ In that case, the plaintiffs alleged that the monthly “GPS tracker” fee that Libre charges immigration detainees does not primarily compensate Libre for the use of the GPS tracker itself, but rather represents a hidden indemnification fee.⁶⁷ The court agreed with the plaintiffs, finding that a major part of Libre’s business model is to collect fees from immigration detainees to indemnify the immigration bonds it procures from third-party immigration detention bond companies. The court reasoned that because a portion of the collected fees go to third-party companies, Libre collects debts on behalf of another, and held that the plaintiffs stated a claim under the FDCPA.⁶⁸ As of April 2020, the case is stayed to allow the parties to finalize a settlement agreement.⁶⁹

⁶¹ See Adolfo Flores, [Immigrants Desperate to Get Out of US Detention Can Get Trapped by Debt](#), BUZZFEED (July 23, 2016), (~~Libre~~ Libre by Nexus customers sign a contract agreeing to a nonrefundable \$620 initial fee, as well as paying the \$420 monthly rental fee for the tracking bracelet and a nonrefundable one-time 20 percent premium to the bond issuer. If a client pays down 80 percent of the bond and agrees to cover the remaining 20 percent in installments, Libre by Nexus will remove the tracking device.”); see also HIGHSMITH, COMMERCIALIZED (IN)JUSTICE, *supra* note 1, at 32.

⁶² See Complaint ¶ 5, *Garcia-Diaz v. Libre by Nexus Inc.*, No. CL19-4356 (Va. Cir. Ct. Aug. 8, 2019) (citing Libre by Nexus website, which linked to “Statement from Nexus Services CEO Mike Donovan Regarding DAPA/DACA Supreme Court Arguments” and including statements including “WE REUNITE FAMILIES”).

⁶³ Flores, *supra* note 59.

⁶⁴ See, e.g., *id.*; Order on Motion to Compel, Motion to Dismiss, and Motion for Sanctions at 4–5, *Quintanilla Vasquez et al v. Libre by Nexus, Inc.*, 4:17-cv-00755-CW (N.D. Cal., August 20, 2018); Inti Pacheco, et al., [Company that Bails out Immigrants is Accused of Abusive and Fraudulent Tactics](#), UNIVISION (April 30, 2018).

⁶⁵ See, e.g., Third Amended Class Action Complaint ¶¶ 167–73, *Quintanilla Vasquez et al v. Libre by Nexus, Inc.*, 4:17-cv-00755-CW (N.D. Cal. Dec. 6, 2018), ECF No. 102 (alleging that Libre used false, deceptive, or misleading representations or means, including falsely misrepresenting or implying that it is affiliated with the United States, falsely representing implying that non-payment of a debt will result in the arrest or imprisonment of a person or the seizure, garnishment, or attachment of a person’s property or wages, when such action is not lawful or when Libre has no intention of taking such action). More research is warranted on the viability of this legal theory, but companies like Libre, which generate significant income from GPS and other equipment rental fees, also may be ignoring the requirements of the federal Consumer Leasing Act, 15 U.S.C. § 1667 *et seq.*, and state analogs.

⁶⁶ Order on Motion to Compel, Motion to Dismiss, and Motion for Sanctions at 13, *Quintanilla Vasquez et al v. Libre by Nexus, Inc.*, 4:17-cv-00755-CW (N.D. Cal. June 9, 2017), ECF No. 28.

⁶⁷ Second Amended Class Action Complaint ¶ 65, *Quintanilla Vasquez et al v. Libre by Nexus, Inc.*, 4:17-cv-00755-CW (N.D. Cal. August 20, 2018), ECF No. 76.

⁶⁸ Order on Motion to Compel, Motion to Dismiss, and Motion for Sanctions at 13–14, *Quintanilla Vasquez et al v. Libre by Nexus, Inc.*, 4:17-cv-00755-CW (N.D. Cal. August 20, 2018), ECF No. 76.

⁶⁹ See Order on Joint Stipulation Staying Case, *Quintanilla Vasquez et al v. Libre by Nexus, Inc.*, 4:17-cv-00755-CW (N.D. Cal. Feb. 18, 2020), ECF No. 126; Order Setting Deadline for Mediation and Requesting Mediation Reports, *Quintanilla Vasquez et al v. Libre by Nexus, Inc.*, 4:17-cv-00755-CW (N.D. Cal. Apr. 3, 2020), ECF No. 131.

The conduct generally actionable under UDAP laws is stated broadly as “unfair” or “deceptive,” making it inclusive of a wide range of industries and practices. Deceptive or unfair provisions in contracts, such as unenforceable waivers of bankruptcy rights or open-ended provisions collateralizing future property also may be actionable under UDAP laws under this definition.⁷⁰ Similar claims have been successful outside of the bail bond context.⁷¹ For instance, the California and Massachusetts Supreme Courts have ruled that a landlord commits an unfair and deceptive practice by including illegal and unenforceable terms in a lease agreement even if the terms are not enforced.⁷² The tenants are deceived in such instances because they are likely to believe that the lessor has the authority to enforce the contract.

Additionally, a violation of a statutory or regulatory standard sometimes can constitute a “per se” UDAP violation, even where these standards do not themselves provide for a separate private right of action,⁷³ under the theory that acting in violation of the law is an unfair practice. For example, bail agents who illegally orchestrate the arrest of an accused person for failure to pay a premium installment, who violate rules related to disposition of collateral,⁷⁴ or who charge fees in excess of what is allowed by law⁷⁵ may be subject to UDAP claims.

Some states, however, have rejected a “per se” approach to technical violations of other laws, requiring in addition that the practice be shown to be unfair or deceptive and that the consumer suffered actual damages.⁷⁶ For this reason, litigants bringing a case of first impression in a jurisdiction are advised to limit claims of per se UDAP violations to cases based on statutory violations that also involve serious consumer abuses, rather than purely technical violations of other statutes.⁷⁷ Nevertheless, in states that do not take a per se approach, violation of another statute may serve as an evidentiary factor that could be part of a wider case to show a practice to be unfair or deceptive.⁷⁸

⁷⁰ See National Consumer Law Center, [Unfair and Deceptive Acts and Practices](#) § 5.6.3.3 (9th ed. 2016).

⁷¹ See *id.*

⁷² *People v. McKale*, 602 P.2d 731 (Cal. 1980); *Leardi v. Brown*, 474 N.E.2d 1094 (Mass. 1985). *But cf.* *Hershenow v. Enter. Rent-A-Car Co.*, 840 N.E.2d 526 (Mass. 2006) (illegal clause that restricted collision damage waiver did not cause loss to consumers who had returned rental cars without damage, so they could not maintain UDAP claim); *Commonwealth v. Monumental Properties, Inc.*, 329 A.2d 812 (Pa. 1974) (unenforceable provisions not per se unfair where provisions were enforceable in certain circumstances); *Perry v. Island Sav. & Loan Ass’n*, 684 P.2d 1281 (Wash. 1984) (good faith enforcement of arguably valid due-on-sale clause not unfair).

⁷³ See, e.g., *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002); *Yale New Haven Hosp., Inc. v. Mitchell*, 662 A.2d 178, 183 (Conn. Super. Ct. 1995), *republished as corrected*, 683 A.2d 1362, 1367 (Conn. Super. Ct. 1995); *Dist. Cablevision Ltd. P’ship v. Bassin*, 828 A.2d 714 (D.C. 2003); see also National Consumer Law Center, [Unfair and Deceptive Acts and Practices](#) § 3.2.7 (9th ed. 2016) (generally discussing per se UDAP violations and listing cases finding violations of other laws to be per se UDAP violations); National Consumer Law Center, [Fair Debt Collection](#) § 16.3.6 (9th ed. 2018).

⁷⁴ See *Habicht v. Sullivan*, No. CV040833934, 2006 WL 1644606, at *3 (Conn. Super. Ct. May 25, 2006) (suing for failure to return truck that was collateral for bail surety bond).

⁷⁵ See *Ramos v. Int’l Fidelity Ins. Co.*, 34 N.E.3d 737, 741 (Mass. App. Ct. 2015).

⁷⁶ See, e.g., *Morales v. Walker Motors Sales, Inc.*, 162 F. Supp. 2d 786, 790 (S.D. Ohio 2000); *Riopta v. Amresco Residential Mortgage Corp.*, 101 F. Supp. 2d 1326, 1332 (D. Haw. 1999) *Hawaii Cmty. Fed. Credit Union v. Keka*, 11 P.3d 1, 14 (Haw. 2000) *Mid-Am. Nat’l Bank v. First Sav. & Loan Ass’n*, 515 N.E.2d 176, 182 (Ill. App. Ct. 1987) (disclosure violation of National Flood Act not per se UDAP violation); *Coffey v. Peoples Mortgage & Loan*, 408 So. 2d 1153, 1155 (La. Ct. App. 1981) (violation of technical usury requirement is not per se violation); *Griffin v. Allstate Ins. Co.*, 44 Pa. D. & C.4th 261, 264 (Pa. C.P. Phila. Cty. 1999); see also National Consumer Law Center, [Unfair and Deceptive Acts and Practices](#) § 3.2.7.3.5 (9th ed. 2016).

⁷⁷ See National Consumer Law Center, [Unfair and Deceptive Acts and Practices](#) § 3.2.7.4 (9th ed. 2016).

⁷⁸ See, e.g., *Culbreath v. Golding Enters., L.L.C.*, 872 N.E.2d 284, 288 (Ohio 2007); *State ex rel. Stovall v. DVM Enters., Inc.*, 62 P.3d 653, 657 (Kan. 2003); *State ex rel. Stovall v. ConfiMed.com*, 38 P.3d 707, 712 (Kan. 2002).

ii. Other State Consumer Protection Laws Applicable to Bail Bond Agreement Terms

In addition to more general UDAP laws, some states have specific consumer protections that may protect consumers from unfair bail bond agreement terms. For example, in the context of consumer transactions, some states require that certain disclosures be provided to cosigners or guarantors;⁷⁹ prohibit or limit waiver of bankruptcy or other consumer rights;⁸⁰ and limit the extent to which attorney's fees may be assessed.⁸¹ And, as noted on page 11, states generally regulate the rates that bail bond agents may charge. Regulation of these rates may complicate private legal challenges in some cases, but could support private litigation in other instances.

Because these laws vary across jurisdictions, advocates should research the applicable laws in their jurisdiction. If there are laws that disallow certain agreement terms or other conduct by the bail bond agent but those laws do not provide a private right of action, advocates should consider using UDAP claims as a vehicle to seek relief, as previously discussed.

3. Truth in Lending Act: Disclosure Requirements

The Truth in Lending Act (“TILA”)⁸² is a federal statute that requires entities that extend credit to give the consumer a detailed and accurate disclosure of the financing terms prior to consummating the transaction. One of the primary disclosures regulated by TILA is the “finance charge”—that is, how much the extension of credit will ultimately cost the consumer.⁸³

TILA standardizes the manner in which borrowing costs are calculated and disclosed.⁸⁴ The statute reflects Congress's effort to guarantee the accurate and meaningful disclosure of the costs of consumer credit, thereby enabling consumers to make informed choices in the credit marketplace and avoid abusive lending.⁸⁵ The law is implemented by Regulation Z, under which a creditor must make a number of specific disclosures in relation to the cost of credit clearly and conspicuously in writing, in a form that the consumer may keep.⁸⁶ Remedies available under TILA include actual damages, statutory damages (though class actions are limited to \$1 million or 1% of a creditor's net worth, whatever is less), and attorney's fees.⁸⁷ Injunctive and declaratory relief are probably available as well, although not specifically mentioned in the statute.⁸⁸

The most obvious application of TILA in the commercial bail bonds context is in the area of financed premiums. TILA may provide a cause of action to the extent that borrowers do not receive statutorily adequate disclosures of the cost of this financing.⁸⁹

⁷⁹ See, e.g., IOWA CODE § 537.3208.

⁸⁰ See, e.g., IOWA CODE § 537.7103(5)(b).

⁸¹ See, e.g., IOWA CODE § 537.2507.

⁸² 15 U.S.C. §§ 1601–1667f.

⁸³ 15 U.S.C. §1605(a); see also 12 C.F.R. § 1026.4.

⁸⁴ *Id.*; Truth in Lending (Regulation Z), 12 C.F.R. §§ 226.1–226.59; see also National Consumer Law Center, *Truth in Lending* (10th ed. 2019).

⁸⁵ 15 U.S.C. § 1601(a) (stating that the 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”).

⁸⁶ 12 C.F.R. § 1026.

⁸⁷ 15 U.S.C. § 1640; see also National Consumer Law Center, *Truth in Lending* § 11 (10th ed. 2019).

⁸⁸ National Consumer Law Center, *Truth in Lending* § 11.4.1 (10th ed. 2019).

⁸⁹ See, e.g., *Egana v. Blair's Bail Bonds, Inc.*, No. 17-5899, 2018 WL 2463210, at *4 (E.D. La. June 1, 2018).

There are two primary barriers to bringing TILA claims in the bail bond context: (1) the McCarran-Ferguson Act and (2) whether the various fees associated with financed premiums meet TILA's definition of "finance charge." *Buckman v. American Bankers Insurance Company of Florida* exemplifies how the McCarran-Ferguson Act may serve as an obstacle to TILA claims.⁹⁰ The plaintiff in *Buckman* was an indemnitor who had executed a mortgage as collateral for a bail bond on behalf of her daughter. Notably, *Buckman* did not involve a financed premium, but rather the forfeiture of the bond after an accused person's failure to appear. The plaintiff alleged that the surety company violated TILA by failing to provide the requisite disclosures. In the federal district court, the surety company successfully invoked the McCarran-Ferguson Act to dismiss the plaintiff's TILA claim (as well as her FDCPA claim, see page 17).⁹¹ The court explained that the McCarran-Ferguson Act precludes the application of federal statutes to "the business of insurance" if those federal statutes do not "specifically relate to the business of insurance."⁹² Noting that the Fifth Circuit held previously that TILA does not specifically relate to the business of insurance, the court reasoned that if the defendants' activities constituted the "business of insurance," they would be "immune" from TILA.⁹³ The court ultimately determined that the transaction at issue—the bail bondsman's posting of a criminal bail bond insured by the bond surety for the plaintiff's daughter—was part of the business of insurance.⁹⁴ Therefore, the court held that the McCarran-Ferguson Act precluded the application of TILA.

TILA may provide a cause of action to the extent that borrows do not receive statutorily adequate disclosures.

The Eleventh Circuit did not rule on the McCarran-Ferguson argument, but rather affirmed on different grounds, holding that the plaintiff's execution of a contingent note and mortgage as part of the bail bond transaction was not an extension of credit subject to TILA (again, there was no financed premium in this case).⁹⁵ TILA defines "credit" as "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment."⁹⁶ The Eleventh Circuit rejected the plaintiff's argument that the contingent note and mortgage were distinct from the bail bond transaction and concluded that "executing an agreement to indemnify a bail bond surety and providing a note and mortgage to facilitate any indemnification that may become necessary" does not constitute an extension of "credit" under TILA.⁹⁷

In any event, the McCarran-Ferguson Act does not prevent the federal government from regulating the *financing* of insurance premiums.⁹⁸ The financing of premiums does not constitute the "business of insurance"—even when the same company that provides insurance

⁹⁰ *Buckman v. Am. Bankers Ins. Co. of Fla.*, 924 F. Supp. 1156, 1157–58 (S.D. Fla. 1996), *aff'd*, 115 F.3d 892 (11th Cir. 1997). *But see* *Egana v. Blair's Bail Bonds, Inc.*, No. 17-5899, 2018 WL 2463210, at *4 (E.D. La. June 1, 2018) (concluding that the McCarran-Ferguson Act did not preempt the plaintiffs' TILA claims).

⁹¹ *Buckman*, 924 F. Supp. at 1157–58.

⁹² *Id.*; *see also* *Am. Bankers Ins. Co. of Fla. v. Inman*, 436 F.3d 490, 493 (5th Cir. 2006) ("Under the McCarran-Ferguson Act, a state law reverse preempts federal law only if: (1) the federal statute does not specifically relate to the 'business of insurance'; (2) the state law was enacted for the purpose of regulating the business of insurance; and (3) the federal statute operates to 'invalidate, impair, or supersede' the state law.").

⁹³ *Buckman*, 924 F. Supp. at 1157.

⁹⁴ *See id.*

⁹⁵ *See* *Buckman v. Am. Bankers Ins. Co. of Fla.*, 115 F.3d 892, 894 (11th Cir. 1997).

⁹⁶ 15 U.S.C. § 1602(f).

⁹⁷ *Buckman*, 115 F.3d at 893–94.

⁹⁸ National Consumer Law Center, *Truth in Lending* § 9.3.4.2.2.2 (10th ed. 2019).

also finances the premium.⁹⁹ Courts generally have distinguished financed premiums from the “business of insurance” for the purposes of TILA claims.¹⁰⁰ Thus, TILA should apply to financed bail premium transactions. This argument has been preliminarily successful in the bail bond context.¹⁰¹ One district court pointed out that “[i]t would be anomalous to hold that [an insurance company’s] premium financing activities are the ‘business of insurance’ but that the identical activities of the finance company . . . are not.”¹⁰² Therefore, “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.”¹⁰³

Plaintiffs also may face arguments that a TILA claim regarding a financed premium should be dismissed because the extension of credit was not subject to a “finance charge.” TILA defines a “finance charge” as the “sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit.” The finance charge “does not include charges of a type payable in a comparable cash transaction.”¹⁰⁴ As a practical matter, bail bond agents often fail to explain or sufficiently document financed premium transactions, including the purpose of add-on fees, which can make it difficult to respond to arguments that certain fees do not constitute a finance charge. In one case, however, the plaintiffs preliminarily succeeded in arguing that certain fees associated with financed premiums met the definition of a finance charge. The court in *Egana v. Blair’s Bail Bonds, Inc.* found that an additional charge for which no explanation was given could constitute a finance charge under TILA, and denied the defendants’ motion to dismiss on that basis.¹⁰⁵

4. Article 9 of the Uniform Commercial Code and Other State Laws: Regulating the Receipt and Repossession of Collateral

Many bail bond agents require the accused person or their indemnitor to sign over collateral, such as automobiles, homes, or other property or assets, to cover the full bail amount.¹⁰⁶ Typically, the bond agreement will allow the bail bond agent to sell the collateral if the accused person fails to appear at future court hearings.¹⁰⁷ Bail bond agents often require collateral not

⁹⁹ See Pearson, *supra* note 24.

¹⁰⁰ See, e.g., *Cody v. Cmty. Loan Corp. of Richmond Cnty.*, 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”).

¹⁰¹ See *Egana v. Blair’s Bail Bonds, Inc.*, No. 17-5899, 2018 WL 2463210, at *4 (E.D. La. June 1, 2018). The First Amended Complaint (“FAC”) describes the process through which Defendant bail bond company agreed to allow plaintiffs to finance the premium for the bond, but utilized contracts that violate the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, by failing to make necessary disclosures, and state contract, conversion, and usury laws by requiring payment of amounts above what state law allows, including paying daily fees for ankle monitors supplied by another company. First Amended Complaint ¶¶ 125–29, *Egana v. Blair’s Bail Bonds, Inc.*, No. 17-5899 (E.D. La. Sept. 12, 2017), ECF. No. 26.

¹⁰² *Egana v. Blair’s Bail Bonds, Inc.*, No. 17-5899, 2018 WL 2463210, at *4 (E.D. La. June 1, 2018) (quoting *Perry v. Fidelity Union Life Ins. Co.*, 606 F.2d 468, 472 (5th Cir. 1979)).

¹⁰³ *Id.*

¹⁰⁴ 15 U.S.C. § 1605(a); see also 12 C.F.R. § 1026.4.

¹⁰⁵ *Egana*, 2018 WL 2463210, at *5.

¹⁰⁶ COLOR OF CHANGE & AM. CIVIL LIBERTIES UNION, *supra* note 7, at 14.

¹⁰⁷ AM. CIVIL LIBERTIES UNION OF WASHINGTON, [NO MONEY, NO FREEDOM: THE NEED FOR BAIL REFORM](#) 3 (2016); see also [JUSTICE POLICY INSTITUTE, FOR BETTER OR FOR PROFIT: HOW THE BAIL BONDING INDUSTRY STANDS IN THE WAY OF FAIR AND EFFECTIVE PRETRIAL JUSTICE](#) 15 (2012), (“If the person or their family is unable to pay, the bondsman will seize and liquidate any collateral used to secure the bond such as a home or property.”).

only to protect themselves and the surety company financially in case a bond is forfeited, but also to enforce full payment of financed premiums.

Bail agents commonly engage in illegal and abusive practices in connection with the repossession of such collateral. For example, a bail agent may illegally attempt to force bail bond cosigners to turn over property used as collateral even in cases where the accused person complied with the terms of bail.¹⁰⁸ A recent report by New York City's comptroller found evidence that some companies . . . fail[] to return collateral as required under contract."¹⁰⁹

Bail bond agents commonly engage in illegal and abusive practices in connection with repossession of collateral that an accused person or their loved one signed over to cover the full bail amount. Advocates may be able to use Article 9 of the UCC to protect consumers from these practices.

In regulating repossessions and foreclosures related to bail bonds, many states rely entirely on laws of general applicability dealing with these topics, though some have imposed additional bail bond-specific requirements.¹¹⁰ Laws of general applicability that provide a vehicle to regulate repossession of bail bond collateral include the Uniform Commercial Code (“UCC”). For example, Article 9 of the UCC deals with disposition of collateral other than real property (i.e., real estate), and regulates the use of so-called “self-help” to obtain collateral.¹¹¹ An advocate first should determine whether a valid security interest that can be enforced in fact exists. Without a valid security interest, a repossession is simply theft and conversion. Less sophisticated or experienced bail agents may not always follow the formalities necessary to establish a security interest.

Even where the security interest is valid, the way the repossession is carried out may give rise to actions for damages, such as failure to give proper notices of sale and disposition of collateral.¹¹² In addition, statutory damages may be available for the use of violence or other illegal tactics under the UCC’s prohibition on “breach[ing] the peace” during repossession.¹¹³ Breaches of the peace may

include violence,¹¹⁴ breaking into private property or enclosures to take a vehicle,¹¹⁵ or impersonating a police officer,¹¹⁶ though they are not limited to these instances. Indeed, advocates generally can argue that a breach of the peace occurs any time the person executing the repossession violates another law to accomplish it.¹¹⁷ Violation of UCC provisions or special

¹⁰⁸ See, e.g., *London v. Gums*, No. CIV.A. H-12-3011, 2014 WL 546914, at *2 (S.D. Tex. Feb. 10, 2014); *Cason v. 1 Bail Bonds*, No. CVCV053198 (Iowa Dist. Ct. for Polk Cnty. Mar. 10, 2017).

¹⁰⁹ *The Public Cost of Private Bail: A Proposal to Ban Bail Bonds in NYC*, New York City Comptroller (January 17, 2018).

¹¹⁰ See, e.g., MD. CODE REGS. 31.03.05.13–.14 (2018) (requiring full description of collateral by affidavit, and requiring immediate return of collateral after bond agreement successfully discharged less costs); NEV. REV. STAT. ANN. § 697.320 (West 2017) (collateral must be “reasonable in relation to the face amount of the bond;” collateral cannot be transferred to another, or transported outside of the state; collateral must not be mingled with bail agent or surety’s assets; owner entitled to any surplus after forfeiture).

¹¹¹ U.C.C. §§ 9-101 to 9-709 (AM. LAW INST. & NAT’L CONF. OF COMM’RS ON UNIF. STATE LAWS 2017).

¹¹² *Id.* § 9-611.

¹¹³ *Id.* § 9-609.

¹¹⁴ See generally Annotation, *Liability for Assault or Trespass in Forcibly Retaking Property Sold Conditionally*, 105 A.L.R. 926 (1936).

¹¹⁵ *Id.*

¹¹⁶ See e.g., *Fleming-Dudley v. Legal Investigations, Inc.*, No. 05 C 4648, 2007 WL 952026, at *10–13 (N.D. Ill. Mar. 22, 2007).

¹¹⁷ See generally Annotation, *Liability for Assault or Trespass*, *supra* note 114.

bail bond collateral provisions that may exist in state law also may give rise to a claim under state UDAP laws (see page 18) even where these statutes themselves do not provide a right of action.

Demands for collateral may create other legal responsibilities for bail bond agents. For example, a bail agent who receives collateral in connection with a bail transaction may have a fiduciary duty to the party posting the collateral, which can create additional obligations to make affirmative disclosures about material facts.¹¹⁸ The failure to disclose material facts may constitute constructive fraud.¹¹⁹

In an unpublished decision, the California Court of Appeal indicated that claims for breach of fiduciary duty and constructive fraud (concealment in the context of a fiduciary relationship¹²⁰) may be viable.¹²¹ In that case, the appellants—loved ones of the accused person—pledged a rental property they owned as collateral for a bond. Because the accused person had been deported, he did not appear at his arraignment and the bond was declared forfeited. To satisfy the bond, the appellants agreed to sell their property to the bail bond agent. However, three days after the parties signed the agreement, the bail agent filed a motion to exonerate the bond. He did not disclose that fact to the appellants. Shortly after escrow on the property sale closed, the bond was exonerated. The appellants filed an action alleging that they were defrauded when the bail agent failed to disclose that he was seeking to have the bond exonerated when they entered into the agreement to sell the property and when escrow was pending and that the bail agent received their property even though he was not liable on the bond.¹²² A jury determined that the bail agent did not conceal or suppress any material fact, and the trial court entered judgment in favor of the respondents. However, the appellate court reversed the judgment on the appellants' fiduciary duty/constructive fraud claim.¹²³ It determined that the bail agent and surety owed a fiduciary duty to the appellants concerning the property pledged as collateral and concluded that the lower court failed to properly instruct the jury on both fiduciary duty and constructive fraud.¹²⁴

5. Antitrust Law: Protection against Anticompetitive and Collusive Behavior

As discussed (see page 11), the vast majority of bail bonds are underwritten by a small handful of large insurance corporations.¹²⁵ This feature of the industry—combined with the particular

¹¹⁸ See, e.g., 10 CAL. CODE REGS. § 2088 (2018) (establishing that “[a]ny bail licensee who receives collateral in connection with a bail transaction shall receive such collateral in a fiduciary capacity”).

¹¹⁹ *Cardenas v. American Sur. Co.*, No. D041392, 2004 WL 206286, at *8 (Cal. Ct. App. Feb. 4, 2004) (noting in the context of a bail bond, “[t]he 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”).

¹²⁰ *Salahutdin v. Valley of California, Inc.*, 24 Cal. App. 4th 555, 562 (Cal. Ct. App. 1994) (“[A] general principle constructive fraud comprises any act, omission or concealment involving a breach of legal or equitable duty, trust or confidence which results in damage to another even though the conduct is not otherwise fraudulent. Most acts by an agent in breach of his fiduciary duties constitute constructive fraud.”) (emphasis omitted).

¹²¹ *Cardenas*, 2004 WL 206286, at *8; see also *People v. V.C. Van Pool Bail Bonds*, 246 Cal. App. 3d 303, 306 n.2 (Cal. Ct. App. 1988) (stating that failure of a bail bond agent who holds collateral to notify a principal about a bond exoneration hearing may be a breach of fiduciary duty).

¹²² *Cardenas*, 2004 WL 206286, at *1.

¹²³ *Id.* at *10.

¹²⁴ *Id.* at *8; see also *id.* at *16 (“ASC had a fiduciary duty to appellants with regard to the rental property given as collateral for the bond.”).

¹²⁵ COLOR OF CHANGE & AM. CIVIL LIBERTIES UNION, *supra* note 7, at 6–7; see also HIGHSMITH, *supra* note 3, at 16–17.

vulnerability of bail bond consumers and general lack of effective oversight—creates an environment where anticompetitive behavior can take root.

Advocates may be able to use laws prohibiting collusive and anticompetitive behavior to protect consumers from unfair and abusive bail industry practices. A recently filed class action lawsuit, *Crain v. Accredited Surety and Casualty Company*,¹²⁶ now consolidated with another case and referred to as *In re California Bail Bond Antitrust Litigation*,¹²⁷ uses federal and state antitrust protections to challenge such practices. With the caveat that it is ongoing and still at the motion to dismiss stage, this case provides one example of how advocates potentially may use antitrust law to protect consumers harmed by collusive practices in the bail industry.

Advocates may be able to use laws prohibiting collusive and anticompetitive behavior to protect consumers from unfair and abusive bail industry practices.

The plaintiffs *In re California Bail Bond Antitrust Litigation* have alleged that the surety companies that underwrite bail bonds in California, in concert with bail agents and others, have violated antitrust law by conspiring to fix the prices of the premiums paid for commercial bail bonds. According to the consolidated complaint, bail agents and surety companies in the state have coordinated to inflate the percentage of the bond required as a nonrefundable premium and have refused to compete to offer lower prices through rebating even though such discounting is clearly permitted by law.¹²⁸ The complaint further alleges that the defendants have enlisted or created industry associations to enforce their conspiracy, used mandated bail agent training courses to enforce the cartel, and acted together to punish departures from the conspiracy.¹²⁹

In April 2020, the federal district court granted in part and denied in part the defendants' motions to dismiss. The court dismissed with prejudice the plaintiffs' Sherman Act (federal antitrust law) claim that the defendants conspired to submit uniform rates to the California Department of Insurance, reasoning that the claim is barred by the McCarran-Ferguson Act.¹³⁰ However, the court denied the motions to dismiss other claims. It allowed the plaintiffs' Sherman Act claim regarding the alleged agreement not to rebate to proceed, concluding that that claim was not barred by the McCarran-Ferguson Act, the state action doctrine, or the filed-rate doctrine.¹³¹ The court also allowed the plaintiffs' Cartwright Act (state antitrust law) claims regarding both rebating and uniform rate filing, as well as their California Unfair Competition Act

¹²⁶ Class Action Complaint, *Crain v. Accredited Sur. & Casualty Co.*, No. 4:19-cv-02165-JST (N.D. Cal. Mar. 8, 2019), ECF No. 1-3.

¹²⁷ Consolidated Amended Class Action Complaint, *In re California Bail Bond Antitrust Litigation*, No. 3:19-CV-000717-JST (N.D. Cal. June 13, 2019), ECF No. 46.

¹²⁸ *Id.* ¶¶ 66–102. The federal district court has “sorted these allegations into two categories: (1) the fixing of premium rates, and (2) the prevention of rebating,” concluding that, in effect, the plaintiffs have alleged that the surety defendants have fixed the maximum as well as the minimum price of bail bonds. Order Granting in Part and Denying in Part Motions to Dismiss, *In re California Bail Bond Antitrust Litigation* at 3–4, No. 3:19-CV-000717-JST (N.D. Cal. Apr. 13, 2020), ECF No. 91.

¹²⁹ Consolidated Amended Class Action Complaint, *In re California Bail Bond Antitrust Litig.* ¶¶ 66–106., No. 3:19-CV-000717-JST (N.D. Cal. June 13, 2019), ECF No. 46.

¹³⁰ Order Granting in Part and Denying in Part Motions to Dismiss, *In re California Bail Bond Antitrust Litigation* at 12, No. 3:19-CV-000717-JST (N.D. Cal. Apr. 13, 2020), ECF No. 91.

¹³¹ *Id.* at 12–14.

claim, to proceed.¹³² Although the court dismissed the claims against the surety defendants, the bail agency defendants, and certain industry association defendants, it gave the plaintiffs the opportunity to amend their complaint to cure the pleadings.¹³³

Advocates should note that although the sort of collusion alleged in *In re California Bail Bond Antitrust Litigation* may be observed elsewhere in the bail and corrections industry, similar fact patterns may require significant resources to uncover. Accordingly, advocates considering a similar cause of action should consult with litigators with antitrust experience before filing a complaint.

E. Theories of Liability for Reaching the Surety

As discussed (see page 11), in most states, bail bonds are underwritten by large insurance companies that contract with bail bond agents to receive a share of consumers' payments. Most states require bail bond agents to secure sureties for the bonds they write.¹³⁴

Though there are thousands of bail bond companies that operate throughout the United States, only a handful of large insurers underwrite the majority of bail bonds posted each year and thus keep the entire industry running.¹³⁵ Though their role is largely hidden from public view, these sureties play a critical role in our commercial bail system. The practices, policies, and actions of bail surety companies have a wide impact on agents, consumers, and the justice system.

Though their role is largely hidden from public view, sureties play a critical role in our commercial bail system.

Surety insurers generally receive 10% of each bail bond premium paid to the bail agent. But these underwriters face almost no risk. Bail bonds rarely are declared forfeited, even when a person fails to appear, in part due to rules that require courts to essentially sue the bail agent in order to collect a forfeiture.¹³⁶ Thus, even when bond is forfeited, the bail agent retains the primary obligation for paying the forfeiture. The surety company has to pay only if the bail agent cannot afford to

pay it itself—an unlikely outcome, due to the fact that sureties typically require bail agents to pay an additional percentage of each bail bond premium, separate from the surety fee, into a “build-up fund” that the surety insurer holds in reserve to cover any forfeitures.¹³⁷ In short, surety insurers only pay bail forfeitures in the rare circumstance that (1) the accused person fails to appear for a court appearance, (2) the court orders that the bail be forfeited, (3) the bail agent does not have enough money on hand to pay the bond, *and* (4) there is not enough money in the bail agent's build-up fund with the surety to cover the forfeiture.

¹³² *Id.* at 32. The court rejected the defendants' argument that the filed-rate doctrine bars the Cartwright Act claim. *Id.* at 15.

¹³³ *Id.* at 32.

¹³⁴ 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).

¹³⁵ COLOR OF CHANGE & AM. CIVIL LIBERTIES UNION, *supra* note 7, at 22.

¹³⁶ JUSTICE POLICY INSTITUTE, *supra* note 107, at 15.

¹³⁷ COLOR OF CHANGE & AM. CIVIL LIBERTIES UNION, *supra* note 7, at 14, 24.

Although bail agents generally operate under a formalized power of attorney or other document establishing agency, and often have exclusive relationships with one or two surety companies, establishing that the surety company should be held liable for wrongful acts committed by bail agents still can prove difficult.¹³⁸

Nonetheless, ensuring that sureties share responsibility for the actions of bail agents is critical to systemic reform. Otherwise, advocates may end up playing whack-a-mole with small bail bond agencies. Moreover, holding sureties responsible may be important to ensuring those harmed by the industry's conduct are able to receive full compensation for the damages they suffer, particularly in large class actions where small bail companies may have limited reserves to pay a judgment.

Ensuring that sureties share responsibility for the actions of bail bond agents is critical to systemic reform.

As an initial matter, theories of direct liability, such as negligence, do not appear to provide a promising path to holding sureties liable. No court has directly addressed the question of whether insurance companies that underwrite bail bonds owe a duty of care to individuals released on those bonds.¹³⁹ In other contexts, however, courts have rejected the argument that sureties owe a common law duty of care to third parties arising out of their underwriting activities.¹⁴⁰

The following sections thus explore more promising theories of liability for reaching the surety. In particular, advocates may be able to use agency principles or other theories of secondary liability to hold sureties liable for the actions of bail agents.

1. Tort Liability through Agency Principles

Plaintiffs have had some success arguing that sureties are vicariously liable for the torts of bail bond companies. In particular, plaintiffs have survived summary judgment by using the contractual agreements between the insurer and the bail bond companies to raise a genuine issue of material fact as to whether the bail companies are agents of the insurers, thereby making the insurers liable for the torts the bail companies commit. A key issue that plaintiffs

¹³⁸ *Compare* *Egana v. Blair's Bail Bonds, Inc.*, No. 17-5899, 2018 WL 2463210, at *6 (E.D. La. June 1, 2018) (dismissing false imprisonment and conversion claims premised on an agency theory because plaintiffs failed to allege facts showing the surety defendants had the right to exercise physical control over the bail bond agent defendants), *with* *Ramos v. Int'l Fidelity Ins. Co.*, 34 N.E.3d 737, 742 (Mass. App. Ct. 2015) (holding that insurer was vicariously liable for agent's actions in overcharging premiums).

¹³⁹ *See, e.g., Irene v. Seneca Ins. Co.*, 337 P.3d 483, 485 (Wyo. 2014) (declining to address issue defendant insurer raised on appeal of whether an insurer that —id nothing more than serve as the surety on a bail bond, [owe] a duty of care to plaintiff, who was injured by the bailed defendant in an automobile accident after he had been released on the bond that [defendant] insured").

¹⁴⁰ *See, e.g., Gray v. Derderian*, 404 F. Supp. 2d 418, 422 (D.R.I. 2005) (holding that liability insurance underwriters owed no duty of care to third-party future patrons of nightclub to inspect the premises for purposes of recognizing and remedying any dangerous or hazardous conditions they might have discovered); *ZP No. 54 Ltd. P'ship v. Fid. & Deposit Co. of Maryland*, 917 So. 2d 368, 375 (Fla. Dist. Ct. App. 2005) (noting that a number of federal and state courts have rejected notion that surety has duty to third parties growing out of its underwriting activities; holding that because surety owed no duty of care to property owner with respect to its issuance of performance bonds to a general contractor for work on owner's construction projects, insurer could not liable in tort to property owner).

face when seeking to establish an agency relationship in these cases is whether the surety has the right to control the conduct of the bail bond company.¹⁴¹

In *West v. Sharp Bonding Agency, Inc.*, the court denied the surety defendant's motion for summary judgment in a wrongful death suit and found that a genuine issue of material fact existed as to whether an agency relationship existed between the surety and the bail bond company.¹⁴² The plaintiffs brought suit after two bail bondsmen, while attempting to arrest an individual who failed to appear in court for a municipal traffic ticket, put the individual's brother in a chokehold and killed him.¹⁴³ The insurer defendant argued it could not be held liable for the torts the bail agents committed because it exerted no "actual control" over the bail bondsmen.¹⁴⁴ The court rejected the insurer's argument because under state law, "the right to control, rather than the actual exertion of control, is sufficient to permit vicarious liability to attach."¹⁴⁵ The court ultimately found that a "principal-agent relationship was created by a 1998 written contract titled Bail Bond Agent Contract" in which the surety insurer appointed the bail bond company "its agent for the purpose of soliciting and executing bail bonds in Kansas and Missouri."¹⁴⁶

Similarly, in *Patino v. Capital Bonding Corporation*,¹⁴⁷ the court relied on the agreement between the insurer and the bail bond company in denying the insurer defendant's motion for summary judgment. The action in *Patino* arose after a bail bond company mistakenly seized and detained the plaintiff, who had the same last name as an individual who skipped a court appearance in another state, in a case of mistaken identity.¹⁴⁸ The plaintiff's claims included false arrest and imprisonment.¹⁴⁹ The defendant insurance company moved for summary judgment on the theory that it was not vicariously liable for the acts of the bonding company's recovery agents.¹⁵⁰ But based on the agreement between the insurer and the bail company, in which the insurer appointed the bail company as its "general agent" to solicit bail bonds, an addendum to the agreement in which the insurer took over management duties of the bail company, and modifications to the agreement that illustrated a right of control, the court found that a genuine issue of material fact existed as to whether the defendant insurance company had the right to control the bail company's recovery agents—the key factor in determining whether the insurance company was vicariously liable for the torts the recovery

¹⁴¹ See, e.g., *Patino v. Capital Bonding Corp.*, 465 F. Supp. 2d 518, 521 (D.S.C. 2006) ("Under South Carolina law, [t]he test to determine agency is whether or not the purported principal has the *right to control* the conduct of his alleged agent.") (citation and internal quotation marks omitted); *West v. Sharp Bonding Agency, Inc.*, 327 S.W.3d 7, 12 (Mo. Ct. App. 2010) ("Generally, all that is required to create an agency relationship is that: (1) the agent holds the power to alter legal relations between the principal and third parties; (2) the agent is a fiduciary with respect to matters within the scope of agency; and (3) the principal has the right to control the conduct of the agent with respect to matters entrusted to the agent.").

¹⁴² *West v. Sharp Bonding Agency, Inc.*, 327 S.W.3d 7 (Mo. Ct. App. 2010). The insurer defendant argued that it could not be held liable for the torts the bail agents committed because it exerted no "actual control" over the bail bondsmen. *Id.* at 13. The court rejected the insurer's argument because under state law, "the right to control, rather than the actual exertion of control, is sufficient to permit vicarious liability to attach." *Id.*

¹⁴³ *Id.* at 10.

¹⁴⁴ *Id.* at 13.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Patino v. Capital Bonding Corp.*, 465 F. Supp. 2d 518 (D.S.C. 2006).

¹⁴⁸ *Id.* at 520–21.

¹⁴⁹ *Patino* sued the bond company, the arresting agents, and the insurance company that sold bonds issued by the bonding company for false arrest and imprisonment. *Id.* at 521.

¹⁵⁰ *Id.*

Using Statutes to Establish Agency Relationship

Advocates may be able to establish an agency relationship between the surety and bail bond company through the state insurance code, which may require bail bond companies to use surety insurers in order to conduct business. For example, under California law, bail agent seeking a license must file . . . a notice of appointment executed by a surety insurer or its authorized representative authorizing that applicant to execute undertakings of bail and to solicit and negotiate those undertakings on its behalf.¹⁵⁴ The law also prohibits insurers from execut[ing] an undertaking of bail except by and through a person holding a bail license.¹⁵⁵ Advocates may be able to use laws of this sort to establish that bail bond agents are agents of the insurers by the terms of the statute, because the law allows insurers to act only through bail agents.¹⁵⁶ Advocates should be aware, however, that this agency relationship may not encompass all of the bail agent's conduct. For example, even if a statute creates an agency relationship that covers matters leading up to and including the execution of a bail contract, it may not cover matters subsequent to the execution of that contract, including the apprehension and surrender of accused persons.¹⁵⁷

agents committed.¹⁵¹ As in *West*, the court noted that the plaintiffs only needed to show the right to control, not actual control, to create a genuine issue of material fact concerning the existence of an agency relationship.¹⁵²

The agency relationship in *Patino* was particularly clear cut because the insurance company not only had appointed the bail company as its general agent to solicit bail bonds but also had taken over management duties for the bail company. In *West*, the court reached the same result under the more typical situation in which the insurer simply appointed the bail company as its agent to do business in the state.¹⁵³ As both courts noted, the surety insurers and the bail companies need each other to do business, and fact discovery could prove the existence of an agency relationship. A plaintiff is most likely to demonstrate the existence of an agency relationship—and hold the insurance company vicariously liable in tort—by using the contract to point to evidence of a right to control the conduct of the bail bond company.

2. Breach of Contract Liability through Agency Principles

If an agency relationship between the insurer and the bail bond company can be established, it also may be possible to hold the insurer accountable based on a breach of contract theory. In *Ramos v. International Fidelity Insurance Company*,¹⁵⁸ the plaintiffs sued the indemnity insurance company that underwrote the bail

¹⁵¹ *Id.* at 519–20, 523.

¹⁵² *Id.* at 523; *cf.* *Egana v. Blair's Bail Bonds, Inc.*, No. 17-5899, 2018 WL 2463210, at *6 (E.D. La. June 1, 2018) (dismissing false imprisonment and conversion claims premised on an agency theory because plaintiffs failed to allege facts showing the surety defendants had the right to exercise physical control over the bail bond agent defendants).

¹⁵³ *See, e.g., Edelbrock v. Douglass*, No. B142859, 2001 WL 1469076, at *6 (Cal. Ct. App. Nov. 19, 2001); CAL. INS. CODE § 1802.1 (requiring bail bond companies to use surety insurers to conduct business).

¹⁵⁴ CAL. INS. CODE § 1802.1.

¹⁵⁵ *Id.* § 1800(a).

¹⁵⁶ *See Groves v. City of Los Angeles*, 40 Cal. 2d 751, 756–60 (Cal. 1953). *Accord Edelbrock v. Douglass*, No. B142859, 2001 WL 1469076, at *6 (Cal. Ct. App. Nov. 19, 2001) (holding based on the same California statute that a bail bondsman and an insurer were in an agency relationship created by statute).

¹⁵⁷ *See Edelbrock*, 2001 WL 1469076, at *6–7 (acts unrelated to solicitation, negotiation, execution and delivery of the bail bond are not included within the course and scope of the agency created by statute; activities of bail bond agent and person hired by bail bond agent in apprehending defendants were not controlled by surety company).

¹⁵⁸ *Ramos v. Int'l Fid. Ins. Co.*, 34 N.E. 3d 737 (Mass. App. Ct. 2015).

bond.¹⁵⁹ The action arose after the bail bondsman overcharged the plaintiffs the premium on their bail amount in violation of state law, converted the plaintiffs' collateral for his personal use, and died leaving an insolvent estate.¹⁶⁰ It was undisputed that there was a contract creating an agency relationship between the bail bondsman and the surety.¹⁶¹ The court refused to enter summary judgment for the insurer on the plaintiff's contract claims, noting that, under agency principles, the insurer was liable for the acts of its agent.¹⁶² The court explained that the plaintiff's claims —are not in any event claims for fraud, *they are claims for breach of contract*— so the question is not one of vicarious liability, but only whether the principal, [the insurer], is bound by the terms of the contracts entered into by its agent."¹⁶³ *Ramos* indicates that breach of contract may be a viable theory for holding surety insurers liable for the conduct of the bail agents they underwrite.

3. Liability through RICO and Other Theories of Secondary Liability

Advocates should consider the possibility of holding bail bond insurers liable for the wrongful acts that bail bond agents commit through other theories of secondary liability, including aiding and abetting, furnishing the means, joint venture, respondent superior, ratification, and conspiracy.

Two recent class actions have sought to hold the surety liable through conspiracy claims under the Racketeer Influenced and Corrupt Organizations (“RICO”) Act. In one ongoing case, *Mitchell v. First Call Bail and Surety, Inc.*, the plaintiffs brought claims for assault, trespassing, false imprisonment, intentional and negligent infliction of emotional distress, and violations of RICO and the Montana Consumer Protection Act.¹⁶⁴ The complaint alleges that the owner of the bail bond company hired bounty hunters to arrest Eugene Mitchell, who had inadvertently missed a court hearing. After staking out Mitchell's house, a team of six bounty hunters broke down the front door and entered Mitchell's bedroom with guns and rifles drawn. Mitchell, his wife, and their four-year-old daughter were in bed at the time.¹⁶⁵ In support of the “enterprise” element of the RICO claim,¹⁶⁶ the complaint alleges that the bail bond company was acting as an agent of the surety, and that the bounty hunters were acting as agents of the bail bond company and subagents of the insurance companies.¹⁶⁷ In October 2019, the federal district court denied a motion to dismiss and allowed the plaintiffs' RICO claims against the surety

¹⁵⁹ To determine the existence of an agency relationship, the court, similar to the approach taken in *Patino* and *West*, looked at the “Agency Contract” between the bail bond company and the indemnity insurer. The agreement in *Ramos* authorized the bail bondsman to act as the insurance company's agent for soliciting and writing bail bonds, and the insurance company also supplied the bail bondsmen with power of attorney. *Id.* at 739.

¹⁶⁰ *Id.* at 738–40.

¹⁶¹ *Id.* at 739.

¹⁶² *Id.* at 742.

¹⁶³ *Id.* (emphasis added).

¹⁶⁴ Complaint, *Mitchell v. First Call Bail & Sur., Inc.*, No. 9:19-cv-00067-DLC (D. Mont. April 17, 2019), ECF No. 1.

¹⁶⁵ *Mitchell v. First Call Bail & Sur., Inc.*, 412 F. Supp. 3d 1208, 1214–15 (D. Mont. 2019) (citation and internal quotation marks omitted).

¹⁶⁶ To survive a motion to dismiss a RICO claim, a plaintiff must allege: “that the Defendant engaged in (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity and, additionally, must establish that (5) the defendant caused injury to plaintiff's business or property.” *Id.* at 1222 (citation omitted).

¹⁶⁷ Complaint ¶¶ 100–31, 135, *Mitchell v. First Call Bail and Surety, Inc.*, No. 9:19-cv-00067-DLC (D. Mont. April 17, 2019), ECF No. 1.

defendants to proceed.¹⁶⁸ This decision appears to be the first decision in the country to suggest that it may be possible to hold bail insurance companies liable through RICO.¹⁶⁹

III. PRISON RETAIL

Numerous private firms have sprung up in recent years to monetize aspects of everyday life in prisons and jails. These entities include telecommunications providers, technology companies, commissary operators, and money transmitters. They make money by charging incarcerated people and their families for basic or essential services, like communicating with a son or daughter, while typically operating in a monopolized environment in which the individual consumers have no choice of alternative or less expensive providers. This fee-based industry (referred to here as “prison retail”) has grown in an unplanned, idiosyncratic manner. What started as a niche industry occupied by numerous narrowly focused companies now is dominated by a handful of conglomerates mostly owned by private equity firms. Although private prison companies tend to receive more attention from activists and the press, prison retail firms can command aggregate revenue comparable to the private prison industry.¹⁷⁰

The prison retail industry now is dominated by a handful of conglomerates mostly owned by private equity firms.

Prison retailing is problematic not only because it is built on an inequitable business premise, but also because industry leaders use specific practices that have been called out as unfair, deceptive, or abusive. Some problems (such as price gouging) are a direct result of vendors’ unchecked monopoly powers, while other issues (such as oppressive and one-sided contract terms) are similar to problems commonly confronted by consumers in other settings.

At the outset, advocates should recognize that litigating claims against prison retailers can be complicated by a variety of unique factors, beginning with incarcerated people’s lack of access to even basic transactional information. For example, to the extent that a contract is exclusively available on the internet, an incarcerated customer without internet access is simply unable to access the document.¹⁷¹ And even a consumer who has access to the internet and terms on a

¹⁶⁸ *Mitchell*, 412 F. Supp. 3d at 1226. The court also rejected the surety defendants’ argument that the McCarran-Ferguson Act reverse preempted the plaintiffs’ RICO claims. *Id.* at 1221–22.

¹⁶⁹ Advocates should note that a similar case did not achieve a favorable decision on its RICO claims. In *Egana v. Blair’s Bail Bonds Inc.*, the plaintiffs’ RICO claims—which likewise sought to connect the surety to the allegedly unlawful acts of the bonding company—were initially dismissed without prejudice. *Egana v. Blair’s Bail Bonds Inc.*, No. CV 17-5899, 2018 WL 2463210, at *2–4 (E.D. La. June 1, 2018) (dismissing RICO claims without prejudice; although plaintiffs sufficiently alleged an enterprise under RICO, they failed to establish a pattern of racketeering activity or threat of future conduct). The plaintiffs then repleaded their RICO claims, but the case settled before the court could rule on the repleaded claims, Order of Dismissal, *Egana v. Blair’s Bail Bonds, Inc.*, No. 17-5899 (E.D. La. Jan. 23, 2020), ECF No. 397.

¹⁷⁰ Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration* (Prison Policy Initiative 2017), (“Private companies that supply goods to the prison commissary or provide telephone service for correctional facilities bring in almost as much money (\$2.9 billion) as governments pay private companies (\$3.9 billion) to operate private prisons.”).

¹⁷¹ As a general rule, incarcerated people are entirely unable to access the internet, either as a matter of agency policy or state law. See generally Titia A. Holtz, Note, *Reaching out from behind Bars: The Constitutionality of Laws Barring Prisoners from the Internet*, 67 BROOK. L. REV. 855, 859–66 (2001–02) (surveying laws prohibiting internet access in correctional facilities).

kiosk or tablet may well be unable to save, study, or share this text with a friend or advisor due to lack of email or a printer. Moreover, understanding the vendor's terms does not necessarily allow an incarcerated consumer to avoid unfair terms: in the prison setting, there is rarely a choice of providers, and as with most consumer contracts, the services are provided on a take-it or leave-it basis with no opportunity to negotiate terms. Prison retail customers also face other challenges common to many consumers in non-prison settings, such as dense terms written in impossibly small print.¹⁷²

This section discusses the practices of prison retailers and the consumer law protections that may apply.¹⁷³ In order to understand how consumer law claims may work in the prison retail context, this section first describes the parties typically involved in prison retail transactions. Next, it looks at two major types of prison retail transactions in turn—communications and financial transactions—and provides an overview of how these industries operate in the prison retail setting.¹⁷⁴ It then turns to potential consumer litigation of prison retail abuses. The litigation section first addresses issues and claims specific to litigation concerning prison communications, money transfers, and release cards, and then discusses laws that may apply across the prison retail industry: state Unfair and Deceptive Acts and Practices laws, state laws provide bases for challenges to site commissions, and antitrust laws.

A. Parties Involved in Prison Retail Transactions

Almost every prison retail transaction is characterized by four, sometimes overlapping, parties: the end user, the payor, the facility, and the vendor.

1. End Users

The end users of prison retail goods and services are typically people who are incarcerated or their friends and family, depending on the product or service being sold. For example, goods sold through a commissary are exclusively sold for use by people inside correctional facilities, whereas telecommunications services are sold for the benefit of the two parties communicating—one held in the prison or jail and one living on the outside. Similarly, financial products can be targeted solely at an incarcerated person (release cards to access the person's own funds), or can be used to facilitate a two-party transaction (money transfers from one person to another).

2. Payors

Much of the money spent at prison retailers comes from families and friends of the incarcerated, either directly or indirectly. People typically enter prison with little or no money, lose their jobs

¹⁷² Regan v. Stored Value Cards, No. 14-cv-1187-AT (N.D. Ga. May 29, 2014), ECF No. 27 (directing defendants to file a reformatted or retyped version of the cardholder agreement in 13-point font).

¹⁷³ Portions of this section were originally published as Raheer, *The Company Store and the Literally Captive Market*, *supra* note 1, at 24–30, 46–53.

¹⁷⁴ This guide identifies some consumer laws of general applicability across prison retail but does not attempt to examine all prison retail practices and applicable consumer protection laws in depth; prison commissaries, for example, are not a core focus here.

when arrested or incarcerated, and, to the extent they can earn anything for work performed while incarcerated, earn wages shockingly far below the minimum wage.¹⁷⁵ Historically, this meant limited opportunities to purchase goods or services inside correctional facilities, due to the lack of a viable customer base. But the rising prevalence of electronic payments has made it increasingly feasible to collect money (even in small amounts) from non-incarcerated payors (for the sake of simplicity, this group of non-incarcerated individuals is referred to here as family, even though such payors can also be friends, attorneys, members of faith, community, or other support groups, or anyone who wants to communicate with an incarcerated individual).

Payors can make direct or indirect payments. Direct payments can take several forms. In the case of telecommunications, a family member can be a party to the transaction being purchased—for example, as the recipient of a collect call. Families also can purchase some tangible goods through prison commissaries for someone else who is incarcerated, although these purchases sometimes are limited to bundled care packages.¹⁷⁶ Additionally, families may pay for specific services by sending an advance payment that the vendor holds.

Indirect purchasing entails a family member transferring money to an incarcerated recipient who then uses the funds to make subsequent purchases. The funds are held by the correctional facility in a pooled deposit account, typically referred to as an “inmate trust account” (for more on inmate trust accounts, see page 40). Once the money is in the trust account, the recipient usually can use it for any purpose not prohibited by prison regulations. Assuming that the transferor trusts the recipient to manage their own funds, transfers to trust accounts have the benefit of versatility—the money in a trust account can be used for a variety of purposes, and is not restricted to one specific service or vendor, in contrast to customer prepayments where money is locked into a specific vendor and/or service, and is usually nonrefundable and subject to arbitrary expiration provisions.

3. Facilities

Correctional facilities play two significant roles in prison retailing. First, the facility selects the vendors who sell goods and services, usually under a long-term contract that grants the vendor the exclusive right to sell certain items or services in the facility.

Second, the facility may receive compensation under the contract with the vendor, thus making the correctional agency financially interested in prison retail revenues. Such consideration can come in the form of a “site commission” (a predetermined percentage of sales revenue) or other types of monetary or in-kind payments.

Defenders of the prison retail sector often attempt to justify vendors’ monopolist privileges by arguing that prices are subject to market competition when facilities solicit and evaluate bids.¹⁷⁷ This theory is becoming increasingly dubious in light of industry consolidation. Nevertheless, it

¹⁷⁵ Wendy Sawyer, [How much do incarcerated people earn in each state?](#), PRISON POL’Y INITIATIVE BLOG (Apr. 10, 2017), (national survey finding hourly wages of 14¢ to \$1.41 for incarcerated workers).

¹⁷⁶ Taylor Elizabeth Eldridge, *The Big Business of Prisoner Care Packages: Inside the Booming Market for Food in Pouches*, PRISON LEGAL NEWS, at 29–30 (Oct. 2018) (profiling major sellers of prison care packages).

¹⁷⁷ GTL, Securus, and CenturyLink all made this argument in the FCC’s 2013 rulemaking. See Reply Comments of Stephen A. Raher, [In the Matter of Rates for Interstate Inmate Calling Services](#), WC Docket No. 12-375, at 5 n.21 (Apr. 22, 2013), (collecting citations).

was never on strong ground to begin with, because a facility's interest in increasing its commission revenue operates to drive end-user prices higher.

As facilities explore new ways to profit from prison retailing, the number and type of potential conflicts-of-interest and forced monopolies have dramatically increased. For example, when facilities receive commissions from an electronic messaging system,¹⁷⁸ they may boost commission revenue by either banning postal mail¹⁷⁹ or implementing policies that make mail cumbersome and impractical.¹⁸⁰ Or if a facility receives a commission from a tablet-based e-book program, it might prohibit books from being sent to incarcerated people through the mail.¹⁸¹ These practices not only drive up expenditures for incarcerated people and their families, but also cut off valuable ways people connect and grow. They likely will become more pronounced as the prevalence of prison retailing grows.

4. Vendors

The final component of any prison retail transaction is the company that sells goods or services, and reaps the profits therefrom. Historically, these firms were niche companies that focused on

Government agencies wishing to contract for services typically have little choice in deciding which company to award contracts.

a particular product, such as telephone service. These legacy companies now have largely been absorbed by and consolidated into large conglomerates that mostly are owned by prominent private equity firms.¹⁸² These increasingly powerful companies continue to grow by expanding the range of corrections services they seek to provide, often selling a variety of products pursuant to bundled contracts with facilities. As a result of this industry consolidation, government agencies wishing to contract for services typically have little choice in

deciding which company to award contracts. In turn, this lack of competition in the industry can facilitate high consumer prices and abusive behavior.¹⁸³

¹⁷⁸ Stephen Raher, [You've Got Mail: The Promise of Cyber Communication in Prisons and the Need for Regulation](#), PRISON POL'Y INITIATIVE, at 11–12 (Jan. 2016), (discussing common commission structures).

¹⁷⁹ Jails in at least thirteen states have banned all incoming mail except for postcards. See PRISON POL'Y INITIATIVE, [PROTECTING LETTERS FROM HOME](#).

¹⁸⁰ Some facilities have striven to make mail slower and less personal by requiring all incoming mail to be scanned and either reprinted or distributed electronically through tablets), often citing dubious security concerns. See e.g., Samantha Melamed, [I Feel Hopeless: Families Call New Pa. Prison Mail Policy Devastating](#), PITTSBURG POST-GAZETTE (Oct. 17, 2018), (new policy of scanning and reprinting incoming mail, based on allegations of drug smuggling, results in missing pages, misdirected letters, weeks long delays, and copies so poor as to be illegible"); Katie Meyer, [Pennsylvania Prison Officials Change Mail Handling after Drug-Related Illnesses](#), NATIONAL PUBLIC RADIO (Sep. 5, 2018), (discussing questionable evidence of drug-smuggling through the mail); [Charlotte County Jail Introduces Inmates to New Communication Tablets](#), WINK (Dec. 4, 2017), (incoming mail to be scanned and distributed electronically on tablets).

¹⁸¹ Samantha Melamed, [One Review of Pa. Prisons' Pricey Ebooks: Books That Are Available For Free. That Nobody Wants Anyway](#), PHILA. INQUIRER (Sept. 21, 2018). The Pennsylvania Department of Corrections receives a 30.5% commission on all e-book sales. Contract Between Commw. of Penn. Dept. of Corr. and Global Tel*Link, Contract No. AGR-346, appx. D (Cost Matrix, revised Dec. 14, 2012) (on file with authors).

¹⁸² As a rough indicator of company value, when Platinum Equity purchased Securus in 2017, it told regulators that it had arranged a loan of up to an aggregate principal amount of \$2.6 billion" to fund the transaction. See Letter to Connecticut Public Utilities Regulatory Authority from Raechel K. Kummer (counsel for Abry) and Catrina C. Kohn (counsel for Platinum Equity), Dkt. No. 00-12-20 (Jun. 15, 2017) (on file with authors) (one of several identical disclosures filed with state public utility commissions concerning the Securus acquisition).

¹⁸³ For more on corporate consolidation, see HIGHSMITH, COMMERCIALIZED (IN)JUSTICE, *supra* note 1, at 16–17.

B. Prison Communications: Overview and Regulation

1. Overview of Prison Communications and the Inmate Calling Services Industry

Incarcerated people typically have had three options for communication: letters, in-person visitation, and telephone calls.¹⁸⁴ This guide focuses on telephone calls as well as newer forms of electronic communications. Until relatively recently, telephone rates were set by state and federal agencies who oversaw the highly regulated industry dominated by the Bell System and smaller independent operators.¹⁸⁵ Phone pricing changed gradually but dramatically following the break-up of the Bell System and the subsequent passage of the Telecommunications Act of 1996, which led to a proliferation of new companies in the so-called “inmate calling services” (“ICS”) industry, attracted by the prospects of high call volumes and unchecked rates.¹⁸⁶ Today the ICS industry is dominated by two non-facilities-based telecommunications carriers that use VoIP-based platforms operating on lines leased from local exchange carriers. These companies—Securus Technologies and Global Tel*Link (“GTL”)—collectively have absorbed dozens of competitors since the 1990s.¹⁸⁷ In 2013, the FCC determined that Securus, GTL, and a third company, Telmate, controlled 85% of the ICS telephone market (measured by revenue).¹⁸⁸ In 2017, GTL acquired Telmate.¹⁸⁹

Today the inmate calling services industry is dominated by two companies: Securus Technologies and Global Tel*Link.

Securus and GTL are aggressively pursuing new revenue sources, both in terms of emerging telecommunications technology and non-telecom businesses. As for the former category, video calling technology (sometimes misnomered by the industry as “video visitation”) and electronic messaging¹⁹⁰ are the latest newcomers. Specialized computer tablets that provide communications, education, and entertainment functions, typically operating on a closed wireless network (but never with internet connectivity¹⁹¹) also are gaining traction in the prison retail market.¹⁹²

¹⁸⁴ Stephen Raher, *Phoning Home: Prison Telecommunications in a Deregulatory Age*, in 2 PRISON PRIVATIZATION: THE MANY FACETS OF A CONTROVERSIAL INDUSTRY 215, 219–20 (Byron E. Price & John C. Morris, eds., 2012).

¹⁸⁵ *Id.* at 217–18.

¹⁸⁶ *Id.* at 218; see also Zachary Fuchs, *Behind Bars: The Urgency and Simplicity of Prison Phone Reform*, 14 HARV. L. & POL’Y REV. 205, 208–11 (2019) (discussing the origins and structure of the ICS industry).

¹⁸⁷ Peter Wagner & Alexi Jones, [State of Phone Justice](#), PRISON POL’Y INITIATIVE (Feb. 2019), (text and graphic accompanying notes 20 and 21).

¹⁸⁸ Second Report and Order and Third Further Notice of Proposed Rulemaking [hereinafter —Second Report & Order], In the Matter of Rates for Interstate Inmate Calling Services, ¶ 76, 30 FCC Rcd. at 12801 (2015) (No. 12-375).

¹⁸⁹ Peter Wagner, [Prison Phone Giant GTL Gets Bigger, Again](#), PRISON POL’Y INITIATIVE BLOG (Aug. 28, 2017).

¹⁹⁰ —“Electronic messaging” refers to text-based electronic messages that incarcerated people can exchange with family members. This product is roughly akin to email, but is different in many critical respects. See Raher, *You’ve Got Mail*, *supra* note 178.

¹⁹¹ See generally Holtz, *supra* note 171, at 859–66 (surveying laws prohibiting internet access in correctional facilities).

¹⁹² It is worth noting that, once the FCC signaled its intent to regulate calling rates in 2013, ICS carriers focused on identifying new unregulated sources of revenue, including these computer tablets. Raher, *The Company Store and the Literally Captive Market*, *supra* note 1, at 26.

Some programs provide tablets to users for free, but then make their money by making most features and content only accessible for a fee.¹⁹³ Such fees tend to greatly exceed free-world prices, though there is no obvious cost-based reason for such pricing.¹⁹⁴ In facilities where tablets are not provided for free,¹⁹⁵ customers must either purchase a tablet (prices can range from \$40 to \$160) or pay a rental fee that can range anywhere from \$5 to \$150 per month.¹⁹⁵

Tablets illustrate the wellspring of potential conflicts of interest in the prison retail industry and the ways in which prison telecommunications practices may exploit captive customers. When a facility stands to profit financially from tablet usage, operational policies can be crafted to increase revenue at the expense of incarcerated people and their families: in-person visits may be prohibited to push video calling;¹⁹⁶ prison libraries or donated books can be cut off and replaced with e-books for purchase;¹⁹⁷ postal mail can be restricted in order to increase electronic messaging usage;¹⁹⁸ and educational programs can be curtailed to redirect students to online-only courses.¹⁹⁹

2. Brief History of Prison Communications Regulation

To help contextualize the strategies available to advocates, this section highlights some of the key moments in the long and complicated history of the regulation (and deregulation) of inmate calling services (“ICS”) rates.²⁰⁰

In 2000, incarcerated people and their families filed the landmark *Wright* class-action lawsuit, which formed the spark for two decades of regulatory reform in the ICS sector.²⁰¹ The *Wright* plaintiffs argued that disproportionately high calling rates violated the federal Communication Act’s requirement that common carriers’ “charges, practices, classifications, and regulation” be “just and reasonable.”²⁰² The federal district court ultimately referred the case to the Federal Communications Commission (“FCC”) under the doctrine of primary jurisdiction, citing two statutory grants of jurisdiction that allowed the FCC to address the plaintiffs’ concerns. First, the

¹⁹³ See generally Wanda Bertram & Peter Wagner, [How to spot the hidden costs in a „no-cost“ tablet contract](#), PRISON POL’Y INITIATIVE BLOG (Jul. 24, 2018).

¹⁹⁴ Perhaps the most infamous example of an abusive pricing structure occurred when the West Virginia state prison system introduced a computer tablet program that charged users a *per-minute* fee to read e-books. See [West Virginia Inmates Charged for Reading „Free“ Books on Tablets](#), THE CRIME REPORT (Nov. 25, 2019).

¹⁹⁵ Tablet pricing varies widely by facility and vendor. See Raher, *The Company Store and the Literally Captive Market*, *supra* note 1, at 21 n.75 (discussing examples of tablet pricing).

¹⁹⁶ Matt Lakin, [Point, Click, But No Touch: Debate Shapes up over Video Visitation at Knox Jail](#), KNOXVILLE NEWS SENTINEL (Nov. 24, 2018), (county jail received \$79,000 over four years in commissions from video visitation after prohibiting in-person visits); Steve Horn & Iris Wagner, [Washington State: Jail Phone Rates Increase as Video Replaces In-person Visits](#), PRISON LEGAL NEWS, at 1 (Oct. 2018).

¹⁹⁷ See Raher, *The Company Store and the Literally Captive Market*, *supra* note 1, at 28–29 (discussing inflated prices for electronic books and music); Wanda Bertram, [Philadelphia Inquirer exposes Pennsylvania’s complicity in cutting off incarcerated people’s access to books](#), PRISON POL’Y INITIATIVE BLOG (Sept. 21, 2018).

¹⁹⁸ See *supra* notes 179–180. Raher, *The Company Store and the Literally Captive Market*, *supra* note 1, at 28 (discussing “premium” add-ons, including “stamps” to send text-only e-message).

¹⁹⁹ Although the authors did not find any documented cases of online fee-based courses replacing in-person instruction, as a general matter, total prison spending on education decreased on a nationwide basis by 6% between 2009 and 2012. LOIS M. DAVIS, ET AL., RAND CORP. CORRECTIONAL EDUCATION IN THE UNITED STATES: HOW EFFECTIVE IS IT, AND HOW CAN WE MOVE THE FIELD FORWARD 3 (2014).

²⁰⁰ For a fuller discussion of this history, see Raher, *The Company Store and the Literally Captive Market*, *supra* note 1, at 24–30, 46–53; Fuchs, *supra* note 186, at 213–22; *Ting v. AT&T*, 319 F.3d 1126, 1130–34 (9th Cir. 2003).

²⁰¹ Class Action Complaint, *Wright v. Corr. Corp. of Am.*, Case No. 00-cv-293-GK (D.D.C. Feb. 16, 2000), ECF No. 1.

²⁰² 47 U.S.C. § 201(b).

court pointed to the just-and-reasonable rates language in § 201(b).²⁰³ Second, the court cited § 276,²⁰⁴ which directs the FCC to ensure competition and fair compensation in the payphone industry while also classifying all “inmate telephone service” as payphone service.²⁰⁵

After the district court’s ruling, the FCC waited almost ten years to commence a rulemaking proceeding. In 2015, the FCC issued its final ICS rules. It relied on both § 201 and § 276 for jurisdiction.²⁰⁶ The final rule imposed rate caps on all ICS calls (both inter- and intrastate) and strictly limited ancillary fees.²⁰⁷ Significantly, the FCC reaffirmed its earlier finding that, for purposes of regulatory accounting, site commissions were not a legitimate cost of providing communications services.²⁰⁸ Two commissioners dissented from the final rule, including then-Commissioner (now Chairman) Ajit Pai.

Acting on a challenge brought by the ICS industry, a split panel of the D.C. Circuit vacated several parts of the FCC’s 2015 rules.²⁰⁹ The court held that the FCC lacked preemptive power to regulate intrastate rates, and therefore vacated the rate caps and limits on ancillary fees, as applied to intrastate calls.²¹⁰ It also vacated the portion of the FCC’s order categorically excluding site commissions from the calculus used to set ICS rate caps, disagreeing with the FCC’s conclusion that site commissions have nothing to do with the provision of ICS.²¹¹

Although the court was hostile to the FCC’s regulation of intrastate matters, the majority echoed one of the more surprising aspects of then-Commissioner Pai’s dissent, finding that the limits on ancillary fees associated with interstate calls were a proper exercise of the FCC’s powers under § 201.²¹² The practical problem, however, is how to determine whether any given account fee (e.g., a fee for making a prepayment) is related to inter- or intrastate calls, if the account is used for both types of communications.²¹³ As for the caps on per-minute interstate rates, the court acknowledged the FCC’s jurisdiction to impose rate caps, but invalidated the rate caps in the final rule based on flawed methodology.²¹⁴

The entire D.C. Circuit panel joined the portion of the holding vacating the FCC’s rule requiring annual reporting of ICS carriers’ revenues and costs related to video calling services. The court

²⁰³ Memorandum Opinion at 6–7, *Wright v. Corr. Corp. of Am.*, No. 00-cv-293-GK (D.D.C. Aug. 22, 2001), ECF No. 94 (citing 47 U.S.C. § 201(b)).

²⁰⁴ 47 U.S.C. § 276. This provision, the “payphone provision,” was added in 1996, when the Communications Act of 1934 was amended by the Telecommunications Act of 1996.

²⁰⁵ Memorandum Opinion at 8, *Wright v. Corr. Corp. of Am.*, No. 00-cv-293-GK (D.D.C. Aug. 22, 2001), ECF No. 94.

²⁰⁶ Second Report & Order, *In the Matter of Rates for Interstate Inmate Calling Services* at ¶ 3, n.12 and accompanying text, 30 FCC Rcd. at 12766.

²⁰⁷ *Id.* ¶ 9, 30 FCC Rcd. at 12769.

²⁰⁸ *Id.* ¶ 118, 30 FCC Rcd. at 12819.

²⁰⁹ *Global Tel*Link v. Fed. Comm’ns Comm’n*, 866 F.3d 397 (D.C. Cir. 2017).

²¹⁰ *Id.* at 402.

²¹¹ *Id.* at 412–14.

²¹² *Id.* at 415 (“Contrary to Petitioners’ contentions, the *Order’s* imposition of ancillary fee caps in connection with *interstate* calls is justified. The Commission has plenary authority to regulate interstate rates under § 201(b), including practices . . . for and in connection with interstate calls.”) (emphasis in original).

²¹³ *Id.* at 415 (upholding FCC’s jurisdiction to limit ancillary fees for interstate calls, but remanding because “w cannot discern from the record whether ancillary fees can be segregated between interstate and intrastate calls”); see also *Mojica v. Securus Tech.*, No. 14-cv-5258, 2018 WL 3212037, *5–6 (W.D. Ark. Jun. 29, 2018) (discussing methodological difficulties of allocating fees between inter- and intrastate calls).

²¹⁴ *Global Tel*Link*, 866 F.3d at 414–15.

noted that the FCC had not proven it had jurisdiction because the record did not show that video calling was a communication by wire or radio.”²¹⁵

The FCC has been slow to issue new rules in the wake of the D.C. Circuit’s ruling in *Wright*. *Wright* still appears to be stayed (though administratively closed) pending further rulemaking, with the parties disagreeing on whether there is an ongoing role for the district court.²¹⁶ As for calling rates, the D.C. Circuit vacated the rate caps in the FCC’s 2015 order, which means interstate ICS rates are now subject to the higher rate caps contained in a 2013 interim order from the FCC, and intrastate rates are subject only to regulation by states.²¹⁷

In the meantime, ICS carriers have sought to escape state intrastate regulation in some jurisdictions by citing their use of VoIP technology, which some states have completely deregulated. This leads to the possibility of wholly unregulated intrastate rates, which is of particular concern given that the vast majority of people who are incarcerated are in state prisons and local jails²¹⁸ and are likely to make many intrastate calls.

C. Financial Transactions: Overview

1. Overview of Correctional Banking

Incarcerated people largely rely on family members for the funds necessary to purchase goods and services on the inside. This structure has led to the proliferation of companies, including correctional banking vendors, which profit from facilitating such transfers.

The job of a correctional banking vendor is simple: receive deposits and facilitate payments on behalf of a customer population that is not allowed to use cash, checks, or payment cards.

The phrase “correctional banking” is a bit of a legal misnomer, given that the actual law of banking is implicated only at the periphery of the industry. Although inmate trust funds are typically held in some kind of depository account, the incarcerated person with equitable title to the money has no direct customer relationship with the depository institution. The job of a correctional banking vendor is simple: receive deposits and facilitate payments on behalf of a customer population that is not allowed to use cash, checks, or payment cards. As a non-bank entity that uses technology to facilitate payments by or for the benefit of incarcerated people, correctional banking vendors are a niche type of financial technology (or “fintech”) firm.²¹⁹

²¹⁵ *Id.* at 415.

²¹⁶ See Joint Status Report, *Wright v. Corr. Corp. of Am.*, No. 00-293 (D.D.C., Dec. 28, 2018), ECF No. 216.

²¹⁷ The 2013 order capped interstate rates at 21¢ per minute for prepaid calls and 25¢ for collect calls, and also created “safe harbor” rates of 12¢ and 14¢ (for prepaid and collect calls, respectively), which are presumed to be reasonable. Report and Order and Further Notice of Proposed Rulemaking [hereinafter “First Report & Order”] at ¶¶ 60, 73, In the Matter of Rates for Interstate Inmate Calling Services, 28 FCC Rcd. at 14140, 14147 (2013) (No. 12-375).

²¹⁸ Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL’Y INITIATIVE (March 24, 2020).

²¹⁹ See Adam J. Levitin, *Written Testimony before the U.S. House of Representatives, Comm. on the Fin. Servs., Subcomm. on Fin. Institutions & Consumer Credit* at 4 (Jan. 30, 2018), *archived* (defining a fintech as a nonbank financial service company that uses “some sort of digital technology to provide financial services to consumers”).

Answering the question of whether incarcerated people are entitled to interest earned on trust accounts balances—one of the few issues in the correctional banking sector to have received extensive judicial attention—provides an informative illustration of current correctional banking trends. Four federal circuit courts of appeals have addressed this question,²²⁰ with only one court holding that the beneficiary has a property right to earned interest.²²¹ Given the small balances in most incarcerated peoples' trust accounts, and today's low interest rates, this may seem like an academic debate. But the most recent appellate opinion to address the issue contains an important factual detail.

Young v. Wall involved a challenge to Rhode Island's 2001 decision to stop paying interest on trust accounts, when the state Department of Corrections decided to outsource management of a wide swath of back-room systems.²²² According to the court, the repeal of the previous interest policy was the result of "[c]omments from prospective vendors" who sought the contract to manage Rhode Island's correctional banking system.²²³ The plaintiff in *Young* did not prevail, and the opinion stands as an illustration of the prison retail economy as applied to correctional banking: accounts that had previously been held and invested by the state treasurer (with earned interest remitted to beneficiaries) were now controlled by a private vendor and people who were incarcerated paid the price.²²⁴ This fact pattern is echoed in many correctional banking contracts, which seem to prioritize bureaucratic convenience and government and private revenue considerations over the best interests of the incarcerated accountholders.

2. Overview of Types of Money Transfers

The money transfers facilitated by correctional banking vendors come in a few varieties: transfers to inmate trust accounts, direct payments for goods or services, and release cards.

i. Inmate Trust Accounts

"Inmate trust account" is a term of art (specific terminology varies by jurisdiction) that describes a pooled deposit account held by a governmental entity for the benefit of multiple incarcerated people, each of whom holds equitable title to a subaccount containing their funds.²²⁵ Historically, inmate trust accounting has been a mundane subspecialty of government fiscal administration: agencies collected funds in the possession of people who come into custody, received deposits (i.e., wages earned during incarceration or money orders sent by families), issued checks or money orders for miscellaneous purchases, and ensured that account balances were disbursed to the accountholder upon their release from custody. Now, many

²²⁰ See Emily Tunink, *Note, Does Interest Always Follow Principal?: A Prisoner's Property Right to the Interest Earned on His Inmate Account under Young v. Wall*, 642 F.3d 49 (1st Cir. 2011), 92 NEB. L. REV. 212, 218 n.44 (2013) (discussing circuit split)

²²¹ *Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194 (9th Cir. 1998).

²²² *Young v. Wall*, 642 F.3d 49, 52 (1st Cir. 2011).

²²³ *Id.*

²²⁴ Joint Stmt. of Facts, *Young v. Wall*, No. 03-220S (D.R.I. Sept. 9, 2005), ECF No. 71.

²²⁵ See e.g., CAL. PENAL CODE § 5008 (Dept. of Corrections and Rehabilitation Secretary "shall deposit any funds of inmates in his or her possession in trust with the Treasurer"); TEX. GOV'T CODE ANN. § 501.014 ("The department shall take possession of all money that an inmate has on the inmate's person or that is received with the inmate when the inmate arrives at a facility to be admitted to the custody of the department and all money the inmate receives at the department during confinement and shall credit the money to an account created for the inmate."); see also N.Y. CORRECT. LAW § 187(3) (statute establishes trust accounting system, but only for wages earned).

agencies wish to outsource the management of such accounts, often bundling the straightforward tasks of trust fund accounting with other “correctional banking” services that private companies load up with user fees. In addition to high fees, inmate trust accounts may be subject to mandatory deductions to cover fines, victim restitution, or costs of confinement.²²⁶

Traditionally, a family member would deposit funds to a trust account by sending a money order to the facility. While this funding method requires time for mailing, it has the benefit of allowing transferors to choose among a variety of entities that issue money orders and that operate in a competitive market.²²⁷ Contractors that hold correctional banking contracts tend to steer transferors away from low-cost money orders, in favor of an array of electronic or in-person payments that allow the contractor to extract high fees.²²⁸

In addition to high fees, inmate trust accounts may be subject to mandatory deductions to cover fines, victim restitution, or costs of confinement.

Fees charged for sending money to a trust account are reliably high, without any readily apparent cost-based justification. Neither Access Corrections nor TouchPay (owned by GTL) publish their fees, but JPay routinely charges fees that equate to 20 to 35% for smaller deposits. When a plaintiff incarcerated in Kansas challenged deposit fees, the state’s supreme court noted that the plaintiff’s mother incurred monthly fees of \$11.40 to deposit \$45 into his trust account—effectively a 25% fee.²²⁹

ii. Direct Payments to Vendors

Prison retail vendors also collect direct payments, which can come either from an inmate trust account or a family member. These payments may be contemporaneous payments for goods or services, but companies are increasingly encouraging customers to prepay, often subject to confusing and abusive terms of service. While prepayments are most common in the telecommunications subsector, commissary companies have also begun experimenting with prepayment options, possibly as a way to boost frequent small-dollar purchases of digital content.

²²⁶ See e.g., 3 Michael B. Mushlin, *Rights of Prisoners* § 16:20 (5th ed. rev. 2018) (discussing attachment of financial assets held by incarcerated people); *Deductions from Pennsylvania prisoner’s trust account require notice*, PRISON POL’Y NEWS (Nov. 2018) (discussing Pennsylvania law); OR. REV. STAT. § 423.105 (mandatory deductions of 10-15% from all trust account deposits); COLO. REV. STAT. § 16-18.5-106 (mandatory deductions of at least 20% from all trust account deposits).

²²⁷ See U.S. POSTAL SERV., OFC. OF INSPECTOR GENERAL, No. RARC-WP-16-007, MODERNIZING THE POSTAL MONEY ORDER, at 8–10 (2016) (summarizing the market of money-order issuers).

²²⁸ Oddly, automated clearing house (“ACH”) transfer is the one common payment channel that is hardly ever an option for trust-fund transfers. Given the strong security and low costs associated with ACH transfers, the lack of an ACH option is surprising, although it could be the result of vendors’ desire to avoid security-related investments that are required of online ACH originators. See Nat’l Automated Clearinghouse Ass’n, Operating Rule § 2.5.17.4 (2018) (additional warranties required for online ACH origination). While vendors that accept payment cards are likely expected, directly or indirectly, to comply with the Payment Card Industry Data Security Standards, these rules are largely focused on protecting confidential payment information in possession of a merchant, or during transmission. See generally [“BI Security Standards Council, Requirements and Security Assessment Procedures,”](#) ver. 3.2.1 (May 2018). In contrast, ACH security requirements are more focused on identity verification and fraud detection.

²²⁹ *Matson v. Kan. Dep’t of Corr.*, 346 P.3d 327, 331–32 (Kan. 2015).

In the case of prepayment, an incarcerated person or a family member transfers funds to a vendor who agrees to apply the amount toward future purchase. Often the vendor will refer misleadingly to such prepaid amounts as creating an “account.” Prepayments held by vendors are simply unsecured contractual obligations of the vendor, and should not be analogized to deposit accounts.²³⁰ Making matters even more confusing for consumers, many correctional banking vendors collect trust account deposits *and* retail-transaction prepayments, which can cause some consumers to confuse the two types of transactions.

Prison retail prepayments raise the same concerns that are implicated in many types of consumer prepaid products, specifically merchant insolvency and loss of prepaid funds through forfeiture provisions.²³¹ Merchant insolvency is a particular risk in the prison industry because such retailers tend to be closely held firms whose financial health is difficult to gauge. In the event of an insolvency event, customers with prepaid accounts would hold (likely worthless) unsecured claims.²³²

Pernicious forfeiture provisions also can result in substantial unfairness to customers. Customers may find that their prepaid funds are silently depleted through “service” or inactivity fees. And forfeiture provisions may not provide for refunds of prepaid amounts upon an incarcerated customer’s release from custody or upon a government contract change that removes the vendor from the prison facility. Some vendors have even advertised prepaid products to correction agencies as a way to avoid unclaimed property laws.²³³ These provisions are entirely a creature of private contract and could easily be prohibited through the terms of the vendor-facility contract. Thus far, however, few facilities have shown any interest in protecting consumers by ending such confiscatory practices.

Even though prepayments are often disadvantageous to incarcerated consumers, they remain common for a few reasons. First, facility instructions or vendor marketing materials may encourage customers to use prepayment options without fully explaining available alternatives. Second, incarcerated people may voluntarily prefer prepayments in an effort to avoid routing funds through trust accounts, where money can be subject to levies for fees, fines, restitution, or civil judgments.

iii. Release Cards

The final financial transaction associated with a term of incarceration comes when a facility owes money to a person upon their release. Typically, this money consists of the final balance

²³⁰ See Eniola Akindemowo, *Contract, Deposit or E-Value? Reconsidering Stored Value Products For a Modernized Payments Framework*, 7 DEPAUL BUS. & COMM. L.J. 275, 278 (2009) (“[Stored value products] are technology-enabled contractual constructs rather than deposits, and . . . the use of deposit analogies to analyze them is generally inappropriate.”).

²³¹ Norman I. Silber & Steven Stites, *Merchant Authorized Consumer Cash Substitutes*, Hofstra Payments Processing Roundtable, at 3 (Mar. 14, 2018), (describing merchant insolvency and the absence of standard terms as “universal problems”).

²³² Outside of bankruptcy, the consumer holding a prepayment claim against an insolvent merchant is likely to receive nothing. In bankruptcy, the consumer may, as a best-case scenario, receive a priority unsecured claim under 11 U.S.C. § 507(a)(7). See Justin R. Alberto & Gergory J. Flasser, *Solving the Gift Card Conundrum*, AM. BANKRUPTCY INSTITUTE JOURNAL 32 (Dec. 2016).

²³³ See Comments of Stephen Raheer, Prison Pol’y Initiative at 5 n.22, *Proposed Amendments to Regulation E: Curb exploitation of people released from custody*, Dkt. No. CFPB-2014-0031 (Mar. 18, 2015).

of an inmate trust account, although in the case of jails, it could simply be a refund of money that the individual had in their possession at the time of arrest. The “release card” is a specialized payment product that has arisen to facilitate this type of disbursement. More specifically, it is an open loop prepaid debit card (typically branded as a MasterCard). Under most release-card contracts, the correctional agency pays nothing and the card issuer makes money by charging cardholders a panoply of exorbitant fees.²³⁴ Making matters worse, most facilities that use release cards do not give people an option to receive release payments through a different method.

D. Consumer Litigation Regarding Prison Retail Transactions

Consumer litigation presents one strategy for combatting abuses in the prison retail industry and securing relief for victims of financial exploitation. This section discusses examples of consumer litigation that has been brought to challenge prison retail abuses. Because litigation in this area is still in nascent stages, this section identifies the core laws that regulate the industry as well as potential consumer claims that may be available. The first three sections focus on unique considerations for litigation concerning three specific prison retail areas—communications, payments and money transfers, and release cards. The final section discusses the potential use of state Unfair and Deceptive Acts and Practices (“UDAP”) laws, state laws relevant to site commissions, and antitrust laws to challenge exploitative practices across the prison retail industry.

1. Litigation Concerning Communications

Title II of the Communications Act²³⁵ requires “just and reasonable” rates, and provides consumer with a private cause of action to sue for violations.²³⁶ This section focuses on overcoming threshold barriers to exercising this private right of action and discusses recent consumer actions challenging ICS rates under the Communications Act as well as under state law. In addition to considering claims similar to those in the lawsuits described below, advocates should consider whether ICS rates are regulated by state law in their jurisdiction, and if so, whether such laws provide another hook for litigation (see side bar on page 45).

A primary barrier for consumers to overcome in challenging ICS rates under the Communications Act is that many courts (including, most obviously, the district court that heard the *Wright* case; see page 37²³⁷) have invoked the doctrine of primary jurisdiction and referred rate challenges to the FCC.²³⁸ While this doctrine does not necessarily end a legal challenge, it can result in decades of delay, as the *Wright* Petitioners can attest. Yet the longer the FCC

²³⁴ *Id.* at 1, 3–5.

²³⁵ Title II refers to the provisions of the Communications Act that govern common carriers (currently codified at 47 U.S.C. §§ 201–76). The most relevant provision of title II for purposes of this discussion is the just and reasonable rate provision in § 201. In 2013, the FCC held that ICS providers are common carriers under title II. First Report & Order, *supra* note 217, ¶ 13.

²³⁶ 47 U.S.C. §§ 201(a), 207; see also *Global Crossing Telecommc’ns, Inc. v. Metrophones Telecommc’ns, Inc.*, 550 U.S. 45, 53–54 (2007) (explaining private cause of action).

²³⁷ See *supra* notes 203–205 and accompanying text.

²³⁸ Madeleine Severin, *Is There a Winning Argument against Excessive Rates for Collect Calls from Prisoners?* 25 CARDOZO L. REV. 1469, 1490–94 (2004).

The longer the FCC postpones action following the D.C. Circuit's 2017 decision in *Global Tel*Link v. FCC*, the stronger the argument plaintiffs have for bringing a private lawsuit.

postpones action following the D.C. Circuit's 2017 decision in *Global Tel*Link v. FCC*, the stronger the argument plaintiffs have for bringing a private lawsuit. The doctrine of primary jurisdiction is a prudential rule that some courts have declined to apply in situations where the agency is aware of but has expressed no interest in the subject matter of the litigation.²³⁹ Thirty months after the D.C. Circuit decided the *Global Tel*Link* case, the FCC finally took some action to address the issues left unresolved after the ruling. Thus far, however, it only has taken up the very narrow issue of ancillary fees.²⁴⁰ As the FCC delays addressing the other issues, advocates may argue that this inaction demonstrates that the agency

has failed to express interest in the subject matter of the litigation, and thus that the court should decline to refer the issue to the FCC under the doctrine of primary jurisdiction.

A second barrier consumers may face is the filed-rate doctrine. Arguments that this doctrine should not apply in this context are discussed beginning on page 66.

Courts have certified at least a few class actions regarding ICS rates in recent years. In 2017, a federal district court in Arkansas certified two class actions challenging the legality of site commissions under title II and alleging common law unjust enrichment against Securus and GTL.²⁴¹ However, after the D.C. Circuit vacated the FCC's attempts to rein in site commissions, the court decertified both classes and dismissed the named plaintiffs' claims.²⁴² In April 2020, the Eighth Circuit affirmed the district court's class decertification order and dismissal of the plaintiffs' individual claims.²⁴³

A similar suit in New Jersey has fared better. Filed in 2013, the plaintiffs challenged ICS rates under title II, as well as 42 U.S.C. § 1983, the New Jersey Consumer Fraud Act ("CFA"), and a common law unjust enrichment claim.²⁴⁴ The plaintiffs ultimately chose to seek class certification on only two of their claims: violation of the CFA and violations of the Fifth Amendment Takings Clause (actionable under § 1983). The court denied the parties' motions for summary judgment²⁴⁵ and certified both claims over GTL's objections in August 2018.²⁴⁶ In March 2020, the court ruled in favor of GTL on the takings claim, but allowed the CFA claim to

²³⁹ *Astiana v. Hain Celestial Group*, 783 F.3d 753, 761 (9th Cir. 2015).

²⁴⁰ See [Public Notice: Wireline Competition Bureau Seeks to Refresh the Record on Ancillary Service Charges Related to Inmate Calling Service \(WC Dkt. No. 12-375\)](#) (Feb. 4, 2020).

²⁴¹ *In re Global Tel*Link Corp. ICS Litigation*, No. 14-cv-5275, 2017 WL 471571 (W.D. Ark. Feb. 3, 2017).

²⁴² *Mojica v. Securus Tech.*, No. 14-cv-5258, 2018 WL 3212037 (W.D. Ark. Jun. 29, 2018).

²⁴³ *Stuart v. Glob. Tel*Link Corp.*, 2020 WL 1870473, at *1 (8th Cir. Apr. 15, 2020).

²⁴⁴ Complaint, *James et al. v. Global Tel*Link Corp., et al.*, No. 13-cv-4989 (D.N.J. Aug. 20, 2013), ECF No. 1.

²⁴⁵ *James v. Global Tel*Link Corp.*, No. 13-cv-4989, 2018 WL 3736478, at *1 (D.N.J. Aug. 6, 2018).

²⁴⁶ *James v. Global Tel*Link Corp.*, No. 13-cv-4989, 2018 WL 3727371, at *12 (D.N.J. Aug. 6, 2018). Among other things, the court distinguished the plaintiffs' New Jersey CFA claims from the unjust enrichment claims in the Arkansas case, noting that the common law of unjust enrichment depends heavily on plaintiffs' individualized circumstances, (contravening the commonality requirement of Federal Rule of Civil Procedure 23(a)(2)), whereas a CFA claim was based on the overall reasonableness of GTL's rates, and did not require adjudication of any facts specific to plaintiffs' specific situations); *Id.* at *11.

proceed to trial.²⁴⁷ Subsequently, the parties reached an agreement, and in May 2020, the class asked the court for preliminary approval of the settlement. While the New Jersey case is arguably the most successful ICS litigation since the *Wright* lawsuit, it is entirely retrospective—in 2016, three years after the case was filed, the New Jersey legislature prohibited site commissions, cracked down on ancillary fees, and capped call rates at 11¢ per minute.²⁴⁸ Accordingly, the class action only concerns rates charged prior to the 2016 legislative reform.

Another ongoing class action, *Pearson v. Hodgson* (also discussed on page 58), alleges that the county jail's phone contract with Securus constitutes an illegal kickback scheme in violation of Massachusetts law. In 2018, the federal district court denied Securus's attempt to dismiss the claims under the Massachusetts consumer protection statute, finding that the plaintiffs were families of limited means who had no reasonable alternative but to pay prices that Securus had inflated in order to pay commissions to the sheriff.²⁴⁹

Non-Litigation Strategies for Reform of Prison Communications Rates

Although this guide is dedicated to exploring potential litigation strategies, litigation often works best as a complement to other reform strategies. Highlighted below are legislative, regulatory, and administrative avenues for reform at the state, local, and federal levels that have been responsible for many recent victories in obtaining relief from excessive communications rates.

Local Contracting for Rates

At the local level, counties may be able to negotiate contracts with more favorable communications rates for local jails.²⁵⁰

State Regulation of Rates

States have addressed unfair ICS rates in a variety of ways, including:

- Imposing statutory ICS rate caps;²⁵¹
- Granting public utility commissions the power to police ICS rates, typically under the umbrella of regulating operator services;²⁵²
- Legislating more general mandates, such as directing correctional facilities to bring ICS rates in line with non-prison phone service rates;²⁵³
- Eliminating site commissions in an effort to bring down costs.²⁵⁴

Federal Regulation of Rates

On the federal level, the scope of further regulation will depend on whether Congress acts to clarify and bolster the FCC's jurisdiction over intrastate ICS rates and newer communications technologies. Legislative reform efforts are ongoing with bills to strengthen the FCC's authority over prison communications.²⁵⁵

If Congress does not act, the FCC still can regulate interstate rates, including non-telephone communications services (with the demonstration that the communication falls within FCC jurisdiction), though challenges to any such regulation are likely given the failure of federal law to keep pace with technology. Nonetheless, the FCC has two potential paths it can take to protect consumers from unreasonable charges for video calling and other newer communications technologies. First, § 1302 of the Telecommunications Act expressly directs the FCC to —encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.²⁵⁶ There are strong arguments that grant the FCC statutory authority to impose price caps on new ICS technologies like video calling and electronic messaging.²⁵⁷ Second, advanced technologies also are susceptible to regulation as a telecommunications service under title II of the Communications Act.²⁵⁸

²⁴⁷ James v. Global Tel*Link Corp., No. 13-cv-4989, 2020 WL 998858, at *2–5 (D.N.J. Mar. 2, 2020) (granting motion for judgment on the pleadings as to takings claim, but denying motion as to CFA claim).

²⁴⁸ N.J. STAT. § 30:4-8.12.

²⁴⁹ Pearson v. Hodgson, 363 F. Supp. 3d 197, 207–08 (D. Mass. 2018).

2. Litigation Concerning Contemporaneous Payments and Money Transfers

Advocates developing litigation concerning contemporaneous payments and money transfers in the prison context should consider the applicability and helpfulness of several financial account and money transaction laws, including the common law of trusts, the Electronic Fund Transfer Act (“EFTA”),²⁵⁰ state money-transmitter statutes, and the Gramm-Leach-Bliley Act (“GLBA”).²⁶⁰

To the extent that a transaction involves an inmate trust account, the first step for consumer advocates should be to analyze whether the account is a bona fide trust, and if so, whether the trustee (most likely the correctional system or another government agency) has breached its fiduciary duty by, for example, allowing a vendor to diminish trust property by charging unreasonable fees. The trust classification will depend on the law or administrative policy that creates the inmate trust system. Although the name “inmate trust account” by itself is not dispositive, such accounts often are governed by generally applicable trust law.²⁶¹ If the general law of trusts applies, beneficiaries may be able to challenge transaction fees to the extent the

²⁵⁰ See, e.g., Dallas Morning News Editorial, *By lowering inmate calling rates, Dallas County put principle over profit*, DALLAS MORNING NEWS (Feb. 20, 2020), (discussing new phone contract in county jail, featuring calling rates of just over 1¢ per minute); Karen Matthews, *NYC Makes Calls from Jail Free. 1st Major US City to Do So*, U.S. NEWS (May 1, 2019), (allowance of 21 minutes of free calling time every three hours).

²⁵¹ See, e.g., N.J. STAT. 30:4-8.12 (11¢ per minute rate caps); 730 ILL. COMP. STAT. 5/3-4-1(a-5) (7¢ per minute rate caps).

²⁵² *In re Inquiry into Regulatory Requirements for Alternative Operator Services Companies*, Iowa Utilities Board, Dkt. No. NOI-2019-0001 (examining ICS rates under Iowa Code § 476.91, which governs operator services); see also Colo. House Bill 20-1267 (legislation to restore the Colorado Public Utility Commission’s jurisdiction over ICS carriers as part of the non-optional operator services regulatory statute; legislation passed the House on March 10, 2020, and was introduced in the Senate and assigned to the Judiciary Committee the following day).

²⁵³ See, e.g., R.I. GEN. LAWS § 42-56-38.1(b) (“No telephone service provider shall charge a customer rate for calls made from a prison in excess of rates charged for comparable calls made in non-prison settings. All rates shall reflect the lowest reasonable cost to inmates and call recipients.”); 2017 Mich. Pub. Act No. 107 (House Bill 4323) part 2, § 219 (provision in appropriations bill requiring that any new ICS contracts “shall include a condition that fee schedules for prisoner telephone calls . . . be the same as fee schedules for calls placed from outside of correctional facilities”).

²⁵⁴ See, e.g., S.C. CODE § 10-1-210 (“The State shall forego any commissions or revenues for the provision of pay telephones in institutions of the Department of Corrections and the Department of Juvenile Justice for use by inmates.”); NEBR. DEPT. OF CORR. ADMIN. REG. 205.03 ¶¶ IX and XII (requiring “rates and surcharges that are commensurate with those charged to the general public for like services,” and foregoing commissions from ICS revenue); see also Fuchs, *supra* note 186, at 226.

²⁵⁵ See, e.g., Martha Wright-Reed Just and Reasonable Communications Act of 2019, S.1764, 116th Cong. (2019–2020); Martha Wright Prison Phone Justice Act, H.R. 6389, 116th Cong. (2019–2020); Video Visitation and Inmate Calling in Prisons Act of 2017, S. 1614, 115th Cong. (2017).

²⁵⁶ 47 U.S.C. § 1302(a).

²⁵⁷ See Raher, *The Company Store and the Literally Captive Market*, *supra* note 1, at 51–52.

²⁵⁸ See *id.* at 52–53.

²⁵⁹ 15 U.S.C. § 1693 *et seq.*

²⁶⁰ Gramm-Leach-Bliley Financial Modernization Act, Pub. L. 106-102, 113 Stat. 1338 (1999) (codified as scattered sections of titles 12, 15, 16, and 18, U.S. Code).

²⁶¹ *E.g.*, *Matson v. Kansas. Dep’t of Corr.*, 346 P.3d 327, 330 (Kan. 2015) (“[W]e have no difficulty finding the plain language of the applicable statutes establishes the inmate trust fund is, in fact, a trust subject to the [Kansas Uniform Trust Code].”); *Washington v. Reno*, 35 F.3d 1093, 1101–02 (6th Cir. 1994) (ruling that people incarcerated in Federal Bureau of Prisons could challenge the Bureau’s allegedly improper disbursements from the commissary trust fund, citing Restatement (Second) of Trusts §§ 199–200 (1959)). The federal Bureau of Prisons maintains two trust funds (the Inmate Trust Fund and the Commissary Trust Fund). The Department of Justice has taken the position that the Bureau is subject to different fiduciary duties with respect to the two different funds. See *Fiduciary Obligations Regarding Bureau of Prisons Commissary Fund*, 19 Op. O.L.C. 127 (1995).

fees are not commercially reasonable.²⁶² The determination of commercial reasonableness will be fact-specific and will likely involve a close examination of the purpose of the inmate trust fund, as defined by the enabling statute or other applicable authority.²⁶³ In addition, if a correctional agency acts as trustee of an inmate trust and receives commissions from a third-party administrator, then the agency may be vulnerable to a charge of breaching its duty of loyalty.²⁶⁴

The EFTA, as implemented by Regulation E,²⁶⁵ likely applies to many transfers of money by family members, particularly debit-card payments,²⁶⁶ but its actual substantive protections are minimal. From the perspective of the incarcerated account holder, if an inmate trust account is a bona fide trust, then it is excluded from the EFTA's definition of an account.²⁶⁷ Even to the extent that EFTA applies to a particular party or transaction, the law is largely concerned with preventing unauthorized transactions, which does not appear to be a widespread problem in prison retailing. Rather, the primary problem is exorbitant fees, but EFTA contains little direct regulation of fees,²⁶⁸ instead favoring disclosure of costs under the premise that consumers will make informed choices. In the context of correctional banking, the EFTA's emphasis on disclosure is an ill fit, since consumers have no meaningful choice in financial companies.

If a contractor facilitates transfers into or out of an inmate trust account, the contractor is most likely governed by state-level money transmitter laws.²⁶⁹ These laws vary greatly by state.²⁷⁰ The Uniform Money Services Act (adopted by 11 states and the Virgin Islands²⁷¹) covers businesses that receiv[e] money or monetary value for transmission,²⁷² but does not apply to a

²⁶² *E.g.*, *Upp v. Mellon Bank, N.A.*, 799 F. Supp. 540, 544–45 (E.D. Pa. 1992) (finding a breach of fiduciary duty by trustee who incurred bank fees not justified by cost or results), *vacated for lack of diversity jurisdiction sub nom. Packard v. Provident Nat'l Bank*, 994 F.2d 1039 (3d Cir. 1993).

²⁶³ *See e.g.*, *E. Armata, Inc. v. Korea Commercial Bank*, 367 F.3d 123, 133–34 (2d Cir. 2004) (holding that trustee of statutory trust created by the Perishable Agricultural Commodities Act did not breach fiduciary duties by holding trust funds in a bank account subject to fees because —maintaining a checking account with commercially reasonable terms may facilitate, rather than impede, the fulfillment of a PACA trustee's duty to maintain trust assets so that they are freely available to satisfy outstanding obligations to sellers of perishable commodities" (citation and internal quotation marks omitted)).

²⁶⁴ Restatement (Third) of Trusts § 78(2) (2007) (“[T]he trustee is strictly prohibited from engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests.”).

²⁶⁵ 12 C.F.R. pt. 1005.

²⁶⁶ *Id.* § 1005.3(b)(1)(v).

²⁶⁷ *Id.* § 1005.2(b)(3) (Regulation E's definition of account” excludes an account held by a financial institution under a bona fide trust agreement”); *see also* 12 C.F.R., pt. 1005, appx. B ¶ 2(b)(2), cmt. 1 (“The term bona fide trust agreement is not defined by the Act or regulation; therefore, financial institutions must look to state or other applicable law for interpretation.”).

²⁶⁸ One of the few provisions of the EFTA that regulates fees is an amendment added by the CARD Act of 2009, which prohibits dormancy and service fees in connection with gift cards and general-use prepaid cards. 15 U.S.C. § 1693f-1. These rules do not apply to most prison retail prepayments, because the statute excludes stored-value products that are readable and not marketed or labeled as a gift card or gift certificate.” 15 U.S.C. § 1693f-1(a)(2)(D). Nor does this provision appear to apply to release cards. *See Humphrey v. Stored Value Cards*, 355 F. Supp. 3d 638, 643–644 (N.D. Ohio 2019) (holding that release cards are not general-use prepaid cards because they are not marketed to the general public”).

²⁶⁹ *But see* Comments of Stephen Raher, Prison Pol'y Initiative, *supra* note 233, at 11 n.54 and accompanying text (discussing JPay's unverified allegation that ew” correctional money services business comply with applicable state regulations).

²⁷⁰ *See* Emily Tunink, Note, *Does Interest Always Follow Principal?: A Prisoner's Property Right to the Interest Earned on His Inmate Account under Young v. Wall*, 642 F.3d 49 (1st Cir. 2011), 92 NEB. L. REV. 212, 218 n.44 (2013).

²⁷¹ Unif. Money Servs. Act, UNIF. L. COMM'N.

²⁷² Unif. Money Servs. Act § 102(14) (2004).

merchant that collects prepayments for future transactions.²⁷³ While the Uniform Money Services Act exempts state and local governments from its coverage, there is no exemption for an agent of a government²⁷⁴—a feature that should be retained if advocates ever call for a federal money transmitter license.²⁷⁵

The GLBA likely applies to several aspects of correctional banking, although publicly available evidence suggests that correctional banking vendors give little thought to complying with the law.²⁷⁶ The provisions most relevant to correctional banking are the privacy provisions found in title V of the GLBA. These rules are applicable to entities that engage in “financial activities,” including transferring and safeguarding money.²⁷⁷ As covered entities that are not overseen by a bank regulator, correctional banking vendors are covered by the GLBA implementing regulations issued by the Federal Trade Commission (“FTC”).²⁷⁸ The GLBA privacy provisions that can potentially benefit incarcerated consumers include notification of privacy practices and the ability to opt out of certain information sharing.²⁷⁹ Covered entities are required to develop a data security plan, which must include certain elements designated by the FTC.²⁸⁰ Although noncompliance cannot be addressed through private litigation (GLBA does not include a private cause of action), a consumer who can show injury resulting from a covered entity’s failure to comply with the GLBA standards, may be able to bring a UDAP claim on that basis.²⁸¹

3. *Litigation Concerning Release Cards*

Advocates developing litigation strategies concerning release cards (prepaid debit cards that facilities use to pay amounts due to incarcerated people upon their release from custody (see page 42)) should consider claims under the Electronic Funds Transfer Act (“EFTA”), as well as claims founded in Fifth Amendment takings, unjust enrichment, and conversion. Release card litigation recently received a major boost from *Brown v. Stored Value Cards*,²⁸² in which the Ninth Circuit reversed the district court’s dismissal of a class action related to release cards in Multnomah County, Oregon. This section reviews the types of claims that appear to have promise based on *Brown* and rulings from federal district courts.

While a variety of potential causes of action related to release cards exist, practitioners should begin by considering claims under the EFTA. Although EFTA’s general applicability to release cards was unclear in the past, the Consumer Financial Protection Bureau (“CFPB”) clarified matters in its latest modification to Regulation E. Effective April 1, 2018, Regulation E’s

²⁷³ *Id.* § 102, cmt. 12 (“[O]nly stored value that consists of a medium of exchange evidenced in electronic record would qualify as stored value for purposes of regulation. A medium of exchange needs to be something that is widely accepted. Closed-end systems, as mere bilateral units of account, therefore would be excluded from regulation.”).

²⁷⁴ *Id.* § 103(3); see also *id.* § 201(a)(2) (licenses are not required for an agent of a licensee, but the Act contains no comparable provision for an agent of an exempt entity).

²⁷⁵ *E.g.*, Levitin, *supra* note 219, at 16 (“Federal money transmitter license, coupled with some sort of federal insurance for funds held by money transmitters . . . would be a simple move that would help reduce unnecessary regulatory burdens.”).

²⁷⁶ The one exception is JPay, which briefly mentions GLBA’s data protection provisions in its privacy policy. Despite this terse reference to the law, JPay does not appear to address GLBA compliance in its bid proposals, nor is there any mention of the consumer disclosure and opt-out procedures.

²⁷⁷ 15 U.S.C. § 6809(3); 12 U.S.C. § 1843(k)(4)(A).

²⁷⁸ 16 C.F.R. § 313.1(b).

²⁷⁹ *Id.* §§ 313.5 (annual privacy notices), 313.7 (opt-out procedure).

²⁸⁰ *Id.* § 314.4.

²⁸¹ National Consumer Law Center, *Fair Credit Reporting* § 18.4.1.14 (9th ed. 2018).

²⁸² *Brown v. Stored Value Cards, Inc.*, 953 F.3d 567 (9th Cir. Mar. 16, 2020).

definition of “account” includes prepaid accounts,²⁸³ and the CFPB’s commentary explaining the rule specifically cites release cards as a type of prepaid product that the new definition covers.²⁸⁴ Moreover, the *Brown* court concluded that release cards constitute accounts under the EFTA even in situations governed by the prior version of Regulation E.²⁸⁵

Three specific types of EFTA claims have potential. First are claims under the EFTA’s prepaid card provision, 15 U.S.C. § 1693f-1. Section 1693f-1 prohibits issuers of general-use prepaid cards from charging dormancy fees, inactivity fees, or service fees (all of which the statute defines) unless certain disclosures are made at the time of issuance *and* the card has been inactive for at least 12 months.²⁸⁶

Early litigation resulted in uncertainty about whether § 1693f-1 covered release cards because, to qualify as a general-use prepaid card, a card must be “marketed to the general public.”²⁸⁷ One federal circuit court now has indicated that this standard can be met. Citing evidence of the defendant’s advertising practices, the Ninth Circuit concluded in *Brown* that the release cards in Multnomah County, Oregon *were* marketed to the general public because “[w]hen inmates are released from jail or prison, they reenter the general public. And when Defendants marketed the cards to Multnomah County, they indirectly marketed them to these released inmates.”²⁸⁸

The second type of potential EFTA claim is rooted in 15 U.S.C. § 1693i, which prohibits the issuance, absent certain disclosures, of unsolicited, validated cards that provide access to a “consumer’s account” (this includes debit cards). In *Brown*, the plaintiff had alleged that a release card was foisted upon her without consent and without her applying for or requesting it and that when people leave incarceration, the release cards are already activated and ready to use. The Ninth Circuit held that the district court abused its discretion by denying leave to amend the complaint because the proposed complaint stated a claim for relief under § 1693i.²⁸⁹ Three federal district courts also have allowed § 1693i claims to proceed, although none has issued a ruling on the merits.²⁹⁰

The third, and most untested, type of EFTA claim relates to the compulsory-use provision, which prevents payers from requiring a consumer to use a certain financial institution (including a specific prepaid card) for receipt of wages or government benefits.²⁹¹ During the CFPB’s last EFTA rulemaking, several advocacy groups requested that the agency extend the compulsory-

²⁸³ 12 C.F.R. § 1005.2(b)(3) (2018).

²⁸⁴ See Bureau of Consumer Financial Protection, *Prepaid Accounts under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z)*, [hereinafter “Regulation E Amendments”] 81 FED. REG. 83934, 83968 (Nov. 22, 2016).

²⁸⁵ *Brown*, 853 F.3d at 574.

²⁸⁶ 15 U.S.C. § 1693f-1(b)(2); see also 12 C.F.R. § 1005.20(d) (implementing regulations).

²⁸⁷ See 15 U.S.C. § 1693f-1(a)(2)(D)(iv).

²⁸⁸ *Brown*, 953 F.3d at 573; see also *Reichert v. Keefe Commissary Network*, 331 F.R.D. 541 (W.D. Wash. May 8, 2019) (certifying class claim under § 1693f-1).

²⁸⁹ *Brown*, 953 F.3d at 575.

²⁹⁰ See *Humphrey v. Stored Value Cards*, 355 F. Supp. 3d 638, 642–43 (N.D. Ohio 2019) (denying defendant’s motion for summary judgment on claim that unsolicited issuance of release cards violates 15 U.S.C. § 1693i); *Humphrey v. Stored Value Cards*, No. 18-cv-1050, 2019 WL 1439771 (N.D. Ohio Apr. 1, 2019) (granting *sua sponte* summary judgment on plaintiff’s § 1693i claim, and certifying decision for interlocutory appeal); *Reichert*, 331 F.R.D. at 558 (order certifying class).

²⁹¹ 12 C.F.R. § 1005.10(e)(2).

use prohibition to release cards.²⁹² Although the CFPB declined to adopt these requested changes, it did note that “to the extent that . . . prison release cards are used to disburse consumers’ salaries or government benefits . . . such accounts are already covered by § 1005.10(e)(2) and will continue to be so under this final rule.”²⁹³ While helpful, this clarification still leaves some uncertainty because it does not specify whether a payroll disbursement must be contemporaneous with the employee’s earning of the underlying compensation. When someone is released from prison, they might receive disbursement of accumulated wages earned during the term of their incarceration. To the extent that the compulsory-use prohibition applies to delayed disbursements of wages, Regulation E would prohibit mandatory use of release cards to make such payments.

In addition to EFTA claims, advocates should consider the availability of non-EFTA claims. Most release-card class actions have included non-EFTA claims such as Fifth Amendment takings, unjust enrichment, conversion, and violations of state UDAP statutes. Such claims frequently have survived motions to dismiss or led to advantageous settlements.²⁹⁴ In *Brown*, the district court granted summary judgment to the defendants on the plaintiff’s takings claim, reasoning that the plaintiff had not suffered a taking because the release cards were the functional equivalent of their confiscated cash. The Ninth Circuit reversed this ruling, calling the district court’s analysis “misguided.”²⁹⁵ Because “the release card deteriorates in value quickly and permanently” (due to the fees), the Ninth Circuit concluded that the cards are not the functional equivalent of cash.²⁹⁶ The court stated that this ruling regarding functional equivalency did not conclude the matter, explaining that “[t]he next step in a fees-for-services takings analysis is to determine whether the fees are a fair approximation of the cost of benefits supplied.”²⁹⁷ The Ninth Circuit left it to the district court to conduct this analysis on remand, but noted that “the extent to which the fees were avoidable might be a factor” for the district court to consider on remand.²⁹⁸

Encouragingly, most courts have held that arbitration provisions in release-card contracts are unenforceable, given the inability of consumers to realistically withhold their consent (see page 64 for further discussion of arbitration clauses).²⁹⁹ The outlier case, where an arbitration

²⁹² See Comments of Stephen Raher, Prison Pol’y Initiative, *supra* note 233, at 8–9.

²⁹³ Regulation E Amendments, *supra* note 284, at 83985.

²⁹⁴ See, e.g., *Reichert v. Keefe Commissary Network*, No. 17-cv-5848-RBL, 2018 WL 2018452, at *3 (W.D. Wash. May 1, 2018) (denying motion to dismiss plaintiff’s conversion and unjust enrichment claims, as well as claims under the Takings Clause of the Fifth Amendment (actionable through § 1983) and the Washington Consumer Protection Act); *Humphrey v. Stored Value Cards*, No. 18-cv-1050, 2018 WL 6011052 (N.D. Ohio Nov. 16, 2018) (certifying class claims for conversion and unjust enrichment); *Brown v. Stored Value Cards, Inc.*, No. 15-cv-01370-MO, 2016 WL 4491836, at *4-5 (Aug. 25, 2016) (denying motion to dismiss plaintiff’s state law claims for conversion and unjust enrichment), *subsequent decision*, 953 F.3d 567, 576 n.7 (9th Cir. Mar. 16, 2020) (vacating district court’s later ruling granting summary judgment to defendants on claims for conversion and unjust enrichment); see also First Amended Complaint, *Adams v. Craddock*, No. 13-cv-05074-PKH (W.D. Ark. May 9, 2013), ECF No. 6 (pleading Fourth and Fourteenth Amendment violations (actionable through § 1983), conversion, and trespass to chattels; class settlement subsequently approved).

²⁹⁵ *Brown*, 953 F.3d at 575.

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 576 (quoting *U.S. v. Sperry Corp.*, 493 U.S. 52, 60 (1989)).

²⁹⁸ *Id.*

²⁹⁹ *Reichert v. Keefe Commissary Network*, No. 17-cv-5848-RBL, 2018 WL 2018452, at *2 (W.D. Wash. May 1, 2018) (denying motions to compel arbitration; “[t]he contracts, including those to arbitrate disputes, must have mutual assent, and Defendants’ contract to arbitrate is unenforceable and unconscionable under Washington law.”); *Brown v. Stored Value Cards, Inc.*, No. 15-cv-01370-MO, 2016 WL 755625, at *4 (order denying motion to compel arbitration) (D. Or. Feb. 25, 2016) (“[Plaintiff] had to take the card and had to work through the Defendants’ system in order to get her money back. . . . It

agreement was held enforceable, is a case from Florida where the federal district court found the plaintiff had been given a clear choice of receiving his funds via debit card or check.³⁰⁰

4. Potential Claims across Prison Retail Transactions

In addition to the area-specific strategies discussed above, advocates should consider whether they can use state UDAP laws, state limitations on local government revenue authority, or antitrust law to challenge exploitative practices occurring across the prison retail industry.

i. Challenging Prison Retail Prices and Practices Using State Unfair and Deceptive Acts and Practices Laws

As discussed (see page 18), statutes in every state prohibit the use of unfair or deceptive acts or practices in consumer transactions. In the past, UDAP laws were of limited relevance in prison because incarcerated people engaged in relatively few commercial transactions. With the rise of prison retailing, however, these laws are becoming increasingly salient. Prison retail vendors regularly employ tactics that may be deceptive, unfair, or unconscionable under consumer laws. Notably, UDAP statutes not only allow enforcement by state attorneys general, but also provide a private cause of action (although sometimes narrower in scope than the enforcement authority granted to the attorney general.³⁰¹ The private enforcement option is critically important because attorneys general may not choose to aggressively promote the rights of incarcerated people as doing so typically would be met with consternation by the

Prison retail vendors regularly employ tactics that may be deceptive, unfair, or unconscionable under consumer laws.

agencies that are either clients of the attorney general (in the case of state prison systems) or at the very least are ideologically aligned with the state's chief law enforcement officer (in the case of county jails).

As defined by the FTC, a deceptive practice requires a false or misleading material claim or omission that is likely to mislead a consumer.³⁰² Although deception is prohibited under the UDAP statutes in most states,³⁰³ not all jurisdictions follow the FTC's definition. In most states, deception is akin to common-law fraud, but with more flexibility (for example, most states do not require proof of reliance to prove deception).³⁰⁴ Advertisements, promotional materials, and product descriptions published by prison retailer vendors frequently contain deceptive claims.³⁰⁵

is not clear that Plaintiff was presented with a meaningful choice, as such I DENY the Motion to Compel.”) (emphasis in original); see also *Regan v. Stored Value Cards, Inc.*, 85 F. Supp. 3d 1357 (N.D. Ga. 2015), *aff'd sub nom.*, 608 Fed. Appx. 895 (11th Cir. 2015) (defendants argued that plaintiff had impliedly accepted or ratified the cardholder agreement through his use of the release card; court denied motion to compel arbitration and ordered an evidentiary hearing on whether a contract had been formed; case settled before evidentiary hearing).

³⁰⁰ *Pope v. EZ Card & Kiosk, L.L.C.*, No. 15-cv-61046, 2015 WL 5308852 (S.D. Fla. Sept. 11, 2015).

³⁰¹ See generally National Consumer Law Center, *Unfair and Deceptive Acts and Practices* § 12.2 (9th ed. 2016).

³⁰² *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 1984 WL 565319, at *37 (1984) (“[T]he Commission will find an act or practice deceptive if, first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material.”).

³⁰³ CARTER, *supra* note 59, at 12–14 (48 states plus D.C. have broadly worded prohibitions on deception).

³⁰⁴ National Consumer Law Center, *Unfair and Deceptive Acts and Practices* § 4.2.3.1 (9th ed. 2016).

³⁰⁵ See, e.g., *POM Wonderful v. Fed. Trade Comm'n*, 777 F.3d 478, 490 (D.C. Cir. 2015) (“In determining whether an advertisement is deceptive in violation of section 5 of the FTC Act, the Commission engages in a three-step inquiry,

For example, the suggestion that a computer tablet has functions that it lacks in reality could be deceptive,³⁰⁶ as could advertised phone rates that do not adequately disclose or explain fees.³⁰⁷ Most state UDAP statutes broadly prohibit unfair or unconscionable practices, although a few of them limit or deny a private cause of action to enforce the broad prohibition.³⁰⁸ Under the FTC Act, a practice is unfair if it is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.³⁰⁹ Other jurisdictions have employed even more expansive definitions of unfairness that seek to root out all manner of inequitable conduct.³¹⁰ Unconscionability is typically defined by reference to various non-exclusive factors that focus on whether a merchant took advantage of a consumer's vulnerability or knowingly structured a transaction in a particularly egregious manner.³¹¹ Thus, in jurisdictions that recognize claims for unfair or unconscionable practices, prison retail customers may frequently have actionable claims because of their inability to avoid injury: prison retailers sell essential goods (food, clothing) or services (communication with family) through state-created monopolies, and if these vendors employ unfair tactics, customers have no alternative. As one court found, families who pay exorbitant phone rates do so out of sheer desperation for contact with their loved ones.³¹²

The following subsections discuss different types of consumer injuries that may give rise to violations of UDAP statutes, in the form of unreasonable prices, oppressive contract terms, and efforts to evade sellers' duties under Article 2 of the Uniform Commercial Code ("UCC") and the Magnuson-Moss Warranty Act.

ii. Prices

Consumers who challenge prices should take care to analogize prison retail pricing to practices that have previously formed the basis for valid UDAP claims. Such practices include using monopoly power to extract excessive fees³¹³ and paying kickbacks to the issuer of a government contract.³¹⁴ Some jurisdictions may recognize unreasonably high prices as unconscionable in and of themselves.³¹⁵ Other jurisdictions may require some type of

considering: (i) what claims are conveyed in the ad, (ii) whether those claims are false, misleading, or unsubstantiated, and (iii) whether the claims are material to prospective consumers.").

³⁰⁶ See *In re Sony PS3 Other OS Litig.*, 551 Fed. Appx. 916, 921–22 (9th Cir. 2014) (misleading statements about computer functionality and operating life were actionable under California False Advertising Law).

³⁰⁷ *Schnall v. Hertz Corp.*, 78 Cal. App. 4th 1144, 1163–64 (2000) (company's imposition of lawful fees was nonetheless actionable as deceptive practice because company failed to make it clear to customers that an avoidable charge is considerably higher than the retail rate for an item or service, which in the absence of contrary information many would expect to apply").

³⁰⁸ CARTER, *supra* note 59, at 15 (44 states plus D.C. broadly prohibit unfairness and/or unconscionability, although 5 of these do not always provide a private cause of action).

³⁰⁹ 15 U.S.C. § 45(n).

³¹⁰ National Consumer Law Center, *Unfair and Deceptive Acts and Practices* § 4.3.3.1 (9th ed. 2016).

³¹¹ *Id.* § 4.4.2; see also Uniform Consumer Sales Practices Act § 4 (factors determining unconscionable practices).

³¹² *James v. Global Tel*Link Corp.*, No. 13-cv-4989, 2018 WL 3727371, at *2 (D.N.J. Aug. 6, 2018) (granting motion to certify class as to two claims).

³¹³ *E.g.*, *Ford v. ChartOne, Inc.*, 908 A.2d 72 (D.C. 2006) (consumer pleaded a valid claim for unconscionably high prices under the D.C. Consumer Protection Procedures Act, where plaintiff's only way to obtain copies of his own medical records was to pay \$6.36 per page to contractor selected by the medical provider).

³¹⁴ *Stalker v. MBS Direct*, No. 10-11355, 2011 WL 797981, at *6 (E.D. Mich. Mar. 1, 2011) (plaintiffs properly stated a claim under the Michigan Consumer Protection Act by alleging that 4–11% commissions that book vendor paid to school districts unreasonably inflated cost of textbooks sold to students), *class cert. denied* 2012 WL 6642518 (E.D. Mich. Dec. 20, 2012).

³¹⁵ *Via Christi Regional Med. Ctr. v. Reed*, 314 F.3d 852, 868 (Kan. 2013) (hospital's use of superior bargaining power to charge inflated prices was actionable; the fact that such pricing was common in the industry held not to be a defense);

independent wrongdoing in addition to unreasonably high prices.³¹⁶ In a class action, a finding of unconscionable prices need not be made customer-by-customer, but rather can be based on judicial comparison of end-user prices to the seller's average costs.³¹⁷ In addition to base prices, transaction fees may be unfair or deceptive, depending on how they are portrayed and what (if anything) the consumer receives in return for payment of the fee.³¹⁸

In the context of prison retailing, consumers have used UDAP statutes to challenge the inflated monopoly prices that ICS carriers charge. For example, plaintiffs in Arkansas challenged Securus's intrastate rates under that state's Deceptive Trade Practices Act.³¹⁹ The district court concluded that the plaintiffs' allegations that Securus "improperly exploit[ed] economic leverage resulting from exclusive-provider contracts" formed the basis for an actionable claim of unconscionability.³²⁰

In a still-pending New Jersey class action, the federal district court denied Global Tel*Link's motion to dismiss claims under the New Jersey Consumer Fraud Act, holding that the plaintiffs had stated a claim of unconscionability based on the anti-competitive way in which rates were imposed upon a vulnerable population (further holding that a separate act of deception was not required).³²¹

Most recently, a federal district court denied Securus's attempt to dismiss a class action claim under the Massachusetts consumer protection statute.³²² The plaintiffs' theory in this case, *Pearson v. Hodgson* (also discussed on pages 45 and 58), relies on an earlier state-court ruling, *Souza v. Sheriff of Bristol County*,³²³ which held that sheriffs may only impose and collect fees that are specifically authorized by statute. The *Pearson* plaintiffs argue that the sheriff violated *Souza* by collecting fees (called "site commissions") that are not authorized by statute, and that Securus violated the Massachusetts UDAP statute by assisting the sheriff in this unlawful activity. In rejecting Securus's motion to dismiss, the court found that the plaintiffs were

Kugler v. Romain, 279 A.2d 640, 653–54 (N.J. 1971) (defendant's targeting low-income consumers with sales of "practically worthless" educational materials for two-and-a-half times a reasonable market price was unconscionable).

³¹⁶ E.g., Galvan v. Northwestern Memorial Hosp., 888 N.E.2d 529, 536 (Ill. App. Ct. 2008) ("Charging an unconscionably high price, by itself, is generally insufficient to establish a claim [under the Illinois Consumer Fraud and Deceptive Business Practice Act] for unfairness. Instead, the defendant's conduct must [also] violate public policy, be so oppressive as to leave the consumer with little alternative except to submit to it, and injure the consumer." (citation omitted)); Hatke v. Heartland Homecare Servs., 77 P.3d 1288 (Kan. Ct. App. 2003) (per curiam; table) (high price not actionable under Kansas Consumer Protection Act absent deceptive bargaining conduct or unequal bargaining power).

³¹⁷ *ChartOne*, 908 A.2d at 90–92.

³¹⁸ Byler v. Deluxe Corp., 222 F. Supp. 3d 885 (S.D. Cal. 2016) (plaintiffs adequately pled deceptive trade practice under California, Illinois, Missouri, and Massachusetts law, based on company's shipping fees (ranging from \$8 to \$49.60 per order), which bore no reasonable relationship to company's actual shipping costs); Martin v. Heinold Commodities, 643 N.E.2d 734, 742–43 (Ill. 1994) (broker's imposition of a "foreign service fee" was deceptive because it inaccurately implied that the fee was charged to recover costs, when in fact it was simply an additional sales commission).

³¹⁹ Antoon v. Securus Tech., No. 5:15-cv-5008, 2017 WL 2124466 (W.D. Ark. May 15, 2017).

³²⁰ *Id.* at *6.

³²¹ James v. Global Tel*Link, Corp., No. 13-cv-4989, 2018 WL 3736478, at *7 (D.N.J. Aug. 6, 2018) (unconscionability claim is "not solely about excessive rates, but also about the manner in which those rates were established—through site commissions and ancillary fees. From the end user's perspective, there was no marketplace. GTL enjoyed a monopoly over individuals held captive by a government agency." (citation and internal quotation mark omitted; emphasis in original)); see also James v. Global Tel*Link, Corp., No. 13-cv-4989, 2020 WL 998858, (D.N.J. Mar. 2, 2020) (denying GTL's motion for judgment on the pleadings as to New Jersey Consumer Fraud Act ("CFA") claims; declining to reexamine its conclusion that the CFA claims do not require deceptive conduct).

³²² *Pearson v. Hodgson*, 363 F. Supp. 3d 197, 207–08 (D. Mass. 2018).

³²³ *Souza v. Sheriff of Bristol County*, 918 N.E.2d 823 (Mass. 2010).

families of limited means who had no reasonable alternative but to pay prices that Securus had inflated in order to pay commissions to the sheriff.³²⁴

iii. Terms and Conditions

Contracts of adhesion with oppressive terms often are actionable for either of two interrelated reasons: (1) complex contract language can deceive consumers into misunderstanding the terms of a bargain, or (2) consumers' inability to negotiate terms leaves them with no meaningful choice.³²⁵ These dual concerns are particularly acute in the prison retail setting, where terms and conditions are unusually oppressive and merchants enjoy a legal monopoly. Terms and conditions that are difficult to understand may be deceptive, while terms that are overwhelmingly exculpatory toward the vendor may be actionable as unfair or unconscionable.³²⁶

A prison retail vendor may face liability for deceptive practices if it uses advertising that portrays services as achieving a specific purpose (e.g., communicating with a loved one) while simultaneously forcing consumers to assent to contract terms that excuse the vendor from actually providing the advertised service.³²⁷ The same goes for goods that are advertised as fulfilling specific functions, but which come with terms stating that the product is not warranted to operate without failure.³²⁸ Other problematic terms and conditions include purported waivers of duties imposed by law. For example, JPay's terms of service for money transfers state that JPay ~~will~~ not be liable for a Payment sent to the incorrect inmate account.³²⁹ This blanket exculpatory term ignores the numerous situations in which JPay could be liable for an erroneous transfer due to its own negligence.³³⁰ JPay also claims (perhaps as part of its efforts to redirect customers to high-fee electronic payment channels) that it is ~~not~~ responsible" for money orders that it receives at its designated mailing address, but which do not reach the intended recipient of funds.³³¹ This provision is not only unfair, but also may be unenforceable as an attempt to evade the common-law duties of a bailee.³³²

³²⁴ *Pearson*, 363 F. Supp. 3d at 207–08.

³²⁵ National Consumer Law Center, *Unfair and Deceptive Acts and Practices* § 4.3.2.3.4 (9th ed. 2016).

³²⁶ *E.g.*, *Barrett-O'Neill v. Lalo, L.L.C.*, 171 F. Supp. 3d 725, 740–41 (S.D. Ohio 2016) (requiring a consumer to enter into a ~~substantially~~ "substantially one-sided transaction" can constitute unconscionable practice under Ohio Consumer Sales Practices Act); *Goodwin v. Hole No. 4, L.L.C.*, No. No. 2:06-cv-679, 2006 WL 3327990, at *8 (D. Utah Nov. 15, 2006) (contract that gave seller the ~~unilateral~~ "unilateral ability to defeat the purpose of the contract (and the [customers]' justified expectations) rings of substantive unconscionability").

³²⁷ See JPAY, INC., *PAYMENTS TERMS OF SERVICE* ¶ 18 (Mar. 10, 2020).

³²⁸ See *id.*

³²⁹ *Id.* ¶ 2.

³³⁰ A customer paying by credit card could have valid grounds to initiate a chargeback if JPay negligently misdirected deposited funds. See MasterCard, *Chargeback Guide* 47, 222 (May 1, 2018) (description of chargeback message reason codes 4853, 53, and 79).

³³¹ JPAY, INC., *PAYMENTS TERMS OF SERVICE*, *supra* note 327, ¶ 7.

³³² Although a money transfer is not a bailment, in the case of an *attempted* payment by negotiable instrument that cannot be consummated, the recipient most likely holds the instrument as a constructive bailee. See *Bayview Loan Servicing v. CWCapital Asset Management (In re Silver Sands R.V. Resort)*, 636 Fed. Appx. 950, 952 (9th Cir. 2016) (recipient of overpayment held excess funds as constructive bailee); see also 8A AM. JUR. 2d *Bailments* § 12 (2009) ("A constructive bailment' or involuntary bailment' arises where . . . a person has lawfully acquired the possession of personal property of another and holds it under circumstances whereby he or she should, on principles of justice, keep it safely and restore it or deliver it to the owner."). Although parties to a bailment may alter their respective rights and obligations by contract, attempts to eliminate a bailee's liability for loss arising from its own misconduct are typically held void as against public policy. *Id.* § 86.

Vendors' privacy policies also contain troublesome provisions that potentially could be challenged, especially when it comes to use of customer data. Securus's "Threads" product collects data from numerous sources for distribution to anyone "connected to" a public law enforcement agency or private investigative firm.³³³ Securus apparently has some awareness that such data sharing implicates privacy laws, because law enforcement customers that subscribe to Threads must sign a form contract promising to "comply with all [applicable] privacy, consumer protection, marketing, and data security laws and government guidelines."³³⁴ Yet Securus's customer-facing terms and conditions provide that Securus "may share your contact information, account information and history, call details, financial transactions and your voice and video records with law enforcement personnel and/or correctional facilities and certain third parties for use in connection with and in support of law enforcement activities,"³³⁵ and that Securus makes no "guarantees regarding the . . . actions by law enforcement officials in handling the data."³³⁶ In other words, Securus uses form contracts to require law-enforcement personnel to observe certain laws, while seemingly requiring the affected consumers to waive the protections of those same laws. Because the agency-facing contract evidences Securus's knowledge of applicable privacy laws, the company's consumer-facing terms may be vulnerable to a challenge as unfair or unconscionable.

iv. Sales of Goods

Sales of goods such as food, toiletries, clothing, and electronic hardware (including computer tablets) implicate both UDAP statutes and consumers' rights under Article 2 of the UCC. The rights of buyers regarding defective goods are likely to become more relevant to the extent that high-priced computer tablets of questionable quality become more common.³³⁷ Because prison retailers tend to offer the most parsimonious express warranties imaginable, consumers often will have to rely on the implied warranty of merchantability available under Article 2 of the UCC.³³⁸ The implied warranty of fitness for a particular purpose³³⁹ also may be relevant in situations where a seller encourages consumer misconceptions, such as leading customers to

³³³ Securus has described Threads as "[s]ystems that merge big data, voice biometrics, and pattern identification, providing early detection and alerts for investigators, attorneys, courts and criminal justice systems." Securus Technologies, Inc., Response to Request for Proposals RFP 18-021, at 261 (Fort Bend County, Texas) (Oct. 17, 2017) (on file with authors). See generally CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY (2016); Anya Prince & Daniel Schwarcz, *Proxy Discrimination in the Age of Artificial Intelligence and Big Data*, IOWA L. REV. (forthcoming 2020) (on file with authors and available on SSRN); Master Services Agreement between Securus Technologies, Inc. and Fort Bend County (Texas) (dated Feb. 6, 2018) (on file with authors).

³³⁴ Master Services Agreement between Securus Technologies, Inc. and Fort Bend County, *supra* note 333, at 5, ¶ 1. The contract also requires agencies to agree to implement eight specific practices, including restricting access to properly authorized employees, using personal information only for lawful purposes, and limiting the further dissemination of personal information. *Id.* ¶ 2.

³³⁵ SECURUS TECHNOLOGIES, INC., FRIENDS AND FAMILY TERMS AND CONDITIONS, [Privacy Policy](#), "How do we share data about you?; see also *id.* ("A of this data may be stored, monitored, searched, analyzed and transferred among law enforcement agencies for law enforcement purposes.")

³³⁶ SECURUS TECHNOLOGIES, INC., FRIENDS AND FAMILY TERMS AND CONDITIONS, [General Terms and Conditions](#), Limitation of Liability. In addition, to the extent that the Threads database includes audio or video of children under thirteen, the use of such data may violate the Children's Online Privacy Protection Act.

³³⁷ Although not a consumer law issue, one tablet user in South Dakota has raised the ongoing malfunctioning of computer tablets as a Sixth Amendment issue, since that state removed prison law libraries and replaced it with a tablet-based Lexis Nexis app. See Motion for Appointment of Counsel, *Gard v. Fluke*, No. 18-cv-5040-JLV (D.S.D. Jun. 19, 2018), ECF No. 3 ("The tablet program is defective and prone to lockouts and other network and system failures. For a year, promised repairs and updates have not provided petitioner with meaningful access to any legal materials.").

³³⁸ U.C.C. § 2-314 (AM LAW. INST. 2017).

³³⁹ U.C.C. § 2-315 (AM LAW. INST. 2017).

believe that a tablet performs a specific function, (e.g., accessing educational content), when in fact it does not.

Prison retailers often impose terms and conditions that misleadingly purport to “disclaim” all implied warranties.³⁴⁰ The enforceability of such a provision is questionable. About one-third of the states have special non-UCC statutes that restrict or prohibit the ability of sellers to disclaim implied warranties.³⁴¹ Moreover, most courts hold that *express* warranties cannot be disclaimed.³⁴² The UCC defines express warranties broadly, including any description of the goods that is made part of the basis of the bargain.³⁴³ It is likely that at least an express warranty by description arises in every sale by a prison retailer.

If a prison retailer provides a “written warranty” as defined by the Magnuson-Moss Warranty Act,³⁴⁴ it is not allowed to disclaim implied warranties at all,³⁴⁵ although it can, with disclosure, limit their duration to that of the written warranty.³⁴⁶ However, “written warranty” is a specialized term that does not include warranties by description.³⁴⁷ Unless a prison retailer issues a written warranty in its own name—likely only if the retailer is having merchandise specially manufactured for it and selling it under its own brand name—or affirmatively adopts the manufacturer’s warranty as its own, the Magnuson-Moss Act does not prevent the retailer from disclaiming warranties.³⁴⁸

The merchandise sold by prison retailers often carries an extremely short manufacturer’s warranty. For example, Union Supply Company sells computer tablets that are covered by a three-month warranty.³⁴⁹ An excessively short warranty period may be found “manifestly unreasonable” or unconscionable under the UCC.³⁵⁰

Other aspects of a prison retail warranty may also be found unconscionable. For example, the warranty accompanying Union Supply Company’s computer tablets requires that, if a defective item is returned for a warranty claim, it must be accompanied by an *original* receipt and all of the original accessories and packaging.³⁵¹ This could be a consumer trap even in a regular free-world transaction, but is particularly onerous for someone in prison, where customers may not

³⁴⁰ E.g., UNION SUPPLY GROUP, INC., [TERMS OF USE](#), (disclaiming “any and all warranties, express or implied, for any merchandise offered”).

³⁴¹ National Consumer Law Center, [Consumer Warranty Law](#) § 5.4.1 (5th ed. 2015).

³⁴² *Id.* § 5.2.

³⁴³ U.C.C. § 2-313 (AM LAW. INST. 2017).

³⁴⁴ 15 U.S.C. § 2301(6).

³⁴⁵ *Id.* § 2308(a).

³⁴⁶ *Id.* § 2308(b).

³⁴⁷ *Id.* § 2301(6). See National Consumer Law Center, [Consumer Warranty Law](#) § 2.2.3 (5th ed. 2015).

³⁴⁸ See National Consumer Law Center, [Consumer Warranty Law](#) § 2.3.2 (5th ed. 2015).

³⁴⁹ The warranty period is technically 180 days, but after 60 days, a repair fee is imposed that may prevent many customers from effectively making warranty claims. Notably, although the company’s website terms include a description of the warranty coverage, it also states that complete warranty terms are available only in the tablet package, a practice that likely violates of the Magnuson-Moss Act. 15 U.S.C. § 2302(b)(1)(A) (requiring warranty terms to be “made available to the consumer (or prospective consumer) prior to the sale of the product to him.”).

³⁵⁰ U.C.C. § 1-302(b); National Consumer Law Center, [Consumer Warranty Law](#) § 7.7.4.6 (the duration of a warranty may not be manifestly unreasonable and may be struck down if unconscionable).

³⁵¹ UNION SUPPLY GROUP, INC., [RULES AND REGULATIONS](#).

even be allowed to keep the packaging.³⁵² After imposing intricate and burdensome rules for warranty claims, Union Supply Company further claims to reserve to itself the sole discretion to determine whether a returned item is eligible for warranty service. If it determines a return is ineligible, the company has the sole discretion to decide whether or not to return the item to its owner.³⁵³ The UCC invalidates restrictions on the buyer's remedies that cause a warranty to fail of its essential purpose,³⁵⁴ and broadly invalidates any unconscionable contract term.³⁵⁵ A warranty that is so limited as to be illusory may also violate a UDAP statute's prohibition of unfairness or deception.³⁵⁶ In addition, the Magnuson-Moss Act allows the FTC or the Attorney General to sue when the terms and conditions of [a written warranty] so limit its scope and application as to deceive a reasonable individual;³⁵⁷ advocates should note, however, that there is no private cause of action under this provision.

The use of oppressive warranty terms is not unique to Union Supply. The warranty for GTL's tablets lasts 12 months, but repairs can take up to one month to complete (or "21 working days"), and GTL has the sole discretion to determine whether conditions of the warranty are met.³⁵⁸ If GTL determines the product is not eligible, the customer has no appeal rights and does not receive the original device back; his only recourse is to purchase a new tablet.³⁵⁹

v. Challenging Site Commissions Using State Limitations on Local Governments' Revenue Authority

Local governments' power to raise revenue, like their other legal functions, derives from authority delegated to them by the state. The various substantive and procedural restrictions that accompany these grants of authority accordingly limit local governments' ability to generate revenue.

In 2010, for example, the Massachusetts Supreme Judicial Court ("SJC") struck down a program of fees that a county sheriff had imposed on prisoners on the grounds that the sheriff lacked the specific legislative authority required by the state constitution.³⁶⁰ A class of prisoners had challenged these fees—including fees on medical co-payments, haircuts, and GED registration—by arguing in part that the sheriff lacked the statutory authority to impose them. The SJC affirmed that sheriffs only have the powers conferred upon them by the legislature.³⁶¹

³⁵² The Union Supply tablets are specifically marketed for people incarcerated in the California prison system, which limits personal property to items on a preapproved list (a list that does not include used packaging) and caps the volume of allowable possessions at six cubic feet per person. CAL. CODE REGS. tit. 15, § 3190(e); Calif. Dept. of Corr. and Rehabilitation, *Inmate Property Matrix* (rev. Apr. 1, 2014).

³⁵³ UNION SUPPLY GROUP, INC., RULES AND REGULATIONS, *supra* note 351.

³⁵⁴ U.C.C. § 2-719 (AM LAW. INST. 2017).

³⁵⁵ *Id.* § 2-302.

³⁵⁶ See, e.g., *Roelle v. Orkin Exterminating Co.*, No. 00AP-14, 2000 WL 1664865, at *6-7 (Ohio Ct. App. Nov. 7, 2000)

(guarantee that promises effective services but is negated by other components of the same contract is a deceptive practice under the Ohio Consumer Sales Practices Act). See generally National Consumer Law Center, [Consumer Warranty Law](#) § 11.1.7 (5th ed. 2015).

³⁵⁷ 15 U.S.C. § 2310(c).

³⁵⁸ Contract Between Commw. of Penn. Dept. of Corr. and Global Tel*Link, Contract No. AGR-346, appx. G at Requirement #103 (on file with authors). Even though the tablets are warranted for twelve months, the batteries (which are presumably a critical component) are only warranted to last three months. *Id.* at 415 (GTL Genesis 116-PA spec sheet).

³⁵⁹ *Id.* appx. G at Requirement #103.

³⁶⁰ See *Souza v. Sheriff of Bristol County*, 918 N.E.2d 823 (Mass. 2010).

³⁶¹ *Id.* at 828-29.

Citing authority establishing that statutory expression of one thing is the implied exclusion of other things, the SJC concluded that “[h]ad the Legislature intended to authorize the sheriff to impose the challenged fees, it would have said so expressly as it had done with other fees.”³⁶² Because no statute supplied the sheriff with the requisite express authority to collect the fees he had imposed on the *Souza* plaintiffs, the charges were unlawful.³⁶³

Souza considered the limits of a sheriff’s ability to directly impose financial assessments. To the extent that privatization is commonly used to generate revenue streams for local governments (through mandatory site commission payments and other comparable contracting arrangements, for example),³⁶⁴ these same limitations may provide a vehicle for challenging some of the onerous costs imposed on people who have contact with these systems.

Such a strategy will depend on the laws of the relevant jurisdiction as well as the nature of the legal financial obligation at issue. A recent case, which seeks to apply the *Souza* holding to a contract for prison phone services, provides one framework for challenging “user-fee” contracting models in states that similarly restrict local revenue authority. In *Pearson v. Hodgson*, a class of consumers seeks to establish that the same restrictions that govern sheriffs’ ability to impose fees directly also should limit their ability to do so indirectly through the “site commission” private contracting model that has become pervasive in the corrections industry. A federal district court adopted this legal argument in a ruling on a motion to dismiss the plaintiffs’ claims under the Massachusetts consumer protection statute.³⁶⁵

Where state restrictions on local governments’ authority are clearly established and have been interpreted to apply to financial assessments of any nature (rather than being limited to “taxes” but not “fees”³⁶⁶), the primary legal question is likely to be whether advocates can apply the limitations to the negotiation of private contracts. In *Pearson*, the plaintiffs pointed out that removing from this statutory framework any revenues collected by private entities would have the effect of providing a roadmap to evading the restrictions entirely. The court adopted this argument, characterizing the question at stake as being about the separation of power across legal institutions in the state.³⁶⁷

Advocates should be aware that this litigation strategy will be available only in states that similarly restrict local governments’ ability to raise revenue, and that also have not directly authorized site commission payments. But where they exist, these restrictions provide an additional legal tool for challenging governments’ contracts with private vendors that require the payment of “site commissions.”

³⁶² *Id.* at 833.

³⁶³ In a similar case, the Supreme Court of Michigan held in 2014 that county courts had authority to impose only those costs that the state’s legislature had separately authorized by statute. *People v. Cunningham*, 852 N.W.2d 118 (Mich. 2014).

³⁶⁴ See HIGHSMITH, COMMERCIALIZED (IN)JUSTICE, *supra* note 1, at 21 (observing that “[t]he business model of kickback payments by private companies to government . . . is largely responsible for the aggressive cost-shifting to vulnerable families that characterizes the corrections industry” and that “[t]hese kickbacks function as de facto taxes or government fees—often assessed without authorization by any legislative body and seized from vulnerable families who are ill-positioned to pay”).

³⁶⁵ See *Pearson v. Hodgson*, 363 F. Supp. 3d 197, 204 (D. Mass. 2018).

³⁶⁶ See, e.g., Ariel Jurow Kleiman, *Nonmarket Criminal Justice Fees*, 71 HASTINGS L.J. (forthcoming 2020) (available on SSRN).

³⁶⁷ *Pearson*, 363 F. Supp. 3d at 204–05.

Antitrust Claims

Because prison retailers can use their market power to harm consumers, consumers may be able to challenge certain trade practices of the prison retail industry under section 4 of the Clayton Act.³⁶⁸ Aspects of prison retailing relevant to such antitrust claims include vendor exercise of monopoly power, the oligopoly in the correctional telecommunications market, and collusion between vendors and facilities in setting prices.

Practitioners should evaluate potentially relevant antitrust theories and concepts, such as the concept of an essential facility. With the growth of prison retailing, incarcerated people increasingly are expected to spend money on various goods and services, thus emphasizing the paramount importance of vendors' ability to accept payments from trust accounts. Accordingly, if a communications or commissary vendor also wins a contract to administer a facility's inmate trust account, that firm may enjoy a bottleneck monopoly,³⁶⁹ and may use that power both to extract fees from family members who often transfer money into their loved one's account and prevent competition from other prison retailers who cannot easily access that trust account.

The larger viability of antitrust claims in the prison retail context depends in part on further research regarding the size and composition of the market. Although this additional information is needed, it is worth noting one recent development that indicates that regulators are aware of the consolidation occurring within the ICS marketplace and the resulting lack of competition. In June 2018, Securus sought FCC permission to acquire ICS carrier Inmate Calling Solutions, LLC (doing business as ICSolutions),³⁷⁰ a wholly owned subsidiary of commissary company Access Corrections and the third largest ICS carrier in the market.³⁷¹ Moody's Investor Service noted that though the acquisition was "costly" for Securus, it would "eliminate[] an aggressive competitor in the smaller facility space comprised of local and county jails."³⁷²

The *Wright* petitioners (see page 37) and others challenged the acquisition.³⁷³ Ultimately, after an extended review by the FCC and the U.S. Department of Justice, Securus and ICSolutions terminated the transaction.³⁷⁴ The abandonment of the merger was announced as a voluntary action by the parties. However, the public statement of FCC Chairman Pai suggests that the FCC was genuinely skeptical about the merger.³⁷⁵

³⁶⁸ 15 U.S.C. § 15.

³⁶⁹ See generally James McAndrews, *Antitrust Issues in Payment Systems: Bottlenecks, Access, and Essential Facilities*, FED. RESERVE BANK OF PHILADELPHIA: BUSINESS REVIEW 3 (Sept. 1995).

³⁷⁰ Joint Application, In the Matter of Joint Application of TKC Holdings, ICSolutions, and Securus Technologies for Grant of Authority, WC Dkt. No. 18-193 (June 12, 2018).

³⁷¹ Raher, *The Company Store and the Literally Captive Market*, *supra* note 1, at 75.

³⁷² [MOODY'S SAYS SECURUS' RATINGS UNCHANGED FOLLOWING ADD-ON TO TERM LOAN](#), (May 7, 2018).

³⁷³ Aleks Kajstura, [Families and advocates ask FCC to stop phone giant's further expansion](#), PRISON POL'Y INITIATIVE BLOG (July 17, 2018).

³⁷⁴ Press Release, U.S. Dep't of Just., Antitrust Div., [Securus Technologies Abandons Proposed Acquisition of Inmate Calling Solutions after Justice Department and the Federal Communications Commission Informed Parties of Concerns](#) (Apr. 3, 2019).

³⁷⁵ Press Release, Fed. Comm'ns Comm'n, [Chairman Pai Statement on Decision by Inmate Calling Services Providers to Withdraw Merger Application](#) (Apr. 2, 2019), ("EC staff concluded that this deal posed significant competitive concerns and would not be in the public interest. I agree.").

IV. DEBT COLLECTION BY PRIVATE CONTRACTORS

State and local governments are increasingly outsourcing the collection of criminal justice debts to private contractors.

Commercial bail and prison retailing are not the only instances of privatization within the criminal legal system that give rise to consumer abuses. State and local governments are increasingly outsourcing the collection of criminal justice debts (resulting from fines, fees, and other charges imposed on criminal defendants) to private contractors.³⁷⁶

These private debt collectors often are authorized to charge the debtor significant collection costs. Some states expressly allow debt collectors to collect fees and costs from individuals on top of the principal owed. In Florida, for example, municipal debt collectors may add a 40% surcharge to debts collected on behalf of local courts.³⁷⁷

Where private collectors engage in unfair or abusive debt collection practices, advocates should determine whether their clients may benefit from the Fair Debt Collection Practices Act (“FDCPA”) and state analogs. The FDCPA protects against a range of deceptive, misleading, abusive, or unfair debt collection practices and provides a private right of action; a successful plaintiff may recover actual and statutory damages, and attorney’s fees and costs.³⁷⁸ In determining whether the FDCPA applies, advocates must consider two threshold questions: (1) whether the entity collecting the debt is a covered “debt collector” and (2) whether the underlying obligation is a “debt.”

A. Applying the Fair Debt Collection Practices Act to Private Debt Collection Companies

The FDCPA does not apply to original creditors (i.e., the entity to whom the debt was owed originally) or to “any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties.”³⁷⁹ However, the statute does apply to private debt collection companies.

The original creditor exclusion generally is not an obstacle here because, unlike in the commercial bail context, these companies collect debt on behalf of another entity—the government. Courts have concluded that the FDCPA applies to private, outside debt collectors, even where the law expressly authorizes them to serve as debt collectors.³⁸⁰

³⁷⁶ SHAFROTH, ET AL., CONFRONTING CRIMINAL JUSTICE DEBT, *supra* note 1, at 122; *see also* Kornya, et al., *Crimsumerism*, *supra* note 1, at 140.

³⁷⁷ FLA. STAT. § 28.246; *see also* FLA. STAT. § 938.35.

³⁷⁸ National Consumer Law Center, *Fair Debt Collection* §11.1 (9th ed. 2018).

³⁷⁹ 15 U.S.C. § 1692a.

³⁸⁰ Kornya, et al., *Crimsumerism*, *supra* note 1, at 142–43; HIGHSMITH, COMMERCIALIZED (IN)JUSTICE, *supra* note 1, at 39; SHAFROTH, ET AL., CONFRONTING CRIMINAL JUSTICE DEBT, *supra* note 1, at 123; *see also* Gillie v. Law Office of Eric A. Jones, L.L.C., 785 F.3d 1091 (6th Cir. 2015) (rejecting argument by debt collection firm appointed by Ohio Attorney General to collect state-connected student loans that it was excluded from the FDCPA as an “officer of the state”), *rev’d on other grounds and remanded sub nom.* Sheriff v. Gillie, 136 S. Ct. 1594 (2016), and *cert. granted, judgment vacated sub nom.* Jones v. Gillie, 136 S. Ct. 2446 (2016).

The more difficult obstacle to overcome when arguing for FDCPA coverage is the requirement that the underlying monetary obligation constitute a “debt.” The FDCPA defines debt as an obligation to pay arising out of a transaction . . . primarily for personal, family, or household purposes.³⁸¹ In the government debt context, courts have interpreted this definition narrowly, generally concluding that the term only covers consensual *quid pro quo* agreements to pay governments for services, and not unilaterally imposed monetary penalties.³⁸² There is good reason to believe that this construction is overly narrow, and that courts have wrongly added a requirement that a transaction be “consensual” to give rise to a debt under the FDCPA.³⁸³ Nonetheless, for now, the term “debt” has largely been interpreted by courts to exclude punitive government fines and, arguably, victim restitution.³⁸⁴

Even under this cramped interpretation of “debt,” advocates still may argue that “user fees,” such as pay-to-stay incarceration fees, indigent defense reimbursement and other fees associated with trial or representation costs, and supervision fees constitute “debts” under the FDCPA.³⁸⁵ In building their arguments, advocates may look to cases finding that unpaid traffic tolls, parking fees and related nonpayment penalties for municipal lots, and utility user fees constitute debts within the meaning of the FDCPA.³⁸⁶ The more consensual an obligation is and the more similar it appears to a private marketplace transaction, the more likely that courts will find the FDCPA applicable.

Even if something does not constitute a “debt” within the meaning of the FDCPA, state debt collection laws or state UDAP statutes may apply.

Advocates considering cases involving criminal legal system debt collection also should recall that even if something does not constitute a “debt” within the meaning of the FDCPA, state debt collection laws³⁸⁷ or state Unfair and Deceptive Acts and Practices (“UDAP”) statutes³⁸⁸ may apply. UDAP laws might be useful tools because they provide a broad cause of action for unfair and deceptive practices generally, though the coverage and applicability to debt collection practices varies from state to state.³⁸⁹

³⁸¹ 15 U.S.C. § 1692a(5).

³⁸² See, e.g., *Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379, 407 (3d Cir. 2000); see generally National Consumer Law Center, *Collection Actions* § 11.7.4.3 (4th ed. 2017).

³⁸³ See National Consumer Law Center, *Collection Actions* § 11.7.4.3 (4th ed. 2017); see also National Consumer Law Center, *Fair Debt Collection* § 4.4.2.3 (9th ed. 2018).

³⁸⁴ See, e.g., *Gulley v. Markoff & Krasny*, 664 F.3d 1073, 1074–75 (7th Cir. 2011) (municipal fines do not qualify as debts); *Herrera v. AllianceOne Receivable Mgmt., Inc.*, 2015 WL 3796123 (S.D. Cal. June 18, 2015) (traffic fines); *Worley v. Mun. Collections of Am., Inc.*, No. 14 C 2418, 2015 WL 890878 (N.D. Ill. Feb. 27, 2015) (municipal fines); *Stubbs v. City of Center Point, Alabama*, 988 F. Supp. 2d 1270, 1276 (N.D. Ala. 2013) (“[A] traffic ticket does not constitute a ‘debt’ under the FDCPA.”); *Gibson v. Prof'l Account Mgmt.*, 2011 WL 6019958 (E.D. Mich. Dec. 1, 2011) (parking ticket); *Harper v. Collection Bureau, Inc.*, 2007 WL 4287293 (W.D. Wash. Dec. 4, 2007) (court fine resulting from an arrest); see also SHAFROTH, ET AL., CONFRONTING CRIMINAL JUSTICE DEBT, *supra* note 1, at 124 (explaining that the underlying monetary obligation does not constitute a debt where the debt obligation arise from a fine relating to a debtors failure to pay a different obligation to the government).

³⁸⁵ Kornya, et al., *Crimsumerism*, *supra* note 1, at 141.

³⁸⁶ See National Consumer Law Center, *Collection Actions* § 11.7.4.3 (4th ed. 2017); see also *Franklin v. Parking Revenue Recovery Servs., Inc.*, 832 F.3d 741 (7th Cir. 2016); *Brown v. Transurban USA, Inc.*, 144 F. Supp. 3d 809, 842 (E.D. Va. 2015).

³⁸⁷ See generally National Consumer Law Center, *Fair Debt Collection* § 16.2 (9th ed. 2018).

³⁸⁸ *Id.* § 16.3.

³⁸⁹ For a state-by-state summary of each state UDAP statute’s coverage of debt collection, see National Consumer Law Center, *Fair Debt Collection* § 16.3.3.6 (9th ed. 2018).

B. Unfair and Abusive Practices Prohibited by the Fair Debt Collection Practices Act

Where the FDCPA is applicable, the statute protects debtors against a range of deceptive, abusive, and unfair practices. In the criminal justice debt context, the most relevant prohibited conduct includes making false threats of arrest for non-payment; communicating with third parties about the debt; misrepresenting the character, amount, or status of a debt; failing to abide by requests to cease further communications; and using deceptive or misleading practices to collect the debt.³⁹⁰

For instance, an advocate might argue that a private debt collection company's conduct is misleading under the FDCPA if the company threatens that nonpayment may result in incarceration without informing the debtor that a court generally must determine that an individual had the ability to pay the debt prior to ordering incarceration for nonpayment.³⁹¹

In making this argument, advocates should bear in mind that the FDCPA is a strict liability statute, meaning that it does not depend on whether the debt collector intended to deceive or mislead the debtor.³⁹² Further, most courts apply the "least sophisticated consumer" standard, which asks whether a debt collector's communication would tend to mislead an unsophisticated but reasonable consumer.³⁹³ If, for instance, if a debtor did not know that she may be incarcerated only if she fails to pay and is financially able to pay, she—as an unsophisticated but reasonable consumer—would likely be misled into believing that she would be incarcerated if she did not pay the debt.³⁹⁴ As a result of the debt collector's misleading statement, the debtor might be persuaded to pay money that she would otherwise dedicate to necessities, potentially leading to harms such as eviction, foreclosure, and hunger.³⁹⁵

³⁹⁰ Kornya, et al., *Crimsumerism*, *supra* note 1, at 143 (citing 15 U.S.C. §§ 1692e(4)–(5), c(b), e(2), b(6), c(a)(2), respectively).

³⁹¹ *Id.*; *Bearden v. Georgia*, 461 U.S. 660, 673 (1983).

³⁹² National Consumer Law Center, *Fair Debt Collection* § 3.2.4 (9th ed. 2018); *see also* *Arias v. Gutman, Mintz, Baker & Sonnenfeldt L.L.P.*, 875 F.3d 128, 134 (2d Cir. 2017); *Oliva v. Blatt, Hasenmiller, Leibsker & Moore L.L.C.*, 864 F.3d 492, 502 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 1283, 200 L. Ed. 2d 469 (2018); *Stratton v. Portfolio Recovery Assocs., L.L.C.*, 770 F.3d 443 (6th Cir. 2014); *Tourgeman v. Collins Fin. Servs., Inc.*, 755 F.3d 1109 (9th Cir. 2014), *as amended on denial of reh'g and reh'g en banc* (Oct. 31, 2014); *Crawford v. LVNV Funding, L.L.C.*, 758 F.3d 1254, 1259 n.4 (11th Cir. 2014); *Glover v. F.D.I.C.*, 698 F.3d 139 (3d Cir. 2012); *McLean v. Ray*, 488 Fed. Appx. 677 (4th Cir. July 17, 2012); *Picht v. John R. Hawks, Ltd.*, 236 F.3d 446, 451 (8th Cir. 2001).

³⁹³ *See, e.g.*, *Altman v. J.C. Christensen & Assoc., Inc.*, 786 F.3d 191 (2d Cir. 2015); *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1194 (11th Cir. 2010); *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1163 (9th Cir. 2006); *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993); *Smith v. Transworld Sys., Inc.*, 953 F.2d 1025, 1028 (6th Cir. 1992); *Graziano v. Harrison*, 950 F.2d 107, 111 (3d Cir. 1991); *see generally* National Consumer Law Center, *Fair Debt Collection* §§ 3.2.1.4, 7.2.3 (9th ed. 2018).

³⁹⁴ A similar sort of violation-by-omission occurred in a recent Seventh Circuit case. *See Pantoja v. Portfolio Recovery Assoc.*, 852 F.3d 679 (7th Cir. 2017), *cert denied*, 138 S. Ct. 736 (2018). In *Pantoja*, the court determined that corresponding with debtors without also warning them that certain actions that they took could revive a debt outside of the statute of limitations violated the FDCPA. *Id.* at 687.

³⁹⁵ Kornya, et al., *Crimsumerism*, *supra* note 1, at 144.

Private Probation Companies

Private probation is another way that for-profit companies have infiltrated the criminal legal system and imposed additional costs on impacted individuals. Some states allow counties and municipalities to contract with private probation companies to administer their probation systems, particularly for lower level offenses.³⁹⁶ Private companies often receive compensation through user fees paid by those on probation rather than through a contract price paid by the government. This arrangement imposes the cost of probation on the individual subject to it.

Typically, individuals must pay a monthly fee to the private company. Human Rights Watch conducted an extensive study of private probation in the South and concluded that, under the basic model, the probation companies charge all individuals on probation flat monthly supervision fees, and courts are contractually obligated to sentence these individuals to pay the fees.³⁹⁷ If an individual cannot pay the supervision fee, they often may enter into a payment plan, which can result in additional charges, such as interest, fees, and/or surcharges.³⁹⁸

Private probation costs may not end there. Private probation may include other requirements that carry additional fees and costs, including drug testing, required counseling or other treatments or courses, and electronic monitoring.³⁹⁹ Companies also may charge administrative fees for enrollment, reinstatement, records, or late or partial payments.⁴⁰⁰

The poorest people may end up paying the highest amount of supervision fees. In some states, the judge may shorten the supervised probation period if the individual on probation entirely pays off all fees, fine, and other costs.⁴⁰¹ In contrast, if an individual fails to make all the required payments within the probation period, the judge may extend supervised probation until the individual pays all of these debts, so the individual incurs more monthly fees.⁴⁰² Private probation schemes along these lines have been challenged on constitutional grounds in court.⁴⁰³

Coercive or unfair debt collection practices may be particularly likely when jurisdictions make payment of criminal justice debts a condition of probation and use private probation companies to collect such payments. These companies then may have a strong financial interest in coercing payments, coupled with tremendous coercive power stemming from their role in determining whether an individual's probation is extended or revoked.

³⁹⁶ HIGHSMITH, COMMERCIALIZED (IN)JUSTICE, *supra* note 1, at 30–31. Though this section is focused on post-trial supervision, in many jurisdictions, the same companies also supervise individuals on pre-trial release or in diversion programs. Human Rights Watch, [Set Up to Fail](#) at 20 (Feb. 20, 2018). Additionally, in some jurisdictions, individuals who cannot pay their court fines and fees are placed on probation until the balance is paid. This form of probation, referred to as “pay only probation,” is really a form of collection and does not entail traditional supervision. Kornya, et al., *Crimsumerism*, *supra* note 1, at 141.

³⁹⁷ Human Rights Watch, [Profiting from Probation: America’s “Offender-Funded” Probation Industry](#) (Feb. 5, 2014).

³⁹⁸ Human Rights Watch, [Set Up to Fail](#), *supra* note 396, at 40–41.

³⁹⁹ *Id.* at 42–44.

⁴⁰⁰ *Id.* at 40.

⁴⁰¹ *Id.* at 41.

⁴⁰² *Id.*

⁴⁰³ See, e.g., *Rodriguez v. Providence Cmty. Corr., Inc.*, 191 F. Supp. 3d 758, 776 (M.D. Tenn. 2016), *appeal dismissed due to parties’ stipulation to dismiss*, 2018 WL 6978402 (6th Cir. Sept. 28, 2018); see also National Consumer Law Center, [Collection Actions](#) § 11.7.1.2 (4th ed. 2017) (noting that challenges to criminal justice debt schemes that irrationally discriminate on the basis of wealth, or that discriminatorily infringe on a fundamental right or interest of the poor, may be viable under the Equal Protection Clause).

V. POTENTIAL OBSTACLES TO LITIGATION

In addition to the industry- and claim-specific obstacles to litigation mentioned in the preceding sections, like those presented by the McCarran-Ferguson Act and statutory scope issues, advocates should be aware of general obstacles that may arise in consumer litigation involving the bail and corrections industry. This section highlights two potential obstacles that are of particular concern when litigating claims against private companies involved in the criminal legal system: arbitration clauses and the filed-rate doctrine.

In addition to these obstacles, which are largely specific to litigating against private entities, plaintiffs may encounter defenses that are common when litigating against government actors and entities claiming to act on behalf of the government. These include immunity and state action defenses, which are beyond the scope of this guide.⁴⁰⁴

A. Arbitration

One potential obstacle to challenging bail and corrections industry abuses through consumer litigation is the existence of mandatory pre-dispute arbitration agreements that the company involved often includes in contracts or terms and conditions. In brief, a “mandatory pre-dispute arbitration agreement” is a contractual provision, agreed to in advance of any dispute or claim, which requires a party to take any claims that may later arise to arbitration instead of to court.⁴⁰⁵ Often called “forced arbitration clauses” in the consumer context because consumers rarely have a realistic way to avoid them, these fine-print terms buried in contracts require consumers to give up the right to assert claims in court as a condition of receiving goods or services from the company. The arbitration clause requires the individual to bring their claims in a private forum selected by the company instead. In the vast majority of cases, the arbitration agreement will also force consumers to bring their claims individually—that is, without access to the class action procedures that are often critical in affirmative litigation.

In general, businesses have been able to enforce arbitration against consumers, workers, and others this way because of the Supreme Court’s expansive interpretations of the Federal Arbitration Act (“FAA”).⁴⁰⁶ A series of recent Supreme Court decisions has expanded the FAA’s reach to cover almost all consumer (and employment) contracts, and has allowed drafters to include so-called “class waivers” in their arbitration agreements to force individuals to give up their right to participate in class actions.⁴⁰⁷

⁴⁰⁴ For a discussion of immunity issues in the criminal justice debt context, see National Consumer Law Center, [Collection Actions](#) § 11.7.6 (4th ed. 2017).

⁴⁰⁵ For a thorough treatment of arbitration agreements, including in depth discussions of challenging the enforceability of arbitration agreements and pursuing consumer claims in arbitration, see National Consumer Law Center, [Consumer Arbitration Agreements](#) (8th ed. 2020).

⁴⁰⁶ 9 U.S.C. §§ 1–16; see generally National Consumer Law Center, [Consumer Arbitration Agreements](#) § 3.3.3.1 (8th ed. 2020).

⁴⁰⁷ *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013); *AT&T Mobility L.L.C. v. Concepcion*, 563 U.S. 333 (2011).

Mandatory arbitration provisions and class-action prohibitions are ubiquitous in the terms of prison retail sales contracts.

These mandatory arbitration provisions and class-action prohibitions are ubiquitous in the terms of prison retail sales contracts. For example, GTL includes a broad arbitration clause and class-action ban in its terms.⁴⁰⁸ JPay publishes separate terms and conditions for its various services and products, all of which require mandatory arbitration of claims.⁴⁰⁹

In fighting the enforcement of arbitration agreements (and class waivers), advocates should look first to the conventional bases for avoiding arbitration. First, because arbitration is a creature of contract, before a court can compel arbitration of any dispute it must be assured that the parties actually have entered into an agreement to arbitrate.⁴¹⁰ The fact that a consumer has not read or understood an arbitration agreement generally is not sufficient to establish that she has not entered into an agreement to arbitrate. However, the coercive nature of prison retail and other corrections industry “agreements,” wherein people who are incarcerated may not have the option to forgo a “service” or have access to contract terms and conditions may undermine contract formation.⁴¹¹

Second, advocates should look for features of the arbitration agreement that might render it unconscionable or otherwise unenforceable as a matter of federal law, such as because it conflicts with the plaintiff’s ability to vindicate federal rights.⁴¹² These challengeable features may include arbitration agreements that force consumers to waive the right to bring certain substantive claims or recover certain remedies otherwise available under law, or terms that require payment of excessive costs and fees in arbitration.

Advocates have had some success resisting arbitration agreements in the prison retail context. For example, GTL lost a motion to compel arbitration as to most of the named plaintiffs in a New Jersey class action because most of the plaintiffs had created their accounts through GTL’s automated interactive voice recognition system, and had not taken any affirmative steps to demonstrate acceptance of the arbitration provision.⁴¹³ Further, courts have largely declined to enforce arbitration provisions in the release card context, finding that cardholders were given no other way to obtain their money, and therefore any agreement to arbitrate was not

⁴⁰⁸ GLOBAL TEL*LINK CORP., [TERMS & CONDITIONS](#) § R (dated Mar. 30, 2015).

⁴⁰⁹ *E.g.*, JPAY, INC., PAYMENTS TERMS OF SERVICE, *supra* note 327, ¶ 15; see also [Comments of Prison Policy Initiative](#) at 5, *Prepaid Accounts under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z)*, Dkt. No. CFPB-2014-0031 (Mar. 18, 2015).

⁴¹⁰ See, *e.g.*, *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1036 (7th Cir. 2016) (“[t]hat text distracted the purchaser from the Service Agreement by informing him that clicking served a particular purpose unrelated to the Agreement.”); *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014) (“[W]here a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on—without more—is insufficient to give rise to constructive notice.”); *Schnabel v. Trilegiant Corp.*, 697 F.3d 110 (2d Cir. 2012); see also National Consumer Law Center, [Consumer Arbitration Agreements](#) § 4 (8th ed. 2020).

⁴¹¹ See Comments of Stephen Raheer, Prison Pol’y Initiative, *supra* note 233, at 5 & n.25.

⁴¹² See National Consumer Law Center, [Consumer Arbitration Agreements](#) § 8 (8th ed. 2020).

⁴¹³ *James v. Global Tel*Link Corp.*, No. 13-4989, 2016 WL 589676, at *4–7 (D.N.J. Feb. 11, 2016), *aff’d*, 852 F.3d 262 (3d Cir. 2017). Also note that the broad arbitration and class-action ban in GTL’s terms fails to identify an arbitral forum, which raises further questions about enforceability.

voluntary.⁴¹⁴ Advocates should remain wary, however, as the prison retail industry presumably learns from its missteps and engages in ongoing efforts to fashion more ironclad arbitration provisions.

B. Filed-Rate Doctrine

In both bail and telecommunications cases, advocates may face arguments that the filed-rate doctrine bars their claims. The relevance of this doctrine and the availability of arguments against its application will vary based on the jurisdiction, the cause of action selected, and the relief sought. Accordingly, this section provides an overview of the doctrine and some general arguments that the doctrine does not preclude suit.

The filed-rate doctrine bars lawsuits that involve challenges to the reasonableness of rates contained in a filed tariff.

The filed-rate doctrine is a court-created rule that bars lawsuits that involve challenges to the reasonableness of rates contained in a filed tariff.⁴¹⁵ In other words, the doctrine precludes lawsuits challenging rates that a regulatory agency required to be filed or that would have the consequence of imposing rates other than the filed rates.⁴¹⁶

Because the doctrine encompasses regulated telecommunication rates, as well as the insurance industry and rates filed with state agencies (though the Supreme Court has not ruled on the extension of the doctrine to the latter two contexts),⁴¹⁷ it may be implicated in bail and telecommunications cases. In the prison communications context, a given service potentially could be covered by a publicly filed tariff. Further, as discussed (see page 11), bail bonds are a form of surety insurance, and some states require the insurance companies that underwrite bail

⁴¹⁴ Reichert v. Keefe Commissary Network, No. 17-cv-5848-RBL, 2018 WL 2018452, at *2 (W.D. Wash. May 1, 2018) (denying motions to compel arbitration; —A contracts, including those to arbitrate disputes, must have mutual assent, and Defendants' contract to arbitrate is unenforceable and unconscionable under Washington law."); Brown v. Stored Value Cards, Inc., No. 15-cv-01370-MO, 2016 WL 755625, at *4 (D. Or. Feb. 25, 2016) (denying motion to compel arbitration; —[Plaintiff] had to take the card and had to work through the Defendants' system in order to get her money back. . . . It is not clear that Plaintiff was presented with a meaningful choice, as such I DENY the Motion to Compel."); see also Regan v. Stored Value Cards, Inc., 85 F. Supp.3d 1357 (N.D. Ga. 2015), *aff'd*, 608 Fed. Appx. 895 (11th Cir. 2015) (defendants argued that plaintiff had impliedly accepted or ratified the cardholder agreement through his use of the release card; court denied motion to compel arbitration and ordered an evidentiary hearing on whether a contract had been formed; case settled before evidentiary hearing).

⁴¹⁵ 64 AM. JUR. 2D *Public Utilities* § 62 (2011); Town of Norwood, Mass. v. New England Power Co., 202 F.3d 408, 416 (1st Cir. 2000) (—[The filed-rate doctrine] limits attacks outside the regulatory process on tariffed rates filed with . . . regulatory agencies.”).

⁴¹⁶ Gonzalez, *supra* note 9, at 1425 n.196; see also Carlin v. DairyAmerica, Inc., 705 F.3d 856, 867 (9th Cir. 2013) (—At its most basic, the filed-rate doctrine provides that state law, and some federal law (e.g. antitrust law), may not be used to invalidate a filed rate nor to assume a rate would be charged other than the rate adopted by the federal agency in question.”) (citation and internal quotation marks omitted); Davel Commc'ns, Inc. v. Qwest Corp., 460 F.3d 1075, 1084 (9th Cir. 2006) (—[T]he doctrine bars suits challenging rates which if successful would have the effect of changing the filed tariff.”) (citation and internal quotation marks omitted); Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 18 (2d Cir. 1994) (—Simply stated, the doctrine holds that any filed rate—that is, one approved by the governing regulatory agency—is per se reasonable and unassailable in judicial proceedings brought by ratepayers.”).

⁴¹⁷ See Mont.-Dakota Utils. Co. v. Nw. Pub. Serv. Co., 341 U.S. 246 (1951); Richardson v. Standard Guar. Ins. Co., 853 A.2d 955, 963 (N.J. Super. Ct. App. Div. 2004) (—We, thus align our decision with the considerable weight of authority from other jurisdictions that have applied the filed rate doctrine to ratemaking in the insurance industry.”).

bonds (the “surety” or the “surety company”) to submit a proposed maximum rate, which, subject to the insurance commissioner’s approval, is adopted on a company-by-company basis and binding on the surety.⁴¹⁸

The seminal filed-rate doctrine case is *Keogh v. Chicago & Northwest Railway Co.*,⁴¹⁹ in which the plaintiff alleged a conspiracy to fix freight transportation rates at an unnaturally high level and requested damages to the extent he had to pay inflated rates as a result of the conspiracy. The Supreme Court held that the plaintiff’s complaint had to be dismissed because, even assuming the conspiracy allegations were true, the rates had been filed with and deemed reasonable by the Interstate Commerce Commission.⁴²⁰

The filed-rate doctrine may be inapplicable because the lawsuit does not, in fact, challenge rates contained in a filed tariff.

Two principles supporting the doctrine have emerged based on the Court’s reasoning in *Keogh*.⁴²¹ The first—known as the “nondiscrimination strand”—reflects the concern that permitting individual ratepayers to attack filed rates would lead to discrimination in the rates charged and also “undermine the congressional scheme of uniform rate regulation.”⁴²² The second—known as the “nonjusticiability” or “administrative deference” strand—asserts that attacks on filed rates would unnecessarily enmesh the courts, which are not institutionally well-suited to engage in retroactive rate setting, in the rate-making process.⁴²³

With the caveat that advocates must conduct jurisdiction-specific research, advocates should consider several possible arguments against the application of the doctrine. First, advocates may be able to argue that the filed-rate doctrine is inapplicable because the lawsuit does not, in fact, challenge rates contained in a filed tariff.⁴²⁴ At the outset, advocates should determine whether there is a publicly filed tariff that covers the bail scheme or the relevant telecommunications service. If not, then the doctrine should not apply.

⁴¹⁸ See, e.g. CAL. CODE REGS. tit. 10 § 2094 (“Every bail permittee shall file with the commissioner a schedule of charges to be made for bail.”); *id.* § 2094.1 (“No bail permittee shall issue or deliver a bail bond except at the rates most recently filed with the commissioner”); IOWA CODE ANN. § 515F.5 (requiring insurers not specifically exempted to file rates with the commissioner of insurance).

⁴¹⁹ 260 U.S. 156 (1922); see also *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986) (confirming *Keogh*’s holding); see generally Vonda Mallicoat Laughlin, *The Filed Rate Doctrine and the Insurance Arena*, 18 CONN. INS. L.J. 373 (2012) (discussing the origins of the filed-rate doctrine).

⁴²⁰ *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156, 161–62 (1922).

⁴²¹ The Ninth Circuit’s articulation of the rationales for the doctrines differs slightly. The Ninth Circuit has stated that there are three justifications for the doctrine: (1) stabilizing rates and preventing discrimination amongst rate payers, (2) federal preemption (or the supremacy of federal law), and (3) deference to federal agency expertise (preventing the interjection of the courts into the rate-making process). *Carlin v. DairyAmerica, Inc.*, 705 F.3d 856, 867–68 (9th Cir. 2013).

⁴²² *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 19 (2d Cir. 1994) (citation and internal quotation marks omitted).

⁴²³ *Id.*

⁴²⁴ See *Nw. Pub. Commc’ns Council v. Qwest Corp.*, 538 Fed. Appx. 822, 824 (9th Cir. 2013) (filed-rate doctrine does not apply when suit “does not challenge filed rates”); Plaintiff’s Opposition to Defendants’ Motion to Dismiss at 24–25, *In re California Bail Bond Antitrust Litigation*, No. 3:19-CV-000717-JST (N.D. Cal. Aug. 14, 2019), ECF No. 68 (“The filed rate doctrine also does not apply because bail agents are not required to, and do not, seek approval from CDI or any other agency regarding discounts offered to consumers. . . . The filed rate doctrine only applies when (assuming all other conditions are met) the challenged practice is one that an agency has and exercises the authority to regulate.”).

In the telecommunications context, tariffs for any type of interstate phone service (inside or outside of prison) are no longer required under FCC rule.⁴²⁵ Instead, non-dominant carriers like inmate calling services providers must publicly disclose rates and terms (confusingly, some providers comply with this obligation by posting a document that they refer to as a “tariff” even though it is governed by the FCC’s detariffing order).⁴²⁶ When issuing its detariffing rule, the FCC concluded that elimination of tariffs in turn would eliminat[e] the ability of carriers to invoke the “filed-rate” doctrine.⁴²⁷ On the other hand, some commentators have argued that the FCC lacks the authority to abolish this judicially created rule.⁴²⁸ The resulting confusion has led some courts to apply the doctrine to ICS rate challenges, even though such rates have long been detariffed at the federal level and thus the filed-rate doctrine should not apply.⁴²⁹

At the state level, when the prospect of robust regulation threatens to erode profits, ICS carriers have been known to strategically detariff services in order to escape regulatory jurisdiction⁴³⁰ (though such efforts are not always successful⁴³¹). The filed-rate doctrine should not apply to these detariffed services.⁴³²

⁴²⁵ Second Report & Order, In the Matter of Policy & Rules Concerning the Interstate, Interexchange Marketplace, Dkt. No. 96-61, 11 FCC Rcd. 20730 (Oct. 31, 1996).

⁴²⁶ *Id.* ¶ 84, 11 FCC Rcd. at 20776. The posting of rates is meant to allow consumers to make informed choices—a concept that is has no relevance in the world of monopoly ICS contracts.

⁴²⁷ *Id.* ¶ 55, 11 FCC Rcd. at 20762; see also *Ting v. AT&T*, 319 F.3d 1126, 1139 (9th Cir. 2003) (filed-rate doctrine “did not survive detariffing”).

⁴²⁸ See Charles H. Helein, Jonathan S. Marashlian, & Loubna W. Haddad, *Detariffing and the Death of the Filed Tariff Doctrine: Deregulating in the “Self” Interest*, 54 FED. COMM. L.J. 281 (2002).

⁴²⁹ *E.g.*, *Daleure v. Kentucky*, 119 F. Supp. 2d 683, 686 (W.D. Ky. 2000) (applying the filed-rate doctrine upon finding “state and federal regulatory agencies approved all of the . . . rates” challenged in the complaint (emphasis added)). In contrast, the correct result was reached, at least at the motion to dismiss stage, in *Antoon v. Securus Tech.*, No. 5:17-cv-5008, 2017 WL 2124466 (W.D. Ark. May 15, 2017), where the court denied a motion to dismiss under filed-rate doctrine because Securus utilizes VoIP technology and the Arkansas Public Service Commission lacks jurisdiction over VoIP services or providers. *Id.* at *6; see also *Ting v. AT&T*, 319 F.3d 1126, 1139 (9th Cir. 2003) (filed-rate doctrine “did not survive detariffing”).

⁴³⁰ See Complaint ¶¶ 47–49, *Pearson v. Hodgson*, No. 18-cv-11130-IT (D. Mass. May 30, 2018), ECF No. 1-1 (when Massachusetts Dept. of Telecommunications & Cable imposed intrastate ICS rate caps, Securus withdrew its tariff and charged rates in excess of the new caps, alleging that its service is delivered via VoIP and therefore exempt from state regulation under Mass. Gen. Laws ch. 25C, § 6A); see also Plaintiffs’ Memorandum of Law in Opposition to Securus Technologies, Inc.’s Motion to Dismiss at 14–17, *Pearson v. Hodgson*, No. 18-cv-11130-IT (D. Mass. May 30, 2018), ECF No. 35.

⁴³¹ See Order Denying Withdrawal of Tariff, *In re Securus Tech.*, Dkt. No. TF-2017-0041 (Iowa Utils. Bd., Feb. 9, 2018) (denying Securus’s motion to withdraw its tariff because, even though the company was no longer a “telephone utility” under state law, it was still an “alternative operator service company,” which is required to file a tariff under state law (see IOWA CODE ANN. § 476.91)).

⁴³² Advocates may be able to make the related argument that the filed-rate doctrine should not apply due to the lack of regulation. See *In re Transpacific Passenger Air Transportation Antitrust Litig.*, 69 F. Supp. 3d 940, 961 (N.D. Cal. 2014) (“The DOT effectively abdicated its authority over the unified air fares in 1999, and there is no evidence of any ongoing regulation of the unified air fares thereafter. Accordingly, Defendants may not use the filed rate doctrine as a shield from civil liability.”), *aff’d and remanded sub nom.*, *Wortman v. All Nippon Airways*, 854 F.3d 606 (9th Cir. 2017); Plaintiffs’ Memorandum of Law in Opposition to Securus Technologies, Inc.’s Motion to Dismiss at 17, *Pearson v. Hodgson*, No. 18-cv-11130-IT (D. Mass. May 30, 2018), ECF No. 35 (“Securus argues that it has neither a state nor federal regulator. Therefore, there is no administrative agency to hear or resolve Plaintiff’s claims even if the claims were about the rates Securus charged. Accordingly, it would be appropriate for Plaintiff’s claims to be heard by a court of law.”).

Even if there is a filed tariff, the filed-rate doctrine may not apply because the lawsuit does not challenge the specific rates charged or the tariff does not encompass the challenged practice.

Even if there is a filed tariff, advocates nonetheless may be able to argue that the filed-rate doctrine does not apply because the lawsuit does not challenge the specific rates charged or the tariff does not encompass the challenged practice.⁴³³ In one case, the federal district court rejected the argument that the filed-rate doctrine barred plaintiffs' claim that additional fees charged by Securus—the company with an exclusive contract to provide inmate calling services to all correctional facilities run by the Bristol County Sheriff's Office—to pay the Sheriff's Office site commissions violated Massachusetts law.⁴³⁴ The court concluded that the plaintiffs' claims were independent of any challenges to the specific

rates charged," explaining that "[n]othing about Securus's filed tariffs deals with the issue of what Securus is doing with the revenue that it receives from the telephone calls, and the filed-rate doctrine does not shield Securus from claims of unfair or deceptive acts relating to their use of these funds."⁴³⁵

Advocates may be able to make similar arguments if they seek to challenge terms, agreements, riders, or forms that never were filed with the regulator. Advocates also may be able to assert that the doctrine does not bar claims centering on installment fees or other charges not encompassed by filed rates.⁴³⁶

Second, in the bail context, advocates may be able to assert that there is no "filed-form" doctrine that would bar suit. The fact that a surety company has filed forms with the state regulator does not mean that the filed-rate doctrine precludes challenges to those agreements in court. In one case, the federal district court certified to the Alabama Supreme Court the question of whether an insured could recover damages under Alabama law where the policy expressly excluded such coverage in a form approved by the state insurance regulator.⁴³⁷ The Alabama Supreme Court rejected the argument that the filed-rate doctrine barred the counterclaims because the Department of Insurance had approved the policy language that included the exclusion, reasoning that the case "is not a rate case."⁴³⁸ The Alabama Supreme Court emphasized that the Department of Insurance's "approval of the policy language does not

⁴³³ See, e.g., *Gelb v. AT&T Co.*, 813 F. Supp. 1022, 1023, 1030 (S.D.N.Y. 1993) (holding—in a case alleging, inter alia, a violation of a consumer protection statute and fraud as a matter of federal common law—that there was nothing in the policy underpinnings of the filed-rate doctrine that would cause it to protect a defendant who unlawfully exacted payment, even at a lawful rate, and further holding that the defendant could not insulate itself from all tort claims by simply invoking the filed-rate doctrine); *id.* at 1030 (concluding that the Supreme Court "does not view the filed rate doctrine as a bar to all tort claims with an indirect nexus to the rate setting function of agencies").

⁴³⁴ *Pearson v. Hodgson*, 363 F. Supp. 3d 197, 209 (D. Mass. 2018).

⁴³⁵ *Id.*

⁴³⁶ See *Lapenna v. Gov't Employees Ins. Co.*, No. 8:05-CV-904-T-24MSS, 2007 WL 4199580, at *2 n.3 (M.D. Fla. Nov. 26, 2007) (concluding, in case where plaintiffs argued that GEICO charged them installment fees exceeding maximum permitted by state law, that "the filed rate doctrine is inapplicable here because this dispute centers on installment fees, which are distinct from premium rates"), *aff'd*, 316 Fed. Appx. 894 (11th Cir. 2009).

⁴³⁷ *Peachtree Cas. Ins. Co. v. Sharpton*, 768 So. 2d 368, 369 (Ala. 2000), *opinion after certified question answered*, No. CIV. A. 97-D-771-N, 2001 WL 286919 (M.D. Ala. Mar. 20, 2001).

⁴³⁸ *Id.* at 372–73.

by itself suggest that [an insurer] may issue a policy that violates” Alabama law.⁴³⁹

Third, advocates should consider arguing that the doctrine does not bar their request for the particular type of relief alleged. For example, while a retroactive claim for money damages is likely to fail, a court may allow a claim for injunctive relief to proceed.⁴⁴⁰

Advocates also should note that, even though the filed-rate doctrine usually is invoked defensively, there is some possibility that they may be able to use it offensively. For instance, when an ICS carrier’s website includes extraordinarily exculpatory terms and conditions (see page 54), a tariff reviewed and approved by a regulator may provide greater customer relief by allowing claims based on the carrier’s gross negligence, willful neglect, or willful misconduct. Under the filed-rate doctrine, the terms in the tariff would be binding, because a carrier cannot —employ or enforce any classifications, regulations, or practices . . . except as specified in [a filed tariff].”⁴⁴¹

VI. CONCLUSION

This guide discusses how advocates can use federal and state consumer protection laws to stop some of the widespread consumer abuses occurring in the shadows of the criminal legal system. It suggests some specific tools, as well as starting points for additional research, that advocates can deploy to build their consumer law claims against actors in the bail, prison retail, and private debt collection industries.

⁴³⁹ *Id.* at 373; see also *S. Farm Bureau Life Ins. Co. v. Banko*, No. 8:06CV840T27EAJ, 2006 WL 2935281, at *2 (M.D. Fla. Oct. 13, 2006) (stating that no “filed form doctrine” under Florida law and that plaintiff failed to cite a case indicating that regulatory approval of an insurance policy form bars suits over policy language).

⁴⁴⁰ See *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 419 (1986); see also *Arsberry v. Illinois*, 244 F.3d 558, 563 (7th Cir. 2001) (“the plaintiffs in this case wanted to get a rate change, the . . . [filed-rate] doctrine . . . would kick in; but they do not, so it does not. *Eventually* they want a different rate, of course, but at present all they are seeking is to clear the decks—to dissolve an arrangement that is preventing the telephone company defendants from competing to file tariffs more advantageous to the inmates.”); *In re Transpacific Passenger Air Transportation Antitrust Litig.*, 69 F. Supp. 3d 940, 946 & n.1 (N.D. Cal. 2014), *aff’d and remanded sub nom.* *Wortman v. All Nippon Airways*, 854 F.3d 606 (9th Cir. 2017) (filed-rate doctrine applies and bars treble damages only as to the filed rates; filed-rate doctrine does not bar claims for injunctive relief) (citing *Square D Co. v. Niagra Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 422 n.28 (1986)); *Daleure v. Kentucky*, 119 F. Supp. 2d 683, 690 (W.D. Ky. 2000) (dismissing plaintiffs’ damages claims against ICS carriers under the filed-rate doctrine, but allowing claims for injunctive relief under the Sherman Act to proceed); Plaintiff’s Opposition to Defendants’ Motion to Dismiss at 25, *In re California Bail Bond Antitrust Litigation*, No. 3:19-CV-000717-JST (N.D. Cal. Aug. 14, 2019), ECF No. 68.

⁴⁴¹ *Am. Tel. & Tel. Co. v. Central Ofc. Tel.*, 524 U.S. 214, 221–22 (1998).



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