TARGETING THE POOR—HOW DEBT COLLECTORS HELP PERPETUATE THE POVERTY CYCLE

Ariel Cook* and James Millard**

“Let all bear in mind that a society is judged not so much by the standards attained by its more affluent and privileged members as by the quality of life which it is able to assure for its weakest members.”

—Javier Perez de Cuellar

I. INTRODUCTION

Debt collection processes seriously impact the American poor. While incurring consumer debt is certainly not a new phenomenon in America, the methods utilized by creditors and debt collectors to pursue and collect on consumer debt have changed drastically over time and have now created a legal environment in which the poor, uneducated, and unrepresented operate at an overwhelming disadvantage. The current methods of debt collection and debt buying, combined with the often-confusing process of defending against a collections lawsuit, make it nearly impossible for the “average Joe” to financially survive

* Ariel Cook is an attorney at Constangy, Brooks, Smith & Prophete, LLP. She was the former Deputy Unit Head of the Consumer Advocacy and Litigation Unit and a staff attorney at Jacksonville Area Legal Aid, Inc. Her areas of practice include debt collection defense, consumer protection litigation, and foreclosure defense.

** James Millard is the Assistant Deputy Director and a staff attorney at Jacksonville Area Legal Aid, Inc. His areas of practice include consumer protection litigation and foreclosure defense.


3 Id. at 3-5.
his consumer debt. And even after a lawsuit concludes, creditor-friendly postjudgment regulations and methods of enforcement available to debt collectors keep the consumer tied down and continuously paying for what was usually a very small debt originally. Concepts of legal justice, fair play, and access to courts require us to examine the significant harm done by the current system and challenge us to create meaningful change within that system.

This Article begins in Part II by briefly defining consumer credit and providing an overview of its origins and development. Part III comments on the unavailability of credit and its deleterious impact on the poor. Part IV provides a high-level synopsis of the debt collection industry, highlighting the recent paradigm shift from in-house debt collections to third-party debt collections. Part V describes the evolution of the debt collection industry—namely, the rise of debt-buying companies and its high-volume business model. Part VI examines the Fair Debt Collection Practices Act (“FDCPA”) in detail, setting forth the limitations it imposes on the collection methods available to debt collectors. Part VI also highlights the historical abuses that led to the enactment of the FDCPA to regulate the debt collection industry and pinpoints significant problems with the legislation. Part VII describes the process and potential pitfalls of an unrepresented defendant in the small claims court system. Two solutions are then discussed in Parts VIII and IX: one specifically targets an overhaul of the small claims court process; the other is a more broad solution that addresses the specific abuses in the industry that serves as the concrete setting for this Article.

II. CONSUMER CREDIT HISTORY

Incurring debt is an age-old practice, but consumer credit is a relatively modern phenomenon. Consumer debt is, in its simplest

4 Id. at 3-4.
5 See infra Part IX.
6 See SHIN & WILNOR, supra note 2, at 13.
terms, “money, goods or services provided to an individual in lieu of payment.”

The most common types of consumer credit include credit cards, automobile loans, and mortgages. The cost of credit is the additional amount, over and above the amount borrowed, that the borrower has to pay including interest, fees, and any other charges. “Much of the demand for consumer credit arose with the growth of urbanization and the mass production of consumer goods.” The formal development of consumer credit started in the 1800s and dramatically spiked in the 1940s. The era of Americans living within their means officially ended in the twenty-first century, with approximately 76% of American families carrying some form of debt. Today, according to the United States Census Bureau, 70.2% of American households have “[g]eneral purpose credit cards such as Visa, MasterCard and Discover.”

Some would say that debt is becoming an epidemic for households in the United States. The Federal Reserve lists overall consumer debt (apart from home mortgages and home equity loans) at “around $2.6 trillion, or $11,000 per adult.” Additionally, consumer debt is growing at an alarming rate. Over the past twenty years, consumer debt has increased by 4.1% per year, while median household income has only increased by .6% per year. This booming phenomenon is causing debt-to-income ratios to skyrocket to unheard of.

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8 STEVEN FINLAY, CONSUMER CREDIT FUNDAMENTALS 4 (2d ed. 2009).
9 Id.; Bd. of Governors of the Fed. Reserve Sys., supra note 7, at 1 n.1.
12 Id. at 3-4.
13 Id. at 4.
16 Id.
17 Id.
18 Id.
levels and is creating “severe financial hardships for many Americans.”

III. POVERTY AND CREDIT TODAY

Millions of poverty-level families are very deep in debt and getting deeper. As of 2013, “[t]he poorest quartile of families is the only group that owes more than it owns.” Most Americans have a credit card, and the majority cannot buy a house or a car without borrowing some money. Not only is credit essential for large purchases, but, in today’s economy, job applicants can expect to have their credit checked as a prerequisite to employment. According to a recent survey, “one in four unemployed Americans have been required to go through a credit check when applying for a job, and one in ten have been denied jobs due to [negative] information in their credit report.” Most employers now check credit histories of at least some of their job applicants.

Bad credit, or no credit, can make consumer purchases more expensive and can lead to more serious consequences as well. Bad credit scores can prevent a person from getting an apartment, can disqualify a person from obtaining a mortgage, and can stop a person

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19 Id.
21 Id.
24 Id.
25 Id.
from buying an affordable car. Typically, large deposits are required for turning on a person's utilities or putting a person's phone bill in someone else's name when a person does not have credit. For example, a person with bad credit might pay $7,600 in interest on a $10,000 auto loan; however, a person with good credit might only pay $1,300 in interest on the same loan. For a person who has bad credit, and is paying the higher interest rate, incurring a $500 car repair expense could mean choosing between a high-interest payday loan or losing a job due to missing work.

According to a study by the Urban Institute and Encore Capital Group's Consumer Credit Research Institute, seventy-seven million Americans have debt in collection. That seventy-seven million comprises 35% of the consumers who have credit files with Experian, Equifax, Transunion or another major credit bureau. These reports indicate 47% of consumers in Nevada have a debt in collection—making Nevada's record the worst. In twelve other states across the nation, 40% of consumers "have a bill in collections." In smaller areas, the in-collection number can be up to 61%.

Per the study, "past due debt" (meaning debt that is past due by more than one month but has not yet been sent to collections) is a problem for one out of every twenty Americans. A debt is typically sent to collections when it has been delinquent for 180 days. While credit reports and credit scores have become a familiar part of American

28 Dewan, supra note 26.
29 Id.
30 Id.
32 Id.
33 Id.
34 Id.
35 Id.
36 Id.
37 Id.
financial culture, approximately twenty-two million Americans have so little income that no credit file exists for them.\(^\text{38}\) Credit card debt has become such a “hot button” issue that it is now a topic of United States presidential debates.\(^\text{39}\) Despite the harsh reality that many Americans face when it comes to their personal financial situations, Americans continue to use credit to spend beyond their means and accumulate debt.\(^\text{40}\)

\section*{IV. Debt Collection Industry}

As sensible consumerism died on the vine, the debt collection industry blossomed.\(^\text{41}\) This debt boom ultimately led to a shift from the traditional practice of original creditors collecting on their own debts to the current trend of selling debts to third-party debt collection agencies.\(^\text{42}\)

Historically, creditors had two options to collect debts—utilize their own internal collections process or outsource the debt collection process to a third party.\(^\text{43}\) Now, creditors have a third option—sell the debt to a debt buyer.\(^\text{44}\) Debt buying can be traced back to the “savings and loan crisis of the late 1980s and early 1990s.”\(^\text{45}\) During that time, “the Resolution Trust Corporation, the federal entity assigned to liquidate failed thrifts, auctioned off nearly $500 billion in unpaid loans that creditors had owned.”\(^\text{46}\) Creditors saw how much revenue these

\begin{enumerate}
\item Id.
\item Id.
\item See id.
\item Id.
\item Id. at 12.
\item Id.
\end{enumerate}
sales created and decided to start selling their debts.\textsuperscript{47} This genesis of selling debts, coupled with the increase in revolving debt, fostered the massive growth of the debt-buying industry.\textsuperscript{48} "Today, the market for the sale of debt has evolved such that many creditors appear to be able to quickly monetize delinquent debts."\textsuperscript{49} More than 75% of debt sold is defaulted credit card debt.\textsuperscript{50}

The high level of consumer debt combined with the high profit margins often makes collection companies a prudent investment choice.\textsuperscript{51} Companies buy debt for pennies on the dollar and yield a high return.\textsuperscript{52} For example, it is not prudent or cost effective for Bank A to pursue a debtor for a $1,000 outstanding payment.\textsuperscript{53} That falls outside the parameters of the bank’s core business of banking.\textsuperscript{54} Instead, the bank pursues a different option—it sells the debt to a third-party collection company for about 10%, or $100.\textsuperscript{55} If the debt collection company can recover anything greater than the $100, it has realized a profit.\textsuperscript{56} It can be quite lucrative—one industry-leading company "boasts of a 239 percent return."\textsuperscript{57} However, the more common return on investment for a debt collector is about 20%, which is still a considerable profit.\textsuperscript{58}

In 2010, debt collection agencies recovered approximately $40 billion from debtors.\textsuperscript{59} Business is still booming. There are around "4,100 debt collection agencies in the United States, employing nearly 450,000 people," and the industry anticipates a 23% spike in growth in

\textsuperscript{47} Id.  
\textsuperscript{48} Id. at 12-13.  
\textsuperscript{49} Id. at 13.  
\textsuperscript{50} Id.  
\textsuperscript{51} See Van Buren, supra note 31.  
\textsuperscript{52} Id.  
\textsuperscript{53} Id.  
\textsuperscript{54} Id.  
\textsuperscript{55} Id.  
\textsuperscript{56} Id.  
\textsuperscript{57} Id.  
\textsuperscript{58} Id.  
\textsuperscript{59} Id.
the coming years.\textsuperscript{60} The Association of Credit and Collection Professionals, the industry's most robust trade association, expended over a half million dollars on congressional lobbying over three years.\textsuperscript{61}

More and more Americans are personally experiencing this booming industry as America faces an endemic of debt collection.\textsuperscript{62} For many people, defaulting on a debt is inevitable, especially in the current economy where many families are facing unemployment or reduced salaries.\textsuperscript{63} Once in default, the creditor will likely outsource the collection activities to a third-party debt collector or a law firm.\textsuperscript{64} The debt collection industry is rapidly expanding, seeing more than thirty million people being part of the collection processes as of March 2012.\textsuperscript{65} The industry's growth is an epidemic; "[t]he industry's participants make more than one billion consumer contacts annually for hospitals, government entities, banks and credit card companies, student lenders, telecommunications companies, and utility providers."\textsuperscript{66}

V. DEBT-BUYING INDUSTRY

Debts are commonly amalgamated into portfolios by the issuer.\textsuperscript{67} Debt buyers usually purchase these portfolios at a steep discount.\textsuperscript{68} Occasionally, if permitted by the purchase and sales agreement, debt buyers will repackage and resell debt pools to other debt-buying organizations.\textsuperscript{69} Unfortunately, a great deal of critical

\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{64} Id.
\textsuperscript{66} STIFLER & PARRISH, supra note 63.
\textsuperscript{67} FED. TRADE COMM'N, supra note 43, at 17.
\textsuperscript{68} Note, supra note 65, at 1448.
\textsuperscript{69} FED. TRADE COMM'N, supra note 43, at 19.
information can be lost during this reselling process.\textsuperscript{70} Some of the information that commonly gets separated during this process includes the consumer identity data, the debt amount, the contacts that created the debt (including applicable interest rates, late fees, choice of law provisions, and other requisite terms), and the consumer's payment history.\textsuperscript{71}

Allegations of fraudulent, misleading, and unethical collection practices plague the debt collection industry.\textsuperscript{72} One of the reasons that the debt collection industry carries such a negative reputation is because the industry is premised on a high-volume business paradigm.\textsuperscript{73} "Debt buyers holding portfolios of debts with a low ratio of book value to face value seek to collect on a sufficient number of debts to generate a profit, through direct collection efforts as well as lawsuits."\textsuperscript{74} Empirical evidence demonstrates that many debt buyers use large volumes of lawsuits as an integral part of their recovery strategy, relying heavily on the reality that debtors will ignore the legal documents and will fail to appear in court to challenge the lawsuit.\textsuperscript{75} Some of the main reasons consumers fail to respond to debt collectors include deficient or misleading notices, ignorance of the requirement to respond, a belief that the debt does not belong to them, or a complete lack of understanding of the legal process and the steps needed to avoid default.\textsuperscript{76}

When consumers ignore debt collection lawsuits or admit to a debt, it usually results in the court entering a default judgment against the consumer.\textsuperscript{77} The judgment then becomes a matter of public record incorporated into a consumer's credit report.\textsuperscript{78} "Adverse judgments in debt collection lawsuits represent one of the most important, and highly

\begin{flushleft}
\textsuperscript{70} Note, supra note 65, at 1448.
\textsuperscript{71} Id.
\textsuperscript{72} Id. at 1449.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} Id. at 1447.
\textsuperscript{78} Id.
\end{flushleft}
damaging, types of public record information.”

A default judgment appearing in a debtor’s credit report can be devastating to an individual’s financial integrity by classifying them as an elevated credit risk. It is common practice for creditors to pull credit reports of new applicants, for employers to routinely review credit reports when evaluating prospective employees, and for landlords to utilize credit reports when considering prospective tenants for a lease.

VI. THE FAIR DEBT COLLECTION PRACTICES ACT

The FDCPA was enacted as an amendment to the Consumer Credit Protection Act to combat “abusive debt collection practices by debt collectors.” Congress created the Act to respond to growing concerns about predatory collection practices. The FDCPA prohibits debt collectors from using threatening or harassing collection techniques when dealing with debtors. Sections 1692d and 1692e of the FDCPA regulate debt collection conduct when dealing with consumers. One of the main reasons the Act was created was due to “abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors.” Pursuant to the FDCPA, “[a] debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt.”

The FDCPA is limited in its application, however, by the definition it provides for “debt collector.” Usually, the FDCPA only

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79 Id. at 1450-51.
80 Id. at 1451.
81 Id.
82 See MARGARET M. LEE, FAIR DEBT COLLECTION PRACTICES ACT (FDCPA) 1 (2013).
83 See Note, supra note 65.
84 See LEE, supra note 82.
86 See § 1692(a).
87 See Fuller, 192 F. Supp. 2d at 1361.
88 See LEE, supra note 82.
covers third-party debt collectors.\textsuperscript{89} Under the FDCPA, a “debt collector” is “any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.”\textsuperscript{90} Apart from collecting under a fictitious name, the FDCPA generally excludes original creditors from recovering their own debts.\textsuperscript{91}

However, with attorneys becoming more and more involved in the debt collection arena, the FDCPA now protects consumers from actions taken by attorneys during the debt collection process.\textsuperscript{92} In \textit{Heintz v. Jenkins}, the Supreme Court established that the FDCPA covers attorneys “engage[d] in consumer-debt-collection activity, even when that activity consists of litigation.”\textsuperscript{93} In \textit{Heintz}, the Court stated that Congress repealed an express exemption from the definition of “debt collector” in an earlier version of the statute for “any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client.”\textsuperscript{94} Once Congress amended the law, without creating another exemption to fill its void, the Court explained, “[O]ne would think that Congress intended that lawyers be subject to the [FDCPA] whenever they meet the general ‘debt collector’ definition.”\textsuperscript{95}

Congress’s actions subsequent to \textit{Heintz} further supported that Congress intended that the FDCPA apply to attorneys’ conduct in litigation.\textsuperscript{96} If Congress intended that all conduct in the course of

\textsuperscript{89} \textit{Id.}
\textsuperscript{90} \textit{Id.}
\textsuperscript{91} \textit{See id.}
\textsuperscript{92} \textit{See infra} notes 94-102 and accompanying text.
\textsuperscript{95} \textit{Id.} at 295; \textit{see also} 15 U.S.C. § 1692a(6) (defining a debt collector in pertinent part as “any person . . . who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.”).
formal pleadings be exempt from the FDCPA, then these express exemptions would be superfluous, and "courts should disfavor interpretations of statutes that render language superfluous."\textsuperscript{97} Furthermore, in amending a statute, Congress is presumed to have knowledge of prior judicial interpretations of the statute.\textsuperscript{98}

That Congress exempted formal pleadings from a single requirement of the FDCPA after the Supreme Court issued its decision in \textit{Heintz} suggests that Congress was aware of the Court having interpreted the Act to apply to the litigating activities of debt-collector attorneys "\textit{and accepted it}," except to the extent that it exempted formal pleadings from § 1692e(11)'s requirements.\textsuperscript{99}

It stands to reason that

\[\text{[i]f Congress had intended to exempt all litigating activities or any one litigating activity from the Act's other provisions, "it presumably would have done so expressly," as it did in § 1692e(11).}\textsuperscript{100} \] Instead, Congress has effectively instructed that all litigating activities of debt-collecting attorneys are subject to the FDCPA, except to the limited extent formal pleadings are exempt under § 1692e(11).\textsuperscript{101}

\textbf{VII. SMALL CLAIMS COURT}

The small claims court is one of the clearest demonstrations of the specific harm the current debt collection process causes indigent Americans.\textsuperscript{102} Small claims courts were designed to, as the Florida Small Claims Rules explain, implement the "simple, speedy, and

\textsuperscript{99} Miljkovic v. Shafritz & Dinkin, P.A., 791 F.3d 1291, 1299 (11th Cir. 2015).
\textsuperscript{100} \textit{Id.}
\textsuperscript{101} \textit{Id.}
\textsuperscript{102} \textit{See infra} notes 104-57 and accompanying text.
inexpensive trial of actions at law in county courts.”\textsuperscript{103} The first small claims court in America was created in Kansas in 1912 and was designed to curb the costs of litigation and to provide pro se litigants with “accessible and effective mechanisms for asserting legal rights.”\textsuperscript{104} In Florida, the Legislature first created a small claims court in 1943.\textsuperscript{105} These first small claims courts were only created in populated areas and used justices of the peace as the judges.\textsuperscript{106} Eventually, justices of the peace were eliminated and county court judges were used to hear small claims cases.\textsuperscript{107} In 1967, Florida created the first rules specifically dedicated to this process, called the “Summary Claims Procedure Rules.”\textsuperscript{108}

Over the years, the jurisdictional limit defining small claims courts has increased from $300 to today’s limit of $5,000, but the underlying goal of a small claims court system has not changed.\textsuperscript{109} In 2000, the Florida Supreme Court noted that the goal of the Florida Small Claims Rules was to create “a system that is open and helpful to those that appear in small claims court, many of whom appear pro se and are unfamiliar with legal proceedings; and a system that is efficient and not wasteful of court resources and people’s time.”\textsuperscript{110}

Despite the intent behind the small claims court process, the process has faced criticisms since its inception, including concerns that the process would be unfavorable to defendants, that the process could move too quickly, and that it did not provide for an effective way to collect a judgment.\textsuperscript{111} Later surveys of participants revealed more

\textsuperscript{103} FLA. SM. CL. R. 7.010(a).
\textsuperscript{105} Id.
\textsuperscript{106} Id.
\textsuperscript{107} Id. at 2.
\textsuperscript{108} Id.
\textsuperscript{109} Id. at 1-2.
\textsuperscript{110} Id. at 2 (citing In re Amendments to the Fla. Small Claims Rules, 785 So. 2d 401, 401 (Fla. 2000)).
\textsuperscript{111} Id. at 1.
specific shortcomings. In 2008, the Florida Senate conducted informal surveys of pro se litigants who used the Florida Small Claims Court and asked them to rate the difficulty of navigating the small claims court process. The most common response score was 2.75 (with 1 standing for “extremely difficult” and 5 standing for “extremely easy”). This difficulty in navigating the small claims court process is a significant problem for many defendants being sued in small claims court by creditors, debt collectors, and debt buyers; thus, the small claims system itself has become a tool by which debt collectors are able to exploit unrepresented defendants—the very people the system was designed to assist.

Even defendants who may have experience in county or circuit court are at a disadvantage when unrepresented because of the differences between the processes for those courts and the process for small claims court. Unlike civil cases filed in county court ($5,000 to $15,000 sought in relief) or circuit court ($15,000 or more sought in relief), the defendant does not respond to the plaintiff’s complaint in writing in a small claims case. Instead, the defendant is required to personally appear at a pretrial conference where the court considers the simplification of issues, amendments to pleadings, admissions of fact and documents, limiting witnesses, settlement negotiations, and other matters that the court may deem necessary. Although the summons clearly states that “the case will not be tried at [this] time” and instructs the defendant not to bring witnesses, the defendant is expected to

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112 Id. at 4 (examples of shortcomings: dismissed before hearing; dismissed after hearing; disposed by default; disposed by judge (no trial); disposed by non-jury; disposed by jury trial; and disposed by other (“cases that are consolidated into a primary case, transferred, have a change of venue, or are disposed upon estreature of a bond, etc.”)).

113 Id.

114 Id.


116 See FLA. SM. CL. R. 7.090(c).

117 FLA. SM. CL. R. 7.090(b).
understand that the pretrial conference will most likely affect the eventual outcome of the case, so any defenses and potential counterclaims should be presented. In many situations, a defendant appears at the designated pretrial conference when ordered to appear, does not receive any information from the judge (if one is present) or other court personnel, and is then called up to the bench and asked by the clerk if he or she “admits” or “denies” the debt. Often, defendants are not provided any explanation of the legal significance of “admitting” or “denying” the debt. As a result, defendants rely on the common definitions of “admit” and “deny” instead of the legal definitions, a common critical mistake made because the defendants have no idea that there are differing definitions. Defendants are thrust into a system about which they are uniformly underinformed.

Defendants face additional difficulties in navigating the small claims court process without a lawyer, and some are within the Florida Small Claims Rules themselves. Specifically, Rule 7.090 requires a defendant in small claims court to present any counterclaims against the plaintiff at least five days before the pretrial conference. The pretrial conference is not only the first step in the case, it is also

119 FLA. SM. CL. R. FORM 7.322.
121 See id.
122 See COMM. ON JUDICIARY, supra note 104, at 1-2 (discussing that the complexity of the legal issues place pro se litigants at a disadvantage with regard to familiarity of law and procedure).
124 See Deborah J. Cantrell, Colloquium, Justice for Interests of the Poor: The Problem of Navigating the System Without Counsel, 70 FORDHAM L. REV. 1573, 1573 (2002) ("The problem of too few choices and too little information is exacerbated for the poor in the legal system that primarily considers itself a for-profit venture."); Deborah Rhode, Symposium, Access to Justice, 69 FORDHAM L. REV. 1785, 1786 (2001) (“Over the last two decades, national spending on legal aid has been cut by a third, and increasing restrictions have been placed on the cases and clients that government-funded programs can accept.”); infra notes 126-46 and accompanying text.
125 See, e.g., FLA. SM. CL. R. 7090(c); FLA. SM. CL. R. 7.100(a)-(b).
126 FLA. SM. CL. R. 7.090(c); see also FLA. SM. CL. R. 7.100(a)-(b).
often the defendant's first and only opportunity to find out how the small claims process works and what lies ahead. The defendant is expected to not only self-identify any potential counterclaims, but to draft them and have them filed five days prior to the first court date. Instead of identifying or clarifying this requirement for the defendant, the standard summons form, as provided in Form 7.322 of the Florida Small Claims Rules, contains no information about a counterclaim deadline and includes no reference to the Florida Small Claims Rules. A defendant, particularly one without representation, would therefore have no reason to consult the Rules or to know that an important avenue of defense was being waived by simply waiting until the pretrial conference to take any action on the case.

Assuming that a defendant is able to identify a counterclaim and have it ready to be filed five days before their first appearance, the defendant may face another unexpected requirement—a filing fee for said counterclaim. In Florida, a defendant must pay a filing fee of $295 any time a counterclaim is filed seeking more than $2,500 in damages. The filing fee issue is even more prejudicial in the situation where the defendant files a counterclaim seeking recovery in excess of the jurisdictional limits of small claims court. In that situation, pursuant to Rule 7.090 of the Florida Small Claims Rules, a defendant must deposit the amount of the filing fee for the higher jurisdiction with the court. That filing fee could be as much as

127 FLA. SM. CL. R. 7.090; FLA. SM. CL. R. 7.100(a)-(b).
128 See FLA. SM. CL. R. FORM 7.322.
129 See id.
130 FLA. SM. CL. R. 7.100 (identifying information regarding counterclaims and the kinds of counterclaims that can be filed: compulsory counterclaim or permissive counterclaim). A compulsory counterclaim is "[a]ny claim of the defendant against the plaintiff, arising out of the same transaction or occurrence which is the subject matter of the plaintiff's claim . . . ." FLA. SM. CL. R. 7.100(a). A permissive counterclaim is "[a]ny claim or setoff of the defendant against the plaintiff, not arising out of the transaction or occurrence which is the subject matter of the plaintiff's claim . . . ." FLA. SM. CL. R. 7.100(b); see also Fee Schedules, DUVAL COUNTY CLERK CTS., https://www.duvalclerk.com/ccWebsite/feeSchedule.page (last visited Nov. 16, 2015).
131 See Fee Schedules, supra note 130.
132 See id. (referencing an additional fee in Duval county of $42 for "foreign judgment").
133 See FLA. SM. CL. R. 7.090(c); see also FLA. SM. CL. R. 7.100(d).
The effect of Rule 7.090 is to tie a defendant’s ability to raise a counterclaim against a creditor or debt collector to the defendant’s ability to pay a filing fee of several hundred dollars up front. It is highly likely that defendants sued in small claims court for nonpayment of a debt do not have the discretionary funds available to front those court costs; such defendants do not have an equal opportunity for a meaningful defense.

Due, at least in part, to the confusing nature of the pretrial conference and the difficulty in accessing and understanding the Florida Small Claims Rules, many defendants fail to appear at the pretrial conference and thus have a default judgment entered against them. Between 2011 and 2014, the default rate in Florida small claims cases ranged from 8.6% to 10.8%. The research has not identified specific reasons for the high default rate, but there are several likely contributing factors. First, the working poor are less likely to be able to take a day off of work to attend a court hearing. “More than half of poor workers, working welfare recipients, and workers who recently left welfare cannot take paid leave from their jobs. When they do have access to paid leave, these workers are more likely than others to have

134 See Fee Schedules, supra note 130.
135 Compare Fla. Sm. Cl. R. 7.090 (acknowledging that there is a procedural hurdle in order to raise a counterclaim against a creditor), with Fee Schedules, supra note 130 (explaining that in order to file a counterclaim, the defendant must pay a filing fee with the court, which is difficult for indigent clients).
136 See generally Cantrell, supra note 124 (explaining that indigent clients who cannot afford to pay for essentials, such as food and housing, probably cannot afford to pay for effective attorneys).
137 See Fla. Sm. Cl. R. Form 7.322; infra notes 138-46 and accompanying text.
140 See Phillips, supra note 139.
only one workweek of leave or less." The fact that defendants are required to appear in person and are simultaneously less able to attend likely increases the number of defaults entered. Second, the fact that many small claims collection lawsuits are brought by a debt-buyer company means that many defendants do not recognize the company filing the action and are therefore less likely to understand what is at stake. When a defendant is served with a small claims court complaint, the summons includes the following language: "The defendant(s) must appear in court on the date specified in order to avoid a default judgment." This is the only information provided to defendants regarding the necessity of appearance at the pretrial conference. Many defendants have no idea that by not appearing at a pretrial conference, he or she could be exposed to judgment liens or wage garnishments; no information is provided to them to inform them otherwise.

In addition to the basic problems of navigating the small claims system, there are other specific reasons why a debtor facing a small claims lawsuit by a creditor or debt collector begins the process at a significant disadvantage. Of major importance is that while the small claims process allows (and was arguably originally intended for) unrepresented litigants to participate in the legal system in a less onerous and expensive way, it does not prohibit attorney representation. The natural result is that parties who can afford representation will get it, and those that cannot, will not. Most often, creditors and debt collectors are represented by attorneys who are familiar with the small claims system while indigent defendants are

141 Id.
142 See id.
143 Holland, supra note 115, at 179, 225-30 (explaining that defendants usually fail to realize the consequences of a default status due to their lack of personal involvement, lack of recognition of the plaintiff, and lack of knowledge of the contested debt amount).
144 See FLA. SM. CL. R. FORM 7.322.
145 Id.
146 See id.
147 See Holland, supra note 115, at 179.
148 See FLA. SM. CL. R. FORM 7.322.
149 See Holland, supra note 115, at 179.
unrepresented and therefore often uninformed.\textsuperscript{150}

Another pitfall related to attorneys is the potential inability to recover attorney's fees in small claims cases.\textsuperscript{151} When a client is unable to pay an attorney's fees, that attorney's ability to recover his or her fees from the opposing party can significantly impact the lawyer's perspective when deciding which clients to represent.\textsuperscript{152} Because of the nature of the judicial system, attorney's fees are substantial and account for the majority of the cost of litigation.\textsuperscript{153} “Thus, while the chance of recovery of attorney’s fees may not seem decisive, it is in many cases.”\textsuperscript{154} Recovery of attorney’s fees is especially critical in credit card debt collection cases as the amount in question is often very small, especially compared to the attorney hours required to litigate the case.\textsuperscript{155}

This essentially negates the entire purpose of the small claims process, as the defendant is now facing a sophisticated, represented, and experienced opponent in a system designed for the less sophisticated, unrepresented, and inexperienced.\textsuperscript{156} As discussed by Peter Holland in his article, \textit{Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers}, “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.”\textsuperscript{157}

\textsuperscript{150} Id.
\textsuperscript{151} See generally Smith, supra note 39 (discussing the general pitfalls of attorney's fees legislation in various states).
\textsuperscript{152} Id. at 175.
\textsuperscript{154} Smith, supra note 39, at 175.
\textsuperscript{155} See, e.g., Johnson v. Eaton, 958 F. Supp. 261, 264 (M.D. La. 1997) (“Indeed, the attorney’s fee award is nearly 27 times greater than the damage award.”).
\textsuperscript{157} Holland, supra note 115.
VIII. RECOMMENDATIONS TO IMPROVE THE SMALL CLAIMS PROCESS

There are several ways in which the small claims court process could be improved for unrepresented defendants facing either debt collectors or creditor plaintiffs. First, some basic changes to the Florida Small Claims Rules should be made. All deadlines that expire prior to the pretrial conference and limit a defendant’s ability to defend against the lawsuit should be removed. The forms provided in the Rules should be rewritten to ensure that the language used is language that can be easily understood by the average pro se litigant. The summons form particularly, should be rewritten to include more basic information about what will occur at the pretrial conference and what a defendant needs to do to be properly prepared. Finally, filing fees for counterclaims should be reduced or eliminated to ensure that a defendant’s ability to defend against a lawsuit is not based on his or her ability to afford a filing fee.

A uniform structure of educational opportunities for pro se litigants (both plaintiff and defendant) should be created and implemented statewide. In 2008, only four counties in Florida reported conducting or facilitating a clinic, workshop, or seminar to educate small claims court defendants. While many counties offer some sort

158 See Yngvesson & Hennessey, supra note 156, at 262-68 (analyzing possible reforms for small claims courts).
159 See generally Purdum, supra note 123, at 26-27 (discussing the criticism of small claims courts by analyzing 291 small claims court records from Leon County, Florida).
160 See id. at 28-29 (determining that “[m]ore than half of all judgments for plaintiffs were by default”).
161 See id. at 37 (“At the very least, small claim courts should provide detailed handbooks for plaintiffs and defendants describing the procedures of the court and detailing what they need to prove or defend their case.”).
162 See id. at 36 (discussing the inadequacy of those instances where litigants are provided with little information from the court).
163 See id. at 36-37 (explaining that the “small claims courts in Florida [were] supposed to be a speedy and [an] inexpensive way of resolving [small claim] disputes,” whereas now the filing fees and other costs of litigation are too excessive to warrant their use for a small claim).
164 COMM. ON JUDICIARY, supra note 104, at 6.
of "self-help center" in the clerk's office, those counties generally limit that help to sample forms and usually do not include any information on the court appearances required in small claims courts.\textsuperscript{165}

In one location where the court requires all pro se litigants to complete an educational seminar prior to participating in trial, the judges indicated that those pro se litigants are better prepared to present their cases at trial.\textsuperscript{166} Having informed litigants benefits all those involved and inevitably increases judicial economy.\textsuperscript{167}

Another way to ensure better results, if a case proceeds to trial is to make better use of available county court mediation programs.\textsuperscript{168} Of the judges polled in 2008, 65\% indicated that mediation was required in small claims actions in their jurisdiction.\textsuperscript{169} Every judge polled in 2008 "praised the utility of this alternative-dispute-resolution service."\textsuperscript{170} While some judges had originally been concerned that litigants would be unsatisfied with mediation, they found that a party's ability to "take control of a case and settle it on his or her own terms" outweighed that concern.\textsuperscript{171} Unfortunately, while some counties offer mediation to pro se litigants, it can be difficult for an unrepresented party to actually take advantage of that service.\textsuperscript{172} The attorney for the plaintiff or court personnel might encourage a defendant to speak directly with the plaintiff's attorney or to engage in more informal negotiations outside the purview of the court system.\textsuperscript{173} While this type of negotiation may appear to be less time-consuming and less expensive than traditional mediation, it is often used to rush an uninformed defendant through the process and to encourage the defendant to sign a stipulation for

\textsuperscript{165} Id.
\textsuperscript{166} Id.
\textsuperscript{167} See id. at 1, 2, 6, 9.
\textsuperscript{168} See id. at 4.
\textsuperscript{169} Id. at 8.
\textsuperscript{170} Id. at 9.
\textsuperscript{171} Id.
\textsuperscript{172} Id.
\textsuperscript{173} But see LA. TASK FORCE ON PRO SE LITIGATION OF THE JUDICIAL COUNCIL, GUIDELINES FOR BEST PRACTICES IN PRO SE ASSISTANCE: TASK FORCE ON PRO SE LITIGATION 26-27 (2004), http://www.lasc.org/la_judicial_entities/Judicial_Council/Pro_Se_Guidelines.pdf (illustrating the ethical considerations that attorneys must consider when communicating with a pro se litigant).
judgment without the time, procedure, or information provided by formal mediation. Court-sanctioned mediation is therefore a critical tool in creating a successful and fair small claims court system.174 Allowing external processes that side-step formal mediation creates a system of missed opportunities in which pro se litigants do not receive the full benefits available to them.175

Another solution to level the playing field is to provide incentives to private attorneys to take small claims cases on a contingency-fee basis. Such incentives include permitting the prevailing party to recover fees in contract cases where the defending party is not a party to the contract, as well as equitable causes of action of account stated and open account.176 For example, California's mutuality provision, section 1717.5(a) of the California Civil Code, provides for recovery of attorney's fees and costs to the prevailing party in a contract action, whether the party is specified in the contract or not.177 Idaho also has a statute that Florida should be adopt which provides for a recovery of fees to the prevailing party in an open account and account stated action.178 Such statutes would provide opportunities for low-income, putative debtors to receive representation for free, as the attorneys would have the potential of earning fees if they prevail in defending the action.179

IX. BROADER CHANGES NEEDED WITHIN THE DEBT COLLECTION INDUSTRY

As part of an ongoing investigation into the methodology and impact of the American debt collection industry, independent journalist group, ProPublica, offers several potential changes intended to level the

174 COMM. ON JUDICIARY, supra note 104, at 3, 6, 8.
175 See generally id. at 8-9, 12 (emphasizing the importance of mediation to litigants in the small claims process).
177 See, e.g., CAL. CIV. CODE § 1717.5(a) (West 2016).
178 See, e.g., IDAHO CODE § 12-120(3) (2015) ("In a civil action to recover on an open account, account stated ... unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney’s fee to be set by the court, to be taxed and collected as costs.").
179 See, e.g., CIV. CODE § 1717.5(a); IDAHO CODE § 12-120(3).
playing field for the working poor.\textsuperscript{180} These changes, coupled with an overhaul of the small claims court process, have the potential to do substantial good for the working-class and poor Americans facing the collection of consumer debts.\textsuperscript{181}

First, ProPublica suggests limiting the amount of money a judgment creditor can withhold or garnish from a judgment debtor's paycheck or bank account.\textsuperscript{182} In most states, including Florida, the amount a judgment creditor can withhold from a paycheck is capped at 25\%.\textsuperscript{183} However, there is no limit on the amount a judgment creditor can take from a debtor's bank account.\textsuperscript{184} A judgment creditor can take up to the amount of the judgment itself, assuming the funds within the account are not subject to any exemptions.\textsuperscript{185} In many instances, garnishment at these levels leaves the debtor unable to meet his or her other obligations and creates a "snowball effect" for the debtor financially.\textsuperscript{186} For example, losing 25\% of each paycheck often makes it impossible for a debtor to keep up with his or her rent payment, which then leads to an eviction, which further negatively affects his or her credit, which in turn means that any credit he or she is able to obtain going forward will be at worse terms, thus perpetuating the cycle of debt for the consumer and simultaneously reducing the chance of repayment to the creditor.\textsuperscript{187}


\textsuperscript{181} \textit{See id. See generally} Holland, \textit{supra} note 115, at 234, 242 (discussing that numerous factors must play a role in fixing the problems associated with the small claims process, such as the bench, the bar, the academy itself, and the legal profession as a whole).

\textsuperscript{182} Kiel, \textit{What Can Be Done Right Now}, \textit{supra} note 180.


\textsuperscript{184} \textit{Id.}

\textsuperscript{185} \textit{Id.}

\textsuperscript{186} \textit{Id.}

According to a 2013 study conducted by Automatic Data Processing ("ADP"), the nation’s largest payroll support provider, one out of ten employed Americans between thirty-five and forty-four had a wage garnishment.\(^{188}\) While garnishment is not a new phenomenon, the cause is.\(^ {189}\) In the past, most wage garnishments were the result of past-due child support.\(^{190}\) Today, more and more of the garnishments are due to judgments on consumer debts.\(^ {191}\) ADP also found that almost 5% of Americans earning between $25,000 and $40,000 per year had a portion of their wages set aside to pay down consumer debts.\(^ {192}\) This increase in consumer debt driven garnishment was particularly significant in the manufacturing sector and among midlevel employees.\(^ {193}\)

The proposed cap on the amount of wages susceptible to garnishment would help ensure a consumer’s ability to work towards repayment of the debt without enduring drastic consequences, such as eviction, car repossession, job loss, or loss of medical treatment.\(^ {194}\) Federal law protects 75% of a consumer’s weekly wages or thirty times the current minimum wage.\(^ {195}\) However, states are free to opt out and provide their own regulation of consumer debt garnishment and many have.\(^ {196}\) The states with the strongest protections against consumer


\(^ {189}\) Arnold & Kiel, Millions of Americans’ Wages, supra note 188.

\(^ {190}\) Id.

\(^ {191}\) Id.


\(^ {193}\) ADP RESEARCH INST., supra note 188, at 11.


\(^ {195}\) Id. at 7-8.

\(^ {196}\) Id. at 8.
wage garnishments are Texas, Massachusetts, and Iowa. The National Consumer Law Center, a nonprofit organization focusing on consumer justice and economic stability, suggests that garnishment regulations should be tailored to preserve a consumer’s ability to continue working while protecting them and their families from financial destitution. In order to accomplish this, the National Consumer Law Center suggests that garnishment regulations address five goals:

1. Prevent debt collectors from seizing so much of the debtor’s wages that the debtor is pushed below a living wage—a wage that can meet basic needs and maintain a safe, decent standard of living within the community;
2. Allow the debtor to keep a used car of at least average value;
3. Preserve the family’s home—at least a median-value home;
4. Prevent seizure and sale of the debtor’s necessary household goods; and
5. Preserve at least $1200 in a bank account so that the debtor’s funds to pay such essential costs as upcoming rent, utilities, and commuting expenses are not cleaned out.

To date, there is not a single state whose garnishment regulations meet all five of these goals.

ProPublica’s second suggestion also relates to the garnishment process, focusing on the need for clear and reliable notice to consumers of the legal protections (if any) available to them during the garnishment process. As discussed above, the available protections

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197 See id. at 10.
198 Id.
199 Id.
200 Id.
201 Id.
202 Kiel, What Can Be Done Right Now, supra note 180.
for judgment debtors vary widely depending on the state. In addition, the information is usually not easily available or understandable to consumers. Because many states place the burden on the consumer to assert any protection or exemption that he or she feels may apply, it is especially critical that consumers be informed of what protections may be available. For example, in Florida, once a judgment creditor secures a writ of garnishment from the court, they are required to mail, via traditional first-class U.S. mail, the writ to the consumer. Along with the writ, the creditor is supposed to send a “claim of exemption” form, which the consumer is responsible for filling out, serving on counsel for the creditor, and filing with the court in order to have the court consider possible protections. The consumer must complete all of this within twenty days of receiving the service form by the creditor.

This method of notification puts consumers at a disadvantage in asserting any applicable protections. First, the notice arrives via traditional mail. Even assuming the notice goes to the correct address, it generally is sent from a law firm’s office, so many consumers assume it is junk mail. Second, the short deadline makes it very difficult for a consumer to correctly assert possible exemptions. In order to maximize a consumer’s chances of successfully navigating the garnishment process, notice should be provided by certified mail or personal service and coupled with a

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203 CARTER & HOBBS, supra note 194, at 3.
204 Kiel, What Can Be Done Right Now, supra note 180.
205 Kiel, Old Debts, Fresh Pain, supra note 183.
206 FLA. STAT. § 77.041(2) (2015).
207 Id. § 77.041(1).
208 Id.
209 See supra notes 206-08.
210 § 77.041(2).
reasonable deadline and increased educational opportunities.\footnote{See supra notes 209-12 and accompanying text.}

Another suggestion offered to level the playing field for debtors is to apply regulations to prevent unnecessary and unwarranted increases in the amount of the debt being sought.\footnote{STIFLER & PARRISH, supra note 63.} For example, attorneys’ fees are regularly added to the debt balance at the time the judgment is entered.\footnote{Kiel, What Can Be Done Right Now, supra note 180.} States can help hold down these balances by making sure that fee awards are based on the actual amount of work done by the attorney on that case.\footnote{See, e.g., Paul Kiel, When Lenders Sue, Quick Cash Can Turn Into a Lifetime of Debt, PROPUBLICA (Dec. 13, 2013, 10:46 AM), http://www.propublica.org/article/when-lenders-sue-quick-cash-can-turn-into-a-lifetime-of-debt [hereinafter Kiel, When Lenders Sue] (explaining that some states cap the attorneys’ fees between 10% and 15%).} Fees in these cases are often set at arbitrary amounts rather than determined based on a review of the attorney’s actual time invested.\footnote{Id.} ProPublica found an example in one firm where a company’s executive routinely sought attorney’s fees equaling one-third of the balance sought in each lawsuit, regardless of the time involved.\footnote{See Arnold & Kiel, Millions of Americans’ Wages, supra note 188.}

Unreasonable postjudgment interest rates further inflate judgments.\footnote{See FLA. STAT. § 55.03(1) (2015).} Many states, like Florida, apply a specific postjudgment interest rate, which is re-evaluated quarterly by the chief financial officer of the state and is tied to the rates set by the Federal Reserve Bank of New York.\footnote{See id.} Once a judgment is obtained, the applicable rate attaches and resets annually.\footnote{Compare Bob Haring, Traditional Credit Cards, NEST, http://budgeting.thenest.com/traditional-credit-cards-22270.html (last visited Nov. 19, 2015) (stating that the traditional credit card interest rate ranges between 15% and 25%), with Pre and Post Judgment Interest Analysis Matrix, AM. INST. CPAS, http://www.aicpa.org/InterestAreas/ForensicAndValuation/Resources/EconomicDamages/pages/prejudgment-post
Other states, however, like Missouri, apply the credit card interest rate even after the court enters a judgment.\textsuperscript{223} In a story about Kevin Evans, a Missouri resident hit with a credit card judgment following the Great Recession, National Public Radio demonstrated the difference that a state’s postjudgment interest rate and attorney’s fee policies can play in the debtor’s ability to pay down a judgment:

If Evans had lived in neighboring Illinois, the interest rate on his debt would have dropped to below 10 percent after his creditor had won a judgment in court. But in Missouri, creditors can continue to add the contractual rate of interest for the life of the debt, so Evans’ bill kept mounting. Missouri law also allowed Capital One to tack on a $1,200 attorney fee. Some other states cap such fees to no more than a few hundred dollars.\textsuperscript{224}

By applying regulations that limit excessive attorneys’ fees awards and reducing the interest rate applied to judgments, states can avoid unnecessary inflation of consumer debts and, by doing so, improve a debtor’s chances of paying off a judgment and a creditor’s chances of receiving payment.\textsuperscript{225}

\textbf{X. CONCLUSION}

The American poor have always amassed consumer debt, but the recent changes in the debt collection industry have made the already difficult legal process even more cumbersome for low-income consumers.\textsuperscript{226} Third-party debt collectors running high-volume collection firms have a significant advantage in what has basically become a numbers game.\textsuperscript{227} The high default rate among low-income consumers further exacerbates the problem when considering the

\footnotesize{\textsuperscript{223} See Arnold & Kiel, 	extit{Millions of Americans' Wages}, supra note 188.\textsuperscript{224} Id.\textsuperscript{225} See, e.g., id.\textsuperscript{226} See supra Part IV.\textsuperscript{227} See supra Part V.}
creditor-friendly postjudgment regulations and collection methods.\textsuperscript{228} The application of the FDCPA to attorneys is a step in the right direction, but many consumers are forced to navigate the debt collection legal system without representation or information and remain at a significant disadvantage.\textsuperscript{229}

There are ways that we can improve the system and it is essential that we do so.\textsuperscript{230} By limiting the amount of wages, improving the notice to consumers of a pending garnishment, and limiting the addition of fees and interest that bloat postjudgment debts, consumers may be better informed and better protected.\textsuperscript{231} When a legal process depends on one party being uninformed and unrepresented, our legal community must commit itself to the examination and reform of that process. We must do this for the low-income consumers trapped in the tangle of the debt collection industry.\textsuperscript{232}

\textsuperscript{228} See supra notes 58-62 and accompanying text.
\textsuperscript{229} See supra Parts VI-VII.
\textsuperscript{230} See supra Part VIII.
\textsuperscript{231} See supra Part IX.
\textsuperscript{232} See supra Part VIII.