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# Litigating Bail Cases: Using consumer laws to challenge commercial bail industry practices

Alex Kornya, Iowa Legal Aid



National  
Consumer Law  
Center  
*Fighting Together  
for Economic Justice*

Ivy Wang, Southern Poverty Law Center

(Moderator) Ariel Nelson, NCLC

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## Moderator: Ariel Nelson, National Consumer Law Center



Ariel Nelson is a staff attorney at the National Consumer Law Center focusing on credit and background reporting and criminal justice debt issues. She is a contributing author to NCLC's [Fair Credit Reporting](#) and [Collection Actions](#). Previously, Ariel litigated administrative and environmental law cases as a staff attorney/clinical teaching fellow at Georgetown University Law Center. She also served as a law clerk to the Honorable Judge David O. Carter of the U.S. District Court for the Central District of California and to the Honorable Judge Dorothy W. Nelson of the U.S. Court of Appeals for the Ninth Circuit. She holds a B.A. from the University of California, Berkeley and a J.D. from Harvard Law School. She is admitted to practice law in Massachusetts, California, and the District of Columbia.



# Resources: Litigation Guide



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## COMMERCIALIZED (IN)JUSTICE LITIGATION GUIDE:

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

By Ariel Nelson, Brian Highsmith, Alex  
Kornya, and Stephen Raheer

National Consumer Law Center®

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# More Resources: Listservs

- Bail & Corrections Industry Abuses Listserv ([Request Form](#); email [anelson@nclc.org](mailto:anelson@nclc.org) with questions)
- National Legal Aid & Defender Association's Court Debt Listserv (email [k.elliott@NLADA.org](mailto:k.elliott@NLADA.org))

# Alex Kornya, Iowa Legal Aid



Alex Kornya is the litigation director and general counsel at Iowa Legal Aid. In his career at Iowa Legal Aid, he has advocated for economic justice primarily in the areas of consumer protection, tax, and housing. Since 2009, he has advocated for the rights of low-income people facing the burden of criminal justice debt, developing and raising various constitutional and consumer protection theories and achieving systemic change.



## Ivy Wang, Southern Poverty Law Center



Ivy Wang is a staff attorney with the Southern Poverty Law Center's Economic Justice Project in New Orleans, LA. Her work tackles the public and private systems that exploit vulnerable populations and punish and imprison people due to their economic status. While at SPLC, she has helped to bring lawsuits against a bail company, its insurer, and a private ankle monitoring company; against municipalities and courts running "debtors prison" that jail people who cannot afford to pay fines and fees; and against private probation and pretrial supervision companies. Prior to joining SPLC, she defended low-income tenants as a Liman fellow at Southeast Louisiana Legal Services and clerked for the Hon. Helen Berrigan in the Eastern District of Louisiana. She is a graduate of Yale Law School and Yale College.





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Alex Kornya, Iowa Legal Aid

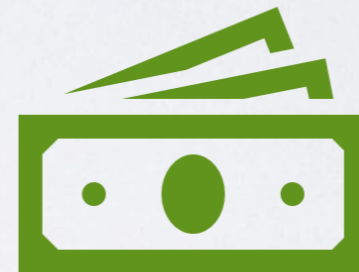


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# How money bail works



**Arrest**

**Bail set  
(by  
schedule  
and/or  
judge)**

**Contact  
Bail Bond  
Company**

**Pay  
Premium**

**Get  
Out  
Of Jail**

# BAIL BOND IS A FORM OF INSURANCE

- Bail bond is a surety – a form of insurance where **A** insures **B** against some conduct of **C**.
- “Bond” is a non-refundable payment for the insurance – i.e., the insurance premium.
- Bail bond “producers” (i.e. bondsmen) are **always** backed by a larger surety company.

# Bail industry actors

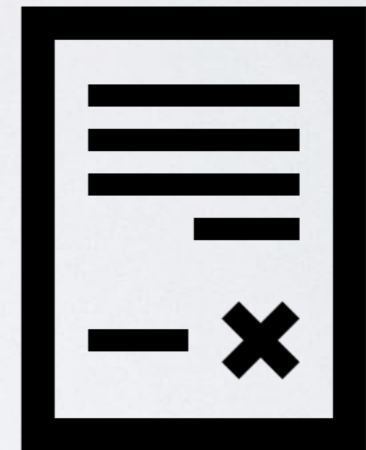
**Principal**



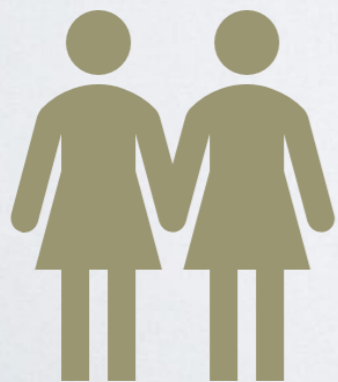
**Bail Bond Company**



**Surety**



**Indemnitors**



**Bounty Hunter**



NEED 3rd Indem

**BAIL BONDS, LLC**

DEFENDANT'S NAME [REDACTED]		
DATE 05-24-16	ISSUED BY MLC	RECEIPT NO. 107660

St. Bernard  
Bond

BOND AMOUNT	26400
PREMIUM @ 15.0%	0
PREMIUM @ 12.5% (JEFFERSON PARISH ONLY)	0
PREMIUM @ 12.0%	3120
ADMINISTRATION FEE	25.00
JAIL FEE	
TRANSFER FEE (IF APPLICABLE)	
TOTAL DUE	3275
AMOUNT PAID	100 + 865 = 965

INTL SE	BALANCE DUE	1660	P. 17. K.S.
	CASH COLLATERAL (IF APPLICABLE)	0	Def has

Previous Balance \$3800

**PAYMENT ARRANGEMENTS:**

I hereby acknowledge that the balance due on this bond needs to be paid, and verify that no one has promised me and reduction in the charges shown on the face of this bond calculation sheet.

I agree that the payments on this balance due will be made in the following manner:

\$ 300 payable [ ] weekly [X] bi-weekly, until paid in full, with the next payment due on \_\_\_\_\_

I understand that in the event the above arrangements are not met by either the defendant or the indemnitor(s), and it has been thirty days since the defendant's release the defendant will be considered to be in violation of either his bond condition or perceived to be a flight risk. This may result in the apprehension and surrender of the defendant.

Defendant: [REDACTED]

multiple balances  
200.00 on 10/10/10  
517.13  
bal 1625.00  
paid at 7/6/14  
1,975.00  
Total  
3,800.00

WARNING: ANY PERSON WHO KNOWINGLY AND WITH INTENT TO INJURE, DEFRAUD OR DECEIVE ANY INSURER, FILES A STATEMENT OF CLAIM OR AN APPLICATION CONTAINING ANY FALSE INCOMPLETE INFORMATION OR IS GUILTY OF A FELONY OF THE THIRD DEGREE

# WHAT'S THE RATE?

- States with commercial bail bonds impose maximum and minimum rate limits in one of two ways:
  - Statute / regulation (generally ~10%)
  - “Filed rate,” i.e. a document is filed with the state insurance commissioner – if approved, that constitutes the limits on rates for that company / bond product

# FINANCED PREMIUMS / CREDIT BONDING

- Often, indigent defendants can afford neither bail nor bond premium.
- Some bondsmen will then finance the bond in installments, often with very onerous terms.
- Legality and regulation of this practice varies across jdx
- Practice is controversial even within the industry

# COMMON LITIGATION POSTURES

- Collection of financed bond premium
- Collection of forfeited bond
- Pre-collection contract claim
- Claims related to ancillary services



# ACTIONABLE PRACTICES

- **CONTRACT CLAIMS**

- Inadequate co-signer disclosures
- Pre-emptive reaffirmation of debt in bankruptcy
- Tracking and consent-to-entry clauses
- Attorney fee provisions

# ACTIONABLE PRACTICES

- **CONTRACT CLAIMS (cont'd)**
  - Open ended collateralization
  - Authorization to obtain judgments by confession
  - Rates that exceed state maximum
  - Add-on services: e.g. GPS bracelet rental, monitoring, procurement of bond by middleman, etc.

# ACTIONABLE PRACTICES

- **FINANCING**

- Financed premiums / credit bail / credit bonding
- No disclosure
- “Open ended terms”
- Violation of state regulations (minority of states)

# GATHERING INFORMATION THROUGH SERFF

- I.e. System for Electronic Rate & Form Filing
- Has rate documents, form contracts, POAs, financing agreements, etc.
- May not have old rate documents – important in filed rate states!

# ACTIONABLE PRACTICES

- **COLLECTION CONDUCT**
  - Intimidation
  - Illegal repo / disposition of collateral
  - Failure to provide sufficient notice predicate for collection
  - Trespass
  - False arrest
  - Assault

# BARRIERS TO LITIGATION

- McCarran Ferguson reverse pre-emption
  - Federal claims cannot be brought in re “the business of insurance”
  - May need to separate financing claims from the product itself
  - May need to explore state law claims
  - May prevent removal to arbitration!
- Insurance as a regulated industry
- Nature of case (financed premium vs. forfeiture)
- Establishing vicarious liability in sureties

# Truth in Lending Act

15 U.S.C. §  
1601 *et seq.*

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TILA requires creditors to disclose, *inter alia*, all charges and fees, and payment schedule

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## Requirements

Credit is: (1) extended to consumers (2) regularly (3) subject to finance charge or payable in 4+ installments (4) primarily for personal, family or household purposes

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McCarran-Ferguson Act “reverse preemption”

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**“Premium financing by an insurance company in connection with the sale of an insurance policy is not the ‘business of insurance’ for McCarran Act purposes. . . .”** *Egana v. Blair’s*. Doc. 122 at 10.

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**Racketeering  
Influenced  
and  
Corrupt  
Organizations Act  
(RICO)**

**18 U.S.C. §  
1962**

Elements: (1) **conduct** of an (2) **enterprise** through a (3) **pattern of racketeering activity**  
or the **collection of unlawful debt**

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Predicate Acts:

- (1) Extortion (2) Kidnapping (3) Extortionate Collection of Debt

- ...

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- ◆ Pattern can be open-ended (threat of repetition of regular way of conducting business) or close-ended (~several years)

- ◆ Conduct = play some part in directing affairs of the enterprise

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# CONVERSION

- **“an act in derogation of the plaintiff’s possessory rights or any exercise or assumption of authority over another’s goods, depriving him of the possession, permanently, or for an indefinite time.”**
- **- Chrysler Credit Corp. v. Whitney Nat’l Bank, 51 F.3d 553, 557 (5th Cir. 1995); see also La. Civ. Code art. 2315.**

# CONTRACT LAW

Contractual terms in derogation of “law enacted for the protection of the public interest” are “an absolute nullity.”

- La. Civ. Code art. 7

“The cause of an obligation is unlawful when the enforcement of the obligation would produce a result prohibited by law or against public policy.”

- La. Civ. Code art. 1968

“[A] contract is absolutely null when it violates a rule of public order.”

- La. Civ. Code art. 2030

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**Fair  
Debt  
Collecti  
on  
Practice  
s Act  
(FDPCA  
)  
15  
U.S.C. §  
1692 *et*  
*seq.***

Prohibits a wide range of abusive collection conduct.

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### **Barriers**

(1) McCarran-Ferguson; (2) bona fide fiduciary [forfeitures]; (3) original creditor exception

- Many states have FDCPA analogs that do not implicate the same barriers as the federal statute.

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## **State Consumer Credit Codes**

**States that have some version of the Uniform Consumer Credit Code may provide for a private c/a for a number of contract and financing claims**

**E.g. illegal repo, unconscionability, rate violations, co-signor violations, bankruptcy waivers, 24 hour access clauses, GPS clauses, etc.**

**•Can be a good way to bring non-vicarious surety claims.**

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# UDA P

**I.e. a private right of action for consumer fraud – often covers an open-ended list of “unfair” and “deceptive” acts and practices.**

## **Barriers**

~21 states exempt the insurance industry from UDAP coverage

•Violations of other law may constitute *per se* UDAP claims, but technical violations without clear damages often disfavored.

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# UCC Art. 9

**I.e. illegal repo or disposition of collateral.**

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E.g. breach of the peace, commercial unreasonable sale, failure to return pledged collateral, acting in the absence of a properly perfected security interest, etc.

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- Applies to financed premium collection and forfeiture claims.

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## Truth in Leasing Act

15  
U.S.C. §  
1667 *et*  
*seq.*

**State  
analogs  
too!**

E.g. “the other TILA.” May create a path to challenge terms of GPS leasing.

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Like the more well known TILA, this statute primarily focuses on providing adequate disclosure so that the consumer knows the true cost and terms of the transaction.

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Covers consumer leases four or more months in duration. Imposes limits on default / delinquency penalties, requires disclosures in contracts AND advertising.

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## How to Protect Yourself and Others Against Abusive Bail Bond Practices

If you feel like a bail bond agent has behaved badly or taken advantage of you or someone you know, you may have legal options.



Contact a consumer protection lawyer or

To report an abusive bail bond practice

# Bail Bonds

What are bail bonds, and how can you protect yourself from abusive bail bond practices?





# QUESTIONS?

Thank you to our speakers!



Since 1969, the nonprofit **National Consumer Law Center®** (**NCLC®**) has worked for consumer justice and economic security for low-income and other disadvantaged people in the U.S. through its expertise in policy analysis and advocacy, publications, litigation, expert witness services, and training. [www.nclc.org](http://www.nclc.org)