

2011

## **Debts, Defaults and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts**

Mary B. Spector  
*Southern Methodist University, Dedman School of Law*

---

### **Recommended Citation**

Mary Spector, Debts, Defaults and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts, 6 Va. L. & Bus. Rev. 257 (2011)

This document is brought to you for free and open access by the Faculty Scholarship at SMU Scholar. It has been accepted for inclusion in Faculty Journal Articles and Book Chapters by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

# VIRGINIA LAW & BUSINESS REVIEW

---

---

VOLUME 6

FALL 2011

NUMBER 2

---

---

## DEBTS, DEFAULTS AND DETAILS: EXPLORING THE IMPACT OF DEBT COLLECTION LITIGATION ON CONSUMERS AND COURTS

Mary Spector<sup>†</sup>

ABSTRACT .....	258
I. INTRODUCTION .....	259
II. CONSUMER DEBT AND ITS COLLECTION .....	263
A. Scope of Debt.....	263
B. Emergence of Debt Buying Industry.....	265
C. Collecting the Debt.....	267
1. <i>Legal Framework</i> .....	267

---

<sup>†</sup> Associate Professor of Law and Co-Director SMU Civil Clinic, Southern Methodist University Dedman School of Law; B.A. 1979, Simmons College; J.D. 1986, Benjamin N. Cardozo School of Law. This project was supported by the American Bar Association Section of Litigation, Litigation Research Fund. The author wishes to extend special thanks to the Section for its early support of the project and to Dean John Attanasio and the George and Pedie Bramblett Endowed Faculty Research Fund for providing financial support. Thanks also go to Dr. Lynne S. Stokes, of SMU's Dedman College, and the members of the AALS Clinical Section's Subcommittee on Lawyering in the Public Interest, for their enthusiasm, confidence and continuing encouragement, qualities personified by the late Professor Alan Lerner who was a valued member of the Committee. The project would not have been possible without valuable assistance provided by Dr. James Haney, Marc Tecce, Stephen Fly, and Mackenzie Linyard. Finally, thanks go to several members of the faculty for their interest in the subject and assistance, in particular, Professors Maureen Armour, Anthony Colangelo, Gregory Crespi, Bill Dorsaneo, Linda Eads, Julie Forrester, Joseph Norton, Marc Steinberg, Beth Thornburg, and Peter Winship.

2. <i>Informal Collection</i> .....	268
3. <i>Collection Litigation</i> .....	269
III. METHODOLOGY: COLLECTING THE DATA.....	273
A. Choosing the Court.....	274
B. Developing a Random Sample.....	275
C. Gathering the Data.....	277
IV. THE FINDINGS.....	278
A. The Basics.....	278
B. The Parties.....	280
1. <i>Plaintiffs, Original Creditors, and Plaintiffs' Attorneys</i> .....	280
a. <i>The Plaintiffs</i> .....	280
b. <i>Original Creditors</i> .....	281
c. <i>The Law Firms</i> .....	285
2. <i>The Defendants and Their Attorneys</i> .....	285
C. Service, Appearance, and Representation of Defendants.....	287
1. <i>Service</i> .....	287
2. <i>Appearance by the Defendant</i> .....	288
3. <i>Representation of Defendants by Attorneys</i> .....	289
D. Substance of the Pleadings.....	290
1. <i>Due Process Concerns</i> .....	290
2. <i>Evidence of Allegations</i> .....	292
E. Outcomes.....	294
1. <i>Dispositions without Prejudice to Refiling</i> .....	295
2. <i>Defaults</i> .....	296
V. CONCLUSION.....	298

### ABSTRACT

This Article explores consumer collection litigation through original research from more than five hundred cases filed in the Dallas County courts. It analyzes the data within the context of the modern debt collection industry, paying special attention to the role of debt buyers and to the peculiar legal issues their involvement raises. After explaining the methodology and mechanics used to gather and analyze the data, the Article discusses the data collected, identifying and analyzing the most significant findings and placing them within a larger legal landscape. While the research confirms anecdotal reports of litigation abuse in consumer collection cases, it also reveals some

surprising patterns. For example, the research indicates that consumer default was not the most common outcome and that minimal effort by consumers often considerably helped to protect their rights and favorably to conclude the litigation. The Article concludes by discussing some of the implications for the judicial system and by suggesting additional areas of research that would increase understanding of the challenges the litigation presents for parties, their lawyers, and the courts.

## I. INTRODUCTION

CONSUMER debt is at center stage in national and world events. Although home mortgages claimed a central role, unsecured consumer debt played an important supporting role in the crisis. Much as mortgages have been bundled and packaged for sale in a secondary market, portfolios of consumer debts are also re-packaged and sold as assets for entities whose primary business is collecting those debts.<sup>1</sup> Experts estimate that as much as \$100 billion of credit card debt is sold annually.<sup>2</sup>

At the time of the sale, the debt buyer rarely receives more than a computer record summarizing the original creditor's records. The summaries generally contain the names and addresses of the consumers, account numbers, and the total amount each owes at the time of the sale.<sup>3</sup> This information may be sufficient to support an agreement between the debt buyer and an individual consumer to settle or repay the debt;<sup>4</sup> however, it is rarely sufficient to support a judgment against the consumer. Nevertheless, consumer advocates claim that attorneys representing debt buyers in court rarely produce more than summary information and yet still obtain judgments that are enforceable by garnishing wages, bank accounts, and other non-

---

1 FEDERAL TRADE COMMISSION, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE, A WORKSHOP REPORT 13 (Feb. 2009) [hereinafter WORKSHOP REPORT]; UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, CREDIT CARDS: FAIR DEBT COLLECTION PRACTICES COULD BETTER REFLECT EVOLVING DEBT COLLECTION MARKETPLACE AND USE OF TECHNOLOGY 7 (Sept. 2009) [hereinafter GAO REPORT].

2 BARBARA SINSLEY, FED. TRADE COMM'N, DBA INTERNATIONAL'S COMMENTS RELATED TO DEBT COLLECTION FOR THE FTC DEBT COLLECTION WORKSHOP, 2-3, (June 2, 2007), available at <http://www.ftc.gov/os/comments/debtcollectionworkshop/529233-00010.pdf> [hereinafter DBA COMMENTS]; GAO REPORT, *supra* note 1, at 7.

3 WORKSHOP REPORT, *supra* note 1, at 22.

4 It also may be all the debt buyer needs in order to satisfy its obligations to "verify" the debt under the Fair Debt Collection Practices Act. 15 U.S.C. § 1692g (2009).

exempt property.<sup>5</sup> Reportedly, debt buyers regularly obtain judgments on the basis of form pleadings that, on their face, fail to comply with applicable procedural, substantive, or evidentiary rules.<sup>6</sup> For example, suits may fail to identify the parties to the suit sufficiently,<sup>7</sup> to allege facts giving fair notice of the claims asserted,<sup>8</sup> or allege facts giving fair notice of whether the claims might be subject to limitations or other defenses.<sup>9</sup> Conclusory allegations regarding the amount of the debt with little, if any, information about its calculation and “robo-signed” affidavits—so-called “sworn” statements that reveal the absence of personal knowledge about the content of the “business records” they attempt to prove<sup>10</sup>—also make it difficult for the consumer to effectively mount a defense, especially without an attorney. After reports of similar deficiencies in foreclosure litigation came to light in the fall of 2010, several banks called a temporary moratorium on foreclosures, and “doctored or dubious” records prompted at least one state’s attorney general to commence an investigation into the conduct of the three major law firms engaged in the litigation.<sup>11</sup>

Until recently, litigation over credit card debt has not garnered the same degree of attention. However, in March 2011, the Minnesota attorney general accused one of the country’s largest debt buyers of engaging in fraud by filing

- 
- 5 See JON LEIBOWITZ ET AL., FEDERAL TRADE COMM’N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION 6, 15-16 (July 2010) [hereinafter BROKEN SYSTEM].
  - 6 *Id.* at 14, 17.
  - 7 See, e.g., WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE §§ 11.51(d) (noting that the “defendant is entitled to know character of legal entity that brings him or her into court”), 11.51(f), 12.100 (2006).
  - 8 See TEX. R. CIV. P. ANN. 45(b) (West 2003) (stating that conclusory allegations are objectionable unless fair notice is given).
  - 9 See GAO REPORT, *supra* note 1, at 43.
  - 10 *Cf.* FED. R. EVID. 803(6), 902(11) (requiring testimony or certification by a “qualified person” that record was made in accordance with the rules).
  - 11 See, e.g., Debra Cassens Weiss, *Bank of America Extends Foreclosure Moratorium to all 50 States*, A.B.A. J., (Oct. 8, 2010), available at [http://www.abajournal.com/news/article/bank\\_of\\_america\\_extends\\_foreclosure\\_moratorium\\_to\\_all\\_50\\_states/](http://www.abajournal.com/news/article/bank_of_america_extends_foreclosure_moratorium_to_all_50_states/); Martha Neil, *JP Morgan Chase Freezes Foreclosures In 56,000 Cases, Will More Banks Follow Suit?*, A.B.A. J. (Sept. 29, 2010) available at [http://www.abajournal.com/news/article/jp\\_morgan\\_chase\\_freezes\\_foreclosures\\_in\\_some\\_56000\\_cases/](http://www.abajournal.com/news/article/jp_morgan_chase_freezes_foreclosures_in_some_56000_cases/); Gretchen Morgensen & Geraldine Fabrikant, *Florida’s High Speed Answer to the Foreclosure Mess*, N.Y. TIMES, Sept. 5, 2010, at BU1, available at <http://www.nytimes.com/2010/09/05/business/05house.html>; Barry Meier, *Foreclosure Mess Draws in Lawyers Who Handled Them*, N.Y. TIMES, Oct. 15, 2010, at B1, available at <http://www.nytimes.com/2010/10/16/business/16legal.html>.

robo-signed affidavits.<sup>12</sup> Other states have also taken steps to curb debt buyers' conduct that falls between the cracks of state and federal debt collection regulations. For example, North Carolina recently enacted legislation prohibiting the filing of a consumer collection suit on the basis of a debt the plaintiff knows or should know is barred by limitations.<sup>13</sup> And, new rules in Massachusetts small claims courts now prevent the entry of a default judgment unless the plaintiff provides a sworn statement that it consulted reliable sources in an effort to locate the defendant.<sup>14</sup> However, in most states consumer debt litigation is governed by the same state and federal laws and rules of procedure that govern all litigation. Such rules place the burden of raising deficiencies in pleading and proof on the opposing party, who may waive its objections if not raised in a timely manner.<sup>15</sup> Consumer advocates, however, claim that most defendants, if they appear at all, appear without counsel, resulting in the frequent entry of default judgments on the basis of unchallenged defective pleadings.<sup>16</sup> Unfortunately, despite the widespread nature of these reports, little empirical information exists regarding the contemporary litigation of consumer debts.<sup>17</sup> Two significant exceptions are

---

12 Press Release, Office of the Minnesota Attorney General (March 28, 2011), *available at* <http://www.ag.state.mn.us/consumer/pressrelease/110328debtbuyers.asp>. Courts and officials in other states are also beginning to consider the issue of robo-signed affidavits in small collection cases. See Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 J. BUS. & TECH. L. 259, 264-73 (2011) (discussing individual courts' treatment of robo-signed affidavits and advocating use of strict proof standards).

13 Consumer Economic Protection Act of 2009, N.C. GEN. STAT. §§ 58-70-145 – 58-70-155 (2011).

14 MASS. ANN. LAWS UNIF. SMALL CLAIMS RULES, Rule 2(b).

15 In Texas, for example, TEX. R. CIV. P. 91 states that a party challenging the sufficiency of a pleading must “point out intelligibly and with particularity the defect, omission, obscurity, duplicity, generality, or other insufficiency in the allegations.” TEX. R. CIV. P. 90 states that unless such deficiencies are “pointed out . . . in writing . . . [they] shall be deemed to have been waived . . . .”

16 NATIONAL CONSUMER LAW CENTER, COMMENTS TO THE FEDERAL TRADE COMMISSION REGARDING THE FAIR DEBT COLLECTION PRACTICES ACT, PROTECTION CONSUMER IN DEBT COLLECTION LITIGATION AND ARBITRATION: A ROUNDTABLE DISCUSSION 4 (August 2009), *available at* [http://www.nclc.org/images/pdf/debt\\_collection/comments\\_ftc\\_09.pdf](http://www.nclc.org/images/pdf/debt_collection/comments_ftc_09.pdf).

17 See BROKEN SYSTEM, *supra* note 5, at 7. More than forty years ago, social scientist David Caplovitz undertook a study of distressed consumers in New York, Chicago, Detroit, and Philadelphia. DAVID CAPLOVITZ, CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT (1974). Published in 1974, prior to widespread use of credit cards, the vast majority of the cases examined involved what Professor Caplovitz called the “conditional sale” transaction, one in which the purchaser does not become the owner of the property purchased until she makes the final payment. *Id.* at 29. Only 5% of the cases involved revolving or open credit. *Id.* Through examination of court records and interviews with

the Urban Justice Center's studies on collection cases filed in New York City Civil Court,<sup>18</sup> which handles more civil cases than any court in the country and where an estimated 320,000 cases to collect credit card debt were filed in 2006 alone.<sup>19</sup>

The project described in this Article was designed to increase our understanding of how debt buyers and their attorneys conduct the litigation and the effect of such litigation on consumers and the courts. Litigation files containing petitions answers, evidence of service, motions, and dispositive orders were reviewed. Information was collected and analyzed and, in the end, the data confirmed some of the more troubling reports regarding the failure of collectors to provide information regarding the debt to consumers in litigation.<sup>20</sup> The research also revealed unexpected findings that suggest areas for further research and analysis.

- more than 1,300 consumer defendants, Professor Caplovitz and his team of researchers generated data that provided a comprehensive portrait of both the creditors and the debtors, the underlying transaction, reasons for defaults, and consequences to the consumer of the debt problems. *Id.* at 8-9. Their work provided valuable data that informed much of the consumer protection legislation that followed. *See* Wolfgang Saxon, *Dr. David Caplovitz, an Authority on Spending Habits, Dies at 64*, N.Y. TIMES (Oct. 3, 1992), <http://www.nytimes.com/1992/10/03/obituaries/dr-david-caplovitz-an-authority-on-spending-habits-dies-at-64.html>. More than fifteen years later, Georgetown law professor Philip Schrag and attorney Hilliard M. Sterling acknowledged the impact of Dr. Caplovitz's work on their study of consumer debt collection litigation in the D.C. small claims courts, where again, most of the plaintiffs were parties to the original credit transaction. Hilliard M. Sterling & Philip G. Schrag, *Default Judgments Against Consumers: Has the System Failed?* 67 DENV. U. L. REV. 357, 357-59 (1990).
- 18 COMMUNITY DEVELOPMENT PROJECT, URBAN JUSTICE CTR., DEBT WEIGHT: THE CONSUMER CREDIT CRISIS IN NEW YORK CITY AND ITS IMPACT ON THE WORKING POOR, 1, 18 (Oct. 2007), [http://www.urbanjustice.org/pdf/publications/CDP\\_Debt\\_Weight.pdf](http://www.urbanjustice.org/pdf/publications/CDP_Debt_Weight.pdf) [hereinafter DEBT WEIGHT]. In the first study, researchers collected data from approximately 600 cases filed in a one-month period in 2006. *Id.* In the second study, data were collected from two sources: a 365-case sample of almost 450,000 cases initiated by debt buyers over a two-and-a-half year period, and a sample of callers seeking legal assistance. THE LEGAL AID SOCIETY, NEIGHBORHOOD ECONOMIC DEVELOPMENT ADVOCACY PROJECT, MFY LEGAL SERVICES, AND COMMUNITY DEVELOPMENT PROJECT, URBAN JUSTICE CTR., DEBT DECEPTION: HOW DEBT BUYERS ABUSE THE LEGAL SYSTEM TO PREY ON LOWER-INCOME NEW YORKERS, URBAN JUSTICE CTR. 1, 9 (May 2010), [http://www.urbanjustice.org/pdf/publications/cdp\\_24may10.pdf](http://www.urbanjustice.org/pdf/publications/cdp_24may10.pdf) [hereinafter DEBT DECEPTION]. *See also* NEW YORK CITY CIVIL COURT, NEW YORK STATE UNIFIED COURT SYSTEM, <http://www.nycourts.gov/courts/nyc/civil/civilhistory.shtml> (last visited Aug. 8, 2011) (providing history and statistics of the court).
- 19 This number is, reportedly, comparable to the total number of cases filed in all of the federal courts in the country during the same period. DEBT WEIGHT, *supra* note 18, at 1.
- 20 *See* BROKEN SYSTEM, *supra* note 5, at ii; *see also* Holland, *supra* note 12, at 264-73.

For example, the data confirmed that a relatively small number of debt buyers file claims on debt assigned by a relatively small number of original creditors. Their allegations are overwhelmingly thin, and supporting documents, when they exist, generally fail to meet procedural and evidentiary standards used to prove the claims alleged. But, while the rate of default judgment was high—nearly 40%—this rate was far lower than the 90% figure reported in roundtable discussions conducted by the Federal Trade Commission.<sup>21</sup> Instead, voluntary and involuntary dismissals *without prejudice* exceeded default judgments. Even more unexpected were the number of dismissals after appearance by the defendant, suggesting that even minimal efforts by defendants can end the litigation. While more research is necessary to determine the precise reasons for the high rate of voluntary dismissals, the data suggest that when a default judgment is not possible, plaintiffs choose to dismiss rather than litigate. Though the result of such a choice may be a temporary victory for the defendant, it leaves open the possibility of relitigation and may explain the phenomenon known as “zombie debt.”<sup>22</sup>

Part I of this Article will describe the structure and economics of the industry, drawing heavily from two reports issued by the Federal Trade Commission<sup>23</sup> and from a September 2009 report from the Government Accountability Office.<sup>24</sup> Part II will describe the methodology of the study, including the mechanics of its design and its implementation. Part III will report and analyze the data and highlight the most significant findings. Part IV will sketch some tentative conclusions regarding the implications of this study for the judicial system and suggest additional research that may further illuminate the systemic challenges of debt-collection litigation.

## II. CONSUMER DEBT AND ITS COLLECTION

### A. Scope of Debt

Since the enactment of the Fair Debt Collection Practices Act (FDCPA) in 1977,<sup>25</sup> total revolving consumer debt grew nearly 30-fold, from

---

21 See BROKEN SYSTEM, *supra* note 5, at 7.

22 See *infra* notes 49-50 and accompanying text.

23 WORKSHOP REPORT, *supra* note 1; BROKEN SYSTEM, *supra* note 5.

24 GAO REPORT, *supra* note 1.

25 Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p (2009).



approximately \$34.5 billion to more than \$989 billion by the end of 2008.<sup>26</sup> Although that number has dropped, as of September 2010, American consumers still held slightly more than \$806 billion of revolving, unsecured debt.<sup>27</sup> The delinquency rate for all consumer loans remained relatively stable through 2007;<sup>28</sup> however, the delinquency rate for all consumer loans reached an all-time high of nearly 5% by the middle of 2009 before slowly declining and falling below 4% in the last quarter of 2010.<sup>29</sup> At that time, approximately \$22.5 billion in consumer loans were delinquent.<sup>30</sup> The delinquency rate for consumer credit cards, which are a subset of all consumer loans, was even higher, reaching a record peak of nearly 6.8% by the middle of 2009 and remaining above 5% through the middle of 2010.<sup>31</sup> Similarly, the charge-off rate for all consumer loans remained stable through 2007;<sup>32</sup> however, by the middle of 2010 the charge-off rate had reached an all-

---

26 FEDERAL RESERVE, FEDERAL RESERVE STATISTICAL RELEASE: CONSUMER CREDIT, (last updated Sept. 8, 2011), [http://www.federalreserve.gov/releases/g19/hist/cc\\_hist\\_r.html](http://www.federalreserve.gov/releases/g19/hist/cc_hist_r.html) [hereinafter FEDERAL RESERVE STATISTICAL RELEASE].

27 *Id.*

28 FEDERAL RESERVE, CHARGE-OFF AND DELINQUENCY RATES ON LOANS AND LEASES AT COMMERCIAL BANKS: DELINQUENCY RATES FOR ALL BANKS, (last updated Aug. 22, 2011), <http://www.federalreserve.gov/releases/chargeoff/delallsa.htm> (“Delinquent loans are those past due thirty days or more and still accruing interest as well as those in nonaccrual status. They are measured as a percentage of end-of-period loans.”) [hereinafter DELINQUENCY RATES]. “The delinquency rate for any loan category is the ratio of the dollar amount of a bank’s delinquent loans in that category to the dollar amount of total loans outstanding in that category.” FEDERAL RESERVE, CHARGE-OFF AND DELINQUENCY RATES ON LOANS AND LEASES AT COMMERCIAL BANKS: ABOUT, (last updated May 2, 2011), <http://www.federalreserve.gov/releases/chargeoff/about.htm>. [hereinafter ABOUT CHARGE-OFF AND DELINQUENCY RATES].

29 DELINQUENCY RATES, *supra* note 28.

30 This figure was calculated by multiplying the Seasonally Adjusted Delinquency Rate for All Consumer Loans for the Fourth Quarter of 2010 by the Outstanding Revolving Consumer Credit held by Commercial Banks as of December 2010. The Seasonally Adjusted Delinquency Rate for All Consumer Loans for the Fourth Quarter of 2010, 3.66% was taken from DELINQUENCY RATES, *supra* note 28, and the Outstanding Revolving Consumer Credit held by Commercial Banks as of December 2010 was taken from FEDERAL RESERVE STATISTICAL RELEASE, *supra* note 26.

31 DELINQUENCY RATES, *supra* note 28.

32 FEDERAL RESERVE, CHARGE-OFF AND DELINQUENCY RATES ON LOANS AND LEASES AT COMMERCIAL BANKS: CHARGE-OFF RATES FOR ALL BANKS, (last updated Aug. 22, 2011), <http://www.federalreserve.gov/releases/chargeoff/chgallsa.htm> (“Charge-offs, which are the value of loans removed from the books and charged against loss reserves, are measured net of recoveries as a percentage of average loans and annualized.”) [hereinafter CHARGE-OFF RATES]; ABOUT CHARGE-OFF AND DELINQUENCY RATES, *supra* note 28 (“Charge-off rates for any category of loan are defined as the flow of a bank’s net charge-offs (gross charge-offs minus recoveries) during a quarter divided by the average level of its loans outstanding over that quarter.”).

time high of approximately 6.8% before finally beginning to decline.<sup>33</sup> The charge-off rate for consumer credit cards soared to nearly 11% in the middle of 2010, falling just below 8% by the end of that year.<sup>34</sup>

The debt collection industry has grown and changed to keep up with the increasing amount of delinquent consumer debt. An industry trade association, whose members include creditors, third-party debt collectors,<sup>35</sup> and attorneys, estimates that the debt-buying industry employs 150,000 people nationwide and, by 2005, was responsible for collecting nearly \$40 billion in outstanding consumer debt.<sup>36</sup> Similar increases are reported in the growth of law firms specializing in collecting consumer debt. Amid layoffs and no-growth in law firms nationwide, debt collection firms saw revenues of more than \$1.1 billion in 2006, a number they have predicted would nearly double by 2011.<sup>37</sup> This growth also parallels increases in the number of new debt-collection cases filed each year. In some jurisdictions, the increase has been explosive: in one jurisdiction a judge reportedly limited one law firm's filings to no more than 500 new debt-collection cases every two weeks.<sup>38</sup>

The growth of consumer debt also created new opportunities in other segments of the collection industry. An important example is the emergence and tremendous growth of the debt buying industry, which is described in the following section.

## B. Emergence of Debt Buying Industry

The debt buying industry has experienced huge growth over the last ten to fifteen years, with analysts estimating that approximately 450 entities acquired more than \$100 billion in distressed debt in 2009<sup>39</sup> and that annual revenues will reach \$6.2 billion by 2011.<sup>40</sup>

Debt buyers buy and collect delinquent accounts; they do not originate

---

33 CHARGE-OFF RATES, *supra* note 32.

34 *Id.*

35 The FDCPA defines collectors as entities who collect debts on behalf of others. 15 U.S.C. § 1692a(6).

36 ANDREW M. BEATO & ROZANNE M. ANDERSON, FED. TRADE COMM'N, COMMENTS OF ACA INTERNATIONAL TO FTC REGARDING THE DEBT COLLECTION WORKSHOP 1, at 8, 11 (June 6, 2007), <http://www.ftc.gov/os/comments/debtcollectionworkshop/529233-00016.pdf> [hereinafter ACA COMMENTS].

37 WORKSHOP REPORT, *supra* note 1, at 14.

38 See Jessica Silver-Greenberg, *Boom in Debt Buying Fuels Another Boom—in Lawsuits*, WALL ST. J. (Nov. 28, 2010), *available at* <http://online.wsj.com/article/SB10001424052702304510704575562212919179410.html>.

39 See *id.* (reporting figures estimated by industry source Kaulkin Ginsburg).

40 WORKSHOP REPORT, *supra* note 1, at 13-14; see also DBA COMMENTS, *supra* note 2, at 2-3.

the accounts themselves, rather they purchase portfolios of delinquent debt after the original lender or an intermediate debt buyer ceases collection efforts or otherwise charges-off an account.<sup>41</sup> Debts may be bundled into portfolios with other debts having similar characteristics, such as age, type of debt, and geographic location of the debtor, and then put out for competitive bids.<sup>42</sup> Purchase prices vary, but often amount to only a fraction of the face value of the debt.<sup>43</sup>

One of the largest debt buyers, Asset Acceptance Capital Corporation, a publicly-traded company based in Warren, Michigan, reported that, in the first quarter of 2009, it spent \$22.1 million to purchase charged-off consumer debt that had a face value of \$747.8 million.<sup>44</sup> It also reported that, during the same period, it collected more than \$94 million in debt.<sup>45</sup> Although amounts collected fell slightly in 2009, the company reported gains by the end of the third quarter of 2009.<sup>46</sup>

Trade associations maintain that they encourage debt buyers to employ due diligence to avoid the purchasing of debts that were previously discharged in bankruptcy or barred by limitations.<sup>47</sup> Debt buyers may also take steps to avoid debt that was incurred fraudulently through identity theft or otherwise.<sup>48</sup> They also admit, however, that their efforts do not prevent a market for old or discharged accounts, or “zombie debt,”<sup>49</sup> which, instead of

41 DBA COMMENTS, *supra* note 2, at 1-2. Credit card debt is also sold and securitized prior to delinquency. See Charles W. Calomiris & Joseph R. Mason, *Credit Card Securitization and Regulatory Arbitrage* 1 (Fed. Reserve Bank of Philadelphia, Working Paper No. 03-7, 2003), available at <http://ssrn.com/abstract=569862>; see also GAO REPORT, *supra* note 1, at 4 (estimating that more than 50% of credit card balances are securitized by banks).

42 ACA COMMENTS, *supra* note 36, at 40-41 (June 6, 2007).

43 See Silver-Greenberg, *supra* note 38 (describing one company’s practice of buying “distressed debt” for a “few pennies on the dollar”).

44 Press Release, Asset Acceptance Capital Corp., First Quarter 2009 Results (April 30, 2009), available at <http://investors.assetacceptance.com/phoenix.zhtml?c=148416&p=irol-newsArticle&ID=1282484&highlight=>.

45 *Id.*

46 Press Release, Asset Acceptance Capital Corp., Fourth Quarter and Full Year 2009 Results (March 10, 2010), available at <http://investors.assetacceptance.com/phoenix.zhtml?c=148416&p=irol-newsArticle&ID=1401251&highlight=>.

47 See ACA COMMENTS, *supra* note 36, at 6-11, 42.

48 See *id.* at 53.

49 Richard Dalton, *‘Zombie Debt’: When collectors haunt you*, NEWSDAY (Feb. 10, 2008), available at [http://www.kaulkin.com/files/2008-02-08\\_Newsday.com.pdf](http://www.kaulkin.com/files/2008-02-08_Newsday.com.pdf); see also Robert Berner & Brian Grow, *Prisoners of Debt*, BUS. WK. (Nov. 12, 2007), available at <http://www.ftc.gov/os/comments/debtcollectionworkshop/529233-00062.pdf>; Victoria

disappearing, rises from the dead and is re-sold at bargain-basement prices.<sup>50</sup>

During the sale, debt buyers acquire a computerized summary of the original creditor's records that contains only the most basic information about the debt, such as the name, address, and Social Security number of the consumer; the total amount owed; the account number; and the name of original creditor.<sup>51</sup> Although this information may be all that federal law currently requires of debt collectors in the early stages of collection, a patchwork of federal, state, and local laws regulate debt collectors' conduct throughout the collection process, as described below.

### C. Collecting the Debt

#### 1. Legal Framework

The FDCPA, designed to prevent consumer deception and abuse during the collection process, is the primary federal statute governing collectors.<sup>52</sup> It regulates the time and place at which the collector may communicate with the consumer,<sup>53</sup> the method of communicating,<sup>54</sup> and the content of the communication.<sup>55</sup> Enforced by the Federal Trade Commission (FTC), the act also provides consumers with a private right of action for violations.<sup>56</sup> Other federal laws, such as the Equal Credit Opportunity Act, which prohibits discrimination in connection with a credit transaction,<sup>57</sup> and the Fair Credit

- J. Haneman, *The Ethical Exploitation of the Unrepresented Consumer*, 73 MO. L. REV. 707 (2008).
- 50 ACA COMMENTS, *supra* note 36, at 43 n.55. The Government Accountability Office reported that some estimate as much as half of all consumer credit card debt is sold multiple times. GAO REPORT, *supra* note 1, at 29; *see also* Asset Acceptance Capital Corp., *What We Purchase*, <http://www.assetacceptance.com/sell/Purchase.aspx> (advertising that it purchases "charged-off receivables at all stages of delinquency, including: Fresh, Primary, Secondary, Tertiary and Warehouse").
- 51 *See* DBA COMMENTS, *supra* note 2, at 8, 12.
- 52 15 U.S.C. §§ 1692-1692p (2006).
- 53 *Id.* § 1692c (2006) (preventing communication at "any unusual time or place," before 8 AM, or after 9 PM).
- 54 *Id.* § 1692b(4) (preventing debt collectors from using postcards when communicating with persons other than the consumer to acquire location information).
- 55 *Id.* § 1692g (requiring notice of the amount of the debt, the name of the creditor to whom it is owed, and a statement that the debtor can request verification of the debt).
- 56 *Id.* §§ 1692k-1692l.
- 57 *Id.* § 1691 (2006); *see* *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28, 32-34 (3d Cir. 1995) (permitting wife to assert ECOA defensively in collection case arising from debt in which wife had no connection); *see, e.g., Sharp v. Chartwell Financial Serv. Ltd.*,

Reporting Act, which limits collectors' ability to report accounts in collections that pre-date the report by more than seven years,<sup>58</sup> also regulate collectors' conduct.

Forty-two states supplement the FDCPA with legislation governing debt collection.<sup>59</sup> Of those, a majority permit a private right of action for consumers harmed by debt collectors' unlawful conduct.<sup>60</sup> Some states have also enacted legislation to provide private remedies for unfair or deceptive acts and practices.<sup>61</sup> A majority of states also require entities wishing to engage in debt collection in their states to obtain a license, post a bond, or register with the state.<sup>62</sup> For example, in Texas, although a license is not required, an entity failing to post the required bond may be enjoined from collecting debts, liable for civil penalties to consumers harmed by its conduct, and subject to criminal penalties.<sup>63</sup> Licensing and bonding requirements may also be imposed by local authorities. For example, in New York City, the Department of Consumer Affairs requires all debt collectors and buyers using the court system to collect debts to obtain a license.<sup>64</sup> Other state regulation of debt collection activities may govern the collector's conduct in the courtroom,<sup>65</sup> as well its conduct in collecting any judgment it obtains.<sup>66</sup>

## 2. Informal Collection

Within this general regulatory framework, informal collection efforts

---

2000 WL 283095, at \*3 (N.D. Ill. 2000) (denying motion to dismiss borrower's claim that payday lender violated ECOA by using racial epithets when attempting to collect debt).

58 15 U.S.C. § 1681c(a)(4) (2006).

59 CAROLYN L. CARTER ET AL., THE CONSUMER CREDIT AND SALES LEGAL PRACTICE SERIES: FAIR DEBT COLLECTION, Appendix E, 731-41 (National Consumer Law Center, 2008).

60 *Id.*

61 *Id.*

62 *Id.*

63 TEX. FIN. CODE § 392.101 (2006) (requiring \$10,000 bond to be filed with Secretary of State); *see also* *Marauder v. Beall*, 301 S.W.3d 817, 821 (Tex. App.-- Dallas 2009, no pet.) (granting an injunction against entity seeking collection of consumer debts because of failure to file appropriate bond).

64 THE N.Y. CITY DEPARTMENT OF CONSUMER AFFAIRS, N.Y. CITY CONSUMER PROTECTION LAW IN BRIEF 1 5, [http://www.nyc.gov/html/dca/downloads/pdf/consumer\\_protection\\_law.pdf](http://www.nyc.gov/html/dca/downloads/pdf/consumer_protection_law.pdf).

65 *See, e.g.*, MASS. ANN. LAWS UNIF. SMALL CLAIMS RULES, Rule 2(b) (2006) (requiring attorney verification of attempts to locate defaulting consumer).

66 *See, e.g.*, CAL. CIV. P. CODE § 704.080 (limiting amount of debtor's cash assets subject to garnishment); CONN. GEN. STAT. ANN. §52-367b (2009) (same).

generally begin with attempts to contact the consumer debtor by phone or mail or by “otherwise encouraging payment.”<sup>67</sup> Under current law, the limited account information acquired by the debt buyer at the time of the sale may be sufficient to satisfy the collectors’ obligations under the FDCPA to validate debts by providing the consumer with information regarding the amount of the debt, the name of the current creditor, and, upon request, the name and address of the original creditor.<sup>68</sup> The debtor and debt buyer may then use this information to work out a payment schedule or to agree to payment of a lump sum that is lower than the face amount of the debt. If the debt is not settled, the debt buyer may do nothing, re-sell the debt for collection at a later time, or initiate litigation.

### 3. Collection Litigation

When informal collection methods do not result in payment, debt buyers increasingly turn to litigation or arbitration.<sup>69</sup> Most of the litigation occurs in state courts, where debt buyers generally must appear through an attorney.<sup>70</sup>

---

67 Debt Buyers’ Ass’n v. Snow, 481 F. Supp. 2d 1, 4 (D.D.C. 2006). At times, such efforts may be extremely creative, as in the use of a mailing sent to consumer debtors offering a “pre-approved” credit card with a limit set just above the amount owed on the previous card. *See* Notice sent by Resurgent Capital Services, L.P. to Past-Due Debtor (on file with the author) (“Take Advantage of \$178.58 of DEBT REDUCTION and get Immediate Available Credit of \$50.00 . . . Pay your \$3378.58 debt in full by balance transferring \$3200 of your debt to a new Visa credit card, and when your credit card is issued, the remaining \$178.58 will be forgiven. You will have \$50.00 available credit when you receive your credit card. . . . Collection activity on your old debt will stop if you accept this offer[.]”).

68 15 U.S.C. § 1692g (2006); *see also* DBA COMMENTS, *supra* note 2 at 11-13. However, debt collectors may be liable to consumers for statutory damages for the failure to completely and accurately identify the original creditor in the informal stage of collection. *See* Schneider v. TSYS Total Debt Management, Inc., 2006 WL 1982499, at \*3 (E.D. Wis. 2006) (refusing to dismiss § 1692g claim where it was “impossible . . . to decide whether collector’s identification of ‘Target’ as original creditor satisfied its obligations under the statute).

69 *See* BROKEN SYSTEM, *supra* note 5, at 5 (noting increased rate of litigation of consumer debts). The FTC recognizes that there is tremendous disagreement among interested parties in the relative benefits of arbitration and litigation. *See id.* at 38-39; *see also* Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 OHIO ST.J. DISP. RES. 843 (2010) (collecting data from 301 consumer arbitrations, most of which were initiated by consumers, conducted from April to December 2007). Whether increased rates of arbitration will continue after the July 2009 withdrawal of the National Arbitration Form from the consumer arbitration business is unknown. *See* BROKEN SYSTEM, *supra* note 5, at 51-53.

70 *See* BROKEN SYSTEM, *supra* note 5, at 6. However, in some courts, entities may be permitted to appear through non-attorney representatives. *E.g.*, TEX. GOV’T CODE §

As discussed above, although the FDCPA governs debt collectors' conduct through all phases of the collection process, it imposes no obligations on collectors' conduct in litigation other than requiring that suits be filed in the venue in which the consumer signed the contract or in which the consumer resides at the commencement of the litigation.<sup>71</sup>

Instead, the litigation of the debts is governed almost entirely by state procedures and laws.<sup>72</sup> At a minimum, due process requires that the defendant be given fair notice and an opportunity to be heard before the plaintiff can establish his or her right to a judgment in any type of litigation.<sup>73</sup> While modern pleading rules usually do not require that plaintiffs provide detailed allegations of fact, the defendant generally must receive notice of who is bringing the claim and what the claim is about.<sup>74</sup>

A few states, as well as local laws and rules of procedure, impose additional requirements on debt collectors seeking to litigate their claims.<sup>75</sup> For example, in some states, there is a presumption that the amount sought is valid if the initial pleading is properly sworn.<sup>76</sup> In other states, parties seeking judicial enforcement of a contract must either allege the relevant provisions of the contract forming the claim or attach a copy of the contract to the complaint.<sup>77</sup> Some states consider it an unfair practice for a debt collector to assert a claim in litigation when the collector knows that such collection is

- 
- 27.031(d) (2009) (providing that corporations “need not be represented by an attorney in justice court”).
- 71 15 U.S.C. § 1692i(a) (2006). A definition of venue may depend on the court whose jurisdiction the plaintiff seeks. For example, a filing in the county court would require that venue be appropriate in the county, while a filing in the justice court may require a more detailed determination of venue to insure the appropriate precinct.
- 72 BROKEN SYSTEM, *supra* note 5, at 6.
- 73 *See* *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (stating that plaintiff’s complaint should contain “more than an unadorned, the-defendant-unlawfully-harmed-me accusation”); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 n.3 (2007) (stating that a plaintiff must include some factual allegation in a complaint to “provid[e] not only ‘fair notice’ of the nature of the claim, but also ‘grounds’ on which the claim rests”).
- 74 *See, e.g.*, FED. R. CIV. P. 7.1(a) (requiring corporate parties to disclose certain corporate affiliations); FED. R. CIV. P. 8(a)(2) (requiring “a short and plain statement of the claim showing that the pleader is entitled to relief”); *see also* 2 JAMES W.M. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 8.04[2] (3d ed. 2008).
- 75 *See* BROKEN SYSTEM, *supra* note 5, at 21 (describing new procedures required in debt buyer cases in Fairfax County, Virginia courts, as well as in North Carolina and New York City). *See, e.g.*, CAL. CIV. CODE § 1788.15 (West 2009) (venue provisions); CAL. R. CT. 3.740 (rules on collection cases).
- 76 *See, e.g.*, ALA. CODE § 12-21-111 (LexisNexis 2005); N.M. STAT. ANN. § 38-7-1 (West 2010); TENN. CODE ANN. § 24-5-107 (2000).
- 77 BROKEN SYSTEM, *supra* note 5, at 18.

barred by limitations,<sup>78</sup> while others merely allow for limitations to be asserted as an affirmative defense, which is waived if not timely asserted.<sup>79</sup>

The characteristics of the individual courts may also vary, not only from state to state, but also within states. For example, in some states, plaintiffs may choose to file collection cases in one of several courts with concurrent jurisdiction,<sup>80</sup> while in other jurisdictions, plaintiffs' choices may be more limited.<sup>81</sup> In all jurisdictions, rules of procedure, evidence, and professional responsibility govern the commencement and conduct of the litigation. Such rules place the burden of raising deficiencies in pleading and proof on the opposing party, and that party's objections may be waived if not raised in a timely manner.<sup>82</sup> While the rules vary by state, and even within states, one thing is clear: the rate of default judgments in consumer debt collection cases is reported to have reached 95% and may be double the default judgment rate

---

78 N.C. GEN. STAT. ANN. § 58-70-115(4) (West 2011).

79 Compare N.C. GEN. STAT. ANN. §§ 58-70-145 to -155 (West 2011) (making it unlawful to file suit on a debt that is barred by limitations), with TEX. R. CIV. P. 94 (requiring a defendant to “set forth affirmatively . . . statute of limitations . . . and any other matter constituting an avoidance or affirmative defense”), and TEX. R. CIV. P. 90 (establishing waiver when defects are not raised in writing before judgment).

80 In Texas, suits seeking between \$500 and \$10,000 may be filed in any one of four different courts: 1) justice courts, where rules of evidence and procedure are not strictly applied; 2) constitutional county courts; 3) statutory county courts-at-law, which exist in primarily urban jurisdictions, such as San Antonio, Houston, and Dallas; or 4) constitutional district courts. See TEX. GOV'T CODE ANN. §§ 24.007 (district courts), 25.0003 (statutory county courts-at-law), 25.0592(a) (providing Dallas county courts-at-law concurrent jurisdiction with district courts over civil matters regardless of amount in controversy), 26.042(a) (constitutional county courts), 27.031(a)(1) (justice courts) (West 2004). In all of the courts except justice courts, entities must appear through an attorney; only individuals may appear *pro se*. See *id.* § 27.031(d) (providing that corporations need not appear by attorney in justice court).

81 In California, collectors may only file in superior court. Cal. Civ. P. § 116.420 (preventing assignees of claims from filing in small claims court). In New York City for example, the New York City Civil Court has exclusive jurisdiction of civil suits seeking less than \$25,000. NY CITY CIV. CT. ACT §§ 201-02; see DEBT WEIGHT, *supra* note 18, at 8 n.51. In Chicago, suits seeking less than \$10,000 must be brought in the Cook County Civil Court. See Armeet Sachdev, *Debt Collectors Pushing to Get Their Day in Court*, CHICAGO TRIBUNE, June 8, 2008, available at <http://www.chicagotribune.com/news/nationworld/chi-sun-debtchasers-jun08,0,5667609.story?page=1>.

82 In Texas, for example, TEX. R. CIV. P. 91 states that a party challenging the sufficiency of a pleading must “point out intelligibly and with particularity the defect, omission, obscurity, duplicity, generality, or other insufficiency in the allegations,” and TEX. R. CIV. P. 90 states that unless such deficiencies are “pointed out . . . in writing . . . [they] shall be deemed to have been waived.” See also FED. R. CIV. P. 8(c) (requiring parties to “affirmatively state any avoidance or affirmative defense”).



in debt cases generally.<sup>83</sup>

The high default judgment rate is especially troubling because debt buyers usually take the debt subject to all of the consumer's potential defenses to payment, such as deceptive practices surrounding the extension of credit, limitations, unconscionability, or claims about insufficient quality of the goods or services.<sup>84</sup> Some, if not all, of those defenses may be available to at least some defaulting consumers.<sup>85</sup> Accordingly, by failing to appear, the consumer waives valid counterclaims or offsets arising from the underlying transaction as well as affirmative claims arising out of attempts to collect the debt. Indeed, one study dating back more than 20 years found that more than half of consumers against whom default judgments were entered had good faith defenses to collection and more than 70% "may have had defenses" to the litigation.<sup>86</sup>

In late 2007, the FTC sponsored a workshop to explore perceived problems with the collection of consumer debts.<sup>87</sup> In early 2009, it issued its report from the workshop and concluded that there appeared to be serious problems in the litigation of consumer debt, but that it needed more information before making any recommendations.<sup>88</sup> Later that year, the FTC convened a series of meetings with private and public attorneys, consumer advocates, industry representatives, academics, and judges from across the country and, in July 2010, issued its findings and recommendations for changes.<sup>89</sup> The report acknowledged many of the problems discussed above. The FTC also urged states, the primary fora for the litigation, to take steps to increase protections available to consumers in debt collection litigation by "adopting measures to make it more likely that consumers will defend in litigation."<sup>90</sup> The recommended measures included that collectors' complaints contain, at a minimum, the following information: 1) the identity of the original creditor; 2) the date of default or charge-off and amount due at that time; 3) the name of the current owner of the debt; 4) the amount

---

83 BROKEN SYSTEM, *supra* note 5, at 7. The Urban Justice Center reports that approximately 80% of all consumer debt cases result in a default judgment for the plaintiff, and that the figure jumps to more than 86% when only certain debt buyers are considered. DEBT WEIGHT, *supra* note 18, at 9; DEBT DECEPTION, *supra* note 18, at 1.

84 DBA COMMENTS, *supra* note 2, at 1-2.

85 *See generally* BROKEN SYSTEM, *supra* note 5, at 12-30.

86 *See* Sterling & Schrag, *supra* note 17, at 384-86 (finding that more than half of consumers against whom default judgments were entered had good faith defenses to collection).

87 WORKSHOP REPORT, *supra* note 1, at 1.

88 *See id.* at 65-66.

89 BROKEN SYSTEM, *supra* note 5, at ii.

90 *Id.* at iii.

currently due on the debt; and 5) a breakdown of the amount due, showing principal, interest, and fees. The FTC also included a number of findings supporting its recommendations, but admitted that no empirical data were presented.<sup>91</sup> This study described in this Article is a first step in collecting such data.

### III. METHODOLOGY: COLLECTING THE DATA

This project examined litigation files of the Dallas County Courts at Law. Dallas County, with approximately 2.4 million residents, is home to roughly 10% of the state's population.<sup>92</sup> Median household income is approximately \$46,000, slightly below the state's median.<sup>93</sup> As a whole, the county is economically and demographically diverse, with the population consisting of approximately 22% African American, 33% non-Hispanic White, and 38% Hispanic/Latino.<sup>94</sup>

The Texas Office of Court Administration reported that in 2007 "suits on debt"<sup>95</sup> accounted for more than 78% of the civil cases filed in county-level courts in Dallas County, but only 43.8% of civil cases filed in county courts statewide.<sup>96</sup> These figures are consistent with reports from other jurisdictions finding that civil litigation is concentrated in cities and counties with significant minority populations, lower median income, and lower home

91 *Id.* at 7.

92 *State and County QuickFacts: Dallas County, Texas*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/48/48113.html> (last modified June 3, 2011).

93 *Id.*

94 *Id.*

95 "Suits on debt" are one of seven categories of civil cases and are defined as "[s]uits based on *enforcing* the terms of a certain and express agreement, usually for the purpose of recovering a specific sum of money." Office of Court Administration, Texas Judicial Council, *Official County Court Monthly Report Instructions* 10 (July 2009), [http://www.courts.state.tx.us/oca/pdf/Cnty\\_Inst.pdf](http://www.courts.state.tx.us/oca/pdf/Cnty_Inst.pdf) (emphasis added). Other categories of civil cases are injury, tax, divorce, and other family cases. *Id.* In addition to consumer debt cases, this category might include suits to recover wages or sums of money allegedly due under a variety of types of contracts.

96 Texas Office of Court Administration, Trial Court Judicial Data Management System, *County-Level Courts: Reported Activity by County from January 1, 2007 to December 31, 2007*, available *at* [http://dm.courts.state.tx.us/oca/oca\\_ReportViewer.aspx?ReportName=CC\\_Reported\\_Activity\\_New.rpt&ddlFromMonth=1&ddlFromYear=2007&txtFromMonthField=@FromMonth&txtFromYearField=@FromYear&ddlToMonth=12&ddlToYear=2007&txtToMonthField=@ToMonth&txtToYearField=@ToYear&ddlCountyPostBack=57&txtCountyPostBackField=@CountyID&export=1706](http://dm.courts.state.tx.us/oca/oca_ReportViewer.aspx?ReportName=CC_Reported_Activity_New.rpt&ddlFromMonth=1&ddlFromYear=2007&txtFromMonthField=@FromMonth&txtFromYearField=@FromYear&ddlToMonth=12&ddlToYear=2007&txtToMonthField=@ToMonth&txtToYearField=@ToYear&ddlCountyPostBack=57&txtCountyPostBackField=@CountyID&export=1706) [hereinafter *County-Level Reports: Reported Activity 2007*].

ownership rates.<sup>97</sup>

### A. Choosing the Court

Although debt buyers seeking between \$500 and \$10,000 may file their cases in justice courts, county courts-at-law, or district courts in Dallas County,<sup>98</sup> this study examined case files from the county courts-at-law only. The county courts-at-law were chosen for three main reasons. First, the five county courts-at-law are contained in a single building and use a centralized filing system that enabled researchers to work in a single location, thus providing efficiencies for the research.<sup>99</sup> In contrast, the justice courts serve five geographically diverse precincts and are contained in ten different buildings spread throughout the county. Moreover, each justice court maintains its own files—meaning records for one precinct may be located almost twenty-five miles from the records for another precinct.<sup>100</sup> Secondly, because the justice courts serve smaller geographical areas within the county, it would be expected that data from courts with a county-wide jurisdiction would reflect a broader picture than data collected from a single geographic precinct within the county.<sup>101</sup>

---

97 See Richard M. Hynes, *Broke but not Bankrupt: Consumer Debt Collection in State Courts*, 60 FLA. L. REV. 1, 5-6 (2008).

98 See *supra* note 80. The justice courts have jurisdiction over civil cases involving not more than \$10,000. TEX. GOV'T. CODE § 27.031(a)(1). County courts at law and district courts in Dallas County have concurrent jurisdiction over all matters. *Id.* § 25.0592. Debt buyers may not bring their claims in small claims court, because it is not available to collection agencies or other assignees of claims seeking to recover on the assigned claim. *Id.* § 28.003(b).

99 Although the costs for filing, citation, and service in county court—\$297—is nearly three times the \$97 charged in justice courts, overall costs might nevertheless be lower in county courts for attorneys handling cases in volume. The FDCPA requires collection cases not involving real property to be filed “only in the judicial district or similar legal entity (A) in which [the] consumer signed the contract sued upon; or (B) in which [the] consumer resides at the commencement of the action.” 15 U.S.C. § 1692i(a)(2). With the knowledge that a group of consumer defendants may reside in a “judicial district” that covers a single county, an attorney may choose to file there, rather than spend the time and money necessary to determine in which of the five “judicial districts” each individual consumer resides.

100 The easternmost justice court for the county is in Mesquite, Texas, approximately 25 miles and nearly thirty-five minutes away from the westernmost justice court in the county.

101 Each individual justice court precinct is significantly less diverse than the county as a whole. For example, within Justice Court Precinct 1, individual voting tracts may be as much as 95% non-Hispanic Whites, while non-Hispanic Whites may comprise less than 2% of the population in an individual voting precinct for Justice Court Precinct 3. *Compare*

The third, and in some ways the most important, reason for selecting the county courts-at-law is that corporate parties must retain counsel to enter an appearance in the county courts; only individuals can appear *pro se*.<sup>102</sup> Because one goal of the project was to examine the conduct of debt buyers and their attorneys in the litigation, it was necessary to select a court in which debt buyers who were not individuals could appear in court only through an attorney.<sup>103</sup>

## B. Developing a Random Sample

With the level of court selected, the next step was to create a random sample of cases to be analyzed. In 2007, a total of 16,819 civil cases were filed in the jurisdiction.<sup>104</sup> Consumer collection cases are a subset of “suits on debt,” which is just one of several categories of civil cases the county courts-

- 2000 CENSUS OF POPULATION AND HOUSING SUMMARY FILE 1 CHARACTERISTICS FOR DALLAS COUNTY VOTING PRECINCT 1148, NORTH CENTRAL TEXAS COUNCIL OF GOVERNMENTS, <http://www.nctcog.org/ris/census/sf1.asp?geo=DALCO&area=1148>, with 2000 CENSUS OF POPULATION AND HOUSING SUMMARY FILE 1 CHARACTERISTICS FOR DALLAS COUNTY VOTING PRECINCT 3517, NORTH CENTRAL TEXAS COUNCIL OF GOVERNMENTS, <http://www.nctcog.org/ris/census/sf1.asp?geo=DALCO&area=3517>.
- 102 Although TEX. R. CIV. P. 7 provides that parties may appear “either in person or by an attorney,” Texas courts interpret the provision to mean that only individuals can appear *pro se*. See *Kunstoplast of Am., Inc. v. Formosa Plastics Corp.*, 937 S.W.2d 455, 456 (Tex. 1996) (finding only limited exception to general Texas rule that corporate parties may be represented only by licensed attorney); see also *Paul Stanley Leasing Corp. v. Hoffman*, 651 S.W.2d 440 (Tex. App. – Dallas 1983, no writ) (holding that although plaintiff corporation was unable to proceed to trial without attorney, trial court abused discretion in failing to give plaintiff opportunity to obtain licensed counsel).
- 103 TEX. GOV'T CODE § 27.031(d) (“A corporation need not be represented by an attorney in justice court.”). A fourth reason for the selection of the county courts-at-law is that by the time planning for this project began in the spring of 2008, the Civil Clinic represented several consumers in such cases. All of the litigation was in the county courts-at-law, and none was in the justice courts or the district courts. See generally, Michael Grabell, *Say-it-in-Spanish Ruling Protested*, DALLAS MORNING NEWS, Mar. 9, 2007, 2007 WLNR 4488743 (providing additional reports of cases pending in county courts-at-law). Additionally, in the justice courts, judges need not be attorneys and do not strictly apply rules of procedure, including discovery rules, or rules of evidence. *Id.*
- 104 This number was provided by the court staff just prior to the commencement of the study and is the number of total cases used to develop the random sample. It differs slightly from information published by the Texas Office of Court Administration, which reported a total 17,581 cases added to the docket in calendar year 2007, but just 16,126 cases actually filed in the county. See *County-Level Courts: Reported Activity 2007*, *supra* note 96.

at-law hear.<sup>105</sup> The clerk numbers the cases sequentially as they are filed. Each filing generally contains a petition, summons, record of service, and dispositive order. While docket information may be reviewed remotely over the internet, the cases were are not electronically searchable by type of case.<sup>106</sup> To review the contents of such case files, one must travel to the courthouse and submit a case number to the clerk, who then retrieves the individual files, one at a time, for review at a desk in the file area.<sup>107</sup>

Because individually reviewing all 16,819 cases was not feasible, the first step in the project was to determine a method to produce a random sample. After consultation with an expert in statistical sampling methods, Dr. S. Lynne Stokes of the Department of Statistical Science at Southern Methodist University, the study employed cluster sampling. Cluster sampling is a method of sampling that divides an entire population into clusters or blocks; after the blocks are randomly selected, researchers gather data from all of the elements within the selected block.<sup>108</sup> Based on an experimental sample<sup>109</sup> and the total number of cases filed,<sup>110</sup> Dr. Stokes divided the total number of cases into 167 clusters of 100 cases and one cluster of 19 cases. Concluding that a sample of 21 clusters containing 2,019 cases would yield approximately 500 cases that fit the criteria for review, with a margin of error of

---

105 The other categories of civil cases that courts-at-law hear are: (1) cases involving injury or damage caused by a motor vehicle; (2) injury or damage not caused by a motor vehicle; (3) tax cases; and (4) other civil cases. *See County-Level Reports: Reported Activity 2007*, *supra* note 96. The Dallas County Courts-at-Law have concurrent jurisdiction with the district courts in civil cases regardless of the amount in controversy. TEX. GOV'T CODE ANN. § 25.0592(a) (West 1997).

106 There are significant differences among the Texas counties regarding the use of technology. For example, in Harris County, which is home to Houston, attorneys may view the contents of court files remotely. *See HARRIS COUNTY DISTRICT CLERK*, <http://www.hcdistrictclerk.com/eDocs/Public/Search.aspx> (last visited July 30, 2011).

107 At the time data collection began, remote electronic access of the contents of Dallas County court files was not possible. However, by the middle of 2010, the public gained remote access to some, though not all, documents contained in civil court files. Letter from Gary Fitzsimmons, Dallas County District Clerk, to Dallas County Citizen and Customers (July 1, 2010), *available at* <http://www.dallascounty.org/media/notices/PublicAccess.pdf>. However, remote access is still not available to county court cases filed in 2007. *Id.*

108 *See* RICHARD D. DE VEAUX, PAUL F. VELLEMAN & DAVID E. BOCK, *INTRO STATS* 311-12 (3d ed. 2009).

109 The experimental sample involved the review of two sets of files in numbered groups of 150. In the first group, numbers 00001 to 00150, twenty-three cases were initiated by an entity other than the original creditor to collect a debt arising out of a consumer credit card transaction. A second numbered set of 150 cases, beginning with case number 0705603, yielded forty cases that fit our criteria for review.

110 *See supra* note 104 and accompanying text.

approximately 4%, Dr. Stokes generated the sample blocks from which the data were collected.<sup>111</sup>

### **C. Gathering the Data**

Researchers examined the files contained in each cluster and eliminated all cases not involving debt buyer plaintiffs seeking to collect individual consumer credit card debt. This process produced a set of 507 cases. For each case, researchers recorded and coded information in thirty different categories. To minimize coding discrepancies, weekly meetings with a doctoral candidate in statistical science, Dr. James Haney, were held to resolve any questions or issues regarding data collection and coding.<sup>112</sup> Dr. Haney reviewed and consolidated the data. Inconsistent data triggered reexamination of the relevant original case file.

The coded information was divided into four general categories. The first category included identifying information, such as the case number, date of filing, date of closing, name of plaintiff/assignee and its attorney, name of original creditor, and name and, if possible, gender of defendant. The second category contained defensive information—for example, whether there was service on the defendant, whether there was an answer or evidence of appearance, and whether an attorney appeared on behalf of the defendant and, if so, his or her identity.<sup>113</sup> Where there was evidence that an attorney appeared, researchers also reviewed the answer to determine the nature of any defenses and counterclaims.<sup>114</sup> The third category included information about the claims alleged in the petition: the amount sought, including the amount of principal and interest if separately alleged; amounts of attorneys fees sought and the method of calculating them; and details of any other charges or fees, such as late payments or over-the-limit fees. Researchers also noted whether the file contained an affidavit or other documentary evidence supporting the petition. When files contained affidavits, researchers recorded the identity and business affiliation of the affiant and noted whether the plaintiff filed any supporting documents, such as a credit agreement or records of payment history, such as the date of last payment or other date of default; they also noted whether plaintiff served discovery on the defendant.

---

111 E-mail from Dr. S. Lynne Stokes, Professor at Southern Methodist University, to Mary Spector, Associate Professor at Dedman School of Law (July 2010) (on file with author).

112 Dr. James Haney is now a Senior Statistician with JP Morgan Chase in Columbus, Ohio.

113 Researchers also gathered names and addresses of plaintiffs' attorneys.

114 Because a defendant need only provide a general denial, theories of defenses may not be alleged in the answer. *See* TEX. R. CIV. P. 92.

Finally, researchers collected data about outcomes, recording whether the cases resulted in a default judgment, dismissal without prejudice, agreed judgment, dismissal with prejudice, or affirmative recovery for the defendant. Researchers also noted whether there was any post-judgment activity related to the case and, if so, what type.

#### IV. THE FINDINGS

This section first considers the scope of the consumer debt litigation in Dallas County and compares it with available data regarding similar litigation outside of the region. It then explores in detail the data collected and begins to draw preliminary conclusions. Finally, this section identifies potential areas for future research.

##### A. The Basics

The 507 cases in the sample, all initiated by debt buyers against consumers to collect delinquent credit card debt, accounted for 25.11% of the cases contained in the cluster. The data indicate that approximately 25.11% of the total cases filed in the Dallas County Courts-at-Law during 2007 were debt-buyer suits to collect consumer debt.<sup>115</sup> When measured against the total number of suits on debt, simple calculations suggest that one-third of all debt cases filed in Dallas County in 2007 were suits seeking recovery of a delinquent credit card account by someone other than the original creditor.<sup>116</sup>

Though perfect comparison with other jurisdictions is difficult, if not impossible, these figures appear consistent with reports from other jurisdictions. For example, the State Court Administrator for Kansas reported that 72.8% of all civil cases filed in 2007 were “seller plaintiff (debt collection)” cases,<sup>117</sup> a number that is very close to the 75.3% reported in

---

115 The percentage of cases identified is consistent with the percentages suggested by an experimental sample of 300 cases reviewed outside the cluster. *See supra* notes 109-11 and accompanying text.

116 In this calculation, the dividend is the percentage of “suits on debt” added in Dallas County as reported by the Texas Office of Court Administration—75.3%. *County-Level Courts: Reported Activity 2007*, *supra* note 96 and accompanying text. The divisor is the percentage of cases that the study shows were initiated by debt buyers to collect credit card debt. Stated in numerical form the equation becomes:  $25.11\% \div 75.3\% = 33.35\%$ .

117 R. LA FOUNTAIN ET AL. THE WORK OF STATE COURTS: AN ANALYSIS OF 2007 STATE COURT CASELOADS 10 (2009) (reporting the results of a joint project of the Conference of State Court Administrators, the Bureau of Justice Statistics, and the National Center for State Courts).

Dallas County; however, because Kansas, like Texas, does not distinguish between types of debt, the identities of the plaintiff, further comparisons cannot be made.

Variation among jurisdictions is to be expected. Aside from differences in substantive law that may influence a decision to file a suit to collect a debt, there are many factors that may contribute to the differing levels of concentration of such cases in certain jurisdictions. Perhaps most obvious is the range of courts available to a plaintiff seeking to file a lawsuit to collect a debt. Because the Dallas debt buyer can choose between three jurisdictions for filing, one might expect cases in any one of the jurisdictions to occupy a smaller portion of the docket than in a jurisdiction where plaintiff's choice of forum is far more limited. For example, the New York City debt buyer seeking to recover less than \$25,000 *must* file in the New York City Civil Court, where it is reported that debt buyers filed more than 200,000 cases in 2009 alone.<sup>118</sup>

Economic and other non-legal factors may also explain differences among jurisdictions. For example, experts reported that during 2007, economic conditions were slightly better in the geographic region of the country that includes Dallas than in other parts of the country.<sup>119</sup> Thus, even if these percentages are lower than figures reported in other jurisdictions, the debt buyer cases make up a sizeable portion of the Dallas County docket.

---

118 NY CITY CIV. CT. ACT §§ 201-02, TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVICES IN NEW YORK, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 16 (Nov. 2010); NEW YORK CITY BAR, REPORT BY THE CIVIL COURT AND CONSUMER AFFAIRS COMMITTEE IN SUPPORT OF INTRO. 0660-2007, (Jan. 21, 2009), *available at* [http://www.nycbar.org/pdf/report/Consumer\\_Debt.pdf](http://www.nycbar.org/pdf/report/Consumer_Debt.pdf).

119 For example, the Dallas metropolitan area led the nation in the number of jobs added from July 2007 to July 2008; it had the largest increase in any of the nation's 12 largest cities. Brendan Case, *Dallas-Fort Worth Has Strongest Job Market in U.S.* DALLAS MORNING NEWS (Aug. 27, 2008), *available at* <http://www.dallasnews.com/sharedcontent/dws/bus/stories/082808dnbusdfwjogrowth.1971087e.html>.



## B. The Parties

### 1. Plaintiffs, Original Creditors, and Plaintiffs' Attorneys

#### a. The Plaintiffs

Although hundreds of debt buyers operate nationwide,<sup>120</sup> just thirty-five different debt buyers appeared in the 507 cases; an even smaller number were responsible for the majority of cases filed. The two most frequently named plaintiffs initiated 182 cases, or slightly over 35.9% of the total filed, and the top five plaintiffs accounted for 326 cases, or nearly 64.3% of the total filed. The next five entities commenced between fourteen and nineteen cases apiece. The identities and frequency of filings of the five most active plaintiffs are set out in Table 1.

Plaintiff	Number of Cases	Percentage
Dodeka LLC	107	21.10%
LVNV Funding LLC	75	14.79%
CACV of Colorado LLC	52	10.26%
CACH LLC	52	10.26%
Resurgence Financial LLC	40	7.89%
<b>Total</b>	<b>326</b>	<b>64.30%</b>

Table 1: Identity and Frequency of Plaintiff

Somewhat surprisingly, of the thirty-five different debt buyers represented in the sample, nine, or about 25%, failed to comply with Texas law requiring debt collectors to file a bond and did not have active bonds on file for calendar year 2007.<sup>121</sup> Their failure to do so amounts to a *per se* violation of the Texas Debt Collection Act,<sup>122</sup> as well as a violation of the Texas Deceptive Trade Practices Act.<sup>123</sup> The unbonded plaintiffs accounted for thirty-eight cases, or 7.49% of the cases examined in the study. Although those numbers may seem insignificant, when that percentage is applied to the total number of cases filed in the county, it can be estimated that unbonded

<sup>120</sup> See Silver-Greenberg, *supra* note 38.

<sup>121</sup> Memo from Justin Light to Mary Spector, Associate Professor of Law, Dedman School of Law (on file with the author) (August 13, 2010) (detailing results of research on the search engine available through the Office of the Secretary of State at <http://direct.sos.state.tx.us/debtcollectors/DCSearch.asp>).

<sup>122</sup> TEX. FIN. CODE ANN. § 392.101 (West 1997).

<sup>123</sup> See *Marauder*, 301 S.W.3d at 821.

debt buyers filed approximately 1,200 cases during 2007.<sup>124</sup> Had any of the defendants in those cases been aware of the unbonded status of the plaintiff, they might have been able to avoid the suits altogether and even to obtain injunctive relief and statutory damages for the debt collectors' conduct.<sup>125</sup> However, none of the thirty-five defendants in the study raised those claims or defenses.<sup>126</sup> Indeed, only two defendants sued by unbonded plaintiffs even appeared. Six cases resulted in a default judgment, and two resulted in a greed judgment calling for a monthly payout.

*b. Original Creditors*

Unsurprisingly, the top three credit card issuers in the nation were among those responsible for most of the underlying debt;<sup>127</sup> however, researchers could not always determine the identity of the original creditor from the plaintiff's allegations. In many of the cases in which plaintiffs did not formally allege the original creditor's identity, the identity was often indicated in the caption or style of the case. When it was not, and the petition did not contain any allegations or hints of any kind regarding the original creditor's identity, careful review of affidavits or exhibits to affidavits submitted in support of the petition provided the only clues of the original creditor's identity. In eight cases, however, researchers found no information at all regarding the identity of the original creditor anywhere in the case file.

Original Creditor	Number of Accounts	Percentage
Citi	134	26.27%
Chase	84	16.47%
Providian	49	9.61%
Bank of America	47	9.22%
<b>Total</b>	314	61.57%

Table 2: Identity and Frequency of Original Creditors

124 However, note that fifteen of the sample cases initiated by an unbonded plaintiff were brought by the same plaintiff.

125 See *Marauder*, 301 S.W.3d at 821-22.

126 Other defenses relating to the plaintiff's ability to collect the debt might also be available, particularly where the plaintiff's connection to the underlying debt is not clearly established though evidence of a valid assignment or otherwise. See, e.g., *U.S. Bank Nat'l Ass'n v. Ibanez*, 941 N.E.2d 40 (Mass. 2011) (invalidating foreclosure where purported assignee of original mortgage failed to sufficient evidence of assignment).

127 GAO REPORT, *supra* note 1, at 3-4.

Including the identity of the original creditor in an allegation can be critical to ensuring due process,<sup>128</sup> establishing that the plaintiff owns the account,<sup>129</sup> and giving notice to a defendant regarding the availability of defenses and counterclaims.<sup>130</sup> Proper identification of the original creditor may also be necessary to comply with the FDCPA's obligation to validate the debt.<sup>131</sup> Slight differences in corporate names can carry legal significance. For example, Texas law contains numerous rules and regulations regarding the reservation, registration, and use of corporate names.<sup>132</sup> Among them is the requirement that out-of-state financial institutions must file an application with the Secretary of State before operating a branch within the state.<sup>133</sup> State law also requires that an entity doing business under a name other than its legal name file an assumed name certificate with the Secretary of State and in each county in which it maintains business premises.<sup>134</sup> An entity that fails to do so may be liable to an opposing party for the "expenses incurred, including attorney's fees, in locating and effecting service of process on the defendant."<sup>135</sup> Significantly, however, subtle differences in the proper identification of business entities in litigation likely often go unnoticed by unrepresented individual consumers who may not fully appreciate the legal significance of proper identification.<sup>136</sup>

Even where the plaintiff provided some information with which to identify the original creditor, however, the data contained substantial variations. For example, an original creditor with the name of "Citibank" was identified in 77 cases, a creditor by the name of "Citibank (South Dakota)"

---

128 BROKEN SYSTEM, *supra* note 5, at 16 (describing some judges' concerns that consumers often do not recognize plaintiffs).

129 See *U.S. Bank Nat'l Ass'n*, 941 N.E.2d at 40 (holding that banks unable to prove ownership at time of foreclosure were not entitled to foreclose); see also *infra* Section IV.D. (discussing sufficiency of the pleadings).

130 See BROKEN SYSTEM, *supra* note 5 and accompanying text.

131 See 15 U.S.C. § 1692g. Although the collector's initial pleading is not treated as a communication which must contain the required validation, see 15 U.S.C. § 1692g(d), improper identification in the pleading might nevertheless amount to deceptive or misleading conduct in violation of 15 U.S.C. § 1692e(10).

132 TEX. BUS. ORG. CODE ANN. §§ 5.001-5.155 (West 2009).

133 TEX. FIN. CODE § 201.102.

134 See TEX. BUS. & COM. CODE § 71.101 (2009).

135 TEX. BUS. & COM. CODE § 71.201(b); cf. TEX. BUS. & COM. CODE § 17.46(b) (establishing that in some circumstances, a corporate entity's failure to identify itself properly can amount to a deceptive trade practice).

136 All eight of the cases in which the plaintiffs failed to identify the original creditor were dismissed by the plaintiff or by the parties jointly without prejudice to the plaintiff's refiling. The orders disposing of two of the cases, however, indicated that the parties settled prior to dismissal.

appeared in 39 cases, and a creditor identified as “Citibank (South Dakota) N.A.” was identified in three cases. Recognizing that some differences might be explained by researcher error, cases identifying “Citi” as an original creditor were rechecked for accuracy. Table 3 identifies all of the cases in which an original creditor’s name included the word “Citi.”

Citibank	77
Citibank (South Dakota)	39
Citi-Sears	9
Citibank (South Dakota) N.A.	3
Citibank South Dakota	1
Citibank/Home Depot	1
Sears-Citi-Sears	1
Sears or Citibank	1
Citibank Credit Services, Inc. (USA)	1
<b>Total</b>	133

Table 3: Number of Original Creditors with “Citi” in Name

Many variations were also found with “Chase” as part of the original creditor’s name, as seen in the next table.

Chase Manhattan Bank	39
Chase	24
Chase Manhattan	5
Chase Visa/Master Card	5
Chase/Bank One	3
Bank One (subs. merged w/ Chase Bank)	2
Chase Bank	1
Chase Bank NA	1
Chase Bank USA	1
Chase Bank USA NA	1
Chase Manhattan Bank USA	1
Chase Manhattan Bank USA, NA	1
JP Morgan/Chase	1
<b>Total</b>	85

Table 4: Number of Original Creditors with “Chase” in Name

Subtle differences in entity names can signify independent corporate

entities with independent legal rights and responsibilities; however, none of the nine “Citi” entities identified by plaintiffs as original creditors in Table 3 were registered as legal entities with Texas’ Office of the Secretary of State during the period in which the cases were pending. A search of the online business service, which is provided by the Office of the Secretary of State, for the term “Citibank” revealed nine filings; however, only one of them—for an entity identified as “Citibank Texas N.A.”—was in existence for any length of time prior to and during the year in which the collection cases were filed. Yet, that entity was not identified as an original creditor in any of the cases examined. The charter for a second entity, “Citibank, N.A.,” was cancelled in October of 2007, and charters for another five were either “cancelled,” “dissolved,” or “forfeited” prior to 2007; the remaining entities did not appear to be related.<sup>137</sup>

Likewise, a search for the term “Chase Manhattan Bank,” identified in Table 4 as an original creditor in 39 cases, revealed a total of 24 filings with the Secretary of State, only one of which was an exact match; however, that entity was identified as a “foreign corporate fiduciary” whose charter was cancelled in 2002. The same search revealed a close match with another entity identified as “*The* Chase Manhattan Bank” (emphasis added) that had a valid charter pre-dating and post-dating 2007; however, that entity was not identified in any of the 85 “Chase” cases as being an original creditor.<sup>138</sup> The search revealed no other matches to the remaining “Chase” entities identified in Table 4.

Improper identification of an original creditor has at least two consequences. First, it could easily frustrate a consumer’s third-party claim by making it difficult, if not impossible, to locate and serve the creditor, much less enforce any judgment obtained against it. It could also provide the basis for a valid counterclaim in the collection case. If the defendants in any of the “Citi” or “Chase” cases established that the plaintiff improperly identified the original creditor, they may have been entitled to statutory damages for a

---

137 This information is available with a password at <http://direct.sos.state.tx.us/home/home-corp.asp> (follow “Find Entity” hyperlink and search “Citibank.” Similar results were achieved searching more broadly with the term “Citi”). Reports of the searches performed in this manner are on file with the author.

138 This information is available with a password at <http://direct.sos.state.tx.us/home/home-corp.asp> (follow “Find Entity” hyperlink and search “chase manhattan bank.”). Reports of the searches performed in this manner are on file with the author. A similar search using the term “Chase Bank” reported twelve filings. One of them, an entity identified as JPMorgan Chase Bank, National Association, appears to be a close match to “JPMorgan/Chase,” which was identified as an original creditor in one case. Reports of both of the Chase searches are on file with the author.

violation of the FDCPA's requirement to accurately validate the debt.<sup>139</sup>

*c. The Law Firms*

Levels of concentration similar to those found among plaintiffs and creditors also existed among the law firms representing them. Five law firms were responsible for filing 309 cases, or 60% of the sample. A sixth firm filed 47 cases, making six firms responsible for a total of 356 cases, or 69.6% of the sample. Although the economics of the debt collection practice is beyond the scope of this article, the volume of cases handled by individual lawyers and their firms must be considered as a factor in the conduct of the collection litigation and should be the subject of further research.<sup>140</sup>

*2. The Defendants and Their Attorneys*

Defendants in all 507 cases were individuals or pairs of individuals. Gender was determined by the name of the defendant. Gender neutral names and names otherwise not indicative to the researchers of gender were categorized as "Unidentified," rather than assigned a gender.

The findings indicated that far more men than women were sued as individual defendants. Nearly 50% were men, but just over one-third were female. Researchers were not able to determine gender in 11.24% of the cases.<sup>141</sup>

---

139 See 15 U.S.C. § 1692g. See generally *Dewees v. Legal Servicing, LLC*, 506 F. Supp. 2d 128, 132-33 (E.D.N.Y. 2007) (denying motion to dismiss § 1692g claim where debt collector improperly identified the original creditor); *Schneider v. TSYS Total Debt Mgmt., Inc.*, 2006 WL 1982499 (E.D. Wis. 2006) (denying collector's motion to dismiss where it was "impossible for this court to decide" whether collector's identification of original creditor as simply "Target" was sufficient).

140 See, e.g., Andrew Keshner, *Problems Faced by Pro Se Defendant Are Typical for Debtors Too Poor to Hire Experienced Counsel*, N.Y. L.J. (Jan. 21, 2011); see *infra* Section IV.D. (discussing substance of pleadings) and Section IV.E. (discussing outcomes).

141 Cultural differences between researchers and defendants might account for the inability to identify certain names as either male or female. Other names, such as "Terry," are commonly used by both men and women.

Gender	Number of Cases	Percent
Male Only	251	49.51%
Female Only	178	35.11%
Unidentified	57	11.24%
Pairs of Individuals	21	4.14%
<b>Total</b>	507	100.00%

Table 5: Gender of Defendants

These statistics are consistent with government data that show men of every age and experience level earn and spend more than women at the same level.<sup>142</sup> Certain choices about debt collection made on the basis of sex or marital status may trigger other important consumer protections.<sup>143</sup> Of course, characteristics other than the defendant's gender also play a role in plaintiffs' decision to initiate litigation to collect a debt. Some are permissible, such as the availability of assets to satisfy a judgment or the existence of other pending litigation involving the defendant. Others, such as race and ethnicity, are not.<sup>144</sup> Accordingly, additional research regarding the extent to which defendant's gender is a factor in plaintiffs' decisions regarding litigation to collect debts arising from the extension of credit may be necessary.

---

142 U.S. DEPT. OF LABOR & U.S. BUREAU OF LABOR STATISTICS, HIGHLIGHTS OF WOMEN'S EARNINGS IN 2008, REPORT NO. 1017 (July 2009), <http://www.bls.gov/cps/cpswom2008.pdf>.

143 *E.g.*, The Equal Credit Opportunity Act, 15 U.S.C. § 1691(a)(1). *Cf.* *Edwards v. Hocking Valley Comm. Hosp.*, 2004 WL 237609 (3d Cir. Feb. 6, 2004) (enforcing settlement of widow's claims that hospital violated Equal Credit Opportunity Act in connection with its attempt to collect for services rendered to deceased husband).

144 *E.g.*, 15 U.S.C. § 1691(a)(1). Lenders may also market their products to particular groups which may account for higher or lower representation among accounts placed for collection. *See also* Steven M. Graves & Christopher Peterson, *Predatory Lending and the Military: The Law and Geography of "Payday" Loans in Military Towns*, 66 OHIO ST. L.J. 653, 690-698 (2005); OZLEM TANIK, CENTER FOR RESPONSIBLE LENDING, PAYDAY LENDERS TARGET THE MILITARY: EVIDENCE LIES IN INDUSTRY'S OWN DATA 1 (Sept. 2005), [http://www.responsiblelending.org/pdfs/ip011-PaydayMilitary\\_0905.pdf](http://www.responsiblelending.org/pdfs/ip011-PaydayMilitary_0905.pdf) (last visited Mar. 1, 2007); URIAH KING ET AL., CENTER FOR RESPONSIBLE LENDING, RACE MATTERS: THE CONCENTRATION OF PAYDAY LENDERS IN AFRICAN-AMERICAN NEIGHBORHOODS IN NORTH CAROLINA 2 (Mar. 22, 2005), [http://www.responsiblelending.org/north-carolina/nc-payday/research-analysis/racematters/rr006-Race\\_Matters\\_Payday\\_in\\_NC-0305.pdf](http://www.responsiblelending.org/north-carolina/nc-payday/research-analysis/racematters/rr006-Race_Matters_Payday_in_NC-0305.pdf).

### C. Service, Appearance, and Representation of Defendants

#### 1. Service

Somewhat surprisingly, plaintiffs did not accomplish service in more than 12% of the cases filed, and those cases were dismissed without prejudice upon the request of either the plaintiff or the court.

Little information regarding non-service exists in Texas or elsewhere. For example, the Texas Office of Court Administration measures the number of “Dismissals for Want of Prosecution or by Plaintiff,” but it does not separately identify how many dismissals occurred because the plaintiff failed to obtain service.<sup>145</sup> Large numbers of filings that are not fully litigated suggest, at a minimum, an unnecessary burden on the courts.

Far more insidious than a dismissal after non-service, however, is entry of a default judgment after the filing of a false affidavit of service, a phenomenon known colloquially as “sewer service.”<sup>146</sup> In California, it is unlawful for a collector to engage in judicial proceedings to collect a debt when it knows that service or process has “not been legally effected.”<sup>147</sup> Recent efforts to curb the practice in New York City resulted in the arrest of at least one process server for the filing of fraudulent affidavits in connection with non-service of defendants and led to overall tougher requirements for process servers doing business in the city.<sup>148</sup>

Indeed, the high rate of dismissals following non-service in the Dallas County cases suggests that sewer service may not be as prevalent there as it elsewhere.<sup>149</sup> Although more research is necessary to understand the role of

---

145 Telephone interview with Angela Garcia, Judicial Information Manager, Texas Office of Court Administration (June 22, 2010). Dismissals without prejudice are discussed in more detail in Section IV.E., *infra*.

146 DEBT WEIGHT, *supra* note 18, at 22-23.

147 CAL. CIV. CODE § 1788.15(a).

148 Ray Rivera, *Council Seeks to Crack Down on Process Servers Who Lie*, N.Y. TIMES, Feb. 26, 2010, at A18. In early 2011, a Dallas County auditor found evidence that deputy constables had lied about obtaining service of process in a range of civil matters. Reports focused on the widespread nature of such conduct—allegedly involving over half of the deputies who serve civil papers—and the role it may have played in evictions, which are filed exclusively in the justice courts. Editorial, *Time to Unplug the Entire Constable Operation?*, DALLAS MORNING NEWS, May 19, 2011, <http://www.dallasnews.com/opinion/editorials/20110519-editorial-time-to-unplug-the-entire-constable-operation.ece>. Little is known, however, about the extent to which alleged wrongdoing by the constables played a role in collection cases filed outside of the justice courts.

149 *See, e.g.*, DEBT DECEPTION, *supra* note 18, at 1.



non-service in consumer debt collection cases, it is possible that the relatively high rate of non-service may partially explain the rate of default judgments discussed below.<sup>150</sup>

## 2. Appearance by the Defendant

Where there was evidence in the file that the defendant had been served, researchers recorded any indication that the defendant attempted to respond to the suit as an “appearance,” even if the communication did not technically comply with procedural requirements for an “answer.”<sup>151</sup> Under these criteria, defendants appeared in 102 cases, or 20.12% of the time. However, because a defendant cannot “appear” if the plaintiff did not accomplish service, a more accurate measure of the appearance rate considers only the cases in which the defendant was served. Under this measure, the defendants appeared in 22.87% of the cases in which they were served. The following tables present the results of these two measures of defendant appearance.

Appearance	Number of Cases	Percentage
No Appearance	344	67.85%
Appearance	102	20.12%
No Service	61	12.03%
<b>Total Cases Filed</b>	507	100.00%

Table 6: Appearance in All Cases Filed

Appearance	Number of Cases	Percentage
No Appearance	344	77.13%
Appearance	102	22.87%
<b>Total Cases Served</b>	446	100.00%

Table 7: Appearance in Served Cases Only

Under each measure, the appearance rate is nearly twice the rate reported by the Urban Justice Center in New York City courts.<sup>152</sup> The low rate of appearance in New York City courts may be partially attributable to sewer service; however, the report did not mention any evidence of cases in which

<sup>150</sup> See *infra* notes 182-83 and accompanying text.

<sup>151</sup> See TEX. R. CIV. P. 83 (Answer; Original and Supplemental; Endorsement), 84 (Answer May Include Several Matters), 85 (Original Answer, Contents), 92 (General Denial) and 93 (Certain Pleas to be Verified).

<sup>152</sup> DEBT DECEPTION, *supra* note 18, at 1.

plaintiffs abandoned the litigation because service was not achieved.<sup>153</sup> While the broad definition of “appearance” used in the Dallas study may explain some of the difference between the two rates of appearance, the number suggests that Dallas plaintiffs did a better job of actually accomplishing service than their counterparts elsewhere.

### 3. Representation of Defendants by Attorneys

Defendants who appeared in the litigation were not surveyed regarding their choices to appear or to seek representation. Accordingly, it is difficult to determine what factors influenced their decisions. Nonetheless, certain patterns can be drawn from the empirical data. As shown in Table 8, 9.87% of defendants served retained counsel and 43.14% of defendants who appeared retained counsel; however, only about 8% of all defendants retained counsel.

	<b>Method of Appearance (x)</b>	<b>Percent of All Cases Filed (x/507)</b>	<b>Percent of Defendants Served (x/446)</b>	<b>Percent of Defendants Who Appeared (x/102)</b>
Pro Se	58	11.44%	13.00%	56.86%
Attorney	44	8.68%	9.87%	43.14%
<b>Total</b>	102	20.12%	22.87%	100.00%

Table 8: Appearance and Representation among All Defendants Served

Researchers have explored defendants’ behavior in other contexts in attempts to explain a defendant’s choice to appear or not to appear. For example, Eric Larson found that tenants from geographic areas with the highest concentration of poverty exhibited the highest rate of default in eviction cases, even when taking into account the merits of any available defenses.<sup>154</sup> In contrast, he found higher rates of appearance and participation among tenants with higher monthly rents and meritorious defenses.<sup>155</sup> While the data discussed in this Article does not provide sufficient information to determine whether similar results would be found in

<sup>153</sup> *Id.*

<sup>154</sup> Eric Larson, *Case Characteristics and Tenant Default in a Housing Court*, 3 J. EMP. LEG. STUD. 121, 136 (2006).

<sup>155</sup> *Id.* at 121.

consumer debt cases, it does suggest at least one factor that may influence defendants' decisions regarding appearance: the amount sought in the lawsuit. As illustrated in Table 9, of the 102 defendants who made an appearance, 53, or slightly more than half, did so in cases in which the plaintiff sought \$5,000 to \$10,000, 29 appeared in cases seeking over \$10,000, and 20 appeared in cases seeking less than \$5,000. As illustrated in Table 10, the data show higher appearance rates in cases seeking between \$5,000 and \$10,000 and lower rates above and below those values. Further research is necessary to fully explain these results.

	<b>Less than \$5,000</b>	<b>\$5,000 to \$10,000</b>	<b>More than \$10,000</b>
Appearance	20	53	29
No Appearance	99	135	110
<b>Total</b>	119	188	139

Table 9: Frequency of Appearance by Amount Sought

	<b>Less than \$5,000</b>	<b>\$5,000 to \$10,000</b>	<b>More than \$10,000</b>
Appearance	16.81%	28.19%	20.86%
No Appearance	83.19%	71.81%	79.14%
<b>Total</b>	100.00%	100.00%	100.00%

Table 10: Appearance Rate by Amount Sought

## D. Substance of the Pleadings

### 1. Due Process Concerns

As previously discussed, the FTC expressed serious concerns regarding debt collectors' conduct in litigation and recently advised collectors that their petitions should allege, at a minimum, five categories of information: "1) the identity of the original creditor; 2) date of default or charge-off and amount due at that time; 3) name of current owner of the debt; 4) amount currently due on the debt and 5) a breakdown of the amount due showing principal, interest and fees."<sup>156</sup> The FTC expressed the belief that such information would likely provide defendants with sufficient information to admit or deny the claims against them and would likely provide judges with sufficient

---

<sup>156</sup> BROKEN SYSTEM, *supra* note 5, at 17.

information to determine whether to enter a default judgment.<sup>157</sup>

All of the cases contained some allegation regarding the identity of the plaintiff or the current owner of the debt and most contained allegations regarding the original creditor;<sup>158</sup> however, with one exception, the plaintiffs' petitions failed to allege any of the remaining kinds of information the FTC recommended.<sup>159</sup>

In all of the cases reviewed, plaintiffs specifically alleged the dollar amount sought. Amounts sought ranged from \$1,045.65 to \$45,958.51. Somewhat surprisingly, more than half the cases sought less than \$10,000, an amount over which the justice court maintains concurrent jurisdiction.<sup>160</sup>

Mean	\$8,394.16
Standard Deviation	\$5,180.85
Minimum	\$1,045.65
25th Percentile	\$4,951.93
Median	\$7,146.37
75th Percentile	\$11,115.66
Maximum	\$45,958.51

Table 11: Amount Sought in All Cases Filed

Less than 5% of the cases, however, contained any allegations breaking down the total amount sought into component parts of principal, interest, and fees. Likewise, less than 5% of the cases contained allegations regarding payment history, such as the date of default or date of the last payment. In other words, in more than 95% of the cases, plaintiffs failed to provide defendants with any information in at least two of the categories the FTC has

---

157 *Id.*

158 *See supra* Part IV.B.1.b. (discussing findings that 8 of the 507 cases failed to contain any information regarding the original creditor).

159 Of course, allegations regarding the identity of the plaintiff and the original creditor without proof of an assignment from the original creditor and/or intermediate assignee can be fatal to the plaintiff's claims to collect a debt. *See U.S. Bank Nat'l Ass'n*, 941 N.E.2d at 40 (invalidating foreclosure where purported assignee of original mortgage failed to sufficient evidence of assignment).

160 However, because the maximum dollar amount that may be sought in the justice court includes attorneys' fees, attorneys seeking fees in connection with the account would be capped if the total of damages and fees exceeded the jurisdictional limits of the court. *See Op. Tex. Att'y Gen. No. JM-409* (1985) (describing long history of treating attorneys' fees as part of amount in controversy when considering jurisdictional limits of justice courts).

identified as being critical to providing due process.<sup>161</sup>

In contrast, more than 30% of the cases contained fairly detailed allegations regarding the calculation and amount of attorneys' fees sought. The following table illustrates the type and frequency of allegations found in the 507 case files.

	<b>Number of Cases</b>	<b>Percent</b>
Calculation of Attorney's Fees	191	30.20%
Date of Last Payment or Date of Default	30	4.70%
Identification of Fees (e.g., late payment, over-the-limit, etc.)	29	4.60%
Calculation of Interest	3	0.50%
Signed Credit Agreement Attached to Petition or Affidavit	1	0.20%

Table 12: Nature of Allegations

## 2. Evidence of Allegations

While the absence of certain allegations is troublesome, the data also revealed significant problems with many of the *included* allegations, particularly with regard to supporting affidavits. The supporting affidavit problems fall into two general categories. The first involves misuse of the sworn account procedure designed to facilitate proof of a debt in circumstances where a merchant or tradesman sells goods or services "on account" and keeps only a record of the items sold.<sup>162</sup> The second involves sufficiency of the evidence submitted to prove the existence and amount of the debt.

With respect to the first category, Texas law permits proof of an account through the use of a report or summary of the account accompanied by an affidavit.<sup>163</sup> There must be testimony that the report or summary was "made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the . . . report, record or data compilation."<sup>164</sup> Evidence of compliance can be

---

<sup>161</sup> At least two unrepresented defendants appeared to contest that the account was theirs. Both cases resulted in dismissal.

<sup>162</sup> See TEX. R. CIV. P. 185.

<sup>163</sup> See *id.*

<sup>164</sup> TEX. R. EVID. 803(6).

offered through the testimony of the custodian of records “or other qualified witness,” either through live testimony or in the form of an affidavit.<sup>165</sup> Compliance with these pleading requirements creates a presumption, only challengeable by a sworn statement of the defendant, that the account stated is correct.<sup>166</sup>

Although courts have held this procedure inapplicable to suits seeking to recover a credit card debt,<sup>167</sup> plaintiffs’ submission of affidavits in almost 400 cases suggests an intent on their part to trigger the presumption. Any misuse of the sworn account procedures by plaintiffs and their attorneys may result from harmless mistake or unfamiliarity with a rule that may not be consistently applied;<sup>168</sup> however, it may also indicate their desire to gain an unfair advantage in litigation and may even amount to an unfair or deceptive collection practice to the extent that it falsely represents “the character” of a consumer debt.<sup>169</sup>

Even if the procedures governing the suit on account were applicable to credit card cases, however, plaintiffs’ affidavits would still have to comply with the rules requiring that a summary be compiled by “a person with knowledge” regarding either the underlying data or “the method or circumstances of preparation” of the summary.<sup>170</sup> Because debt buyers purchase their accounts after default, it would be highly unlikely, as a practical matter, that any of their employees would possess sufficient “personal knowledge” to testify under oath about the creation of the underlying account or any other details regarding the account.<sup>171</sup>

Yet, in 397 of the 400 cases where affidavits were filed—or in more than 78% of all the cases—the affidavits were made by an employee of the plaintiff who purported to have actual knowledge that an amount contained in the

---

165 *Id.* (Testimony or affidavit may be used “unless there is an indication of lack of trustworthiness.”).

166 The procedure was designed to permit the merchant who sold goods or services on “account,” keeping a record of items and services sold, to submit the account records in court as proof of the debt. TEX. R. CIV. P. 185.

167 See *Williams v. Unifund CCR Partners Assignee of Citibank*, 264 S.W.3d 231 (Tex. App.—Houston [1st Dist.] 2008, no pet.); *Bird v. First Dep. Nat’l Bank*, 994 S.W.2d 280 (Tex. App.—El Paso 1999, pet. denied).

168 See WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 11.05[2] (discussing courts’ inconsistent interpretation of the rule).

169 *E.g.*, 15 U.S.C. § 1692c(2)(A).

170 TEX. R. EVID. 803(6); 902(10).

171 See Holland, *supra* note 12, at 264-73 (discussing individual courts’ treatment of robo-signed affidavits and advocating use of strict proof standards). *But see* *Simien v. Unifund CCR Partners*, 321 S.W.3d 235 (Tex. App.—Houston [1st Dist.] 2010) (rejecting consumer’s challenge to debt buyer’s affidavit on application of three part test).

summary or data compilation represented an overdue account of the defendant. Furthermore, in 97.22% of the cases where an affidavit was filed, the affidavit constituted the only evidence of the validity of the account. Only 14 files contained affidavits made by an agent or employee of the original creditor.

As described above, people signing and swearing to affidavits with little or no personal knowledge of the facts recited in them are at the heart of civil and criminal investigations into banks' foreclosure practices across the country.<sup>172</sup> Although, there has been little research into the extent to which this practice exists in collection litigation in areas other than mortgages,<sup>173</sup> courts and law enforcement officials in different states have taken action against at least one debt buyer for engaging in the practice.<sup>174</sup> While the data in this study suggest that robo-signing may not be limited to a particular jurisdiction or to an individual entity engaged in credit card collection, further research is necessary to understand the extent of the practice. Likewise, additional research may also shed some light on attorneys' roles in obtaining, submitting, and relying upon such "evidence" as well as the extent to which their conduct is consistent with their professional responsibilities to the courts and the public.<sup>175</sup>

## E. Outcomes

Based on the above information, one might have predicted that the data regarding outcomes would reveal that the vast majority of cases result in a

---

172 Robie Whelan, *GMAC Spotlight on "Robo-Signer,"* WALL ST. J., Sept. 22, 2010, available at <http://online.wsj.com/article/SB1000014240527487033994045755063>; Meier, *supra* note 11; Sophia Pearson, *Ally's GMAC Dismisses 250 Maryland Foreclosures,* BLOOMBERG BUSINESS WEEK, Jan. 19, 2011, available at <http://www.bloomberg.com/news/print/2011-01-19/ally-s-gmac>.

173 Jessica Silver-Greenberg, *Dead Soul is a Debt-Collector,* WALL ST. J., Dec. 31, 2010, available at [http://online.wsj.com/article/SB10001424052970204204004576049902142690400.html?mod=rss\\_whats\\_news\\_us&utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+wsj/xml/rss/3\\_7011+%28WSJ.com%3A+What%27s+News+US%29&utm\\_content=Google+Reader](http://online.wsj.com/article/SB10001424052970204204004576049902142690400.html?mod=rss_whats_news_us&utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+wsj/xml/rss/3_7011+%28WSJ.com%3A+What%27s+News+US%29&utm_content=Google+Reader). *But see* Holland, *supra* note 12, at 268-72 (discussing courts' scrutiny of supporting affidavits in debt collection cases).

174 *See, e.g.,* Brent v. Midland Funding, LLC, 2011 WL 8362363 (N.D. Ohio 2011) (approving \$5.2 million class settlement of FDCPA claims against debt buyer for filing robo-signed affidavits); David Shaffer, *State files suit against debt firm,* MINNEAPOLIS STAR-TRIBUNE (Mar. 29, 2011), available at <http://www.startribune.com/business/118777379.html>.

175 *See* Haneman, *supra* note 49 (suggesting that attorneys should have heightened responsibilities when they have reason to know adversaries will be unrepresented).

default judgment for the plaintiff, with few, if any, cases resulting in a win for the defendant. The following subsections describe the extent to which the data bore out that prediction.

### 1. *Dispositions Without Prejudice to Refiling*

Researchers recorded outcomes by placing the title of the order disposing of the case into one of eight categories: default judgments, dismissals without prejudice, nonsuits,<sup>176</sup> agreed judgments, dismissals with prejudice, closed for bankruptcy, affirmative recovery for defendant and other.<sup>177</sup> A dismissal without prejudice occurred in 51.25% of cases in which the defendant was served and jumped to 61.77% when the defendant appeared. It jumped even higher—to 75%—in cases in which the defendant appeared with an attorney.

Although both the nonsuit and the dismissal without prejudice result in the end of the lawsuit and the dismissal of a plaintiff's claims without prejudice to refiling, the former suggests it was the plaintiff's choice to dismiss the claims, while the latter suggests the dismissal was initiated by the court.<sup>178</sup>

Other irregularities were recorded in connection with dismissals entered without prejudice. For example, it is common practice in the jurisdiction for the parties to file a dismissal *with* prejudice following the settlement or resolution of the parties' dispute;<sup>179</sup> however, the files of six of the cases in which the disposition occurred *without* prejudice revealed that the parties reached an agreement.<sup>180</sup> Hence, despite the apparent existence of an agreement settling the case, the plaintiff maintained the right to sue on the same underlying claims. Another five cases contained dispositive orders with titles indicating dismissals *without* prejudice even though the orders stated that

---

176 In Texas, the plaintiff has an absolute right to dismiss some or all of its claims prior to the presentation of all evidence supporting those claims. TEX. R. CIV. P. 162.

177 These categories differed slightly from the categories used by the Texas Office of Court Administration, which combined court and plaintiff initiated dismissals without prejudice. The seven categories used by the Texas Office of Court Statistics are: default judgments, agreed judgments, judgments after trial—no jury, judgments by jury verdicts, dismissed for want of prosecution or by plaintiff, show causes disposed, and other dispositions.

178 See TEX. R. CIV. P. 162 (Plaintiff “may dismiss a case, or take a non-suit, which shall be entered in the minutes.”).

179 See generally WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 102.04[1] (The goal of settlement is to end litigation “both pending and contemplated.”).

180 There was no indication that an attorney assisted the defendants in the negotiation of these agreements, a factor which likely would have led to the inclusion of provisions prohibiting the parties from further litigation on the merits.



the dispositions occurred *with* prejudice.<sup>181</sup> Finally, one case containing an order entitled “Nonsuit” also contained evidence that the *defendant* obtained the dismissal after the *plaintiff* failed to appear.

## 2. Defaults

Just as surprising as the number of dismissals was the number of defaults. In contrast to reports from other jurisdictions,<sup>182</sup> defaults occurred in just 39.46% of all cases. The majority of cases were dismissed without prejudice either by the judge or by the plaintiff. The following tables illustrate the outcomes of all cases in which the defendant was served:

<b>Outcomes</b>	<b>All Cases Served</b>	<b>Percentage</b>
Dismissal without Prejudice by Court or Plaintiff	229	51.35%
Default Judgment	176	39.46%
Agreed Judgment	22	4.93%
Dismissed with Prejudice	9	2.02%
Closed for Bankruptcy	4	0.90%
Affirmative Recovery for Defendant	3	0.67%
Other	3	0.67%
<b>Total</b>	<b>446</b>	<b>100.00%</b>

Table 13: Outcomes in Served Cases

181 See TEX. R. CIV. P. 162. *Cf.* Travelers Ins. Co. v. Joachim, 315 S.W.3d 860 (Tex. 2010) (illustrating differences between dismissals with and without prejudice following dismissal).

182 See *supra* note 83 and accompanying text.

Type of Appearance	None	Pro Se	With Attorney	All Cases
Dismissal without Prejudice by Court or Plaintiff / Nonsuit	170	27	32	229
Default Judgment	166	9	1	176
Agreed Judgment	7	13	2	22
Dismissal with Prejudice	1	4	4	9
Closed for Bankruptcy	0	2	2	4
Affirmative Recovery for Defendant	0	1	2	3
Other	0	2	0	3
<b>Total</b>	344	58	44	446

Table 14: Outcomes and Appearance in Served Cases

The data suggest that by merely appearing, the defendant, at least temporarily, will likely avoid a default judgment and liability. In some cases, the defendant's appearance resulted in the permanent avoidance of liability. In two of the three cases in which an affirmative judgment for the defendant occurred, the defendant's appearance, without more, resulted in a final judgment in his favor. In one case, the defendant appeared for trial but the plaintiff did not, and the court entered judgment for the defendant. In the second, both parties proceeded to trial after the court denied the plaintiff's request for a continuance. Despite the plaintiff's presentation of two witnesses, the court ruled that the plaintiff failed to carry its burden and entered judgment for the defendant.

Obviously, the defendant's level of participation in the case made a difference in the outcome of the case. What is surprising, however, is how minimal the defendant's participation need be to alter the outcome of the case dramatically. Simply showing up can be the key to success.<sup>183</sup>

---

183 As allegedly said by filmmaker and author Woody Allen, "eighty percent of life is showing up." See FRED R. SHAPIRO, *THE YALE BOOK OF QUOTATIONS* (2006) (attributing quote to Woody Allen as reported in the *New York Times* on August 21, 1977).

## V. CONCLUSION

This study is a first step in the collection of empirical data regarding litigation initiated by debt buyers to collect consumer debts.<sup>184</sup> While it is premature, at best, to draw too many conclusions from the data, one thing is clear: the data are largely consistent with many of the anecdotal reports regarding collection litigation and provide empirical support for some of the more serious concerns expressed by the Federal Trade Commission in its July 2010 report. Specifically, the study confirmed that many consumers do not participate in the litigation and that debt buyers provide consumers with very little information concerning the debt. For example, of the 507 cases examined:

- More than 95% of the complaints failed to provide any information regarding date of default or calculation of the amount allegedly owed, allegations the FTC suggests are necessary to insuring due process.
- More than 78% of cases contained affidavits having characteristics of robo-signing.
- Nearly 40% of all cases resulted in default judgment.
- More than 25% of the collectors failed to file state-mandated bonds and, therefore, were operating outside the law at the time they filed their suits.
- Fewer than 10% of defendants retained counsel.

The data provided little evidence, however, that faulty service played a role in the entry of judgments. Indeed, slightly more than 12% of the cases were dismissed before the defendants were served. Of those that remained, more than half resulted in a dismissal without prejudice. While the high rate of dismissal may indicate that “sewer service” was not a problem in the jurisdiction, it may raise other questions regarding debt collectors’ use of the courts as a tool in the collection process.

In addition, the findings suggest at least three areas for further study. First, the data leave open several questions regarding collectors’ conduct in the litigation they initiate, including the initial decisions about whether to commence litigation, particularly in light of the high rate of dismissals without final judgment. Other questions involve the role of gender, if any, in collectors’ decisions regarding collection; and the role that law firm economics plays in the litigation. Additional research should also explore the

---

184 Judith Fox, Associate Clinical Professor of Law at Notre Dame Law School, is engaged in a similar project, *Debt Collection: A Survey of Indiana Courts*, in collaboration with the consumer protection division of the Indiana Office of the Attorney General.

practices of collectors and their attorneys in preparing affidavits and preserving other evidence intended to be submitted to a court.

The data also suggest additional areas for research regarding consumer behavior. For example, researchers may explore decisions and attitudes regarding the accumulation and payment of debt, as well as factors influencing consumers' decisions about participating in the judicial process, particularly in light of the finding that by simply appearing in the litigation—without more—the consumer has the ability to dramatically increase the likelihood of a favorable result. Because the collection process does not end with the judgment, researchers may also wish to explore the consequences of such litigation on consumers after its conclusion. For example, attention might be paid to the role of the litigation, and any resulting judgment, in calculating credit scores when determining eligibility for future employment, insurance, or credit.

The third area for future research concerns the courts. First, attention should be paid to the courts' role in ensuring due process and the effectiveness of existing rules of practice. Additionally, because the data suggest that such cases account for nearly a quarter of all civil litigation, researchers may wish to explore the impact, economic or otherwise, the litigation has on judicial resources.

Despite the many aspects of the litigation that remain to be explored, this study nevertheless provides an important starting point for understanding the impact consumer collection litigation has on consumers and the courts. It also provides rule makers, legislators, and the courts with important tools to insure that the justice system functions to protect the interests of all the parties it serves.

