

# JUNK JUSTICE: A STATISTICAL ANALYSIS OF 4,400 LAWSUITS FILED BY DEBT BUYERS

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*Abstract:* Debt buyers have flooded courts nationwide with collection lawsuits against consumers. This article reports the findings from the broadest in-depth study of debt buyer litigation outcomes yet undertaken. The study demonstrates that in debt buyer cases, (1) the vast majority of consumers lose the vast majority of cases by default the vast majority of the time; (2) consumers had no lawyer in ninety-eight percent of the cases; and (3) those who filed a notice that they intended to defend themselves without an attorney fared poorly, both in court and in out of court settlements.

This study challenges the notion that there is an “adversary system” within the context of debt buyer lawsuits. The findings suggest that no such adversary system exists for most defendants in consumer debt cases. Instead, these cases exist in a “shadow system” with little judicial oversight, which results in mass produced default judgments.

The procedural and substantive due process problems which are endemic in debt buyer cases call for heightened awareness and remedial action by the bench, the bar, and the academy. As lawyers who are “public citizens, with a special

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responsibility for the quality of justice,”<sup>1</sup> the profession can do better. This article proposes suggestions for further study, and several common sense reforms.

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<sup>1</sup> MODEL RULES OF PROF'L CONDUCT pmb1. ¶ 1 (2011).

2014

*Junk Justice*

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“We’re watching a fight between two players, one a skilled repeat gladiator, and one who’s thrown into the ring for the first time and gets clubbed over the head before they even get a sense of what the rules are.” - Elizabeth Warren, 2006.<sup>2</sup>

## INTRODUCTION

This paper examines the litigation outcomes achieved by a specific type of plaintiff: entities that purchase defaulted consumer debt from banks for pennies on the dollar, and then file lawsuits against millions of consumers for the full face value of the debt. Banks sell this junk debt after they charge it off pursuant to Treasury Regulations, and then take the full face value of the debt as a loss for tax purposes.<sup>3</sup> Junk debt arises primarily from credit cards and other unsecured debt.<sup>4</sup> It is called “junk” not only because of its low price, but also because it is often sold pursuant to “as is” contracts with broad disclaimers of warranty, with little or no documentation other than an Excel spreadsheet listing of accounts.<sup>5</sup>

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<sup>2</sup> Michael Rezendes & Francie Latour, *No Mercy for Consumers*, BOSTON GLOBE, July 30, 2006, [http://www.boston.com/news/specials/debt/part1\\_main/](http://www.boston.com/news/specials/debt/part1_main/) (quoting Elizabeth Warren).

<sup>3</sup> This “loss” is comprised not only of principal loaned, but also of all accrued interest, late fees, over-limit fees, and whatever other discretionary fees may have been added, all of which serve to increase the amount of the loss for tax purposes. The Uniform Retail Credit Classification and Account Management Policy requires the bank to charge-off an account 180 days after delinquency. Uniform Retail Credit Classification and Account Management Policy, 65 Fed. Reg. 36903 (June 12, 2000), *available at* <http://1.usa.gov/GTzwVz>. *See also* Internal Revenue Code, Bad Debts, 26 U.S.C. § 166 (2012) (providing deduction for worthless debt); 26 C.F.R. § 1.166-2(d) (2012) (evidence of worthlessness of debt as applied to banks); Rev. Rul. 2001-59, <http://1.usa.gov/GU4UGw>.

<sup>4</sup> Increasingly banks are starting to sell, and junk debt investors are starting to purchase deficiencies from secured consumer debt, such as car loans, and foreclosure deficiencies. *See infra* note 46 and accompanying text.

<sup>5</sup> According to a January, 2013 study by the Federal Trade Commission of over 5,000 portfolios of sale, four cents on the dollar is the national average, spanning the time frame between March and August of 2009. U.S. FEDERAL

Lawsuits filed by junk debt buyers expose a business model that is, literally, the buying and selling of claims to be utilized in litigation for profit.<sup>6</sup> Short of voluntary payment, the primary goal of debt-buyer lawsuits is to turn unsecured debt into court judgments, fully secured and fully collectable through garnishment and other enforcement proceedings. As is pointed out in the Federal Trade Commission's 2009 report titled *Broken System* and elsewhere, in their rush to secure judgment, debt buyers often mislead consumers and courts.<sup>7</sup>

There is a widespread belief that in our broken system, small claims courts have become an extension of the debt collection industry. There are anecdotal reports that more than 95% of all collection cases end in a judgment in favor of the

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TRADE COMM'N, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY ii (2013) [hereinafter STRUCTURE & PRACTICES], available at <http://www.ftc.gov/os/2013/01/debtbuyingreport.pdf>. *Structure & Practices* is the first major study of the inner workings of the debt buying industry, however it provides no data on the litigation behavior or success of debt buyers, a subject which is left to this and other studies.

<sup>6</sup> Assume the following scenario which, for the sake of simplicity of illustration, will use simple, rather than compound interest: on December 31, a consumer owes \$1,000 on her credit card, all of which is principal and does not include any interest, late fees or other fees. She fails to pay her credit card bill, and never makes another payment. What happens? On February 1, she will receive a bill for the \$1,000, plus 29.99% interest based on the annual percentage rate, plus a late fee for \$39. She will continue to receive these charges for the next 5 months (for a total of 6 months, or 180 days until the creditor will "charge off" the account for tax purposes). By this time, the bill will be approximately \$1,394, or almost 40% higher than it was on the day that she defaulted. This \$1,000 loan, which now includes an extra \$400 tacked on since the day the consumer stopped paying, will be sold for \$56 (assuming a sales price of 4 cents on the dollar), and the consumer will then be sued by a debt buyer for \$1,400, plus attorneys' fees of 15%, or \$210. (This assumes they will not also be seeking prejudgment interest of 29.99%). For the consumer, the price of defaulting has suddenly become 161% of the principal of the amount loaned. For the debt buyer who invested \$56, the potential return on investment is 2,800%; \$56 invested and \$1,610 returned.

<sup>7</sup> *Regulate Junk Debt*, FREDERICK NEWS-POST, Dec 18, 2011, [http://www.fredericknewspost.com/archive/article\\_071a18fb-1f4c-5687-9899-faafbcf30d9b.html](http://www.fredericknewspost.com/archive/article_071a18fb-1f4c-5687-9899-faafbcf30d9b.html) ("Part of the confusion arising from this shady practice among consumers is whether the calls they receive are to collect legitimate debt, or whether they are being taken for a ride . . . A frightening angle to this is that junk debt purchasers can sue the alleged debtor based on little but a supporting affidavit.")

collector.<sup>8</sup> At least one judge who handles debt buyer and collections cases reports that in over 90% of all such collection cases filed, the creditor lacks the requisite proof to prevail.<sup>9</sup> Instead of proof, arguably creditors rely on a *de facto* system of “default judgment justice” wherein the creditors know that very few defendants will ever challenge the lawsuit, and overwhelmed courts and judges will simply enter default judgments in order to keep the flood of paperwork from bringing the workflow to a halt.

There is a developing literature which examines the multitude of doctrinal and due process concerns that arise from this system of “default judgment justice.”<sup>10</sup> The Federal Trade Commission, the Consumer Financial Protection Bureau (“CFPB”), the National Consumer Law Center, and many others have published important studies,<sup>11</sup> and academics have demonstrated relatively recent but growing interest.<sup>12</sup>

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<sup>8</sup> See U.S. FED. TRADE COMM’N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN LITIGATION AND ARBITRATION 7, n. 18 (2010) [hereinafter BROKEN SYSTEM], available at <http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf>; Jessica Silver-Greenberg, *Lender Drops Pursuit of Debt*, WALL ST. J., June 24, 2011, at C1 (“Roughly 94% of collection cases filed against borrowers result in default judgment in favor of the lender, according to industry estimates.”).

<sup>9</sup> Jessica Silver-Greenberg, *Problems Riddle Moves to Collect Credit Card Debt*, N.Y. TIMES, Aug. 13, 2012, at A1 (“I would say that roughly 90 percent of the credit card lawsuits are flawed and can’t prove the person owes the debt” said Noah Dear, a civil court judge in Brooklyn . . .”). See also William Glaberson, *In New York, Some Judges Now Skeptical About Debt Collectors’ Claims*, N.Y. TIMES, May 7, 2010, at A15.

<sup>10</sup> See, e.g., RICK JURGENS & ROBERT J. HOBBS, NAT’L CONSUMER LAW CTR., THE DEBT MACHINE: HOW THE COLLECTION INDUSTRY HOUNDS CONSUMERS AND OVERWHELMS COURTS 1 (2010), available at <http://www.nclc.org/images/pdf/pr-reports/debt-machine.pdf> (“In pursuit of judgments, creditors and collectors have swamped small claims and other state courts with a torrent of lawsuits.”); BROKEN SYSTEM, *supra* note 8; STRUCTURE & PRACTICES, *supra* note 5.

<sup>11</sup> See sources cited *supra* note 10.

<sup>12</sup> See, e.g., Judith Fox, *Do We Have a Debt Collection Crisis? Some Cautionary Tales of Debt Collection in Indiana*, 24 LOY. CONSUMER L. REV. 355 (2011); Elizabeth Warren, *Unsafe at Any Rate*, 2007 DEM. J. 8, 10 (2007) (“Anxiety and shame have become constant companions for Americans struggling with debt. Since 2000, families have filed nearly 10 million petitions for bankruptcy. Today about one in every seven families in America is dealing with a debt collector.”); Elizabeth Warren & Oren Bar-Gill, *Making Credit*

In separate studies of Texas and Indiana, Mary Spector and Judith Fox have done groundbreaking small-scale empirical quantitative and qualitative analyses of state court filings in these cases.<sup>13</sup> The National Center for State Courts has done a rough categorization of “contract” cases filed, most of which are collection cases.<sup>14</sup> Important new analyses, notably by Dalié Jiménez, are emerging of the “as is” sales and purchase contracts which exist between original creditors and debt buyers, and between initial and subsequent purchasers.<sup>15</sup> Regulatory actions, notably by the Office of the Comptroller of the Currency (“OCC”), have resulted in settlements, including one where JP Morgan Chase “neither admits nor denies” that in its collection litigation it filed false affidavits, filed false documents that resulted in financial errors in favor of the bank, and failed to have in place processes and systems to ensure the accuracy and integrity of accounts sold to debt buyers.<sup>16</sup> In light of the flood of lawsuits, the anecdotal reports regarding the high rates of default, and the findings of the regulators regarding widespread abuse, it is appropriate to do a broad scale statistical analysis of court filings and litigation outcomes.

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*Safer*, 175 U. PA. L. REV. 101, 160 (2008) (noting the widespread negative effects of consumer debts and that “[n]ot even death will insulate families from the sting of aggressive debt collectors. Sears, for example, had a special team to collect from bereaved families when a customer died still owing a credit balance—even though the family had no legal obligation to pay these debts.”); Young Walgenkim, *Killing “Zombie Debt” Through Clarity and Consistency in the Fair Debt Collection Practices Act*, 24 LOY. CONSUMER L. REV. 65 (2011).

<sup>13</sup> See discussion *infra* Part I.E.

<sup>14</sup> See ROBERT C. LAFOUNTAIN ET AL., NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS 11 (2012), available at [http://www.courtstatistics.org/other-pages/~media/microsites/files/csp/data%20pdf/csp\\_dec.ashx](http://www.courtstatistics.org/other-pages/~media/microsites/files/csp/data%20pdf/csp_dec.ashx).

The author has spoken with a researcher at NCSC to confirm this.

<sup>15</sup> Dalié Jiménez, *Illegality in the Sale and Collection of Consumer Debts*, (December 5, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2250784](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2250784).

<sup>16</sup> Consent Order at Art. I, ¶ 2, Art. IV, ¶ 1(p), JPMorgan Chase Bank, N.A., No. 2013-138 (Office of the Comptroller of the Currency, U.S. Dep’t of the Treasury Sept. 18, 2013), available at <http://www.occ.gov/static/enforcement-actions/ea2013-138.pdf>.

This paper analyzes 4,400 cases filed in Maryland collection courts by eleven separate debt buyers, each of whom filed more than 1,000 cases per year during the 2009-2010 two year sample period.<sup>17</sup> The subject debt buyers were selected because they filed a large number of cases and, at the time they were selected, they comprised a representative sample of large publicly traded national corporate plaintiffs as well as small closely held regional and local corporate plaintiffs.<sup>18</sup> In order to capture the largest percentage of cases that had reached a judgment, dismissal or other final disposition as of the cutoff date for gathering the data,<sup>19</sup> the data sample is comprised of cases that were filed by the subject debt buyers between January 1, 2009 and December 31, 2010.<sup>20</sup>

This study uses a larger statistical sample with more metrics and more analysis than is available in prior studies. In contrast to the two principal recent statistical studies of debt buyers,<sup>21</sup> this study is not confined to a single court or county forum. Rather, the cases in this study's sample were drawn from a pool of all 26 District Court jurisdictions in the state.<sup>22</sup>

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<sup>17</sup> The debt buyers were:

Legal Name	Name Used in Case Search
Pasadena Receivables, Inc.	Pasadena
Midland Funding LLC aka Midland Credit Management	Midland
Arrow Financial Services, LLC	Arrow
LVNV Funding, LLC	LVNV
Asset Acceptance, LLC	Asset
Portfolio Recovery Associates	Portfolio
Cavalry Portfolio Services LLC	Cavalry
Fradkin & Weber, PA	Fradkin
Advantage Assets II, INC	Advantage
North Star Capital Acquisition	North Star
Atlantic Credit & Finance, INC	Atlantic

<sup>18</sup> There has since been some consolidation in the industry. *See infra* note 115.

<sup>19</sup> Cutoff date was March 31, 2012.

<sup>20</sup> Of the 4,400 cases sampled, as of the March 31, 2012 cutoff date, all but 381 cases (8.65%) had reached final disposition through a money judgment, bankruptcy, dismissal or settlement.

<sup>21</sup> *See* discussion of Spector and Fox studies *infra* Part I.E.

<sup>22</sup> Maryland has 26 counties. The District Court has exclusive original



The empirical findings of this study confirm the widespread belief that in litigation, debt buyers employ a high volume default judgment business model, and that their legal pleadings, evidence and tactics are rarely exposed to the adversary process. Principal findings of this study include: (1) about 1 in 4 cases filed were dismissed by the court because the summons was never served on the defendant; (2) less than 2 in 10 defendants who were served with a summons filed a response (known in Maryland as a “Notice of Intention to Defend”); (3) in almost 7 out of 10 cases, debt buyers obtained judgments against defendants in an average amount of more than \$3,000; (4) the vast majority of cases do not result in a voluntary settlement; (5) more than 99% of the judgments against defendants were obtained without a trial; (6) fewer than 2% of defendants were represented by a lawyer, and those who did have a lawyer achieved far better outcomes than those who did not have a lawyer; and (7) based on the 2010 census data, there appears to be a disparate impact on racial minorities.

The data and analysis of this study has important implications for advocates, judges, litigants, legislators, regulators, policy makers and academics.

This paper is divided into four parts. Part I describes the nature of the debt buying and debt collection industry, and surveys the existing literature on lawsuits filed by debt buyers. Part II describes the methodology of the study and reports its results. Part III contains my analysis and draws conclusions. Part IV contains my recommendations for further study and action.

## I. THE DEBT INDUSTRY AND PREVIOUS STUDIES

### A. *Debt Collectors*

Debt collection cases have concerned scholars and policy makers for decades. In 1974, David Caplovitz published *Consumers in Trouble*, which constituted the first broad empirical

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jurisdiction over small claims (\$5,000 or less), and concurrent jurisdiction with the Circuit Court on claims over \$5,000 up to \$30,000. MD. CODE ANN., CTS. & JUD. PROC. §§ 3-401, 3-405 (West 2011).

study of consumers facing debt collection in the United States.<sup>23</sup> In his Foreword to the Caplovitz study, United States Senator William Proxmire concluded that when it comes to collection of consumer debt, “[o]ur legal system benefits the unscrupulous and penalizes the weak.”<sup>24</sup> Many of Caplovitz’s findings from more than forty years ago still apply to today’s “consumers in trouble.” Caplovitz found that consumers who default on financial obligations are rarely the “deadbeats” of popular myth, a fact which remains true today, and which even the collection industry admits.<sup>25</sup> He also found that the people most likely to be in trouble were the poor,<sup>26</sup> and that consumers usually get into trouble due to circumstances beyond their control.<sup>27</sup> Caplovitz concluded that when they do get into trouble, consumers face a debt collection court system that is unfair to them.<sup>28</sup> It is notable that the Caplovitz study was published in 1974, three years before the passage of the Fair Debt Collection Practices Act, which was designed to correct collection abuses.<sup>29</sup>

When it comes to the perceived fundamental unfairness of the debt collection system, little has changed in the intervening years. In 2010, the Federal Trade Commission concluded that in today’s collection system, “neither litigation nor arbitration currently provides adequate protection for consumers. The

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<sup>23</sup> DAVID CAPLOVITZ, CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT xii (1974). Caplovitz wrote about law suits filed by original creditors; not the debt buyers of this study, because debt buyers did not exist in 1974. His study was comprised largely of in-person interviews of debtors. He found that in many cases, these consumers had valid defenses to the lawsuits.

<sup>24</sup> *Id.*

<sup>25</sup> CAPLOVITZ, *supra* note 23, at x (Foreword by William Proxmire); Mike Bevel, *You’re Doing it Wrong: Misrepresenting the Collection Industry*, INSIDEARM, April 29, 2011, <http://www.insidearm.com/opinion/youre-doing-it-wrong-misrepresenting-the-collection-industry/> (“At no point would a reputable collection agency doing its job correctly ever refer to a consumer as a deadbeat.”).

<sup>26</sup> CAPLOVITZ, *supra* note 23, at 4.

<sup>27</sup> 48% of consumers were in trouble because of a loss of income and 11% due to unexpected increases in their expenses, such as medical bills. *Id.* at 53. Only 5% were what Caplovitz regarded as the stereotype of “deadbeat” debtors. *Id.* at 54.

<sup>28</sup> *Id.* at 291-301.

<sup>29</sup> Sen. Proxmire, who wrote the foreword to *Consumers in Trouble*, was also chair of the Senate Banking Committee during the passage of the FDCPA.

system for resolving disputes about consumer debts is broken.”<sup>30</sup> Some of the hallmarks of this broken system include lack of data integrity, lack of proof, inadequate documentation, robo-signing and other unfair and deceptive acts and practices.<sup>31</sup> Judges, advocates, academics, federal regulators,<sup>32</sup> state regulators,<sup>33</sup>

<sup>30</sup> BROKEN SYSTEM, *supra* note 8, at i.

<sup>31</sup> “Robo-signing” can include signing affidavits which falsely claim to be based on personal knowledge, and having third parties sign affidavits in the name of the alleged affiant. The later practice was recently condemned by Maryland’s Court of Appeals. *Atty. Griev. Comm’n. v. Dore*, 73 A.3d 161, 178 (Md. 2013).

<sup>32</sup> CONSUMER FIN. PROT. BUREAU, FAIR DEBT COLLECTION PRACTICES ACT ANNUAL REPORT (2013). The FTC and CFPB jointly held a roundtable on debt collection in mid-2013. *See Life of a Debt: Data Integrity in Debt Collection*, FED. TRADE COMM’N (June 6, 2013) [hereinafter *Life of a Debt*], <http://www.ftc.gov/news-events/events-calendar/2013/06/life-debt-data-integrity-debt-collection>. Since the passage of the Fair Debt Collection Practices Act, the Federal Trade Commission has been responsible for consumer protection in debt collection. The Dodd-Frank Act shifted much of that responsibility from the FTC to the newly created Consumer Financial Protection Bureau. The CFPB now shares overall enforcement responsibility with the FTC and other agencies including the Office of the Comptroller of the Currency and the Federal Communications Commission. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 11-203, §1089, 124 Stat. 1376, 2092-93 (2010) (amending the Fair Debt Collection Practices Act, 15 U.S.C. §§1692 *et seq.*). The CFPB can prescribe rules regarding debt collection, issue guidance, collect data, undertake research and conduct educational campaigns. In particular, the CFPB has the power to regulate large non-bank actors on consumer financial services including debt collection, and has recently begun to use that authority. It is anticipated that the CFPB will promulgate new rules on debt buying in the near future.

<sup>33</sup> Maryland has been a particularly active regulator in this field. For example, the following enforcement actions were undertaken in the last few years, contributing to the staying or dismissal of tens of thousands of debt buyer lawsuits: Summary Order to Cease and Desist, Portfolio Recovery Group, No. CFR-FY2012-074 (Md. State Collection Agency Licensing Bd. Apr. 9, 2013), *available at* <http://www.dllr.state.md.us/finance/consumers/pdf/portfoliorecc&d.pdf>; Settlement Agreement and Consent Order at 5-6, Credit Service, LLC, No. CFR-FY2012-077 (Md. State Collection Agency Licensing Bd. Oct. 14, 2011), *available at* <http://www.dllr.state.md.us/finance/consumers/pdf/creditservicesettlement.pdf> (“Filing actions . . . intended to obtain judgment on affidavit . . . but which contained affidavits that were based . . . on the affiant’s knowledge, information and belief, a standard insufficient to obtain such judgments . . . [c]laiming and receiving unauthorized attorney’s fees . . . [c]laiming and receiving prejudgment interest that included compound interest and

Congress,<sup>34</sup> and the media have broadly exposed these and other problems unique to debt collection.<sup>35</sup>

misrepresenting the correct amount of principal and interest in the documents filed . . . [f]iling complaints alleging ownership of particular consumer claims but which complaints contained invalid or deficient assignment documents . . . filing complaints beyond the 3-year statute of limitations . . . [m]ailing collection letters to consumers threatening to file lawsuits based on consumer claims that were already beyond the 3-year statute of limitations”); Settlement Agreement and Consent Order at 4-5, Sunshine Financial Group, LLC, Nos. CFR-FY2011-135 & CFR-FY2012-019 (Md. State Collection Agency Licensing Bd. Sept. 9, 2011), *available at* <http://www.dllr.state.md.us/finance/consumers/pdf/sunshinesettlement.pdf>; Settlement Agreement at 4, Worldwide Asset Management et al., No. DFR-FY2010-221 (Md. State Collection Agency Licensing Bd. Aug. 10, 2010), *available at* <http://www.dllr.state.md.us/finance/consumers/pdf/worldwidesettlement.pdf> (“[A] debt collector . . . may not ‘[c]laim, attempt, or threaten to enforce a right with knowledge that the right does not exist.’ . . . [t]he Agency has reasonable grounds to believe that respondents engaged in unlicensed collection agency activities and that all Respondents engaged in other violations . . . referenced above.”). *See also* Press Release, Office of Commc’ns & Pub. Affairs, Md. Judiciary, Thousands of District Court of Maryland Cases Dismissed (Mar. 17, 2011), *available at* <http://www.courts.state.md.us/media/news/2011/pr20110317.html> (announcing the dismissal of 10,168 Midland Funding cases filed between January 15 2007-January 15, 2010 and noting also that 27,000 Mann Bracken cases were dismissed in 2010); Press Release, Office of Commc’ns & Pub. Affairs, Md. Judiciary, District Court of Maryland Dismisses Sunshine Financial Group Debt Collection Cases (Sept. 21, 2011), *available at* <http://www.courts.state.md.us/media/news/2011/pr20110921.html> (announcing that 314 cases were dismissed and 323 reduced to remove atty’s fees.); Press Release, Office of Commc’ns & Pub. Affairs, Md. Judiciary, District Court of Maryland Dismisses Thousands More Debt Collection Cases (Oct. 11, 2012), *available at* <http://www.courts.state.md.us/media/news/2012/pr20121011.html>.

<sup>34</sup> Press Release, Sen. Sherrod Brown, Following Call to Rein in Debt Collection Industry, Brown Holds Hearing on Efforts to End Consumer Abuses (July 17, 2013), *available at* <http://www.brown.senate.gov/newsroom/press/release/following-call-to-rein-in-debt-collection-industry-brown-holds-hearing-on-efforts-to-end-consumer-abuses> (“Former bank employees have reported that they were instructed to ‘[g]o ahead and sign’ affidavits verifying consumer debts, even when they didn’t have documentation . . . [w]hen debt buyers purchase these loans from the biggest banks, they sign ‘as is’ contracts, giving banks cover to offload debts for collection that may be inaccurate, incomplete, or legally uncollectable.” (quoting Sen. Sherrod Brown)).

<sup>35</sup> *See, e.g.,* Jim Dwyer, *In Civil Court, Reckoning Awaits Those Who Got Seduced by Plastic*, N.Y. TIMES, Oct. 11, 2008, at A19; Jeff Horwitz, *It’s Robo*

Nowhere is the breakdown in the collections system more evident than in the context of lawsuits filed by junk debt buyers. Junk debt buyers are even further removed from personal relationships with consumers than the commercial lenders in the Caplovitz study. It is therefore unsurprising that these investors in junk debt would resort to “bureaucratic procedures to collect debts,” a trend that has made debt collection the most complained about business under the Federal Trade Commission’s jurisdiction.<sup>36</sup>

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*Redux: Card Lawsuits Stalk Banks*, AM. BANKER, Jan. 31, 2012, at 1. The *Boston Globe* published a very important series of articles in 2006, which paved the way for other reporters. See Rezendes & Latour, *supra* note 2 (mentioning the activities of the Goldstone brothers – Mass. Debt buyer) (“[A]most unnoticed by policy-makers, many millions of Americans have slid, or been pushed, into a debtor’s hell[.]”) (Quoting Elizabeth Warren, “We’re watching a fight between two players, one a skilled repeat gladiator, and one who’s thrown into the ring for the first time and gets clubbed over the head before they even get a sense of what the rules are.”); Beth Healy, *Dignity Faces a Steamroller*, BOSTON GLOBE, July 31, 2006, [http://www.boston.com/news/specials/debt/part2\\_main/](http://www.boston.com/news/specials/debt/part2_main/) (“The ‘people’s court’ has become the collectors’ court . . . [i]t is a de facto arm of a fast-growing and aggressive industry that has swamped court dockets with lawsuits[.]”) (recounting the case of a Judge Barrett, who ordered a defendant to surrender her jewelry or be imprisoned) (“Often, debtors are treated with less courtesy than the accused felons in the criminal court across the hall, and their rights are less respected.”); Walter V. Robinson & Michael Rezendes, *Enforcers’ Might Goes Unchecked*, BOSTON GLOBE, Aug. 1, 2006, [http://www.boston.com/news/specials/debt/part3\\_main/](http://www.boston.com/news/specials/debt/part3_main/) (describing the abuses of Boston “Constables” publicly appointed collectors); Walter V. Robinson & Beth Healy, *Regulators, Policy Makers Seldom Intervene*, BOSTON GLOBE, Aug. 2, 2006, [http://www.boston.com/news/specials/debt/part4\\_main/](http://www.boston.com/news/specials/debt/part4_main/) (quoting Donald Friedman of debt buyer Liberty Point Corp. “[debt buying] is one of the sexiest, one of the most financially lucrative businesses you can get into.”) (“[I]n spite of all this, there is an eerie silence among regulators, policy makers, and legislators.”).

<sup>36</sup> STRUCTURE & PRACTICES, *supra* note 5, at i.

*B. Debt Buying*<sup>37</sup>

The highly successful debt buyer business model is simple to describe. First, buy debts for pennies on the dollar;<sup>38</sup> second, clog the courts with small claims lawsuits; third, rely on the fact that defendants are not likely to contest the cases or show up in courts; and finally, bank on the fact that small claims court judges often do not enforce basic rules of evidence or procedure in uncontested cases.

Over the past two decades, the seemingly easy money to be made from investing in and pursuing junk debt has caused the industry to explode<sup>39</sup> to the point where today the face value of purchased credit card debt exceeds \$100 billion annually.<sup>40</sup> The

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<sup>37</sup> This section contains a brief overview of the junk debt buyer industry. For a more detailed overview, see CLAUDIA WILNER & NASOAN SHEFTEL-GOMES, LEGAL AID SOC'Y ET AL., DEBT DECEPTION: HOW DEBT BUYERS ABUSE THE LEGAL SYSTEM TO PREY ON LOWER-INCOME NEW YORKERS (2010), available at [http://www.nedap.org/pressroom/documents/DEBT\\_DECEPTION\\_FINAL\\_WEB.pdf](http://www.nedap.org/pressroom/documents/DEBT_DECEPTION_FINAL_WEB.pdf); RACHEL TERP & LAUREN BOWNE, EAST BAY CMTY. LAW CTR. & CONSUMERS UNION OF UNITED STATES, PAST DUE: WHY DEBT COLLECTION PRACTICES AND THE DEBT BUYING INDUSTRY NEED REFORM NOW (2001), available at [http://www.ebclc.org/documents/Past\\_Due\\_Report\\_2011.pdf](http://www.ebclc.org/documents/Past_Due_Report_2011.pdf); JURGENS & HOBBS, *supra* note 10; 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 (2011).

<sup>38</sup> The FTC found that the range for non-mortgage debt examined in their study was between 1.5 and 6.6 cents on the dollar for charged-off portfolios. STRUCTURE & PRACTICES, *supra* note 5, at D-6. The average across all debt buyer activity was about 4 cents on the dollar. *Id.* at ii. In fact, some debt sells for less than one penny on the dollar.

<sup>39</sup> Modern day debt buying is often said to have originated with the sale of debts by the FDIC and the Resolution Trust Corporation in the wake of the savings and loan crisis. Robert M. Hunt, *Collecting Consumer Debt in America*, BUS. REV., Q2 2007, at 11, available at [http://www.philadelphiafed.org/research-and-data/publications/business-review/2007/q2/hunt\\_collecting-consumer-debt.pdf](http://www.philadelphiafed.org/research-and-data/publications/business-review/2007/q2/hunt_collecting-consumer-debt.pdf); STRUCTURE & PRACTICES, *supra* note 5 at 17. The debt buying market is now dominated by large participants. *Id.* at i (the nine largest debt buyers held over 75% of debts sold in 2008); Defining Larger Participants of the Consumer Debt Collection Market, 77 Fed. Reg. 65,775 (Oct. 31, 2012) (amending 12 C.F.R. pt. 1090 to define larger participants in the consumer debt collection industry, including debt buyers).

<sup>40</sup> Jessica Silver-Greenberg, *Boom in Debt Buying Fuels Another Boom – In Lawsuits*, WALL ST. J., Nov. 29, 2010, at A1 (“More than 450 debt buyers

explosive growth of this industry has created an array of challenges to the courts, to the consumer defendants, and to notions of constitutional due process. One of the most basic challenges is the fact that consumers do not recognize the name of the debt buyer plaintiff, or the amount being sued on. This adds to the exceedingly high rate of default judgments.<sup>41</sup>

The confusion that results from the buying and selling of legal claims was observed by Lord Coke almost 500 years ago when he described:

[T]he great wisdom and policy of the sages and founders of our law, who have provided, that no possibility, right, title, nor thing in action, shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits, of great oppression of the people.<sup>42</sup>

Lord Coke's observation foreshadowed what Caplovitz eventually concluded:

[T]he breakdown in credit transactions that results in lawsuits is . . . very much a product of the anonymity of consumer transactions in urban America. It is this lack of knowledge of each other by the parties to these transactions that contributes to mistrust, misinterpretations of the reasons for the default, and the employment of harsh, bureaucratic procedures to collect debts. In this respect we are dealing . . . with an urban problem in which trust, based on personal relationships, is absent.<sup>43</sup>

Today's debt buyer lawsuits involve the purchase, sale, and suing upon old, unreliable, inaccurate documentation of abandoned consumer credit accounts, consisting primarily of

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scooped up an estimated \$100 billion in distressed loans last year, according to the latest estimates by Kaulkin Ginsburg, a debt-collection industry adviser."); The FTC's report utilized data on debt portfolios worth \$143 billion, bought by the 9 largest debt buyers. STRUCTURE & PRACTICES, *supra* note 5, at 8.

<sup>41</sup> See *Life of A Debt*, *supra* note 32.

<sup>42</sup> *Lampet's Case*, (1612) 77 Eng. Rep. 994 (K.B.) 997 (emphasis added).

<sup>43</sup> CAPLOVITZ, *supra* note 23, at 9.

lending products such as subprime credit cards with (what used to be) usurious interest rates,<sup>44</sup> accumulated late fees, over limit fees, and monthly usage fees. Debt buyers pay pennies on the dollar for accounts abandoned by the original creditor, sold “as is” with little or no documentation, and lots of disclaimers of warranty.<sup>45</sup>

Junk debt investors purchase consumer debt from large financial institutions in portfolios, containing thousands of individual debts. Although the cases in this study are comprised primarily of credit card debt, it is important to note that all kinds of consumer debt is being bought and sold today, including mortgage foreclosure deficiencies.<sup>46</sup> Scholars have documented some of the problems inherent in this business model.<sup>47</sup> **More**

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<sup>44</sup> In 1978, the U.S. Supreme Court held that a national bank may export the home state’s interest rate, regardless of state usury caps. *Marquette National Bank of Minneapolis v. First of Omaha Service Corporation*, 439 U.S. 299, 308, n.24 (1978).

<sup>45</sup> Typical disclaimers of warranty include that the account may already be satisfied, that the debtor may have prevailed at trial, that the debtor was the victim of identity theft, that the debtor declared bankruptcy, that the account is beyond the statute of limitations, that the debtor is dead, that the amount of the alleged debt is only approximate, and that documentation may not exist. *See, e.g.,* Loan Sale Agreement By and Among FIA Card Services, N.A. and CACH, LLC (Apr. 14, 2010) [hereinafter Loan Sale Agreement], *available at* <https://s3.amazonaws.com/s3.documentcloud.org/documents/329733/fia-to-cach-forward-flow.pdf>. *See also* Jiménez, *supra* note 15.

<sup>46</sup> Debt buyer interest in foreclosure deficiency judgments has been known since at least 2011. Jessica Silver-Greenberg, *The House Is Gone But The Debt Lives On*, WALL ST. J., Oct 1, 2011, <http://online.wsj.com/news/articles/SB10001424053111904060604576572532029526792> (“The increase in deficiency judgments has sparked a growing secondary market. Sophisticated investors are ‘ravenous for this debt and ramping up their purchases[.]’”). *See also* Douglas French, *The New Deficiency Market*, MISES ECON. BLOG, (Oct 4, 2011), <http://archive.mises.org/18607/the-new-deficiency-market/>. This trend only seems likely to increase, as suits on deficiency judgments generally rise. *See* Kimbriell Kelly, *Lenders Seek Court Actions Against Homeowners Years After Foreclosure*, WASH. POST, June 15, 2013, [http://www.washingtonpost.com/investigations/lenders-seek-court-actions-against-homeowners-years-after-foreclosure/2013/06/15/3c6a04ce-96fc-11e2-b68f-dc5c4b47e519\\_story.html](http://www.washingtonpost.com/investigations/lenders-seek-court-actions-against-homeowners-years-after-foreclosure/2013/06/15/3c6a04ce-96fc-11e2-b68f-dc5c4b47e519_story.html).

<sup>47</sup> Lauren Goldberg, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711 (2005) (an early report on abusive collection by debt buyers); Holland, *supra* note 37 (reporting abuses in the small claims jurisdiction in Maryland); Sam Glover, *Has the Flood of Debt*



recently, regulators and mainstream media have expressed concern regarding the “as is” terms, without representations or warranties, on which these debts are purchased. The FTC and the OCC in particular have questioned the adequacy of the information debt buyers receive with purchased debts.<sup>48</sup> The FTC’s *Structure and Practices* study revealed that debt sale and purchase agreements between the creditor and the debt buyers generally limit the availability of key documents, such as account statements and credit agreements.<sup>49</sup> Further, the debt sale agreements often disclaim the accuracy of the information provided and explicitly disclaim warranties of title, validity, enforceability, collectability, and accuracy.<sup>50</sup> In 2009, the FTC found that information provided to debt buyers was “so deficient that collectors [sought] payment from the wrong consumer or demand[ed] the wrong amount.”<sup>51</sup>

The lack of proof, disclaimers of warranty and unreliable record keeping have led to significant criticism and threats of regulatory action to strengthen supervision of the debt buying

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*Collection Lawsuits Swept Away Minnesotans’ Due Process Rights*, 35 WM. MITCHELL L. REV. 1115 (2008) (reporting the “flood” of collection suits and consequent abuses in Minnesota); Neil L. Sobol, *Protecting Consumer From Zombie-Debt Collectors*, NEW MEXICO L. REV. (forthcoming 2014), available at <http://ssrn.com/abstract=2350555>. An additional important aspect of the problem, not treated in this article, is the negative impact on the creditworthiness of debtors who fall victim to abusive collection practices. See Mary Spector, *Where the FCRA Meets the FDCPA: The Impact of Unfair Collection Practices on the Credit Report*, 20 GEO. J. ON POVERTY L. & POL’Y 479 (2013).

<sup>48</sup> STRUCTURE & PRACTICES, *supra* note 5, at 35-36.

<sup>49</sup> *Id.*

<sup>50</sup> Jiménez, *supra* note 15, at 4. Note however that representatives of the debt collection industry deny that this is current practice. See *Life of a Debt*, *supra* note 32; *Shining a Light on the Consumer Debt Industry: Hearing Before the Subcomm. on Financial Institutions and Consumer Protection of the S. Comm. on Banking, Housing, and Urban Affairs*, 113th Cong. (July 17, 2013) [hereinafter *Statement of Corey Stone*], available at [http://www.banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=293a7183-c6c6-4753-97a6-a44c859dc093](http://www.banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=293a7183-c6c6-4753-97a6-a44c859dc093) (testimony of Corey Stone, Assistant Director, Office of Deposits, Cash, Collections, and Reporting Markets of the Consumer Financial Protection Bureau). These denials are difficult to verify, because debt buyers usually refuse to produce the contracts.

<sup>51</sup> FED. TRADE COMM’N, COLLECTION CONSUMER DEBTS: THE CHALLENGE OF CHANGE 22 (2009).

business.<sup>52</sup> This criticism and the threat of regulatory intervention have already led one major bank to cease its sale of defaulted consumer debt altogether.<sup>53</sup> Despite these problems, the debt buying industry remains strong and has even begun to expand internationally, with industry leader Encore Capital recently acquiring the English debt buyer Cabot Financial.<sup>54</sup>

### C. Debt Buyer Collection Litigation

The debt buying business model has been to flood the courts across the country, resulting in hundreds of millions of dollars of default judgments entered against consumers.

Maryland provides a good example of how this business model has affected some courts. In two of Maryland's largest jurisdictions, consumers sued by debt buyers for only a few hundred or a few thousand dollars are summoned to appear in a courtroom in order to engage in "resolutions conferences" with sophisticated plaintiffs' lawyers.<sup>55</sup> These meetings occur inside of courtrooms in which no judge is present to oversee the proceedings.<sup>56</sup> If the consumer fails to appear, the file goes to a judge for consideration of entry of an uncontested "affidavit judgment." On the other hand, if the consumer does appear and

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<sup>52</sup> See *infra* notes 79-80 and accompanying text.

<sup>53</sup> Maria Aspan & Jeff Horwitz, *Chase Halts Card Debt Sales Ahead of Crackdown*, AM. BANKER, Jul 1, 2013, [http://www.americanbanker.com/issues/178\\_126/chase-halts-card-debt-sales-ahead-of-crackdown-1060326-1.html](http://www.americanbanker.com/issues/178_126/chase-halts-card-debt-sales-ahead-of-crackdown-1060326-1.html).

<sup>54</sup> Saabira Chaudhuri, *Encore Capital Buys Majority Stake in Cabot Credit For \$192 Million*, WALL ST. J., May 30, 2013, <http://online.wsj.com/article/BT-CO-20130530-704282.html>.

<sup>55</sup> Maria Aspan, *Courthouse 'Rocket Dockets' Give Debt Collectors Edge Over Debtors*, AM. BANKER, Feb. 11, 2013, [http://www.americanbanker.com/issues/179\\_29/courthouse-rocket-dockets-give-debt-collectors-edge-over-debtors-1065545-1.html](http://www.americanbanker.com/issues/179_29/courthouse-rocket-dockets-give-debt-collectors-edge-over-debtors-1065545-1.html) (describing the "resolution conferences"). It is notable that the American Banker article comes more than four years after Baltimore Sun editorial called for an end to these "rocket dockets," noting that "The docket has offered few or no safeguards for defendants and carried the imprimatur of the judicial system . . ." Editorial, *Reform 'Rocket Docket'*, BALTIMORE SUN, Jan. 27, 2009, [http://articles.baltimoresun.com/2009-01-27/news/0901260050\\_1\\_district-court-docket-maryland-hospitals](http://articles.baltimoresun.com/2009-01-27/news/0901260050_1_district-court-docket-maryland-hospitals).

<sup>56</sup> Aspan, *supra* note 55 ("What's missing is a judge or other neutral moderator.").

demands a trial, there is no guarantee that a trial will be held on that date. Despite the fact that there is no judge present, the continued existence of these proceedings is premised on the notion that these “conferences” are a type of “pretrial conference” contemplated under the Maryland Rules.<sup>57</sup>

Like any other judgment creditor, once a debt buyer has secured a judgment, it has access to a panoply of enforcement methods.<sup>58</sup> The most powerful of these is a supplementary proceeding to force the judgment debtor to appear in court in order to provide information about the debtor’s assets.<sup>59</sup> The debtor is summoned to court to answer questions about their assets and income, to enable the creditor to locate assets to seize, accounts and employers to garnish and real property on which liens can be placed. If debtors do not appear in court, they risk being found in contempt and arrested, a phenomenon which Lea Shepard called “Creditor’s Contempt.”<sup>60</sup> In many arrest warrant cases, judges will order that the bond which the defendant paid be released to the judgment creditor.<sup>61</sup> **As both Shepard and Caplovitz observed, creditor’s contempt has the effect of extending the long-banned practice of imprisonment for debt into**

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<sup>57</sup> *Id.* (noting that the judges of the Maryland District Court defend the practice and claim that it is voluntary). Although the Maryland Rules allow “pretrial conferences” to be ordered sua sponte in the District Court, the specific Rule at issue appears to contemplate a proceeding at which a judge is present. MD. R. 3-504(a) (“The court . . . may direct all parties to appear before it”); MD. R. 3-504(b-c)(listing administrative matters to be raised at the hearing such as witnesses to be relied upon and amendment of pleadings, and for the court to enter an order on such matters). In contrast, in 2008, here is how the Baltimore Sun described the proceedings, which have changed little since then: “Lawyers call up debtors one at a time to work out payment plans in rapid, on-the-spot settlements. Other days, lawyers haggle with debtors in the courthouse hallways. When cases go to judges, hospitals typically win after hearings that last a few minutes or less.” Fred Schulte & James Drew, *Their Day In Court*, BALTIMORE SUN, Dec. 22, 2008, [http://articles.baltimoresun.com/2008-12-22/news/0812210157\\_1\\_maryland-hospitals](http://articles.baltimoresun.com/2008-12-22/news/0812210157_1_maryland-hospitals).

<sup>58</sup> MD. R. 3-631.

<sup>59</sup> Known in Maryland as “Discovery in Aid of Enforcement.” MD. R. 3-633.

<sup>60</sup> Lea K. Shepard, *Creditor’s Contempt*, 2011 BYU L. REV. 1509 (2011).

<sup>61</sup> *Id.* at 1550.

the twenty-first century.<sup>62</sup>

Imprisonment for contempt arising out of small consumer debt has attracted local and national media attention.<sup>63</sup> Policy makers have begun to respond, expressing concern and launching investigations into the practice.<sup>64</sup> Encore Capital disavowed arrest as a debt collection device due to negative publicity,<sup>65</sup> and others have criticized the tactic in the debt collection industry.<sup>66</sup> However, the problem continues to cause concern around the country.<sup>67</sup>

#### D. The Maryland Experience

Maryland has been a leader in combating the unique problems created by debt buyer litigation, as evidenced by effective private class action litigation,<sup>68</sup> aggressive enforcement

<sup>62</sup> *Id.* at 1543-1544; CAPLOVITZ, *supra* note 23.

<sup>63</sup> Jessica Silver-Greenberg, *Welcome to Debtors' Prison*, 2011 Edition, WALL ST. J., Mar. 17, 2011 [hereinafter *Debtor's Prison*, 2011 Edition], <http://online.wsj.com/news/articles/SB10001424052748704396504576204553811636610> (noting that more than a third of states allow arrest for debt and that over 5,000 warrants had been issued since 2010); Alain Sherter, *Jailed for \$280: The Return of Debtors' Prisons*, CBS NEWS (Apr. 20, 2012, 1:04 PM), [http://www.cbsnews.com/8301-505144\\_162-57417654/jailed-for-\\$280-the-return-of-debtors-prisons/](http://www.cbsnews.com/8301-505144_162-57417654/jailed-for-$280-the-return-of-debtors-prisons/) (noting the problem and discussing the case of a woman imprisoned for \$280 alleged debt, which she did not owe, and quoting Illinois Att'y Gen. Lisa Madigan "'Too many people have been thrown in jail simply because they're too poor to pay their debts.'"); Susie An, *Unpaid Bills Land Some Debtors Behind Bars*, NAT'L PUB. RADIO (Dec. 12, 2011, 12:01 AM), <http://www.npr.org/2011/12/12/143274773/unpaid-bills-land-some-debtors-behind-bars>.

<sup>64</sup> *Welcome to Debtors' Prison*, 2011 Edition, *supra* note 63 (noting the state of Illinois and the FTC had launched investigations into the practice).

<sup>65</sup> *Id.*

<sup>66</sup> Mike Bevel, *Debt Collectors (Don't) Want to Send Debtors to Prison*, INSIDEARM.COM, (Nov. 23, 2011, 11:48 AM), <http://www.insidearm.com/daily/debt-collection-news/accounts-receivables-management/debt-collectors-dont-want-to-send-debtors-to-prison/> (criticizing Silver-Greenberg and other articles reporting on the same issue, apparently on the grounds that such arrests are not directly "because of debt", without denying that such arrests are requested by collectors).

<sup>67</sup> See, e.g., Martha C. White, *Lenders Use a New Dirty Trick to Jail You for Small Debts*, TIME, Aug. 28, 2012, <http://business.time.com/2012/08/28/lenders-use-a-new-dirty-trick-to-jail-you-for-small-debts/>.

<sup>68</sup> See *Bradshaw v. Hilco Receivables, LLC*, 765 F. Supp. 2d 719 (D. Md.

actions by the state Department of Labor, Licensing and Regulation,<sup>69</sup> and measures taken by the Chief Judge of the District Court of Maryland, who has dismissed more than 20,000 debt buyer cases since 2010.<sup>70</sup> Most notably, effective as of January 1, 2012, Maryland adopted comprehensive amendments to its procedural court rules for obtaining default judgments, also known as “affidavit judgment,” in uncontested cases in the “small claims” division of its District Court.<sup>71</sup> Despite these efforts, Maryland courts remain flooded with debt buyer lawsuits, and neither the basic business model nor the ultimate outcome of these cases—massive default judgments—have been altered.

### *E. Existing Studies of Debt Buyer Activity*

One of the first reports on perceived litigation abuse by debt buyers came in a series of Boston Globe articles in 2006.<sup>72</sup> The Globe reported on threats of imprisonment,<sup>73</sup> gross inequality in the courtroom,<sup>74</sup> and shoddy evidence.<sup>75</sup> Although these abuses were recognized early, they have persisted. Since

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2011) (holding that “Hilco violated the [FDCPA] in filing lawsuits without a license in violation of the Maryland Collection Agency Licensing Act”); *Hauk v. LVNV Funding, LLC*, 749 F. Supp. 2d 358 (D. Md. 2010) (same); *Finch v. LVNV Funding, LLC*, 71 A.3d 193 (Md. Ct. Spec. App. 2013) (holding that judgments obtained when the plaintiff was not a licensed debt collector are void) *cert. denied* 77 A.3d 1084 (Md. 2013).

<sup>69</sup> See, *supra* Note 33.

<sup>70</sup> *Id.*

<sup>71</sup> MD. R. 3-306. For text and commentary on the extensive changes, see NOTICE OF PROPOSED RULE CHANGES: 171<sup>ST</sup> REPORT, STANDING COMMITTEE ON RULES OF PRACTICE & PROCEDURE, MD. CT. OF APPEALS 31-47 (2011).

<sup>72</sup> Rezendes & Latour, *supra* note 2; Healy, *supra* note 35; Robinson & Rezendes, *supra* note 35; Robinson & Healy, *supra* note 35.

<sup>73</sup> Healy, *supra* note 35 (“[S]uch threats are a common tool, both in small-claims court and in the district court civil sessions.”).

<sup>74</sup> See *id.*; Rezendes & Latour, *supra* note 2 (quoting Professor (now Senator) Elizabeth Warren, “We’re watching a fight between two players, one a skilled repeat gladiator, and one who’s thrown into the ring for the first time and gets clubbed over the head before they even get a sense of what the rules are.”)

<sup>75</sup> Rezendes & Latour, *supra* note 2 (recounting the case of a disabled veteran sued for debt while deployed; an affidavit filed by the plaintiff falsely claimed he was not in the military.).

2006, debt buyers have attracted increasing attention from advocates, regulators, and scholars.<sup>76</sup> In 2009, a legal support program for municipal employees published *Where's the Proof?* which is arguably the first study devoted solely to the perceived abuses of debt buyers.<sup>77</sup> The report provided some of the earliest hard statistics on debt buyer behavior, finding that less than six percent of debt buyers were willing or able to demonstrate proper chain of title of the debt being pursued.<sup>78</sup>

As of mid-2014, debt buyers have begun to receive serious regulatory scrutiny, with the CFPB's adoption of a rule to extend its regulatory supervision to larger participants in the debt collection industry,<sup>79</sup> and the Office of the Comptroller of the Currency's publication of its suggested "best practices" in debt sales.<sup>80</sup> Congress is also taking up the question of debt collection reform.<sup>81</sup>

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<sup>76</sup> *Supra* notes 33, 47 and 55.

<sup>77</sup> ROBERT MARTIN ET AL., DIST. COUNCIL 37 MUN. EMPS. LEGAL SERVS., *WHERE'S THE PROOF?* (2009), available at [http://www.dc37.net/benefits/health/pdf/MELS\\_proof.pdf](http://www.dc37.net/benefits/health/pdf/MELS_proof.pdf).

<sup>78</sup> *Id.* at 3 (noting that debt buyers responded to requests for the substantiation of debts in only 5.5% of cases).

<sup>79</sup> Defining Larger Participants of Certain Consumer Financial Product and Service Markets, 12 C.F.R. § 1090 (2012). See also Press Release, Consumer Fin. Prot. Bureau, Consumer Financial Protection Bureau to Oversee Debt Collectors (Oct. 24, 2012), available at <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-to-oversee-debt-collectors/>.

<sup>80</sup> *Shining a Light on the Consumer Debt Industry: Hearing Before the Subcomm. on Fin. Inst. and Consumer Protection of the S. Comm. on Banking, Housing, and Urban Affairs*, 113th Cong. (July 17, 2013) (statement of the Office of the Comptroller of the Currency, Appendix 1).

<sup>81</sup> A hearing led by Sen. Sherrod Brown was held on the question in a Senate subcommittee. Press Release, Sen. Sherrod Brown, Following Call to Rein In Debt Collection Industry, Brown Holds Hearing on Efforts to End Consumer Abuses (July 17, 2013), available at <http://www.brown.senate.gov/newsroom/press/release/following-call-to-rein-in-debt-collection-industry-brown-holds-hearing-on-efforts-to-end-consumer-abuses> ("Former bank employees have reported that they were instructed to '[g]o ahead and sign' affidavits verifying consumer debts, even when they didn't have documentation . . . [w]hen debt buyers purchase these loans from the biggest banks, they sign 'as is' contracts, giving banks cover to offload debts for collection that may be inaccurate, incomplete, or legally uncollectable. . . Today I hope to hear from the FTC . . . and the CFPB about how we can modernize debt collection oversight to better serve consumers.").

In 2010, a coalition of legal aid and community development organizations in New York City carried out one of the first studies of debt-buyer cases, titled *Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers*.<sup>82</sup> The *Debt Deception* study used a sample of 365 court cases, of which 336 had reached a final judgment.<sup>83</sup> The study found that 81% of the cases resulted in a default judgment, and 94% of cases overall resulted in judgment for the debt buyer.<sup>84</sup> Not a single consumer in this study was represented by an attorney, and not a single case in this study went to trial.<sup>85</sup> The cases were filed against people who lived overwhelmingly in poor and minority neighborhoods.<sup>86</sup> The study also noted that out of court settlements in court cases tended to be unsustainable payment plans, and that in the event of default, the debt buyer would be entitled to judgment in the full amount of the alleged debt.<sup>87</sup> The report recommended increased regulation, increased judicial scrutiny, and increased legal representation.<sup>88</sup>

A subsequent New York study published in 2013, *Debt Collection Racket*, provides insight into developments since the *Debt Deception* study.<sup>89</sup> Using statistics from New York state

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Testimony at the hearing favored improvements in the provision of information involved in debt collection. *Statement of Corey Stone, supra* note 50, at 3 (“[T]here is a surprising amount of consensus across all market participants – from debt collectors, creditors, and collection attorneys, to consumer advocates, legal services providers and state attorneys general that we must develop clear standards for data integrity and record keeping in the debt collection market.”). *See also Shining a Light on the Consumer Debt Industry: Hearing Before the Subcomm. on Fin. Inst. and Consumer Protection of the S. Comm. on Banking, Housing, and Urban Affairs*, 113th Cong. (July 17, 2013) (statement of Reilly Dolan, Acting Associate Director for the Division of Financial Practices at the Federal Trade Commission).

<sup>82</sup> WILNER & SHEFTEL-GOMES, *supra* note 37.

<sup>83</sup> *Id.* at 8.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 10-12.

<sup>87</sup> *Id.* at 13.

<sup>88</sup> *Id.* at 16-17.

<sup>89</sup> SUSAN SHIN & CLAUDIA WILNER, NEW ECONOMY PROJECT, THE DEBT COLLECTION RACKET: HOW THE INDUSTRY VIOLATES DUE PROCESS AND PERPETUATES ECONOMIC INEQUALITY (Sarah Ludwig & Josh Zinner eds. 2013), *available at* <http://www.nedap.org/resources/documents/DebtCollectionRacketNY.pdf>.

courts and the U.S. Census, *Debt Collection Racket* suggests that while the overall rate of default judgments in New York state may have fallen (by somewhere between 38% and 62% depending on location) between 2010 and 2013, the number of consumers represented by an attorney remains negligible at only 2%.<sup>90</sup> Through empirical analysis, the study also demonstrated racial and economic disparate impact.<sup>91</sup> The areas most affected are “clustered in predominantly middle-income black communities.”<sup>92</sup>

Mary Spector’s 2011 study reported on a detailed analysis of 507 cases filed in Dallas, Texas.<sup>93</sup> The cases were drawn from the Dallas Court-at-Law, which is one of three courts with concurrent jurisdiction over such cases in Dallas.<sup>94</sup> The Texas Study examined several of the same metrics which were examined in *Debt Deception* and which are examined in this study. Some of the findings from Texas differed from the findings of the *Debt Deception* study. Whereas *Debt Deception* showed a default rate of 81% in New York,<sup>95</sup> In the Texas sample, only about 40% of cases resulted in default judgment.<sup>96</sup> Further, the Texas study found that 50% were dismissed without prejudice.<sup>97</sup> Finally, the Texas study showed that in 12% of cases, debt buyers were unable to serve the defendant;<sup>98</sup> in nearly 23% of served cases the defendants appeared;<sup>99</sup> and that defendants were represented by a lawyer in almost 10% of served cases.<sup>100</sup>

Judith Fox’s 2012 study analyzed the activity of debt buyers in Indiana through a sample of 645 cases.<sup>101</sup> In Indiana, debt buyers often chose to avoid filing in small claims courts,

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<sup>90</sup> *Id.* at 5, 14.

<sup>91</sup> *Id.* at 4.

<sup>92</sup> *Id.*

<sup>93</sup> Mary Spector, *Debts, Defaults and Details: Exploring the Impact of Debt Collection Litigation on Consumers and the Courts*, 6 VA. L. & BUS. REV. 257, 274-77 (2011).

<sup>94</sup> *Id.* at 273.

<sup>95</sup> WILNER & SHEFTEL-GOMES, *supra* note 37, at 8.

<sup>96</sup> Spector, *supra* note 93, at 296.

<sup>97</sup> *Id.* at 296.

<sup>98</sup> *Id.* at 278.

<sup>99</sup> *Id.* at 288.

<sup>100</sup> *Id.* at 289.

<sup>101</sup> See Fox, *supra* note 12.



even though they were well within the jurisdictional limit.<sup>102</sup> Indiana, like Maryland, changed its rules to increase the documentary requirements upon debt buyers filing collection cases, and this appeared to have temporarily suppressed filings.<sup>103</sup> Indiana also had high rates of non-appearance, with 83% of defendants failing to respond and only 2.5% not served.<sup>104</sup> Of those who responded to the complaint, most did not do so in the form required by court rules.<sup>105</sup> Debt buyers obtained default judgment in 73% of cases.<sup>106</sup> As in the *Debt Deception*, none of the cases examined resulted in a trial.<sup>107</sup>

One other study, somewhat different from the others, is important to the discussion. In her 1992 study of Baltimore City's rent court,<sup>108</sup> Barbara Bezdek observed many of the same phenomena as were observed in this study: special accommodation of plaintiff's representatives,<sup>109</sup> high rates of default,<sup>110</sup> and a general lack of evidentiary proof.<sup>111</sup>

Unlike previous studies, this study examines a large number of online court dockets from a statewide sample in a unified system comprised of twenty-six different counties. Maryland has a unified online trial court docket, and a search for any given party or attorney on the state courts' official "Maryland Judiciary Case Search" website returns results for all trial courts

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<sup>102</sup> *Id.* at 374-76.

<sup>103</sup> *Id.* at 373.

<sup>104</sup> *Id.* at 377. Note however that it was "assumed that service was perfected unless the file reflects otherwise." *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 381.

<sup>107</sup> Note that a small number of cases went to trial in Spector's study: Spector, *supra* note 93, at 297, tbl.14 (discussing one case which resulted in a trial with judgment for the defendant, and showing the breakdown of outcomes generally).

<sup>108</sup> Barbara L. Bezdek, *Silence in Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992). For a more recent examination of the plight of tenants, and continuing flaws in substantive and procedural law, see Mary Spector, *Tenant Stories: Obstacles and Challenges Facing Tenants Today*, 40 JOHN MARSHALL L. REV. 407 (2007).

<sup>109</sup> *Id.* at 551-53.

<sup>110</sup> Nearly 70% of cases resulted in complete success for the plaintiff landlord. *Id.* at 554.

<sup>111</sup> *Id.* at 562.

in the state, regardless of geography or jurisdictional amount.<sup>112</sup> Maryland Judiciary Case Search includes for each case the names of the parties, city, state, case number, trial date, and disposition.<sup>113</sup> This study was limited to cases filed in the District Court, which has exclusive original jurisdiction for cases under \$5,000, and concurrent jurisdiction with the Circuit Court for cases between \$5,000 and \$30,000. All cases studied also included the names of any attorneys and law firms, the amount sought in the complaint, and the amount of any judgment, plus separate itemizations for any fees, costs or interest added to the judgment. Unlike the federal PACER system or other state systems, the Maryland website does not provide access to actual case documents. Those have to be retrieved from the courthouse in which they were filed, with the exception of older cases outside the scope of this study, which are sent to a central repository in the state's capital.

## II. THE STUDY

### A. *Methodology*

With the aid of two teaching assistants and the students enrolled in the Consumer Protection Clinic at the University of Maryland Francis King Carey School of Law, we did a random sampling of 200 cases filed in 2009 and 200 cases filed in 2010 (400 cases total), filed by each of 11 debt buyer plaintiffs, resulting in a total sample size of 4,400.<sup>114</sup> The specific 11 debt buyers were selected because they constituted the highest volume filers in the state of Maryland.<sup>115</sup>

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<sup>112</sup> See *Maryland Judiciary Case Search*, MARYLAND COURTS, <http://casesearch.courts.state.md.us/inquiry/processDisclaimer.jis>.

<sup>113</sup> *Id.*

<sup>114</sup> The debt buyers selected were: Pasadena Receivables, Inc.; Midland Funding LLC (also known as Midland Credit Management); Arrow Financial Services, LLC; LVNV Funding, LLC; Asset Acceptance, LLC; Portfolio Recovery Associates; Cavalry Portfolio Services, LLC; Advantage Assets II, INC; North Star Capital Acquisition; Fradkin & Weber, PA; Atlantic Credit & Finance, INC. A twelfth debt buyer, Equable Ascent Financial, LLC, also known as Hilco Receivables, was originally included in the list, but proved to have too few filings in 2009.

<sup>115</sup> All had filed over 1,000 cases in the 2009-2010 period. This proved to

The years 2009 and 2010 were selected because they were the most recent years that had a high percentage of case outcomes that had reached a final disposition of judgment or dismissal. In contrast, many cases filed during 2011 had not yet reached an outcome at the time the data were gathered.<sup>116</sup> Finally, all cases studied were subject to the Maryland Affidavit Judgment Rules that existed prior to the implementation of new Rules on January 1, 2012.<sup>117</sup> While a companion study for cases filed after January 1, 2012 might yield insight into the efficacy of the new rules, such a comprehensive analysis is beyond the scope of this article.<sup>118</sup>

The data on each pre-selected debt buyer were gathered from Maryland Judiciary Case Search, pursuant to a protocol that insured that the cases were selected at random.<sup>119</sup> Maryland Judiciary Case Search provides free access to a limited amount of information on cases filed in Maryland courts, including the district courts which have exclusive original jurisdiction over “small claims” cases of under \$5,000.00 (typically credit card or medical debt), and which consequently deal with almost all debt buyer cases in Maryland.<sup>120</sup> The study data included information

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be a practical approach to identifying significant debt buyers: the highest volume filer for the subject time period was Pasadena Receivables, Inc. which filed 24,435 cases during 2009-2010. During the years 2011-2013, consolidation occurred in the industry. In 2012 the largest volume filers in Maryland were Pasadena Receivables (and its new alter-ego, Maryland Portfolios), Midland Funding, and Portfolio Recovery Associates. Pasadena is local and privately held, while Midland Funding and Portfolio Recovery are publicly traded and national, Figures from the first half of 2013 suggest that Pasadena will behind Asset Acceptance this year.

<sup>116</sup> Examination of the data gathered has since shown that it takes a year or more from filing for some types of outcome to be reached. Had more recent cases been used, the results would have showed a distorted picture of the outcomes, with a disproportionately high number of affidavit judgments: affidavit judgments took an average of less than 150 days, while default judgments took almost 340 days on average and dismissals for lack of prosecution under MD. R. 3-507 took over 400 days.

<sup>117</sup> MD. R. 3-306.

<sup>118</sup> We did analyze a small sample of 100 cases filed after January 1, 2012, and those results are reported in Section II.C. Based on this smaller sample, there does not appear to be any significant change in rates of default judgments since the rules changes.

<sup>119</sup> See *Maryland Judiciary Case Search*, *supra* note 112.

<sup>120</sup> *But see* sources cited *supra* note 47, which suggest that the sale and enforcement of mortgage deficiency judgments is on the rise in Maryland and

on filing and judgment dates, types of judgments, the amount of money sought and awarded, and a breakdown of amounts awarded in addition to the initial claim (i.e., costs, interest, and attorneys' fees). Most importantly, the data also included information about service of process, representation of the parties and the filing of defenses.<sup>121</sup> In addition, the data from this study were compared to the more limited data reported in the Maryland District Court's internal statistics used for tracking purposes,<sup>122</sup> as well as the official Maryland Judiciary Annual Statistics Report.<sup>123</sup>

### *B. Results*

#### 1. Amount Claimed in the Lawsuits Filed

The amount claimed in a lawsuit is a significant metric, because it can determine jurisdictional questions, whether pretrial discovery will be allowed, whether a jury trial will be allowed, and whether all of the formal rules of evidence will apply at trial. In Maryland, lawsuits in which the principal amount sought is \$5,000 or less (exclusive of costs, interest and attorneys' fees) are treated as "small claims," with less formality and fewer procedural safeguards. More broadly, the amount claimed is a significant metric because it reflects the financial impact of debt collection suits on communities and on the economy.

In the data sample of all 4,400 cases, 83% of the lawsuits claimed a principal amount of less than \$5,000.00, thus qualifying them as "small claims." This is significant because in practice,

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elsewhere. Case collection was limited to the District Courts because the Circuit Courts did not experience the same high volume of case filings. None of the 11 selected debt buyers filed more than 100 cases in the Circuit Court between 2009 and 2012. The volume of cases in Circuit Court was therefore insufficient for a large-scale study of the kind possible using District Court cases.

<sup>121</sup> The complete protocol is contained in Appendix A, *infra*.

<sup>122</sup> *District Court of Maryland Statistics*, MARYLAND COURTS, <http://www.courts.state.md.us/district/about.html#stats>.

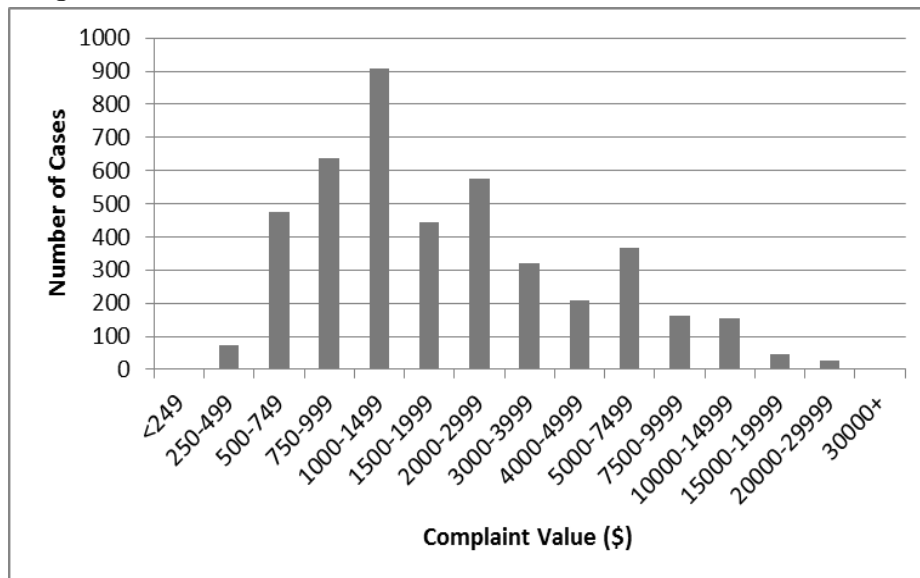
<sup>123</sup> The official annual report is less useful than the internal statistics. *See Annual Reports*, MARYLAND COURTS, <http://www.courts.state.md.us/publications/annualreports.html>

these “less than \$5,000” cases get treated as “small claims” in which few or no rules of evidence are applied and in which few if any procedural safeguards are observed. Put another way, in only 17% of the cases could a defendant even potentially have the right to the benefit of pretrial discovery, or of all the rules of evidence. Further, to be eligible to demand and obtain a jury trial, the principal amount claimed in the lawsuit must be more than \$15,000.

The average amount of principal claimed was \$2,993.73, according to the following distribution: 27% sought less than \$1,000; 56% sought between \$1,000 and \$5,000, and 17% sought more than \$5,000. The 17% of cases over the small claims limit were distributed in a narrowing tail, up to \$30,000, as shown in Figure 1, below.

Notably, the 17% of cases in which the amount claimed was over \$5,000, thus entitling the defendant to pretrial discovery and the full range of the rules of evidence, did not experience significantly different outcomes from the cases below \$5,000 in which the defendant was not entitled to these added protections. This is not surprising when one considers that few consumers know their legal rights, let alone how to assert them.

Figure 1 - Amounts Demanded



The average principal amount sought in the total data sample of 4,400 cases was \$2,993.17. Of the 2,006 cases that resulted in judgment, the average amount sought in principal was \$2,967.58. In these 2,006 cases where judgment was entered, debt buyers were awarded 94.7% of the principal claimed in the lawsuit (\$2,811.66 out of \$2,967.58).

Although the average amount of the judgment principal was \$2,811.66, the average total amount awarded (including any pre-judgment interest, costs and attorneys' fees) was \$3,323.76. In other words, assuming that the consumer actually borrowed the full \$2,811.66 as principal (i.e. assuming it did not include any late fees, over limit fees or interest, which is almost never the case), the data show that consumers got an average of \$512.10 (18.2%) tacked onto the judgment. The bulk of this amount was interest and attorneys' fees. "Costs" (which presumably include a private process server's fee) averaged only 11.6% (\$59.75) of the additional \$512.10. In terms of dollar value, prejudgment interest was the single largest amount added to a judgment. Prejudgment interest was added in 67% of the cases (1,347 out of 2,006) in which judgment was entered in favor of the debt buyer plaintiff. The average amount of prejudgment interest added in these 67% of cases won by the plaintiff was \$476. This is a significant figure, in that it amounts to almost 10% of the jurisdictional amount of \$5,000, when 83% of all cases were for an amount claimed of less than \$5,000. Finally, in 561 cases an average of \$474 was awarded for attorneys' fees. The bottom line is that debt buyers obtained judgment that was almost one fifth (18.2%) greater than the principal amount of the debt that they purchased for pennies on the dollar.

Pre-judgment interest and attorneys' fees are particularly significant because they should usually require proof greater than that required to prove a simple debt. If a plaintiff claims attorneys' fees or pre-judgment interest at a contractual rate, the plaintiff must prove that such amounts are provided for in the underlying contract.<sup>124</sup> Further, under the American Rule, attorneys' fees may be awarded only pursuant to a statute or contract, and they should not be awarded to law firms which are

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<sup>124</sup> MD. R. 3-306(d)(1).

themselves debt buyers, or are owned by debt-buyers, because Maryland prohibits attorneys who act in their own interests from charging attorneys' fees.<sup>125</sup>

## 2. How Consumers Respond to Debt Buyer Lawsuits

Previous studies have found that the overwhelming majority of consumers do not formally defend collection suits against them.<sup>126</sup> This study confirms that finding. Even when the figures were adjusted to remove those defendants who were not served with a complaint,<sup>127</sup> eighty-five percent of all consumers failed to file a defense in writing (known in Maryland as a "Notice of Intention to Defend"). The lack of consumer engagement in debt collection cases is an ongoing problem that escapes resolution. At the June 2013 joint Federal Trade Commission/Consumer Financial Protection Bureau workshop titled "The Life of a Debt" much was made of this problem, but no solutions were offered.<sup>128</sup>

Figure 2 demonstrates that: (1) 85% of the 2,947

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<sup>125</sup> See, e.g., *Weiner v. Swales*, 141 A.2d 749 (Md. 1958). The Financial Services division of the Attorney General's office has successfully pursued at least one debt buyer for violation of this rule. Settlement Agreement & Consent Order at ¶11(b), *Sunshine Financial Group, LLC*, Nos. CFR-FY2012-019 & CFR-FY2011-135 (Md. Collection Agency Licensing Bd. Sept 9, 2011), available at <http://www.dllr.state.md.us/finance/consumers/pdf/sunshinesettlement.pdf> (finding that *Sunshine* violated Maryland and Federal debt collection law by claiming attorney's fees not permitted in law). Since the *Sunshine* case, other firms in similar positions have stopped seeking attorneys' fees. Moreover, one of the compromises in the revised Rules was that, starting on January 1, 2012, a debt buyer who was seeking affidavit judgment at the time of filing the lawsuit need not produce the underlying contract if (1) it was not seeking prejudgment interest in excess of 6%; and (2) it was not seeking attorneys' fees. The practical result has been that since January 1, 2012, debt buyers in Maryland always seek 6% prejudgment interest, and they never seek attorneys' fees and they do not attach the underlying contract. See MD. R. 3-306.

<sup>126</sup> See *supra* Part I.E.

<sup>127</sup> Because the study relied on electronic court records, it was not possible to determine if actual service took place in all of these cases. Defective or "sewer" service may still be depressing the response rate of consumer defendants.

<sup>128</sup> See *Life of a Debt*, *supra* note 32.

consumers served with a complaint did not file a written response; (2) 13% filed a response by themselves; and (3) 2% had a lawyer at the time of or after a response was filed.

Figure 2 – How Consumers Respond to Suits

	Everyone		People Who were Served	
	N	%	N	%
Represented by Lawyer	52	1%	52	2%
Responded Pro Se	397	9%	397	13%
Did Not Respond	3951	90%	2498	85%
<i>Total</i>	<i>4400</i>	<i>100%</i>	<i>2947</i>	<i>100%</i>

The finding that only 2% of the people had a lawyer is consistent with the findings of other studies.<sup>129</sup> On closer examination, the number of consumers actually *defended in the lawsuit* by a lawyer is likely to be even smaller: in 5 of the 52 cases where the defendant had a lawyer, the defendant declared bankruptcy. The attorney whose name appears on the record may therefore simply have been acting in relation to the bankruptcy, rather than actively defending the case. A Notice of Intention to Defend was filed in only one of these five cases, and in a different case the attorney appears to have assisted the defendant in challenging a post-judgment garnishment, but the lawyer did not defend the underlying lawsuit.

### 3. Bankruptcies

Figure 3 shows bankruptcies filed by defendants and the amounts sought in the complaint. Defendants declared bankruptcy in 261 of 4,400 cases.<sup>130</sup> An attorney appearance was filed in only 5 of these 261 cases. Consumers filed for bankruptcy

<sup>129</sup> See *supra* Part I.E.

<sup>130</sup> Case Search records Bankruptcy as a case status rather than as a case outcome – therefore bankruptcies out of the total sample, rather than cases with a final outcome.



even though no money judgment was entered in about 56% of the cases, and in the remaining 44%, when a money judgment had been entered.<sup>131</sup> With an average amount claimed of \$4,450, bankruptcy cases were significantly larger (almost 50% higher) than the average of \$2,993.73 claimed overall.<sup>132</sup>

Figure 3 – Bankruptcies Observed

<b>Bankruptcies</b>	<b>N</b>	<b>%</b>	<b>Total Complaints</b>	<b>Average Complaint</b>
Notice Filed Pre Judgment	147	56%	\$ 680,988.84	\$ 4,632.58
Notice Filed Post Judgment	114	44%	\$ 480,680.88	\$ 4,216.50
<i>Total</i>	<i>261</i>	<i>100%</i>	<i>\$ 1,161,669.72</i>	<i>\$ 4,450.84</i>

#### 4. Unrepresented Consumers Fare Poorly

As a preliminary matter, it is important to note that 925 of the 4,400 cases sampled were dismissed when the defendant was never served. In 702 of these cases, the court record reflects that the dismissal was due to lack of prosecution or lack of jurisdiction. In other words, according to the data sample, 24% of all cases filed were never served. While no firm conclusions can be drawn from the fact that 24% of cases were never served, three possibilities seem likely: (1) a large number of defendants settled prior to the law suit getting served, which obviated the need for service; (2) debt buyer documentation is so stale that they cannot obtain accurate current location information on defendants; or (3) the debt buyer business model is structured such that it is not profitable to invest resources into locating current addresses for defendants.

Of the 2,947 cases that were served and reached final outcome, 2,498 people (85% of the total) did not file a response; 397 people (13%) filed a *pro se* response; and 52 people (2%) had a

<sup>131</sup> The distinction of presence vs. absence of a money judgment was made because the actual dates of the bankruptcy filing were not a part of the data which gathered pursuant to the protocol.

<sup>132</sup> See *infra* Figure 3.

lawyer who entered an appearance in the case.

Of the 2,947 cases that were served and reached final outcome, 2,006 (68%) resulted in a money judgment against the defendant, in an average amount of \$3,323.76. Yet, only 9 (0.4%) of the judgments were the result of a trial. Outcomes varied depending on whether the person (1) filed no response; (2) filed a response; or (3) had a lawyer who entered an appearance in the case.

Defendants who filed no response had the worst outcomes. Of the 85% of people who did not file a response, debt buyers obtained a judgment by affidavit, consent, default, or trial 73% of the time, and recovered 82% of the amount sought in the complaints.

Defendants who filed a response had better outcomes than those who did not file a response, but the outcomes were poor overall. Of the 13% of defendants who proceeded *pro se* (by filing a response called a Notice of Intention to Defend), debt buyers obtained judgment by affidavit, consent, default, or trial 47% of the time, and recovered 62% of the amount sought in the complaints.

Defendants who had a lawyer fared best. Of the 2% of defendants who had a lawyer enter an appearance in the case, debt buyers obtained an affidavit, consent, or default judgment only 15% of the time, and recovered only 21% of the principal amount sought in the complaints.<sup>133</sup> However defendants were represented by a lawyer in only 52 cases, and it is clear that different lawyers provided different levels of service, rendering this data not statistically significant enough to be a reliable measurement. Nevertheless, data from outside of this study confirms what is widely believed: lawyers make a difference. A 2013 unpublished study of the Maryland's Pro Bono Resource Committee's Consumer Protection Project found that of 80 cases in which pro bono attorneys represented defendants in collection suits by debt buyers, debt buyers obtained final money judgments in only 12 cases (15%). Overwhelmingly, defendants with an

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<sup>133</sup> The fact that there were affidavit and default judgments when there was an attorney of record suggests that the attorney involvement commenced only after judgment was entered, but the data is not conclusive.

attorney succeeded in having the case dismissed.<sup>134</sup>

Figure 4 - Outcomes by Representation

Outcome	No Notice to Defend Filed		Notice Filed		Attorney	
	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%
Money Judgment	1812	73%	186	47%	8	15%
% of Total Complaint Amounts awarded		82%		62%		21%

Figure 5 – Detailed Outcomes by Representation Status

Outcome	No Notice to Defend Filed		Notice Filed		Attorney		Total	
	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%
Affidavit Judgment <sup>135</sup>	1518	61%	96	24%	6	12%	1620	55%
Consent Judgment for P <sup>136</sup>	231	9%	61	15%	2	4%	294	10%
Default Judgment for P <sup>137</sup>	61	2%	22	6%	0	0%	83	3%

<sup>134</sup> Study on file with the author.

<sup>135</sup> See MD. R. 3-306. To seek affidavit judgment the plaintiff must demand it and file an affidavit to support it at the time of filing the complaint. MD. R. 3-506(b). If the defendant fails to file a Notice of Intention to Defend (“NOID”), the court may grant judgment without a trial, provided the affidavit is sufficient. MD. R. 3-306(e)(2)(A). When the defendant files a NOID, but fails to appear at trial, it appears that some clerks record the resulting judgment as an affidavit judgment, hence the presence of 96 affidavit judgments among defendants who filed NOIDs.

<sup>136</sup> A consent judgment may be entered at any time. MD. R. 3-612. However, consent judgments may represent enforcement of the terms of settlements, allowed by Rule 3-506(b).

<sup>137</sup> A default judgment may be entered in two situations: where affidavit judgment is denied, but on the trial date the defendant fails to appear; where a

Dismissed by Court	149	6%	66	17%	11	21%	226	8%
Rule 3-506 Dismissal <sup>138</sup>	293	12%	69	17%	17	33%	379	13%
Rule 3-506(B) Dismissal upon stipulated terms <sup>139</sup>	164	7%	58	15%	7	13%	229	8%
Rule 3-507 Dismissal <sup>140</sup>	78	3%	14	4%	2	4%	94	3%
Trial Judgment for P	2	0%	7	2%	0	0%	9	0%
Trial Judgment for D	2	0%	3	1%	7	13%	12	0%

NOID is filed but the defendant fails to appear. MD. R. 3-509. One anomalous default judgment was entered where the plaintiff failed to appear at a hearing.

<sup>138</sup> A form of voluntary dismissal where the plaintiff can dismiss without the court's permission provided no counterclaim has been made, and notice is given to the parties and the court. MD. R. 3-506(a). The analysis of the specific reason or reasons that cases were dismissed is limited, because the data in Case Search often does not specify whether the dismissal was due to a voluntary settlement (pursuant to Rule 3-506(b)) or to any other of several factors listed in Rule 3-506, or even factors which are not listed in Rule 3-506. One such factor may be that debt buyers have been known to settle or dismiss as soon as they become aware that a case might be contested. Similarly, collection phone calls and letters do not stop just because a lawsuit was filed. In fact, it seems axiomatic that people who are served with a lawsuit are more likely to make a settlement than those who have not. This is another area that warrants study, but which is beyond the scope of this article.

<sup>139</sup> A dismissal based upon a settlement. The case may be reinstated in order to "enforce the stipulated terms." MD. R. 3-506(b). A dismissal on stipulated terms may therefore become a consent judgment if the terms are not kept.

<sup>140</sup> A lawsuit is subject to dismissal by the court if the complaint has not been served for more than a year, or if there have been no docket entries for one year. MD. R. 3-507.

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Default Judgment for D	0	0%	1	0%	0	0%	1	0%
Total	2498	100%	397	100%	52	100%	2947	100%

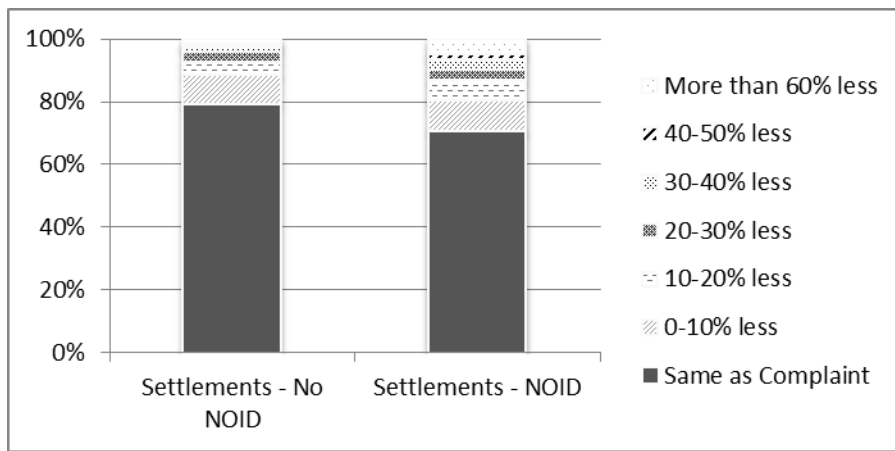
### 5. Settlement

Settlements between debt buyers and unrepresented defendants<sup>141</sup> are fairly common. Of the 2,498 people who were served and did not file a Notice of Intention to Defend, 395 (16%) settled. Some of these settlements (164, 42%) were recorded as Rule 3-506(b) dismissals, so their terms are unknown. The remaining 231 (58%) were consent judgments, the terms of which are known. **Most of consent judgments (183, or 79%) were for the amount demanded in the complaint.** The forty-eight defendants (21%) who settled for a reduced amount achieved an average reduction of 19%. However, outcomes were not evenly distributed: twenty-two (10%) achieved a reduction of less than 10%, while four achieved reductions of over 50%. These results suggest that even the few defendants who do settle their cases with plaintiffs do not usually benefit much from the resulting settlement. **A very small group was successful in achieving a significant reduction in the alleged debt, but most are no better off than if they had simply waited for affidavit judgment.**

Self-represented defendants (i.e. those who filed a Notice of Intent to Defend) fared little better. More of them settled: 119 out of 397 (30%) as opposed to 16% of the unrepresented. Of these settlements, sixty-one (51%) were consent judgments. **Most of these consent judgments (forty-three, 69%) were for the same amount as the complaint.** Where the judgment was for less than the amount in the complaint, it was reduced by an average of 23%. Again, however, only a small number of defendants benefitted the most, as shown in Figure 6, below.

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<sup>141</sup> In this context, “unrepresented” is used to designate those people who did not have a lawyer, and who did not file a Notice of Intention to Defend. “Self-represented” is used to designate people who did not have a lawyer, but who did file a Notice of Intent to Defend.

Figure 6 - Consent Judgments<sup>142</sup>

## 6. Trends in Debt buyer Activity

In addition to the cases from 2009 and 2010 which are studied above in detail, the total number of lawsuits filed in Maryland by the subject debt buyers was calculated for the period from January 1, 2011 through December 31, 2013. In Maryland, debt buyers filed more than 37,000 cases in 2011, more than 22,000 cases in 2012, and more than 24,000 cases in 2013.<sup>143</sup> Thus, as calculated in Figure 7, the total number of filings in Maryland by the subject debt buyers during each year from 2009 through 2013 was as follows: 40,796 in 2009; 43,581 in 2010; 37,202 in 2011; 22,566 in 2012; and 24,317 in 2013. It is clear that filings hit their peak in 2010, their low point in 2012, and perhaps began to rebound in 2013. It is unclear – and worthy of further

<sup>142</sup> Here, “No NOID” denotes people who were unrepresented (i.e. the people who did not have a lawyer and who did not file a Notice of Intent to Defend). “NOID” represents people who did not have a lawyer, but who did file a Notice of Intent to Defend.

<sup>143</sup> There is an additional group of debt buyers who were either nonexistent or not as active in 2009-2010 as they were after that time frame. Adding the gross number of filings of this new group raises the total filings in 2011 to 37,202; in 2012 to 22,566; and in 2013 to 24,317. This new group consists of the following entities: Credit Acceptance, Osiris Holdings, Unifund CCR, Razor Capital, and Maryland Portfolios.

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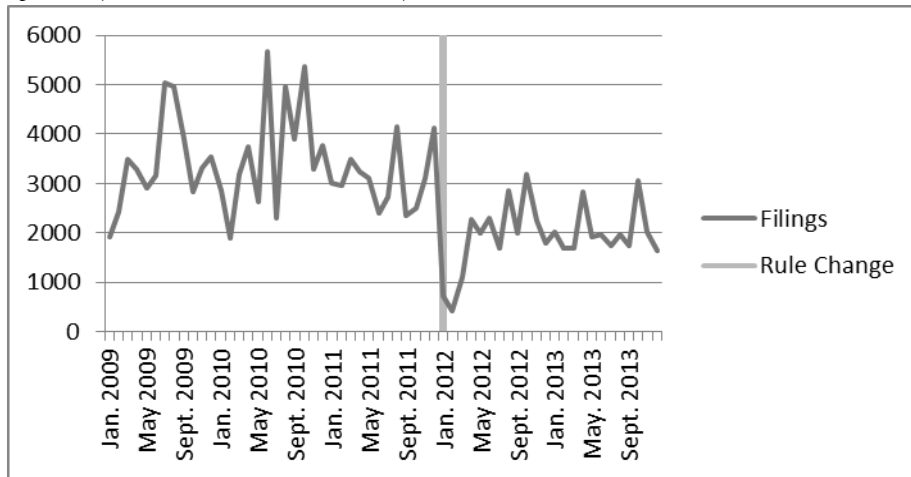
study to determine - whether the dramatic decline in filings is due to market forces, to regulatory action, to the 2012 changes to the Maryland Rules, or some other factor or combination of factors. It is also unclear whether the pattern in Maryland is reflected in other states.

Figure 7 – Number of Cases & Market Share of Debt Buyers, 2009-2012

Debt Buyer	Years										Totals
	2009	%	2010	%	2011	%	2012	%	2013	%	
Advantage Assets, II, INC	462	1%	1685	4%	144	0%	0	0%	1	0%	<b>2291</b>
Arrow Financial Services, LLC	5376	13%	2321	5%	75	0%	1	0%	1	0%	<b>7773</b>
Asset Acceptance, LLC	2978	7%	3770	9%	1154	3%	492	2%	2208	9%	<b>8394</b>
Atlantic Credit & Finance, INC	1712	4%	979	2%	97	0%	2	0%	14	0%	<b>2790</b>
CACH	2701	7%	2146	5%	817	2%	210	1%	1093	4%	<b>5874</b>
Cavalry Portfolio Services, LLC	990	2%	1223	3%	1791	5%	354	2%	1602	7%	<b>4358</b>
Commercion Credit Acceptance	0	0%	0	0%	0	0%	45	0%	1	0%	<b>45</b>
Equable Ascent	824	2%	1013	2%	3234	9%	1399	6%	1531	6%	<b>6470</b>
Fortis Capital	50	0%	1612	4%	3539	10%	250	1%	145	1%	<b>5451</b>
Fradkin & Weber, PA	57	0%	38	0%	31	0%	0	0%	0	0%	<b>126</b>
LVNV Funding, LLC	249	1%	3748	9%	102	0%	20	0%	3	0%	<b>4119</b>
Midland Funding, LLC	2756	7%	4445	10%	5205	14%	0	0%	5	0%	<b>12406</b>
North Star Capital Acquisition	5546	14%	4839	11%	14242	38%	10786	48%	9619	40%	<b>35413</b>
Osiris Holdings	1155	3%	540	1%	64	0%	1	0%	1	0%	<b>1760</b>
Palisades	0	0%	84	0%	404	1%	31	0%	208	1%	<b>519</b>
	345	1%	520	1%	101	0%	21	0%	9	0%	<b>987</b>

Collection LLC											
Pasadena											
Receivables,											
INC	13570	33%	10865	25%	3688	10%	2122	9%	1085	4%	<b>30245</b>
Portfolio											
Recovery											
Associates	1608	4%	2651	6%	2189	6%	6328	28%	6608	27%	<b>12776</b>
Razor	0	0%	128	0%	40	0%	314	1%	103	0%	<b>482</b>
Sherman	20	0%	0	0%	0	0%	4	0%	0	0%	<b>24</b>
Sunshine											
Financial Group,											
LLC	36	0%	822	2%	231	1%	4	0%	0	0%	<b>1093</b>
Unifund	361	1%	152	0%	54	0%	182	1%	80	0%	<b>749</b>
<b>TOTALS</b>	<u>40796</u>		<u>43581</u>		<u>37202</u>		<u>22566</u>		<u>24317</u>		<u><b>168,462</b></u>
<b>MONTHLY</b>											
<b>AVERAGE</b>	3399.67		3631.75		3100.17		1880.50		2026.42		

Figure 8 - Total Debt Buyer Filings in Maryland District Courts, Jan. 1, 2009 to December 31, 2013



Polls by InsideARM, a debt-collection trade publication, show that despite the overall trend that Figure 8 appears to show, the



purchase and sale of junk debt is a continuing feature of the debt collection industry.<sup>144</sup> Given the number of private class actions and public enforcement actions by the state of Maryland against prominent debt buyers in Maryland, the decline in the volume of lawsuits may also reflect a decision to increase collections through non-litigation means such as letters and phone calls.<sup>145</sup> There are, however, no signs that the debt buying industry is disappearing or that the problems identified by the Rules Committee have been solved. The filing of tens of thousands of debt buyer lawsuits continues to be a significant load on Maryland's courts and consumers.

While some debt buyers have stopped filing collection cases in Maryland, others have increased their filings. **Encore Capital Group (parent of Midland Funding, LLC) purchased Asset Acceptance, Inc. in mid-2013, leaving only three major players in Maryland, where there were once more than ten.**<sup>146</sup>

## 7. Geographic Concentration of Cases

**Debt buyers sued disproportionately in jurisdictions with larger concentrations of poor people and racial minorities.** For example, Prince George's County has only 15% of the Maryland's population, yet 23% of all debt buyer complaints were filed against Prince George's County residents.<sup>147</sup> A disparity also exists in Baltimore City, as illustrated in the Figure 9 below.

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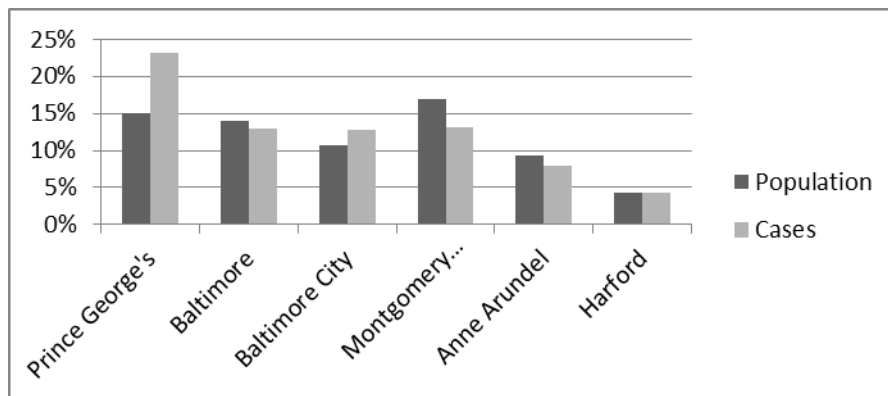
<sup>144</sup> In Summer 2011, the last period for which InsideARM has published figures, 37.2% of original creditors were increasing their use of debt collection agencies or debt buyers while 22.9% were maintaining the same level of usage. *The ARM Barometer: Creditor Results*, INSIDEARM.COM, (Summer 2011), <http://www.insidearm.com/features/arm-barometer/summer-2011/creditor-results/>. Most debt buyers reported an increase in activity in the same period: 42.9% moderate, 14.3% large. *The ARM Barometer: Debt Buyer Results*, InsideARM.com, (Summer 2011), <http://www.insidearm.com/features/arm-barometer/summer-2011/results-debt-buyers/>.

<sup>145</sup> While the shift from litigation to non-litigation based collection would be an interesting subject for further study, it is a difficult area to research empirically, because non-litigation based collection does not leave the same type of broad paper trail in the public records.

<sup>146</sup> See *supra* Figure 7, showing the market share of various debt buyers in Maryland.

<sup>147</sup> See *infra* Figure 9.

Figure 9 – Cases and Population in Top Six Jurisdictions



As Figure 9 shows, based on filing rates and population estimates for 2010,<sup>148</sup> Prince George's County and Baltimore City have a greater proportion of debt buyer cases than that of the general population. In contrast, Baltimore, Montgomery and Anne Arundel Counties have fewer cases based on population, while Harford seems to be evenly balanced.

The differences between these areas can be better shown by comparing some of their basic demographics. As Figure 10 shows, there is no straightforward connection between either median income or race, and disparities in the filing rate in these jurisdictions. Baltimore City households have nearly half the median income of Maryland, and Baltimore City is a "majority-minority" jurisdiction, but its case-to-population disparity is only 2% (i.e. Baltimore City's share of cases was 2% more than its share of Maryland's population). Prince George's County has a nonwhite population 5% higher than Baltimore City, and slightly above average income, but its case-to-population disparity is 8%. Baltimore County, with a slightly lower than median income and a slightly higher nonwhite population fared similarly to Anne

<sup>148</sup> Population figures from the 2010 United States Census, compiled by the Maryland Department of Planning. MD. DEPT. PLANNING, 2000-2010 INTERCENSAL ESTIMATES BY GENDER, RACE & ORIGIN (2012) [hereinafter INTERCENSAL ESTIMATES], available at [http://www.mdp.state.md.us/msdc/IntercensalEst00\\_10/MDEst\\_2000to2010\\_byRace&Origin.xls](http://www.mdp.state.md.us/msdc/IntercensalEst00_10/MDEst_2000to2010_byRace&Origin.xls).

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Arundel County, which has significantly higher income and lower nonwhite population.

Figure 10 – Comparison of High Filing Jurisdictions

County	Median Income <sup>149</sup>		Race <sup>150</sup>		Population		
	Income	Difference from State Median	Non-White	Difference from State %	People <sup>151</sup>	Cases	Disparity <sup>152</sup>
Prince George's County	\$72,178	1%	74%	35%	863420	1020	8%
Baltimore County	\$64,814	-9%	34%	-5%	805029	569	-1%
Baltimore City	\$39,561	-45%	69%	30%	620961	565	2%
Montgomery County	\$94,358	32%	36%	-3%	971777	580	-4%
Anne Arundel County	\$84,409	18%	22%	-16%	537656	347	-1%
Harford County	\$78,648	10%	18%	-21%	244826	186	0%
Maryland	\$71,294	—	39%	—	5773552	4400	—

<sup>149</sup> Median Income figures are from the American Communities Survey (ACS), 3 year estimates for 2009-2011. MD. DEPT. PLANNING, MEDIAN HOUSEHOLD INCOME IN MARYLAND'S JURISDICTIONS (THREE YEAR ACS DATA) 2009-2011, available at [http://www.mdp.state.md.us/msdc/HH\\_Income/ACS\\_3yr\\_Household\\_Median\\_Income\\_2011.xls](http://www.mdp.state.md.us/msdc/HH_Income/ACS_3yr_Household_Median_Income_2011.xls). Disparity figures are the percentage deviation from the median income for Maryland.

<sup>150</sup> From the 2010 United States Census, compiled by the Maryland Department of Planning. INTERCENSAL ESTIMATES, *supra* note 148.

<sup>151</sup> *Id.*

<sup>152</sup> "Disparity" represents the difference between each jurisdiction's proportion of Maryland's population and that jurisdiction's proportion of the sampled cases. For example, Prince George's County has 15% of the Maryland's population but had 23% of the sampled cases, so the disparity between cases and population is 8%: Prince George's County had 8% more cases than the size of its population indicates it should.

However, the general trends in this comparison suggest that race and wealth make a difference: the counties with the fewest proportionate share of lawsuits are richer and less diverse than Maryland as a whole.

An analysis based on zip codes or census tracts would enable a more detailed comparison of case data with census data. Alternatively, further study specifically dedicated to the disparate impact of debt collection suits would go a long way towards determining whether debt-buyer suits disproportionately affect particular groups.

### C. Follow-Up

As noted above, the rules governing affidavit judgments in Maryland changed on January 1, 2012.<sup>153</sup> In order to explore the immediate effects of these changes, a sample size of 100 cases filed after January 1, 2012, was analyzed using the same protocol as for the original study.<sup>154</sup>

Of the 100 follow-up cases gathered, 83 resulted in a final outcome, of which 55 (66%) were judgments against the Defendant. Analysis of this limited sample suggests limited changes following the introduction of the new rules.

First, the new sample had a larger dollar value on average, while the amount of the judgment was smaller on average. Specifically, while the original sample had an average complaint amount of \$2,993, in the follow-up it was \$3,248. In the original sample, the average total judgment was \$3,323, but in the follow-up it was \$2,594. Part of this change may be accounted for by a substantial drop in awards of interest and attorneys' fees, which is a direct result of the new Rule 3-306. Pre-judgment interest was awarded in 67% of judgments in the original sample, but only 25% in the follow up sample, while awards of attorneys' fees dropped from 28% in the original sample to 13% in the follow-up sample.

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<sup>153</sup> See *supra* note 71 and accompanying text.

<sup>154</sup> Due to the consolidation that has occurred in the industry, only 5 of the original debt buyers had sufficient numerous filings to sample in 2012: Pasadena Receivables, Midland Funding, Cavalry Portfolio, Asset Acceptance and Portfolio Recovery Associates. The cutoff date for gathering data for this sample was November 15, 2013.

Second, the follow-up shows an *increase* in the proportion of affidavit judgments, from 55% of served cases with outcomes from the original sample, to 63% of similar cases in the follow up sample.<sup>155</sup> This is somewhat puzzling, given the increased requirements of the new rules. It is possible that the result is an artifact of other changes and not a real increase in the frequency of default judgments. Likewise, it could mean that the cases filed under the new rules are of a better quality. The increase corresponded with a drop in Rule 3-507 dismissals. The proportion of cases “active” was also higher in the follow-up than in the original sample. This suggests that some cases in the follow-up will be dismissed eventually. At the time of sampling, there were simply too many possible influences on the affidavit judgments to draw firm conclusions regarding the impact of the new rules.

Third, more defendants defended themselves in the follow-up: 24% of defendants who were served filed a Notice of Intention to Defend in the follow-up, compared with only 15% in the original sample. It is, however, difficult to relate this development to the new affidavit judgment rule. The increased filings of Notices of Intent to Defend may be a result of generally increased awareness about the flaws of debt buyer lawsuits, or the fact that there is now a formal pro bono legal assistance program in effect to defend debt buyer lawsuits, or due to other factors.

Finally, several metrics showed no significant change in the follow-up: the rate of service, geographical distribution of cases, attorney representation<sup>156</sup> and proportion of bankruptcy

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<sup>155</sup> The proportion of cases served was the same in both samples: 76%.

<sup>156</sup> Because representation is so rare, as shown by the original sample, a larger follow-up would be required to state with any certainty that attorney representation was unchanged. In addition to the nascent emergence of a formal pro bono representation program in debt buyer cases, the District Court in partnership with the Maryland Legal Aid Bureau has also created and rapidly expanded a “Self-Help Center” that has provided assistance to literally tens of thousands of *pro se* litigants, many of whom are defending debt buyer lawsuits. A 2012 University of Maryland study of the Self-Help Center concluded that “There was also evidence, drawn from analyses of case event data obtained from the Judiciary’s management information system, suggesting that cases involving clients of the Center, when compared with cases involving self-represented litigants who did not receive Center services,

filings.

### III. ANALYSIS

The following three sections contain an analysis of the findings described in Part II. Section A describes the implications for providing legal assistance or representation to consumers sued by debt buyers. Section B compares the findings of this study with those of four other studies.

#### A. *The Importance of Representation*

Figure 5 shows that consumers sued by a debt buyer have the worst outcomes when they do nothing and the best outcomes when they are represented by an attorney. When consumers did nothing, the cases against them were dismissed about 20% of the time. In contrast, the less than 2% of defendants who had a lawyer achieved a dismissal rate of about 70%.

Although Maryland has over 30,000 lawyers (22,500 of whom are in private practice),<sup>157</sup> in 2009-2010, only thirty-eight attorneys represented consumers in a total of fifty-two of the 4,400 cases sampled.

Extensive state funding for the representation of such defendants is unlikely under current budgetary conditions. Avenues for improving representation and access to justice have been explored by the Maryland Access to Justice Commission including fee shifting,<sup>158</sup> the implementation of a right to counsel

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showed greater understanding and engagement of litigants about the case, and improved chances for judgments being based on merits and rights, rather than default." *Evaluation of the Glen Burnie District Court Self-Help Center*, UNIV. OF MD. INST. FOR GOVERNMENTAL SERV. AND RESEARCH, [http://www.igrs.umd.edu/applied\\_research/displaymedia.php?mediaID=26](http://www.igrs.umd.edu/applied_research/displaymedia.php?mediaID=26) (last updated Feb. 18, 2014).

<sup>157</sup> The ABA estimates 23,000 lawyers were practicing in Maryland as of 2013, and about 75% of these were in private practice. MKT. RESEARCH DEP'T, AM. BAR ASS'N, NATIONAL LAWYER POPULATION BY STATE (2013), *available at* [http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/2013\\_natl\\_lawyer\\_by\\_state.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/2013_natl_lawyer_by_state.authcheckdam.pdf).

<sup>158</sup> Md. Access to Justice Comm'n, *Fee Shifting to Promote the Public Interest in Maryland*, 42 U. BALT. L.F. 38 (2011). The Commission's proposals focused on one-way fee shifting to support plaintiffs in civil rights and similar

in civil cases,<sup>159</sup> and unbundled legal assistance for self-represented litigants.<sup>160</sup>

A recent study by James Greiner and Cassandra Pattanayak examines the impact of representing people pro bono.<sup>161</sup> Although it was not the main purpose of this study to explore this question, some of the results of this study are relevant to that debate. The proceedings of the District Courts of Maryland are very different from the subject-specific proceedings that the Greiner study examined, and as the authors noted, the nature of both the subject matter and the forum may mean that their results are not generally applicable.<sup>162</sup> Reflecting on that study, Jeff Selbin and several colleagues have suggested that more attention should be paid to where and at what point in the process limited legal assistance resources should be tapped.<sup>163</sup> The instant study clearly shows that consumer defendants had better outcomes when a lawyer appeared in their case. However, the primary purpose of this study is not to demonstrate the value of representation, but rather to demonstrate what occurs in its absence.

As noted in Part II.B.5 above, the data regarding

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cases, however, the resulting bill was unsuccessful in the legislature. MD. ACCESS TO JUSTICE COMM'N, ANNUAL REPORT 2012, 9-10 (2012) [hereinafter MD. ACCESS TO JUSTICE REPORT], *available at* <http://www.courts.state.md.us/mdatjc/pdfs/annualreport2012.pdf>.

<sup>159</sup> MD. ACCESS TO JUSTICE REPORT, *supra* note 158, at 10.

<sup>160</sup> *Id.* at 1-4.

<sup>161</sup> D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118 (2012).

<sup>162</sup> Greiner and Pattanayak used the Harvard Legal Aid Bureau's work in unemployment insurance cases. In explaining their results, the authors thought that self-representation may have been easier in this particular type of case, and that the administrative law judges hearing the cases may have compensated for the disadvantages of self-representation. *Id.* at 2150-51.

<sup>163</sup> Jeffrey Selbin, Jeanne Charn, Anthony Alfieri & Stephen Wizner, *Service Delivery, Resource Allocation, and Access to Justice: Greiner and Pattanayak and the Research Imperative*, 122 YALE L.J. ONLINE 45 (2012), <http://www.yalelawjournal.org/images/pdfs/1099.pdf>. A study addressing this question is currently under way led by Dalié Jiménez and James Greiner. Dalié Jiménez, D. James Greiner, Lois R. Lupica & Rebecca L. Sandefur, *Improving the Lives of Individuals in Financial Distress Using a Randomized Control Trial: A Research and Clinical Approach*, 20 GEO. J. ON POVERTY L. & POL'Y 449 (2013).

settlements suggests that in many cases, defendants who settle are as badly off as those who are subjected to judgments. The problem of settlements arose at the FTC/CFPB roundtable on “The Life Cycle Of A Debt.” Thomas Lawrie, a Maryland Assistant Attorney General made the point that contact between debt-collecting attorneys and unrepresented defendants provides collecting attorneys with an opportunity to push defendants to settle on terms they do not understand and cannot afford.<sup>164</sup> Unsustainable settlements are likely to merely delay, rather than prevent, judgments. Further study would be required to determine exactly what terms defendants in these cases generally receive, whether they understand the terms of their settlements, and whether they are in fact able to fulfill those terms. One obvious solution would be to have a standard form settlement agreement that is realistic and fair, and which provides that an alleged breach of the agreement should be met with a motion to enforce the terms of the settlement, rather than a default judgment in the full amount sued for.

### *B. Comparison with Other Studies*

Figure 11, below, sets out three key metrics gathered in this and previous studies of debt buyer cases: (1) the percentage of defendants who did not respond to the debt collection complaint; (2) the percentage of defendants who were represented; and (3) the percentage of cases which resulted in judgments against defendants, together with the sample size and years in which the data were gathered.

The results show some clear trends, but also large disparities. Some of these disparities can be explained by methodological differences between the studies. However, some disparities can only be explained as real differences in the lawsuits studied. These differences might arise because of the circumstances at the time of each study, differences between the geographical areas studied, or the impact of differing law and

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<sup>164</sup> Patrick Lunsford, *ARM Data Exchange Standards Focus of FTC/CFPB Collection Roundtable*, INSIDEARM.COM, (June 7, 2013), <http://www.insidearm.com/daily/debt-buying-topics/debt-buying/arm-data-exchange-standards-focus-of-ftccfpb-collection-roundtable/>.



procedure in the jurisdictions studied.

Figure 11 – Comparison of Key Results

	Defendant failed to respond	Defendant represented	Judgments	Overall Sample Size	Year Studied
This Study	85%	< 2%	73% <sup>165</sup>	4400 <sup>166</sup>	2009-2010
Spector Study <sup>167</sup>	77%	10%	44%	507	2007
Fox Study <sup>168</sup>	83%	4%	81% <sup>169</sup>	645	2009
Debt Deception Study <sup>170</sup>	—	0%	94%	365	2006-2008
Debt Collection Racket Study <sup>171</sup>	94%-82%	2%	38-62% <sup>172</sup>	168,807	2011

<sup>165</sup> This number is the sum of affidavit, default, consent and trial judgments. See *supra* Figure 5.

<sup>166</sup> As mentioned earlier, out of the 4,400 case sample, only 2,947 (76%) involved cases where the complaint was served on the defendant, and the case reached final disposition.

<sup>167</sup> Spector, *supra* note 93, at 288-289, 296.

<sup>168</sup> Fox, *supra* note 12, at 377, 381. Fox's figures do not account for defendants who were not served, so the true rate of default is higher. In addition, Fox's figure of 83% for non-response is that for total non-response. Many of the responses were technically inadequate and may have been rejected by the Court.

<sup>169</sup> This figure is the aggregate of default, summary and consent judgments. *Id.* at 377.

<sup>170</sup> WILNER & SHEFTEL-GOMES, *supra* note 37, at 8. The study did not provide a figure for failure to respond complaints and observed no represented defendants.

<sup>171</sup> SHIN & WILNER, *supra* note 89, at 5-6. Note that these statistics varied by jurisdiction. The sample included basic information from all civil collection suits filed in New York. *Id.*

<sup>172</sup> These figures represent the range of *default* judgment percentage across New York jurisdictions. No figure is available in this study for non-default judgments.

Consumers in Trouble <sup>173</sup>	70-98%	11-30%	91-92%	1504	1967
Bezdek Study <sup>174</sup>	85%	0.18%-2.8%	—	659	1991

The clearest trend, repeatedly highlighted in the literature, is that defendants often do not respond to collection suits.<sup>175</sup> This has been recognized by industry and consumer advocacy at least since the FTC's roundtable discussions, leading to its *Broken System* report.<sup>176</sup> The evidence suggests that the rate of default is approximately 80-90%.<sup>177</sup> Comparison with the Baltimore rent court study shows that failure to appear extends beyond consumer credit collection cases to rent cases. More recent figures from elsewhere in the country suggest that tenant defendants fail to appear just as often as the debt buyer defendants in this study.<sup>178</sup> This is significant because of the high stakes involved in

<sup>173</sup> CAPLOVITZ, *supra* note 23, at 215, 221-223. The ranges given are the ranges observed as between the cities in which court actions were studied: New York, Detroit and Chicago.

<sup>174</sup> Bezdek, *supra* note 108. This study is unlike the others because it concerns actions based on rent and some of the figures are not directly comparable. The range given for representation represents two figures—0.18% is the representation rate based on court files and 2.8% the rate at which defendants reported receiving legal advice. *Id.* at 556, n.79.

<sup>175</sup> A lack of debtor participation came to be a central theme of the "Life of A Debt" roundtable held by CFPB and FTC in June 2013. Lunsford, *supra* note 164.

<sup>176</sup> BROKEN SYSTEM, *supra* note 8, at 7, n.18 ("There was a broad consensus among roundtable panelists that relatively few consumers who are sued for alleged unpaid debts actually participate in the lawsuits... panelists from throughout the country estimated that sixty percent to ninety five percent of consumers debt collection lawsuits result in defaults, with most panelists indicating that the rate in their jurisdiction was close to 90%.").

<sup>177</sup> See *supra* Figure 11.

<sup>178</sup> See, e.g., WILLIAM E. MORRIS INST. FOR JUSTICE, INJUSTICE IN NO TIME: THE EXPERIENCE OF TENANTS IN MARICOPA COUNTY JUSTICE COURTS 2 (2005), available at <http://morrisinstituteofjustice.org/docs/254961Finalevictionreport-P063.06.05.pdf> (less than 20% of defendant-tenants appeared); KAREN DORAN, JOHN GUZZARDO, KEVIN HILL, NEAL KITTERLIN, WENGFENG LI & RYAN LIEBL, LAWYERS' COMM. FOR BETTER HOUS., NO TIME FOR JUSTICE: A STUDY OF CHICAGO'S EVICTION COURT 4 (2003) (56% of defendant tenants

rent cases, in which tenants stand to lose, literally, the roof over their heads. Despite the increased stakes, it appears that rent court defendants are no more likely to defend themselves in court than the people who are sued by debt buyers. This suggests that coercing defendants to attend and participate in court by “raising the stakes” (for example, through the creditor’s contempt discussed by Shepard) is not effective.

Lack of legal representation is another clear trend. Rates of attorney representation of defendants in debt buyer cases vary from 0% to 10%. Although representation rates are uniformly low, the variation between studies is extremely high: the Spector study suggests that five times as many defendants are represented in these cases in Texas as compared to Maryland or New York.<sup>179</sup> Again, Spector’s figures may represent a difference in forum or economic conditions.

While the rate at which consumers do not respond to the lawsuit is uniformly high, actual rates of default judgment varied widely, from 38% to 81%, across all jurisdictions and studies. The New York studies accounted for both the highest and the lowest rate, depending on jurisdiction and date.<sup>180</sup> Various results across jurisdictions may reflect socioeconomic differences. As both New York studies observe, and as has been true at least since the 1970s, debt collection is concentrated in poor areas, and falls disproportionately on minorities.<sup>181</sup>

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appeared), *available at* <http://lcbh.org/images/2008/10/chicago-eviction-court-study.pdf>. That these rates differ widely suggests that just because the case is high stakes for the individual they are not necessarily more likely to participate in the case than in lower stakes cases.

<sup>179</sup> See *supra* Figure 11.

<sup>180</sup> Compare WILNER & SHEFTEL-GOMES, *supra* note 37, at 8 (highest) with SHIN & WILNER, *supra* note 89, at 6 (default judgment rate for New York City Civil Courts, lowest).

<sup>181</sup> See *supra* note 114 and accompanying text. Collectors have also been accused of intentionally targeting the poor, an allegation which they deny. Suein Hwang, *Once-Ignored Consumer Debts Are Focus of Booming Industry*, WALL ST. J., Oct. 25, 2004, <http://online.wsj.com/article/SB109865776922954118.html>.

Figure 12 – Default Judgment Rates by County

County	Cases	Cases Served	Affidavit Judgments	Rate of Default Judgment (All cases)	Rate of Default Judgment (Served cases)
Prince George's	1020	635	373	37%	59%
Montgomery	580	340	214	37%	63%
Baltimore County	569	408	241	42%	59%
Baltimore City	565	417	164	29%	39%

Figure 12<sup>182</sup> shows the rate of affidavit judgments in the four Maryland counties for which the most claims were recorded. Montgomery County and Baltimore County are more affluent areas,<sup>183</sup> while Prince George's County and Baltimore City are less affluent with higher minority populations. Yet Baltimore City has the lowest rate of default judgment and Montgomery the highest. Baltimore City defendants appeared *less* frequently than those in Montgomery and Prince George's and as frequently as those in Baltimore County. The difference in rates cannot be explained as a result of case loads, affluence or the willingness of defendants to defend themselves. The likely explanation is that there are differences in judicial attitude. While some judges might believe that a failure to respond weighs heavily in favor of entry of a default judgment, the rules for granting affidavit judgment suggest otherwise. The law requires that before a judge may enter affidavit judgment, the debt buyer, like any other plaintiff, must present supporting documentation, plus an affidavit that affirmatively shows that the affiant is competent to testify to the matters asserted, that the affiant has personal knowledge of those

<sup>182</sup> Using the sample data gathered in this study.

<sup>183</sup> For readers unfamiliar with Maryland geography, Baltimore County and Baltimore City are distinct jurisdictions. The Baltimore City jurisdiction occupies a roughly square area of 92 square miles centered on downtown Baltimore. Baltimore County surrounds Baltimore City and stretches north to the Pennsylvania border, occupying 682 square miles.

matters, and that the affidavit is based on admissible evidence.<sup>184</sup>

One surprising finding is that between the time of the Caplovitz *Consumers in Trouble* study and the today, rates of defendant participation and representation appear to have dropped, while at the same time courts have become progressively less willing to grant default judgments. This may reflect a difference in methodology: Caplovitz's rates were based on interviews with defendants, and he counted those who received advice from a lawyer,<sup>185</sup> while this and other modern studies detect only cases in which a lawyer has actually entered an appearance on behalf of the defendant in the court records.

The reason for the failures to appear remain a mystery that will no doubt attract future study. In debt buyer cases, one of the most common problems is that defendants do not recognize the name of the plaintiff or the amount for which they are being sued.<sup>186</sup> Further, most of the debts involved are unsecured credit card debts, which are not associated with any particular object. This disconnection, combined with the general lack of personal involvement in modern consumer credit already noted above, may be a significant cause of defendant default.

This suggestion may seem at odds with the results of Bezdek's 1992 rent court study. As noted, defendants failed to appear just as often 20 years ago in Baltimore City rent court as they do in the contemporary collection courts studied in this article.<sup>187</sup> Surely being subjected to eviction from one's home is more serious than being sued on a credit card. This may be so in some respects, but Bezdek found that, at least by the time the

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<sup>184</sup> MD. R. 3-306.

<sup>185</sup> *Id.* at 222-224. For Caplovitz's methodology, *see id.* at 8-10.

<sup>186</sup> *Debt Buyers*, OFFICE OF THE MINN. ATTORNEY GENERAL, <http://www.ag.state.mn.us/Consumer/Publications/DebtBuyers.asp> (last visited Sept. 4, 2013) ("Some people who are sued by debt buyers do not recognize the name of the party who is suing them and ignore the lawsuit."); WILNER & SHEFTEL-GOMES, *supra* note 37, at 7 ("People sued by [a debt buyer] are often faced with lawsuits that allege unfamiliar debts, filed by debt buyers whose names they do not recognize."); Clinton Rooney, *Defense of Assigned Consumer Debts*, 43 CLEARINGHOUSE REV. 542, 545 (2010) ("[W]hen a debt buyer unknown to the consumer sends a letter claiming to be owed a debt . . . [t]he consumer likely does not even recognize the name on the envelope.").

<sup>187</sup> *See supra* Figure 11.

tenants reached rent court, the rental relationship was impersonal: there were “a few instances of ‘mom-and-pop’ landlords bringing legitimate claims . . . . These actions were few and far between. The primary operators in the rent court are a class of business agents . . . .”<sup>188</sup>

Bezdek noted the contrast between the deference accorded to landlords’ agents in rent court and the impatience the court generally showed towards tenants.<sup>189</sup> Censorious attitudes toward debtors were also reported in 2006 by the Boston Globe, including routine threats of imprisonment.<sup>190</sup> The Globe concluded that “[o]ften, debtors are treated with less courtesy than the accused felons in the criminal court across the hall, and their rights are less respected.”<sup>191</sup>

Behavior of this kind undermines procedural fairness and damages public trust in the judiciary.<sup>192</sup> Neutrality and respectful treatment are among the key elements of the procedural fairness that our society expects.<sup>193</sup> Too often, courts fall short of this standard in collection cases. When, as the Boston Globe put it, dignity faces a steamroller in the courts,<sup>194</sup> it is perhaps unsurprising that the public lacks confidence in the judicial process and so fails to engage with the courts by filing defenses.

Whatever the real reason for default by defendants, and despite the decline in defendant participation and representation, the comparison to Caplovitz’s day is in one respect hopeful. Then, the defendant almost invariably suffered a default judgment.<sup>195</sup> Today, a default judgment is no longer a foregone conclusion. Again this change may owe something to the subject

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<sup>188</sup> Bezdek, *supra* note 108, at 556.

<sup>189</sup> *Id.* at 551-52 (noting that landlords and their agents were given some control over the timing of their cases within the rent docket while tenants were forced to wait with no indication when their cases would be called).

<sup>190</sup> Healy, *supra* note 35.

<sup>191</sup> *Id.*

<sup>192</sup> The importance of procedural fairness in public confidence in the judiciary was noted in a white paper of the American Judges Association in 2007. Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 COURT REV. 5 (2007).

<sup>193</sup> *Id.* at 6.

<sup>194</sup> Healy, *supra* note 35.

<sup>195</sup> In over 90% of cases, a default judgment was entered for the Plaintiff. See *supra* Figure 11.

matter of these disputes. Back then, most plaintiffs were original creditors suing on installment-type credit agreements, not debt buyers suing upon on open-ended credit card accounts. The difference may simply represent the generally poor quality of debt buyer suits. However, the growing evidence is that the lawsuits filed by original creditors are just as shoddy and poorly documented as those filed by debt buyers.<sup>196</sup>

However, it seems more likely that procedural changes since then are largely responsible. When Caplovitz examined his cases, confession of judgment was still possible in consumer cases. In fact, Philadelphia cases were excluded from Caplovitz's analysis of outcomes in court because those cases were all confessions of judgment.<sup>197</sup> Default judgments were entered as a matter of course and without judicial oversight when defendants failed to appear or answer.<sup>198</sup> Today, entry of a default judgment is no longer supposed to be a rubber-stamping exercise which occurs in all cases of default.

While data about representation can be found in most of the studies in Figure 11, only Bezdek discusses the impact of representation. She finds representation an unconvincing explanation for the disparity between the success of landlords and tenants.<sup>199</sup> The comparison is somewhat complicated because landlords can be represented by non-lawyers, and these "landlords' agents" are in fact professional representatives.<sup>200</sup>

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<sup>196</sup> See, e.g., Complaint for Permanent Injunction, Civil Penalties, Restitution, and Other Equitable Relief, *People v. JPMorgan Chase & Co.*, No. BC508466, 2013 WL 1915821 (L.A. Cnty., Cal. Super. Ct. May 9, 2013) (alleging various debt collection abuses); Consent Order, Order for Restitution, and Order to Pay Civil Money Penalty, *In re American Express Bank, FSB*, No. 2012-CFPB-0003 (Consumer Fin. Prot. Bureau Oct. 1, 2012), available at <http://files.consumerfinance.gov/f/2012-CFPB-0003-American-Express-Bank-FSB-Consent-Order.pdf> (Consent Order between CFPB and American Express for "deceptive debt collection practices"); Consent Order, *In re JPMorgan Chase Bank, N.A.*, No. 2013-138, (Office of the Comptroller of the Currency, U.S. Dep't of the Treasury Sept. 18, 2013), available at <http://www.occ.gov/static/enforcement-actions/ea2013-138.pdf> (settling regulatory action by OCC for abusive debt collection); *Mississippi v. JPMorgan Chase & Co.*, No. 3:2014cv00054 (S.D. Miss. Jan. 22, 2014).

<sup>197</sup> CAPLOVITZ, *supra* note 23, at 192.

<sup>198</sup> *Id.* at 201-03.

<sup>199</sup> Bezdek, *supra* note 108, at 562-63.

<sup>200</sup> MD. CODE ANN., BUS. OCC. & PROF. § 10-206(b) (West 2011)

Only a handful of tenants in Bezdek's sample were assisted, three by lawyers, six by friends or relatives.<sup>201</sup> All of them managed to avoid an entirely negative outcome.<sup>202</sup> Bezdek sees this as a sign that it may not be *representation* per se which improves the tenant's outcome.<sup>203</sup> Unfortunately, informal assistance by non-lawyers was beyond the reach of this study,<sup>204</sup> so the importance of brief advice and assistance compared to full legal representation remains fertile ground for further research.

#### IV. RECOMMENDATIONS

##### A. *Acknowledge That We Have a "Shadow System" for Collections*

An adversarial process overseen by a neutral judge is the supposed hallmark of the American justice system. Each side has a lawyer who is a zealous advocate, and a judge presides while a judge or jury determines the facts, applies the law and decides an outcome. Any cracks in the system are supposed to be filled by public defenders, legal aid lawyers, court appointed lawyers, or lawyers who are providing pro bono representation.

The reality is quite different. For consumer defendants in collection cases, there is a "shadow system" which is characterized by a lack of public awareness, a lack of formal rules, a lack of understanding on the part of defendants, and a lack of legal representation. In short, our broken debt collection system is

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(providing that "a person . . . representing a landlord" need not be admitted to the Bar; the same exception is conferred to those representing a tenant if the person is a law student or employee of an organization funded by the Maryland Legal Services Corporation).

<sup>201</sup> Bezdek, *supra* note 108, at 562.

<sup>202</sup> *Id.*

<sup>203</sup> *See id.* at 563 ("The fact that the tenants who were assisted by non-lawyer friends or relatives achieved more success than the average tenant invites the speculation that qualities other than legal representation may account for some tenants' persistence in court. Qualities such as encouragement . . . and assistance in presenting [the matter] oneself may account for a more successful hearing. . . . Perhaps the significance of assistance to tenants . . . is chiefly the breaking of [the rent court's] rhythm [of landlord-plaintiff claims].")

<sup>204</sup> Such assistance could only be discovered by interviewing defendants, and perhaps by observing hearings.



scarcely recognizable to the uninitiated. Before we can move forward, we need to fully accept the fact of just how far the system falls short of traditional notions of due process.

*B. Restore the Rules of Evidence to Ensure Due Process.*

Due process concerns are implicated when courts do not require that claims be proved by admissible evidence authenticated by someone with relevant personal knowledge about the evidence being proffered. Debt buyer lawsuits have proliferated because courts have not insisted on this, preferring to wield the rubber stamp rather than engage in the more demanding job of acting as guardians at the gates. Too often, debt buyers do not have admissible evidence to prove that a consumer was ever liable to a bank or that the debt buyer has standing to sue, and do not have reliable evidence to prove damages. Debt buyers often do not have the proof because the banks either did not have it or chose not to transfer it at the time the portfolios of debt were sold.<sup>205</sup>

The percentage of default judgments obtained by debt buyers exists because judges have allowed relaxed and informal procedures—originally intended to streamline small-stakes cases brought by self-represented litigants—to be used by some of America's most powerful financial services corporations, fully lawyered up, against the very lawyer-less litigants whom small claims procedures were supposed to protect.

*C. Revisit the Model Rules of Professional Conduct*

The study of collections lawsuits is largely a study of what happens in the absence of an adversarial system. Because civil litigants do not currently have a right to counsel, the question for the profession becomes whether we are doing the right thing even when nobody is looking. In light of the abundant documentation of litigation abuses, and the knowing sale of junk debt by banks, the legal profession as a whole needs to step up and fix the problems. The Preamble to the Model Rules of Professional

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<sup>205</sup> Holland, *supra* note 37, at 272; Peter A. Holland, *Defending Junk Debt Buyer Lawsuits*, 46 CLEARINGHOUSE REV. 12, 14 (2012).

Conduct states that lawyers have “a special responsibility for the quality of justice.”<sup>206</sup> This special duty is partially spelled out in the Model Rules. One such rule is Model Rule 3.3, which prohibits lawyers from knowingly making false statements of fact to a tribunal or failing to correct false statements of fact to a tribunal.<sup>207</sup>

The Rule 3.3 problem arises because lawyers for debt buyers refuse or fail to advise the tribunal about the contents of the Purchase and Sale Agreement between the bank and the debt buyer, which often specifically disclaims any warranties (including warranties of title), and which in some cases state that the account balances are only “approximate.”<sup>208</sup> It is difficult not to conclude that lawyers who represent to a tribunal that there is a precise balance owing, when in fact the balance is only “approximate,” are engaging in a misrepresentation of material fact or a failure to correct a previous misstatement of material fact. Comment 2 of Rule 3.3 states that the purpose of the Rule is “to avoid conduct that undermines the integrity of the adjudicative process.”<sup>209</sup> Comment 7 to the Rule states that in general in a civil case, “if necessary to rectify the situation, an advocate must disclose the existence of the client’s deception to the court or to the other party.”<sup>210</sup> Comment 7 goes on to state that if the Rule were otherwise, “the client could in effect coerce the lawyer into being a party to a fraud on the court.”<sup>211</sup> Comment 13 to Rule 3.3 states that “the advocate must disclose”

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<sup>206</sup> MODEL RULES OF PROF’L CONDUCT pmb. ¶ 1 (2011).

<sup>207</sup> *Id.* at R. 3.3.

<sup>208</sup> See *supra* notes 15, 78 and accompanying text. See also Jeff Horwitz, *Bank of America Sold Card Debts to Collectors Despite Faulty Records*, AM. BANKER, March 29, 2013, [http://www.americanbanker.com/issues/177\\_62/bofa-credit-cards-collections-debts-faulty-records-1047992-1.html](http://www.americanbanker.com/issues/177_62/bofa-credit-cards-collections-debts-faulty-records-1047992-1.html) (explaining that the sales contracts between banks and debt buyers often disclaim “any representations, warranties, promises, covenants, agreements, or guarantees of any kind or character whatsoever’ about the accuracy or completeness of the debts’ records” resulting in the sale of claims for balances which are only approximate, that may have already been paid in full or discharged in bankruptcy).

<sup>209</sup> MODEL RULES OF PROF’L CONDUCT R 3.3 cmt. 2 (2011).

<sup>210</sup> *Id.* at cmt. 7.

<sup>211</sup> *Id.*

cases of actual perjury by a client regarding a material fact.<sup>212</sup> It is difficult to discern how robo-signed affidavits containing forged signatures, or which falsely claim to be based on personal knowledge, do not constitute actual perjury by a client, which are the subject of mandatory disclosure by the client's advocate.

Based on this author's anecdotal experience, many debt buyer attorneys report that they don't receive the Purchase and Sales Agreement as part of their file. This is not satisfactory, because to be competent, a lawyer must always investigate the relevant facts and law prior to filing a lawsuit.<sup>213</sup> As stated by one court, in a collection case "where an attorney commences suit in so uninformed a manner that he is ignorant even as to what law governs his suit, it cannot be said that he has undertaken a level of review sufficient to satisfy even the most general requirements of attorney conduct . . . ."<sup>214</sup>

It is understandable that as more and more secret Purchase and Sale Agreements become public, the faith of the courts and the public continues to be shaken. In the context of robo-signing directed by a foreclosure lawyer, Maryland's highest court recently stated that "even the slightest accommodation of deceit or lack of candor in any material respect quickly erodes the validity of the process."<sup>215</sup> Once the procedural validity starts to erode, "the people are then justified in abandoning support for the system in favor of one where honesty is preminent."<sup>216</sup> It is up to the profession, in an act of self-governance, to restore a system in small claims courts "where honesty is preminent." Debt buyers profit by filing vast numbers of suits that are at best unsubstantiated and at worst fraudulent. They do so with the cooperation of lawyers, who also profit from this behavior. The attitude that all of the known problems of proof in debt buyer cases can be ignored unless a defense is mounted is no longer acceptable.

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<sup>212</sup> *Id.* at cmt. 13.

<sup>213</sup> *Id.* at R 1.1.

<sup>214</sup> *Miller v. Upton, Cohen & Slamowitz*, 687 F. Supp. 2d 86, 98 (E.D.N.Y. 2009).

<sup>215</sup> *Attorney Grievance Comm'n of Md. v. Dore*, 73 A.3d 161, 178 (Md. 2013) (quoting *United States v. Shaffer Equipment Co.*, 11 F.3d 450, 457 (4th Cir. 1993)).

<sup>216</sup> *Id.*

*D. Revisit the Model Code of Judicial Conduct*

The Model Code of Judicial Conduct needs to be updated to reflect the modern reality of self-representation and of sophisticated lawyers running roughshod over self-represented litigants. The Model Code requires impartiality and fairness in general but does not specifically refer to self-represented litigants.<sup>217</sup> The Maryland Code of Judicial Conduct more clearly establishes the power of judges to make reasonable accommodations to ensure that self-represented litigants have the “the opportunity to have their matters fairly heard.”<sup>218</sup> Comment 2 to Rule 2.6 in Maryland talks about ensuring that self-represented litigants have the “right to be heard.”<sup>219</sup>

These rules assume that there is a self-represented litigant who is participating and wants to “be heard.” But the problem with debt buyer lawsuits—and with small claims in general—is that the vast majority of defendants do not show up and ask to “be heard.” The Rules need to be updated to give judges guidance for appropriate conduct dealing with unrepresented parties in the vast majority of cases where they do not appear in court. One test of our system is what happens when both sides have excellent lawyers who are zealous advocates. But an equal test, which impacts a far greater number of people, is what happens when one side consistently does not have a lawyer (or does not even show up), while the other does. How do we ensure a level playing field amidst so great an imbalance of power? Judges need further guidance in this area to ensure that our system can pass both tests. To that end, the Model Code needs updating.

*E. Revisit the Law School Curriculum.*

When they first observe the shadow system, students and practicing lawyers are surprised to discover that there are sometimes court rooms with no judges in them, trials with no witnesses, and hallways filled with lawyers presenting defendants

<sup>217</sup> MODEL CODE OF JUDICIAL CONDUCT R. 2.2 (2011).

<sup>218</sup> MD. CODE OF JUDICIAL CONDUCT R.2.2 cmt. 4 (2010).

<sup>219</sup> *Id.* at R.2.6 cmt. 2. Note, however, that no such comment exists in the ABA Model Code. See MODEL CODE OF JUDICIAL CONDUCT R. 2.6 (2011).

with settlements which are doomed to fail. The surprise comes not only from due process and equal protection concerns, but also from the fact that “nobody ever told me about this” either in law school or in law practice. The fact that it is unknown and not discussed is precisely what makes it a “shadow system.”

While the philosophical debate over the proper balance between theory and practice in law schools continues, access to a lawyer becomes less and less obtainable for the majority of Americans in the majority of cases.<sup>220</sup> While lack of access to lawyers has many causes, one cause is that students, professors, and even most lawyers are totally unaware of the shadow system. Law students should be exposed to the shadow system early in their law school career. This requires only a few hours of direct courtroom observation, which would not interfere with existing course demands. There would be several immediate benefits to the student, to the academy and to the profession. First, it would break the myth of the adversary system that is assumed throughout law school. Second, it would immediately infuse first year classes with real world issues of legal profession and procedure. Third, it might serve as a deterrent to judicial rubber-stamping and restore some balance to proceedings when judges know that students are watching and reporting back. Fourth, it would inspire more future lawyers to think creatively about how to improve delivery of legal services to underrepresented client populations, either through pro bono, low bono, fee shifting, counterclaims, or class actions.

One of the reasons that appellate cases are valuable as teaching tools is because the lawyers did such a great job in developing the facts and exploring the law. The fact that most people in this country today do not have and cannot afford a lawyer is relevant to our understanding of how the law develops. For example, very few *pro se* plaintiffs can survive a Motion to

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<sup>220</sup> See e.g., Thomas D. Morgan, *Foreword: Training Law Students for the Future: On Train Wrecks, Leadership & Choices*, 6 U. ST. THOMAS L.J. 297 (2009) (foreword to a symposium issue on “the ‘train wrecks’ that legal education may soon experience”); BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012); I. Richard Gershon, *In Ten Years All New Law Schools*, 44 U. TOLEDO L. REV. 335 (2013) (suggesting that the creation and destruction of new law schools will drive innovation).

Dismiss in this post-*Iqbal* world we now live in.<sup>221</sup> And even if they could, it is impossible for most consumers to bring *their* disputes to court, because of the Supreme Court's recent jurisprudence about forced arbitration.<sup>222</sup> Early exposure to the shadow system would demonstrate to students that the life of the law is neither logic nor experience; it is both, and the constant struggle to establish the proper balance should begin with students gaining early exposure to the law as it exists for the vast majority of our citizens in the vast majority of cases.

#### F. Adopt Simple, Common Sense Reforms

Just as Lord Coke predicted, the sale of causes of action has created confusion and a multiplication in the number of lawsuits.<sup>223</sup> One of the goals of this paper is to spark debate on these and other proposals for reform. Below is a partial list of some common sense reforms.

1. Ban "as is" sales contracts and require full documentation.

If banks do not have the requisite proof to pursue the claims in their own name, they should not be allowed to sell off accounts with full knowledge that the purchaser will use the courts to extract default judgments, despite the fact that there is no adequate data to prove the debt. Arguably, if improvident lending or irresponsible consumer behavior ultimately results in default, then any discretionary lawsuit should be pursued by the

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<sup>221</sup> Ashcroft v. Iqbal, 556 U.S. 662 (2009); Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 629 (2010) (noting that 85% of motions to dismiss on pleading grounds in *pro se* cases were granted following Iqbal); *c.f.* Raymond H. Brescia, *The Iqbal Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination*, 100 KY. L.J. 235 (2011).

<sup>222</sup> Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 SW. U. L. REV. 87 (2012) (explaining the hurdles established by Supreme Court arbitration jurisprudence); Beth Davis, *Mandatory Arbitration Agreements in Long-Term Care Contracts: How to Protect the Rights of Seniors in Washington*, 35 SEATTLE U. L. REV. 213 (2011) (reporting how claims of elder abuse are suppressed by the use of arbitration clauses in long-term care facility contracts in Washington state).

<sup>223</sup> See *supra* note 42 and accompanying text.

bank that was allegedly harmed, not by some unknown investor in claims. But if debts are to be sold, they should be sold whole: complete with *all* of the information that the bank would need if it were suing in its own name. This requires proof of liability for breach of contract and proof of contract damages. Such proof would include the underlying contract, a running balance on the account, and a breakdown of the principal amount of money borrowed, plus a separate itemization of all interest, all late fees, all over limit fees, all add-on products, all maintenance fees, and any other fees that were added to the principal amount. It is notable that recovery of any fees or interest are limited to those bargained for in the underlying contract, which is missing in almost every debt buyer case.

Another option would be to limit any recovery to the amount of the principal amount of the original extension of credit, and to specifically exclude from recovery all finance charges such as interest, late fees and over-limit fees which cannot be proved by a written contract.

## 2. Require full disclosure of un-redacted forward flow agreements

The Purchase and Sale Contracts (also known as “Forward Flow Agreements”) between banks and debt buyers must no longer remain secret. For all the cases that are currently in litigation in which the bundle of debt was sold “as is” with all faults, and with explicit disclaimers of warranty, this fact needs to be widely publicized to the defendants and to the courts. All debt buyer lawsuits should contain a copy either the original Forward Flow Agreement (at forty or more pages this may prove inconvenient) or a link to a website that hosts the specific forward flow agreement which goes with each account. An easy example is the agreement between FIA Card Services, Inc. and CACH, LLC which was highlighted by the American Banker for its explicit disclaimers of warranty, including that the debt may not be owed, may have been discharged in bankruptcy, may be the result of fraud, may not be supported by documentation, and that the balance amount is only “approximate.”<sup>224</sup> Can lawyers, in

<sup>224</sup> Horwitz, *supra* note 208; Loan Sale Agreement, *supra* note 45.

their role as “public citizens having a special obligation to ensure the quality of justice” think of any possible justification for hiding from the tribunal the fact that the bank disclosed at the time of sale that the consumer may not be liable, and that even if liable, that the stated amount of liability is only “approximate”?

3. Adopt statutes mandating reciprocal fee shifting in consumer contract cases

Most consumer contracts for goods or services state that if the creditor files a lawsuit, the consumer must pay all collections costs and all of the creditor’s reasonable attorneys’ fees. Legislatures could adopt a statute that states simply that in a consumer contract, if there is a provision for attorneys’ fees in the event that the creditor prevails, the provision is reciprocal as a matter of law. Many states have such a statute already.<sup>225</sup> Such a statute incentivizes the private bar to step forth and provide a defense, when a meritorious defense exists. This should have a deterrent effect on the filing of cases that cannot be proven.

4. Provide same day lawyers in the courthouse

If the “adversarial presentation of evidence and arguments” is to survive,<sup>226</sup> we must ensure that legal help is available to those who need it. Persuading defendants to represent themselves will always be difficult if they are forced to navigate a strange and hostile system without sufficient advice or assistance from the legal profession. Even if defendants can be convinced to participate in the lawsuits, they will not receive justice without legal help. The defendants in this study who did file a response to the lawsuit (presumably the most committed

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<sup>225</sup> Jeffrey C. Bright, *Unilateral Attorney’s Fees Clauses: A Proposal to Shift to the Golden Rule*, 61 *DRAKE L. REV.* 86, 114-120 (2012) (noting the different approaches taken by state statutes which require fee-shifting reciprocity).

<sup>226</sup> The strength of the adversarial tradition is such that “our entire dispute resolution system depends on the integrity of the participants, who seek the truth through an adversarial presentation of evidence and arguments.” *Attorney Grievance Comm’n of Md. v. Dore*, 73 A.3d 161, 178 (Md. 2013).



defendants) fared much worse than those who had a lawyer. At a minimum, consumers sued in collection courts should be able to get some legal advice before they enter what has become the lion's den. To this end, courthouse projects staffed by volunteer or legal services attorneys have proven highly successful in delivering limited unbundled legal advice.<sup>227</sup> While this "half a loaf" approach is not ideal, it does provide limited ammunition to the astute few self-represented litigants who aspire to a fair fight in court. Further, because the evidence in debt buyer cases is inherently shoddy (as evidenced in the "as is" Forward Flow Agreements) these trials should be easy for a self-represented litigant to win, with a little bit of help and coaching from a lawyer.

## CONCLUSION

This article has provided a window into the opaque world of consumer defaults in debt buyer law suits. **Forty years ago, David Caplovitz described the economic condition of consumers who defaulted on their debts to the businesses that had extended them credit. Much of what he observed applies equally to today's defendants in debt buyer lawsuits.** Like their counterparts from forty years ago, today's defendants lack adequate health insurance,<sup>228</sup> lack a safety net sufficiently broad to prevent the traumatic financial consequences of sickness or unemployment,<sup>229</sup> and lack the tools to avoid financial scams.<sup>230</sup>

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<sup>227</sup> Maria Aspan, *supra* note 55 (noting the work of the ProBono Resource Center of Maryland).

<sup>228</sup> TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT* (2001); Melissa B. Jacoby, Teresa A. Sullivan & Elizabeth Warren, *Rethinking the Debates over Health Care Financing: Evidence from the Bankruptcy Courts*, 76 N.Y.U. L. REV. 375 (2001).

<sup>229</sup> Robert J. Landry, III & Amy K. Yarbrough, *Global Lessons from Consumer Bankruptcy and Healthcare Reforms in the United States: A Struggling Social Safety Net*, 16 MICH. ST. J. INT'L L. 343 (2007).

<sup>230</sup> Contemporary concern focuses on payday loans. *See, e.g.*, Marcie Geffner, *Payday loans 'unaffordable'*, BANKRATE.COM BANKING BLOG (Feb. 22, 2013, 3:00 PM), <http://www.bankrate.com/financing/banking/payday-loans-unaffordable/> (reporting the findings of the Pew Charitable Trust); PEW CHARITABLE TRUSTS, *HOW BORROWERS CHOOSE AND REPAY PAYDAY LOANS* (2013), *available at*

The bench, the bar and the academy each have a role to play in shining the light onto the shadow system, thereby paving the way to much needed reforms.

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[http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Safe\\_Small\\_Dollar\\_Loans/Pew\\_Choosing\\_Borrowing\\_Payday\\_Feb2013.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Safe_Small_Dollar_Loans/Pew_Choosing_Borrowing_Payday_Feb2013.pdf); Gretchen Morgenson, *Find the Loan Behind the Loans*, N.Y. TIMES, Sept. 7, 2013, [http://www.nytimes.com/2013/09/08/business/find-the-loan-behind-the-loans.html?\\_r=0](http://www.nytimes.com/2013/09/08/business/find-the-loan-behind-the-loans.html?_r=0) (noting recent pressure by state regulators on online, payday lenders).

## APPENDIX A: FULL PROTOCOL OF STUDY

I assigned the gathering of data relating to certain debt buyers and years to clinic students, who then entered the data into a pre-formatted Microsoft Excel spreadsheet. Some students gathered data on a single debt buyer in a single year, while others gathered multiple debt buyers and years. For example, an individual student was responsible for gathering data regarding 200 lawsuits filed in the District Court by Midland Funding, LLC during the 2009 calendar year. Under this system each student gathered between 200 and 800 records. Any questions regarding the study's protocol were addressed as they arose.

Data were gathered from Maryland Judiciary Case Search ("Case Search"), which is a searchable online database containing the actual court dockets. Case Search can be searched in a number of ways: by case number, filing date, jurisdiction and party names. Pursuant to the written protocol, students gathered data by searching for the named debt buyers appearing as plaintiffs in civil cases in the District Court of Maryland.<sup>231</sup> Without any parameters for dates, Case Search will display a maximum of 500 search results for any given search. Because many debt buyers filed large numbers of cases, it was necessary to limit each search to a specific month or even a specific day.<sup>232</sup>

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<sup>231</sup> Using Case Search to search for party names is problematic: Case Search will only detect literal matches for part or all of a party name. Searching for the proper legal name of a debt buyer would often miss many cases filed by that debt buyer. For example, "Pasadena Receivables, Inc." will often appear in court records without the comma or period, without "Inc" or with simple spelling errors such as reversing the "i" and the "e" in "Receivables". To address this problem, the first word of the plaintiff's name was used in the search criteria. *For example*, for "Pasadena Receivables, Inc." the search term was "Pasadena". Any search results unrelated to the debt buyer were ignored. Because the name of each debt buyer was rather unique, the number of unrelated search results were minimal and statistically insignificant.

<sup>232</sup> First, students were instructed to select a random month, by requesting a random number between 1 and 12 from <http://www.random.org>. The student would then enter a date range in case search covering that month. *For example*, April 1<sup>st</sup>, 2009 to April 30<sup>th</sup>, 2009. If this search produced more than 500 results, the student would request a new random number between 1 and the number of days in the selected month, and then conduct the search again for the day selected.

Using a random number generator, a case was then randomly selected from the cases filed in the District Court in that month or on that day.<sup>233</sup> The student would copy the specified data from the record on Case Search.<sup>234</sup>

After the data were gathered, quality control checks were performed and, as discussed below in detail, any outliers were removed. First, some aberrant cases were removed and replaced: duplicates of cases which despite randomization, were sampled more than once, cases which were transferred to another jurisdiction,<sup>235</sup> which simply recorded the entry of a foreign judgment,<sup>236</sup> where the complaint amount was zero or where the principal amount of the judgment was greater than the complaint amount.<sup>237</sup> Second, the consistency of spelling was checked to

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<sup>233</sup> Again, the randomization was performed using <http://www.random.org>.

<sup>234</sup> The data were: Case Number, Plaintiff, Court, Filing Date, Case Status (Active, Closed or Bankruptcy), Complaint Amount, Judgment Type (Affidavit Judgment, Consent Judgment for P, Consent Judgment for D, Default Judgment for P, Default Judgment for D, Trial Judgment for D, Trial Judgment for P, 3-506(B) Dismissal upon Stipulated Terms, Rule 3-506 Dismissal, Rule 3-507 Dismissal, Complaint Dismissed by Court) (this category was left blank if no judgment/dismissal had been entered in a given case), Judgment Amount (this category was left blank unless a judgment against D was entered), Judgment Interest (this category was left blank unless a judgment against D was entered), Attorney Fees (this category was left blank unless a judgment against D was entered), Court Costs (this category was left blank unless a judgment against D was entered), Other Amounts (this category was left blank unless a judgment against D was entered), Total Judgment (Judgment Amount + Judgment Interest + Attorney Fees + Court Costs + Other Amounts), Whether post judgment interest at the legal rate was awarded, Whether the Defendant filed a Notice of Intention to Defend, Whether the Defendant had an Attorney, Defendant's address, Defendants zip code, Plaintiff's Attorney, Plaintiff's Attorney's Firm.

In all cases the case number was preceded by an asterisk, to prevent the spreadsheet software from truncating case numbers that began with a zero. All amounts were entered as simple numbers. All yes or no data were recorded as their "Yes" or "No".

<sup>235</sup> These were removed because the case record did not cover the whole course of the case.

<sup>236</sup> *Id.*

<sup>237</sup> These two categories were removed because they seemed to indicate substantial errors in the data recorded on Case Search which would harm the accuracy of the results in general. Note that cases were only removed if the judgment amount (i.e. the amount of the complaint for which plaintiff obtained judgment), not the total judgment, was greater than the complaint. The former indicates an error, while the latter is caused by the addition of

ensure that data could be properly analyzed automatically.<sup>238</sup> Third, one particular judgment type was rechecked: dismissals under Rule 3-506. There appeared to have been some confusion among students that led to some Rule 3-506(b) dismissals being wrongly recorded as Rule 3-506 dismissals. All cases with the Rule 3-506 judgment type were re-checked by a teaching assistant and any errors in judgment type were corrected.

Finally, 10% of the sampled cases were re-checked against Case Search for errors. A total of fifty-one errors or omissions were detected. The errors were not material, relating to defendants' addresses or plaintiff's attorneys or firms. All of these errors were corrected before subsequent analysis.

The last step before analysis of the data was to check the quantitative data for outliers. The quantitative variables are "Complaint Amount," "Judgment Amount," "Interest," "Costs," "Other Amounts," "Atty Fees," and "Total Judgment." Each category had many data points beyond two deviations of the mean and even three deviations of the mean. For example, in "Complaint Amount," 0.023% of data fell outside two standard deviations of the mean, and 0.009% of data fell outside three standard deviations. Scatterplots revealed that many of the quantitative variables were generally normally distributed.

Rather than arbitrarily remove data outside of two or three standard deviations, only a couple of very extreme data points were removed (all other data generally behaving normally) to provide the most robust presentation of data. The only data outliers removed were a complaint amount of \$252,260 (approximately 48 standard deviations greater than the mean), and a costs datum of \$650 (approximately 30 standard deviations greater than the mean). These data were very likely the result of typographical recording errors in Case Search itself.

The complaint amount outlier was not a case that resulted in judgment against the defendant; therefore, none of the judgment related variables were impacted. The average complaint amount with this outlier included was \$3,050.38 with a

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costs, interest and attorneys' fees.

<sup>238</sup> Zip codes were also limited to five digits, and any quantitative data which had been entered as currency were changed to a simple number to aid computer analysis.

standard deviation of \$5,149.06. Removing this outlier decreased the average complaint amount to \$2,993.73 with a standard deviation of \$3,520.56.

The costs outlier was removed and the mean for costs without this outlier was imputed in its place. Imputation was necessary because completely removing this datum would have provided a less precise measurement of the average total judgment category, which includes costs.