Note

A Moral and Legal Imperative to Act: The Bail Bond Industry, Consumer Protection, and Public Enforcers

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INTRODUCTION

Late one spring night, Eugene Mitchell and Shayleen Meuchell cuddled in bed with their four-year-old daughter and settled into a quiet evening at home in their sleepy Montana town.[1] Moments later, six intruders kicked in the couple's front door and entered their bedroom with guns drawn.[2] Neither local nor federal law enforcement authorized the "military-style assault team" that charged unannounced into the couple's home wearing body armor and brandishing assault rifles.[3] Rather, the intruders were private-citizen bounty hunters, or debt collectors, instructed to apprehend Mr. Mitchell in connection with a $1,000 debt the couple held after contracting with a bail bond agency to secure Mr. Mitchell's pretrial release on two misdemeanor traffic charges.[4] Prioritizing its profits, Mr. Mitchell's

* J.D. Candidate 2022, University of Minnesota Law School. Editor-in-Chief, *Minnesota Law Review*, Volume 106. I wrote this Note in dedication to my three-year-old daughter. Yara, I cannot imagine how difficult it has been to share your mom with law school the past three years. After my 1L year the two of us made a deal, and this Note is part of my commitment to you, love. My deepest gratitude to the attorneys and advocates whose work inspired this Note, especially Brian Highsmith. Brian, thank you for agreeing to review an early version of my Note. Thank you to my family, friends, classmates, and law school faculty and staff who provided advice, thoughtful guidance, and moral support. Finally, a special note of gratitude to Eura Chang, Marra Clay, Casey Epstein, Meredith Gingold, Ben Parker, Julia Potach, Leah Reiss, Zach Robole, Mollie Wagoner, and Professor Maria Ponomarenko for their excellent edits during the publication process.

1. *See* Complaint for Damages, Declaratory Relief, and Request for Jury Trial at 2, 14, Mitchell v. First Call Bail & Sur., Inc., No. 9:19-cv-00067-DLC (D. Mont. filed Apr. 17, 2019) [hereinafter Mitchell Complaint]; *see also Mitchell and Meuchell v. First Call Bail and Surety, Inc, Et Al.*, ACLU (Nov. 4, 2019) [hereinafter ACLU Mitchell Summary], https://www.aclu.org/cases/mitchell-and-meuchell-v-first-call-bail-and-surety-inc-et-al [https://perma.cc/CJW6-34TB].

2. *See* Mitchell Complaint, *supra* note 1, at 2.

3. *Id.*; *see* ACLU Mitchell Summary, *supra* note 1.

4. *See* Mitchell Complaint, *supra* note 1, at 2–4 (explaining the traffic charges filed against Mr. Mitchell and how the intruders charged into the couple's home to

bail company ordered the bounty hunters' attack to protect its financial interests,[5] despite knowing young children lived inside the home.[6]

One month earlier, approximately two thousand miles south of Mr. Mitchell's home, Ronald Egana arrived at a courthouse in New Orleans, Louisiana to attend his criminal hearing as required under the terms of his pretrial release and bail bond contract.[7] However, as Mr. Egana passed through the courthouse metal detector, his bail agent unexpectedly seized him and forced him instead to the bail company's business office.[8] Mr. Egana sat handcuffed in the agent's office while the bail agent called his mother and threatened to surrender him to jail unless she immediately paid the $1,500 Mr. Egana allegedly owed in overdue payments.[9] Lacking a better option, Ms. Egana used the money for her rent and car payments for the month to pay the amount demanded.[10] Previously, in exchange for his initial release from custody, Mr. Egana and his mother had entered into an agreement with a bail bond agency.[11] Under the parties' contract, the pair would provide the bail agency the $3,275 bail premium in an interest-accruing installment plan.[12] However, similar to the agreement Mr. Mitchell signed in Montana,[13] Mr. Egana's bail bond contract hid high interest rates, undisclosed fees, and other unfair, deceptive, and unconscionable terms and conditions.[14] In Mr. Egana's

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arrest Mr. Mitchell because he had inadvertently missed a court hearing four days earlier); *id.* at 10 (noting that the "Revocation of Bond" form listed the couple's outstanding debt at $1,000 at the time of the raid); *id.* at 14–18 (explaining other circumstances surrounding the incident).

5. *See id.* at 11.

6. *See id.* at 15.

7. *See* First Amended Complaint for Jury Demand Class Action at 16, Egana v. Blair's Bail Bonds, Inc., No. 2:17-cv-05899-JTM-DEK (E.D. La. filed Sept. 12, 2017) [hereinafter Egana Complaint].

8. *See* Jessica Silver-Greenberg & Shaila Dewan, *When Bail Feels Less like Freedom, More like Extortion*, N.Y. TIMES (Mar. 31, 2018), https://www.nytimes.com/2018/03/31/us/bail-bonds-extortion.html [https://perma.cc/L444-BD43].

9. *See* Egana Complaint, *supra* note 7; *see also* Silver-Greenberg & Dewan, *supra* note 8.

10. *See* Egana Complaint, *supra* note 7, at 18.

11. *See id.* at 1–2.

12. *See id. See generally infra* Part I.A (describing bail bond contracts and bail premiums charged to consumers).

13. *See* Mitchell Complaint, *supra* note 1, at 57–59 (alleging Mr. Mitchell's bail bond contract violated state and federal consumer protection laws).

14. *See* Egana Complaint, *supra* note 7, at 29–30, 38–40 (alleging Mr. Egana's bail bond contract violated state and federal consumer protection laws). *See generally infra* Part II.A.2.b–c (examining unconscionable terms commonly found in bail bond contracts).

case, after enduring a year of abusive debt collection tactics and turning over nearly twice the amount listed in his original contract,[15] his bail agents ultimately surrendered him to the local jail after he could no longer afford the superfluous[16] ankle monitoring fees charged in the bail bond contract.[17] Similarly, Mr. Mitchell's bail agents surrendered him into custody the night of the raid.[18]

In many states, after individuals like Mr. Mitchell and Mr. Egana are returned to custody, their debts will remain and interest will continue to accrue, pursuant to their bail bond agreements.[19] Consequently, on opposite ends of the country, the Mitchell and Egana families remained trapped in debt because the United States is one of only two countries worldwide that permits private companies to profit because its citizens cannot afford the cash bail payment needed to maintain their preconviction freedom.[20]

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15. *See* Egana Complaint, *supra* note 7, at 1–2.

16. *See id.* (explaining that while the court did not require remote ankle monitoring as a condition for release, the bail bond contract required the remote monitoring and demanded Mr. Egana cover the associated costs at approximately $300 per month); *id.* at 8–9 (explaining the bail agency's common practice to not disclose mandated ankle monitoring and associated fees until all parties signed the contract and defendants were released from custody); *see also id.* at 30–31 (alleging the contract signed by Ms. Egana as an indemnitor did not disclose the additional fees required due to the mandatory remote ankle monitoring).

17. *See id.* at 1–2 (explaining why bail agents surrendered Mr. Egana into custody).

18. Mitchell Complaint, *supra* note 1, at 16–17.

19. Brian Highsmith, *Criminal Justice Debt: Consumer Debt Advice from NCLC*, NAT'L CONSUMER L. CTR. (June 29, 2018), https://library.nclc.org/criminal-justice-debt-consumer-debt-advice-nclc [https://perma.cc/RUG7-XQMY].

20. *Selling Off Our Freedom: How Insurance Corporations Have Taken over Our Bail System*, COLOR OF CHANGE & ACLU 17 (May 2017) [hereinafter *Selling Off Our Freedom*], https://www.aclu.org/sites/default/files/field_document/059_bail_report_2_1.pdf [https://perma.cc/4WM7-U6JR] (noting that the United States and the Philippines are the only countries allowing private, for-profit companies to operate as bond sureties); 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/VS7F-T8S2] ("In Canada, selling bail bonds can earn you two years in prison on a charge equivalent to bribing a juror. In Australia, a government commission rejected the idea of introducing commercial bail in part because 'it lends itself to abuses such as collusive ties between bondsmen and organized crime or police, lawyers, and court officials.'"); *see also* Joshua Page, Victoria Piehowski & Joe Soss, *A Debt of Care: Commercial Bail and the Gendered Logic of Criminal Justice Predation*, 5 RUSSELL SAGE FOUND. J. SOC. SCIS. 150, 151 (2019) ("[C]ommercial bail stands at the center of resource extraction in the pretrial process and is one of the most distinctive aspects of the U.S. criminal justice system. The United States and the Philippines are the only countries that permit a for-profit bail bond industry.").

Horrors like those faced by the Mitchell and Egana families transpire every day.[21] An extensive body of academic literature on bail and pretrial detention documents the gross injustices facilitated under the American cash bail system.[22] As a result, a growing number of courts and legislatures have taken action to eradicate or dramatically reform bail bond practices in their jurisdictions.[23] Legal arguments aimed at dismantling the American bail system frequently focus on constitutional claims.[24] For example, the California Supreme Court recently unanimously held that the State's pretrial detention practice was unconstitutional.[25] However, because the California Supreme Court only reached its decision by extending the U.S. Supreme

21. *See infra* Part I.

22. *See Selling Off Our Freedom*, *supra* note 20, at 6–8; *see also Commitments to Anti-Racism Ring Hollow: Fairfax Financial Is the Last Big Insurance Holdout in the Dying Bail Industry*, ACLU & COLOR OF CHANGE 3–4 (Jan. 2021) [hereinafter *Commitments to Anti-Racism Ring Hollow*], https://www.aclu.org/sites/default/files/field_document/012121-fairfaxbail.pdf [https://perma.cc/W74K-CR85].

23. *See What's Happening in Pretrial Justice*, PRETRIAL JUST. INST. (Feb. 1, 2021), accessible at https://university.pretrial.org/viewdocument/where-pretrial-improvements-are-hap-2 [https://perma.cc/LK9C-NP4C] (reporting state-by-state efforts to reform cash bail and pretrial detention policies).

24. *See, e.g.*, Complaint for Jury Demand Class Action at 12–13, Walker v. City of Calhoun, No. 4:15-cv-00170-HLM (N.D. Ga. Sept. 8, 2015) (alleging bail bond practices violate the Fourteenth Amendment); Class Action Complaint at 22–25, Dixon v. City of St. Louis, No. 4:19-cv-00112 (E.D. Mo. Jan. 28, 2019) (same); Class Action Complaint at 17–19, Edwards v. Cofield, No. 3:17-cv-00321-WKW-SRW (M.D. Ala. filed May 18, 2017) (same); Class Action Complaint at 25, Caliste v. Cantrell, No. 2:17-cv-06197 (E.D. La. June 27, 2017) (same); Class Action Complaint at 15, Little v. Frederick, No. 6:17-cv-00724-RGJ-PJH (W.D. La. June 5, 2017) (same); Class Action Complaint at 16, Lomas v. Harris Cnty., No. 4:16-cv-03745 (S.D. Tex. Dec. 28, 2016) (same); Intervenor Class Complaint at 29–33, Schultz v. Alabama, No. 5:17-cv-00270-MHH (N.D. Ala filed Feb. 21, 2017) (same); First Amended Class Action Complaint at 59–61, Daves v. Dallas Cnty., No. 3:18-cv-00154-N (N.D. Tex. filed Jan. 21, 2018) (alleging bail bond practices violate the Sixth and Fourteenth Amendments' Equal Protection, Substantive Due Process, and Procedural Due Process Clauses); Class Action Complaint at 30–32, Parga v. Tulsa Cnty., No. 18-cv-00298-CVE-JFJ (N.D. Okla. filed June 6, 2018) (same); Class Action Complaint at 29–31, Allison v. Allen, No. 1:19-cv-01126 (M.D.N.C. filed Nov. 12, 2019) (same); Class Action Complaint at 58–63, Ross v. Blount, No. 2:19-cv-11076-LJM-EAS (E.D. Mich. filed Apr. 14, 2019) (same). *See generally* Ashli Giles-Perkins, *Justice Delayed Is Justice Denied: Holding Cash Bail Unconstitutional*, 25 PUB. INT. L. REP. 102 (2020) (arguing cash bail is unconstitutional).

25. *See In re* Humphrey, 482 P.3d 1008, 1013 (Cal. 2021) ("What we hold is that where a financial condition is nonetheless necessary, the court must consider the arrestee's ability to pay the stated amount of bail—and may not effectively detain the arrestee 'solely because' the arrestee 'lacked the resources' to post bail."). *See generally* Maura Dolan, *California's Top Court Ends Cash Bail for Some Defendants Who Can't Afford It*, L.A. TIMES (Mar. 25, 2021), https://www.latimes.com/california/story/2021-03-25/california-supreme-court-nixes-cash-bail-some-defendants [https://perma.cc/3CU7-7JPC] (providing context for the California Supreme Court's decision).

Court's narrow holding in *Bearden v. Georgia*,[26] it is too early to evaluate the results of this decision—especially when the bail industry may source its view on the constitutionality of bail bond elsewhere within the Court's jurisprudence.[27]

While some bail reformers propose legislative change as the path forward, such reform efforts are too slow-moving to address the industry's abuses.[28] Despite a growing body of research refuting the idea that cash bail is necessary to maintain public safety[29] or ensure

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26. *See* 461 U.S. 660, 667–68, 674 (1983) (holding that the State may not imprison people solely because they lack the resources to pay a fine "without considering the reasons for the inability to pay or the propriety of reducing the fine," or making other allowances).

27. *See* Schilb v. Kuebel, 404 U.S. 357, 365 (1971) (dictum) ("Bail, of course, is basic to our system of law."); United States v. Salerno, 481 U.S. 739, 754–55 (1987) (holding pretrial detention without bail based on a defendant's dangerousness was constitutional); Fields v. Henry Cnty., 701 F.3d 180, 185 (6th Cir. 2012) (finding no constitutional violation under a policy that required an automatic twelve-hour holding period before bail because "[t]here is no constitutional right to speedy bail"); *see also* Brief for Amici Curiae Am. Bail Coal., et al. in Support of Defendant-Appellant at 25, Walker v. City of Calhoun, No. 16-10521 (11th Cir. June 21, 2016) ("As a textual matter, the Eighth Amendment pre-supposes the permissibility of monetary bail. If plaintiff's theory were correct, the Eighth Amendment would read: 'no bail shall be required.' But instead it provides only that '*[e]xcessive* bail shall not be required.'" (emphasis in original) (quoting U.S. CONST. amend. VIII)); Brief for Amici Curiae Am. Bail Coal., et al., *supra*, at 25–26 (arguing federal appellate courts "take the constitutionality of monetary bail as given").

28. *See* Vanessa Romo, *California Becomes First State to End Cash Bail After 40-Year Fight*, NPR (Aug. 28, 2018), https://www.npr.org/2018/08/28/642795284/california-becomes-first-state-to-end-cash-bail [https://perma.cc/84CJ-PTQL] (explaining it took California "nearly four decades to revamp the state's cash bail system" with SB 10 in 2018); Andrew Sheeler & Hannah Wiley, *Voters Reject California's Bid to End Cash Bail*, SACRAMENTO BEE (Nov. 4, 2020), https://www.sacbee.com/news/politics-government/capitol-alert/article246895752.html (last visited Nov. 21, 2021) (explaining how an unlikely alliance of civil rights groups' and bail bond lobbyists mobilized voters to repeal SB 10 through a subsequent ballot referendum, Proposition 25); *see also* Jason Pohl, *California's Far-Left Activists Shocked They Beat Prop. 25. What's the Future of Bail Now?*, SACRAMENTO BEE (Nov. 6, 2020), https://www.sacbee.com/news/politics-government/election/article246968937.html (last visited Nov. 21, 2021) (explaining local civil rights groups celebrated the Proposition 25 "victory" because SB 10 would "merely replace one oppressive system with another").

29. *See, e.g.*, Glenn A. Grant, *Report to the Governor and the Legislature: Criminal Justice Reform*, N.J. CTS. 5 (2019), https://www.njcourts.gov/courts/assets/criminal/cjrannualreport2019.pdf [https://perma.cc/RC8F-SZRB] (finding that after the dramatic reform of the New Jersey cash bail bond system, the vast majority of released defendants returned to court without being charged with new offenses); Bauer, *supra* note 20 (arguing the current bail bond system fails to identify "who is dangerous and who isn't," explaining the system merely "separates those who have cash and those who don't").

that released defendants will appear at court hearings,[30] legislative efforts to reform and regulate the bail industry have failed to curb the industry's growth and continued harm to consumers.[31] For decades, the bail industry's forceful lobbying tactics have largely blocked legislation seeking to regulate the industry or eradicate it entirely.[32] The bail industry's well-financed[33] lobbying campaign succeeds by framing and distorting public perception to ensure that harmed parties are viewed narrowly as dangerous or likely guilty "bad guys" while bail agencies are viewed as "heroes" or scrappy small businesses surviving on thin margins in service of greater civic and public safety objectives.[34] It is under this enduring narrative that the pri-

30. *See, e.g.*, *Selling Off Our Freedom*, *supra* note 20, at 47 (reviewing research conducted by the Vera Institute finding cash bail was not required to promote court attendance and successful pretrial release); *see also* Bauer, *supra* note 20 (explaining only 12% of defendants in Washington, D.C., a city with no private bail bonds since 1992, fail to appear, whereas in Dallas, "one of the most pro-bail counties in the nation," 26% of defendants fail to appear).

31. Brian Highsmith, *Commercialized (In)Justice: Consumer Abuses in the Bail and Corrections Industry*, NAT'L CONSUMER L. CTR. 9–13 (Mar. 2019), https://www.nclc.org/images/pdf/criminal-justice/report-commercialized-injustice.pdf [https://perma.cc/PE6U-M9CR]. *But see* Sheila Cohen, *Bail Bond Industry Fights Back Against Moves to Limit or End Cash Bail*, WIS. PUB. RADIO (Jan. 21, 2019), https://www.wpr.org/bail-bond-industry-fights-back-against-moves-limit-or-end-cash-bail [https://perma.cc/79G2-URXK] (explaining Wisconsin and a handful of other states currently prohibit commercial bail bonding); Blair R. Zwillman, *New Jersey Leads the Way in Bail Reform*, 318 N.J. LAW. MAG. 16 (June 2019) (arguing that a significant change to New Jersey's pretrial release system effectively eliminated cash bail in the state in 2017).

32. *See Selling Off Our Freedom*, *supra* note 20, at 40–43 (describing the power and influence wielded by the American Bail Coalition lobby); *see also* Bauer, *supra* note 20 (explaining how the American Bail Coalition successfully defended against efforts to reform the cash bail industry and proactively lobbied to expand the industry's reach despite criticism from "[t]he American Bar Association, the National Association of Counties, the International Association of Chiefs of Police, the National District Attorneys Association, and others [who] have condemned commercial bail as a system that discriminates against the poor and places Americans' liberty at the mercy of private businesses"). *See generally* Timothy R. Schnacke, Michael R. Jones & Claire M.B. Brooker, *The History of Bail and Pretrial Release*, PRETRIAL JUST. INST. 12–19 (Sept. 23, 2010), https://cdpsdocs.state.co.us/ccjj/Committees/BailSub/Handouts/HistoryofBail-Pre-TrialRelease-PJI_2010.pdf [https://perma.cc/KZ4Q-6RYT] (outlining past legislative attempts to reform the cash bail industry).

33. *See* Bauer, *supra* note 20 (describing how bail lobbyists recently spent $250,000 to relegalize private bail bond in Oregon, a State that banned bail bond agencies in 1978).

34. *See id.* (describing the bail industry's Safe Streets Colorado campaign, which "ran television ads narrated by children's voices that depicted a 'fugitive' busting into a home and shooting up a family"); Dan Frosch & Ben Chapman, *New Bail Laws Leading to Release of Dangerous Criminals, Some Prosecutors Say*, WALL ST. J. (Feb. 10, 2020), https://www.wsj.com/articles/bail-reform-needs-reform-growing-group-of

vate bail bond industry has marched itself into its current reality: an underregulated and nearly risk-proof industry involving a tight network of coordinated actors, which amass an estimated $2 billion in profits annually, while simultaneously subjecting American consumers to physical, emotional, and financial harm.[35]

Families like the Mitchells and Eganas need urgent relief and protection.[36] This Note argues that consumer protection statutes offer a novel legal avenue to protect consumers engaged with the bail bond industry.[37] In particular, it argues that state attorney generals (AGs) already have the authority they need under state consumer protection laws to pursue meaningful reforms. Public enforcers like state AGs hold both a moral and legal imperative to take enforcement action against the bail bond industry under a consumer protection legal theory.[38]

At its core, bail bond contracting is a commercial transaction between a service provider, the bail bond agency, and its customers, criminal defendants and their friends and family who indemnify the bond. Consumer law experts have adopted the term "commercialized injustice" to label the consumer abuses perpetuated by private companies profiting from the bail industry and mass incarceration broadly.[39] According to these experts, bail bond companies exploit consumers' desperation and limited legal knowledge to shift risks inherent to their business model onto their vulnerable customers.[40]

-opponents-claim-11581348077 [https://perma.cc/ENT2-XDPT].

35. *See Selling Off Our Freedom*, *supra* note 20, at 1.

36. *See infra* Parts I–II.

37. *See generally* 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) (explaining how practicing attorneys may use consumer protection statutes to combat abuses in the criminal legal system); Ariel Nelson, Brian Highsmith, Alex Kornya & Stephen Raher, *Commercialized (In)Justice Litigation Guide: Applying Consumer Laws to Commercial Bail, Prison, Retail, and Private Debt Collection*, NAT'L CONSUMER L. CTR. 15–27 (June 2020), https://www.nclc.org/images/pdf/criminal-justice/WP_Litigation_Guide.pdf [https://perma.cc/YN6L-K8YF] (analyzing misconduct in the bail industry and arguing for increased consumer protection litigation to address commercial abuses).

38. *See* Press Release, Consumer Fin. Prot. Bureau ("CFPB"), Consumer Financial Protection Bureau and Virginia, Massachusetts, and New York Attorneys General Sue Libre for Predatory Immigrant-Services Scam (Feb. 22, 2021), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-and-virginia-massachusetts-and-new-york-attorneys-general-sue-libre-for-predatory-immigrant-services-scam [https://perma.cc/4N4J-NJQL].

39. Highsmith, *supra* note 31, at 1 ("'[C]ommercialized injustice' [is] consumer abuses perpetuated by companies profiting from the criminal legal system and mass incarceration.").

40. *See id.*; *see also Selling Off Our Freedom*, *supra* note 20, at 24 (explaining how

Thus, unlike other types of surety, bail bond companies almost never report losses in their portfolios.[41] Thousands of American consumers, including the disproportionately Black, Brown, and Indigenous women who cosign bail bond contracts as indemnitors,[42] find themselves in a tricky predicament: unable to afford the unexpected expense of bail,[43] no matter how small,[44] but terrified by the severe consequences their families will face under pretrial detainment,[45] no matter how briefly the accused remains in custody.[46] Thus, even as understood by bail agents themselves,[47] the bail bond industry prof-

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bail insurance companies underwriting bail contracts place responsibility for losses on bail agents, who in turn place responsibility on their clients).

41. *Compare* Bauer, *supra* note 20 (comparing average losses claimed by property and auto insurance companies at 40–60 percent of revenue), *with Selling Off Our Freedom*, *supra* note 20, at 24 (quoting a bail bond insurance executive at AIA Holdings, Inc. as stating: "You know how many checks has [sic] this company written to pay a bail loss? . . . Not a single one").

42. *See* Joshua Page, *I Worked as a Bail Bond Agent. Here's What I Learned.*, APPEAL (Apr. 4, 2019), https://theappeal.org/i-worked-as-a-bail-bond-agent-heres-what-i-learned [https://perma.cc/9ZF9-PXYA] ("Defendants' female relations (mothers, grandmothers, aunts, wives, and friends) typically come up with the funds to get them out of jail. Often, these women—disproportionately women of color—also agree to co-sign the bond (a requirement of many bail companies and sureties).").

43. *See, e.g.*, *Selling Off Our Freedom*, *supra* note 20, at 18 (explaining that Black men and women held in local jails awaiting trial had "earned a median income of only $900 and $568, respectively, in the month prior to being held").

44. *See Report on the Economic Well-Being of U.S. Households in 2018: Dealing with Unexpected Expenses–May 2019*, BD. GOVERNORS FED. RSRV. SYS. (May 28, 2019), https://www.federalreserve.gov/publications/2019-economic-well-being-of-us-households-in-2018-dealing-with-unexpected-expenses.htm [https://perma.cc/54VV-ZLXK] (estimating that 39% of Americans are unable to afford an unexpected expense of $400 or greater without selling something or borrowing money).

45. *See* Schnacke et al., *supra* note 32, at 9–10 (summarizing empirical research that found defendants detained because they were unable to pay their cash bail bond were more likely to be convicted and receive higher sentences than defendants who were released).

46. *See* Page, *supra* note 42 (explaining a young mother felt she "had" to bail her ex-boyfriend out of jail quickly because otherwise "he would remain in jail, unable to work or help care for their child"); Bauer, *supra* note 20 (noting pretrial detentions as brief as two or three days significantly increased low-risk defendants' likelihoods of committing new crimes before trial when compared with equivalent defendants held less than twenty-four hours); *Selling Off Our Freedom*, *supra* note 20, at 28 (narrating the tragic death of twenty-eight-year-old Sandra Bland during a three-day pretrial detainment after a traffic stop for a failure to signal).

47. *See* Bauer, *supra* note 20 (quoting one bail bond agent commenting: "'You make the most money off domestic violence, cuz [sic] the bail's high. Domestic violence is $50,000. You figure that's at least $5,000' in the bank. 'And a lot of times those cases don't even get filed'").

its to the determent of vulnerable and historically marginalized communities.[48]

This Note evaluates the application of consumer protection laws to the bail bond industry, focusing on state laws prohibiting unfair or deceptive acts or practices (UDAP).[49] This analysis reveals that private enforcement of consumer rights through individual and class action litigation offers a promising[50] but imperfect path to addressing commercialized injustice within the bail industry.[51] Part I provides an overview of the mechanics of the modern cash bail system and introduces the problem of commercialized injustice. Part II analyzes the application of state UDAP laws to consumers' engagements with the bail bond industry. Part II also critiques the current focus on private enforcement and explains why private litigation offers an imperfect solution. Part III argues that public enforcers like state AGs are wellsuited to bolster consumer protection efforts against bail bond companies to ultimately end commercialized injustice in the bail industry at a systemic level.[52]

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48. Highsmith, *supra* note 31, at 2–6.

49. While a discussion of "abusive" acts or practices under consumer protection law prohibiting unfair, deceptive, or abusive acts or practices (UDAAP) is beyond the scope of this Note, the bail industry's practices arguably also violate UDAAP statutes for unfairness, deception, or abusiveness. *See generally* CFPB, CONSUMER LAW AND REGULATIONS: UNFAIR, DECEPTIVE, OR ABUSIVE ACTS OR PRACTICES 1–2 (Oct. 2012) (defining unfair, deceptive, and abusive acts or practices).

50. *See* Press Release, ACLU, ACLU's First Lawsuit Against For-Profit Bail Underwriters That Drive Predatory Industry Ends in Financial Payout for Clients (Oct. 7, 2020) [hereinafter ACLU Settlement Press Release], https://www.aclu.org/press-releases/settlement-reached-between-bail-companies-and-montana-couple-terrorized-bounty [https://perma.cc/D53L-NY3B] (announcing settlement).

51. *See* Laura Kusisto, *Criminal-Justice Changes Are Squeezing the Bail-Bond Industry*, WALL ST. J. (Feb. 21, 2020), https://www.wsj.com/articles/criminal-justice-reforms-are-squeezing-the-bail-bond-industry-11582299332 [https://perma.cc/4UEG-VNSL] (explaining while private litigation places new pressures on the bail bond industry, the industry is not under "existential" threat).

52. Earlier drafts of this Note emphasized how, to that point, no public enforcer had taken action against the bail bond industry under a consumer protection legal theory. Before publication, the CFPB and state attorneys general in Virginia, Massachusetts, and New York jointly filed a lawsuit against the immigration bond company, Libre by Nexus, alleging violations of state and federal UDAP statutes. In the Author's view, this recent development strongly bolsters this Note's thesis statement and call to action on the need for joint public and private enforcement of UDAP laws to curb the bail bond industry's harms. *See* Complaint, Consumer Fin. Prot. Bureau v. Nexus Servs., Inc., No. 5:21-cv-00016-EKD (W.D. Va. filed Feb. 22, 2021).

I. "COMMERCIALIZED INJUSTICE" IN THE MODERN BAIL INDUSTRY

Like many American legal principles, bail finds its source in the Magna Carta and early British common law.[53] However, under the early British common law, bail sureties were typically provided by a friend or family member, not the profit-driven industry that exists today.[54] Bail reformers commonly analogize the bail bond industry to payday lending, stressing that "[l]ike payday lenders who profit from families' needs for immediate funds, bail corporations take advantage of the urgent crisis of detention to lock people and their families in bad contracts, surveillance and control, and debt."[55] Section A provides an introduction to consumers' marketplace experiences with bail bond agencies, documenting how bail bond agencies profit by shifting their risk to consumers. Section B adds nuance to consumers' direct experiences by illuminating how bail bond insurance underwriters, or sureties, and other third-party actors also profit from the exploitation of consumers. Section C explains the broad power and authority provided to bail agencies and their agents to use force and fear to maintain control over their profits.

A. BAIL BOND AGENCIES PROFIT BY SHIFTING RISK TO CONSUMERS

The modern cash bail system begins with the arrest of accused defendants.[56] From hours to several days later, defendants have their bail set by a statutory schedule or, more commonly, by a judge.[57] As with other areas of discretionary decision-making within the criminal legal system,[58] empirical research routinely documents racial disparities across bail amounts set, even when defendants share identical backgrounds and criminal charges.[59] Afterwards, defend-

53. *See* Caleb Foote, *The Coming Constitutional Crisis in Bail* (pt. 1), 113 U. PA. L. REV. 959, 965–68 (1965) (explaining the origins of bail surety).

54. Schnacke et al., *supra* note 32, at 6.

55. *Selling Off Our Freedom*, *supra* note 20, at 6.

56. *See* Alex Kornya & Ivy Wang, *Litigating Bail Cases: Using Consumer Laws to Challenge Commercial Bail Industry Practices*, at 06:36–06:49 (July 23, 2020), available at https://register.gotowebinar.com/recording/2162229606895075085 [https://perma.cc/MG2V-FNA4] (enter your first name, last name, and email in the respective fields; then click "Register").

57. *But see* BRONX FREEDOM FUND, http://www.thebronxfreedomfund.org [https://perma.cc/Y8EL-5NEB] (providing community-funded bail payments); David Arnold, Will Dobbie & Crystal S. Yang, *Racial Bias in Bail Decisions*, 133 Q.J. ECON. 1885, 1892 (2018) (explaining the limited circumstances under which a defendant may be released on recognizance (ROR)).

58. *See Race and Discretion in the Criminal Legal System*, N.Y.U., CTR. ON RACE, INEQ., & L., https://www.law.nyu.edu/centers/race-inequality-law/our-work/race-and-discretion-in-criminal-legal-system [https://perma.cc/5VU2-KZDS].

59. *See* Arnold et al., *supra* note 57, at 1886 (demonstrating that Black defend-

ants have two options for release: pay the entire bail amount or enter into a bail bond agreement with a bail agency.[60] When defendants cannot afford the full bail amount, their family and friends contact a commercial bail agent or bail bondsman to secure their release.[61] Still incarcerated after their arrest, defendants have limited access to information required to make an informed decision,[62] and their family and friends are rarely in any stronger position to select a bail agency or negotiate more favorable terms in their bail bond contracts.[63]

To facilitate the defendant's release from jail, the parties pay a nonrefundable premium or fee to the bail bond agency and, in return, bail agencies secure the defendant's initial release from jail.[64] Most bail bond agencies charge the highest premium rate authorized by state legislatures, typically around ten percent of the total bail amount.[65] However, in some circumstances, bail bond agencies may charge premiums that exceed ten percent.[66] Bond premiums and fees

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ants in Miami-Dade and Philadelphia were 3.6% more likely to receive monetary bail rather than ROR and to receive bail amounts that were on average $9,923 higher when compared to White defendants charged with similar crimes); Jon Kleinberg, Himabindu Lakkaraju, Jure Leskovec, Jens Ludwig & Sendhil Mullainathan, *Human Decisions and Machine Predictions*, 133 Q.J. ECON. 237, 287–88 (2018) (reporting the results of their statistical study, which found that judges fail to fairly judge risk potential when setting bail, and that variables such as a judge's mood or a defendant's demeanor significantly influence bail decisions); *Commitments to Anti-Racism Ring Hollow*, *supra* note 22, at 4 ("Bail amounts assigned to Black men average 35% higher than those for white men.").

60. *See* Kornya & Wang, *supra* note 56, at 06:50–07:14.

61. *See id.*

62. *See* Mel Gonzalez, Note, *Consumer Protection for Criminal Defendants: Regulating Commercial Bail in California*, 106 CALIF. L. REV. 1379, 1381–82 (describing the limited information available to defendants while incarcerated).

63. *The Devil in the Details: Bail Bond Contracts in California*, UCLA SCH. L. CRIM. JUST. REFORM CLINIC 6 (May 2017), https://static.prisonpolicy.org/scans/UCLA_Devil%20_in_the_Details.pdf [https://perma.cc/Z24W-AXBP].

64. *See* Kornya & Wang, *supra* note 56, at 07:09–07:24.

65. *See id.* at 16:04–16:25; *see, e.g.*, *Commercial Bail Bond Rates*, PHILA. REINSURANCE CORP. (Sept. 2017), available at https://filingaccess.serff.com/sfa/home/GA (click "Begin Search"; then click "Accept"; then search "12319" in the "NAIC Company Code" field; then select "Commercial Bail Bonds"; then select "PRC GA Bail Bond 2017 Final" under "Attachments") (documenting the bail surety's policy to set bail premiums between four percent and ten percent with lowest rates only offered to principals who hire an attorney, secure a friend or family member as an indemnitor, agree to a "case worker," have no *charges* within the last three years, and are not currently charged with a felony).

66. *See* Kornya & Wang, *supra* note 56, at 16:25–18:21 (explaining that in "field rate" states like Iowa, bail bond agencies may file a rate form with the state insurance commissioner to charge a variety of rates depending on the company's risk assessment); *see, e.g.*, *Bail Bonds Rates*, AM. CONTRACTORS INDEM. CO. (Aug. 2016), available at

are never returned to the parties at the conclusion of the criminal case, even when defendants attend every court appearance, criminal charges are dropped, or defendants are acquitted.[67] If the principal and their indemnitors[68] cannot afford the full amount of the premium, they can enter into financing agreements to cover the bail bond contract's premium and fees.[69] However, the terms and costs associated with these lines of credit routinely fall short of the transparency required in state and federal consumer protection laws.[70] Installment plan debt remains even after criminal cases dissolve and "even though the [bail agent] has no further obligation to the court and faces zero financial risk."[71] Additionally, bail agents regularly require the defendant's family and friends to join the bail bond contract as indemnitors.[72] As indemnitors, the defendant's family and friends protect bail bond agencies' profits by "guaranteeing" they will cover the full bail amount if the defendant fails to appear or otherwise violates the terms of the bail contract.[73]

Bail agencies are notoriously secretive about their policies and seldom post their bail bond or financing contracts on their websites.[74] Thus, defendants and indemnitors frequently sign contracts after only a cursory opportunity to review.[75] Yet, across the industry, bail bond contracts include hidden expenses and vague contract provisions that trap families in cycles of control, surveillance, and debt,[76]

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https://filingaccess.serff.com/sfa/home/MN (click "Begin Search"; then click "Accept"; then search "10216" in the "NAIC Company Code" field; then select "ACIC-All States Bail Filing-Minnesota 160801-Final" under "Attachments") (documenting the company's discretion to charge premiums between fifty to one hundred percent of the cash bail amount when the court sets a bail amount at fifteen percent or less the recommended penal amount).

67. Highsmith, *supra* note 31, at 4, 25–26.

68. *See, e.g.*, *Indemnitor*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Someone who indemnifies another.").

69. *See* Kornya & Wang, *supra* note 56, at 07:25–07:52.

70. Highsmith, *supra* note 31, at 26–27 ("The terms and cost of this extension of credit may be murky and devoid of the types of disclosures typically required in consumer contracts . . . . [C]ontract terms impose invasive, abusive, and unfair terms that are arguably unconscionable."); *see also* Kornya & Wang, *supra* note 56, at 12:41–15:52 (discussing common issues with consumer contracts in their litigation against bail bond companies).

71. *Selling Off Our Freedom*, *supra* note 20, at 29.

72. *See* Kornya & Wang, *supra* note 56, at 11:02–11:19.

73. *See id.*

74. *The Devil in the Details: Bail Bond Contracts in California*, *supra* note 63, at 1.

75. *See* Gonzalez, *supra* note 62, at 1381–83.

76. *See id.* at 1382 (explaining how bail bond agencies place burdensome, undisclosed contractual terms on defendants like costly installment plans, weekly check-ins, and electronic GPS monitoring, even when not required by the court).

while concurrently affording bail agencies broad latitude to return defendants to jail, even for trivial, nonmaterial, or pretextual reasons.[77] Given the inherent injustices in bail bond contracting and the prevalence of bad actors in the marketplace, legal scholars reviewing bail bond contracts recently argued that "even the most industrious and sophisticated consumer would be significantly hampered in making an educated choice [between] bail bond compan[ies]."[78]

B. BAIL BOND INSURERS AND PRIVATE EQUITY INVESTMENT FIRMS SIMILARLY PROFIT BY SHIFTING RISKS TO BAIL AGENCIES AND CONSUMERS

The most visible player in the bail bond industry, bail bond agencies, only represent part of the entire bail bond industry.[79] Large insurance companies or bail sureties "back" local bail agencies as underwriters to bail agencies' agreements with consumers.[80] In theory, bail sureties underwrite bail bond agreements to help defray the risks of their business.[81] Within these underwriting agreements, bail agencies pay sureties a percentage of the bail premiums collected, typically ten percent of the premium.[82] Bail agencies also pay into "build-up funds" that bail insurers keep as reserves.[83] Yet unlike other insurance industries, bail surety companies incur uncommonly low losses.[84]

Bail insurance companies maintain their high profit margins by controlling the terms set within bail agency contracts, often directly mandating the abusive terms bail agents include in their consumer contracts.[85] Unlike other types of surety bonds, bail bond insurers are only responsible for losses as a last resort.[86] Shifting risks to consumers and policyholders[87] and lobbying to shape the market risk

77. *Selling Off Our Freedom*, *supra* note 20, at 32 (detailing how bail bond agencies "[r]ig [c]ontracts and [s]hift [r]isk to [f]amilies" to allow bail agents to arrest defendants and return them to jail, even when defendants attend all court appearances).

78. *The Devil in the Details: Bail Bond Contracts in California*, *supra* note 63, at 1.

79. *Selling Off Our Freedom*, *supra* note 20, at 22.

80. *See* Kornya & Wang, *supra* note 56, at 11:20–11:48.

81. *See id.*

82. *Selling Off Our Freedom*, *supra* note 20, at 14.

83. *Id.*

84. *Id.* at 14, 21–25.

85. *See* Mitchell Complaint, *supra* note 1, at 32–33 (explaining bail insurers, including AIA Holdings, Inc., commonly draft bail agreements and require their partner bail agents to use them).

86. *Selling Off Our Freedom*, *supra* note 20, at 11, 24.

87. *See supra* Part I.A.

and regulatory field pays off for these insurers.[88] One executive at a large bail surety company, AIA Holdings, Inc. (AIA Holdings), recently boasted that in the company's one hundred plus years in existence it had never paid out a loss on its bail portfolio.[89] While many bail sureties report similar financial outcomes,[90] a nearly risk-proof portfolio is antithetical to an insurance business.[91] By comparison, insurers in the auto and property industries sacrifice between forty and sixty percent of their revenues in losses annually.[92] The Bureau of Justice Statistics (Bureau) conducted a robust study on defendant court appearances between 1990 and 2004.[93] According to the Bureau's study, while failures to show are isolated and rare events, they nevertheless occur at rates higher than bail underwriters' reported loss rates.[94] To illustrate how bail bond companies unlawfully profit at the expense of their vulnerable consumers, Part II analyzes a form contract currently used by bail agents partnering with AIA Holdings to underwrite their bail bond contracts with consumers.[95]

Finally, at another level removed from consumers, multinational private equity firms also seek to capitalize on the lucrative bail bond industry by investing into bail agencies and bail insurance providers.[96] For example, in 2012 Endeavour Capital—a multi-billion-dollar private equity fund predominately serving public clients like large municipal pension funds, university endowments, and foundations—

88. *See Selling Off Our Freedom*, *supra* note 20, at 25 (explaining why bail agencies are rarely on the hook for the full bail amount when a defendant skips bail).

89. *See* Bauer, *supra* note 20.

90. *See id.* ("When I reviewed the financial records of 32 surety companies, I found that, in 2012, they cumulatively paid less than 1 percent in bail losses.").

91. *See Insurance*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("[A] contract by which one party, for a consideration, which is usually paid in money . . . promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest." (quoting GEORGE J. COUCH, COUCH ON INSURANCE § 1.2 (2d ed. 1984)).

92. Bauer, *supra* note 20.

93. Ethan Corey & Puck Lo, *The 'Failure to Appear' Fallacy*, APPEAL (Jan. 9, 2019), https://theappeal.org/the-failure-to-appear-fallacy [https://perma.cc/SKU4-KFSG] (reporting on the study).

94. *See id.* ("The largest study on court appearances to date, conducted by the Bureau of Justice Statistics between 1990 and 2004 in 40 of the 75 largest U.S. counties, found that more than three quarters of defendants showed up for all of their court dates. Of the minority that missed at least one hearing, 94 percent appeared in court within a year after their missed court date.").

95. *See infra* Part II.A.2.b–c.

96. *See Selling Off Our Freedom*, *supra* note 20, at 22–25 (showing private equity firms like Endeavour Capital, Tokio Marine, and Fairfax Financial invest in bail bond agencies and bail insurers often holding majority stakes of these bail companies).

acquired Aladdin Bail Bonds,[97] the largest bail bond agency in the country and arguably one of the industry's worst actors.[98] Since purchasing its controlling stake, Endeavour Capital used its "strategic" investment to expand the Aladdin Bail Bonds "brand" across the country.[99] After an unprecedented wave of racial justice protests in summer 2020,[100] Endeavor Capital succumbed to pressures from policymakers[101] and advocates[102] and finally divested from its bail bond investment portfolio.[103] However, at the same time, Fairfax Financial, a Canadian-based private equity firm, bought up shares forfeited by recent market exits, cementing its position as the new leader in the market.[104]

C. PRIVATE BAIL COMPANIES USE THEIR BROAD, QUASI-LAW-ENFORCEMENT AUTHORITY TO AID THEIR DEBT COLLECTION EFFORTS

The bail industry protects its financial position through subcontracted bounty hunters who use arrest, force, and fear to maintain

97. *Profiting Off Misery: Endeavour Capital and the Predatory Bail Industry*, ACLU 2 (Dec. 2019), https://www.aclu.org/sites/default/files/field_document/aladdin_bail_report_-_final.pdf [https://perma.cc/7LRN-4FQG].

98. *See id.* at 5 ("[S]ince it has been owned by Endeavour Capital, Aladdin Bail Bonds and its affiliates have paid out hundreds of thousands of dollars in a class action settlement, seen nine of its bail bond agents arrested and charged in a sweep in California, and drawn media coverage and a lawsuit after one of its bounty hunters shot the mother of an individual he was trying to apprehend . . . ."). *See generally id.* at 3–9 (describing the physical, emotional, and financial abuses perpetuated by Aladdin Bail Bonds).

99. *Triton Holdings LLC*, ENDEAVOUR CAPITAL, https://endeavourcapital.com/ec/the-aladdin-group [https://perma.cc/N47S-YCKM].

100. *See* Audra D.S. Burch, Weiyi Cai, Gabriel Gianordoli, Morrigan McCarthy & Jugal K. Patel, *How Black Lives Matter Reached Every Corner of America*, N.Y. TIMES (June 13, 2020), https://www.nytimes.com/interactive/2020/06/13/us/george-floyd-protests-cities-photos.html [https://perma.cc/WV5F-8PPK] (providing an extensive look at racial injustice protests throughout America through narrative and photographs).

101. *See, e.g.*, *America for Sale? An Examination of the Practices of Private Funds: Hearing Before the H. Comm. on Fin. Servs.*, 116th Cong. 59–60 (2020) (statement of Rep. Rashida Tlaib, Member, H. Comm. on Fin. Servs.) (questioning a senior leader at Endeavour Capital on the company's bail bond investments during a House Financial Services Committee Hearing on private equity firms).

102. Press Release, ACLU, ACLU and Color of Change Statement on Endeavour Capital's Divestment from Predatory, for-Profit Bail Industry (Feb. 21, 2020), https://www.aclu.org/press-releases/aclu-and-color-change-statement-endeavour-capitals-divestment-predatory-profit-bail [https://perma.cc/FG6A-9RVB] (celebrating Endeavour Capital's divestment as a "major win" in their multi-year campaign to pressure the company to end its partnerships with the for-profit bail industry).

103. *See* Kusisto, *supra* note 51 (explaining Endeavour Capital and its peers have begun to abandon and divest from their bail bond portfolios).

104. *Selling Off Our Freedom*, *supra* note 20, at 2, 5–9.

control over company profits.[105] Abusive bounty hunter practices have plagued the bail bond industry for decades.[106] For example, in pursuit of a bail fugitive, a group of masked bounty hunters forced their way into the wrong home and murdered an innocent young couple in 1997.[107] Yet, today, bounty hunters still exercise more search and seizure power than state and federal law enforcement agents.[108] Consistent with the Supreme Court's precedent, bounty hunters may "enter homes without warrants . . . ; break down doors without knocking or announcing themselves; and . . . transport fugitives across state lines without extradition orders."[109]

In *Taylor v. Taintor*, the Supreme Court outlined its expansive and permissive understanding of bounty hunter authority in dictum, by explaining:

> When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another State; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the rearrest by the sheriff of an escaping prisoner.[110]

While bail industry defendants commonly cite dictum in *Taylor v. Taintor* to evade liability for their harms perpetuated against consumers,[111] bounty hunters are not above the law.[112] Yet, lower courts

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105. *See* Kornya & Wang, *supra* note 56, at 11:50–12:33.

106. *See Bounty Hunters Kill Couple in Case of Mistaken Identity*, N.Y. TIMES (Sept. 2, 1997), https://www.nytimes.com/1997/09/02/us/bounty-hunters-kill-couple-in-case-of-mistaken-identity.html [https://perma.cc/YTF3-SM7F].

107. *Id.*

108. *See, e.g.*, United States v. Poe, 556 F.3d 1113, 1121 (10th Cir. 2009) (holding because bounty hunters are not state actors their actions are not subject to the same constitutional scrutiny as government actors).

109. *See* Daphne Congcong Zhang, *Lax Washington Oversight of Bounty Hunters Sets Stage for Mayhem, Tragedy*, SEATTLE TIMES (Jan. 16, 2019), https://www.seattletimes.com/seattle-news/times-watchdog/high-adrenaline-bounty-hunter-industry-operates-with-little-oversight-despite-concerns-over-training-tactics [https://perma.cc/HVU4-NXQZ].

110. 83 U.S. 366, 371 (1872) (dictum).

111. *See, e.g.*, Brief of Appellants at 5–6, Milborn v. Vinson, 850 So. 2d 1219 (Miss. Ct. App. 2002) (No. 2000-CA-01394-COA) (invoking *Taylor v. Taintor* to justify the bail bond agency defendant's actions).

112. *Profiting Off Misery: Endeavour Capital and the Predatory Bail Industry*, *supra* note 97, at 5–8 (documenting civil and criminal consequences resulting from abusive bounty hunter practices); *see also* Walker v. Commonwealth, 127 S.W.3d 596, 603 (Ky. 2004) (rejecting bounty hunter defendant's argument that he did not have "fair warning" of the criminality of his conduct due to the court's dictum in *Taylor v.*

occasionally invoke the Court's dictum in *Taylor v. Taintor* to justify bail agents' broad and intrusive authority to recover fugitives,[113] permitting bail companies to shirk responsibility for their tortious conduct[114] and even empowering bounty hunters to recover damages for their "injuries" sustained while seizing principals, despite their own negligence.[115] Still, throughout the late 1990s and early 2000s, lower courts began to adopt a key limitation on bail agents' authority, holding their conduct must only target the principal.[116] At the time, many lower courts drew a firm line to protect against unlawful trespasses and other privacy infringements targeting the family and friends of principals.[117] However, in reaction to the few successful legal judgments won by principals and indemnitors, the bail industry simply evolved and began to use its consumer contracts to maintain power over its consumers.[118]

In addition to bounty hunters' lacking constitutional restraints,[119] bail bond contracts likewise afford bail agencies, and their designees, broad jurisdiction and control over defendants, de-

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Taintor).

113. *See* Mitchell v. First Call Bail & Sur., Inc., 412 F. Supp. 3d 1208, 1217–18 (D. Mont. 2019) (invoking *Taylor v. Taintor* to recognize bounty hunter's broad authority under the common law); *see also* State v. Mathis, 509 S.E.2d 155, 159 (N.C. 1998) (highlighting how the "Supreme Court [broadly] defined the rights and powers of sureties and bail bondsmen at common law" and also noting that *Taylor v. Taintor* is "the most often quoted case in this area of the law"); Commonwealth v. Lyon, No. CR97004681-00, 1998 WL 34170164, at *1 (Va. Cir. Ct. Mar. 16, 1998) ("Federal and state courts frequently cite *Taylor v. Taintor* . . . for the common law rules governing the manner in which bail bondsmen may arrest their principals . . . ." (citation omitted)).

114. *See, e.g.*, *Mathis*, 509 S.E.2d at 163 (raising *Taylor v. Taintor* to affirm the intermediate appellate court's reversal of a jury conviction against bounty hunters for breaking and entering, assault, and injury to real property).

115. *See, e.g.*, Mota v. Gruszczynski, No. CV 10731900, 2011 WL 13111722, at *1, *8 (Ohio Ct. Com. Pl. July 18, 2011) (granting summary judgment in favor of a bounty hunter for "dog bite injuries" and loss of consortium after the bail agent entered the principal's parents' home mistakenly believing the principal lived with his parents).

116. *See, e.g.*, *Milborn*, 850 So. 2d at 1223 (explaining *Taylor v. Taintor* permits bail agents the right to search the principal's home, but not a third party's home).

117. *See id.* at 1226 (affirming the jury's award of damages against a bail bond agency, which unlawfully trespassed upon the principal's mother's home); *see also* State v. Tapia, 468 N.W.2d 342, 344 (Minn. Ct. App. 1991) ("The authority given to the bondsman to effectuate a principal's arrest does not extend to the forcible entry of a third party's residence."). *But see Mathis*, 509 S.E.2d at 163 (declining to hold bounty hunters responsible for the injuries they perpetuated against the principal's mother and her home).

118. *See infra* notes 119–37 and accompanying text.

119. *See supra* notes 108–17.

spite little regulatory oversight on their actions.[120] In many cases, bail bond contracts provide bail agents and their subcontracted bounty hunters irrevocable consent to enter the defendant's home or any other dwelling that defendants occupy.[121] Because in every jurisdiction consent is a complete bar to a statutory or common law trespass claim, bail agencies routinely use their contracts to shield themselves from liability.[122] In extreme cases contracts expressly waive the right to sue for the most common tort actions previously pursued by consumers,[123] despite the reality that such contract provisions rest on dicey legal standing.[124] While federal courts partially source bounty hunters' authority to capture and surrender principals under contract law,[125] the bail industry's consumer agreements must still adhere to federal and state consumer protections prohibitions.[126] Blurring the line between their quasi-law-enforcement role to return criminal fugitives and their debt collector role, bail companies regularly use force and fear to coerce debt payments from consumers who lack legal sophistication and knowledge about their legal rights and protections.[127]

Under scant regulation,[128] bail companies actively market themselves to policymakers as public service providers,[129] while simulta-

120. Zhang, *supra* note 109 (highlighting the lack of regulation and skill of bounty hunters across the nation).

121. *E.g.*, *The Devil in the Details: Bail Bond Contracts in California*, *supra* note 63, at 10 ("You irrevocably grant to Surety and its designees the right to enter your residence, or any other property that you own or occupy, without notice, at any time, for the purpose of locating, arresting, and returning Defendant to custody."); Highsmith, *supra* note 31, at 27 ("[Bail bond] contract terms impose invasive, abusive, and unfair terms that are arguably unconscionable. For example, some contracts require the [defendant and indemnitors] . . . to consent to any force necessary to return them to custody, or to authorize the surety to enter their home without notice and at any time.").

122. *See, e.g.*, WASH. REV. CODE § 4.24.630 (2010) (outlining liability for damages to property require the defendant to act "wrongfully" or act without "authorization").

123. *See infra* Part II.A.2.

124. *See infra* Part II.A.2.c.

125. *See, e.g.*, Ouzts v. Maryland Nat. Ins. Co., 505 F.2d 547, 551 (9th Cir. 1974) (noting bounty hunters' broad and intrusive authority over principals "arises from the private undertaking implied in the furnishing of the bond" and the "contract between the parties" (citation omitted) (quoting Fitzpatrick v. Williams, 46 F.2d 40 (5th Cir. 1931))).

126. *See* Kornya et al., *supra* note 37, at 129–40 (describing bail bond industry practices that potentially violate consumer protection statutes); Nelson et al., *supra* note 37, at 13–27 (same).

127. *See infra* notes 195–209 and accompanying text.

128. *See Selling Off Our Freedom*, *supra* note 20, at 36–37 (explaining bail sureties, as a type of insurance, are regulated at the local level in a "piecemeal regulatory system" whereby overburdened regulators commonly overlook bail bond regulation due

neously executing decisions based on their financial interests, which often directly conflict with the stated public policy goals of criminal bail.[130] Predictably, the bail bond industry's abusive practices fall disproportionately on communities of color, and further exacerbate racial disparities in the criminal legal system and income inequality in the United States.[131] For example, a recent study on bail and pretrial practices in Delaware revealed that racially disparate treatment across judicial bail decisions accounted for nearly half of the state's Black-White disparity in criminal convictions.[132] Emphasizing how the bail bond industry maintains high profit margins by controlling the terms of the deal in bail bond contracts,[133] bail reformers explain how the modern bail industry not only perpetuates racial disparities in the criminal legal system[134] but also divests millions from communities of color.[135] As underscored by Mr. Mitchell's and Mr.

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to its relatively small footprint within insurance regulation broadly); *infra* note 140 (explaining Minnesota's automatic approval process for bail bond surety contracts). *See generally* 15 U.S.C. §§ 1011–1015 (providing basic provisions for federal regulation and taxation of insurance companies).

129. *See* Michael Hiltzik, *Column: Facing Eradication, the Bail Industry Gears up to Mislead the Public About Its Value*, L.A. TIMES (Oct. 4, 2019), https://www.latimes.com/business/story/2019-10-04/hiltzik-bail-industry-eradication [https://perma.cc/A6QR-U2YC] ("Few businesses enjoy a reputation for providing a public service as inflated as the bail bond industry.").

130. *See* Highsmith, *supra* note 31, at 26 ("Moreover, 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." (footnote omitted)).

131. Ellen A. Donnelly & John M. MacDonald, *The Downstream Effects of Bail and Pretrial Detention on Racial Disparities in Incarceration*, 108 J. CRIM. L. & CRIMINOLOGY 775, 780 (2018).

132. *Id.* ("[B]ail and pretrial detention absorb much of the criminal processing disparities between Blacks and Whites. Pretrial conditions contribute to 43.5% of explainable Black-White disparity in convictions and 37.2% of the disparity in guilty pleas.").

133. *See The Devil in the Details: Bail Bond Contracts in California*, *supra* note 63 (providing in-depth detail about the control bail bond sureties hold while highlighting that the companies profit at $2 billion annually).

134. *See* Highsmith, *supra* note 31, at 1–3 ("The expanding reach of the modern corrections industry represents the intersection of two troubling trends: (1) the outsourcing of the criminal legal system to the private sector, exemplified by the growth of the private prison industry; and (2) the imposition of fines and fees on mostly low-income defendants to fund the criminal legal system."); *see also* Corey & Lo, *supra* note 93 ("[C]ash bail has transformed into a de facto form of pretrial incarceration, often for people who have simply been accused of low-level offenses, such [as] drug or property crimes. According to the Bureau of Justice Statistics, nearly half a million people sit in jail waiting for trial nationwide, the vast majority of whom would be free if not for their inability to afford bail.").

135. *See* Highsmith, *supra* note 31, at 25–27 ("In New York City alone, an estimat-

Egana's experiences, the bail bond industry profits by subjugating its vulnerable customers to physical, emotional, and financial abuse.[136] Abusive bail bond industry practices extend beyond hardball business conduct. As evidenced by the industry's consumer contracts, bail bond companies commit egregious consumer protection violations in pursuit of profits.[137]

II. PROMISING, YET INADEQUATE: PRIVATE LITIGATION AS A SOLUTION

Consumer protection laws prohibiting unfair or deceptive acts or practices provide a powerful tool to protect vulnerable consumers engaged with the bail bond industry.[138] For example, in Mr. Mitchell's case, the ACLU filed its (now successfully settled) lawsuit against AIA Holdings and its local partners in 2019 under a consumer protection legal theory.[139] Despite the promise of state UDAP laws as a vehicle for reform and recovery, private litigation alone is unlikely to systemically eradicate the physical, emotional, and financial harms inflicted by the bail bond industry. Section A begins by briefly documenting the rise of state and federal UDAP laws in the United States and outlining common attributes shared by UDAP laws generally. Next, Section A examines a bail bond consumer contract drafted by the bail surety AIA Holdings and analogizes practices described in AIA Holdings' contract to similar conduct found to violate state UDAP law as unfair or deceptive marketplace conduct.[140] Finally, Section B

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ed $16 to $27 million in nonrefundable fees was extracted in 2017 from people arrested and their family and friends.").

136. *See supra* notes 1–6 and accompanying text.

137. *See infra* Part II.A.2.

138. *See supra* note 37 and accompanying text.

139. *See* ACLU Settlement Press Release, *supra* note 50 (showing the plaintiffs were successful in persuading a court to rule provisions of the bail contract were void and unenforceable).

140. After several failed attempts to obtain bail bond contracts from the bail agencies directly, the Author obtained the form contract analyzed in Part II from SERFF, an e-filing database that provides public access to insurance providers' filings. *Minnesota Bail Bond Agreement*, ALLEGHENY CAS. CO., available at https://filingaccess.serff.com/sfa/home/MN (click "Begin Search"; then click "Accept"; then search "13285" in the "NAIC Company Code" field; then select "Allegheny Casualty Company"; then select "ACC.MN.0307" under "Attachments"). AIA Holdings filed its Bail Bond Agreement with the State of Minnesota on August 10, 2020, and received authorization to begin using the contract in Minnesota on August 11, 2020. *See id.* Pursuant to Minnesota statute, the AIA Holdings Bail Bond Agreement was automatically approved for use in Minnesota as one of the State's exempted commercial insurance policy forms. *See* Minn. Admin. R. § 2700.2470. Notably, AIA Holdings has filed and received approval to use identical Bail Bond Agreements in at least two additional states, Utah and Indiana. *Utah Bail Bond Agreement*, INT'L FID. INS. CO. & ALLE-

examines this Note's core thesis statement on the need for joint public and private enforcement under UDAP to curb the bail bond industry's harmful practices at a systemic level.

A. BAIL INDUSTRY PRACTICES LIKELY VIOLATE STATE UDAP LAWS

A new body of legal scholarship demonstrates the potential utility of state laws prohibiting unfair or deceptive acts or practices to provide families harmed by the bail industry a powerful tool for protection and recovery.[141] Because state legislators often modeled state UDAP laws after language in the federal equivalent, state laws share important common characteristics with the federal UDAP statute.[142]

1. Conduct Generally Prohibited Under UDAP Laws

In 1938, Congress passed the first consumer protection statute prohibiting "unfair or deceptive acts or practices" in commercial transactions and provided the Federal Trade Commission (FTC) with enforcement power.[143] As FTC Commissioner Robert E. Freer explained at the time, Congress adopted the new language to expand the FTC's regulatory authority and ease existing legal hurdles to its consumer protection efforts.[144] Yet after adoption, even with enhanced oversight authority granted to the FTC, consumers still lacked sufficient protection against fraud and abuse in their marketplace transactions.[145] Consequently, in the 1960s, states began to adopt parallel UDAP laws with analogous language and expanded en-

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GHENY CAS. CO., available at https://filingaccess.serff.com/sfa/home/UT (click "Begin Search"; then click "Accept"; then search "13285" in the "NAIC Company Code" field; then select "AAHL-130041751" under "SERFF Tracking Number"); *Indiana Bail Bond Agreement*, INT'L FID. INS. CO. & ALLEGHENY CAS. CO., available at https://filingaccess.serff.com/sfa/home/IN (click "Begin Search"; then click "Accept"; then search "13285" in the "NAIC Company Code" field; then select "AAHL-129930880" under "SERFF Tracking Number").

141. Kornya et al., *supra* note 37, at 107.

142. *See* Carolyn Carter, *Consumer Protection in the States: A 50 State Evaluation of Unfair and Deceptive Practices and Laws*, NAT'L CONSUMER L. CTR. (Mar. 2018), accessible at https://www.nclc.org/issues/how-well-do-states-protect-consumers.html [https://perma.cc/4GZ2-DRPA]; *see also* William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 733 (1972) (noting a majority of state UDAP laws use statutory language similar to the federal statute).

143. 15 U.S.C. § 45(a)(1)–(2).

144. Robert E. Freer, Comm'r, Fed. Trade Comm'n, Address Before the Annual Convention of the Proprietary Association (May 17, 1938), https://www.ftc.gov/system/files/documents/public_statements/676351/19380517_freer_whe_wheeler-lea_act.pdf [https://perma.cc/53FY-R7UU].

145. *See* Carter, *supra* note 142, at 10 (explaining at the time consumers "had . . . few[] tools at their disposal" because available claims such as common law fraud required "rigorous and often insurmountable proof of . . . the seller's state of mind").

forcement mechanisms.[146] State UDAP analogs provided joint "public enforcement authority" to state and federal agencies and, unlike the federal statute, provided consumers with a private cause of action in most jurisdictions.[147] By the 1980s, every state legislature had ratified a complimentary, local UDAP law.[148]

Under the federal definition, an act or practice is "unfair" when: "(1) [i]t causes or is likely to cause substantial injury to consumers; (2) [t]he injury is not reasonably avoidable by consumers; and (3) [t]he injury is not outweighed by countervailing benefits to consumers or to competition."[149] Prior FTC enforcement actions suggest the FTC considers the following conduct, among other acts, "unfair" under the federal UDAP statute: refusing to release assets used to secure loans or debt,[150] modifying the terms of an executed financing agreement,[151] and using unfair provision in contracts of adhesions.[152] Although not always statutorily defined, an act is "unfair" in most states if it is "immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers."[153] Mirroring the federal definition, in many jurisdictions, judicial evaluation of unfairness requires an inquiry into the level of consumer agency or choice in the transac-

146. *Id.*

147. *See* Prentiss Cox, Amy Widman & Mark Totten, *Strategies of Public UDAP Enforcement*, 55 HARV. J. ON LEGIS. 37, 42, 45 (2018).

148. *Id.* at 42.

149. *See* CFPB, *supra* note 49 (citing Letter from Fed. Trade Comm'n to Wendell H. Ford, Sen., U.S., & John C. Danforth, Sen., U.S. (Dec. 17, 1980), https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness [https://perma.cc/8DY9-WZUZ] (regarding FTC policy statement on unfairness)).

150. *See* Proposed Settlement Agreement, Stipulated Injunction, Release, and Final Order, FTC v. Capital City Mortg. Corp., No. 1:98-cv-00237-GK (D.D.C. Feb. 23, 2005); *see also* Press Release, Fed. Trade Comm'n, Capital City Mortgage Settles FTC Charges (Feb. 24, 2005), https://www.ftc.gov/news-events/press-releases/2005/02/capital-city-mortgage-settles-ftc-charges [https://perma.cc/DG7P-G7CG] (announcing UDAP settlement against mortgage company for refusing to release liens on homes after consumers made final mortgage payments).

151. *See* Press Release, Fed. Deposit Ins. Corp., FDIC Announces Settlement with American Express Centurion Bank, Salt Lake City, Utah for Unfair Practices (June 30, 2009), https://www.fdic.gov/news/press-releases/2009/pr09108.html [https://perma.cc/6S25-PFZD] (announcing UDAP settlement against credit card issuer for reducing consumers' lines of credit after obtaining executed agreements).

152. *See* CAROLYN L. CARTER, JONATHAN SHELDON, JOHN W. VAN ALST & JEREMIAH BATTLE, JR., NAT'L CONSUMER L. CTR., UNFAIR DECEPTIVE ACTS AND PRACTICES § 4.3.1 (9th ed. 2016) (listing "unfair provisions in adhesion contracts" as a practice "found to be unfair").

153. 17 AM. JUR. 2D *Consumer Protection* § 278 (2021) (citing Stack v. Abbott Laboratories, Inc., 979 F. Supp. 2d 658 (M.D.N.C. 2013); Bahringer v. ADT Sec. Servs., Inc., 942 F. Supp. 2d 585, 593 (D.S.C. 2013); Aliano v. Ferriss, 988 N.E.2d 168, 177 (Ill. App. Ct. 2013); Aliano v. Ferriss, 996 N.E.2d 9 (Ill. 2013) (disposition denied)).

tion.[154] In most cases, allegedly unfair conduct produces a monetary or financial injury to consumers, for example, "costs or fees paid by consumers as a result an unfair practice."[155]

While federal rules on unfairness focus on injuries to consumers,[156] the rules on deceptiveness regulate marketing representations or omissions by businesses.[157] Under the federal definition, an act or practice is "deceptive" if the following conditions are met: "(1) [T]he representation, omission, act, or practice misleads or is likely to mislead the consumer; (2) the consumer's interpretation of the representation, omission, act, or practice is reasonable under the circumstances; and (3) the misleading representation, omission, act, or practice is material."[158] Prior FTC enforcement actions suggest the FTC considers the following conduct "deceptive" under the federal UDAP statute: inadequate disclosures of material terms in advertising[159] and misrepresentations about loan terms.[160] Similarly, in most states "deceptive" prohibitions largely apply to false or misleading advertising by a business offering goods or services for sale.[161] In general, state courts may also hold an act or practice is deceptive if it has the "capacity" or "tendency" to deceive, even if actual deception

154. *See id.* § 283 (explaining an act or practice is not unfair if consumers may reasonably avoid injury); *see, e.g.*, Robinson v. Toyota Motor Credit Corp., 775 N.E.2d 951, 962 (Ill. 2002) (affirming the intermediate appellate court's holding "that there was a total absence of the type of oppressiveness and lack of meaningful choice necessary to establish unfairness").

155. CFPB, *supra* note 49, at 2.

156. *See id.*

157. Letter from Fed. Trade Comm'n to Rep. John D. Dingell, Chairman, Comm. on Energy and Com. (Oct. 14, 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf [https://perma.cc/LRG9-YV2G] (regarding the FTC policy statement on deception).

158. *See* CFPB, *supra* note 49, at 5.

159. Press Release, Fed. Trade Comm'n, FTC Drives to End the Blur in Car Leasing Ads (Nov. 21, 1996), https://www.ftc.gov/news-events/press-releases/1996/11/ftc-drives-end-blur-car-leasing-ads [https://perma.cc/6BRU-RQHN] (announcing UDAP settlement against five vehicle leasing companies for inadequate disclosure of material lease terms in television advertising).

160. Press Release, Fed. Trade Comm'n, FTC: Mortgage Brokers Deceptive Claims Tricked Consumers Looking for a Good Rate (June 2, 2004), https://www.ftc.gov/news-events/press-releases/2004/06/ftc-mortgage-brokers-deceptive-claims-tricked-consumers-looking [https://perma.cc/ABZ8-7JTF] (announcing UDAP enforcement action against mortgage broker for its misleading advertising about loan terms).

161. AM. JUR., *supra* note 153, § 280 (citing Johnson v. MetLife Bank, N.A., 883 F. Supp. 2d 542 (E.D. Pa. 2012); Bahringer v. ADT Sec. Servs., Inc., 942 F. Supp. 2d 585, 593 (D.S.C. 2013); Fikri v. Best Buy, Inc., 1 N.E.3d 484, 488 (Ohio Ct. App. 2013); Degutis v. Fin. Freedom, 978 F. Supp. 2d 1243, 1264 (M.D. Fla. 2013); State *ex rel.* Miller v. Vertrue, Inc., 834 N.W.2d 12, 34 (Iowa 2013)).

is not proven.[162] When settling disputes, state courts generally hold the following marketing practices violate state UDAP laws: failing to convey the whole truth,[163] falsely portraying or implying an affiliation with a government entity to secure payments from consumers,[164] and deceptively representing the "characteristics" of goods or services to manipulate consumers' purchasing decisions.[165]

While judicial determinations under UDAP laws primarily depend on the factual record in each case,[166] support to the likely application of state UDAP laws to the bail industry is discernable by analogizing state courts' treatment of similar acts or practices challenged in other industries. When settling disputes, state courts generally hold the following practices violate state UDAP laws for unfairness: exploiting an unequal bargaining position[167] and failing to disclose in writing the full costs of an installment loan before executing a consumer contract.[168] As further explored *infra*, common acts and practices within the bail bond industry likely violate state UDAP laws as unfair or deceptive marketplace conduct.[169]

2. UDAP Laws as Applied to the Bail Industry

AIA Holdings and its subsidiaries Allegheny Casualty Company and International Fidelity Insurance Company[170] underwrite the

162. *See id.*

163. *See, e.g.*, State v. Ortho-McNeil-Janssen Pharms., Inc., 777 S.E.2d 176, 188 n.11, 208 (S.C. 2015) (affirming a jury's verdict finding the pharmaceutical company violated the state's UDAP law for "underrepresent[ing] and minimiz[ing] the frequency and severity of the risks associated with [the drug]").

164. *See, e.g.*, Commonwealth v. Foster, 57 Pa. D. & C.2d 203, 210 (Ct. Com. Pl. 1972) (enjoining defendants from deceptively "representing, directly or by implication, to consumers that . . . [d]efendant is associated or affiliated with [a municipal agency]").

165. *See, e.g.*, Brown v. Lyons, 332 N.E.2d 380, 385 (Ohio Ct. Com. Pl. 1974) ("Representations . . . in connection with a consumer transaction that goods and services have performance characteristics, uses, and benefits which, in fact, they do not have constitute deceptive acts and practices . . . .").

166. *See* CARTER ET AL., *supra* note 152, § 3.3.2.

167. *See, e.g.*, Negrin v. Norwest Mortg., Inc., 700 N.Y.S.2d 184, 193 (App. Div. 1999) (reversing dismissal of UDAP claims because disclosed fees may nevertheless violate the UDAP if defendant "enjoys a 'disparity of bargaining power'" and uses that power to impose unfair fees).

168. *See, e.g.*, Lozada v. Dale Baker Oldsmobile, Inc., 197 F.R.D. 321, 340–42 (W.D. Mich. 2000) (granting plaintiffs' motion for summary judgment on UDAP claims on the grounds that the car dealer's undisputed failure to provide copies of "cost-of-credit disclosures" violated Michigan's UDAP statute).

169. *See infra* Part II.A.2 (applying state UDAP laws to the bail bond industry).

170. *Other Bonds: Contract and Commercial Bonds*, AIA SURETY, https://www.aiasurety.com/other-bonds [https://perma.cc/8J3B-8TRS] (explaining

largest shares of bail bond agreements in the United States.[171] Thus, the analysis below reflects experiences commonly encountered by consumers when engaging in the bail bond marketplace.[172] Because UDAP litigation as applied to the bail bond industry is a relatively new body of law, the best support for the likely application of state UDAP laws to the bail industry is uncovered by studying courts' treatment of similar conduct in other industries. Subsection 2.a explains how bail bond companies violate UDAP laws with their deceptive bait and switch marketing practices. Subsections 2.b and 2.c explain how bail bond companies violate UDAP laws with their unconscionable consumer contract terms.

a. Bail Bond Companies Engage in Deceptive Bait and Switch Marketing Practices

State UDAP laws prohibit deceptive bait and switch marketing practices, which foster a mismatch between the product or service offered and the one sold because these practices lure consumers into transactions they would not otherwise enter.[173] Under UDAP, bait and switch advertising occurs when a seller advertises a product or service in an alluring or enticing manner to attract attention from customers; however, once "hooked," the seller attempts to switch the buyer to a different product or service to increase the seller's profits.[174] Importantly, under UDAP, state courts hold companies liable for their deceptive marketing practices even if the challenged practice is "customary" in an industry[175] and whether a company delivers its "bait" to consumers in public advertisements or private conversations.[176]

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that AIA Holdings, d/b/a Allegheny Casualty Company and International Fidelity Insurance Company, provides its underwriting services to bail bond agencies across the country).

171. AIA SURETY, https://www.aiasurety.com [https://perma.cc/ZPX6-CC9G] ("The Nation's Oldest and Largest Family of Bail Bond Insurance Companies").

172. *See* Mitchell Complaint, *supra* note 1, at 33 (explaining AIA Holdings custom to require its partner bail agents to use its form contract).

173. *See supra* notes 159–60, 163–65 and accompanying text.

174. *See, e.g.*, CAL. CODE REGS. tit. 4, § 1304.1 (2021).

175. *See* CARTER ET AL., *supra* note 152, § 4.2.8 (explaining state UDAP laws follow the federal FTC Act in holding "[i]t is no defense to a deception claim under the FTC Act that the challenged practice is engaged in throughout an industry or is 'customary' business conduct").

176. *See id.* § 5.3.1 (citing Hawaii Cmty. Fed. Credit Union v. Keka, 11 P.3d 1 (Haw. 2000); Chandler v. Am. Gen. Fin., Inc., 768 N.E.2d 60 (Ill. App. Ct. 2002)) ("[A] loan officer's statement early in the process of loan negotiation that a low rate was available could be the basis of a bait-and-switch claim.").

As a common practice, bail bond agencies market their services to prospective customers both inside of jails, on jail bulletin board postings, and outside of jails, in a variety of mediums.[177] In advertisements, bail bond agencies frequently promise "discounted rates, rebates, [and] other economic incentives" like "the possibility of payment via a payment plan" to entice consumers to their businesses.[178] Yet, bail companies often later reveal that consumers do not qualify for special programs and teaser rates advertised pursuant to undisclosed terms and conditions.[179] In fact, due to the bail industry's widespread deceptive marketing practices, Google and Facebook recently banned bail bond advertisements on their platforms.[180] In egregious cases, bail agents withhold the consumer contract from principals and cosigners entirely, only revealing the full contract after the bail agent performed its contracted duty to secure the principal's release from custody.[181] Under similar facts, bail bond agencies backed by AIA Holdings very likely deceptively advertise their services to consumers in violation of state UDAP laws.[182]

Contrary to the routine, simplified representations bail agencies market to consumers,[183] the AIA Holdings contract reveals the available deal costs significantly more than advertised and places onerous requirements on principals and indemnitors.[184] At the same time, the AIA Holdings contract begins by narrowing the scope of the bail agency's legal responsibility.[185] Under the agreement, the bail agency

177. *See The Devil in the Details: Bail Bond Contracts in California*, *supra* note 63 (depicting bail bond agency advertisements).

178. *See* Gonzalez, *supra* note 62, at 1413.

179. *See id.*

180. David Graff, *Google Bans Ads for Bail Bond Services*, GOOGLE: ADS & COM. BLOG (May 7, 2018), https://www.blog.google/products/ads/google-bans-ads-for-bail-bonds-services [https://perma.cc/JBY9-NYZ7] (explaining Google based its decision to ban bail advertisements under its "strict policies to keep misleading or harmful ads off of [its] platform"); *Restricting Ads for Addiction Treatment Centers and Bail Bonds*, FACEBOOK (Aug. 9, 2018), https://www.facebook.com/business/news/restricting-ads-for-addiction-treatment-centers-and-bail-bonds [https://perma.cc/8UZR-N65U] (explaining Facebook's decision to ban bail advertisements "in an effort to limit bad actors").

181. *See* Egana Complaint, *supra* note 7, at 16–17 (explaining that while the coplaintiff was an indemnitor on the agreement, she did not receive the full contract and binding terms until after her son was released from custody).

182. *See* 16 C.F.R. § 444.3(a)(2) (2021) (outlining a lender or retail installment seller's failure to disclose cosigner liability is an unfair practice under UDAP).

183. *See* Gonzalez, *supra* note 62, at 1381 ("Get out now! Payment plans available! We'll come pick you up. We're on your side! Call us now! It's Free!! Bad Boys Bail Bonds.").

184. *See infra* Part II.A.2.c (analyzing the AIA contract's extreme terms).

185. *See* ALLEGHENY CAS. CO., BAIL BOND AGREEMENT § 1 (2020) (on file with au-

fulfills its legal obligation and earns the ten percent bond premium upon the initial release of the principal from custody.[186] Thus, in practice principals have very few choices. Once released from prison, principals must agree to faithfully execute the contract as AIA Holdings drafted, despite any bait and switch marketing practices, otherwise the bail agent will return them to jail.[187] When compared to the deal available, bail bond agents do not merely make "imprecise," "vague," "exaggerated," or "harmless" representations to consumers.[188] State courts routinely hold similar claims, which falsely promise services of a specific nature, violate state UDAP laws as deceptive marketplace conduct.[189] Under these facts, bail bond companies' common practices very likely violate state UDAP laws as deceptive.[190]

b. Bail Bond Companies Use Unfair, Complex Language to Control and Intimidate

State UDAP laws also protect consumers against unfair adhesion contracts when those contracts use complex and confusing boilerplate language to hide unreasonably harmful terms.[191] Thus, even

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thor).

> **§ 1.** The premium for the Bond is fully earned upon the release of Defendant from custody. . . . The fact that Defendant may have been improperly arrested, the bail reduced, or the criminal case dismissed shall not obligate the Surety to return the premium, or any portion of it."

186. *See id.*

187. *See* Gonzalez, *supra* note 62, at 1415 (raising a similar argument).

188. *See* CARTER ET AL., *supra* note 152,§ 4.2.10 (defining puffing as an available affirmative defense when "an expression of opinion, not a representation of fact" is exaggerated and noting "[p]uffing is a common defense to FTC [UDAP] actions, although usually not a successful one").

189. *See id.* ("[A] claim is not puffing where the claim promises a specific act, or where the claim's truth or falsity can be determined . . . . Even a false statement regarding a future event can be a UDAP violation.").

190. *See id.* §§ 4.2.15.1–.3 (explaining a company's failure to disclose is actionable under state UDAP laws); *id.* §§ 4.2.16.1–.2 ("[A] practice is deceptive even if subsequently clarified."); *id.* § 4.2.16.2 (citing Teague Motor Co. v. Rowton, 733 P.2d 93 (Or. Ct. App. 1987)); Myers v. Liberty Lincoln-Mercury, Inc., 365 S.E.2d 663 (N.C. Ct. App. 1988)) ("Signing another document after the deception is apparent does not waive the consumer's right to sue for a UDAP violation.").

191. *See, e.g.*, Fed. Trade Comm'n v. Alcoholism Cure Corp., No. 3:10-cv-266-J-34JBT, 2011 WL 13137951, at *55, *58 (M.D. Fla. Sept. 16, 2011) (finding unfair, "confusing[,] and self-contradictory" terms in defendant's lengthy contract violated Florida's consumer protection law); Ting v. AT&T, 319 F.3d 1126, 1149, 1152 (9th Cir. 2003) (finding an extreme "take-it-or-leave-it" consumer contract term unconscionable under California's consumer protection law); John Deere Leasing Co. v. Blubaugh, 636 F. Supp. 1569, 1575 (D. Kan. 1986) (finding similarly under Kansas's consumer protection law); *see also* CARTER ET AL., *supra* note 152 §§ 4.3.4.1–.2 (apply-

when bail bond companies disclose their practices in consumer contracts, they may nonetheless violate state UDAP laws.[192] As parties to an adhesion contract,[193] injured bail bond consumers must only prove acts and practices carried out under bail bond contracts "cause a substantial injury not outweighed by countervailing benefits" to prevail.[194] Here, business practices outlined in the AIA Holdings Bail Agreement arguably violate state UDAP laws for unfairness.

First, under the AIA Holdings Agreement, principals and their loved ones must sacrifice substantial privacy rights in their phones, homes, workplaces, and vehicles.[195] For example, under the contract, principals and indemnitors must provide *irrevocable* consent to bail agents to enter principals' and indemnitors' homes, at any time, during the duration of the bond.[196] Additionally, under the contract, bail agents may even enter the private homes of nonparties to the Agreement, so long as the principal "occupies" the residence.[197] Yet, under the terms of the contract, indemnitors and third parties cannot recover from the bail agency for any injuries inflicted on people or

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ing UDAP to adhesion contracts).

192. *See The Devil in the Details: Bail Bond Contracts in California*, *supra* note 63 (arguing similarly); *see also* CARTER ET AL., *supra* note 152, §§ 4.3.4.1–.2.

193. *See Contract—Adhesion Contract*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A standard-form contract prepared by one party, to be signed by another party in a weaker position, usu[ally] a consumer, who adheres to the contract with little choice about the terms.").

194. *See* CARTER ET AL., *supra* note 152, § 4.3.4.1 (citing 49 Fed. Reg. 7,744 (Mar. 1, 1984)).

195. *See* ALLEGHENY CAS. CO., *supra* note 185, §§ 16–17.

> **§ 16.** You irrevocably grant to Surety and Bail Producer, and their agents and employees, the right to enter your residence, or any other residence or real property you own or occupy, without notice, at any time for the purpose of locating, arresting, and returning the Defendant to custody, and subject to applicable law, you waive and release any and all causes of action in connection therewith, including without limitation, torts of trespass and false imprisonment. . . .
>
> **§ 17.** Defendant agrees that Surety may attach a location tracking device on any vehicle owned or driven by Defendant, at any time, without notice, and monitor the location of the vehicle through any available technology. Defendant further agrees that Surety may use location technologies to locate and track any wireless device of Defendant at any time during the period of the Bond is in force and any applicable Bond remission period . . .
>
> > **(f)** YOU WILL NOT HAVE THE OPTION TO OPT-OUT OF LOCATION USE OR TRACKING DURING THE PERIOD THE BOND IS IN FORCE AND ANY APPLICABLE BOND REMISSION PERIOD.

196. *See id.*

197. *See id.*

property, even if bail agents and bounty hunters act recklessly or negligently.[198]

Second, the AIA Holdings contract employs slippery language to superficially disclose fees and costs associated with the bail bond contract, while in reality reserving the bail agency's discretion to charge consumers at higher-than-anticipated rates.[199] For example, under the AIA Holdings contract, consumers agree to pay a "fugitive recovery fee" in the event of a bond forfeiture.[200] However, the bail bond contract fails to precisely enumerate the charged rate.[201] Instead, the contract merely explains the recovery fee is "typically" between ten and twenty percent of the bond amount.[202] Thus, while the average consumer may not expect to receive a recovery fee above twenty percent, under the express terms of the contract, the bail agency may also assign an "[a]typically" higher fee at its own discretion.[203]

Third, the AIA Holdings contract covertly provides bail agents with broad latitude to return the accused to jail, even for trivial, nonmaterial, or pretextual reasons.[204] The AIA Holdings contract us-

198. *See id.* § 5.

> **§ 5.** In the event that the apprehension and surrender of Defendant to custody is required for any reason, including the failure to appear by Defendant at any required Court proceeding or hearing, Defendant understands, agrees, and acknowledges that such apprehension and surrender involves risk of harm to Defendant and others, and as such, Defendant accepts the risk of such harm that may be caused to Defendant and/or others. Defendant also agrees to defend, indemnify and hold Surety harmless (including all agents and employees thereof) from any injuries, harm, losses, claims, actions, lawsuits, damages, liability, demands, fees and expenses, including attorneys fees and costs, made by any third party against Surety (including all agents and employees thereof) arising out of such apprehension and surrender of Defendant.

199. *See id.* § 6(b) (explaining consumers must pay a fugitive recovery fee).

> **§ 6.** You, jointly and severally (together and separately) with any other indemnitor, shall indemnify the Surety and keep the Surety indemnified and hold it harmless from and against any and all claims, lawsuits, damages, losses, liability, demands, actions, judgments, fees, fines, penalties and expenses (including attorneys fees and costs), relating to, or arising out of, Surety's issuance or procurement of the Bond (together, "Liabilities"), including, but not limited to, the following . . .
>
> > **(b)** any fugitive recovery fee if there is a forfeiture of the Bond (which fee is typically ten to twenty percent [10–20%] of the amount of the Bond plus any out of pocket expenses).

200. *See id.*

201. *See id.*

202. *See id.*

203. *See id.*

204. *See id.* § 4.

es flexible and ambiguous language authorizing bail agents, in their "sole and absolute discretion," to "immediately apprehend, arrest, and surrender" an accused party for "any act" bail agents believe "constitutes reasonable evidence" of the principal's "*intention*" to not appear or otherwise violate the terms of the agreement.[205] Notably, the contract uses the expansive terms "any act," "intention," and "otherwise violate the terms of bail" to capture every possible action or omission by principals and indemnitors while simultaneously failing to define the only limiting language of "reasonable evidence."[206] After providing bail agencies wide latitude to terminate the parties' contracted benefit, e.g., the principal's pretrial release from custody,[207] the AIA Holdings contract also demands that principals and indemnitors cover all court fees and other business expenses incurred to capture and surrender the principal to custody.[208] Thus, in practice, the AIA Holdings contract relieves the surety and its partners from almost all risks commonly associated with a bail surety business, and empowers bail agencies to return defendants into custody, even unfairly.[209] With consumers on the hook for any recovery costs, bounty hunters have free rein to carry out elaborate, exceedingly ex-

> **§ 4.** Unless otherwise provided by applicable law (if any), the following events shall constitute a breach of your obligations to the Surety, and the Surety shall have the right to immediately apprehend, arrest and surrender Defendant to custody, and you shall have no right to the refund of premium whatsoever . . .
>
> **(b)** Defendant moves from his/her current address without prior written consent of the Surety, or Defendant fails to notify Surety of any changes in address;
>
> **(c)** Defendant commits any act that constitutes reasonable evidence of the intention to cause a forfeiture of the Bond or Defendant's failure to appear in Court as required . . . ;
>
> **(e)** Defendant or an Indemnitor makes any materially false statement in any material submitted to Surety for the Bond, including the Bail Bond Application and Indemnitor Application;
>
> **(f)** The bail for Defendant is increased;
>
> **(g)** Indemnitor requests the surrender to custody of the Defendant; and/or
>
> **(h)** There is a material increase in the risk assumed by the Surety (as determined by the Surety in its sole and absolute discretion), including, by way of example, but not limited to, depreciation or impairment of any collateral pledged as security for the Bond.

205. *See id.* § 4(c), (h).

206. *See id.* § 4(c).

207. *See id.* § 4.

208. *See id.* § 5 (explaining under the AIA contract principals and indemnitors agree to hold the bail agency and its partners harmless against any expenses incurred in connection with the apprehension and surrender of the principal).

209. *See id.* §§ 4–5.

pensive, "military-like" recovery missions, even when such recovery tactics are unnecessary.[210]

Then, the AIA contract hides its extreme provisions in legalese and confusing wording. Such terms and practices, when viewed holistically, effectively deprive consumers of their benefit of the deal. While companies across industries use their consumer contracts to lock consumers into unbalanced agreements, here, bail bond contracts are not merely hardball, one-sided contracts.[211] Because bail agents don a deceptive cloak of official authority and abuse their quasi-policing powers to blur the line between their debt-collection and quasi-law-enforcement roles,[212] bail bond companies' practices extend beyond a mere contractual dispute. Under these facts, bail bond companies' common practices likely violate state UDAP laws for unfairness.[213]

c. Bail Bond Companies Use Unfair, Complex Language to Deceive and Mislead

Finally, state UDAP laws protect consumers against unfair consumer contracts, which use complex and confusing boilerplate or standardized language to mislead consumers about their legal rights.[214] For example, Michigan's UDAP statute expressly prohibits companies from "[c]ausing a probability of confusion or of misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction."[215] When states like Michigan specifically prohibit certain conduct within the UDAP statute itself, state courts generally treat violations of those enumerated prohibitions as per se violations of the law, even when the defendant lacked awareness of its statutory duty or proceeded in "good faith."[216] Here, the AIA Holdings Bail Agreement employs language designed to confuse consumers under-

210. *See, e.g.*, *supra* notes 1–6 and accompanying text (describing bail agents' "military-style" raid to recover one principal held on an approximately $1,000 bail bond debt in connection with a minor traffic violation).

211. *See* Tess Wilkinson-Ryan, *Justifying Bad Deals*, 169 U. PA. L. REV. 193, 195–201 (2020) (documenting the rise of "contracts of adhesion").

212. *See supra* Part I.C.

213. *See* CARTER ET AL., *supra* note 152, §§ 4.3.6–.7, .8, .10 (explaining the following acts and practices violate state UDAP laws: "coercive high-pressure sales and collection tactics," "taking advantage of disparate knowledge," "taking advantage of a vulnerable group," and "misuse of special status").

214. *See, e.g.*, MICH. COMP. LAWS § 445.903 (2021).

215. *See id.* § 445.903(n).

216. *See* CARTER ET AL., *supra* note 152, §§ 3.2.2.1–.2 (reviewing state courts' treatment of per se violations under state UDAP laws); *see id.* § 4.2.6 ("A seller's good faith efforts do not prevent a practice from being deceptive.").

standing of their legal rights and exert extensive influence over its future litigation risk, as expressly prohibited in many state UDAP laws. For example, under the AIA Holdings contract, principals and indemnitors ostensibly waive "any and all" legal claims under every federal, state, and local law or ordinance related to the bail agencies' collection of irrelevant, private consumer information files against them.[217] According to the contract's express language consumers may not proceed with claims under the Fair Credit Reporting Act nor have any right to even access the consumer information files collected against them.[218] Yet, under the contract's terms, bail agencies may use their secret consumer files as "reasonable evidence" of the principal's "intention" to violate the bail bond contract, and thus, justify its decisions to surrender the principal to jail.[219] Such practices are patently unfair.

As explained above, the AIA Holdings contract also requires the accused's family and friends to sacrifice substantial privacy rights without any right to revoke consent or seek recovery on any injuries to self or property, even if a bail agent acts negligently or recklessly.[220] Such language not only serves to unfairly intimidate and control consumers,[221] it also improperly misleads consumers about their legal rights in connection with the transaction.

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217. *See* ALLEGHENY CAS. CO., *supra* note 185, § 15.

> **§ 15.** To the maximum extent permitted by applicable law, you hereby waive any and all rights you may have under federal law (including, but not limited to, Title 28, Privacy Act-Freedom of Information Act and Title 6, Fair Credit Reporting Act) and any local or state law relating to Surety obtaining, and you consent to and authorize Surety to obtain, any and all private or public information and/or records concerning you from any party or agency, private or governmental (local, state or federal), including, but not limited to, credit reports, Social Security Records, criminal records, civil records, driving records, tax records, telephone records, medical records, school records, worker compensation records, and employment records. You further authorize, without reservation, any party or agency, private or governmental (local, state or federal) contacted by Surety to furnish to Surety or Bail Producer, in accordance with applicable law, any and all private and public information and records in their possession concerning you to the Surety and direct that a copy of this document shall serve as evidence of said authorization.

218. *See id.*

219. *See* quoted text *supra* note 204.

220. *But see* RESTATEMENT OF CONSUMER CONTRACTS § 5 (AM. L. INST., Tentative Draft 2019) ("[General contractual] terms 'excluding the business's liability or limiting the consumer's remedies for losses caused through an intentional or negligent act or omission of the business are also substantively unconscionable.'").

221. *See supra* Part II.A.2.b.

Immediately following the contract's language authorizing bail agents with broad surveillance and control power, the contract expressly requires principals and indemnitors to "waive and release any and all causes of action in connection therewith, including without limitation, torts of trespass and false imprisonment[,]"[222] despite the fact that such an attempt is likely illegal.[223] Then, in case the bail surety needs to commence a legal collection proceeding against consumers, the AIA Holdings contract requires consumers to proactively stipulate that a receipt documenting the bail surety's initial bond payment serves as "conclusive evidence" of meeting its legal obligation in any future collection action against consumers,[224] again, despite the fact such terms are likely unenforceable.[225] The AIA Holdings contract also authorizes its bail agent partners to obtain a confession of judgment (COJ) to secure the principal's bond.[226] Once obtained, the AIA Holdings contract permits bail agents to file the previously obtained COJ "at any time."[227] Described by consumer law scholars as the "civil version of a criminal confession," COJs permit bail agencies' future debt collection actions to bypass the procedural safeguards of a trial and move quickly from filing to garnishment.[228] However, such practices constitute unfair credit practices under long-standing FTC rules.[229]

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222. *See* quoted text *supra* note 195.

223. *See* RESTATEMENT OF CONSUMER CONTRACTS § 5 reporter's notes (AM. L. INST., Tentative Draft 2019) ("[T]erms that are presumed to be substantively unconscionable [include] terms that exclude the business's liability or limit the consumer's remedies for death or personal injury.").

224. *See* ALLEGHENY CAS. CO., *supra* note 185, § 6.

> **§ 6. . . .** The voucher, check or other evidence of any payment made by Surety shall be conclusive evidence of such payment in any action against you as to the propriety of such payment and as to the extent of your liability to Surety for such payment hereunder.

225. *See* RESTATEMENT OF CONSUMER CONTRACTS § 5 (AM. L. INST., Tentative Draft 2019).

226. *See* ALLEGHENY CAS. CO., *supra* note 185, § 9.

> **§ 9.** If a Confession of Judgment (COJ) is taken as security for the Bond, the Surety shall have the right to enter, record and file the COJ at any time, and such COJ shall constitute a lien entitled to a preference against any of your property, whether or not the Surety is entitled to be indemnified at the time of the entry, recording or filing of such COJ. If such COJ is entered, recorded or filed by the Surety against you, the COJ entered shall be effective and available to the Surety against you.

227. *See id.*

228. *See* Kornya & Wang, *supra* note 56, at 26:30–27:05; *see also* 49 Fed. Reg. 7,553, 7,748 (Mar. 1, 1984) ("The cognovit is a legal device whereby the debtor, by means of a provision included in the cont[r]act, consents, in advance to the creditor obtaining a judgment without prior notice or hearing.").

229. *See* 16 C.F.R. § 444.2(a)(1) (2021).

Similarly, the AIA Holdings contract demands expansive control over collateral used in bail bond contracts.[230] For example, the contract provides bail agencies broad authority to determine the value of collateral[231] and to also sell or obtain physical custody of collateral

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230. *See* ALLEGHENY CAS. CO., *supra* note 185, §§ 7–8, 10.

> **§ 7. . . .** You authorize the Surety to hold, apply or sell the Collateral, or any part thereof, in order to pay or reimburse the Surety for any and all sums due to Surety under this Agreement, the Bond and/or to place the Surety in cash funds so as to protect the Surety against the payment of any Liabilities, including any claim, demand, loss, or judgment arising out of the Bond, even if the Surety has not paid any such Liability. Subject to applicable law (if any), the Surety may make any such sale, at its discretion, at public or private sales, and without demand, notice or advertisement of the time and place of said sale, and also with the right to purchase said Collateral at such sale or sales, freed and discharged from any equity or redemption, except as otherwise provided by applicable law.
>
> **§ 8.** The Surety shall not be liable for the depreciation of any Collateral or for any interest thereon. In the event of depreciation of the value of Collateral, or any part thereof, or of any Collateral that may be hereafter pledged to or deposited with the Surety, upon request of the Surety, you shall provide the Surety with additional and satisfactory Collateral so that the total value of the Collateral shall equal the value of the Collateral at the time of the initial pledge or deposit. Subject to applicable law (if any), if you fail to deposit such additional Collateral, the Surety shall have the full right, power and authority, without further demand or notice, to sell, assign and deliver the whole or any part of such Collateral, including any substituted or additional Collateral, at public or private sale, at its option, and without demand, notice or advertisement, and also with the right to purchase said Collateral at any such sale, freed and discharged from any equity or redemption as provided by applicable law. . . .
>
> **§ 10.** You acknowledge and agree that the Surety may foreclose against the Collateral and/or exercise any of the rights or remedies provided under this Agreement or take any combination of such actions without waiving any other right or remedy. Failure to exercise any rights or remedies of the Surety at any one time shall not constitute a waiver of the right to exercise them at any other time. Any security or Collateral you give may be substituted, subordinated, or released by the Surety without affecting any other rights. The Surety shall not be obligated to enforce its rights against any security, Collateral or indemnitor prior to enforcing its rights against you or any other indemnitor.

231. *See id.* § 4(h).

> **§ 4.** Unless otherwise provided by applicable law (if any), the following events shall constitute a breach of your obligations to the Surety, and the Surety shall have the right to immediately apprehend, arrest and surrender Defendant to custody, and you shall have no right to the refund of premium whatsoever . . . .
>
> > **(h)** There is a material increase in the risk assumed by the Surety (as determined by the Surety in its sole and absolute discretion), including, by way of example, but not limited to, depreciation or impairment of any collateral pledged as security for the Bond.

at their discretion.[232] Unlike other types of commercial lending, once consumers pay off their debts under the agreement, the AIA contract explains the bail agency will only return or release consumers' collateral after consumers provide "sufficient and competent written legal evidence satisfactory to the Surety."[233] More egregiously, the AIA Holdings contract explains consumers must also sign a release of legal claims against the bail agency before the agency will return collateral used to secure the contract.[234] Such dramatic control over consumers' property, especially over homes, directly conflicts with homestead exemptions in many jurisdictions, which expressly limit debt collectors' ability to seize homesteads when used as collateral in commercial lending.[235]

Notwithstanding the contract's weak qualifying language that such provisions are "subject to applicable law (if any)," the AIA Holdings contract serves its intended purpose to unfairly discourage consumers from taking valid legal action against the company. Across the country, bail agents use consumer contracts like the AIA Holdings Bail Agreement to trap consumers into unfair deals and then restrain consumers understanding of their legal rights.[236] As a result, many consumers never seek out legal action or support.[237] Under these facts, bail bond companies' common practices arguably violate state UDAP laws in nearly every jurisdiction.[238]

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232. *See id.* §§ 8, 10.

233. *See id.* § 11(a).

> **§ 11.** Subject to applicable law (if any), the Surety will return the Collateral to you when all of the following are satisfied:
>
> > **(a)** the Surety receives sufficient and competent written legal evidence satisfactory to the Surety (for example, written notice from the Court) of the discharge, release or exoneration of the Surety from all liability under the Bond . . . .

234. *See id.* § 11(d).

> **§ 11.** Subject to applicable law (if any), the Surety will return the Collateral to you when all of the following are satisfied: . . . .
>
> > **(d)** upon the request by Surety, you shall execute and deliver to Surety a legal release of claims upon the return by Surety of the Collateral to you.

235. *See, e.g.*, MINN. STAT. § 510.01 (2020); *see also* 16 C.F.R. § 444.2(a)(2) (2021).

236. *See* quoted text *supra* note 185.

237. *See Consumer Complaint Database*, CFPB, https://www.consumerfinance.gov/data-research/consumer-complaints [https://perma.cc/UK6S-Q23J] (listing only three out of over two million consumer complaints reported between 2011 and 2021 involved "bail bond" practices).

238. *See* CARTER ET AL., *supra* note 152, § 6.11.1 (explaining the FTC's Trade Regulation Rule Concerning Credit Practices expressly prohibits waiver of homestead exemptions for nonhomestead debt and the use of confessions of judgment as unfair practices under UDAP); *id.* § 5.6.8 (citing case law in Minnesota, Arizona, Ohio, Texas,

B. CHALLENGES WITH PRIVATE LITIGATION AGAINST THE BAIL INDUSTRY UNDER UDAP LAWS

Despite its potential as a useful tool to regulate the bail bond industry, state UDAP laws have a number of limitations that potentially undercut their utility in addressing the harms of the commercial bail industry. As further discussed below, while UDAP laws offer a promising path to curb the bail industry's harms and protect vulnerable communities, private litigation alone likely falls short of the full potential of state UDAP laws to ameliorate the bail industry's worst practices. Specifically, challenges with private UDAP litigation in general and, in some jurisdictions, weaknesses within the state UDAP laws themselves, present significant hurdles to achieving systemic industry reform through private litigation. This Section examines this Note's core argument about the need for joint public and private enforcement to curb the bail bond industry's harmful practices. Subsection 1 describes common litigation challenges that erect hurdles to bail bond consumers' litigation under UDAP. Subsection 2 reviews differences across state UDAP laws to highlight how in some judications the UDAP laws themselves impede consumer protection litigation against the bail industry.

1. Common Litigation Challenges as Applied to the Bail Industry

Despite likely resting on solid legal ground,[239] reliance on private litigation to regulate the bail bond industry poses a variety of enforcement issues due to unique litigation challenges when applying UDAP to the bail industry.[240] First, plaintiffs' attorneys struggle to discover potential litigants and defendants. Harmed consumers sign their bail bond contracts at tense moments, years prior to litigation, and understandably often lose or misplace paperwork and legal documents in the intervening years.[241] Additionally, bail agencies are notoriously protective of their policies and practices, and they almost

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Vermont, and Michigan to establish that misrepresenting a consumer's legal rights is a deceptive act or practice under state UDAP laws); *supra* notes 190, 213 (explaining additional practices providing a colorable action under UDAP); *infra* note 253 (discussing a Montana court's declaration that several of the AIA Holdings contract provisions were void for public policy).

239. *See supra* Part II.A.

240. UDAP litigants face many litigation challenges beyond the scope of this analysis. This Subsection only highlights litigation challenges that pose unique hardships when applying UDAP to the bail industry. See generally CARTER ET AL., *supra* note 152, §§ 11–12, for a more robust discussion of common challenges faced by UDAP litigants in individual and class actions.

241. *See* Kornya & Wang, *supra* note 56, at 28:05–30:36 (explaining that in many cases the only party with access to a bail bond contract is the bail surety itself).

never post their bail bond or financing contracts on their websites.[242] While this Note analyzes a publicly available bail bond agreement drafted by AIA Holdings, in general, such contracts are not easily obtained.[243] At the same time, plaintiffs struggle to find legal representation because their claims often involve relatively small debts, especially in comparison to the expense of a lawsuit.[244] Further exacerbating the problem, false or misleading representations within bail bond contracts often deceive consumers about their ability to take legal action against their bond providers.[245]

With principals and indemnitors contractually responsible for all legal costs and fees incurred in collection actions taken against them, bail bond companies regularly file collection actions against consumers, even for the very small debts.[246] Thus, even when potential plaintiffs find adequate representation, bail companies may still block plaintiffs' private enforcement attempts under a collateral consequence of their vigorous debt collection actions. By initiating collection actions against principals and indemnitors, bail bond companies force consumers to state all compulsory counterclaims during the collection actions or risk losing them.[247] Depending on jurisdictional rules, claim preclusion issues can trap plaintiffs in difficult litigation posture.[248] In many states, prior collection actions arising out of the bail contract will provide bail companies a powerful fringe benefit, liability mitigation through claim preclusion.[249] Because nearly all bail bond collection actions result in default judgments after consumers fail to respond,[250] when bail companies file collection

242. *See The Devil in the Details: Bail Bond Contracts in California*, *supra* note 63, at 1.

243. *See* Kornya & Wang, *supra* note 56, at 28:05–30:36.

244. *See, e.g.*, Mitchell Complaint, *supra* note 1, at 3 (involving $1,670 bail bond); Egana Complaint, *supra* note 7, at 1 (involving $3,275 bail bond debt); Class-Action Cross-Complaint for Restitution, Preliminary and Permanent Injunction, and Declaratory and Other Equitable Relief at 6, BBBB Bonding Corp. v. Caldwell, No. RG19041553 (Cal. Super. Ct. filed Oct. 30, 2019) (involving $1,000 bail bond); *see also* Highsmith, *supra* note 31, at 2–3.

245. *See infra* Part II.

246. *See infra* Part II.

247. *See* FED. R. CIV. P. 13(a)(1). *But see id.* 41(b) (limiting claim preclusion when prior proceedings lack adequate jurisdiction); Fuller v. Pac. Med. Collections, Inc., 891 P.2d 300, 307 (Haw. Ct. App. 1995) (holding claim preclusion did not apply to plaintiffs' UDAP claims because the collections court lacked jurisdiction over the claims).

248. *See* CARTER ET AL., *supra* note 152, § 11.6.7 (explaining state court split on whether to treat UDAP counterclaims as compulsory during collection actions).

249. *See id.*

250. *See* Erika Rickard, Darcy White, Qudsiya Naqui, Lester Bird & Amie Lewis, *How Debt Collectors Are Transforming the Business of State Courts*, PEW CHARITABLE TRS. (May 2020), https://www.pewtrusts.org/-/media/assets/2020/06/debt

actions as a part of their routine practices, they can mitigate both their economic uncertainty and potential legal exposure.[251]

Finally, even when plaintiffs overcome litigation barriers to attain valuable judicial precedent, given the large power and resource differential between the bail bond industry and harmed consumers,[252] the industry may still exploit its positional power to evade unfavorable judicial opinions.[253] In response to successful private litigation the industry may simply refuse to comply with disfavored litigation outcomes, innovate with new schemes, or adopt nominal reforms, while providing no meaningful difference in its interactions with consumers.[254] For example, prior legal scholarship documents

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-collectors-to-consumers.pdf [https://perma.cc/UV92-U28W].

251. *See* Frazier v. Matrix Acquisitions, LLC, 873 F. Supp. 2d 897, 908 (N.D. Ohio 2012) (holding a prior collection action filed against the plaintiff barred their subsequent UDAP lawsuit under claim preclusion); *cf.* Sheahy v. Primus Auto. Fin. Servs., Inc., 284 F. Supp. 2d 278, 283 (D. Md. 2003) (holding similarly on an FDCPA claim). *But see* Johnson v. Anderson, 590 N.E.2d 1146, 1150 (Ind. Ct. App. 1992) (holding a prior collection action did not preclude plaintiff's subsequent UDAP allegation against the same creditor); Egge v. Healthspan Servs. Co., 115 F. Supp. 2d 1126, 1131 (D. Minn. 2000) (holding similarly on an FDCPA claim).

252. *See supra* Part I.

253. For example, before settling with AIA Holdings, attorneys with the ACLU won an important declaration from the court that provisions in the AIA Holdings Bail Agreement requiring consumers to "defend, indemnify, and hold harmless the Surety and/or Bail Producer . . . for any injuries, harm, losses, claims, lawsuits, damages, losses [sic], liability, demands, actions, fees and expenses . . . arising out of such activities," "waive any and all rights you have under federal law," and "waive and release any and all causes of action in connection therewith including, without limitation, torts of trespass and false imprisonment" were void for public policy under Montana law. *See* Mitchell v. First Call Bail and Surety, Inc., 425 F. Supp. 3d 1256, 1263 (D. Mont. 2019). Mr. Mitchell's attorneys hoped the court's declaration would "send a signal to . . . for-profit bail companies [that they] can and will be held accountable for [their] exploitative actions." *See* ACLU Settlement Press Release, *supra* note 50. However, since this ruling, AIA Holdings has filed and received approval to use consumer contracts with identical terms in Minnesota, Utah, and Indiana. *See* sources cited *supra* note 140. Furthermore, AIA Holdings has developed a new moneymaking scheme in Montana. As of June 2020, AIA Holdings has filed and received approval to provide a sliding scale model, permitting its bail agents to charge premium rates between five and twenty percent. *See, e.g.*, *Non-Standard Commercial Surety Bonds Countrywide Rate and Rule Manual*, ALLEGHENY CTY. CO., available at https://filingaccess.serff.com/sfa/home/MT (click "Begin Search"; then click "Accept"; then enter "13285" in the "NAIC Company Code" field; then select "PERR-132432297" under "SERFF Tracking Number"; then select "ACC - Non Standard Commercial Surety Bonds Rating Manual - CW.pdf" under "Attachments").

254. *Cf.* V.B. Dubal, *Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, 2017 WIS. L. REV. 739, 793–96 (explaining gig industry companies abated progress in private employee misclassification litigation by dragging out litigation to ensure workers were too under-resourced and exhausted to capitalize on any relief granted, refusing to comply

how gig industry firms abate progress won in employee misclassification litigation by modifying their business models and worker agreements to avoid unfavorable holdings that would reclassify their workers as employees or redistribute power and coordination rights to their workers.[255] Thus, as plaintiffs' attorneys caution, dramatic, industry-wide improvement is unlikely through private enforcement efforts because bail companies will likely undertake extreme measures to fight litigation and neutralize unfavorable decisions.[256]

2. Weaknesses in UDAP Laws as Applied to the Bail Industry

In addition to the barriers faced by plaintiffs when enforcing UDAP in private litigation, in some states the UDAP laws themselves erect barriers to systemic progress. In 2018, National Consumer Law Center (NCLC) conducted a national evaluation of state UDAP laws and highlighted common weakness across local UDAP legislation.[257] Borrowing the NCLC's methodology and research results, the next Subsection examines three key variances between state UDAP laws that weaken the laws when applied to the bail industry in private litigation.[258] Subsection 2.a examines substantive weaknesses or jurisdictional rules narrowing the breadth of unfairness and deception prohibited. Subsection 2.b examines scope weaknesses or jurisdictional rules constricting the scope of industries regulated. Subsection 2.c examines evidentiary challenges or jurisdictional rules requiring plaintiffs to prove defendants acted with intent or knowledge to prevail.[259]

a. In a Minority of Jurisdictions, State UDAP Laws Contain Substantive Weaknesses[260]

According to the NCLC study, the breadth of substantive protections afforded in state laws "is one of [the] most important features"

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with disfavored outcomes, and modifying their business models and worker agreements to avoid unfavorable holdings).

255. *See id.* at 790–91. *See generally* Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 981, 997 (9th Cir. 2014) (declaring FedEx's full-time drivers were employees, not independent contractors, under California law).

256. *See* Dubal, *supra* note 254, at 790–91.

257. *See* Carter, *supra* note 142.

258. A robust analysis of each state's legislative text and judicial treatment is beyond the scope of this Note. For a detailed study of variances across state UDAP laws, see *id.*

259. *See id.* at 11–12.

260. *See id.* at 5–8 (rating Colorado, Delaware, Minnesota, Nevada, Oregon, South Dakota, and Virginia's UDAP statutory prohibitions as "weak").

of a state's UDAP law.[261] Although most state UDAP laws broadly prohibit deceptive and unfair practices,[262] UDAP laws in three states confine the legislation to the acts and practices narrowly enumerated in legislation or regulations.[263] As consumer law scholars explain, without statutory language broadly prohibiting unfair and deceptive practices, UDAP legislation provides significantly weaker consumer protections.[264]

For example, Colorado's UDAP statute only prohibits the deceptive acts or practices listed in the state statute.[265] Thus, while certain bail bond practices—e.g., deceptive marketing practices, bait and switch advertising, and failing to provide cosigners written agreements before entering into installment payment plan contracts—align with the acts or practices statutorily enumerated,[266] substantive weaknesses in Colorado's statute will likely block plaintiffs' claims on some of the practices described in the AIA Holdings contract.[267] For example, Colorado's UDAP statute does not expressly prohibit the use of confessions of judgments to secure debt or the use of homestead exemption waivers in adhesion contracts.[268] So, while Colorado law limits the use of homesteads as collateral in "any debt, contract, or civil obligation"[269] and also voids confessions of judgments arising out of consumer credit transaction in separate statutes,[270] unlike in most jurisdictions, the inclusion of those terms

261. *Id.* at 12.

262. *See id.* at 5–8 (rating Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Washington D.C., Florida, Georgia, Hawai'i, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Washington, West Virginia, and Wyoming's UDAP statutory prohibitions as "strong"); *see also id.* at 13–14 ("The UDAP statutes in 45 states and the District of Columbia include a broad prohibition against deception that is enforceable by both consumers and a state agency. . . . In 39 states and the District of Columbia, the UDAP statute includes at least a fairly broad prohibition against unfair or unconscionable acts that is enforceable by consumers and a state agency.").

263. *See id.* at 12–13 (explaining why Colorado, Oregon, and South Dakota's UDAP laws offer the weakest substantive prohibitions in the nation).

264. *See id.*

265. *See id.* at 13. *See generally* COLO. REV. STAT. § 6-1-105 (2021).

266. *See id.* §§ 6-1-105(1)(e), (g), (i), (l) (prohibiting false representations as to the characteristics of a products or services); *id.* § 6-1-105(1)(n) (prohibiting bait and switch advertising); *id.* § 6-1-105(1)(m) (requiring the delivery of written contracts at the point of sale under an installment payment plan).

267. *See id.* § 6-1-105 *et seq.*

268. *See id.*

269. *See id.* § 38-41-201.

270. *See id.* § 5-3-207.

in bail bond contracts do not provide a colorable claim under Colorado's UDAP because the law does not expressly list such practices in the state UDAP statute.[271]

Additionally, despite state statutes including broad prohibitions on unfairness and deception, in five states, UDAP laws do not permit consumers to privately enforce the statute's broad prohibitions.[272] For example, although New York's UDAP law defines unfairness to prohibit "unconscionable contract terms" broadly, the law only empowers public enforcers, not consumers, to enforce those provisions.[273]

b. In a Minority of Jurisdictions, State UDAP Laws Contain Scope Weaknesses[274]

Next, the NCLC study emphasizes that the scope of state UDAP laws, or the industries or transactions falling within the statute's reach, "is just as important as its substantive prohibitions."[275] As the NCLC study explains, when state UDAP laws shield entire industries from liability, plaintiffs may not use UDAP to obtain redress against companies practicing within exempted industries—even for allegedly unfair, deceptive, or fraudulent marketplace conduct.[276] As applied to the bail bond industry, which conducts its core functions as a lender and insurer, weaker state UDAP laws exempt insurance or consumer lending related acts or practices. These exemptions can, but do not always, erect significant barriers for prospective plaintiffs.

Regarding the application of UDAP to insurers, the NCLC study identifies twenty-one state UDAP laws, which fully or partially block consumers from enforcing UDAP prohibitions against insurers in private litigation.[277] For example, under Iowa's UDAP law only the

271. *See* Carter, *supra* note 142, at 54 (explaining only those statutory violations listed in Colorado's UDAP are actionable).

272. *See id.* at 13 (explaining Texas, Tennessee, and Mississippi's broad prohibition on deceptive acts or practices are unenforceable by consumers in private litigation).

273. *See id.* at 15 (explaining limitations on New York's UDAP law).

274. *See id.* at 5–8 (rating Alabama, Alaska, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Maryland, Michigan, Montana, New Hampshire, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Virginia, and Wisconsin's UDAP laws as "weak" for exempting insurance businesses); *see also id.* (rating Alabama, Florida, Louisiana, Michigan, Nebraska, New Hampshire, Ohio, Rhode Island, and Virginia's UDAP laws as "weak" for exempting credit or lending businesses).

275. *See id.* at 17 ("If a UDAP statute has strong substantive protections but applies them to few industries it is of little help to consumers.").

276. *See id.*

277. *See id.* at 20; *see also id.* at 5–8 (rating Alabama, Alaska, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Maryland, Michigan, Montana, New Hampshire,

state attorney general may enforce UDAP to curb unfairness or deception perpetuated by insurance providers.[278] As a form of insurance, in many jurisdictions, these exemptions present a significant hurdle to private litigation against bail sureties under UDAP.[279] That said, because the unfair or deceptive acts or practices described in the AIA Holdings contract largely relate to bail agencies' services as a creditor, and not its services as a surety or insurer,[280] such limitations likely only provide a complete shield to bail bond companies in the very few states with UDAP laws, which broadly limit the application of UDAP to both insurers and creditors.[281]

Regarding the application of UDAP to creditors, the NCLC study identifies nine states as adopting the most expansive UDAP limitations for lenders and creditors.[282] However, most of these exemptions only extend to banks, credit unions, and similar institutions.[283] While these provisions restrict private litigation for predatory lending and other unfair lending practices in the aggregate,[284] the exemptions do not extend to bail bond companies, which do not qualify as a financial institution.[285] In fact, statutory or judicial exemptions afforded to creditors or lenders under UDAP only pose a substantial roadblock to UDAP litigation against the bail industry in a handful of few states with very broad creditor exemptions.[286] In addition to

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Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Virginia, and Wisconsin as "weak" for exempting or narrowing UDAP's application to insurers).

278. *See id.* at 20–21.

279. *See* Kornya & Wang, *supra* note 56, at 08:13–10:39 (explaining bail bond is a type of surety or insurance).

280. *See id.* at 19:00–20:45 (explaining the common practices of credit bonding and financing bail premium are not a form of insurance business but rather a separate type of lending industry apart from function as a surety which is subject to consumer protection requirements).

281. *See* Carter, *supra* note 142, at 5–8 (rating Alabama, Florida, Louisiana, Michigan, Nebraska, New Hampshire, Ohio, Rhode Island, and Virginia's UDAP laws as "weak" for exempting or narrowing the law's application to lenders or creditors). *But see infra* notes 283, 285 (explaining lender and creditor limitations in Alabama, Florida, Louisiana, New Hampshire, and Virginia do not block UDAP claims against bail bond creditors).

282. *See* Carter, *supra* note 142, at 19 (naming Alabama, Florida, Louisiana, Michigan, Nebraska, New Hampshire, Ohio, and Virginia).

283. *See, e.g.*, ALA. CODE § 8-19-7(3) (2021) (exempting financial institutions regulated at the state or federal levels); VA. CODE § 59.1-199 (2021) (same); N.H. REV. STAT. § 358-A:3(I) (same); FLA. STAT. § 501.212(4) (2021) (same); LA. STAT. ANN. § 51:1406 (2021) (same).

284. *See* Carter, *supra* note 142, at 18–19.

285. *See* 18 U.S.C. § 20 (defining financial institution).

286. *See* Carter, *supra* note 142, at 17–18, 50 nn.3, 13–14. *See generally* OHIO REV. CODE § 1345.01(A) (providing broad exemptions to creditors and lenders); NEB. REV. STAT. § 59-1617(1) (2021) (exempting regulated companies); Chavers v. Fleet Bank,

UDAP exemptions on entire industries, in a few states UDAP laws only narrowly apply to certain stages of marketplace transactions.[287] For example, courts in a few states interpret local UDAP laws to exclude postsale conduct, like unfair debt collection tactics.[288] In those jurisdictions, plaintiffs likely could not use state UDAP laws to respond to bail bond agents' "coercive high-pressure" debt collection tactics.[289]

c. In a Minority of Jurisdictions, State UDAP Laws Present Evidentiary Challenges[290]

Finally, even when legislators and courts empower UDAP plaintiffs with extensive enforcement power in substance and scope, jurisdictional requirements requiring plaintiffs to demonstrate reliance or prove defendants acted knowingly or intentionally complicate plaintiffs' private UDAP enforcement efforts.[291] While most UDAP laws do not require plaintiffs to establish a knowing or intentional violation to prevail,[292] a few states require intent, knowledge, or willfulness to prevail under UDAP.[293] For example, South Dakota requires plaintiffs to prove a defendant's deception was both knowing and intentional.[294] On the other hand, state courts in Illinois only require proof of intent when plaintiffs allege deceptive omissions,[295] while state courts in Kansas only require plaintiffs

844 A.2d 666, 677–78 (R.I. 2004) (interpreting the state's UDAP law to broadly exempt creditors); Liss v. Lewiston-Richards, Inc., 732 N.W.2d 514, 521 (Mich. 2007) (interpreting the state's UDAP law narrowly).

287. *See* Carter, *supra* note 142, at 5–8 (rating Kentucky, Minnesota, Mississippi, and Wisconsin as "weak" for excluding "post-sale acts"); *see also id.* 17–18.

288. *See id.* at 17–18.

289. *See supra* notes 212–13 and accompanying text.

290. *See* Carter, *supra* note 142, at 5–8 (rating Colorado, Nevada, and Wyoming's UDAP laws as "weak" for requiring public enforcers to prove intent or knowledge to prevail); *id.* (rating Arizona, Georgia, Indiana, Maryland, North Carolina, Pennsylvania, Texas, and Virginia's UDAP laws as "weak" for requiring proof of reliance to prevail).

291. *See id.*

292. *See* CARTER ET AL., *supra* note 152, § 4.2.4.1 (explaining intent is not generally required under state UDAP statutes).

293. *See id.* § 4.2.4.2 (reviewing state UDAP laws requiring proof of intent or knowledge).

294. *See* Carter, *supra* note 142, at 13 (explaining plaintiffs "must bear the heavy burden of showing that the deceptive act was both knowing and intentional" under South Dakota's UDAP).

295. *See* CARTER ET AL., *supra* note 152, § 4.2.4.1 (explaining Illinois's UDAP law requires plaintiffs to demonstrate defendants intended consumers to rely on their omissions).

to prove willfulness to prevail.[296] As the NCLC report explains, although unfair and deceptive business practices rarely occur by mistake, requirements to prove intent or knowledge impose "heavy burden[s]" on plaintiffs.[297]

Relatedly, many states require plaintiffs to plead UDAP allegations with specificity, as required under Federal Rule of Civil Procedure 9(b).[298] And even in jurisdictions applying the lower pleading standard in Rule 8(a), the fact-driven nature of UDAP decisions similarly demands a heightened level of specificity in UDAP complaints.[299] Due to special presuit investigation and discovery challenges, private plaintiffs' attorneys face significant barriers to collecting the information needed to plead successfully.[300] Given these challenges, predictably, very few plaintiffs initiate private litigation against the bail bond industry under state UDAP laws. Yet, in cities across the country, bail bond companies drown vulnerable consumers in small claims lawsuits to recover debts under consumer transactions that arguably violate state consumer protection laws[301] and simultaneously use their spoils to block legislative efforts to reform their unfair and deceptive practices.[302] To protect vulnerable consumers, state attorneys general have the legal authority and moral imperative to take immediate action, because if local bail bond businesses are regularly engaged in abusive, deceptive, and unconscionable acts or practices, then "those businesses should be held accountable through the same laws that would apply were they operating in any other corner of the marketplace."[303]

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296. *See id.* (explaining Kansas's UDAP law requires plaintiffs to demonstrate willfulness with some UDAP violations).

297. *See* Carter, *supra* note 142, at 13, 28.

298. *See* CARTER ET AL., *supra* note 152, § 11.6.5.2 (citing precedent in Illinois, Missouri, Maryland, Tennessee, Indiana, Minnesota, Texas, Nevada, Virginia, New Jersey, Pennsylvania, Ohio, Kansas, Utah, Wisconsin, Washington, Florida, North Dakota, Arizona, Washington D.C., Colorado, Connecticut, and Vermont).

299. *See id.* §§ 11.6.5.1–.4; *see also id.* § 11.7.4 (explaining consumer documents, often exclusively in the companies' possession, are "critical to proof of the consumer's case"). *See generally* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 663 (2009) (holding complaints must allege sufficient facts that would "state a claim to relief that is plausible on its face" to survive a motion to dismiss).

300. *See supra* Part II.A.

301. *See, e.g.*, Afford-A-Bail, Bail Bonds v. Hollomon, No. SCC-648343 (Conn. Centralized Small Claims Ct. Feb. 10, 2017) (collecting $300).

302. *See supra* Part I.

303. Kornya et al., *supra* note 37, at 107.

III. THE CASE FOR JOINT PUBLIC-PRIVATE ENFORCEMENT

As revealed in Part II, private litigation under UDAP offers a promising, but imperfect, path to addressing commercialized injustice within the bail industry.[304] Private enforcement limitations arising when applying UDAP to the bail industry can be understood as erecting three key types of challenges: power and resource imbalances,[305] evidentiary challenges,[306] and scope and substance limitations within state UDAP laws themselves.[307] Given their unique powers when acting in a public enforcement role under consumer protection statutes like UDAP, state AGs are well-suited to end commercialized injustice in the bail bond industry at a systemic level. Section A explains how coordination action between state AG offices can help mitigate resource and power differentials between the parties, and furthermore, encourage the bail bond industry to take self-regulation more seriously. Section B explains how the state AGs' compulsory investigation tools mitigate evidentiary challenges and presuit investigation and discovery challenges. Section C explains why statutory weaknesses do not impede state AGs and other public enforcers efforts as rigorously as they do with private enforcement efforts.

A. STATE AG AUTHORITY TO LITIGATE IN THE PUBLIC INTEREST

Most state UDAP laws provide authority to state AGs to publicly enforce the act's prohibitions.[308] Even when not specifically prescribed within the UDAP statute itself, in most states, state AGs may publicly enforce consumer protection statutes like UDAP under *parens patriae*; their power to litigate in the public interest.[309] As defenders of the public, state AGs may use their enforcement powers in support of specific consumers or consumers in the marketplace generally. In recent years, state and federal UDAP laws have provided state AGs a powerful tool to reform persistent and widescale com-

304. *See supra* Part II.

305. *See supra* Part II.

306. *See supra* Part II.

307. *See supra* Part II.

308. *See* Carter, *supra* note 142, at 11.

309. *See* William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 Yale L.J. 2446, 2460–61 (2006) (describing the power of attorneys general to initiate enforcement action against private parties); *see also In re* Lorazepam & Clorazepate Antitrust Litig., 205 F.R.D. 369, 386 (D.D.C. 2002) (surveying *parens patriae* authority of state attorneys general to represent consumers' interests and litigate in the public interest). *But see* Blumenthal v. Barnes, 804 A.2d 152, 170 (Conn. 2002).

mercial abuses.[310] To bolster their positional authority when taking enforcement actions against powerful corporation, state AGs have begun adopting aggressive multistate enforcement actions wherein states unite to file concurrent consumer protection lawsuits against the same defendant under identical or similar legal theories.[311] State AGs participating in coordinated enforcement efforts have successfully applied UDAP laws to secure multimillion and multibillion dollar settlements against large pharmaceutical companies, credit reporting agencies, and mortgage companies.[312] Coordinated and individual public enforcement actions by state AGs provoke meaningful reforms in industry practices.[313] When used by resourceful public enforcers, UDAP laws provide state AGs a powerful tool to regulate abusive business models within the bail industry.

In the first public enforcement lawsuit of its kind, the Consumer Financial Protection Bureau (CFPB) and state AGs in Virginia, Massachusetts, and New York recently initiated an enforcement action against Libre by Nexus, Inc., alleging the immigration bond company engages in unfair, deceptive, and abusive practices in violation of state and federal UDAP laws.[314] The complaint explains the enforce-

310. *See* Cox et al., *supra* note 147, at 38 ("In the hands of public enforcers, laws protecting consumers from unfair and deceptive acts and practices—commonly called 'UDAP' laws—have played a stunning role in recent years. . . . UDAP laws have chalked up record-setting payouts against some of the nation's most powerful companies . . . .").

311. Dee Pridgen, *The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practices Laws*, 81 ANTITRUST L.J. 911, 922 (2017).

312. *See* Cox et al., *supra* note 147, at 38–39 (describing the $181 million Risperdal settlement and $50 billion National Mortgage settlement); Geoff Mulvihill, *Judge Conditionally Approves Purdue Pharma Opioid Settlement*, ASSOCIATED PRESS (Sept. 1, 2021), https://apnews.com/article/purdue-pharma-opioid-settlement-6fd3e10dcd6b0eeffd2f0b885efd4693 [https://perma.cc/H3Y7-Z68L] (describing the more than $600 million Purdue Pharma OxyContin settlement); Press Release, Off. of Cal. Att'y Gen., Attorney General Becerra Announces Settlement Against Equifax Providing $600 Million in Consumer Restitution and State Penalties (July 22, 2019) [hereinafter Equifax Settlement Press Release], https://oag.ca.gov/news/press-releases/attorney-general-becerra-announces-settlement-against-equifax-providing-600 [https://perma.cc/LY9K-JPXS] (describing the $600 million Equifax settlement).

313. *See* Press Release, Off. of Minn. Att'y Gen., Attorney General Ellison Obtains Nearly $9 Million Settlement with CenturyLink for Overcharging Minnesota Customers (Jan. 8, 2020), https://www.ag.state.mn.us/Office/Communications/2020/01/08_CenturyLinkSettlement.asp [https://perma.cc/C7AH-KAVH] (announcing settlement terms including "significant" reforms to the company's billing practices); Equifax Settlement Press Release, *supra* note 312 (announcing settlement terms included an agreement to strengthen data security).

314. *Consumer Financial Protection Bureau and Virginia, Massachusetts, and New*

ment action arises from the unlicensed company's alleged practice of luring vulnerable consumers into abusive, English-only immigration bond contracts, while simultaneously marketing its services in Spanish-language advertisements.[315] The allegations in the CFPB's lawsuit are alarming; however, public enforcers should not restrict their enforcement efforts to similar "clear" win cases. As explained in Part II, bail bond contracts are illegible to native and nonnative English speakers alike.[316] As the people's attorney, state AGs hold a special responsibility to protect the state's most vulnerable consumers. A commercial contract is a commercial contract, whether the consumer enters into the agreement at a department store or a jailhouse. Consumer protection is the cornerstone of the modern state AG office, yet, until recently state AGs have not used their consumer protection expertise to investigate and enforce consumer abuse within the bail bond industry. Public enforcers can and should take aggressive enforcement action at a much larger scale. Until then, the bail bond industry will continue to trap vulnerable consumers across the country in cycles of physical, emotional, and financial harm under unfair and deceptively advertised consumer agreements.

B. STATE AG AUTHORITY TO USE COMPULSORY INVESTIGATIVE TOOLS

In general, state AGs enforcing UDAP statutes have broad authority to use compulsory investigative tools to mitigate the evidentiary challenges commonly found in private UDAP enforcement actions.[317] Subpoenas and civil investigative demands provide state AGs powerful presuit investigation and discovery avenues to compel sworn testimony from witnesses or the production of critical documents like consumer contracts.[318] With reasonable cause,[319] state

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York Attorneys General Sue Libre for Predatory Immigrant-Services Scam, CFPB (Feb. 22, 2021), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-and-virginia-massachusetts-and-new-york-attorneys-general-sue-libre-for-predatory-immigrant-services-scam [https://perma.cc/3X96-F4DJ] (summarizing the CFPB's allegation that company "preys on immigrants, primarily Hispanics, who speak little or no English and are being held in federal detention centers, desperate to return to their families" by "lur[ing] its victims through a series of false and misleading statements about its programs, . . . [and] English-only contracts that bind [consumers] to years of exorbitant monthly payments").

315. Complaint, CFPB v. Nexus Services, Inc., No. 5:21-cv-00016-EKD (W.D. Va. filed Feb. 22, 2021).

316. *See supra* Part II.

317. *See* CARTER ET AL., *supra* note 152, § 13.3.

318. *See id.* (outlining a state's investigative authority under UDAP laws).

319. *See id.* § 13.3.5.1 (explaining reasonable cause is an easy standard to establish).

AGs may investigate a potential UDAP violation at any time.[320] In fact, state AGs may proceed with investigations before receiving a formal consumer complaint, despite examined practices falling within the regulatory ambit of another agency, and without regard to statute of limitation concerns.[321] These special powers allow state AGs to more easily meet the heightened pleading requirements under UDAP laws. Additionally, because state AGs may investigate without complaints, public enforcement is not challenged by plaintiff-attorney match problems like private enforcement.

C. STATE AG ABILITY TO CAPITALIZE ON UDAP'S FLEXIBILITY

As foreshadowed earlier, when used by public enforcers, substance and scope problems in UDAP statutes rarely offer substantial hurdles to legal action against the bail industry.[322] Despite variations between the states, consumer law scholarship emphasizes an important common feature shared by state UDAP laws "in the hands" of public enforcers: flexibility.[323] Consumer law experts emphasize that courts routinely apply a "principle" or "standard-based" legal analysis rather than a "rule-based" analysis when resolving UDAP disputes.[324] Unlike with rule-based standards, which narrowly enumerate regulated conduct, principle-based legislation grants courts "broad discretion" to enforce the law in alignment with the legislation's stated objective.[325] As a principle-based law, under UDAP, public enforcers may nimbly respond to shifting needs in the marketplace, "without returning to the legislature every time a new scheme hatches."[326] Except in narrow circumstances,[327] under UDAP laws, public enforcers maintain significant power to "police" commerce in

320. *See id.* § 13.3.1.

321. *See id.* § 13.3.2 (citing People by Spitzer v. Network Assocs., Inc., 758 N.Y.S.2d 466 (Sup. Ct. 2003) (discussing investigative power without formal complaints); Wash. Home Remodelers, Inc. v. State, Office of the Att'y Gen., Consumer Prot. Div., 45 A.3d 208 (Md. 2012) (discussing administrative subpoena power despite it falling within another agency's purview); Auto-Owners Ins. Co. v. State, 692 N.E.2d 935 (Ind. Ct. App. 1998) (discussing investigation not barred by statute of limitations)).

322. *See supra* Part II.

323. *See* Cox et al., *supra* note 147, at 44–45.

324. *See id.*

325. *See id.* at 45 ("[B]oth rules and principles leave the enforcer with discretion on *whether* to enforce. Principles, however, grant the enforcer considerable discretion on *how* to enforce. As a result, while there is always a difference between the 'law on the books' and the 'law in action' . . . the difference is more pronounced when the law on the books is a principle.").

326. *See id.*

327. *See supra* Part II.

the marketplace without regard to the nature of the consumer transactions challenged.[328]

CONCLUSION

Across the country, bail bond industry businesses engage in a pattern of unfair and deceptive consumer practices. Bail bond companies exploit their grossly unequal bargaining power, depress consumer access to comparative information, employ contracts with terms unreasonably favorable to the company's interests, conceal extreme contract terms in confusing legal jargon, and ultimately provide consumers no meaningful choice within the market. Vulnerable consumers need urgent intervention. State UDAP laws provide public enforcers a powerful tool to halt the bail industry's most egregious and exploitative practices. The AIA Holdings Bail Agreement offers a small window into consumer abuses vulnerable communities face in their engagements with their bail bond providers. To protect vulnerable consumers, state attorneys general have the legal authority and moral imperative to take action.

328. *See supra* Part II.