

Law phasing out money bail faces litigation, possible battle initiative

Gov. Jerry Brown signed a bill on Tuesday that will phase out cash bail in California. But the fight over pretrial release is likely to continue for years.



Supporters watch Gov. Jerry Brown sign SB 10. From left, Assembly Speaker Anthony Rendon, D-Lakewood; Senate President Pro Tem Toni Atkins, D-San Diego; SB 10 author Sen. Robert Hertzberg, D-Van Nuys; California Chief Justice Tani Cantil-Sakauye; SB 10 co-author Assemblyman Rob Bonta, D-Alameda.

SACRAMENTO -- Gov. Jerry Brown signed a bill on Tuesday that will phase out cash bail in California. But the fight over pretrial release is likely to continue for years.

On one side are progressive groups that championed SB 10. Many of them opposed the bill after late amendments entrusted new powers to judges and risk assessment tools that some say have a disproportionately negative impact on non-white defendants.

Meanwhile, a representative of the bail industry said the companies are exploring a lawsuit to block the implementation of SB 10. They are also considering going to the ballot in 2020 with an initiative that would bring back cash bail.

"Our path to a more just criminal justice system is not complete, but today it made a transformational shift away from valuing

private wealth and toward protecting public safety," said the bill's author, Sen. Robert Hertzberg, D-Van Nuys, in an emailed statement.

"If this is the end of the road, I'm really disappointed," said Santa Clara University School of Law Professor W. David Ball. "If this is phase one of a much larger project, I feel much better about it."

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Of the two main late changes to SB 10, Ball said he was more troubled by the discretion given to judges. They are traditionally nervous about letting people out due to the chance the offender will commit a heinous new crime, Ball said.

By contrast, risk assessment tools can be audited and improved over time in order to remove bias, he said.

"Risk assessment tools show black people are more likely to get arrested because they are," Ball said.

Ball, who said he served as an informal adviser to a coalition of groups that supported the bill, said he was worried that bail bondsmen would go into businesses based on monetizing pretrial detention.

That coalition began to splinter after the bill was largely rewritten in recent days. Longtime SB 10 supporters such as the ACLU actually began urging legislators to vote against the bill.

"A first step is following through on Senator Hertzberg's commitment to address racial bias in risk assessment tools with new legislation," said the three California chapters of the ACLU in a joint statement after SB 10 was signed. "The implementation of this bill -- and subsequent legislation in this area -- must ensure a significant reduction in incarceration and also provide due process and promote racial justice."

Owners of bail bond businesses, meanwhile, are hoping they can prevent SB 10 from ever fully going into effect.

"SB 10 is deeply flawed and will cause consequences to public safety," said Gloria Mitchell, president of the California Bail Bonds Association. "It is also a violation of the United States and California Constitution's right to bail."

Some attorneys have looked askance at these constitutional arguments, noting the constitutional rights speak more to the right to pretrial release than the right specifically to pay a bond. Mitchell's group is currently defending the bail system in *Buffin et al. v. City and County of San Francisco*, 15-CV4959 (N.D. Cal., filed Oct. 28, 2015).

Mitchell said her organization is also looking into whether the bill's authors violated the Legislature's rule that a bill cannot be voted on within 72 hours of an amendment. SB 10's bill history shows it was amended on Aug. 17 and passed the Assembly floor three days later. But these amendments may not have been "available on the internet for 72 hours" as required under 2016's Proposition 54.

Failing that, Mitchell added, "the voters will get to make the decision in 2020," a reference to her group's intention to place an initiative on the ballot bringing back cash bail.

The bill has a relatively long implementation period. Rather than going into effect on Jan. 1, like a typical new law, the current bail system won't be phased out until Oct. 1 next year.

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