



Preventing Whack-a-Mole Management of Consumer Debt Cases:

A PROPOSAL FOR A COHERENT AND
COMPREHENSIVE APPROACH FOR STATE COURTS



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More than two-thirds of civil cases filed in state courts annually likely involve lawsuits by creditors seeking payment on consumer debts.

Introduction

Americans are drowning in debt – an estimated \$4 trillion or roughly \$13,000 for every man, woman, and child in the United States.¹

Readily available credit is beneficial for the American economy, making it possible for people to afford a home, invest in higher education, and purchase durable consumer goods such as automobiles, home appliances, and other items that would otherwise be beyond their financial means. Concerns are growing, however, that Americans increasingly struggle to repay their debts, especially those incurred to cover routine living expenses, emergency situations, and out-of-pocket medical costs.

Many then find themselves as defendants in consumer debt collection cases filed in state courts.

Recent studies of civil litigation have found that nearly one in four civil cases filed in state courts involves consumer debt collection; one in ten is a mortgage foreclosure; and 16 percent of civil cases are small claims cases, many of which are consumer debt collection cases that qualify for streamlined processing due to their minimal monetary value.²



¹ This figure excludes residential mortgage debt. Jessica Dickler, *Consumer Debt Hits \$4 Trillion*, CNBC (Feb. 21, 2019), available at <https://www.cnbc.com/2019/02/21/consumer-debt-hits-4-trillion.html>.

² Nearly two-thirds (64%) of cases were contracts, and more than one-third of contracts were consumer debt cases. PAULA HANNAFORD-AGOR, SCOTT GRAVES & SHELLEY SPACEK MILLER, *THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS 18-19* (NCSC 2015) [*hereinafter* CIVIL LANDSCAPE].

In addition, nearly one in five cases is a landlord/tenant claim, 40 percent of which demand payment of past due rent in addition to the eviction of the tenant.³ Overall, more than two-thirds of civil cases filed in state courts annually likely involve lawsuits by creditors seeking payment on consumer debts.⁴

These cases pose tremendous challenges to state courts due not only to their high volume but also to the distinctive characteristics of the defendants, who are overwhelmingly unrepresented, often intimidated by court procedures, and uninformed about their substantive rights or how to assert them in court.⁵ Often they are also struggling with other

issues, including poor health, unstable housing situations, and language fluency.⁶ The cases themselves are typically assigned to high-volume dockets, for which judges and court staff often lack the resources and expertise to scrutinize claims, and identify and correct errors before a judgment is entered. A final judgment is often not the end of the court's workload as judgment creditors seek court orders to enforce the judgment through wage garnishment or seizure of liquid assets. As the amount of consumer debt continues to grow, there is a strong likelihood that state courts will see corresponding increases in consumer debt collection caseloads.

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³ Id. PAULA HANNAFORD-AGOR, CASELOAD HIGHLIGHTS, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS: EXAMINING DEBT COLLECTION, LANDLORD/TENANT AND SMALL CLAIMS CASES 4 (NCSC 2019) [hereinafter CASELOAD HIGHLIGHTS].

⁴ Id. In addition, an estimated 767,000 nonbusiness bankruptcy cases are filed in federal court. JUST THE FACTS: CONSUMER BANKRUPTCY FILINGS, 2006-2017, available at <https://www.uscourts.gov/news/2018/03/07/just-facts-consumer-bankruptcy-filings-2006-2017>.

⁵ CIVIL LANDSCAPE, *supra* note 2, at 31-33.

⁶ Studies show dramatic correlations between poverty rates and health and wellbeing. See, e.g., Olivia Egan et al., *Health and Social Conditions of the Poorest versus the Wealthiest Counties in the United States*, 107 AM. J. PUB. HEALTH 130 (2017); Alice Kuo, *Poverty and Child Health in the United States*, 137(4) PEDIATRICS e20160339 (Apr. 2016).

PROJECT BACKGROUND

In August 2016, the Conference of Chief Justices and the Conference of State Court Administrators endorsed the findings and recommendations of the Civil Justice Improvements Committee (CJI Committee). With a generous grant from the State Justice Institute (SJI-16-P-231), the National Center for State Courts and IAALS, the Institute for the Advancement of the American Legal System, undertook a three-year project to implement the recommendations. As part of the CJI Implementation Plan, the NCSC and IAALS conducted preliminary research to document the impact of rules enacted in New York State on consumer debt litigation. The project also included an exploratory survey of state court policymakers, judges, and court administrators about post-judgment enforcement efforts in state courts. This paper describes contemporary challenges associated with managing consumer debt caseloads and some promising solutions to address those challenges. It then discusses recommendations by the CJI Committee that offer a comprehensive framework for managing these cases and proposes a model approach to reform.

Until recently, state judicial branches were mostly unaware of how much of their civil caseloads consisted of consumer debt collection cases and the case management challenges that they posed for courts and for the litigants themselves. The mortgage foreclosure crisis that occurred after the 2008-2009 economic recession raised widespread concerns about how poor management by mortgage servicing companies complicated foreclosure cases in state courts.⁷ As state courts, and some federal agencies, began to investigate problems related to mortgage foreclosure cases, many

became aware of similar problems in other consumer debt cases.⁸ The 2015 *Landscape of Civil Litigation in State Courts*, which was undertaken to inform the deliberations of the CCJ Civil Justice Improvements Committee (CJI Committee), highlighted the impact of these problems for state courts with respect to both effective case management and the public legitimacy of the judicial branch. In its recommendations, the CJI Committee emphasized the importance of monitoring compliance with procedural due process requirements for both contested and uncontested cases.⁹

⁷ Gretchen Morganson, *Flawed Paperwork Aggravates a Foreclosure Crisis*, NEW YORK TIMES (Oct. 3, 2010), available at <https://www.nytimes.com/2010/10/04/business/04mortgage.html>. Problems included incomplete or missing documentation of ownership of the debt; failure to comply with federal and state notification procedures; failure to document agreements with homeowners concerning modified mortgage repayment plans, including allegations of fraud and bad faith by lenders pursuing foreclosure after agreeing to modifications; and failure to properly notarize required documents.

⁸ FEDERAL TRADE COMMISSION, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION (July 2010) [*hereinafter* FTC REPORT].

⁹ CCJ CIVIL JUSTICE IMPROVEMENTS COMMITTEE, CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL (NCSC 2016) [*hereinafter* CALL TO ACTION]. Appendix I of the report provided detailed recommendations for addressing widespread problems associated with consumer debt cases. Many of those recommendations referenced the impact of rules implemented first by the Civil Court of New York City, and subsequently statewide, on reducing the incidence of fraudulent and abusive debt collection efforts. *Id.* at Appendix I: Problems and Recommendations for High-Volume Dockets 5-7 (2016) [*hereinafter* Problems and Recommendations for High-Volume Dockets].

Over the past five years, state courts have been trying to manage these caseloads on a piecemeal basis – developing rules, business practices, and resources for litigants that vary depending on the source of the underlying debt, the litigation posture of the defendants (contested or uncontested), and the stage of litigation. Although the factual issues in these cases are usually straight-forward, a patchwork of federal and state statutes and regulations typically apply,¹⁰ adding to

the confusion of unrepresented defendants. The debt burden is growing, and there is a strong likelihood that state courts will see corresponding increases in debt collection caseloads.¹¹ To meet the challenge, state courts need to implement policies, rules, procedures, and business practices to manage consumer debt collection cases in a more consistent and coherent manner.

Challenges with Managing Consumer Debt Collection Caseloads

Consumer debt cases are often characterized by several common traits that make them difficult to manage effectively and fairly.



As a general rule, the factual basis for these claims is fairly straight-forward. A person purchases goods or services in exchange for payment either to the original seller or to a third-party financier (e.g., credit card lender), then fails to pay the debt according to the contractual terms of the sale or financing agreement. But the law governing consumer debt claims may involve a patchwork of state and federal regulations depending on the nature of the original debt. A great deal of recent attention has been focused on third-party debt buyers that purchase the debt from original creditors.¹² Although third-party cases comprise a large portion of consumer debt cases in state courts,

cases are also initiated by original creditors seeking repayment of debts for a broad array of consumer debt, including home mortgages, automobile and other secured property loans, student loans, medical debt, payday loans, and credit card and other unsecured consumer financing. Many states have enacted specific statutory and regulatory requirements related to discrete types of consumer debt specifying the permissible terms of the agreements (e.g., interest rates, repayment terms, disclosure notifications, remedies for breach of contract, etc.).¹³

Traditionally, courts relied on the parties to ensure that debt collection claims comply with applicable

¹⁰ See, e.g., FAIR DEBT COLLECTION PRACTICES ACT, 15 U.S.C. §§ 1692-1692g (2020); CREDIT UNION NATIONAL ASSOCIATION, GUIDE TO STATE USURY LAWS, *available at* https://www.cuna.org/uploadedFiles/Advocacy/Priorities/State_Government_Affairs/a-z_usury_lawguide.pdf; AMERICAN INSTITUTE OF CPAS, PRE AND POST JUDGMENT INTEREST ANALYSIS MATRIX, *available at* <https://www.aicpa.org/interestareas/forensicandvaluation/resources/economicdamages/prejudgment-postjudgment-matrix.html#>.

¹¹ Civil case filings increased by 4 percent in 2017, the only category of cases that saw any increase. NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD DIGEST, 2017 DATA, *available at* <http://courtstatistics.org/~media/Microsites/Files/CSP/Overview/CSP%20Caseload%20Digest%202017%20Data%20print.ashx>.

¹² CONSUMER FINANCIAL PROTECTION BUREAU, MARKET SNAPSHOT: THIRD-PARTY DEBT COLLECTIONS TRADELINE REPORTING (July 2019).

¹³ Information on state usury laws at <https://wallethub.com/edu/cc/usury-laws/25568/#credit-card-industry>; and payday lending state statutes at <http://www.ncsl.org/research/financial-services-and-commerce/payday-lending-state-statutes.aspx>; Allen E. Farnsworth, *United States Contract Law* (1999).

state and federal laws governing the underlying debt. Hence, it was the plaintiffs' responsibility to exercise due diligence before filing the claim to ensure that factual allegations in the complaint are accurate. It was the defendants' responsibility to assert any legally valid objections to claims. In the event of disagreement, both parties were obligated to produce evidence to support their claims and defenses. The role of the court was to provide the forum, the ground rules, and the procedural decision-making criteria that both sides agree are fair. It was decidedly not the court's role to insert itself into disputes about the facts or the law unless specifically asked to do so by the parties; in fact, doing so would be viewed as unfairly favoring one side over the other, a clear violation of the court's obligation to remain impartial.¹⁴

Increasingly, however, defendants in debt collection cases are unrepresented. They are rarely knowledgeable about local court procedures, much less the details of the laws governing the debt. The availability

and quality of self-help resources and free or low-cost legal assistance vary from state to state, and even from court to court. The court environment itself can be overcrowded and confusing for litigants, and court staff rarely have adequate time and resources to offer in-depth information or to confirm that defendants understand what little information has been provided.¹⁵ Consequently, their ability to navigate court procedure is shaky, at best, making it less likely that they can successfully challenge plaintiffs' claims, even assuming that they recognize the availability of various defenses. Plaintiffs, on the other hand, are overwhelmingly represented by attorneys, many of whom specialize in consumer debt collection litigation. This asymmetry in legal representation and expertise presents judges and court staff with a now familiar ethical dilemma: ensuring that unrepresented litigants have access to legal information, but not violating judicial impartiality by offering legal advice about applicable consumer rights or available defenses to the claim.¹⁶

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¹⁴ Paula Hannaford-Agor, *Changing Times, Changing Relationships for the Bench and Civil Bar*, 2018 TRENDS IN STATE COURTS 32-33 (2018) [*hereinafter Changing Times*].

¹⁵ Problems and Recommendations for High-Volume Dockets, *supra* note 9, at 5-7.

¹⁶ *Changing Times*, *supra* note 14, at 3.

Default Judgments in Consumer Debt Collection Cases

Of course, the challenges noted above only occur in contested cases – that is, cases in which the defendant entered an appearance or filed an answer or other responsive pleading. In fact, analyses of consumer debt caseloads confirm that a substantial proportion of cases are uncontested, usually resulting in a default judgment. The 2015 *Civil Landscape* found that at least one-fourth of consumer debt cases was disposed by default judgment.¹⁷ More recent studies of civil caseloads have found even higher rates of default judgment in consumer debt cases.¹⁸

There are five common explanations for why defendants might fail to respond to consumer debt collection lawsuits. In many instances, the claim is factually and legal valid, but the defendant is financially unable to pay the debt and intentionally chooses not to invest time or additional resources in response to the complaint, believing that the eventual outcome is a foregone conclusion.¹⁹ In other instances, the complaint may not include sufficient information about the debt for the defendant to make an informed decision about whether the debt is valid. Even when sufficient information is disclosed in the complaint, and the defendant wants to contest the validity of the debt or to negotiate more manageable payment terms, the defendant may lack either information or confidence in their ability to do so.²⁰

Perhaps the most troubling explanation for defendants' failure to respond in many cases is that the

Common reasons that defendants fail to respond to consumer debt collection lawsuits:

1. Defendant lacks money to pay a valid debt.
2. Defendant lacks information with which to assess the validity of the debt.
3. Defendant lacks information about how to contest an invalid debt.
4. Defendant lacks information about how to negotiate a settlement for valid debt collection case.
5. Defendant does not receive notification of the lawsuit.

defendant never received notice that a lawsuit had been filed. Procedural due process mandates that defendants receive meaningful notification when they are named in civil lawsuits. However, state statutes and rules of civil procedure vary considerably with respect to what constitutes meaningful notification. The most widely accepted form of notice involves having the sheriff or a private process server

¹⁷ CASELOAD HIGHLIGHTS, *supra* note 3, at 1. Note that an additional 22% of consumer debt cases were disposed by unspecified judgment, some of which may have been default judgments.

¹⁸ For example, default judgment rates were 63.6% for small claims cases involving consumer debt collection filed in Black Hawk County (IA) District Court (PAULA HANNAFORD-AGOR et al., IOWA PROGRAM IMPLEMENTATION REPORT 8 (2019)); 19.7% for consumer debt cases filed in Collin County (TX) Justice of the Peace Court (SHELLEY SPACEK MILLER et al., TEXAS PROGRAM IMPLEMENTATION REPORT 9 (2019)); and 44% of small claims cases filed in West Valley City (UT) Justice Court (PAULA HANNAFORD-AGOR et al., EVALUATION OF UTAH ODR PILOT PROJECT (2020)). The Federal Trade Commission estimated default rates from 60% to 95%. FTC REPORT, *supra* note 8, at 7.

¹⁹ Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. SOC. JUST. 51 (2010-2011); FTC REPORT, *supra* note 8, at 7.

²⁰ Problems and Recommendations for High-Volume Dockets, *supra* note 9, at 5-6.

personally serve the defendant with a summons and copy of the complaint. Because some defendants are difficult to locate, most states also permit substituted service, which involves serving the summons and complaint on any adult residing in the defendant's home, or by posting the summons and complaint on the defendant's front door followed by mailing copies by certified or first-class mail. If no physical address for the defendant is known, state rules provide for constructive service by publication.²¹ After the defendant has been served, the plaintiff must file an affidavit by the process server as proof of service within the time period specified by law. Depending on the jurisdiction, the defendant then has 21 to 30 days from service of process to enter an appearance or file an answer or responsive pleading.

Over the past decade, courts have become increasingly aware of two distinct case management problems specifically with respect to service of process – one involving inadequate review of the case file and the other involving outright fraud on the court. The latter scenario – pejoratively called “sewer service” – garners more public attention as it involves deliberate efforts to violate defendants’ procedural due process rights.²² State Attorneys General in New York, California, and Minnesota have pursued large-scale criminal fraud charges in cases alleging that thousands of defendants were not properly served.²³ As a result of those prosecutions, tens of thousands of default judgments entered against defendants in debt collection cases in those states were ultimately vacated.²⁴ In the former

scenario, however, courts fail to adequately scrutinize the case file to ensure that the affidavit of service was properly filed and is, at the very least, facially valid (e.g., affidavit completed by a properly licensed process server, or if substituted service by mail was employed, that the summons was delivered to the correct address and within the statutorily permitted timeframe).

Issues related to court review of filings in debt collection cases extend beyond the existence and legitimacy of proof of service. Government investigations and empirical studies of consumer debt litigation have repeatedly found judgments entered in cases in which viable defenses could have been raised and likely would have been successful. Examples include cases in which the wrong person was named as the defendant, cases lacking documentation that the plaintiff had standing to bring suit, cases lacking documentation about the amount of the debt, and cases in which the statute of limitations for bringing suit had expired.²⁵ Under common law, objections to claims on these grounds (lack of standing, time-barred debt, or other procedural due process grounds) had to be raised affirmatively by the defendant; courts had no obligation to take notice of defects in the claim, even those that were facially obvious. In uncontested cases, few courts have sufficient time and resources to review documentation supporting motions for default judgment to ensure that the claims are valid. In fact, in some jurisdictions, doing so might violate ethical obligations to maintain the perception of impartiality.²⁶

²¹ See generally AM. JUR. 2D, PROCESS §§91-139 (2020). If the plaintiff fails to file proof of service, the court may dismiss the case.

²² Problems and Recommendations for High-Volume Dockets, *supra* note 9, at 5.

²³ Press Release, The Office [Minnesota] Attorney General Lori Swanson, Attorney General Swanson Sues Legal Process Server for Engaging in “Sewer Service,” (Nov. 6, 2014); Press Release, Attorney General Cuomo Announces Arrest of Long Island Business Owner for Denying Thousands of New Yorkers Their Day in Court (April 14, 2009); Press Release, Attorney General Kamala D. Harris Announces Suit Against JP Morgan Chase for Fraudulent and Unlawful Debt-Collection Practices (May 9, 2013). A Maryland court also dismissed hundreds of debt collection cases because the debt buyer was not licensed to operate in the state. See Jamie S. Hopkins, *Md. Courts freeze 900 debt-collection lawsuits*, BALTIMORE SUN (July 20, 2011), available at <https://www.baltimoresun.com/business/bs-bz-debt-collection-suits-20110720-story.html>.

²⁴ Problems and Recommendations for High-Volume Dockets, *supra* note 9, at 5.

²⁵ Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, U. MD. L. SCHOOL LEGAL STUDIES RESEARCH PAPER No. 2014-13; Mary Spector, *Defaults and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. L. & BUS. REV. 257 (2011); Jamie S. Hopkins, *Maryland Court Dismisses 3,168 Debt-Collection Cases*, BALTIMORE SUN (Oct. 11, 2012).

²⁶ See, e.g., MD. JUD. ETHICS COMM., OPINION 2006-01.

Reforms in New York City Civil Court, and later New York State, were prompted by investigative reports published by a variety of consumer law advocacy organizations.

■ **JUNE 2008:** The Consumer Rights Project of MFY Legal Services, Inc. investigated the appearance rate of defendants in consumer debt cases filed in the New York City Civil Court.

- Only seven law firms represented plaintiffs in 30% of the 597,912 cases filed in 2007.
- In more than two-thirds of those cases (68%), the plaintiffs were one of nine creditors, most of whom were third-party debt buyers.
- The appearance rate for defendants in those cases was less than 9 percent.
- Further review of a sample of 91 cases found that the defendant was personally served with the summons and complaint in only 6 percent of cases, service to a person of suitable age and discretion accounted for 54 percent of cases, and service by “nail and mail” accounted for the remaining 40 percent of cases.
- During the same period, the investigation found that the Civil Court rarely conducted traverse hearings when defendants appeared in court with objections that they had not been properly serviced with the summons and complaint.

MFY Legal Services, Inc., Consumer Rights Project, *Justice Disserved: A Preliminary Analysis of the Exceptionally Low Appearance Rate by Defendants in Lawsuits Filed in the Civil Court of the City of New York* (June 2008).

■ **MAY 2010:** A consortium of consumer law advocacy organizations studied case characteristics and outcomes for a sample of 365 lawsuits filed by 26 debt buyers from January 2006 to July 2008, and 451 consumer debt cases in which the defendant contacted a legal hotline for assistance.

- Forty-one percent (41%) of cases were brought by debt buyers who were unlicensed with the New York City Department of Consumer Affairs.
- Only 10 percent of defendants answered the summons and complaint.
- Debt buyers prevailed in 94 percent of cases, usually by default judgment.

- The default judgment rate for the unlicensed debt buyers was 87 percent compared to 73 percent for debt buyers who were licensed during the study period.
- More than one-third of cases (35%) filed against defendants who contacted the legal hotline for assistance were deemed meritless by lawyers reviewing the case, including instances in which the debt buyer sued the wrong person, the defendant was a victim of identity theft, and the plaintiff had previously attempted to collect the debt and the case had been dismissed with prejudice.

The Legal Aid Society, Neighborhood Economic Development Advocacy Project, MFY Legal Services, and Urban Justice Center Community Development Project, *Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers* (May 2010).

■ **JUNE 2013:** The New Economy Project examined statewide data from the New York Office of Court Administration for civil cases filed in 2011 and 90 randomly-selected debt buyer lawsuits filed in six geographic regions in New York State.

- Debt buyers obtained default judgments in 62 percent of cases compared to 42 percent of all debt collection cases.
- Debt collection lawsuits accounted for 8 out of 10 default judgments entered.
- Although none of the 90 debt buyer cases reviewed complied with court rules that the application for default judgment provide proof supporting the claim, 97 percent of the motions for default judgment were granted.
- In 81 of the 90 debt buyer cases, an employee of the debt buyer filed affidavits testifying to facts that only the original creditor would know.

The New Economy Project, *The Debt Collection Racket in New York: How the Industry Violates Due Process and Perpetuates Economic Inequality* (June 2013).

Post-judgment Enforcement of Civil Damage Awards

Successfully obtaining a judgment award for civil damages is not the end of the process for litigants in consumer debt collection cases. Unless the debtor makes arrangements with the creditor to pay the debt, the creditor may have to return to the court to enforce the judgment. This process can involve compelling the debtor to disclose information about their employment or about the existence and location of tangible or intangible assets. With that information, the creditor can petition the court to order an employer to garnish the debtor's wages or to order the seizure and sale of assets to satisfy the debt. In surveys of members of the American Judges Association (AJA) and the National Association for Court Management (NACM), respondents reported that creditors seek post-judgment enforcement "frequently" (46%) or "all the time" (14%).²⁷ AJA members estimated that an average of 26 percent of in-court proceedings in consumer debt cases involve post-judgment matters, and a sizeable minority (38%) reported that they spend as much time on post-judgment as pretrial matters. Most AJA and NACM members disagreed that debtors cooperate in these proceedings (15% strongly disagree, 48% disagree) or that most judgments are ultimately satisfied (11% strongly disagree, 52% disagree). The AJA respondents estimated that 12 percent of debtors in post-judgment proceedings contest the validity of the judgment.

The monetary value of these judgments is often quite modest. In the 2015 Civil Landscape study, 75 percent of judgments in contract cases were less than \$5,000.²⁸ But these judgments have a long-lasting impact on the lives of debtors, impairing their ability to secure stable housing, higher education, and other critical goods and services. Post-judgment enforcement of civil awards raises at least three

distinct court management issues. The first is the length of time that creditors are allowed to enforce the judgment (up to 20 years in most states), which is considerably longer than creditors are typically allowed to initiate debt collection procedures. The underlying policy rationale for the longer enforcement period recognizes that many debtors will be unable to satisfy the judgment immediately. Indeed, those that can afford to pay the debt likely would have done so and avoided having a judgment entered against them. But the debtor may have more financial resources to do so in the future, and the longer judgment enforcement period provides creditors with a window of time in which to eventually collect the judgment.

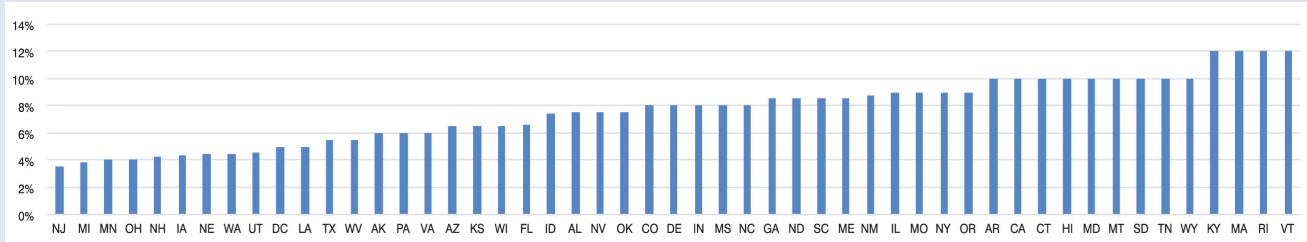
To compensate for the delay in receiving payment, and to incentivize debtors to satisfy the judgment as soon as reasonably practical, state law authorizes judges to award post-judgment interest on the debt until it is fully paid. In most states the interest rate is a fixed amount set by statute, although some states have enacted a formulaic approach in which the post-judgment interest rate is indexed to federal treasury bill rates, ensuring that the post-judgment interest rate reflects prevailing economic conditions.²⁹ Figure 1 shows the allowable post-judgment interest rate for each state effective May 23, 2019. The average (mean) post-judgment interest rate is 7.63%, but rates ranged considerably from 3.5% in New Jersey (1.5% for small claims cases) to 12% in Kentucky, Massachusetts, Rhode Island, and Vermont. While the underlying policy rationale is reasonable, consumer advocates have raised concerns about creditors who deliberately delay pursuing enforcement actions, especially on smaller judgment amounts, to allow interest to accrue on the debt.³⁰

²⁷ NACM members estimated that 71 percent of creditors seek post-judgment enforcement. Unpublished survey findings on file with the NCSC. The surveys were distributed by email to the membership of AJA and NACM from April 22 through May 16, 2019.

²⁸ CIVIL LANDSCAPE, *supra* note 2, at 24.

²⁹ Although the allowable post-judgment interest rate varies in those states, once the judgment is entered, the post-judgment rate is fixed for the lifetime of the judgment.

³⁰ See, e.g., Ravi Sahae, *Contracts Should Include Post-Judgment Interest Provisions* (Apr. 1 2016), available at <https://marinbar.org/news/article/?type=news&cid=33>.

Figure 1: Post-Judgment Interest Rate (eff. 5/23/2019)

A related issue is the problem that debtors face when trying to vacate judgments they believe are legally invalid. For cases in which the original judgment was entered without proper service of process, the post-judgment action may be the first time that the debtor learns about the original lawsuit. For judgments that have been pending for any length of time, the original case documents may have been archived, making it difficult, or even impossible, for the debtor to raise legitimate objections about service or other legal deficiencies.

The last issue involves efforts on the part of creditors to leverage the power of the judicial branch to coerce debtors to satisfy judgments. A February 2018 report published by the American Civil Liberties Union (ACLU) recounted dozens of case studies from

across the country in which debtors were arrested, and sometimes even jailed, in debt collection cases. Many of these cases involved insufficient notice of post-judgment hearings as well as the imposition of bail requirements that functionally resulted in a contemporary form of debtors' prison.³¹ It may be appropriate to use the threat of civil and criminal contempt procedures in cases involving debtors' willful refusal to provide information about assets that might be used to satisfy lawful judgments. In many respects, however, the issues associated with aggressive post-judgment enforcement of civil awards are similar to those that courts have confronted over the past decade related to aggressive collection of court fines and fees without taking into account the debtor's ability to pay.³²

³¹ AMERICAN CIVIL LIBERTIES UNION, A POUND OF FLESH: THE CRIMINALIZATION OF PRIVATE DEBT (2018). See also Anjali Tsui, *The New Debtors' Prisons: They Loan You Money, Then They Get a Warrant for Your Arrest* (Dec. 3, 2019), available at <https://www.propublica.org/article/they-loan-you-money-then-they-get-a-warrant-for-your-arrest>.

³² CONFERENCE OF STATE COURT ADMINISTRATORS, THE END OF DEBTORS' PRISON, EFFECTIVE COURT POLICIES FOR SUCCESSFUL COMPLIANCE WITH LEGAL FINANCIAL OBLIGATIONS (2015-2016 COSCA Policy Paper). Among the unintended consequences of aggressive enforcement of legal financial obligations, COSCA found that defendants often accumulated court debt that they could not pay, resulting in their incarceration at taxpayer expense. *Id.* On February 3, 2017, the Conference of Chief Justices adopted Resolution 3 endorsing court education and use of resources and tools to ensure fair and transparent procedures to assess defendants' financial ability to pay court costs and fees.

Promising Solutions, Implemented on a Piecemeal Basis

Over the past decade, state courts have identified a number of key points in the litigation process where issues are likely to occur in consumer debt collection litigation and have begun to take steps to address those problems. Dedicated and inventive court leaders from a handful of states have taken steps to implement solutions that focus in on these key points, including developing rules, business practices, and resources for litigants. There have been efforts at the federal level as well, with the federal Consumer Financial Protection Bureau calling out the concerns and issuing guidance.³³

A number of states have led the way with reforms to their court rules and business practices. In response to skyrocketing case numbers and key reports highlighting concerns regarding service and the high default rate, New York began implementing reforms through administrative directives in New York Civil Court in 2009. These efforts were taken statewide in 2014, when New York adopted a set of court rules relating to the proof of default judgment in consumer credit matters. The reforms include a few key components, including that affidavits be filed in support of a default judgment application, with supporting exhibits, along with an affirmation by counsel regarding the statute of limitations. New York also requires the mailing of an additional notice of the action to defendants from the clerk, which provides an additional check on service.

Massachusetts has put in place reforms more recently with rules that went into effect on January 1, 2019.³⁴ The reforms apply to both third and first party collections involving consumer revolving credit agreements not secured by real property. The new rules in Massachusetts require affidavits to be filed earlier in the

Key Points in Consumer Debt Collection Lawsuit

- Notification that a consumer debt collection has been filed (Service of Process)
- Notice of facts supporting the claim (Complaint)
- Information for debtors about available defenses (Answer)
- Review of documentation supporting the validity of the debt and the relief sought before entering judgment (Motion for Default Judgment, Summary Judgment, Trial Judgment)
- Post-judgment enforcement actions (Debtor Interrogatories, Garnishment, Writ of Fieri Facias)

litigation than in New York; affidavits with specific information and supporting evidence must be filed along with the complaint. If the plaintiff does not comply with these specifications, the clerk will notify the parties that the court will dismiss the complaint within 30 days unless the plaintiff shows cause why the complaint should not be dismissed. The new rules require a much greater volume of information to be shared, at the time of filing, along with a certification as to the accuracy of that information.³⁵ North Carolina is another state that requires documentation along with the complaint, and evidence and information filed with the court prior to default judgment

³³ E.g., BUREAU OF CONSUMER FINANCIAL PROTECTION, 12 CFR 1006, RIN-3170-AA31, Debt Collection Practices (Regulation F) (March 18, 2016).

³⁴ See Mass. R. Civ. P. 8.1 (including special requirements for certain consumer debts); 479 Mass. 1401 (2018).

³⁵ *Id.*

or summary judgment establishing the amount and nature of the debt.³⁶ Effective August 1, 2019, Oregon has implemented additional procedures for consumer debt cases as well, requiring a Consumer Debt Collection Disclosure Statement with the initial pleading.³⁷

While these reforms have focused on actions to recover debt related to credit card and third-party debt buyer actions, new categories of consumer debt cases with similar issues have sprung up. Many of these other case types have received little attention, flying under the radar of reform. While New York has been a model in taking a comprehensive look at reforms,³⁸ these reforms have been limited to credit card and third-party debt buyer actions. Unfortunately, the issues highlighted above are not so limited; the same concerns arise related to medical debt, auto debt, and student loan debt. Consumer advocates in New York have highlighted a new category of debt collection in civil court now brought by landlords for rent arrears, after having received a judgment for an amount owing in housing court.

Unfortunately, the impact of these reform efforts has been limited, both because of the small number of courts that have implemented reforms and the limits on the reforms themselves. For example, many courts

implement these reforms in a very narrow way—by type of disposition (reforms related to default judgment entry only), type of debt (credit card actions), individual court (municipal court, small claims), or location (urban courts only). In many states, the organizational structure of courts, especially systems of general and limited jurisdiction courts with concurrent jurisdiction over civil cases, creates incentives for forum shopping to evade enhanced procedural and operational reforms. In addition, many reforms rely heavily on judicial involvement and discretion. Where excellent judges are at the helm, the users of the system on both sides of these cases benefit. Because of high turnover, however, where these reforms are not embedded deeper into routine court business practices and staff, these impacts can be fleeting. What results is a whack-a-mole exercise that forces courts to start over, or lose ground, with changing leadership and changing circumstances. Moreover, even after reforms, judgments that were entered prior to the reforms continue to be brought back to the court through post-judgment actions for enforcement. To meet this challenge, state courts need to implement policies, rules, procedures, and business practices to manage consumer debt collection cases in a more consistent, coherent, and long-lasting manner.

³⁶ N.C. Gen. Stat. §§58-70-150, 58-70-155 (providing that in all actions initiated by a debt buyer, including a copy of the contract or other writing evidencing the original debt and a copy of the assignment or other writing establishing that the plaintiff is the owner of the debt).

³⁷ Utah R. Civ. P. 5.180 (requiring the court to send a notice of dismissal and to dismiss the case if the filer does not file a disclosure statement with the court within 30 days of the date the notice was mailed).

³⁸ Press Release, New York State Unified Court System, Chief Judge Announces Comprehensive Reforms to Promote Equal Justice for New York Consumers in Debt Cases (April 30, 2014).

The Path to Debt Collection Reform: Build on CCJ Recommendations

We need to rethink how our courts work in fundamental ways, and that is especially true in the area of debt collection.



Our courts need to implement a coherent, comprehensive, statewide approach that employs both rules and administrative business practices to deter sloppy or unethical practices and ensure a fair, accessible, and streamlined process for litigants. In the following recommendations, we build off the national recommendations for civil justice reform, which provide an excellent framework for a comprehensive approach, and offer a tailored set of recommendations and best practices for implementing reform in consumer debt collection cases.

The CJI Committee recommendations provide a framework for civil justice reform that emphasizes a tailored set of pathways with associated rules and a corresponding administrative infrastructure, under the overall umbrella of court responsibility and ownership. The experience of state courts around the country confirms that these components—court rules, procedures, and business practices—are essential for ensuring forward momentum in cases. While this is true where litigants on both sides are fully engaged in the adversarial process, the need for a holistic solution is even more critical in high-volume cases where there is not representation on both sides. As the Call to Action report emphasizes, “[t]hese rubrics are even more critical in the substantial proportion of civil caseloads comprised of uncontested cases and cases involving large asymmetries in legal expertise. While most of these cases resolve relatively quickly, the Landscape study makes clear that significant numbers of cases

“Restoring public confidence means rethinking how our courts work in fundamental ways. Citizens must be placed at the center of the system. They must be heard, respected, and capable of getting a just result, not just in theory but also in everyday practice. Courts need to embrace new procedures and technologies. They must give each matter the resources it needs—no more, no less—and prudently shepherd the cases our system faces now. It’s time for our system to evolve. Our citizens deserve it. Our democracy depends on it.”

Call to Action at 3.

languish on civil calendars for long periods of time for no apparent reason. Research shows that poor management of high volume dockets can especially affect unrepresented parties.”³⁹ Recognizing these unique challenges, the Call to Action report includes an appendix focused specifically on the problems and recommendations for high-volume dockets, including a number of recommendations specific to consumer debt collection cases.⁴⁰

³⁹ CALL TO ACTION, *supra* note 9, at 14.

⁴⁰ Problems and Recommendations for High Volume Dockets, *supra* note 9, at 18.

Court Responsibility Is Essential

At the core of the Call to Action report and recommendations is the premise that courts “take responsibility for managing civil cases from time of filing to disposition.”⁴¹ Our system has historically expected the litigants, through their counsel, to drive the pace of civil litigation, with courts engaging as called upon as issues arise. While that party-take-the-lead approach can be problematic in cases where there is representation on both sides, it is unworkable in consumer debt cases given the lack of representation on one side and the resulting power imbalance. In these cases, it is essential that courts ultimately be responsible for ensuring just outcomes.⁴² The court—including judges, court managers, and the entire judicial branch—must take responsibility for managing these cases towards a just and timely resolution. While a simple concept, it must be embraced by all and serve as a foundational theme under all other proposed reforms.

New York has embraced this approach, recognizing that “it is the role of the court to provide access to justice for all.”⁴³ Judge Fern Fisher, former Deputy Chief Administrative Judge for the New York City Civil Courts and former Director of the New York State Courts Access to Justice Program, spoke of the need to educate the judiciary about how they see their role in these cases. The judges are on the front lines, playing an important role in achieving justice and fairness given the power imbalances. While they have a responsibility to be neutral, judges also have a responsibility to appropriately assist litigants in furtherance of the goal of the fair administration of justice.⁴⁴ Particularly for these cases, where the full court is engaged in triage and support, it is critical that all understand their essential role in achieving justice for all.



⁴¹ CALL TO ACTION, *supra* note 9, at 16.

⁴² *Id.* at 34 (“Although plaintiffs are generally represented by attorneys, defendants in these cases are overwhelmingly unrepresented, creating an asymmetry in legal expertise that, without effective court oversight, can easily result in unjust case outcomes.”)

⁴³ Telephone Conversation with Hon. Fern Fisher, former Deputy Chief Administrative Judge for New York City Courts and Director of the New York State Courts Access to Justice Program (Jan. 28, 2019).

⁴⁴ See JOHN M. GREACEN & MICHAEL HOULBERG, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., ENSURING THE RIGHT TO BE HEARD: GUIDANCE FOR TRIAL JUDGES IN CASES INVOLVING SELF-REPRESENTED LITIGANTS (Nov. 2019).

The Need For Triage And A Streamlined Process

In complement to this concept, Recommendation 2 provides that “courts must match resources with the needs of the case.”⁴⁵ While some may read this as intense engagement of resources for complex cases, and fewer resources for smaller cases such as consumer debt collection actions, this is not the intent. In fact, such an approach will lead to clogged dockets and, even worse, injustice for the litigants that our system is intended to serve. What is needed is a tailored approach—across the rules, procedures, staffing, and technology—to ensure appropriate engagement of resources. The resulting imperative: “Every case must have an appropriate plan beginning at the time of filing, and the entire court system must execute the plan until the case is resolved.”⁴⁶

In order to support this concept of court responsibility, and to better match resources to case needs, Recommendation 3 provides for mandatory triaging of cases into pathways upon filing. “Data and experience tell us that cases can be grouped by their characteristics and needs. Tailoring the involvement of judges and professional staff to those characteristics and needs will lead to efficiencies in time, scale, and structure.”⁴⁷

This is particularly true for consumer debt collection cases, as borne out by both the data and experience. When unmanaged, these cases can end up with a mismatch of resources to needs—seemingly needing significant court resources while also underserving the needs of the litigants. Courts should tailor the process for these cases to provide a right-sized approach that ensures justice, be it through a formal streamlined pathway or internal business processes developed to support clear management of these cases. This

streamlined process will likely include less direct judicial involvement in individual cases, but increased court attention, along with automatically calendared core case processes and movement of the case forward in an intentional and systematic way. Flexibility needs to be built in to allow court involvement and/or management when necessary.

To implement a streamlined and tailored approach, it is key to match rule reforms with reforms to internal court business practices to effectively address the problems identified above. In terms of rule reforms, the focus should be on ensuring that judgments comply with basic procedural requirements for “notice, standing, timeliness, and sufficiency of documentation supporting the relief sought.”⁴⁸ Empirical research reflects that fact-pleading standards and robust mandatory disclosures induce the parties to identify key issues in dispute early in the process and inform litigants about the claims and their possible defenses.⁴⁹ Business practices must be implemented to complement the rules to ensure access to justice.⁵⁰ Given the context of these cases, and the documented instances of judgments being entered without notice or adequate documentation, courts must implement practices specifically designed to prevent abuse and ensure justice. Embedding protections against abuse and error into both the rules and business practices provides the best assurance of access to justice, the fair administration of justice, and the defense against bias toward either party. When the rules require verification of service, disclosure of key facts, proof of standing, and timeliness of the action, the court assumes the impartial task of ensuring compliance with its own rules.

⁴⁵ CALL TO ACTION, *supra* note 9, at 18.

⁴⁶ *Id.*

⁴⁷ *Id.* at 19.

⁴⁸ *Id.* at 33, Recommendation 11.1.

⁴⁹ PAULA HANNAFORD-AGOR & CYNTHIA G. LEE, UTAH: IMPACT OF THE REVISIONS TO RULE 26 ON THE DISCOVERY PRACTICE IN THE UTAH DISTRICT COURTS 24-25, 36-38, 53-56 (April 2015); PAULA HANNAFORD-AGOR ET AL., NEW HAMPSHIRE: IMPACT OF THE PROPORTIONAL DISCOVERY/AUTOMATIC DISCLOSURE (PAD) PILOT RULES 17- 18 (Aug. 19, 2013); Peggy E. Bruggman, Reducing the Costs of Civil Litigation: Discovery Reform, Public Law Research Institute 29-46 (1995).

⁵⁰ CALL TO ACTION, *supra* note 9, at 37 (“Courts must implement systems to ensure that entry of final judgments complies with basic procedural requirements for notice, standing, timeliness, and sufficiency of documentation supporting the relief sought.”).

A Model Approach

OVERALL SIMPLIFICATION

In consumer debt cases, it is essential that courts simplify the rules, processes, and court-litigant interface, removing unnecessary complexity as much as possible.⁵¹ For the rules, this means simple, straightforward language that can be understood by the broadest audience possible, recognizing that the vast majority of defendants will be navigating the rules without attorney representation. This is a benefit for those with counsel as well, as attorneys will be able to navigate the process in a way that is more proportional to the amount at issue if the rules are clear, the process is streamlined, and cases are resolved in a timely manner. Courts should utilize process mapping, design sprints, and other techniques to identify opportunities to simplify the process.⁵²

Technology can have great impact, from simple technology to cutting edge innovations. Starting with the most simple, implementing court business practices with technology will allow tracking, monitoring, and deploying of resources where most needed. Courts must track these cases and understand the time to disposition and rate of default. “Experience and research tell us that one cannot manage what is unknown. Smart data collection is central to the effective administration of justice and can significantly improve decision making.”⁵³

Once the rules and processes are in place, courts should ensure that simple forms, including online “intelligent forms,” are available to assist litigants in creating pleadings and other documents. Forms should be available in languages commonly spoken

in the jurisdiction. Processes associated with the forms, such as attaching documents and making payments, should be simplified as much as possible.

Digitizing court filings and making them available online, including the return of service affidavit, is critical in these cases. This is an important advancement for litigants, as it provides a clear record of—and easy access to—court filings. Defendants are not able to dispute the affidavit of service if they are not able to see it. Electronic record keeping also “significantly reduces the risk of lost or misfiled paper.”⁵⁴ Electronic access to the records enables the judge and court personnel to easily ascertain whether the procedural rules have been followed and the required documentary support has been filed prior to entering an order. In the New York Civil Court, paper files and the backlog of filing has resulted in significant challenges for the defendants who are not able to easily access information from their court file, including a copy of the return of service. This can also lead to continuances until the documentation is located. New York has taken steps to work around this issue, including requiring the plaintiff to bring documentation to the hearings. While they are awaiting e-filing in their court, New York Civil Court also has begun scanning the affidavits of service and making these available online as a temporary solution.

The more opportunities for information and access to documentation online and outside of court, the better. Remote opportunities for engagement

⁵¹ *Id.*

⁵² See NCSC’s Case Management VizTool, *available at* <https://www.ncsc.org/viztool>; see also INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., LISTEN>LEARN>LEAD, A GUIDE TO IMPROVING COURT SERVICES THROUGH USER-CENTERED DESIGN (2019).

⁵³ CALL TO ACTION, *supra* note 9, at 31.

⁵⁴ Problems and Recommendations for High-Volume Dockets, *supra* note 9, at 15.

THE ONGOING CHALLENGE OF ACCESS TO AFFORDABLE LEGAL ASSISTANCE

Service of process and other rule reforms do not address the availability, or lack thereof, of affordable legal assistance. This is a fundamental challenge in these cases. As was confirmed in the *Civil Landscape* study, the majority of defendants in these cases are unrepresented. The view of our system as an adversarial one, where both parties are represented by competent attorneys who can assert all claims and defenses, does not match with reality.

Alongside rule reforms, New York has focused on ensuring a critical mass of lawyers in court to provide assistance to litigants. Each year the legislature has funded \$100,000,000 toward legal services. Partnerships have been critical, and there is a long list of law schools and legal service providers who are involved in meeting the needs of litigants, including CUNY School of Law, Fordham Law, CAMBA Legal Services, Inc., New York Legal Assistance Group (NYLAG), New Economy Project, and Mobilization for Justice to name a few.

New York also has an access to justice program that includes help-centers statewide, volunteer lawyers programs, and navigator programs. In addition to offering these resources, the New York Civil Court has been intentional about how these resources can be used to their utmost potential, including coordinating the docketing of debt collection cases on the days of the week when the Lawyer for a Day program is onsite. Unbundling can play a critical role in these cases as well, and New York has supported the use of unbundling in several ways, including holding an unbundling conference in 2016.

A focus on the delivery of legal services, including lawyers and other less traditional approaches, is one way to help litigants navigate through a very complex process. New York stands apart in its investment of time and resources in trying to address the legal services delivery gap. Most states have allocated far fewer resources, and many rural areas have little to no access to lawyers. In those instances, process simplification is essential for litigants to be able to successfully navigate the courts. In an ideal world, these approaches would be paired to ensure access to justice for all.

whenever possible are also beneficial to litigants. More courts are making such remote opportunities available, including videoconferencing and online dispute resolution (ODR).⁵⁵

For unrepresented litigants in consumer debt cases who must appear in person, courthouses can be confusing and distracting. “Courts should ensure that the courtroom environment for proceedings on

⁵⁵ Utah launched a pilot of its online dispute resolution system in September 2018 for small claim disputes that involve \$11,000 or less. Through the online platform, a series of screens educate the parties and provide options for resolution through payment plans or otherwise. The platform allows for asynchronous communication, at a time when it is convenient for the parties, and the ability to upload forms and other documentation. In addition to the remote interface, the Utah platform also stands apart in its use of a “facilitator,” who is “authorized not only to help the parties try to reach a settlement, but also to offer guidance on filling out forms or explaining them the procedural aspects of the case.” Deno Himonas, *Utah’s Online Dispute Resolution Program*, 122 DICK. L. REV. 875 (2018).

high volume dockets minimizes the risk that litigants will be confused or distracted by over-crowding, excessive noise, or inadequate case calls.”⁵⁶ Courts often sequence cases after the initial call to benefit attorneys, resulting in a longer wait time for those who are unrepresented. In addition, given that plaintiffs’ counsel in these cases are often very familiar with the court staff and environment (e.g., walking freely within the courtroom space and utilizing the copier as if they are a member of the court staff), there can be confusion about their role. “To curb misunderstandings, courts should provide clear physical separation of counsel from court personnel and services, and standardized guidelines to all litigants

and counsel concerning how settlement negotiations are conducted and the consequences of settlement. Before accepting settlements, judges should ascertain that both parties understand the agreement and its implications.”⁵⁷ Courts should evaluate the space and the experience of navigating the courthouse through the lens of the unrepresented litigant. Technology offers great opportunity for improvements, such as the use of electronic sign-in systems, signage, and notifications.

The following specific process steps build on this underlying approach of a streamlined and accessible process.

Essential Process Steps:

1. Verification of service of process.
2. Requirement of supporting proof of claims including standing (chain of ownership), basis for debt (contract or account) including fees/interest, and date of default and/or affirmation that claim was filed within statute of limitations.
3. Court-provided answer forms and information about available defenses.
4. In-person and online resources to support payment plans for uncontested debt.
5. Court staff review of documentation, with judicial oversight as needed, before entering judgments for the creditor.
6. Notice to the debtor when a creditor seeks an order of garnishment prior to execution.

VERIFICATION OF SERVICE OF PROCESS

As a preliminary step, parties must be adequately served. Given that typical methods of serving process have been found to be fraught with inaccuracies and inadequacies, as discussed above, service of process reform is an essential component to any reform effort. Courts must take ownership of the management of

these cases, and that includes verifying service of process.

As part of the New York reforms, the court amended and expanded the rule that requires a special notice mailed by the court to the defendant.⁵⁸ At the time of filing of the proof of service of the summons and

⁵⁶ CALL TO ACTION, *supra* note 9, at 33.

⁵⁷ *Id.* at 34.

⁵⁸ 22 NYCRR § 208.6(h); *see also* Administrative Order of the Chief Administrative Judge of the Courts AO/185/14 (Sept. 15, 2014), *available at* <https://www.nycourts.gov/LegacyPDFS/RULES/comments/orders/AO-185-14.pdf> (promulgating court rules relating to the proof of default judgment in consumer credit matters).

complaint, the plaintiff must submit to the clerk a stamped unsealed envelope addressed to the defendant together with a written notice, in both English and Spanish, with specific language from the rule alerting the defendant that a lawsuit has been filed and providing a link to the court's website for additional information.⁵⁹ The envelope must be addressed to the defendant at the address where process was served, and the clerk then mails the letter to the defendant with the additional notice. Under the rule, default judgment may not be entered if the additional notice is returned as undeliverable.⁶⁰ Where such a procedure is put in place, it is important that the parties are notified when the notice comes back as undelivered.

Without this notice, the plaintiff cannot move forward with the case, including moving for default judgment.

These types of innovations, focused on ensuring adequate notice to the parties of the claims against them, is an essential first step in ensuring justice in these cases, as it goes back to one of the underlying reasons for such high default rates—the defendant does not receive notice of the action. Technology innovations will continue to help address issues related to service,⁶¹ but in the meantime, courts must not take adequate service for granted, and must be on the front-lines of verifying that service has been completed and the defendant has received notice.

SUPPORTING PROOF

Given issues with inadequate service and lack of information about the underlying action, “it cannot be assumed that defaults are a de facto ‘admission’ of liability or no contest.”⁶² In fact, once defendants appear, many cases result in voluntary or involuntary dismissals. Studies show that, “in more than half of default cases, consumers had good faith defenses to collection.”⁶³ Yet in the vast majority of cases the parties are unrepresented and do not have adequate information to navigate the process and provide an adequate response or defense to the complaint. For these reasons, it is paramount that supporting proof of claims include standing (chain of ownership), basis

for the debt (contract or amount) including fees and interest, and the date of default. CCJ and COSCA recently brought light to the importance of proof underlying any judgment, issuing a resolution “urging their members to consider enacting rules requiring plaintiffs in debt collection cases to file documentation demonstrating their legal entitlement to the amounts they seek to collect before entry of any default judgment.”⁶⁴

These requirements have been central to the rule reforms around the country. In New York, as an example, plaintiffs seeking a default judgment in

⁵⁹ *Id.*

⁶⁰ The rule provides one exception, “where the address at which process was served matches the address of the defendant on a Certified Abstract of Driving Record issued from the New York State Department of Motor Vehicles.” *Id.*; See also, e.g., CA Civ. Code 1788.50 *et seq.* (requiring specific information to be included in the complaint and business records and a copy of the contract or other documentation for entry of default judgment).

⁶¹ JOHN M. GREACEN, INST. FOR THE ADVANCEMENT OF THE AM. LEG. SYS., 18 WAYS COURTS SHOULD USE TECHNOLOGY TO BETTER SERVE THEIR CUSTOMERS 28 (2018).

⁶² Problems and Recommendations for High-Volume Dockets, *supra* note 9, at 5.

⁶³ *Id.* at 5 (citing Mary Spector, *Defaults and Details Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 Va. L. & Bus. Rev. 257, 272 (2011)).

⁶⁴ Conference of Chief Justices and Conference of State Court Administrators, Resolution 4: In Support of Rules Regarding Default Judgments in Debt Collection Cases (adopted Aug. 22, 2018).

consumer credit cases must submit affidavits, the content of which depends on whether the plaintiff is an original creditor or a debt buyer. The affidavits must be supported by exhibits, including a copy of the credit agreement, the bill of sale or written assignment of the account, relevant business records of the original creditor that set forth the name of the defendant, the last four digits of the account number, the date and amount of the last payment, additional information regarding interest/fees/credits, and the balance due.⁶⁵ This information is critical, as debt cases frequently lack identifying information and documentation of the debt, particularly where the debt has been sold three or four times.

A preferred approach is to require supporting information and proof at the time of filing. This can take

the form of fact-based pleading and/or required documentation in support of the complaint itself. Providing this additional information at the time of service would likely increase the appearance rate, as defendants can use this information to determine the validity of the debt and any possible defenses. In the superior courts of New Hampshire, for example, introducing rules requiring fact-based instead of notice-based pleading reduced the default rate from 11 to 8 percent.⁶⁶ By requiring information within the complaint and concurrently filed supporting documentation, information is available at the time of service to the defendant to assess the validity of the claims and/or raise objections to invalid claims. The defendant will also have information available upfront to negotiate partial or full payment.

STANDARDIZED ANSWER FORMS AND ACCESS TO INFORMATION

Alongside greater information from the plaintiff, it is essential that courts provide standardized answer forms, both online and at the court, that include available responses and defenses. Many parties do not engage in the process, or come to the courthouse, because they do not understand that they have defenses and are unable to assert them in response to the complaint.⁶⁷ While a simple reform, these forms have a huge impact on the ability of an unrepresented party to identify common defenses and assert counterclaims.⁶⁸ The provision of forms also addresses the concern often raised by court staff that their assistance will cross the line from legal information to legal advice. The provision of forms, in person or electronic, takes this information out of the guarded

hands of court staff and puts it into the hands of the litigant in a consistent and fair way.

Information also must be provided to unrepresented litigants about court processes, options, and expectations. The vast majority of unrepresented litigants do not come to the process with background information, context, or understanding about what to expect or how to navigate the process to ensure a fair and just outcome. Self-represented litigants report that their experience in court is “bewildering, intimidating, and frustrating because they do not understand the language used, the rules applied, or the process followed in the court.”⁶⁹ Because of this, “[c]ourts must ensure that litigants have access to accurate and understandable information about court processes

⁶⁵ 22 NYCRR § 208.14-a (Proof of Default Judgment in Consumer Credit Matters).

⁶⁶ HANNAFORD-AGOR et al., *supra* note 48.

⁶⁷ Problems and Recommendations for High-Volume Dockets, *supra* note 9; *see generally* D. James Greiner, Dalie Jimenez & Lois R. Lupica, *Self-Help Reimagined*, 92 IND. L. J. 1119 (2017).

⁶⁸ *See, e.g.*, New York Courts, Written Answer Consumer Debt Transaction, *available at* <https://www.nycourts.gov/LegacyPDFS/rules/CCR/forms/Consumer-Credit-Answer.pdf>.

⁶⁹ GREACEN, 18 WAYS, *supra* note 60, at 2.

and appropriate tools such as standardized court forms and checklists for pleadings and discovery requests.”⁷⁰ This information should include clear and specific direction, plain language, and checklists to assist litigants in navigating the process.⁷¹

The internet is often the first place people go for information. In addition to easy and free access for litigants, online information can provide a source that is both consistent and complete, which is not always what someone will experience when they contact someone at the court by phone for information. Information and court services must be accessible remotely and by smartphone.⁷²

Online resources have been very important in New York. As noted above, New York provides a link to its online resources within the summons.⁷³ The information is presented in plain language on the website and within electronically available forms. Rather than selecting “Consumer Debt,” the website initially triages with simple understanding questions, including “Problems with Money.” There is a lot of room for improving the way that our court customers obtain information, including making them available online to changing the way the information is gathered through technology (through basic document assembly tools or more interactive technologies).⁷⁴

While online information is critical, the value of real-time assistance from a person cannot be overstated.⁷⁵

Courts can meet this need through technology, such as online chat services or 800-number help lines, or in person through on-site navigator personnel.⁷⁶ There are efforts underway around the country to implement nonlawyer navigator programs, and these programs have the opportunity to support access to justice for unrepresented litigants by helping them to understand and navigate their case.⁷⁷ New York has been a leader in the area, developing a court navigator program first in the housing court and then adding navigators in consumer debt cases.⁷⁸

Finally, it is critical to think beyond these two access points—in person at the courthouse and online—and include other places where litigants can go for information and assistance. “To expand the availability of important court information, courts might partner with private enterprises and public service providers, such as libraries and senior centers, to install interactive, web-based, court business portals at the host locations.”⁷⁹ New York attacks this problem from all angles, with flyers and signs, direct communication from the judges and the clerks, and through announcements in the courtroom. The court has partnered with outside agencies and nonprofit organizations, provided community education

⁷⁰ CALL TO ACTION, *supra* note 9, at 33.

⁷¹ See LOIS R. LUPICA, INST. FOR THE ADVANCEMENT OF THE AM. LEG. SYS., GUIDELINES FOR CREATING EFFECTIVE SELF-HELP INFORMATION (2019).

⁷² GREACEN, 18 WAYS, *supra* note 60, at 4, 12.

⁷³ The New York summons includes a link to www.nycourts.gov. 22 NYCRR § 208.6(h). The more specific and tailored the link, so as to point the defendant to the resources they need in response, the better.

⁷⁴ GREACEN, 18 WAYS, *supra* note 60.

⁷⁵ NATALIE A. KNOWLTON ET AL., INST. FOR THE ADVANCEMENT OF THE AM. LEG. SYS., CASES WITHOUT COUNSEL: RESEARCH ON EXPERIENCES OF SELF-REPRESENTATION IN U.S. FAMILY COURT 27 (2017) (“Participants were likely to indicate such in-court resources were useful, particularly in the sense that they found it helpful to work with a live, knowledgeable person and to be able to ask questions specific to their situations.”).

⁷⁶ See generally MARY E. MCCLYMONT, NONLAWYER NAVIGATORS IN STATE COURTS: AN EMERGING CONSENSUS (2019).

⁷⁷ *Id.* at 38.

⁷⁸ See Judge Fern Fisher, *Navigating the New York Courts with Assistance of a Non-Lawyer*, 122 DICK. L. REV. 825 (2018).

⁷⁹ CALL TO ACTION, *supra* note 9, at 37.

with seminars on various topics, developed videos, and partnered with law schools and lawyers in the community through law clinics and other programs.⁸⁰

They have also thought outside the box, including partnering with the electric company, Con Ed, on⁸¹ language that could be included with the bills.

RESOURCES FOR CASES INVOLVING UNCONTESTED DEBT

Some creditors would prefer to set up a payment plan and begin payment rather than obtain a judgment and go through garnishment and post-judgment processes. Where the debt is uncontested, this may be of benefit to the defendant as well. Thus, in certain circumstances, mediation and other approaches that support discussion between the parties may be beneficial. Mediation is more likely to succeed when both parties are unrepresented. In cases where only the plaintiff is represented, there is a tendency for power imbalances that can undermine the fairness and effectiveness of mediation. Many ODR platforms

are designed to allow parties to request assistance from a professional mediator if they encounter difficulty resolving the case in direct negotiations. The mediation can take place either synchronously using videoconferencing technologies or asynchronously through text messaging. The efficacy of online mediation has not been fully assessed, however, especially its implications for professional ethics in mediation. The impacts on consumer debt cases—including whether the process is more accessible and more just—have not been fully assessed either.

REVIEW OF DOCUMENTATION

Before issuing a final judgment, the court should review information regarding service and any affidavits and supporting documentation to ensure that the plaintiff is entitled to the relief sought. The court has a responsibility to ensure that final judgments in default cases meet the same standards of due process and proof as contested cases.⁸²

The Call to Action report highlights the need for the rules and processes established above to be implemented by the court, not as the responsibility of a single actor but as the responsibility of the court as a whole. “The court, including its personnel and IT

systems, must work in conjunction with individual judges to manage each case toward resolution.”⁸³ The national recommendations call upon a team approach, implemented through the creation of civil case management teams (CCMTs), in order to effectively manage cases.⁸⁴ CCMTs consist of a responsible judge supported by appropriately trained professional staff and technology.⁸⁵ CCMTs provide the opportunity for team members to play to their respective strengths, with tasks performed by members of the team whose experience and skills correspond with the various task requirements.⁸⁶

⁸⁰ See Eric He, Access to Justice helps level the playing field: Program provides legal help for those facing cases alone in Civil Court, *Queens Chronicle* (Nov. 27, 2019).

⁸¹ Telephone Conversation with Hon. Fern Fisher, former Deputy Chief Administrative Judge for New York City Courts and Director of the New York State Courts Access to Justice Program (Jan. 28, 2019).

⁸² CALL TO ACTION, *supra* note 9, at 35.

⁸³ *Id.* at 16.

⁸⁴ *Id.* at 27.

⁸⁵ See generally CIVIL JUSTICE INITIATIVE: A GUIDE TO BUILDING CIVIL CASE MANAGEMENT TEAMS (NCSC 2017) (*hereinafter* CCMT GUIDE).

⁸⁶ CALL TO ACTION, *supra* note 9, at 27.

Consumer debt collection cases are particularly suited to a team approach, as CCMTs provide additional staff oversight of the docket and day-to-day management of these cases. There are numerous aspects of a consumer debt collection case that require attention and follow up, but do not require a high degree of discretion. Thus, the court can delegate administrative authority to specially trained staff who can set deadlines, monitor cases, issue notices, set cases for hearings, and confirm that required documents have been submitted.

A judge need not manage every aspect of a case after it is filed; in these cases, litigants will benefit from and appreciate court staff who are able to be more responsive to questions and scheduling needs. “Delegation and automation of routine case management responsibilities will generate time for judges to make decisions that require their unique authority, expertise, and discretion.”⁸⁷ This does not mean less attention for these cases; however, court staff should be more involved, with clear delegation of case management responsibilities so as to ensure these cases move forward in a fair and efficient manner for the benefit of all parties.

For those courts that have not fully incorporated the concept of CCMTs across their docket, consumer debt cases provide an excellent opportunity for courts to experiment with this approach. In New York, the clerks have the authority to process defaults themselves. Where there has been no answer or response, the clerks review the required documentation, as specified under the rules, and enter judgment. Where there is an answer, response, or any other issue requiring judicial attention, the case is forwarded to a judge. Checklists can be built that incorporate the requirements of the rules to support review of the affidavits

“Using court management teams effectively requires that the court conduct a thorough examination of civil case business practices to determine the degree of discretion required for each. Based upon that examination, courts can develop policies and practices to identify case management responsibilities appropriately assignable to professional court staff or automated processes. Matching management tasks to the skill level of the personnel allows administrators to execute protocols and deadlines and judges to focus on matters that require judicial discretion. Evaluating what is needed and who should do it brings organization to the system and minimizes complexities and redundancies in court structure and personnel.”

Call to Action at 3.

and evidence prior to entry of judgment. Administrative staff (e.g., judicial assistants) can review the check list to ensure that all of the required documentation actually exists, contact parties about any missing documents before scheduled court hearings, or highlight missing information for the judge; skilled staff (e.g., case managers) can review the documentation to ensure that documentation is legally sufficient and highlight deficiencies for the judge. The judge then reviews cases and issues orders and judgment based on these different levels of review.⁸⁸

⁸⁷ *Id.* at 28.

⁸⁸ CCMT GUIDE, *supra* note 85; *see, e.g.*, LYDIA HAMBLIN & PAULA HANNAFORD-AGOR, EVALUATION OF THE CIVIL JUSTICE INITIATIVE PILOT PROJECT (CJIPP) (2019).

POST-JUDGMENT ENFORCEMENT

Managing post-judgment enforcement proceedings is a significant part of court calendars in many courts. Doing so effectively and fairly requires courts to ensure procedural consistency with the requirements for the underlying judgment, especially concerning notice to debtors about the purpose of post-judgment enforcement hearings and information about how to challenge the underlying judgment if the debtor believes it was entered in error. Courts should also ensure that debtors can access documentation supporting the underlying judgment, ideally electronically, but at the very least in the court's own casefiles. If debtor access to the documentation is currently unavailable or logistically impractical through the court, rules requiring plaintiffs to provide it to debtors for review should be adopted.

Court rules and procedures should also incentivize creditors to enforce judgments in a timely manner,

including, if feasible, encouraging statutory reforms that discourage creditors from delaying enforcement actions. These could include reducing the statutory timeframe in which creditors may pursue enforcement actions, adding procedural requirements that creditors demonstrate good faith efforts to enforce the judgment before seeking an extension of the enforcement period, and basing post-judgment interest rates on prevailing economic conditions.

Finally, courts should implement policies that prohibit coercive measures to enforce civil judgments (e.g., bench warrants, bail or bond requirements) except cases in which a judicial officer has examined the debtor and concluded that they are financially able to pay all or some of the debt and are willfully refusing to do so.⁸⁹



⁸⁹ See *Bearden v. Georgia*, 461 U.S. 660 (1983).

Conclusion

The report and recommendations of the CJI Committee presented a comprehensive framework for civil case processing designed to secure the fair, speedy, and inexpensive resolution of civil cases in state courts.

The framework envisioned a future in which:

- Each case receives the court attention necessary for efficient and just resolution;
- Teams of judges, court attorneys, and professional trained staff manage the case from filing to disposition;
- Litigants understand the process and make informed decisions about their cases;
- Justice is not only fair but convenient, timely, and less costly;
- Modern technology replaces paper and redundancy; and
- Civil justice is not an insider's game fraught with outdated rules and procedures.⁹⁰

The framework also emphasizes a renewed focus on high-volume civil dockets, especially the need to improve access for unrepresented litigants, to play closer attention to uncontested dockets, and to scrutinize claims more rigorously to ensure procedural fairness for litigants. The CJI Committee's recommendations highlighted the importance of proportionality for individual cases, including the need to align rules, procedures, and court personnel with the needs and characteristics of similarly situated cases. An implicit corollary is the importance of proportionality for caseloads in addition to individual cases. Consumer debt collection cases comprise as much as two-thirds of civil caseloads, making them an obvious opportunity for implementing the CJI Committee recommendations and realizing the Committee's vision for a substantial portion of the caseload. The benefits

would accrue not only to litigants in debt collection cases, but also to courts as they strengthen their infrastructure for managing all civil cases more effectively.

Over the past decade, state courts have become increasingly aware of the unique challenges associated with consumer debt collection litigation, many of which stem from the asymmetry in representation status and legal expertise between plaintiffs and defendants. This asymmetry raises fundamental barriers for many defendants who would otherwise be able to negotiate workable settlements for valid claims. More disturbingly, it also makes it possible for unscrupulous creditors to exploit gaps in the courts' capacity to ensure compliance with fundamental due process protections, including notice, standing, timeliness, documentation of the amount of the debt, and even-handed post-judgment enforcement. The result has been widespread instances of fraud and abuse that inflict long-lasting harm on defendants and undermine public confidence in the integrity of the judicial branch. Fortunately, state court leaders in New York and elsewhere have faced these challenges and developed innovative solutions, especially for discrete problems related to service of process and default judgments in credit card and third-party debt collection cases. Those efforts involved careful planning, coordination with and feedback from key stakeholder groups, training for judges and court staff, and successful integration of the policy changes into court rules and business processes to ensure their continued viability in the face of inevitable judicial and staff turnover.

⁹⁰ CALL TO ACTION, *supra* note 9, at 15.

Although these efforts have not been rigorously evaluated, preliminary assessments suggest that broadening their scope to all types of consumer debt collection and all stages of litigation including post-judgment actions could form the basis for a more comprehensive and coherent approach to case management. These strategies should also be embedded into new solutions, such as online dispute resolution, that offer opportunities for enhanced process simplification and more useful information for unrepresented litigants. Effective implementation of these reforms depends on judicial leadership to focus on both their scope and their institutional grounding, including investments in judicial and staff training, and in

technology infrastructure to support effective case management and greater accessibility for litigants.

The Call to Action report conceptualized civil justice reform broadly, “These trends have severe implications for the future of the civil justice system and for public trust and confidence in state courts. The cost and delays of civil litigation effectively deny access to justice for many members of our society, undermining the legitimacy of the courts as a fair and effective forum to resolve disputes.”⁹¹ This is especially true for debt collection cases, and it is imperative that states heed CCJ Resolution 4 in support of debt collection reform, adopt this model approach, and put these reforms in place to ensure access to justice for all.

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⁹¹ *Id.* at 11.



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