

# 2019 UPDATES

## The Big (Criminal) Elephant in the Room

California SB-10 was signed into law by Governor Brown in August of 2018. SB 10, if not repealed, goes into effect in October of 2019 and will eliminate the entire cash bail and bail industry. SB 10 was introduced based on a 2016, yearlong study conducted and backed by California Chief Justice Tani Cantil-Sakauye. The study concluded that the state's bail system was "unsafe and unfair" and is dependent on a defendant's finances versus whether or not they are a public threat or flight risk. According to Justice Cantil-Sakauye, before SB 10, only defendants with the financial means had the ability to "purchase their freedom" via a bail bond and that often left poor, minorities incarcerated due to their financial status.

Originally, SB 10 was backed by the likes of the ACLU and Human Rights Watch, but shortly before the bill hit Gov Brown's desk, it was radically changed. The new component that has these civil rights groups up in arms involves the use of an artificial intelligence computer rating system that will determine whether a suspect is low, medium, or high risk to public safety. The algorithm for this rating system has yet to fully established but could include prior history of convictions, age, race, etc. As part of the SB 10, each county has the option to create its own rating system or buy one that has already been established. As of now, more than 100 civil rights groups oppose SB10 because the proposed algorithm could create a "racial bias" in of itself based on the above factors. The ACLU's position has shifted from praise of eliminating the entire "unfair" bail industry to now opposing the bill because it grants too much power to the courts and creates racial biases and disparities that will permeate the justice system.

Recently, Jeff Clayton, executive director of the American Bail Coalition, discussed SB 10 on the popular, Legal Talk, podcast. Clayton expressed concern as well with the rating system saying that "[low risk offenders] these low-level misdemeanors, basically will go home... medium risk cases will be supervised en masse by state agencies... high risk cases will get preventative detention." Clayton also went on to defend the constitutional right to bail stating, "the fundamental heart of the bill is unconstitutional under California State Constitution. The constitution says everybody has the a right to bail with limited exceptions. [The bill is saying], we are just going to wholesale deny bail based on the state law is putting the constitutional cart before the horse."

With SB 10 is it estimated that there about 15,000 bail industry related jobs at stake. The bail industry has started collecting the necessary signatures that would put reform of SB 10 on the 2020 ballot and would delay the effective October 2019 start

date until after the ballot. As of November 20, 2018, 576,745 signatures have been collected; the state is working to verify these signatures to ensure there are enough to get the reform on the ballot.

## **In the News**

### **Case Study: A Look at New Jersey, One Year After Bail Reform**

In 2017, New Jersey became the first state to massively overhaul their cash bail system. The New Jersey attorney general hailed the success of the program, but local police and prosecutors sang a different tune. The police blamed the bail reform for release of criminal defendants that in their eyes, should have been kept behind bars. In addition, county governments were taxed with the cost of implementing a new system and had no way of funding it since the state did not provide any sort of funds to do so.

The first year since the historic criminal justice bail reform: still mixed results. While the number of low level criminals “languishing” away in jail has been slashed by 20 percent, the problems that reared at the release of the program are still problems. A report that was conducted by Judge Glenn Grant, on behalf of the state legislature and governor, noted that while the system had become more fair to lower income individuals, since it is now risk-based and relies on empirical evidence to better identify who is a risk, it is simply not sustainable because the state provided no funding and right now the program is being funded by court fees. The report also found that by 2019, paying the bills associated with this new implementation will be an issue.

Pretrial monitoring of defendants has also become a serious issue. In 2017 alone, court staff were burdened with keeping 24-hour a day tabs on 3,686 defendants. Law enforcement and the bail bonds industry continue to argue that the new system is dangerous. Earlier in 2018, a man that was awaiting trial on a domestic violence charge was released early, and within days fatally shot his girlfriend. The overhaul will continue to be monitored, but as of now it appears that unless the state starts funding the mandate, more issues with pretrial monitoring (that could be deadly for victims) could bring the whole overhaul down.

### **Walker vs. The City of Calhoun**

In September of 2015, an indigent man, Maurice Walker, on behalf of himself and others similarly situated, sued the city of Calhoun, Georgia, because he felt that the city was violating the fourteenth amendment by jailing the poor because they cannot pay a small amount of money to be released. Walker was arrested on September 3rd, 2015 for being a pedestrian under the influence of alcohol. The crime is classified as a misdemeanor and punishable by a fine not to exceed \$500. Walker was notified by police that he would need to pay \$160 cash bond and he could be released. Walker, who was solely living off of social security, earning \$530 a month, could not afford the bond, nor could his family. Walker’s lawsuit alleges that the city’s policy of using a secured-money bail schedule with bond amounts based on the fine an arrestee could expect to pay if found guilty, plus applicable fees is unconstitutional, as defendants who could afford to deposit the bail amount were released immediately, whereas those who could not pay were held until the next court session on a non-holiday Monday. In Walker’s case,

his arrest landed on Labor Day weekend and he was unable to post bail and/or see a judge until the following Monday, which was eleven days later. Walker filed the suit, five days into his incarceration, and was released the following day by the city council.

After the lawsuit was filed by Walker, the City of Calhoun, via a decision and injunction by Judge Murphy of the Municipal City Court, adopted a Standing Bail Order that set bond amounts in accordance with the offense and also guaranteed a hearing within 48 hours of the arrest for indigent defendants that live below the national poverty line. The defendants were to be released on their own recognizance.

The Georgia Sheriffs Association, the American Bail Coalition and the Georgia Association of Professional Bondsmen filed motions in support of Calhoun's practices. Murphy's injunction and the case eventually made its way to the federal, 11th Circuit Court, where in a 2 to 1 ruling, it was found that Murphy's ruling, as written, could not stand because there was not enough guidance to the city of Calhoun on how it must comply with the minimum standards set forth by the Constitution.

While American Bail Coalition executive director, Jeff Clayton, hailed the 11th Court's decision to "finally put an end to these unmeritorious lawsuits", an attorney for Walker stated, "The court offered no opinion on the merits of the constitutional claim... the case will go back to the district court where (Murphy) will have the opportunity to consider how to fine tune his injunction".

### **Charges filed Against Bail Bond Agent for Unlawful Practices**

Bail agent, Marvin Morgan, along with several insurance companies are in hot water with the NYC Department of Consumer Affairs (DCA) for allegedly charging illegal fees, refusing to provide copies of documents to consumers and failing to return collateral owed to consumers. According to the DCA's investigation, the insurance companies looked the other way. Morgan's bail agent license has been revoked by the New York State Department of Financial Services.

The DCA is seeking more than \$57,500 in fines and restitution for sixteen consumers that were affected by Morgan's wrongdoings.

### **Couple Charged with Improper Bail Bonding**

A Statesville, NC couple has been charged by the North Carolina Department of Insurance for acting as a bail agent while unlicensed. the woman, Tonya Zsamani, allegedly acted as a bail bonding agent between December 2017 and June of 2018. Zsamani and her husband took premium payment and filed an appearance bond on behalf of a man named Alexander Busby. A Department of Insurance representative, Barry Smith, said he was unable to determine if the suspect had ever held a license in the past. Both of the Zsamanis have been charged with misdemeanors but have not been arrested or placed in custody.

### **DOI Takes Action Against Seaview Insurance Company**

In August of 2018, the California Department of Insurance issued a Non-Compliance notice to Seaview Insurance Company for allegedly failing to maintain eligibility guidelines for its surety line of products, which may result in discrimination to California consumers. Seaview Insurance Company is the surety for the largest bail agency in the state, Aladdin Bail Bonds.

According to the Department of Insurance, after a regularly scheduled examination found that Seaview Insurance Company lacked specific guidelines for collateral requirements, as well as, specific requirements for down payment of bond premium programs. This alleged violation, according to the Department of Insurance, results in an inability for applicants to receive equal access to a bail bond creating the presumption that Seaview has applied rates that were excessive, inadequate and/or unfairly discriminatory.

Seaview Insurance had ten days to provide proof of a systemwide correction or risk a public hearing that may involve penalties or other actions deemed appropriate by the insurance commissioner.

### **Court Upholds Decades Old Bail Law**

In February 2018, a Los Angeles County District Court judge upheld the decades old regulation that bars bail agents from recommending, suggesting, or referring attorneys to arrestees.

In 2017, bail agent, Chad Conley, sued the California Insurance Commissioner, Dave Jones, challenging Jones' or any insurance commissioner's perceived authority over adopting the 1940's regulation and also asserted that the ruling inhibits bail agent's first amendment rights.

In the judge's ruling, she noted that the insurance commissioner made a compelling argument that attorney referrals by bail agents are inherently misleading.

Commissioner Jones celebrated the victory adding, "The court's decision upholding my regulation protects the integrity of the justice system by preventing bail agents from misrepresenting their role as looking out for the interests of the arrestee... "A bail agent's interest is not to protect arrestees—it is rather a financial interest limited to obtaining a premium from the arrestee and protecting the surety company's bond."

### **Facebook and Google Ban Bail-Bond Industry Advertisements**

In the most recent attempt to quiet the bail bonds industry, the two tech giants, Facebook and Google have banned advertisements on their platforms citing the decision was based upon studies that the for-profit bail industry profits off of minorities and poor communities.

According to David Graff, Google's senior director of global policy, "We made this decision based on our commitment to protect our users from deceptive or harmful products, but the issue of bail bond reform

has drawn support from a wide range of groups and organizations who have shared their work and perspectives with us.”

Facebook’s Monika Bickert, the vice president of global policy management, said something along the same lines, noting, “Advertising that is predatory doesn’t have a place on Facebook”.

On the other side of the argument, Jeff Clayton, executive director of American Bail Coalition said in a statement, “The ad bans won't affect bail bond agencies' bottom lines much” adding that bail bond agencies still appear in organic SEO searches.

Don Mescia, executive director of United Bail of America, said of Google’s announcement to stop for-profit bail advertising, “another example of the moral and ethical failings of the American society”.

### **A Frontier for Bail Agents: Immigration Bonds**

Immigration bonds are very similar to regular bail bonds but are issued to illegal aliens that have been arrested or detained by Immigrations and Customs Enforcement (ICE) and are a federal bond. ICE Immigration has to approve the detainee for a bond based on factors similar to a regular bond, such as flight risk and risk to public safety.

There are two types of immigration bonds, a delivery bond and a voluntary departure bond. With a delivery bond, an ICE judge decides whether a detainee is eligible for a bond; they must have an arrest warrant and a notice of custody conditions from ICE to be released. This bond is used to ensure the detainee shows up to all hearings and has time to consult with an immigration attorney prior to their hearing. Voluntary Departure Bonds can be used by detainees to voluntarily leave the country, at their own expense, within a specific period of time. The bond, if paid in full, is refundable once the detainee has left the country. If the detainee has not or will not leave the country, the bond will be forfeited. As with regular bonds, the riskier the threat to public safety, the higher the cost of the bond (if the judge even allows for a bond). Delivery bonds vary between \$1500 and can even reach \$10K. Departure Bonds start at a minimum of \$500.

Immigration Bonds may be secured by cash or cash equivalent or by a surety company authorized by the Department of Treasury to post such bonds. According to ICE, in 2013 (the last known public figures) 45,179 immigration bonds were issued in the amount of \$243 million.

To sell immigration bonds in California, a person will need to meet the minimum requirements set by the state and obtain a bail agent license, as well as a property and casualty license; the property and casualty license is required to transact on behalf of the surety company.