

## REMARKS

### Ensuring Justice: The Role of State Court Systems in Responding to the Consumer Debt Crisis

Justice Fern A. Fisher\*

#### INTRODUCTION

The financial crisis and resulting economic downturn precipitated a huge increase in consumer credit transaction legal problems, primarily with credit cards.<sup>1</sup> As original creditors sold individuals' increasing debts to third party debt collectors, the third party debt collector industry quickly became the major collector of credit card debts in the United States.<sup>2</sup> In the Civil Court of the City of New York, the rise in the number of third party debt collector credit card cases first drew attention in 2007. As these cases increased, judges, court clerks and consumer advocates identified numerous shared procedural and substantive issues in these cases,<sup>3</sup> issues that were often different from those presented by original creditor cases. Indeed, prior to the advent of this new industry, original creditor cases did not attract the attention of either the court or consumer

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1. See URBAN JUSTICE CENTER, DEBT WEIGHT: THE CONSUMER CREDIT CRISIS IN NEW YORK CITY AND ITS IMPACT ON THE WORKING POOR 1 (2007), available at [http://www.urbanjustice.org/pdf/publications/CDP\\_Debt\\_Weight.pdf](http://www.urbanjustice.org/pdf/publications/CDP_Debt_Weight.pdf); see also APPLESEED, DUE PROCESS AND CONSUMER DEBT: ELIMINATING BARRIERS TO JUSTICE IN CONSUMER CREDIT CASES 1, available at <http://ftc.gov/os/comments/debtcollectroundtable3/545921-00031.pdf>.

2. See URBAN JUSTICE CENTER, *supra* note 1, at 3; see also APPLESEED, *supra* note 1, at 13; FED. TRADE COMM'N, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE at iv (2009), available at <http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf>.

3. Consumer advocates meet with Civil Court Administrators and staff more than once a year on issues of concern.

advocates. With the spotlight on these problems, the Civil Court administration took action to address these common procedural and substantive issues and ensure justice in consumer cases, particularly in the third-party collector cases. In addition to implementing new court rules and directives, the Civil Court administration launched several access to justice programs to ensure that consumer credit defendants—ninety-nine percent of whom are not represented by an attorney—have access to an even playing field against creditor plaintiffs.<sup>4</sup>

This Article highlights the three most serious problems associated with third-party debt collection cases that the Civil Court administration identified—problematic and erroneous judgments; uneven administration of justice in the court room; and unrepresented consumer defendants. The Article also documents the Civil Court's response to these challenges and contends that the steps the Civil Court took helped dramatically decrease consumer credit case filings in New York City.

#### I. ENSURING JUSTICE TO DEFAULTING DEFENDANTS

In 2007, there was an unusually high number of default judgments entered in consumer credit cases.<sup>5</sup> Upon the Civil Court's review of this spike, it became evident that there were three particular barriers to justice for defaulting defendants: (1) defendants were not receiving adequate notice due to improper service; (2) many plaintiffs awarded default judgments would not have been able to prove their claims had the defendant appeared; and (3) the statute of limitations would have barred many of the plaintiffs' claims had the defendants answered the notice.

The surge in default judgments suggested that many defendants were not receiving proper service or did not appreciate the significance of a summons and complaint. To resolve this issue, the Civil Court sought and obtained a new rule from the governing body of the New York State Court System, rule 208.6(h).<sup>6</sup> Under Rule 208.6(h), when plaintiffs file a proof of service with the court, they must also submit a notice in English and Spanish and an addressed stamped

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4. THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 16 (2012), available at [http://www.courts.state.ny.us/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT\\_Nov-2012.pdf](http://www.courts.state.ny.us/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT_Nov-2012.pdf).

5. See CONSUMER RIGHTS PROJECT, MFY LEGAL SERVICES, INC., JUSTICE DISSERVED: A PRELIMINARY ANALYSIS OF THE EXCEPTIONALLY LOW APPEARANCE RATE BY DEFENDANTS IN LAWSUITS FILED IN THE CIVIL COURT OF THE CITY OF NEW YORK 2 (2008), available at [http://www.mfy.org/wp-content/uploads/reports/Justice\\_Disserved.pdf](http://www.mfy.org/wp-content/uploads/reports/Justice_Disserved.pdf).

6. Uniform Civil Rules for the New York City Civil Court, 22 NYCRR § 208.6(h) (implemented by Chief Clerk's *Memorandum Additional Notice on Consumer Credit Actions*, THE CIVIL COURT OF THE CITY OF NEW YORK (Apr. 1, 2008), <http://www.nycourts.gov/courts/nyc/SSI/directives/CCM/ccm176.pdf>) [hereinafter 22 NYCRR § 208.6(h)]. The Administrative Board of the New York State Court System is the governing body of the court system. It is made up of the four Presiding Justices of the four Appellate Division Courts and the Chief Judge. A chart of the Administrative structure is available at <http://www.nycourts.gov/admin/AdminStructure.pdf>.

envelope.<sup>7</sup> The notice informs the defendant that a case has been filed and explains the consequences of failing to appear. The court mails the notice to the defendant and receives any envelopes returned as undeliverable.<sup>8</sup> Between May 2008 and September 2009, 28,422 envelopes were returned as undeliverable.<sup>9</sup> Most of the returned envelopes were marked “addressee unknown”; strikingly some were returned indicating that no such address even existed.

Prior to Rule 208(h)’s promulgation, civil court clerks entered default judgments in consumer credit cases without the benefit of knowing whether there was a problem with the address. Following the rule change, clerks are now directed not to enter a default judgment in cases where notices are returned as undeliverable. Plaintiffs may seek relief by requesting a judgment by motion before a judge, but proving service in these cases is difficult and no plaintiff has moved for relief since the new rule was created. An additional benefit of rule 208.6(h) is that more defendants started coming to court to answer cases.<sup>10</sup> The number of defendants appearing in court rose dramatically following this new rule suggesting that the only notice defendants received came from the court.

In addition to the problem of inadequate notice, the review found that many default judgments in third party debt collector cases were awarded even where the plaintiffs’ submitted evidence failed to prove their case. Plaintiffs seeking judgments on default establish their claims by submitting affidavits from persons with personal knowledge of the facts.<sup>11</sup> In many default judgments, employees of the debt collector agency submitted affidavits that failed to establish the underlying original debt. At the same time judges were reporting that in cases in their parts, when defendants had answered, plaintiffs could not prove their cases. Third-party debt collectors could not establish a chain of custody for the books and records to establish the debt, particularly when the debt was sold more than once.

In response, the Civil Court implemented a directive requiring plaintiffs to submit an affidavit establishing a sale of account of the original creditor, an affidavit for each subsequent sale by each debt seller, and an affidavit from an employee of the plaintiff with personal knowledge establishing a chain of title of the accounts. Sample forms of the required affidavits are offered as part of the

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7. 22 NYCRR § 208.6(h), *supra* note 6.

8. 22 NYCRR § 208.6(h), *supra* note 6.

9. New York City Civil Court statistics are available in the office of the Chief Clerk. There were 3933 envelopes returned in 2012.

10. Between May 2008 and September 2009, 5879 litigants came in with the notice to answer their cases. New York City Civil Court statistics are available in the office of the Chief Clerk.

11. *Joosten v. Gale*, 514N.Y.S.2d 729 (N.Y. App. Div. 1987); *see also Civil Court Directive: Entry of Default Judgments*, Civ. Ct. CITY N.Y. (July 14, 2010), <http://www.nycourts.gov/courts/nyc/SSI/directives/DRP/DRP191A.pdf>.

directive. The directive is applicable only to debts purchased after September 1, 2009.<sup>12</sup>

Judges and consumer advocates also discerned that many of the debts sought in court by third-party collectors exceeded statute of limitations.<sup>13</sup> In New York this defense is affirmative and must be raised by the defendants.<sup>14</sup> Unrepresented litigants seldom raise the defense because of lack of legal knowledge. However, a defendant's answer can be amended to include the defense with leave of the court at any time that does not prejudice the plaintiff.<sup>15</sup> The dilemma the Civil Court faced was how to address the possibility that plaintiffs seeking default judgments were suing for stale debts. Defendants defaulting in answering could not affirmatively raise the defense of statute of limitations, and court officials were concerned that allowing thousands of default judgments based on stale debts ran counter to ensuring justice.

Relying on the Fair Debt Collection Practices Act (FDCPA), which prohibits the use of fraud in the collection of debts<sup>16</sup> and supersedes the affirmative defense issue under New York Law, the Civil Court issued a new directive in May 2009.<sup>17</sup> The directive requires plaintiffs asking for default judgments to establish by affidavits that there is a reasonable belief that any debt sought does not exceed the statute of limitations. This new directive became even more significant after the New York Court of Appeals decided that the appropriate statute of limitation time frames should be based on the requirements of the state where the debt contract originated.<sup>18</sup> Few consumer debt transaction case contracts are originated in New York, and many other jurisdictions have statute of limitations significantly shorter than New York.

Collection cases have steadily declined from a high of 298,743 in 2008, to 96,460 at the end of 2012. The decline has been most marked in third-party collection cases: of these 96,460 filings, only 36,904 were third-party collection cases.<sup>19</sup> Default judgments have also decreased. The consumer debt crisis con-

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12. *Directives and Procedures: Default Judgments on Purchased Debt*, CIV. CT. CITY N.Y. (May 13, 2009), <http://www.nycourts.gov/courts/nyc/SSI/directives/DRP/drp182.pdf>.

13. As Deputy Chief Administrative Judge for New York City, Justice Fisher meets with Bar Associations and consumer groups on consumer debt issues on a regular basis. Additionally, as the central authority for the Civil Court, she is in charge of the New York State Access to Justice Program for the State of New York.

14. N.Y. C.P.L.R. § 3018(b) (McKinney 2013).

15. *Id.* § 3025(b).

16. The Federal Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p (1990). The Federal Trade Commission agrees with this position. See FED. TRADE COMM'N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION (2010), available at <http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf>.

17. *Chief Clerk's Memorandum: Default Judgments and Time Barred Debt in Consumer Credit Actions*, CIV. CT. CITY N.Y. (June 1, 2010), <http://www.courts.state.ny.us/courts/nyc/SSI/directives/CCM/CCM186A.pdf>.

18. *Portfolio Recovery Assoc., LLC v. King*, 901 N.Y.S.2d 575 (2010).

19. The New York City Civil Court statistics are on file with the Chief Clerk of the Civil Court. The numbers include all consumer debt cases. The court does not separate third-party debt collection cases

tinues to exist throughout the country, and at least anecdotally, other state court systems have not experienced the dramatic drop in filings experienced by New York City.<sup>20</sup> It is reasonable to conclude that the default judgment policies of the Civil Court of New York City have had an impact on third party debt collection cases.

## II. ENSURING JUSTICE IN THE COURTROOM

Defendants who answer summons and complaints are not protected by the directives applicable to default judgement cases, and Court Administrators cannot direct judges on how to handle cases before them. However, Court Administrators can issue advisory notices to update judges on developments in the law or suggest approaches to handling cases in order to ensure procedural justice. I issued an advisory notice regarding consumer credit cases on October 23, 2007 and amended that notice on June 21, 2008 to address issues in consumer debt cases.<sup>21</sup>

These advisory notices suggest possible approaches to resolving recurrent issues such as whether the plaintiff is a licensed debt collector, whether the plaintiff validly owns the debt, whether the defendant was properly served, and whether the statute of limitations bars the complaint. The notice also seeks to ensure that unrepresented litigants understand the contents of the agreements they sign and the consequences of a failure to adhere to the terms of the agreement. In this way, although the Court Administrator cannot dictate the steps each judge takes, she can exert some influence on their handling of these matters.

Still, the effectiveness of these advisory notices is somewhat limited by the way consumer debt cases in New York City are assigned. One court part in each county handles consumer debt cases, and the system for assigning judges to this part varies from county to county. In some counties, the judge who is assigned to the part is rotated. In other counties the assignment is more permanent. As a result, judicial approaches to handling consumer debt cases vary. Some judges are more engaged in resolving the cases and have adopted the advisory notices' suggestions, while other judges have very different approaches.<sup>22</sup> Despite the

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from original creditor cases for statistical purposes. This conclusion is based on information from judges and clerks.

20. Martin Merzer, *Lawsuits Over Credit Debt Spike In California, Florida, Nevada: Courts in State Hit Hardest By Recession See A Parade of Debtors*, CREDITCARDS.COM (Apr. 18, 2011), <http://www.creditcards.com/credit-card-news/florida-nevada-california-more-credit-card-debt-lawsuits-court-1282.php>.

21. *Advisory Notice: Consumer Debt Cases: CPLR § 3015 (e); Validation; Allocations of Stipulations*, CIV. CT. CITY N.Y. (June 21, 2008), <http://www.courts.state.ny.us/courts/nyc/SSI/directives/AN/consumerdebt.pdf> (amending directive of Oct. 23, 2007); *Advisory Notice: Consumer Debt Cases: Statute of Limitations*, CIV. CT. CITY N.Y. (Feb. 23, 2010), <http://www.courts.state.ny.us/courts/nyc/SSI/directives/AN/AN11.pdf>.

22. See Jessica Silver-Greenberg, *Problems Riddle Moves to Collect Credit Card Debt*, N.Y. TIMES (Aug. 12, 2012), <http://dealbook.nytimes.com/2012/08/12/problems-riddle-moves-to-collect-credit-card-debt>.

advisory notices, consumer advocates' concerns regarding how some judges handle these cases persist.<sup>23</sup>

### III. LEVELING THE PLAYING FIELD THROUGH COURT OPERATED ACCESS TO JUSTICE PROGRAMS

All consumer debt plaintiffs are represented by an attorney, while ninety-nine percent of defendants are unrepresented.<sup>24</sup> A very small number of represented litigants have retained attorneys at their own expense, but the majority of represented defendants receive assistance from programs operated by the New York State Courts Access to Justice Program, including the Volunteer Lawyer For the Day Consumer Program, the Volunteer Lawyer Consumer Program, and court-designed Do-It-Yourself Computer programs that guide *pro se* defendants.

Commenced in 2009, the Volunteer Lawyer for the Day Consumer Program recruits volunteer lawyers and law students. Staff from the Access to Justice Program train and supervise the volunteers. Because the volunteers operate under the auspices of a Court supervised program, they are considered State employees and subject to indemnification defense if sued for malpractice.<sup>25</sup> The program provides unbundled (limited scope) legal services assisting defendants in settling their cases, and the program's services end if a defendant's case goes to trial. The Court partners with law schools, bar associations, and legal services providers which each provide an attorney to assist volunteers while settling cases.<sup>26</sup> Volunteers may not settle a case unless an attorney from a partner organization reviews the agreement. The Court's supervision of the program, in concert with the partner attorneys' assistance, ensures that volunteers receive adequate oversight. In 2012, the Lawyer for the Day program assisted 3794 litigants in New York City Civil Court courtrooms. Since its inception in 2009, the program has represented over 10,000 individuals.<sup>27</sup>

The Volunteer Lawyer Consumer Program, in existence since 2008, pro-

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23. Deputy Chief Administrative Judge of New York City Courts Fern A. Fisher regularly meets with bar associations and community groups on consumer debt issues. Complaints are voiced at these meetings.

24. THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 16 (2012), available at [http://www.courts.state.ny.us/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT\\_Nov-2012.pdf](http://www.courts.state.ny.us/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT_Nov-2012.pdf).

25. Formal Opinion No. 2000-F1, 2000 N.Y. Op. Att'y Gen. 1 (2000). Since the beginning of the Volunteer Lawyer Programs no volunteer has been sued. The New York State Access to Justice Program has student practice orders which allow second and third year law students to practice law under the supervision provided by the court.

26. The following law schools and organizations co-partner with the Court: Cardozo Law School, CUNY School of Law, Touro Law School, St. John's Law School, New York Legal Assistance Group, Brooklyn Bar Foundation, and the New York County Lawyers Association.

27. N. Y. STATE COURTS, NEW YORK STATE COURTS ACCESS TO JUSTICE PROGRAM 2012 REPORT at vii (2012), available at [http://www.nycourts.gov/ip/nya2j/pdfs/NYA2J\\_2012report.pdf](http://www.nycourts.gov/ip/nya2j/pdfs/NYA2J_2012report.pdf). Statistics from the inception of the program are on file in Justice Fisher's office.

vides consumer debtors advice only in Help Centers located in courthouses in New York City. Volunteer lawyers and law students are supervised by court-employed Help Center attorneys. The Court sponsors periodic trainings for volunteers. 781 litigants were assisted through this program in 2012.<sup>28</sup>

In addition to these volunteer programs, the Access to Justice Program has developed a computer program that assists an unrepresented litigant in creating an affidavit in support of an order to show cause to vacate a default in answering or appearing. The program is one of many Do-It-Yourself programs that allow unrepresented litigants to fill out court forms through the use of a computer interview that guides the individual to the completion of form to filed with the court.<sup>29</sup> The program was developed using software designed by Chicago Kent Law School called A2J Author.<sup>30</sup> Between 2012 and the first quarter of 2013, users of the program generated 10,359 documents for use in court proceedings.

#### CONCLUSION

One of the key responsibilities of state courts is to ensure equal access to justice. The financial crisis and resulting flood of unrepresented litigants continue to challenge state court systems' ability to fulfill this responsibility.<sup>31</sup> Across the country, consumer debt cases and the third-party debt industry pose particular and significant barriers to justice. In the face of these obstacles, the New York City Civil Court chose action over passivity. With the unwavering support of Chief Judges Judith S. Kaye and Jonathan Lippman, the Civil Court created rules, issued directives, and founded programs to address the uneven administration of justice in third party debt collection cases. Our mandate to ensure equal access to justice commanded nothing less. Our actions offer a template to other jurisdictions struggling with similar issues.

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28. NEW YORK STATE COURTS, NEW YORK STATE COURTS ACCESS TO JUSTICE PROGRAM 2012 REPORT 5 (2012), available at [http://www.nycourts.gov/ip/nyaj2j/pdfs/NYA2J\\_2012report.pdf](http://www.nycourts.gov/ip/nyaj2j/pdfs/NYA2J_2012report.pdf); *Court-Sponsored Volunteer Attorney Program*, NYCOURTS.GOV, <http://www.nycourts.gov/attorneys/volunteer/vap/index.shtml> (last visited Apr. 16, 2013).

29. See generally *Affidavit To Vacate a Default Judgment in a Consumer Debt Case*, NYCOURTS.GOV, [http://www.nycourts.gov/courts/nyc/civil/int\\_affidavit2vacate.shtml](http://www.nycourts.gov/courts/nyc/civil/int_affidavit2vacate.shtml) (last visited Apr. 16, 2013) ("This free and easy program makes papers that help you tell a judge why you missed your court date or didn't answer a complaint in a consumer debt case. When you finish this program, you can print a paper called an 'Affidavit in Support of an Order to Show Cause,' which you must give to the clerk in Civil Court. The papers ask the judge to let you come back to court."); *DIY Forms, New York City Civil CourtHelp*, NY COURT HELP, [http://www.courts.state.ny.us/courthelp/diy/nyccivil\\_civil.html](http://www.courts.state.ny.us/courthelp/diy/nyccivil_civil.html) (last visited Apr. 16, 2013) (offering "[f]ree and easy guided step-by-step programs for people with cases in New York City Civil Court").

30. *A2J Author*, IIT CHI.-KENT C. L., <http://www.kentlaw.iit.edu/institutes-centers/center-for-access-to-justice-and-technology/a2j-author> (last visited Apr. 16, 2013).

31. *Id.*