

CORPORATE MANIPULATION OF COMMERCIAL BAIL
REGULATION*James Gordon**

INTRODUCTION

When a Louisiana state court set Ronald Egana’s bail at \$26,000, Egana’s mother and close friend did what hundreds of thousands of arrestees do each year: They sought the services of a commercial bail bondsman.¹ Blair’s Bail Bonds agreed to post Egana’s bail in exchange for a twelve-percent nonrefundable premium, the state-approved rate in the jurisdiction in which Egana was arrested.² Egana’s mother and friend, however, could not afford the entire \$3,275 premium, so Blair’s agreed to allow Egana to pay in installments, provided that Egana agree to wear an ankle monitor.³ After Egana signed the agreement, Blair’s informed him for the first time that he would be charged an additional \$10 daily fee for the ankle monitor until he paid \$3,000 toward the premium.⁴ Several months later, armed bounty hunters working for Blair’s handcuffed Egana while he was at work, threatening to have him sent to jail unless he immediately paid Blair’s \$2,300.⁵ Even after Egana’s mother paid Blair’s—

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1. See Amended Complaint at 10, *Egana v. Blair’s Bail Bonds, Inc.*, No. 2:17-cv-5899, 2018 WL 2463210 (E.D. La. filed Sept. 12, 2017) [hereinafter *Egana* Complaint], <https://www.nclc.org/images/pdf/litigation/egana-1st-amended-complaint.pdf> [https://perma.cc/6GDM-4BFC]. Courts set bail for millions of defendants annually. See Color of Change & ACLU Campaign for Smart Just., *Selling Off Our Freedom: How Insurance Corporations Have Taken Over Our Bail System 2* (2017), https://www.aclu.org/sites/default/files/field_document/059_bail_report_2_1.pdf [https://perma.cc/LY9W-FSZG] (explaining that millions must turn to bail bond corporations to be released from detention). The DOJ has found that about half of persons charged with a felony post a commercial surety bond. See Brian A. Reaves, DOJ, Bureau of Just. Stat., NCJ 243777, *Felony Defendants in Large Urban Counties, 2009—Statistical Tables*, at 1 (2013), <https://www.documentcloud.org/documents/1097204-fdluc09.html> [https://perma.cc/8HFP-HWFS] (noting that, from 1990 to 2009, “[t]he percentage of pretrial releases that included financial conditions climbed from 37% to 61%, including an increase from 24% to 49% in the use of surety bonds”).

2. See *Egana* Complaint, *supra* note 1, at 10. Blair’s allegedly charged Egana more than twelve percent, including a \$25 administrative fee and \$130 in undisclosed charges. *Id.*

3. *Id.* at 10–11.

4. *Id.* at 11.

5. *Id.* at 14–15. States provide bounty hunters broad authority to arrest defendants and “surrender” them to local officials. See, e.g., N.C. Gen. Stat. § 58-71-20 (2020) (“At any

and Egana lost his job as a result of being kidnapped at work—Blair’s bounty hunters continued to harass Egana and his family, ultimately demanding and receiving an additional \$1,500.⁶ When Egana asked to have the ankle monitor removed because he had paid well above what his contract demanded—and what state law allowed—Blair’s refused, explaining that the “insurance company” that had underwritten Egana’s bond “would not allow the ankle monitor to be removed.”⁷

The “insurance company” that Blair’s referred to is among a small number of insurance corporations—often called surety companies—that dominate the commercial bail industry.⁸ Just nine companies control the thirty surety corporations that underwrite the vast majority of the \$14 billion in bail bonds written each year.⁹ Surety companies collect about \$2 billion annually, all of which necessarily involves profiting off of low-income arrestees.¹⁰ As Egana’s case illustrates, these companies dictate which arrestees avoid pretrial detention and on what terms.¹¹ They operate without substantial oversight or risk—many surety companies are registered in the Cayman Islands or Bermuda and trade outside the United States¹²—and, together, they control powerful trade associations that discourage competition and, through expensive and effective lobbying efforts, obstruct meaningful regulatory reform.¹³

time before there has been a breach of the undertaking in any type of bail or fine and cash bond the surety may surrender the defendant to the sheriff of the county in which the defendant is bonded . . .”).

6. See *Egana* Complaint, *supra* note 1, at 16.

7. *Id.* at 17.

8. See Shane Bauer, *Inside the Wild, Shadowy, and Highly Lucrative Bail Industry*, *Mother Jones* (May/June 2014), <https://www.motherjones.com/politics/2014/06/bail-bond-prison-industry> [<https://perma.cc/E3XG-AF3T>] (providing a history of surety company involvement in the commercial bail industry).

9. *Color of Change & ACLU Campaign for Smart Just.*, *supra* note 1, at 22.

10. *Id.* at 7 (“Between agents and insurance companies, the industry collects around \$2 billion a year. Estimates vary from \$1.4 to \$2.4 billion; however, opaque corporate finance reporting and varied state and local recordkeeping hide the true size of the industry.”).

11. See text accompanying *supra* note 7; see also *Color of Change & ACLU Campaign for Smart Just.*, *supra* note 1, at 32 (explaining how bail corporations control the contract terms of the bail bond agreement).

12. *Color of Change & ACLU Campaign for Smart Just.*, *supra* note 1, at 2 (“Bail insurance corporations are increasingly held as under-the-radar subsidiaries of large global companies. Traded in London, Tokyo, and Toronto, or registered in tax havens like the Cayman Islands and Bermuda, these corporations . . . operate far from the influence of the people and communities over whom they hold so much power.”).

13. See *infra* section II.B (arguing that surety companies use their financial power to stymie bail reform and manipulate industry regulation).

While the problems associated with the commercial bail industry—including arrestees’ exposure to bounty hunter violence, exploitative contract terms, and crippling debt¹⁴—are well documented,¹⁵ no scholarship has focused on how surety companies authorize and encourage consumer abuse.¹⁶ This Comment argues that the extreme concentration of economic and lobbying power in the commercial bail industry presents a distinct set of problems apart from abuses perpetrated by local bond agents—including disrupting the bail bond market and facilitating regulatory capture¹⁷—and that the influence of surety companies thus offers an important but overlooked argument against cash bail. Accordingly, this Comment suggests that, provided that states do not eliminate cash bail entirely, effective regulation of the commercial bail industry requires targeting surety company activity. Specifically, this Comment proposes that states eliminate the role of surety companies in the commercial bail market and allow local bail bondsmen to charge arrestees less than the state-approved premium rate.¹⁸

This Comment proceeds in three parts. Part I explains how the commercial bail industry developed and discusses policy problems commonly associated with the industry. Part II argues that the industry has endured only because of surety company market concentration, which has incentivized and facilitated lobbying efforts that have resulted in favorable political influence. Part III recommends that states either pursue comprehensive, structural bail reform or otherwise pursue short-term reforms that undermine the influence of surety companies.

I. COMMERCIAL BAIL AND ITS PROBLEMS

Only two countries in the world have legal commercial-money-bail industries: the United States and the Philippines.¹⁹ In several countries,

14. See *infra* section I.B (providing an overview of problems commonly associated with commercial bail).

15. See, e.g., 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, 124–40 (2019) (arguing that defendants’ exposure to abuse related to bail bond transactions should be considered a consumer protection issue); Mel Gonzalez, Note, *Consumer Protection for Criminal Defendants: Regulating Commercial Bail in California*, 106 *Calif. L. Rev.* 1379, 1386 (2018) (same).

16. See, e.g., Kornya et al., *supra* note 15, at 128 n.107 (focusing on local bondsmen activity but acknowledging that the “failure to ensure that surety companies share responsibility for the actions of bail bond producers carries a risk of stymieing systemic reforms”); Gonzalez, *supra* note 15, at 1424 (explaining that the piece’s argument “primarily focused on bail companies” but noting that surety companies are the “biggest benefactors of the money bail system”).

17. See *infra* section II.

18. See *infra* section III.B (elaborating on these solutions).

19. See Adam Liptak, *Illegal Globally, Bail for Profit Remains in U.S.*, *N.Y. Times* (Jan. 29, 2008), <https://www.nytimes.com/2008/01/29/us/29bail.html> (on file with the *Columbia Law Review*).

including Canada and England, contracting to pay another's bail qualifies as criminal obstruction of justice.²⁰ This Part offers an explanation for how the industry developed in America and why it has endured in most states. Section I.A provides a brief history of bail and the rise of the commercial bail industry. Section I.B outlines problems commonly associated with the industry and considers, and ultimately rejects, potential explanations for why the industry has endured despite those problems.

A. *The Development of the Commercial Bail Industry*

The modern conception of bail has Anglo-Saxon roots, drawing from a time when criminal law was largely enforced between private parties.²¹ Rather than involving state-imposed detention, all but the most serious crimes carried a monetary penalty payable directly from the criminal to the victim.²² To ensure that the accused party would appear in court, a "surety"—that is, another individual—would agree to provide the court with "bail" exactly equal to the criminal penalty.²³ Thus, if the accused fled, the accuser was guaranteed exactly what would be owed had the court ultimately found in their favor.²⁴ Professor June Carbone has argued that the Anglo-Saxon system represented the "last entirely rational application of bail."²⁵

As criminal law grew increasingly complex following the Norman Conquest, the bail system changed.²⁶ More crimes carried corporal punishment, which gave offenders an understandably strong incentive to flee.²⁷ Pretrial detention accordingly became more common, and those accused of the most serious crimes lost any right to bail whatsoever.²⁸

While England ultimately embraced some degree of bail reform, a deep wariness of pretrial detention set the backdrop for the development of the bail system in the United States.²⁹ Following independence, almost every state constitution provided for a right to bail for all charged crimes but "willful murder," and even then, only "where proof [was] evident or

20. *Id.*

21. See Timothy R. Schnacke, Michael R. Jones & Claire M.B. Brooker, *Pretrial Just. Inst., The History of Bail and Pretrial Release 1* (2010), https://cdpsdocs.state.co.us/ccjj/Committees/BailSub/Handouts/HistoryofBail-Pre-TrialRelease-PJI_2010.pdf [<https://perma.cc/NN2H-4GWU>].

22. *Id.*

23. *Id.* at 2.

24. *Id.*

25. *Id.* (quoting June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 *Syracuse L. Rev.* 517, 520 (1983)).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 4.

the presumption great.”³⁰ At the federal level, this right to bail was mirrored in the original Judiciary Act and, to an extent, in the Eighth Amendment.³¹ Thus, bail at the founding was viewed as a necessary safeguard against the injustice of pretrial detention, and the right to bail was relatively absolute.

The right to bail and the unique circumstances of the nineteenth-century American frontier combined to spark the commercial money bail bond industry.³² Because of the vastness of the frontier and a perceived lack of communal ties, defendants were thought to present a flight risk.³³ Judges responded by setting unaffordably high bail.³⁴ Thus, a commercial market for bail—a market that had never been permitted to develop in England³⁵—began to thrive in the United States.³⁶ The industry eventually spread nationwide, becoming an integral part of the American criminal justice system.³⁷ In 2009, forty-nine percent of pretrial releases nationwide were executed through the services of a for-profit bail bondsman.³⁸

From a broad perspective, the industry’s business model is simple: In exchange for a nonrefundable premium paid by the defendant—ten percent of the bail amount in most jurisdictions—a bail bondsman promises the court that the defendant will appear.³⁹ If the defendant does not appear, the bail bondsman owes the state the full bail amount.⁴⁰ Because the commercial bondsman has a financial interest in ensuring that the defendant appears in court, the bondsman has an incentive to monitor the defendant and, if necessary, arrest the defendant and force

30. *Id.*

31. *Id.* at 5. The Eighth Amendment does not provide an affirmative right to bail; it only protects defendants against “excessive bail.” *Id.*

32. See *id.* at 6; see also Bauer, *supra* note 8.

33. See Schnacke et al., *supra* note 21, at 6 (“[T]he absence of close friends . . . in frontier America would have made it very difficult for the court to find an acceptable personal custodian for many defendants, and . . . the vast unsettled American frontier provided a ready sanctuary for any defendant wanting to flee.” (quoting Wayne H. Thomas, Jr., *Bail Reform in America* 11–12 (1976))).

34. Bauer, *supra* note 8.

35. See Schnacke et al., *supra* note 21, at 6 (“Commercial bonds, never permitted in England, were . . . a useful device in America.” (quoting Wayne H. Thomas, Jr., *Bail Reform in America* 11–12 (1976))).

36. Bauer, *supra* note 8.

37. *Id.* This brief historical narrative is necessarily simplified, and one important additional aspect of the unique history of bail in the United States is how the bail system developed to perpetuate and reinforce racist policies underlying the criminal justice system. See generally, e.g., Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 *Cornell L. Rev.* 899 (2019) (explaining how the modern criminal justice system, including the bail system, is designed to accommodate mass incarceration and preserve de facto slavery).

38. See Reaves, *supra* note 1, at 15.

39. See Bauer, *supra* note 8.

40. *Id.*

them to appear.⁴¹ The popular image of bounty hunters in the Wild West thus provides a reasonably accurate representation of how the industry operates.

B. *Critiques of and Justifications for Commercial Bail*

From the state's perspective, the industry's entrepreneurial spirit neatly solved the flight-risk problem on the frontier. Simultaneously, however, the industry's existence presented a logistical problem and created significant policy concerns. The logistical problem was that, if a defendant did fail to appear, the state needed to ensure that the commercial bondsman had the resources to pay the court.⁴² In other words, the state needed an insurance company to guarantee the contract between it and the commercial bondsman.⁴³ Today, almost every state requires commercial bondsmen to contract with a national surety company in order to write bail on behalf of arrestees.⁴⁴ Surety companies profit by taking a cut of the nonrefundable premium—usually also ten percent.⁴⁵ In Ronald Egana's case, for example, Blair's charged Egana \$3,275, and Banker's Insurance—the surety company—likely received \$327.50 of Egana's payment.⁴⁶

The policy problems associated with commercial bail are ultimately grounded in the discomfort of privatizing fundamental components of the criminal justice system. In 2007, the ABA recommended “without qualification” the abolishment of the commercial bail industry and provided four reasons to do so that are representative of common critiques of commercial bail.⁴⁷ First, the defendant's ability to contract with a private commercial bondsman does nothing to support bail's ostensible goal of promoting public safety.⁴⁸ Second, the industry's existence transfers the

41. States that allow commercial bail give bail bondsmen the authority to arrest defendants. See, e.g., N.C. Gen. Stat. § 58-71-30 (2020) (“For the purpose of surrendering the defendant, the surety may arrest him . . .”).

42. See Just. Pol'y Inst., *For Better or for Profit: How the Bail Industry Stands in the Way of Fair and Effective Pretrial Justice* 26 (2012), http://www.justicepolicy.org/uploads/justicepolicy/documents/_for_better_or_for_profit_.pdf [https://perma.cc/G87U-69T4]. Until the 1940s, most commercial bondsmen were local, family-owned businesses, but as incarceration rates and bail amounts increased, the commercial market expanded, which created a role for surety companies. *Id.*

43. See Bauer, *supra* note 8.

44. *Id.*; see also, e.g., N.Y. Ins. Law § 6801 (McKinney 2012) (providing that no person, firm, or corporation may engage in a bail bond business “[e]xcept for a corporation authorized to write fidelity and surety insurance and to do a bail bond business”).

45. See Color of Change & ACLU Campaign for Smart Just., *supra* note 1, at 14.

46. See *Egana* Complaint, *supra* note 1, at 1.

47. See Schnacke et al., *supra* note 21, at 15 (quoting ABA, *ABA Standards for Criminal Justice: Pretrial Release* 45 (3d ed. 2007)).

48. *Id.*

decision of which defendants are an acceptable flight risk to the commercial bondsman.⁴⁹ Third, the decision whether to contract with a defendant—and on what terms—is made without transparency.⁵⁰ And fourth, the industry discriminates against low-income defendants who cannot afford the nonrefundable premium, regardless of whether the defendant is a flight risk or poses a risk to public safety.⁵¹

In addition to these issues, defendants like Egana are often subjected to exploitative contract terms, harassment, and violence.⁵² For the reasons discussed in Part II, commercial bail bondsmen and their bounty hunters operate virtually without oversight.⁵³ The most famous examples are illustrated in episodes of “Dog the Bounty Hunter,” in which Dog gleefully tackles defendants in McDonald’s parking lots.⁵⁴ But there are more tragic examples as well. In October 2012, a bounty hunter in Virginia—who had recently received a state license after only five days of training and a \$400 fee—shot a defendant in the stomach without provocation and was never charged.⁵⁵ In 2015, bounty hunters shot a woman in a fast food drive-through while attempting to capture another person in her car.⁵⁶ In April 2017, bounty hunters in Montana broke into a defendant’s house in the middle of the night and pointed assault rifles at the defendant’s four-year-old daughter.⁵⁷

These issues are especially pronounced because of the outsized role that plea bargains play in our criminal justice system. Defendants who are detained pretrial are three times more likely to be sentenced to prison than defendants charged with the same crime who are released pretrial.⁵⁸ Because of the collateral effects of detention—such as potential loss of employment—defendants who cannot afford bail are more likely to agree to a plea offer, regardless of the merit of the charge.⁵⁹ Defendants who

49. *Id.*

50. *Id.*

51. *Id.*

52. See generally *Egana* Complaint, *supra* note 1 (describing Egana’s personal experience with the commercial bail industry).

53. See *infra* Part II.

54. See, e.g., Adam Popescu, *Dog the Bounty Hunter Is Hunting Alone*, N.Y. Times (Jan. 17, 2020), <https://www.nytimes.com/2020/01/17/style/duane-chapman-dog-bounty-hunter.html> (on file with the *Columbia Law Review*) (“Back in 2004, Duane Chapman, known as Dog, hot-wired a reality revolution with ‘Dog the Bounty Hunter.’ Riding shotgun . . . , viewers were pulled along on fugitive chases as Dog led his crew in pursuit of those who had broken the terms of their bail agreements.”).

55. See Bauer, *supra* note 8.

56. See Color of Change & ACLU Campaign for Smart Just., *supra* note 1, at 33.

57. See Andrea Woods & Alex Rate, *Armed Bounty Hunters Raided Our Clients’ Home to Prevent Private Companies from Losing \$1,670*, ACLU (Apr. 17, 2019), <https://www.aclu.org/blog/criminal-law-reform/armed-bounty-hunters-raided-our-clients-home-prevent-private-companies> [<https://perma.cc/8D54-S2PG>].

58. Bauer, *supra* note 8.

59. *Id.*

cannot otherwise afford bail are thus systemically placed in a weak bargaining position: They can agree to whatever terms are offered by a commercial bondsman, they can attempt to negotiate a plea offer with a prosecutor that involves securing their release, or they can lose their liberty, along with all of detention's collateral consequences. These systemic effects have, in turn, facilitated mass incarceration, with particularly devastating impacts on Black and Latinx communities targeted by the criminal justice system.⁶⁰

Critiques of commercial bail have led some states to reject the industry. In the 1960s, a progressive effort for bail reform led four states—Illinois, Kentucky, Oregon, and Wisconsin—to abolish the industry entirely.⁶¹ Other states have adopted pretrial release programs that facilitate the release of low-risk defendants.⁶² A few jurisdictions have recently limited cash bail in favor of alternative systems.⁶³ Nonetheless, commercial bail has endured in most states, including the country's largest jurisdictions.⁶⁴

Proponents of the industry offer two principal justifications for its existence. First, they argue that the profession requires skill and experience and must accordingly remain privatized to ensure high rates of court appearances.⁶⁵ This justification, however, is intuitively and

60. See, e.g., Color of Change & ACLU Campaign for Smart Just., *supra* note 1, at 1 (“The for-profit bail industry has reinforced and profited from the racially biased nature of our criminal justice system, which routinely targets low-income people, Black people, and other people of color for reasons that have nothing to do with their guilt or innocence.”).

61. See Schnacke et al., *supra* note 21, at 19. Illinois recently eliminated all forms of cash bail. See Cheryl Corley, *Illinois Becomes 1st State to Eliminate Cash Bail*, NPR (Feb. 22, 2021), <https://www.npr.org/2021/02/22/970378490/illinois-becomes-first-state-to-eliminate-cash-bail> [<https://perma.cc/FH2E-V9HX>].

62. *Id.* at 8.

63. See ACLU of N.J., *Pretrial Justice Reform*, <https://www.aclu-nj.org/theissues/criminaljustice/pretrial-justice-reform> [<https://perma.cc/7DZL-92SJ>] (last visited Feb. 6, 2021) (explaining New Jersey's recent bail reforms); Susan Montoya Bryan, *Court Official: New Mexico's Bail Reforms Are Working*, AP News (Nov. 25, 2019), <https://apnews.com/article/0de4edc6567246cd996a3a9e8cf2f611> [<https://perma.cc/7WM5-CTP6>] (explaining New Mexico's recent reforms of its pretrial release system); Jolie McCullough, *Report: Harris County's Bail Reforms Let More People out of Jail Before Trial Without Raising Risk of Reoffending*, *Tex. Trib.* (Sept. 3, 2020), <https://www.texastribune.org/2020/09/03/harris-county-bail-reform> [<https://perma.cc/J4UK-RHPH>] (explaining the impact of recent bail reforms in Harris County, Texas).

64. See *Just. Pol'y Inst.*, *supra* note 42, at 26 (noting that forty-six states allowed commercial bail in 2012).

65. See, e.g., *Brief for Amici Curiae Am. Bail Coalition, Ga. Ass'n of Pro. Bondsmen & Ga. Sheriffs' Ass'n in Support of Defendant-Appellant and Reversal of the Preliminary Injunction at 12–16, Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018) (No. 4:15-cv-00170), 2016 WL 3452938 (arguing that “[t]he modern commercial surety system has statistically proven to be the most effective means of enabling defendants to obtain pretrial release while ensuring they appear in court”); Liptak, *supra* note 19 (quoting a bail bondsman's view that their role should remain privatized because they “do it better” than a public agency would).

empirically questionable. Fleeing in modern society is more difficult than it was on the nineteenth-century American frontier. Moreover, failing to appear carries substantial consequences independent of bail forfeiture.⁶⁶ Unsurprisingly, defendants appear in court at high rates, even in jurisdictions that have rejected commercial bail. For example, in Washington, D.C.—a jurisdiction that took steps to eliminate cash bail in the 1960s—ninety-four percent of defendants are released pretrial, and ninety-one percent of those defendants appear at trial.⁶⁷ And in some jurisdictions, charitable bail funds—which rose to prominence as a progressive strategy to undermine cash bail systems by bailing out defendants for free—have demonstrated that defendants will appear in court without any financial incentive; the Brooklyn Bail Fund, for example, reports that ninety-five percent of its clients make all scheduled court appearances.⁶⁸

The second purported justification for commercial bail is that the industry promotes public safety.⁶⁹ As the ABA argues, however, commercial bondsmen are under no legal obligation to ensure that a defendant does not commit a crime.⁷⁰ Their sole financial interest is to prevent flight. It is accordingly unclear how commercial bail bondsmen whose incentive is to choose their customers based on flight risk—and whose industry relies on defendants committing crimes—can reasonably argue their existence promotes public safety.⁷¹

66. See Ethan Corey & Puck Lo, *The ‘Failure to Appear’ Fallacy*, Appeal (Jan. 9, 2019), <https://theappeal.org/the-failure-to-appear-fallacy> [<https://perma.cc/L3Y5-4W3W>] (“For many people, a single [failure to appear] can keep them trapped in the criminal justice system. Failure to appear is a crime in 46 states In some states, penalties for FTAs can be as high as 10 years in prison.”).

67. See Lea Hunter, *What You Need to Know About Ending Cash Bail*, Ctr. for Am. Progress, (Mar. 16, 2020), <https://www.americanprogress.org/issues/criminal-justice/reports/2020/03/16/481543/ending-cash-bail> [<https://perma.cc/AW9U-NYYS>].

68. See *Our Results*, Brooklyn Community Bail Fund, <https://brooklynbailfund.org/our-results-1#:~:text=95%25%20of%20Clients%20Make%20all,as%20a%20dozen%20or%20more> [<https://perma.cc/JXS4-GXSH>] (last visited Feb. 6, 2021) (“We have shown that bail is not only unjust, it’s unnecessary. Our clients had no financial obligation to us, and 95% of them made all required criminal court appearances, which can be as few as two or three, or as many as a dozen or more.”).

69. See, e.g., Brief for Amici Curiae Am. Bail Coalition, Ga. Ass’n of Pro. Bondsmen & Ga. Sheriffs’ Ass’n, *supra* note 65, at 23 (“Understood within its historical context and sound policy objectives, our modern system of bail is fundamentally not about poverty or wealth, but instead about preserving liberty while ensuring community safety”); Editorial, *Cash Bail’s Lonely Defender*, N.Y. Times (Aug. 25, 2017), <https://www.nytimes.com/2017/08/25/opinion/cash-bails-lonely-defender.html> (on file with the *Columbia Law Review*) (“The industry’s gripe [with bail reform efforts] is understandable: The shift from cash bail is bad for business. Of course, that’s not how those in the industry frame their argument. They claim that public safety is the real concern.”).

70. See Schnacke et al., *supra* note 21, at 15 (quoting ABA, *ABA Standards for Criminal Justice: Pretrial Release* 45 (3d ed. 2007)).

71. See, e.g., Bauer, *supra* note 8 (explaining that, because bail amounts for DUIs increase from \$5,000 to \$100,000 when the charge involves an injury, a bail bondsman

Thus, neither history nor policy justifications provide an adequate explanation for why commercial bail continues to exist. A final plausible justification for the industry is that our society should defer to market autonomy, even in an area that involves a quintessential state function. As Part II demonstrates, however, this justification also fails to comport with the industry's market concentration and consistent efforts to limit competition. Part II thus proposes an alternative explanation: The industry continues to exist only because of the unjustified lobbying power of surety companies and their trade associations.

II. HOW SURETY COMPANIES CONTROL THE COMMERCIAL BAIL INDUSTRY

As Part I demonstrates, commercial bail in the United States developed as a result of historical circumstance rather than as part of any deliberate policy effort to craft an ideal bail system. State legislatures now have ample evidence that the industry is no longer necessary to effectuate the bail system's goal of deterring flight and preserving public safety.⁷² Moreover, the industry's practices present serious legal and policy problems that further undermine any justification for its existence.⁷³ Nonetheless, commercial bail remains a robust, multibillion-dollar industry, and its practices result in devastating consequences for defendants, their families, and their communities.⁷⁴

This Part argues that the industry's endurance is the result of surety company market concentration. The industry's consolidation has allowed it to avoid competition and maintain enormous profits, which in turn has empowered and incentivized global and domestic insurance giants to engage in startlingly effective lobbying efforts to maintain the status quo. Section II.A explains how surety companies profit off the industry without risk, and section II.B argues that surety companies have used their financial power to stymie bail reform and manipulate industry regulation.

A. *How Insurance Corporations Profit off the Bail System*

The businesses most commonly associated with the bail bond industry are small shops with eye-catching neon signs clustered around courthouses.⁷⁵ While these businesses appear to be local—and appear to be competing with each other in a functional market—that perception is largely a mirage. There are over 25,000 local bail bondsmen nationwide, but their operations—including which customers they serve and on what

“beamed” when he learned that one of his clients had injured someone while driving under the influence).

72. See *supra* section I.B.

73. See *supra* section I.B.

74. See generally *Color of Change & ACLU Campaign for Smart Just.*, *supra* note 1 (providing an overview of problematic commercial bail industry practices and how they impact defendants).

75. *Id.* at 6.

terms—are controlled by surety corporations.⁷⁶ Just nine companies back the thirty corporations that underwrite the \$14 billion in bail bonds issued each year.⁷⁷ For example, Tokio Marine, a Japanese insurance giant that earned about \$40 billion in global revenue in 2016, controls four bail surety corporations.⁷⁸ Similarly, Fairfax Financial, a Canadian insurer that earned \$10 billion in revenue in 2016, controls three surety corporations.⁷⁹

Bail surety companies have maximized their profit in two particular ways. First, surety companies integrated a clever scheme into their contracts with commercial bondsmen to avoid losses. As section I.B explains, the entire purpose of surety companies in the bail industry ecosystem is to guarantee the contract between the commercial bondsman and the state. In Egana’s case, for example, the commercial bondsman, Blair’s, would have (theoretically⁸⁰) owed the state \$26,000 if Egana fled. But if Blair’s went bankrupt and could not afford to pay the state, the surety company, Banker’s, would owe the state the \$26,000. To avoid this situation, surety companies require bondsmen to set aside an additional portion of the premium paid by the arrestee—usually another ten percent—to a “build-up fund,” an account otherwise inaccessible to the bondsman that must be depleted before the surety company pays anything.⁸¹ The result of this business model is that the bail surety industry bears essentially no risk while earning about \$2 billion in revenue annually.⁸² In 2012, for example, the entire industry cumulatively paid less than one percent in losses.⁸³ AIA Bail Bond Surety, a surety company that has existed for over 100 years—and currently underwrites about \$700 million in bail bonds annually—has *never* paid the state for bail forfeiture.⁸⁴ In comparison, the auto- and property-insurance industries typically pay forty to sixty percent of their revenue in losses.⁸⁵

76. *Id.* at 6–7.

77. *Id.* at 7.

78. *Id.* at 22–23.

79. *Id.*

80. The industry uses its lobbying power to support legislation that makes it more difficult for jurisdictions to collect bail forfeitures from commercial bondsmen. See Just. Pol’y Inst., *supra* note 42, at 35. In some jurisdictions, courts must notify several parties by certified mail within thirty days to collect on the bond. *Id.* The result is that some overburdened court systems have failed to collect millions of dollars from bail bondsmen. *Id.* In 2012, for example, California courts were owed about \$150 million, and New Jersey courts were owed about \$100 million. *Id.*

81. See Color of Change & ACLU Campaign for Smart Just., *supra* note 1, at 14; Abdulai Bah & Samuel Black, Big Insurance Behind Bail Bonds, Al Jazeera Am.: Fault Lines Blog (May 23, 2014), <http://america.aljazeera.com/watch/shows/fault-lines/FaultLinesBlog/2014/5/23/the-big-insurancebehindbailbonds.html> [<https://perma.cc/GW33-PGR5>].

82. See Bauer, *supra* note 8.

83. *Id.*

84. *Id.*

85. *Id.*

Second, because surety companies hold themselves out as insurers—even though, as just explained, they are not insuring anything in practice—they benefit from market regulation of insurance products. As section I.B explains, surety companies earn revenue by charging local bondsmen ten percent of the premium paid by defendants, which in turn is ten percent of the bail amount in most jurisdictions. That premium figure is regulated by state insurance agencies, which typically approve premium rates for all insurance products based on rate applications filed by market participants.⁸⁶ In California, for example, insurance companies, including bail surety companies, file a premium-rate application to the California Department of Insurance, which approves the rate unless it is “excessive, inadequate, unfairly discriminatory,” or otherwise unlawful.⁸⁷ Because there are so few competitors in the bail surety market, and because they have substantially agreed with each other not to compete on price, all surety companies file for the same rate: ten percent in most states.⁸⁸ Moreover, with the exception of California, all states prohibit local commercial bail bondsmen from charging less than the approved rate because it would qualify as unlawful “rebating.”⁸⁹

The result of this regulatory scheme is that the bail bond market is noncompetitive. In a functioning market, arrestees would theoretically shop around the courthouse and seek a lower premium. And because costs are so low in the bail bond market—as explained above, defendants rarely jump bail and, even if they do, surety companies almost never pay for forfeiture—there is good reason to believe that arrestees would receive better prices in an open market.⁹⁰ The lack of competition is, of course, highly consequential to arrestees: Arrestees that can afford the artificially high premium cost must pay more and, if they agree to a payment plan, they are more exposed to debt. If they cannot afford the artificially high premium cost, they remain detained.

86. See Complaint at 11–13, *Crain v. Accredited Sur. & Cas. Co.*, No. RG19004509 (Cal. Sup. Ct. 2019), https://www.lieffcabraser.com/pdf/california_bail_bonds_complaint.pdf [<https://perma.cc/2B8C-WCBM>] (explaining the rate filing system in California and its interaction with the bail surety market).

87. Cal. Ins. Code § 1861.05 (1993).

88. See, e.g., Complaint, *supra* note 86, at 11–18 (alleging that surety companies in California conspired to file the same rates).

89. See, e.g., N.C. Gen. Stat. § 58-71-80(a)(8) (2020) (prohibiting North Carolina bail bondsmen from rebating); see also Chris Burand, *Conflicts of Interest and Rebating*, *Ins. J.* (Apr. 4, 2016), <https://www.insurancejournal.com/magazines/mag-features/2016/04/04/403445.htm> [<https://perma.cc/453D-NBFX>] (explaining the policy behind rebating prohibitions).

90. See Complaint, *supra* note 86, at 12–13 (arguing that the bail surety market is noncompetitive relative to other insurance markets).

B. *How Surety Corporations Use Economic Power to Maintain Commercial Bail*

Because surety companies operate with enormous profits and no risk, they have undertaken serious efforts to protect the commercial surety industry from reform. In the 1990s, in response to growing opposition to commercial bail, the industry organized a trade organization that would become the American Bail Coalition (ABC), which includes in its membership about half of the industry's surety companies.⁹¹ ABC then began a partnership with the American Legislative Exchange Council (ALEC), a conservative lobbying organization that provides access to legislators in exchange for corporate fees.⁹² Since the mid-1990s, ABC and ALEC have helped author and pass twelve bills in various states.⁹³ Their efforts have successfully reinforced the industry's role in the criminal justice system: From 1992 to 2006, the percentage of defendants charged with felonies released on surety bonds doubled from twenty-one to forty-two percent.⁹⁴

In addition to promoting favorable legislation, members of the industry have engaged in "multimillion dollar lobbying efforts" opposing bail reform.⁹⁵ In Broward County, Florida, for example, the industry's efforts led to the defunding of a pretrial services program that had successfully reduced the county's jail population.⁹⁶ In California, surety companies spent at least \$4 million successfully opposing Proposition 25, which would have eliminated or restricted money bail for most arrestees across the state.⁹⁷ Bankers Insurance—the surety company that underwrote Egana's bond—contributed \$1.1 million alone in opposition to Proposition 25.⁹⁸ And, outside the election arena, ABC consistently litigates against bail reform suits around the country; their lawyer is former U.S. Solicitor General Paul Clement.⁹⁹

The industry has also strategically supported the campaigns of legislators, judges, and district attorneys.¹⁰⁰ In California alone, the industry contributed almost \$700,000 to local political campaigns between 2002 and 2011.¹⁰¹ In Louisiana, ABC successfully lobbied for a law that

91. Just. Pol'y Inst., *supra* note 42, at 33; see also Schnacke et al., *supra* note 21, at 21.

92. See Just. Pol'y Inst., *supra* note 42, at 32–33.

93. *Id.* at 33.

94. *Id.*

95. *Id.* at 27.

96. *Id.* at 27–28.

97. See California Proposition 25, Replace Cash Bail with Risk Assessments Referendum (2020), Ballotpedia, [https://ballotpedia.org/California_Proposition_25,_Replace_Cash_Bail_with_Risk_Assessments_Referendum_\(2020\)](https://ballotpedia.org/California_Proposition_25,_Replace_Cash_Bail_with_Risk_Assessments_Referendum_(2020)) [https://perma.cc/8BSV-4HZ3] (last visited Mar. 13, 2021) (listing surety company campaign contributions).

98. *Id.*

99. See Color of Change & ACLU Campaign for Smart Just., *supra* note 1, at 40.

100. See Bauer, *supra* note 8.

101. See Just. Pol'y Inst., *supra* note 42, at 27.

requires arrestees to pay a two-percent fee—in addition to the standard nonrefundable premium—that is divided up among local sheriffs’ departments, district attorneys’ offices, and public defenders’ offices, so that “every criminal-justice player [has] a financial interest in commercial surety.”¹⁰²

To understand the scope of regulatory capture benefitting the industry, consider North Carolina’s Insurance Code, which regulates not just surety companies but the entirety of the commercial bail system in the state.¹⁰³ Under North Carolina insurance regulations, bounty hunters can get a state license by taking a twelve-hour course and passing an exam.¹⁰⁴ Once they are licensed and employed by a bondsman, they can legally arrest defendants they contract with¹⁰⁵ and are even awarded a badge that looks like those worn by state law enforcement.¹⁰⁶ Becoming a commercial bail bondsman, however, is not quite as simple: An individual who desires to open a bail bond business must undergo a one-year apprenticeship with a currently licensed bondsman and receive that bondsman’s approval.¹⁰⁷ The effect of that rule is that the industry operates like a cartel to exclude outsiders; a charitable bail fund like the Brooklyn Bail Fund, for example, would likely never have the ability to operate in North Carolina.¹⁰⁸ When a bondsman completes an apprenticeship and is properly licensed, North Carolina then provides significant protection from liability: Bondsmen are never required to refund a premium (even if the judge later lowers bail),¹⁰⁹ and arrestees may not bring any common law contract claim against the bondsman they contract with (even if, for example, the arrestee was incompetent or was under duress while signing the agreement).¹¹⁰ Commercial bondsmen are also funneled information from the state to help them choose customers: The state is required to share otherwise private criminal records with bondsmen and surety companies upon request.¹¹¹ Just as important as these favorable rules are the regulations that are *not* in the insurance code. Other than bare-bones licensing requirements, there is no public oversight of the industry.

It is also beneficial to the industry that the state insurance agencies regulate bail as opposed to an agency more naturally linked to the criminal justice system. Because commercial bail regulations are located in state insurance codes, surety companies are placed in a more complex regulatory

102. Bauer, *supra* note 8 (quoting Graymond Martin, Assistant Dist. Att’y, Orleans Parish).

103. See N.C. Gen. Stat. § 58-71-1 to -200 (2020).

104. *Id.* § 58-71-70 to -71.

105. *Id.* § 58-71-30.

106. *Id.* § 58-71-40(d1)(1).

107. *Id.* § 58-71-41.

108. See *supra* note 68 and accompanying text.

109. See N.C. Gen. Stat. § 58-71-16.

110. *Id.* § 58-71-10.

111. *Id.* § 58-71-200.

space, which in turn allows their activity to be overlooked. The New York State Insurance Division, for example, oversees 1,700 insurance companies with assets exceeding \$4.2 trillion, of which only a few are bail surety companies.¹¹² Additionally, surety companies portraying themselves as purely insurance organizations—even when local bail bondsmen are acting as their agents in executing contracts and monitoring arrestees—are insulated from liability. As Part III explains, insurance industry activity, which traditionally operates under state law, is generally exempt from federal antitrust regulation.¹¹³ And because surety companies are a step removed from contracts with arrestees, they have successfully claimed that they do not offer “credit” sufficient to hold them liable under federal and state consumer protection laws, such as the federal Truth in Lending Act.¹¹⁴

In short, the immense profit derived from the commercial bail system and the concentration of economic power within the industry has both incentivized and facilitated the manipulation of criminal justice policy in favor of industry interests and at the expense of low-income defendants.

III. REGULATING BAIL SURETY COMPANIES

Bail reform is in a pivotal moment. In the last few years, advocates for reform have experienced both victories and failures. New Jersey and New Mexico recently substantially eliminated cash bail, converting to systems that rely on risk assessment and judicial discretion.¹¹⁵ Harris County, Texas—which operates the third-largest jail system in the country—recently reformed its misdemeanor bail system through a consent decree.¹¹⁶ In New York and California, however, state legislatures passed bail reform legislation that would have similarly restricted cash bail, but subsequent opposition efforts led by the commercial bail industry ultimately dismantled many of its reforms.¹¹⁷ Because of the current public interest in bail reform—and the subject’s divisiveness—it is important to raise awareness about the full legal and policy ramifications of a profit-driven bail system. Accordingly, section III.A argues that the concentration of economic power among bail surety companies offers an additional powerful but often overlooked argument in favor of comprehensive, structural bail reform. Section III.B then offers suggestions for less comprehensive, but perhaps more readily achievable, regulatory action that would help address the problematic role that surety companies inhabit in the commercial bail ecosystem.

112. See *Color of Change & ACLU Campaign for Smart Just.*, *supra* note 1, at 36.

113. See *infra* section III.B.

114. See *Egana v. Blair’s Bail Bonds, Inc.*, No. 17-cv-5899, 2018 WL 2463210, at *6 (E.D. La. June 1, 2018) (dismissing Egana’s Truth in Lending Act claim against a surety company).

115. See *supra* note 63 and accompanying text.

116. See *supra* note 63 and accompanying text.

117. See *infra* section III.B.

A. *Structural Bail Reform*

As Part I explains, common critiques of the commercial bail industry include its inherent discriminatory impact on low-income defendants and its practical impact of shifting the decision regarding which defendants are detained pretrial from courts to private parties.¹¹⁸ The extreme market concentration and lobbying coordination in the commercial bail industry raise an additional important argument against cash bail.

Commercial bail initially performed a specific, limited functional purpose in the criminal justice system: By placing the risk of forfeiture on local bail bondsmen, the system incentivized bondsmen to monitor defendants and maintain high rates of court appearances, thereby maintaining the integrity of criminal law enforcement.¹¹⁹ In the one-hundred-plus years since the industry established itself, however, its influence has expanded to virtually every aspect of the bail system, such that the exclusive focus of bail regulation schemes—such as North Carolina’s insurance regulations—is to maximize industry profit rather than meaningfully pursue bail’s ostensible policy goals of deterring flight and promoting public safety.¹²⁰ In the case of Broward County, for example, the industry’s lobbying efforts defunded what had proven to be an effective pretrial services program.¹²¹

The industry’s enormous profits, consolidation, and accompanying influence have thus demonstrated that a for-profit bail system is fundamentally at odds with the criminal justice system’s policy goals. Even if we were to accept that local commercial bail operations provide some marginal benefit to the bail system—that private bondsmen are better, for example, at deterring flight than a public agency—there is now so much money at stake, and in so few hands, that it has become unrealistic to simultaneously accommodate the industry and maintain a bail system that protects societal interests. Accordingly, the lobbying activity of surety companies and their trade associations suggests that states should pursue structural reform and abandon cash bail systems in favor of proven alternative systems, such as those that rely on pretrial release or risk assessment tools.

B. *Reform Targeting Surety Companies*

While there are undoubtedly strong arguments favoring the abandonment of cash bail, structural bail reform is difficult to achieve both because it is politically controversial and because devising an ideal bail system is a complex undertaking. Executing structural reform requires support not only from the public but also from stakeholders such as

118. See *supra* section I.B.

119. See *supra* section I.A.

120. See *supra* section II.B.

121. See *supra* text accompanying note 96.

judges, public defenders, and prosecutors.¹²² Moreover, support must be sufficient to overcome inevitable opposition from the commercial bail industry.¹²³ In New York, for example, progressive advocates successfully convinced the state legislature to pass comprehensive bail reform that would have substantially eliminated cash bail, but the law was repealed just two months after it went into effect after public outcry driven by the bail industry.¹²⁴ Similarly, in California, the state legislature passed legislation in 2018 that would have replaced the cash bail system with a system relying on risk-assessment algorithms and judicial discretion.¹²⁵ In the 2020 election, however, the bail industry and progressive advocates including the ACLU joined unlikely forces to reject a ballot proposition that would have upheld the legislation.¹²⁶ The bail industry, of course, was protecting its business interests in California, while progressive groups were concerned that risk-assessment algorithms systemically integrate racial bias into their recommendations.¹²⁷ The stories in New York and California illustrate that reform advocates, even in progressive jurisdictions, should pursue short-term reform to protect low-income defendants while contemplating and advocating for structural reform.

There are two particular short-term reforms targeting surety company influence that would benefit bail systems that revolve around cash bail. First, states should consider simply eliminating the role of surety companies in the industry. As section I.B explains, every jurisdiction requires local commercial bail bondsmen to contract with a surety company in order to ensure that the bondsman has the resources to pay the state if the defendant flees and the bail bond is forfeited.¹²⁸ As section II.A demonstrates, however, surety companies—and even bondsmen themselves¹²⁹—rarely, if ever, pay the state.¹³⁰ Accordingly, their role in the bail bond market serves no public purpose. Moreover, as section II.A argues, their presence restricts market competition because bail bonds are unjustifiably treated as regulated insurance products.¹³¹ And, as section II.B argues, their market concentration and accompanying lobbying

122. See Jamiles Lartey, *New York Tried to Get Rid of Bail. Then the Backlash Came.*, Politico (Apr. 23, 2020), <https://www.politico.com/news/magazine/2020/04/23/bail-reform-coronavirus-new-york-backlash-148299> [<https://perma.cc/UJ3X-JTKQ>] (explaining challenges that lawmakers face executing bail reform).

123. *Id.*

124. *Id.* (explaining how industry representatives convinced the New York State Legislature that the new legislation was responsible for an increase in crime rates).

125. See Prop. 25 California 2020 Election Results: Bail-Reform Measure Is Rejected by Voters, ABC 7 News (Nov. 4, 2020), <https://abc7.com/prop-25-california-2020-results-did-pass-election-ca/7587637> [<https://perma.cc/FFU6-HH75>].

126. *Id.*

127. *Id.*

128. See *supra* section I.B.

129. See *supra* note 80 and accompanying text.

130. See *supra* section II.A.

131. See *supra* section II.A.

power has led to problematic manipulation of bail regulation.¹³² Eliminating the role of surety companies would thus solve two significant systemic problems in money bail systems. Executing this proposal would require reorganizing how the market operates—premium rates would no longer be regulated by state insurance agencies¹³³—but states could plausibly replace the premium rate with a statutory cap on what bail bondsmen can charge while otherwise allowing the market to continue to operate. This proposal would, of course, face fierce lobbying opposition, but in states like California, where the legislature has proven to be open to bail reform but faced progressive backlash over the specifics of reform proposals, eliminating the role of surety companies should be uncontroversial.

An alternative proposal is to allow local commercial bail bondsmen to rebate or otherwise charge less than premium rates filed for by surety companies. As section II.A explains, premium rates are currently approved by state insurance agencies, and in every state but California, commercial bail bondsmen cannot rebate or charge less than the approved rate.¹³⁴ Executing this proposal would have two important beneficial effects on the commercial bail market. First, allowing rebating would result in competition, which would make commercial bail bonds more affordable to arrestees. More low-income arrestees would be able to afford premiums, and arrestees who agree to payment plans would be less exposed to debt obligations.

Second, allowing rebating would result in surety-company vulnerability to antitrust suits. In every state but California, surety-company market activity is insulated from federal antitrust liability because, under the federal McCarran–Ferguson Act (MFA), claims involving “the business of insurance” are exempt from federal antitrust laws.¹³⁵ The MFA essentially operates as a reverse preemption statute. In the bail bond industry context, the idea is that any claim involving what bondsmen charge arrestees would not fall under the scope of federal antitrust regulation because rates are approved under a state regulatory scheme, and state insurance codes typically do not allow bondsmen to rebate.¹³⁶ In California, however, commercial bail bondsmen are permitted to rebate

132. See *supra* section II.B.

133. See *supra* section II.A.

134. See *supra* section II.A.

135. See *In re Cal. Bail Bond Antitrust Litig.*, No. 19-cv-00717-JST, 2020 WL 3041316, at *5 (N.D. Cal. Apr. 13, 2020) (“[T]he McCarran-Ferguson Act . . . exempts from federal antitrust laws ‘the business of insurance, but only to the extent that such business is regulated by the state, and does not involve a boycott, coercion or intimidation.’” (quoting *Feinstein v. Nettleship Co. of L.A.*, 714 F.2d 928, 931 (9th Cir. 1983))).

136. See, e.g., *id.* at *7 (holding that, because “the issuance of bail bonds in California is subject to an ‘extensive regulatory scheme,’” the “Plaintiffs’ Sherman Act claim that Defendants conspired to submit uniform maximum rates to CDI is barred by the McCarran-Ferguson Act”); see also section II.A (providing background on the premium rate application process).

under state law.¹³⁷ A district court in the Northern District of California recently held that rebating activity in California—that is, a California bondsman’s decision whether to reduce the premium charge—does not qualify as “the business of insurance” under the MFA because, unlike premium rate filings, rebating activity is not directly regulated by a California state agency.¹³⁸ Consequently, the district court held that a class action complaint alleging that surety companies, the American Bail Coalition, and local bail bondsmen in California conspired to universally charge the maximum premium rate was not precluded by the MFA.¹³⁹

If other states allow commercial bail bondsmen to rebate, surety companies will thus need to allow commercial bondsmen to compete or otherwise risk antitrust liability. Of course, there would be other barriers to liability—plaintiffs would need to plausibly allege, for example, that surety companies are engaging in an unlawful conspiracy as opposed to permissible parallel conduct¹⁴⁰—but allowing rebating would remove the most significant barrier to antitrust liability, and the California suit’s success suggests that antitrust law presents a concrete threat to surety company dominance. Moreover, the deterrent effect of the threat of liability would encourage competition.¹⁴¹

CONCLUSION

Law enforcement leaders, prosecutors, defense lawyers, judges, and religious leaders have consistently derided the commercial bail industry. Nonetheless, the industry continues to thrive in most states. This Comment argues that the industry’s endurance is the result of the market concentration among the insurance corporations that underwrite the industry’s bail bonds. These companies have reaped enormous profits at the expense of low-income defendants, which has incentivized and empowered them to engage in extraordinarily successfully lobbying efforts to manipulate industry regulation. The influence of these companies provides an additional argument in favor of the abandonment of money bail systems and suggests that states pursuing short-term reforms should

137. Cal. Ins. Code § 750(d) (2020).

138. See *In re Cal. Bail Bond Antitrust Litig.*, 2020 WL 3041316, at *7.

139. *Id.* The district court ultimately held that the plaintiffs had failed to sufficiently allege that individual surety companies participated in the conspiracy, but it dismissed those claims without prejudice, suggesting that an amended complaint could cure the defect. *Id.* at *14–15.

140. See *id.* at *11 (“In order to state a [Sherman Act] claim, antitrust plaintiffs must claim more than parallel conduct and a conclusory allegation of agreement.”). The complaint offered a number of specific examples of blatant industry representative efforts to charge the maximum price. See *id.* at *5–7.

141. See, e.g., *Am. Soc. of Mech. Eng’rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 572 (1982) (“A principal purpose of the antitrust private cause of action is, of course, to deter anticompetitive practices.” (citation omitted)).

target the activity of these insurance companies to protect low-income defendants from consumer abuse.