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ARTICLES

ASSEMBLY-LINE PLAINTIFFS

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ASSEMBLY-LINE PLAINTIFFS[†]

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Around the country, state courts are being flooded with the claims of massive repeat filers. These large corporate plaintiffs leverage economies of scale to bring tremendous quantities of low-value claims against largely unrepresented individual defendants. Using recently developed litigation-analytics tools, this Article presents the first nationwide study of these “assembly-line plaintiffs,” examining the top civil filers in a range of state courts across the country going back to 2004. It documents the pervasive nature of this litigation, finding that in many court systems just the top ten private filers account for between one fifth and one third of all civil litigation.

This pattern raises serious concerns. Drawing on existing empirical literature and a sample of 1000 recent case dockets, the Article describes how these cases turn state courts into near-automatic claims processors for large corporations, transferring assets from mostly absent defendants without significant scrutiny of the underlying claims. These defendants, moreover, are often particularly vulnerable low-income consumers or members of other marginalized groups. And although many concerns raised by this litigation overlap with those related to unrepresented litigants more broadly, the structural features of assembly-line litigation — its one-sidedness, high volume, and low claim value — present distinctive challenges. The Article concludes by considering a few specific potential reforms designed to meet those challenges: assessing a surcharge on frequent filers as a form of congestion pricing; enabling common defenses to be asserted as affirmative causes of action to facilitate aggregation; and moving courts away from one-case-at-a-time adjudication toward a more investigative, administrative-agency-like model.

INTRODUCTION

Most civil litigation in the United States no longer looks like what is taught in law schools. Over the last thirty years, state courts have undergone a generational change: in the early 1990s, almost everyone in court was represented by a lawyer; today, fewer than half of the cases filed have lawyers on both sides.¹ The traditional model of civil

[†] The *Harvard Law Review* has not independently reviewed the data and analyses described herein.

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¹ See *infra* section I.A, pp. 1714–16 (discussing PAULA HANNAFORD-AGOR, SCOTT GRAVES & SHELLEY SPACEK MILLER, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS 31–33 (2015) [hereinafter LANDSCAPE STUDY]); Anna E. Carpenter, *Active Judging and Access to Justice*, 93 NOTRE DAME L. REV. 647, 649–60 (2017).

litigation, in which lawyers advocate on both sides of a dispute in front of a neutral judge, no longer applies in something like 12 million out of the roughly 16 million civil cases filed in state courts each year.²

The emerging dominance of unrepresented litigation raises serious concerns about the adequacy of our civil justice systems for reaching accurate results, their ability to provide due process for litigants, and the distributive consequences of systems that place significant burdens on poor and otherwise marginalized communities.³ These concerns arise throughout the civil justice system, in categories of disputes that reflect many aspects of everyday life and commerce in the United States: consumer purchases, student loans, rent payments, and more. State courts backstop the bread-and-butter transactions that make up the consumer economy, overseeing litigation over contracts and providing the ultimate enforcement mechanism for the trillions of dollars of consumer debt in the United States.⁴ The gap between the idealized structures of court procedures and the realities of litigation thus poses significant problems for the fair and accurate enforcement of civil law across a broad swath of daily activity.⁵

But because these problems are concentrated in state courts, many aspects of this radical change in civil justice remain unknown. State courts remain chronically understudied, whether due to the difficulty in gathering information about many distinct systems or because of the common perception of federal courts as the home of more complex and high-stakes cases.⁶ In particular, there has been little examination in legal scholarship of one of the driving forces behind this litigation: the plaintiffs who generate massive numbers of cases involving unrepresented litigants.⁷

² See *infra* section I.A, pp. 1714–16.

³ See *infra* section III.A, pp. 1744–51.

⁴ See *Consumer Credit — G.19: Current Release*, BD. OF GOVERNORS OF THE FED. RESRV. SYS., <https://www.federalreserve.gov/releases/g19/current> [<https://perma.cc/H5BV-NZAQ>] (last updated Feb. 7, 2022) (showing \$4.4 trillion of consumer debt outstanding in the U.S. economy in 2021); see also Stephen C. Yeazell, *Courting Ignorance: Why We Know So Little About Our Most Important Courts*, DAEDALUS, Summer 2014, at 129, 129 (“To an extent not always recognized, the United States depends on state trial courts to run the world’s largest economy and coordinate its mechanisms of social control.”).

⁵ See generally Norman W. Spaulding, *The Ideal and the Actual in Procedural Due Process*, 48 HASTINGS CONST. L.Q. 261 (2021).

⁶ See, e.g., *id.* at 264; Anna E. Carpenter, Jessica K. Steinberg, Colleen F. Shanahan & Alyx Mark, *Studying the “New” Civil Judges*, 2018 WIS. L. REV. 249, 251 (2018) [hereinafter *The “New” Civil Judges*] (“[L]egal scholarship continues to focus almost exclusively on federal courts . . .”); Zachary D. Clopton, *Making State Civil Procedure*, 104 CORNELL L. REV. 1, 1 (2018) (“[S]tate courts and state procedure are notably absent from the scholarly discourse.”); Yeazell, *supra* note 4.

⁷ The most in-depth empirical analyses of large repeat plaintiffs in contemporary state courts in the legal literature have been in the context of scholarship on third-party debt-collection litigation. See, e.g., Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 LOY. CONSUMER L. REV. 179 (2014); Dalíé Jiménez, *Dirty Debts Sold Dirt Cheap*,

This Article presents the first broad survey of these plaintiffs, finding a remarkable and troubling pattern. In courts throughout the country, just a handful of private companies are responsible for outsized portions of courts' dockets. The world of civil litigation is not just one in which unrepresented parties square off in court, or where a local bank or retailer files a few dozen cases against customers in arrears. Instead, today's courts are top-heavy, flooded by the claims of megafilers who bring cases in the thousands or tens of thousands within single jurisdictions every year, generating economies of scale to permit the profitable submission of masses of small-dollar cases.

To document this phenomenon, this survey contains three parts. First, a study of available data from trial courts of general jurisdiction across eighteen states examines the case volumes of the private plaintiffs with the highest filings in 2019 to provide a recent snapshot of case filing patterns. Second, a longitudinal study across a smaller number of courts examines case volumes from 2004 through 2020 to identify changes in these patterns over time. And finally, a docket-level analysis looks more closely at a thousand-case sample from the 2019 study to provide detail about what is going on in the cases at the core of these trends.

The results are dramatic. In a given court system within the sample, the top ten private filers typically accounted for between one fifth and one third of all of the cases filed.⁸ Across the twenty state court jurisdictions examined in California, for instance, just ten companies filed about 114,000 cases in 2019, more than a quarter of the roughly 447,000 civil cases filed that year by all plaintiffs combined.⁹ In twenty-one jurisdictions in New Jersey, the number was 116,000 cases filed by the top ten filers out of 281,000 total cases — over 41%.¹⁰ And it is often the same companies, primarily a collection of financial services companies and debt collectors, who end up being these top filers across the country. For instance, Midland Funding, a debt-collection company, filed more than 122,000 cases across eighteen states in 2019 — a single company filing more cases than many entire judicial systems see in a

52 HARV. J. ON LEGIS. 41 (2015); Mary Spector, *Debts, Defaults and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. L. & BUS. REV. 257 (2011); see also Jessica K. Steinberg, *A Theory of Civil Problem-Solving Courts*, 93 N.Y.U. L. REV. 1579 (2018); Yonathan A. Arbel, *Adminization: Gatekeeping Consumer Contracts*, 71 VAND. L. REV. 121 (2018); Lisa Stifler, *Debt in the Courts: The Scourge of Abusive Debt Collection Litigation and Possible Policy Solutions*, 11 HARV. L. & POL'Y REV. 91 (2017). This scholarship has not generally attempted to study plaintiffs' filing rates across a wide range of jurisdictions. This Article engages in such a cross-jurisdictional study, and focuses on any plaintiff bringing a sufficiently high number of cases, which includes a variety of firms such as financial services firms, property managers, or healthcare companies, in addition to third-party debt collectors.

⁸ See *infra* section II.A, pp. 1726–33.

⁹ For more on how this Article uses the term “civil case,” see *infra* notes 41 and 107.

¹⁰ See *infra* Table 1, p. 1729.

year.¹¹ What's more, this top-filer burden appears to be rising over time, with the median proportion of cases attributable to the top ten filers in the longitudinal study rising from 14.4% in 2004 to 24.3% in 2020.¹²

These cases are almost entirely lawsuits over consumer contract issues. Although the exact composition of the suits varies from year to year, the vast majority of them are either suits by financial services companies attempting to collect on contracts that they have directly with consumers or suits by third-party debt collectors attempting to collect consumer debts that they have purchased from other companies.¹³

On its own, the fact that a company files a lawsuit — or even many lawsuits — is not necessarily a reason to be concerned about the health of the civil justice system. Using economies of scale to reduce the costs of litigation can even be a welcome development, allowing the pursuit of meritorious claims for less money. But the cases filed by these companies predominantly fall into a type of litigation that this Article refers to as “assembly-line litigation.” Assembly-line litigation is litigation in which a sophisticated corporate plaintiff brings a high volume of similar, small-value claims against individual natural-person defendants who are almost universally unrepresented and who often do not appear in court. In today's state courts, such litigation has come to resemble an automated assembly line, in which courts rubber-stamp the plaintiffs' claims with little or no analysis and issue judgments against the absent defendants. In doing so, courts transfer assets from unsophisticated, often-indigent persons to major corporations without seriously evaluating the merits of each case.

In any one case, such a process would be troubling enough. But as this Article indicates, such litigation is extremely common, accounting for huge portions of states' entire civil dockets. Examining the cases filed by the most common plaintiffs in our nation's civil justice systems paints a picture in which state courts appear to frequently act as ministerial claims processors for large corporations, advancing their claims from filing to judgment to collection without much, if any, significant probing or analysis.¹⁴ Such near-automatic processing of cases creates significant concerns about the ex ante incentives for corporations to engage in negligent or fraudulent business practices;¹⁵ it also raises concerns about the effective ex post enforcement of protections for judgment debtors, such as limitations on the garnishment of wages or

¹¹ See *infra* Table 2, p. 1732.

¹² See *infra* Table 3, pp. 1733.

¹³ See *infra* section II.B, pp. 1733–36. There are a small number of remaining plaintiffs outside of these two categories, who tend to be healthcare companies or property managers. See *infra* section II.B, pp. 1733–36.

¹⁴ See *infra* Part II, pp. 1724–43.

¹⁵ See, e.g., Jiménez, *supra* note 7, at 81–84, 93–97.

assets.¹⁶ Even if a significant majority of the claims brought by these plaintiffs are valid, the structural incentives for them to look the other way and pursue bad claims — combined with periodic evidence of outright fraud by some actors — are barometers of a dysfunctional system.¹⁷

Concerns about unrepresented litigants facing off against sophisticated corporations are well documented and extend back for decades.¹⁸ But the scale and nature of the assembly-line litigation documented here have normative implications for one of the most pressing questions facing the civil justice world: how to improve the fair and accurate processing of cases for an increasingly lawyerless pool of litigants. Assembly-line litigation brings out some of our civil court systems' most significant failings when it comes to unrepresented litigants. But assembly-line litigation also is unlikely to be fixed by some of the most prominent interventions aimed at helping those litigants. Assembly-line litigation has two key structural features: a high volume of claims and claims that are typically low value. These features, in turn, pose problems for certain interventions, such as the public provision of counsel or the development of more active judging, that are promising ways of dealing with some of the problems of pro se litigation. The high volume of assembly-line litigation means that the increased costs of more involved case-by-case investigations may be severe. The low value of the claims, meanwhile, raises questions about whether paying for lawyers' and judges' time in many of these cases is the most effective use of public funds.

Understanding these structural features of assembly-line litigation is important because these cases raise core questions regarding the role of courts and the distribution of burdens when it comes to the enforcement of civil law. In a wide swath of cases around the country, our civil courts no longer look like bilateral dispute resolution systems. Instead, they appear more as systems for the unilateral petitioning of the government for permission to transfer ownership over assets. Key features of our civil justice system — most notably, the general rule that parties who do not show up are subject to default judgments — are not well designed for this world of pervasive unilateral claims. And substantive legal regimes whose efficacy depends on affirmative defenses are imperiled in the many cases where no defenses are made at all.

As a result, reformers must decide how much to focus on pushing these cases back in the direction of bilateral disputes, such as by making courts more defendant friendly, as opposed to working to more effectively scrutinize the many one-sided cases, such as by making courts

¹⁶ See *infra* Part III, pp. 1743–56.

¹⁷ See *infra* Part III, pp. 1743–56.

¹⁸ See *infra* p. 1717 (discussing Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95 (1974)); see also DAVID CAPLOVITZ, *CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT* 191–270 (1974).

more administrative and inquisitorial. The Article closes by considering several types of policy interventions along the continuum between these two options, ranging from reforms like creating new causes of action that could be grafted easily into existing structures, to more radical interventions that would depart from traditional models of both one-case-at-a-time adjudication and aggregate litigation.

In both its descriptive findings and normative discussion, this Article aims to contribute to conversations in three overlapping literatures. First, recognizing the nature and volume of assembly-line litigation complicates existing tropes within conversations about access to justice. Perhaps as a result of most scholarship's focus on federal courts, civil procedure scholarship regarding access to justice generally focuses more on plaintiffs' concerns. Whether the issue is pleading standards, court fees, mandatory arbitration, Article III standing, personal jurisdiction, or the certification of class actions, many of the most salient issues in procedure scholarship in recent years have focused on the ability of plaintiffs — usually “the little guy” in the framing of these issues — to sue defendants, who are often governments, corporations, or other sophisticated repeat players.¹⁹ But in state courts, these roles are reversed: the most common cases pit a better-resourced plaintiff, often a corporation with lawyers, against an unrepresented individual defendant.²⁰ And, as the Article will show, a system in which these less-resourced defendants are unable to enforce their rights will fail to deter fraud and lawbreaking by powerful actors in much the same way as a system that does not allow plaintiffs to sue when they have been wronged.

Second, this attentiveness to the ways in which assembly-line litigation differs from other types of litigation involving unrepresented defendants builds on and adds to a growing, empirically informed, and nuanced body of literature that addresses the urgent need for pro se court reform.²¹ As efforts to manage litigation with unrepresented parties have developed, it has become increasingly clear that pro se

¹⁹ See, e.g., A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 353–59 (2010) (discussing the “access-promoting,” “liberal” ethos in civil procedure as associated with decreased barriers for plaintiffs bringing claims, *id.* at 353); Theodore Eisenberg & Kevin M. Clermont, *Plaintiphobia in the Supreme Court*, 100 CORNELL L. REV. 193, 204 (2014) (equating the dismissal of claims to “denial of access to justice”); Brooke D. Coleman, *The Vanishing Plaintiff*, 42 SETON HALL L. REV. 501, 517 (2012) (“The reality is that individuals in this country, especially poor individuals, simply do not have access to the legal services necessary to pursue their grievances or disputes.”); see also Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN. L. REV. 1275, 1298 (2005) (“[O]rganizations are defendants in more than 80% of all federal civil litigation; individuals are plaintiffs in almost 70%.”).

²⁰ See *infra* Part I, pp. 1713–24.

²¹ See, e.g., Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967 (2012); Tonya L. Brito, David J. Pate, Jr. & Jia-Hui Stefanie Wong, *“I Do for My Kids”*: *Negotiating Race and Racial Inequality in Family Court*,

litigation cannot be treated as only one type of litigation whose problems can be solved by a single uniform intervention. A straightforward place to see this is in the advocacy surrounding a civil *Gideon*²² right, which is often formulated as applying to only a subset of civil cases in which particularly important interests are at stake, such as housing, immigration, or child custody,²³ and where there is disagreement as to the best approach even within these categories.²⁴ In a way, this is unsurprising: now that a significant majority of all civil litigation can be described as “pro se litigation,” efforts to improve processes and outcomes for unrepresented parties can no longer be considered targeted at a narrow subset of cases. The world of pro se litigation is complex and multifaceted; this Article argues that assembly-line litigation, which carries its own particular challenges, needs a distinct set of responses.

Finally, this Article joins the growing body of work responding to calls for greater analysis of state courts.²⁵ State courts, by providing alternatives to federal courts for private enforcement, have rightly been recognized as valuable forums for developing the law and offering plaintiffs avenues for relief.²⁶ Relatedly, in debates over the relative merits and demerits of state versus federal courts, state courts are often regarded as more plaintiff friendly, with federal courts therefore being

83 FORDHAM L. REV. 3027 (2015); Anna E. Carpenter, Colleen F. Shanahan, Jessica K. Steinberg & Alyx Mark, *Judges in Lawyerless Courts*, 110 GEO. L.J. (forthcoming 2022), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3746&context=faculty_scholarship [<https://perma.cc/GG2H-JBN8>]; D. James Greiner, Ellen Lee Degnan, Thomas Ferriss & Roseanna Sommers, *Using Random Assignment to Measure Court Accessibility for Low-Income Divorce Seekers*, 118 PROC. NAT'L ACAD. SCI. U.S., Apr. 6, 2021, at 1; Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478 (2019); Kathryn A. Sabbeth & Jessica K. Steinberg, *The Gender of Gideon*, 69 UCLA L. REV. (forthcoming 2022), <https://ssrn.com/abstract=3807349> [<https://perma.cc/WK9P-RK4L>]; Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741 (2015).

²² *Gideon v. Wainwright*, 372 U.S. 335 (1963).

²³ See, e.g., *2021/2022 Federal/State Civil Right to Counsel Bills*, NAT'L COAL. FOR A CIV. RIGHT TO COUNS., http://civilrighttocounsel.org/legislative_developments/20212022_bills [<https://perma.cc/FZU2-SHEJ>] (collecting state legislation involving a civil right to counsel).

²⁴ See, e.g., Rebecca Aviel, *Why Civil Gideon Won't Fix Family Law*, 122 YALE L.J. 2106, 2114–23 (2013) (arguing that the problems of unrepresented litigants in family courts would be better addressed by institutional reforms that soften the adversarial model of civil litigation, rather than a universal right to counsel).

²⁵ See, e.g., *The “New” Civil Judges*, *supra* note 6, at 272–74, 284–85 (“[S]uch courts are almost entirely ignored as sites for scholarly research, most notably by legal scholars.” *Id.* at 284.); Ethan J. Leib, *Localist Statutory Interpretation*, 161 U. PA. L. REV. 897, 900 (2013) (noting that state and local trial court officials “are the face of law and justice to citizens in our democracy”); Justin Weinstein-Tull, *The Structures of Local Courts*, 106 VA. L. REV. 1031, 1104 (2020) (“[T]he legal academy should embrace local courts as a field of study because the stakes are high, the questions are clear, and the methods are important.”).

²⁶ See, e.g., Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411, 415 (2018).

seen as the favored courts of large corporate entities.²⁷ This Article adds nuance to these narratives about state courts by revealing the extent to which they are flooded by large corporate plaintiffs. These cases pose significant, routine access-to-justice problems for the unrepresented individuals who find themselves in court as defendants, not claimholders. They also provide a civil analogue to the failures of due process in the mass-throughput systems developed for adjudicating and penalizing lower-level criminal offenses in states' municipal courts.²⁸ In both the criminal and civil contexts, state courts are where the law's role in economic coordination and social control is operationalized on the day-to-day level;²⁹ and in both contexts, significant power imbalances and the breakdown of legal oversight give rise to serious due process concerns, while the high-volume nature of the disputes makes reform costly and difficult.³⁰

The Article proceeds as follows: First, Part I provides background on state courts and the rise of pro se litigation and describes the category of assembly-line litigation in more detail, focusing on debt-collection litigation in particular. Next, Part II reports the findings of the three studies described above. Part III then discusses the structural challenges posed by this type of litigation for civil justice reform, arguing that effective reforms should aim specifically at the problems of high case volumes and low claim values, rather than more general problems often targeted by pro se court reform writ large. Finally, Part IV gives examples of potential reforms that aim specifically at high-volume, lower-stakes litigation when it comes to court funding, claim aggregation, and court structure.

I. ASSEMBLY-LINE LITIGATION

State courts are overburdened and struggling. For the last two decades, they have faced chronic funding shortages, with budget cuts

²⁷ See, e.g., Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 593 (1998) ("Removal of civil cases from state to federal court results in a precipitous drop in the plaintiffs' win rate."); Brooke D. Coleman, *Civil-izing Federalism*, 89 TUL. L. REV. 307, 325 (2014) ("By keeping cases out of the state courts and closing off state law remedies, businesses benefit."); Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101, 2108 (2019) ("As businesses emigrate from state to federal court, they leave behind a stakeholder pool that is less corporate heavy and, eventually, more plaintiff friendly.")

²⁸ See Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964, 965 (2021) (discussing the "cavalier speed, legal sloppiness, punitive harshness, and disrespectful treatment of defendants" in criminal municipal courts, which process millions of cases per year but about which little systematic knowledge exists).

²⁹ See Yeazell, *supra* note 4, at 129 ("[T]he United States depends on state trial courts to run the world's largest economy and coordinate its mechanisms of social control.")

³⁰ See *infra* Part III, pp. 1743–56; see also Natapoff, *supra* note 28, at 1036.

sparked by recessions and many state legislatures declining to restore funding in times of economic growth.³¹ At the same time, the composition of courts' caseloads has changed, from the more tort-heavy landscape of the twentieth century to a docket dominated by contract disputes.³² And perhaps the most significant change is the explosion of litigation involving unrepresented litigants, who now are present in a sizable supermajority of all civil cases.³³ This section first gives a brief overview of these broad trends, and then focuses on a subset of cases at the core of the changing modern judiciary: assembly-line litigation.

A. *The Emergence of Majority-Pro Se Courts*

Over the last thirty years, there has been a revolution in civil litigation. In state courts throughout the country, civil litigation has transitioned from a system in which most parties are represented to one in which the vast majority of litigants are advocating for themselves without an attorney. In the early 1990s, a broad sample of state courts of general jurisdiction found that both sides of a lawsuit were represented by lawyers in 95% of cases.³⁴ But by 2013, that number had dropped to 45%.³⁵ And when courts of limited jurisdiction and single-tiered court systems are included, the rate is even lower — just 24%.³⁶ In effect, state courts have become, for most litigants, “poor people’s courts,”³⁷ processing millions of cases in which significant issues ranging from domestic disputes to housing to consumer debt must be litigated by private persons who are not represented by counsel.³⁸

Although much legal scholarship focuses on federal courts, this shift in state courts is extremely consequential for how civil justice is administered and perceived throughout the country. For most people in the United States, “going to court” means going to a state court.³⁹ The vast

³¹ See CIV. JUST. IMPROVEMENTS COMM., NAT’L CTR. FOR STATE CTS., CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL 10–11 (2016).

³² *Id.* at 8–9.

³³ See *id.* at 9.

³⁴ See LANDSCAPE STUDY, *supra* note 1, at 31.

³⁵ *Id.* at 32. The numbers of unrepresented litigants in the 1992 and 2013 reports are not perfectly comparable. In the 1992 survey, a party’s representation status was determined by looking to whether the party was represented by counsel at any point during a given case. In the 2013 survey, in contrast, representation was measured by whether the party was *unrepresented* at any point during the case. *Id.* at 31 n.83. The magnitude of the difference in representation rates between the two surveys may therefore be slightly overstated, as the 2013 survey would count some people as unrepresented whom the 1992 survey would have counted as represented — for instance, a party who might have been represented by counsel at the start of their case, but not later on. *Id.*

³⁶ *Id.* at 32.

³⁷ See Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 39 (2010).

³⁸ See Steinberg, *supra* note 21, at 748–59.

³⁹ Leib, *supra* note 25, at 898. Any attempt at generating a robust picture of state civil justice systems will quickly encounter limitations on data. See Catherine R. Albiston & Rebecca L.

majority of civil litigation occurs in these courts.⁴⁰ Federal courts handle many cases of significant importance, but their share of the overall caseload of civil litigation nationwide is, depending on how you count, somewhere around 1%.⁴¹ In 2018, for instance, there were about 277,000 new civil filings in federal district courts across the country.⁴² In contrast, the state courts of Texas alone saw more than 1.5 million new civil cases.⁴³ Not counting traffic cases or domestic cases, state courts as a whole in 2018 received an estimated 16.4 million new civil filings.⁴⁴ The federal courts, although critically important to the legal system for many reasons, are not nearly as significant as state courts when it comes to the everyday adjudication of common disputes.

As these numbers suggest, pro se litigation is not simply a growing subcategory of litigation — it is, increasingly, the main event in courts around the country.⁴⁵ But despite this new reality, civil courts remain generally structured around the old model of adversarial civil litigation, in which parties are represented by learned counsel and therefore retain control over the course of a suit, which proceeds in front of a neutral

Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 WIS. L. REV. 101 (2013). Many courts do not record relevant information, or do not make records publicly available. See, e.g., Carpenter et al., *supra* note 21 (manuscript at 22). For those whose data is more accessible, different approaches and institutional structures make comparing between states difficult. There have been significant efforts in recent years to improve the quality of information regarding civil justice around the country, see Albiston & Sandefur, *supra*, at 101–02, but there is still a long way to go. As a result, the descriptions that are possible in this section are, of necessity, somewhat broad strokes.

⁴⁰ See *The “New” Civil Judges*, *supra* note 6, at 252.

⁴¹ *Id.*; see also CT. STAT. PROJECT, STATE COURT CASELOAD DIGEST: 2018 DATA 7 (2018) (reporting 16.4 million new civil cases filed in 2018 in state courts); *Federal Judicial Caseload Statistics 2018*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018> [<https://perma.cc/QJ56-9W4K>] (reporting 277,010 new civil cases filed in federal courts in 2018).

This is a somewhat generous estimate because it errs on the side of undercounting state court filings. There is no universal definition of what counts as a “civil” “case.” Where possible, this Article relies on data that does not include traffic cases or domestic/family cases in the definition of “civil,” as many courts treat these case categories as distinct. See, e.g., CT. STAT. PROJECT, *supra*, at 7; see also *infra* note 107 (discussing reasons for not including domestic/family cases in the empirical data in this paper).

The most significant decision in this tally, numbers-wise, is the decision not to include traffic court cases. Other statistics with much higher numbers generally include those cases. See, e.g., Weinstein-Tull, *supra* note 25, at 1039–42 (citing NAT’L CTR. FOR STATE CTS., EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2015 STATE COURT CASELOADS 1, 3 (2016) (including traffic-court cases in its total case count, and noting that such cases amount to more than half of all filings)). Traffic cases often involve very different procedural and institutional structures, and so are generally not discussed in this Article or included in case counts.

⁴² *Federal Judicial Caseload Statistics 2018*, *supra* note 41.

⁴³ OFF. OF CT. ADMIN., TEX. JUD. BRANCH, ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY: FISCAL YEAR 2018, at 2 (2018), <https://www.txcourts.gov/media/1443455/2018-ar-statistical-final.pdf> [<https://perma.cc/K679-VFJG>].

⁴⁴ CT. STAT. PROJECT, *supra* note 41, at 7.

⁴⁵ See Steinberg, *supra* note 21, at 749–52.

judge who takes little or no role in factfinding and does not assist the parties.⁴⁶ This gap between model and reality raises serious concerns that courts are not serving a significant portion of the public well, by failing to accurately adjudicate worthwhile claims and defenses and allowing case outcomes to be highly influenced by wealth or by chance rather than the merits of the underlying claims.⁴⁷

But not all pro se litigation is the same. As it becomes truer that litigation involving unrepresented parties simply is *most* litigation, it is important not to lump all such cases together as a matter of either diagnosis or treatment. Reforms that may benefit an unrepresented plaintiff in a civil rights case, such as reducing the initial burdens for pleading a case, may redound to the detriment of unrepresented defendants in debt-collection cases, where uninformative pleadings raise the difficulty of providing a defense. And even reforms that one might think of as across-the-board improvements, such as providing lawyers to unrepresented parties, may not receive universal welcome. In some family law contexts, for instance, institutional reforms that deemphasize the adversarial model of litigation may be more appropriate than a civil *Gideon* approach that focuses on providing attorneys to litigants.⁴⁸ Understanding the problems that state courts face and devising appropriate reforms thus requires identifying and investigating distinct types of cases involving unrepresented parties and considering tailored approaches for civil justice reform. The following sections aim to do just that, drilling down in more detail on the masses of low-value contract claims that constitute assembly-line litigation.

B. *The Components of Assembly-Line Litigation*

Assembly-line litigation both contributes to and reflects one of the main changes in state court civil litigation from the late twentieth century to today: the decline of tort cases and the increased dominance of contract cases.⁴⁹ From 1992 to 2013, the proportion of suits alleging tort claims in a broad sample of civil cases fell from around 49% to 13%, while the proportion of cases alleging contract claims rose from 48% to at least 64%.⁵⁰ (Even this 64% figure is likely artificially low because

⁴⁶ See Jessica K. Steinberg, *Adversary Breakdown and Judicial Role Confusion in "Small Case" Civil Justice*, 2016 B.Y.U. L. REV. 899, 910 (2016) ("Adversary theory retains both historical and present-day currency, and is often articulated as a fundamental tenet of American adjudication.").

⁴⁷ See, e.g., *id.* at 937–40.

⁴⁸ See Aviel, *supra* note 24, at 2114–20 ("The partisan advocacy that characterizes the assistance of counsel in an adversarial system can create a coordination problem, preventing parents from realizing the mutual gains of a cooperative approach to resolving custody disputes." *Id.* at 2119.).

⁴⁹ Compare LANDSCAPE STUDY, *supra* note 1, at 6 (presenting 1992 data), with *id.* at 8 (presenting 2010 data).

⁵⁰ *Id.* at 7, 17. The National Center for State Courts hypothesizes that one underlying cause of this significant change is that tort claims are more likely to involve a defendant with insurance

small claims cases, which are highly likely to be contract cases, were analyzed separately.)⁵¹ Contract litigation, in turn, is most likely to fall within three main case types: debt collection, landlord/tenant, and foreclosure.⁵² These cases are where assembly-line litigation takes place.

Assembly-line litigation, as I use it in this Article, is defined by four main components: First, it involves a sophisticated, repeat-player plaintiff, such as a bank. Second, the claims brought by that plaintiff are numerous, relatively small value, and highly similar to each other. Third, the defendants in the cases are mostly absent from court, and, when they do show up, are predominantly unrepresented by attorneys. Finally, the cases brought by the sophisticated plaintiff are processed by judges and courts that maintain a mostly passive role.

These components are all, on their own, familiar. The significant role of sophisticated repeat players has been understood at least since Professor Marc Galanter's famous article *Why the "Haves" Come Out Ahead*,⁵³ high numbers of small-value claims are familiar from the world of class actions;⁵⁴ the high rate of no-show defendants in state courts is well documented;⁵⁵ and recent years have seen considerable discussion of the problems of passive judging in a wide range of contexts.⁵⁶ But when all of these features are present together a type of litigation emerges that is distinct from other, similar cases. When these four features are combined, there is a serious risk of courts functioning essentially as rubber stamps for litigation mills, taking in masses of claims, spending little time testing their validity, issuing enforceable judgments against unsophisticated defendants, and fostering the development of a business model built around a presumption of uninspected claims.

This section delves into each of these component definitions, providing examples along the way from the context of third-party-debt-collection suits.⁵⁷ This type of debt-collector litigation is not the only type of assembly-line litigation; as Part II will show, a fair volume of assembly-line litigation is brought by first-party creditors — mostly

coverage, which provides greater incentive to settle disputes and prevent them from being filed as cases at all. *Id.* at 35. The increasing costs and delays associated with litigation over the last few decades may therefore have contributed significantly to the decline in tort case filings. *See id.*

⁵¹ *Id.* at 17.

⁵² *Id.* at 19.

⁵³ *See* Galanter, *supra* note 18.

⁵⁴ *See, e.g.*, Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 *IND. L. REV.* 65, 66 n.3 (2003).

⁵⁵ *See, e.g.*, LANDSCAPE STUDY, *supra* note 1, at 32.

⁵⁶ *See generally* *The "New" Civil Judges*, *supra* note 6; Carpenter, *supra* note 1; Carpenter et al., *supra* note 21.

⁵⁷ Although the term can be used in a variety of ways, I use "debt-collection company" or "debt collector" to mean a company that is regularly engaged in collecting debts originally owed to third parties — not to indicate, for instance, a company such as a bank or retail store that gives credit to consumers and sometimes pursues those consumers' debts on its own behalf.

financial services companies as well as some healthcare companies and property-management companies. But third-party-debt-collection litigation accounts for the majority of assembly-line cases in recent years found by the studies in Part II, and existing scholarship on debt-collection litigation helps to illustrate the kinds of problems that arise with this type of litigation in particular.⁵⁸ The regulatory environment also differentiates between first-party and third-party debt collection, with the Fair Debt Collection Practices Act⁵⁹ (FDCPA), one of the primary federal laws regulating debt collection, applying to third-party debt collectors rather than first-party debt collectors.⁶⁰ There are several rationales for this differentiation between first-party and third-party debt collectors, including that first-party creditors (such as major banks) already have significant regulatory oversight, and that they have more of a market incentive to maintain goodwill with consumers, who are often their primary customers.⁶¹ Third-party debt collectors, in contrast, do not depend on cultivating a consumer customer base, giving them less incentive to care about fostering consumer goodwill.⁶² This theory finds some support in the rates of consumer complaints about company behavior: third-party-debt-collection companies are more often the source of consumer complaints, with the Federal Trade Commission (FTC) receiving around five times as many complaints regarding third-party debt collectors as it does regarding in-house collection attempts by creditors.⁶³ Third-party debt collection therefore makes sense as a focus both because it accounts for a large portion of assembly-line litigation quantitatively and because it is a place where we should be particularly attentive to the possibility of business models that skirt regulation and result in consumer harm.

I. Sophisticated Repeat Plaintiffs with Many Low-Value Claims. —

The story of assembly-line litigation is one in which sophisticated litigants develop mass economies of scale when it comes to the processing and bringing of claims. These economies of scale can exist prelitigation, during litigation, and postlitigation: companies that anticipate litigation can structure their transactions to make such litigation easier, such as through the use of form contracts and routinized record building;⁶⁴ they can hire lawyers or law firms that specialize in certain types of litigation, reducing

⁵⁸ See *supra* note 7 (collecting academic scholarship).

⁵⁹ 15 U.S.C. §§ 1692–1692p.

⁶⁰ See *id.* § 1692a(6). The exact scope of the FDCPA's coverage has been a subject of debate in recent years. See *infra* note 257.

⁶¹ See Todd J. Zywicki, *The Law and Economics of Consumer Debt Collection and Its Regulation*, 28 LOY. CONSUMER L. REV. 167, 176–77 (2016).

⁶² *Id.* at 177.

⁶³ See, e.g., CONSUMER FIN. PROT. BUREAU, FAIR DEBT COLLECTION PRACTICES ACT: ANNUAL REPORT 2013, at 15 (2013).

⁶⁴ See, e.g., Galanter, *supra* note 18, at 98.

the per-case costs of research and case management;⁶⁵ and they can develop routinized systems for the collection and enforcement of judgments.⁶⁶

In the debt-collection context, the litigation explosion of recent decades accompanied the rise of a business model in the 1990s and 2000s that increasingly relied on lawsuits as a tool for collections. Beginning in the late 1990s and early 2000s, amidst a general boom in the debt-buying industry,⁶⁷ a new type of debt-collection company began emerging with a business model centered around litigation and highly routinized, low-cost-per-case systems for filing complaints, obtaining judgments, and proceeding with garnishment.⁶⁸ Although it can be difficult to get detailed internal accounts of these companies' litigation tools and methods, details from investigative reporting and public enforcement actions suggest that the model involves using digital technology and support staff to leverage the time of the lawyers involved in managing cases, with potentially dramatic results. In one instance in New Jersey, a single lawyer filed more than 69,000 lawsuits in a single year, often filing between 300 and 400 per day.⁶⁹ The lawyer's workflow was structured to permit rapid review of documents that had been prepared by his staff and quickly populated on multiple screens in front of him, allowing him to briefly review and electronically sign mass numbers of papers in rapid succession, which would then go on to be processed and filed by still more nonlawyer staff.⁷⁰ As this business model spread more broadly within the debt-collection industry, court filings boomed as well. In New Jersey, for instance, the number of court

⁶⁵ See, e.g., *id.*

⁶⁶ Cf. *id.* at 109 n.33 (describing the challenges that nonrepeat parties may face when attempting to execute judgments).

⁶⁷ See FED. TRADE COMM'N, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY 12–13 (2013) (describing the growth of the modern “large scale” debt-buying industry in the 1990s, *id.* at 12, after the Resolution Trust Corporation's auctioning of nearly \$500 billion in unpaid loans); David C. Vladeck, *Debt's Dilemmas: ACCI's Annual Colston Warne Lecture*, 47 J. CONSUMER AFFS. 358, 360 (2013) (same).

⁶⁸ See, e.g., Stifler, *supra* note 7, at 92, 97–98 (“While creditors have always had the ability to take debtors to court to collect debts, the widespread use of courts to collect debts is new.” *Id.* at 92.); Suein Hwang, *Once-Ignored Consumer Debts Are Focus of Booming Industry*, WALL ST. J. (Oct. 25, 2004, 11:59 PM), <https://www.wsj.com/articles/SB109865776922954118> [<https://perma.cc/2B7N-UTHQ>] (profiling Asset Acceptance, “a [n]ew [t]ype” of debt collector); Paul Kiel, *So Sue Them: What We've Learned About the Debt Collection Lawsuit Machine*, PROPUBLICA (May 5, 2016, 7:57 AM), <https://www.propublica.org/article/so-sue-them-what-weve-learned-about-the-debt-collection-lawsuit-machine> [<https://perma.cc/6WQ7-9QHG>] (describing the highly automatic “review” process employed by the law firm Pressler & Pressler, the largest collections firm in New Jersey in 2011).

⁶⁹ Kiel, *supra* note 68.

⁷⁰ *Id.*

judgments obtained by debt buyers against consumers rose from 500 in 1996 to 140,000 in 2008.⁷¹

As these processes have continued developing and maturing over the last decade, law firms in the collections industry have begun advertising their efficiency and scale, marketing themselves as providing “a high level of automation and litigation flow,”⁷² or “advanced automated collection” systems.⁷³ Specialized technology systems have emerged to serve this market, advertising to both creditors and law firms and emphasizing the economies of scale that come from computerized automation — with one company, for instance, promising “[u]nprecedented automation” that can be used “[t]o fully automate the collections litigation process.”⁷⁴ Among other things, these technology systems can enable firms to automate the gathering and production of documentation, check documents for compliance with regulations and court procedures, and audit workflows to detect errors.⁷⁵ In the era of big data, some firms advertise the possibility of increased returns to litigation through the kinds of data analytics that large digitized platforms enable.⁷⁶ In the estimation of one CEO of a collections-litigation software company, such software “scale[s] efficiently,” which helps make litigation “the most effective debt recovery strategy” by enabling high-volume case management.⁷⁷

These economies of scale, in turn, permit plaintiffs to pursue cases even when the amount of money involved is low. One FTC survey of 90 million consumer accounts purchased by debt buyers, for instance, indicated an average face value of around \$1600.⁷⁸ Surveys of debt-buyer cases confirm that debt buyers pursue claims that are lower in

⁷¹ See Stifler, *supra* note 7, at 98.

⁷² *Collection Litigation Workflow*, LAW OFF. OF MARC R. DONATY, <https://www.donaty.com/collection-litigation-workflow> [<https://perma.cc/RBM2-W6PA>].

⁷³ *About Us*, STERN & STERN, P.C. COLLECTION & JUDGMENT ENF'T, <https://www.sternlawcollections.com/about> [<https://perma.cc/B2QL-CQWN>].

⁷⁴ *How It Works*, OLIVER TECH., <https://olivertechnology.com/how-it-works/> [<https://perma.cc/5VES-Y2W6>]; see also Mike Adams, *Collection Law Firm Management*, NEUANALYTICS (Aug. 19, 2021), <https://www.neuanalytics.com/blog/collection-law-firm-management> [<https://perma.cc/YD9N-UZBR>] (“Creditors with large receivables portfolios would be well served to adopt automation with a robust auditing and control regime . . .”).

⁷⁵ See sources cited *supra* note 74.

⁷⁶ See, e.g., *Why NeuAnalytics*, NEUANALYTICS, <https://www.neuanalytics.com/why-neu> [<https://perma.cc/KU7F-D43P>] (touting an analytics platform that “helps creditors dynamically model and predict the best collection strategy and vendor for each account”).

⁷⁷ *Lawgix Becomes Oliver Technology Corporation, Solves Unmet Market Need with First-of-Its-Kind Litigation Platform*, INSIDEARM (June 16, 2020, 8:00 AM), <https://www.insidearm.com/news/00046393-lawgix-becomes-oliver-technology-corporat/> [<https://perma.cc/BCA3-4NTH>].

⁷⁸ See FED. TRADE COMM’N, *THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY* i–ii (2013). A total face value of \$143 billion divided by 90 million accounts yields an average of \$1588.89 per account.

value than the claims in comparable cases; one study, for instance, found that in the Chicago and Newark areas debt-buyer suits sought claims whose average value was 30% lower than in cases where a major bank was the plaintiff.⁷⁹ Another study, of several thousand cases filed by debt buyers in Maryland, found that the average amount of principal claimed was about \$2990, with 27% of cases seeking amounts below \$1000.⁸⁰ These findings are consistent with those discussed in Part II below: even where court filing fees may be several hundred dollars, and a meaningful portion of defendants may not even have the means to pay a judgment, the efficiency enabled by these plaintiffs' litigation machines can make it worthwhile to file claims for \$700 or \$800 in consumer debt.⁸¹

2. *Absent and Unrepresented Defendants.* — Where low-value claims make for thin margins, it would be difficult — and perhaps impossible — for assembly-line plaintiffs to make money via litigation that proceeds in the traditional adversarial model, with an opposing side that probes and tests the factual and legal merits of the plaintiffs' claims. When cases are disputed, some assembly-line plaintiffs drop the case rather than litigate, to keep costs low.⁸² Assembly-line litigation thus takes place (and may only be possible) where defendants are rare. In the Maryland study, for instance, 85% of defendants who were served with a complaint never filed a written response.⁸³ Members of an FTC panel estimated in 2010 that most jurisdictions' rates of default judgment in debt-collection lawsuits were between 60% and 95%, with a preponderance toward the higher end of that range.⁸⁴ Several studies from other jurisdictions are consistent with those estimates.⁸⁵

There is some evidence that the absence of defendants in mass-consumer contexts such as debt collection relates to inadequate or improper service. At an FTC roundtable, for instance, officials reported indicia of fraudulent service in the debt-collection context, such as an impromptu audit of a process server uncovering implausible claims of

⁷⁹ Paul Kiel & Annie Waldman, *The Color of Debt: How Collection Suits Squeeze Black Neighborhoods*, PROPUBLICA (Oct. 8, 2015), <https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods> [<https://perma.cc/72AP-W9CU>].

⁸⁰ See Holland, *supra* note 7, at 205.

⁸¹ See *infra* section II.C, pp. 1736–42.

⁸² See, e.g., Hwang, *supra* note 68.

⁸³ Holland, *supra* note 7, at 208.

⁸⁴ FED. TRADE COMM'N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION 7 (2010).

⁸⁵ See Stifler, *supra* note 7, at 108 (reviewing studies). Interestingly, Texas seems to have a much lower default judgment rate, at around 30%, for reasons that remain unknown. *Id.* at 108 & n.97. Texas defendants do not appear to show up at particularly high rates; one study of debt-collection cases in Dallas County found that defendants appeared around only 20% of the time, a rate that is within the same ballpark as other jurisdictions. See Spector, *supra* note 7, at 288.

distances traveled within short amounts of time.⁸⁶ An investigation by one public agency into process servers in New York City showed that many process servers filed false affidavits of service, failing to check the accuracy of addresses they went to or failing to go to those addresses entirely.⁸⁷ Similarly, a sample of 451 individuals who had called a non-profit hotline to seek advice after being sued by debt buyers found that 71% of them either had not been served with process or had been served incorrectly.⁸⁸ These findings mirror those from the world of housing law, such as eviction and foreclosure suits, in which there are regular reports of defective service of process or fraudulent assertions that process has been served when it has not been.⁸⁹ As discussed more in Part III below, these problems with service — and the obvious incentives for plaintiffs to engage in negligent or fraudulent “sewer service” practices — are some of the core normative concerns underlying assembly-line litigation.

When defendants do show up to court, they are largely unrepresented. The Maryland study, for instance, found that defendants were represented by a lawyer in only 2% of cases.⁹⁰ A Texas study found a slightly higher rate of representation, with about 9% percent of defendants represented by counsel.⁹¹ As is true with any type of litigation, it is hard to prove conclusively that the presence of counsel is causally responsible for broad differences in outcomes — it could be the case that lawyers are more likely to take on cases that have a higher chance of succeeding. But it is also true that, reliably, defendants who are represented by counsel are much more likely to have better outcomes, ranging from dismissal to settlement on more favorable terms.⁹²

⁸⁶ See FED. TRADE COMM’N, *supra* note 84, at 8–9.

⁸⁷ *Id.* at 9.

⁸⁸ THE LEGAL AID SOC’Y NEIGHBORHOOD, ECON. DEV. ADVOC. PROJECT, MFY LEGAL SERVS. & URB. JUST. CTR., CMTY. DEV. PROJECT, DEBT DECEPTION: HOW DEBT BUYERS ABUSE THE LEGAL SYSTEM TO PREY ON LOWER-INCOME NEW YORKERS 9 (2010).

⁸⁹ See, e.g., Josh Kaplan, *Thousands of D.C. Renters Are Evicted Every Year. Do They All Know to Show Up to Court?*, DCIST (Oct. 5, 2020, 1:43 PM), <https://dcist.com/story/20/10/05/thousands-of-d-c-renters-are-evicted-every-year-do-they-all-know-to-show-up-to-court> [<https://perma.cc/JEJ2-J4E4>]; Editorial Board, Opinion, *With Eviction Avalanche Looming, Court Documents Fail to Ensure Due Process for Tenants*, PHILA. INQUIRER (Feb. 12, 2021), <https://www.inquirer.com/opinion/editorials/evictions-pandemic-philadelphia-municipal-court-writ-of-possession-20210212.html> [<https://perma.cc/PJ53-ZGNX>]; see also *infra* notes 167–168 and accompanying text.

⁹⁰ Holland, *supra* note 7, at 208.

⁹¹ Spector, *supra* note 7, at 289.

⁹² See Engler, *supra* note 37, at 44–66 (surveying studies in a variety of contexts); D. James Greiner, Cassandra Wolos Pattanayak & Jonathan Hennessy, *The Limits of Unbundled Legal Assistance: A Randomized Study in Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901 (2013) (reporting results of randomized controlled trial in eviction context that found a large effect of providing tenants with limited legal assistance); Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. FOR SOC. JUST. 51 (2010) (reviewing available empirical evidence regarding access to counsel); Carroll Seron, Gregg Van

3. *Passive Courts.* — Whether defendants appear or not, state courts' adherence to a traditional model of party control and neutral judging is a significant barrier against meaningful testing of an assembly-line plaintiff's claim. Where defendants don't appear, the general practice of issuing default judgments means that plaintiffs' claims receive little scrutiny. Where defendants do appear, they often have difficulty navigating the language and processes of the court system to effectively make their case.⁹³ And even where flexible procedures theoretically allow judges to adopt a more active and investigatory role, such as in small claims courts, judges often retain the passive role emphasized by the traditional model.⁹⁴

In the debt-collection context, qualitative studies of unrepresented litigants have found that they often fail to make their arguments in traditional legal and evidentiary formats that are legible to state court judges.⁹⁵ Judges, meanwhile, frequently treat such cases "like any other civil case between two equal parties," and do not go out of their way to assist the unrepresented debtor.⁹⁶ Some judges note that even though they are aware of significant problems in debt-collector litigation as a category, they do not see it as appropriate to advance the interests of defendants by asking more of debt-buyer plaintiffs, even though those plaintiffs are represented by counsel.⁹⁷ Judges themselves may not be happy with this arrangement, in which they serve as the near-automatic processors of masses of corporate claims. As one state court judge put it, "over the years I've become less of an authentic arbiter of disputes and more a processor of paperwork."⁹⁸

* * *

This section has provided a brief overview of assembly-line litigation, describing it in the context of broader trends within state courts and laying out the features that make it distinctive. There is more to say about this type of litigation — including, in particular, the significant normative concerns that it raises, which are taken up in Part III below.

Ryzin, Martin Frankel & Jean Kovath, *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419 (2001) (presenting results of randomized experiment in New York City Housing Court finding that "provision of legal counsel produces large differences in outcomes for low-income tenants in housing court"). *But see* 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, 2126 (2012) (describing a "dearth of credible, quantitative information" regarding the efficacy of providing counsel to indigent litigants).

⁹³ See, e.g., Carpenter, *supra* note 1, at 657–60.

⁹⁴ See Steinberg, *supra* note 7, at 1603–04.

⁹⁵ See, e.g., HUM. RTS. WATCH, RUBBER STAMP JUSTICE: US COURTS, DEBT BUYING CORPORATIONS, AND THE POOR 60–61 (2016).

⁹⁶ *Id.*

⁹⁷ See *id.* at 61.

⁹⁸ Kiel, *supra* note 68.

But first, to ground that conversation, Part II presents empirical findings documenting just how common assembly-line litigation is in states throughout the country, and how significantly this type of litigation shapes courts' dockets.

II. ASSEMBLY-LINE PLAINTIFFS

This section presents the results of the first broad study of one of the key forces underlying assembly-line litigation: the major corporate plaintiffs who file large volumes of cases in state courts throughout the country. It documents a striking, widespread pattern in which large portions of states courts' dockets are attributable to only a handful of plaintiffs, often the same companies across different states. In turn, looking in more detail at these cases demonstrates that these mass filings match the description of assembly-line litigation, and give rise to the serious normative concerns discussed below in Part III.

Existing empirical work shows why examining the filings of corporate plaintiffs will illuminate the work of state courts in general and provide insight into assembly-line litigation in particular. The broadest recent study of state civil courts was the National Center for State Courts' 2013 "Landscape" study, which documented that the majority of civil cases pit a business plaintiff against a natural-person defendant,⁹⁹ often in a contract dispute involving an alleged debt.¹⁰⁰ But we still don't know many of the most basic facts about these plaintiffs, or about the distribution of cases among plaintiffs — for example, how common it is for a business plaintiff to be involved in a large number of suits, a key question when trying to establish the prevalence of assembly-line litigation in state courts. Other studies have suggested that some individual plaintiffs may file an extremely large number of cases; but those studies have been narrower in scope, limited to individual court systems or individual plaintiffs, and focused on debt collectors rather than corporate plaintiffs generally.¹⁰¹

⁹⁹ See THE PEW CHARITABLE TRS., HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE COURTS 6–8 (2020).

¹⁰⁰ See LANDSCAPE STUDY, *supra* note 1, at 17–19; see also THE PEW CHARITABLE TRS., *supra* note 99.

¹⁰¹ See, e.g., TOM FELTNER, JULIA BARNARD & LISA STIFLER, CTR. FOR RESPONSIBLE LENDING, DEBT BY DEFAULT: DEBT COLLECTION PRACTICES IN WASHINGTON 2012–2016, at 1 (2019) (finding that a single law firm that frequently represented debt buyers filed 21,354 collections cases in Washington Superior Courts in a four-year period); HUM. RTS. WATCH, *supra* note 95, at 14 (noting that “5 large debt buyers filed more than 21,000 new lawsuits” in Maricopa County over a 12-month period, and providing anecdotes of court staff in other states describing a high volume of debt-collector filings); CHRISTOPHER L. PETERSON & DAVID MCNEILL, CONSUMER FED’N OF AM., UNWARRANTED: SMALL-CLAIMS COURT ARREST WARRANTS IN PAYDAY LOAN DEBT COLLECTION 16–17 (2020), <https://consumerfed.org/wp-content/>

This study provides a broad examination of the top-filing plaintiffs in courts around the country. It examines filing rates in hundreds of jurisdictions across twenty court systems in eighteen states.¹⁰² It also analyzes a subset of those jurisdictions over time, assessing filing trends over a sixteen-year period from 2004 through 2020. It is not limited to debt collectors, but instead looks at private corporate plaintiffs of any type. And it incorporates a docket-level analysis of a sample of these cases for further evidence that the type of litigation conducted by these plaintiffs fits the description of assembly-line litigation.

To facilitate a comparison of litigation trends over time and between states, the study focuses on the “top-filer burden” in civil courts. The top-filer burden is defined as the percentage of all civil cases filed in a given time period that are filed by the ten private parties who file the most cases. As the sections below describe, the cases filed by these top filers appear to be, overwhelmingly, assembly-line litigation. The top-filer burden thus provides a window into the distribution of assembly-line litigation occurring in state courts. It is by no means the whole picture — as there may be many more parties filing assembly-line cases than just the top ten filers — but it provides a rough sense of a “floor” of how much of this kind of litigation is occurring.¹⁰³ Focusing on these top filers also highlights how concentrated private litigation has become in the hands of a few key actors in jurisdictions around the country, and how many of those actors are the same companies operating across many different states.

uploads/2020/02/Payday-Lending-in-Small-Claims-Court.pdf [https://perma.cc/SV3B-26W7] (finding that Utah small claims courts are dominated by a few dozen plaintiffs who are all high-cost lenders); LISA STIFLER, TOM FELTNER & SAFA SAJADI, CTR. FOR RESPONSIBLE LENDING, *UNDUE BURDEN: THE IMPACT OF ABUSIVE DEBT COLLECTION PRACTICES IN OREGON 1* (2018) (finding that six debt buyers collectively filed 75,000 cases in Oregon courts over a five-year period); Holland, *supra* note 7, at 214–16 (describing high numbers of debt-buyer lawsuits in Maryland from 2009 to 2013); Jessica Silver-Greenberg, *Boom in Debt Buying Fuels Another Boom — In Lawsuits*, WALL ST. J. (Nov. 28, 2010, 12:01 AM), <https://on.wsj.com/3cBCXrx> [https://perma.cc/Q6B8-K8ZC] (reporting self-reported filing data from Encore Capital Group that it filed 245,000 lawsuits in 2009 and 474,000 lawsuits in 2008).

¹⁰² As used in this Article, “court” or “court system” refers collectively to the institutions operating under a common name that make up a particular level of the judiciary within a state, such as the Georgia Superior Courts or the Illinois Circuit Court. “Jurisdiction,” in turn, refers to the distinct institution with authority for a particular territory, such as the Illinois Circuit Court of Cook County or the Superior Court of Fulton County, Georgia. There are more jurisdictions than states in the sample because most states are composed of many jurisdictions. And there are more courts than states because two states in the sample have more than one court of general jurisdiction that has been included — namely, the Indiana Superior Court and Indiana Circuit Court as well as the Georgia Superior Court and Georgia State Court.

Additionally, although Washington, D.C., is not a state, this Article uses the term “state” generically throughout to include the District of Columbia as well as the actual states in the survey.

¹⁰³ Part of this imperfection is born of necessity — although new docket-analysis tools allow for easier access to state court data in the aggregate, there are limits on their usability for more granular assessments. For more details, see *infra* Appendix I, pp. 1775–86.

The study consists of three distinct surveys. The first is a cross-sectional “snapshot” survey that is designed to capture the top-filer burden in twenty court systems in 2019. The second is a longitudinal survey that conducts a similar examination in eight of those court systems every four years from 2004 through 2020. The third survey is a docket-level analysis of a sample of 1000 cases from 2019, which provides more detail on the types of cases involved in the 2019 cross-sectional study. The next three sections describe each of these surveys and their results.

A. 2019 Snapshot

The first analysis of the top-filer burden across the country is a cross-sectional survey of civil litigation in 2019 that examines filings from the 586 jurisdictions for which data was available across 20 trial courts of general jurisdiction in 18 states (including the District of Columbia).¹⁰⁴ Although the longitudinal survey discussed below allows for a comparison of trends in the top-filer burden across time, this cross-sectional study allows for examining the top-filer burden across a larger number of jurisdictions, as data is available for more jurisdictions for the year 2019 than is available for the 2004–2020 period covered by the longitudinal survey.¹⁰⁵

1. *Methods Summary.*¹⁰⁶ — This survey was conducted using Westlaw’s recently developed “Litigation Analytics” tool, which reports aggregate data from many courts around the country and allows for analysis of many case dockets at once. Using this tool, it is possible to identify the top filers in a given jurisdiction and to restrict the relevant universe of cases based on filing type and date. To facilitate cross-court comparisons and yield a more conservative estimate of the top-filer burden, the universe of “civil” cases was defined broadly — not as the cases that the states had affirmatively categorized as “civil,” but instead as all cases categorized as anything other than “criminal” or “family.”¹⁰⁷ That

¹⁰⁴ In some states, only partial information was available, as Westlaw did not contain complete information for every jurisdiction in every state. For instance, in California, 2019 data was available for twenty counties, which tended to be more populous counties such as Los Angeles County, San Francisco County, and San Diego County; but data was not available for California’s thirty-eight other counties, and in particular for less-populous rural counties such as Mariposa County or Mendocino County. For a listing of the numbers of jurisdictions available for each state court system included in the study, see *infra* Appendix I, Table 5, pp. 1779–80.

¹⁰⁵ Examining 2019 in particular also allows for an analysis of the most recent full calendar year before the COVID-19 pandemic, which has had significant and ongoing effects on courts, litigants, and the underlying economic conditions that give rise to disputes.

¹⁰⁶ For more detail regarding the methods discussed in this and subsequent sections, see *infra* Appendix I, pp. 1775–86.

¹⁰⁷ Although many family law cases can be thought of as civil cases, a problem arises with family law cases as to how to make apples-to-apples comparisons between courts that have different systems of categorization. Some states handle at least some family law matters within courts of general jurisdiction, while others have specialized family courts that handle a range of family law matters,

number yielded the denominator of the “top-filer burden” percentage — all civil cases filed within the court during the relevant time period. The numerator was then obtained by examining Westlaw’s list of the top participants within that universe of civil cases, identifying the top ten private filers, and tallying the number of cases each party participated in as a plaintiff that were filed during the time period in question. Appendix I provides a full description of the methodology used for the surveys in each section.¹⁰⁸

This approach was not without limitations. Most significantly, Westlaw’s tool reports only the top twenty participants within a given court system, regardless of whether those parties participate in cases as plaintiffs or defendants. As a result, it is possible that counting only the filings of the top participants will underestimate the total number of cases filed by the top ten private filers.¹⁰⁹ To lessen the effects of this shortcoming, the survey includes only states in which it was possible to identify at least eight top private participants who were the plaintiff in at least 85% of the cases they participated in during the time in question. This avoided populating the survey with large numbers of participants who did not file many cases, but who were on Westlaw’s top-participants list nonetheless because of the number of cases in which they appeared as a defendant.¹¹⁰ But this mechanism also may have the

including criminal matters. See Barbara A. Babb, *Reevaluating Where We Stand: A Comprehensive Survey of America’s Family Justice Systems*, 46 FAM. CT. REV. 230, 230–32 & 249 n.2, 250 n.11 (2008). Westlaw’s Litigation Analytics tool does not have separate listings for these separate family courts. Therefore, to facilitate an apples-to-apples comparison between jurisdictions, and because cases categorized as “family law” may be criminal cases, family cases were excluded from the definition of “civil” cases within this study. As a result, the denominator used to calculate the “top-filer burden” is smaller than it would be if family law cases were included.

¹⁰⁸ See *infra* Appendix I, pp. 1775–86.

¹⁰⁹ For instance, where the twentieth participant had participated in 5000 cases, but had been plaintiff in only 4500 of those cases, it is possible that just out of view there would be a party that had participated in 4800 cases and been plaintiff in 4600 of them. But because that party would not be included in Westlaw’s list, it would not be picked up in this survey even though it was more of a “top filer” than the last participant in the list, and the reported top-filer burden would be an undercount of the true top-filer burden.

¹¹⁰ For instance, Infinity Auto Insurance, which was a participant in 4947 cases in Florida in 2019, but a plaintiff in only 12 of those cases, would not be counted toward the eight-party minimum under this requirement. See *Florida Circuit Court Docket Analytics*, WESTLAW LITIG. ANALYTICS, [https://1.next.westlaw.com/Analytics/Home?transitionType=LegalLitigation&contextData=\(sc.Default\)#/](https://1.next.westlaw.com/Analytics/Home?transitionType=LegalLitigation&contextData=(sc.Default)#/) (search for “Florida Circuit Court” under “Courts” and then select the “Experience” tab) (last visited Dec. 23, 2021). The data used for these determinations were those returned by Westlaw’s Litigation Analytics tool in the spring of 2021; changes to Westlaw’s data-processing algorithms or the addition of new sources to the database may yield different results for searches conducted at different times.

This “85% rule” was also supported by a preliminary finding in the research, which was that most of the top private participants were predominantly either repeat plaintiffs or repeat defendants: out of 341 observations of top private participants, 92.7% were the plaintiff either more than 85% of the time or less than 15% of the time. For purposes of this statistic, an “observation” refers to a specific party within a specific state during the year 2019. So, for instance, Wells Fargo Bank

effect of skewing the sample toward states in which the top filers file more cases, as those states are the ones in which the top twenty overall participants will be more likely to contain more top filers and fewer top defendants. This potential skew, plus the fact that the sample is non-random,¹¹¹ counsels hesitation in extrapolating the findings presented here to other states that were not included in this analysis.

Additionally, by counting cases only in trial courts of general jurisdiction, the top-filer burden numbers reported here may miss the filings of repeat plaintiffs in small claims courts, at least in states where small claims courts are separated from trial courts of general jurisdiction.¹¹² And finally, because the aggregated totals on Westlaw depend on the automated detection of cases that have the same plaintiff, they are particularly susceptible to problems involving inconsistent entries and/or typos.¹¹³ These sources of potential error would also have the likely effect of undercounting cases involving top filers, and so may cause the results reported here to be slightly conservative.

2. *Results.* — There are several different ways of considering the top-filer burden. Perhaps most basic is a court-by-court breakdown of the total available civil case filings in Westlaw's database, the total number of those filings involving the top ten private filers, and the percentage of the former that the latter make up. Table 1 provides such a breakdown, in alphabetical order by state. For these and other figures reported here, the totals and averages listed are for the jurisdictions within each state for which data were available.¹¹⁴

in Florida in 2019, which was the plaintiff in 87.5% of its cases within Florida Circuit Court, is one observation; Wells Fargo Bank in Minnesota in 2019, which was the plaintiff in 95.6% of its cases within Minnesota District Court, would be a second, distinct observation. The 85% rule thus helped "rule in" the top plaintiffs, while the risk that it would "rule out" a significant number of top filers was low.

¹¹¹ See *supra* p. 1726.

¹¹² See *infra* Appendix I, pp. 1775–86.

¹¹³ See *infra* Appendix I, pp. 1775–86.

¹¹⁴ See *supra* note 104.

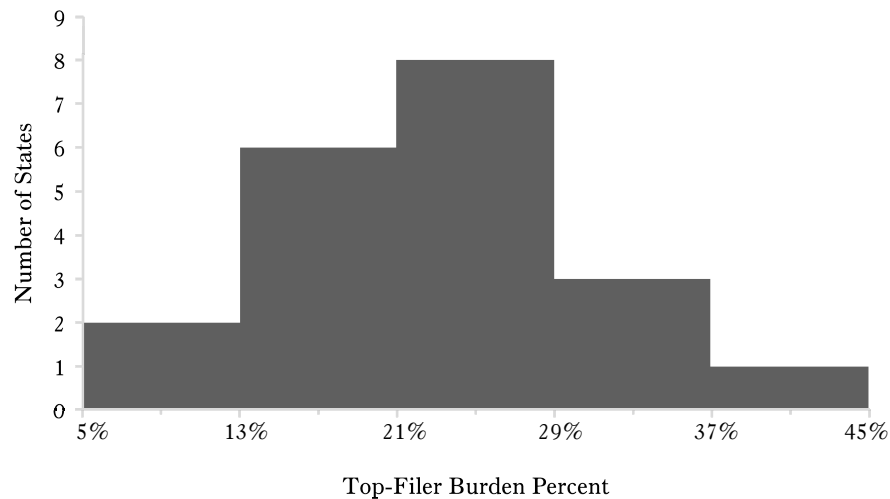
Table 1: Top-Filer Totals and Percentages by State

STATE	STATE COURT NAME	TOTAL AVAILABLE 2019 CIVIL FILINGS	SUM OF TOP TEN FILER CASES	TOP-FILER PERCENTAGE
Alaska	Superior Court of Alaska	16,286	2596	15.94%
California	California Superior Court	446,853	114,518	25.63%
Connecticut	Superior Court of Connecticut	90,424	16,499	18.25%
Florida	Florida Circuit Court	668,684	84,935	12.70%
Georgia	Georgia State Court	43,366	6851	15.80%
Georgia	Georgia Superior Court	124,323	16,999	13.67%
Illinois	Circuit Court of Illinois	188,040	44,603	23.72%
Indiana	Indiana Circuit Court	62,889	16,431	26.13%
Indiana	Indiana Superior Court	120,794	39,802	32.95%
Kansas	Kansas District Court	111,902	17,651	15.77%
Minnesota	Minnesota District Court	99,756	29,541	29.61%
Missouri	Missouri Circuit Court	286,163	54,249	18.96%
New Jersey	Superior Court of New Jersey	281,599	116,735	41.45%
North Dakota	North Dakota District Court	28,452	8147	28.63%
Oklahoma	Oklahoma District Court	64,790	17,324	26.74%
Oregon	Oregon Circuit Court	60,148	18,505	30.77%
Tennessee	Circuit Court of Tennessee	46,960	9968	21.23%
Texas	Texas County Court	82,091	23,335	28.43%
Washington	Washington Superior Court	104,711	8121	7.76%
Washington, D.C.	Superior Court of the District of Columbia	36,254	9833	27.12%
AVERAGE		148,224	32,843	23.06%
TOTAL		2,964,485	656,859	22.15%

As Table 1 indicates, the top-filer burden ranges from a low of 7.76% in Washington Superior Court to a high of 41.45% in the Superior Court of New Jersey. Averaging across the jurisdictions for which data was available within a state, most state court systems fall closer to the low 20% range. Indeed, the average top-filer burden in the table is about 23%, and the median is about 25%.¹¹⁵ Similarly, as the last line of Table 1 reports, if one were to consider all of the cases filed across all the included jurisdictions together, and then consider all of the cases filed by each jurisdiction's top ten filers together, the combined top-filer burden would be about 22%.

Figure 1 presents a histogram of these results, showing the distribution of the top-filer burden across the sample of states. As the figure shows, fourteen of the state courts in the survey had a top-filer burden between 13% and 29%; four had a top-filer burden above that range, and two had a top-filer burden below that range.

Figure 1: Distribution of Top-Filer Burden Rates



It is worth stressing that this is not a randomly chosen, representative sample of state trial courts of general jurisdiction; it is a report of all of the jurisdictions for which the right type of data was available. The sample is therefore not necessarily indicative of the national distribution of litigation by top filers.

Nonetheless, the sample contains a wide array of states and state court jurisdictions and shows a similar picture playing out in states with a variety of characteristics. The sample includes states with large populations such as Texas, California, Florida, and Illinois and states with

¹¹⁵ Because there is an even number of observations, the median is calculated here as a midway point between Illinois (23.72%) and California (25.63%), or about 24.68%.

small populations such as Alaska, North Dakota, the District of Columbia, and Kansas. It also includes a wide geographic range of states and states with a variety of mixes of urban and rural populations as well as different demographic and economic compositions. Although it is hard to make a firm generalization across all of these axes (with, for instance, only two states in the sample from the Northeast), there does not appear to be any obvious correlation between the top-filer rate in a state and that state's population size or geographic region.

Instead, the picture presented by these results is a reasonably consistent one. In courts throughout the United States, a small number of private companies account for a large percentage of all civil litigation filed in courts of general jurisdiction. The top-filer burden in courts in the large, demographically diverse states of California and Texas is 25.63% and 28.43%, respectively. The smaller, more rural, and predominantly white states of North Dakota and Kansas come in at 28.63% and 15.77%, respectively. In each of these states, a handful of private companies account for a very large share of all civil litigation.

The cross-sectional survey also yielded data about who those companies are. In addition to case filing numbers, the survey gathered the names of each of the top filers. Each filer was then identified as falling into one of three categories: debt collectors, financial services companies, and a catch-all "other" category.¹¹⁶ Of the 200 slots occupied by the top ten filers in each of the twenty state court systems evaluated, financial services companies occupied 94, debt collectors occupied 77, and other companies (predominantly a mix of healthcare providers and property managers) occupied 29. Although debt collectors occupied fewer slots than financial services companies, they filed more cases overall: 326,574 cases in the survey were attributable to debt collectors, while 285,451 cases were attributable to financial services companies. An additional 44,834 were attributable to the "other" companies.

Many companies were top filers in multiple states; only 70 unique companies appeared across the survey. And that number may give an artificially high impression of the number of actors involved. Of the 200 slots, 128 were occupied by ten specific companies. These ten companies, a mix of debt collectors and financial services companies, accounted for 549,444 cases across the survey — about 84% of all of the cases filed by all top filers in the sample.¹¹⁷ Table 2 provides a list of these companies, their categorization, the number of cases attributable to them across the states, and the number of court systems (out of twenty) in which each appeared as a top ten filer across the survey.

¹¹⁶ For more information about the process of categorization, see *infra* Appendix I, pp. 1775–86. For a list of the companies as well as their identified categories, see *infra* Appendix II, pp. 1786–89.

¹¹⁷ $549,444 / 656,859 = 83.65\%$.

Table 2: Top Filers Across In-Sample States

PARTY NAME	PARTY TYPE	TOTAL CASES FILED	TOTAL APPEARANCES
Midland Funding	Debt Collector	122,627	17
Portfolio Recovery Associates	Debt Collector	96,525	17
Capital One Bank (USA)	Financial Services	76,753	17
Discover Financial Services	Financial Services	66,132	16
LVNV Funding	Debt Collector	64,015	15
Bank of America	Financial Services	36,892	10
Synchrony Bank	Financial Services	26,510	11
American Express Centurion Bank	Financial Services	22,960	9
Cavalry SPV I LLC	Debt Collector	22,668	10
Citibank	Financial Services	14,362	6
TOTAL		549,444	128

As Table 2 indicates, two debt collectors — Midland Funding and Portfolio Recovery Associates — are significantly more active filers than any other companies in the sample. Midland Funding’s 122,627 filings practically put it in a league of its own, filing more cases in this sample than the entire 2019 civil caseloads of many states.¹¹⁸ The remaining top filers are a mix of name-brand national financial services companies such as Capital One and Discover and highly active debt collectors such as LVNV Funding and Cavalry SPV I.

These data paint a picture in which a few large national companies are responsible for a sizable fraction of all civil litigation occurring in states throughout the country. The top three filers here filed more than 295,000 cases just within the jurisdictions studied in the sample, a number on par with the roughly 286,000 total civil cases filed by all parties in all federal district courts in 2019.¹¹⁹ In many states, the top ten private companies account for more than one fifth of all filed cases. And it is often the same private companies filing tens of thousands of cases in different states that make up those numbers. The vast majority of cases are brought by third-party debt collectors and financial services companies, with healthcare companies and property managers appearing as top plaintiffs in some jurisdictions as well.¹²⁰ These features of this litigation repeat themselves in big and small states, from coast to coast.

¹¹⁸ See *supra* Table 1, p. 1729 (reporting the in-sample filing totals for different states).

¹¹⁹ See *Federal Judicial Caseload Statistics 2019*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2019> [<https://perma.cc/W9VW-J6JW>] (stating that there were 286,289 civil case filings in U.S. district courts in 2019).

¹²⁰ For more discussion of the distinction between financial services companies and third-party debt collectors, see *supra* notes 57–63 and accompanying text.

The next two sections describe additional findings that add background and detail to this picture.

B. 2004–2020 Longitudinal Study

1. Methods Summary. — In addition to the cross-sectional study, which focused on 2019, data were gathered for a longitudinal study of the top-filer burden in state courts. For this survey, data were gathered in largely the same way as in the cross-sectional study discussed above, with a few distinctions. First, rather than being gathered for only a single year, data were gathered for five years: 2004, 2008, 2012, 2016, and 2020. Second, to ensure an apples-to-apples comparison across jurisdictions over time, the longitudinal study was limited to only those jurisdictions for which data were available in each survey year.¹²¹

2. Results. — The results from the longitudinal study indicate that the top-filer burden in the studied jurisdictions has, for the most part, been increasing over time. Table 3 presents the top-filer burden from each state over the study years, while Figure 2 presents a graph of the median top-filer burden from the sample over the study years.

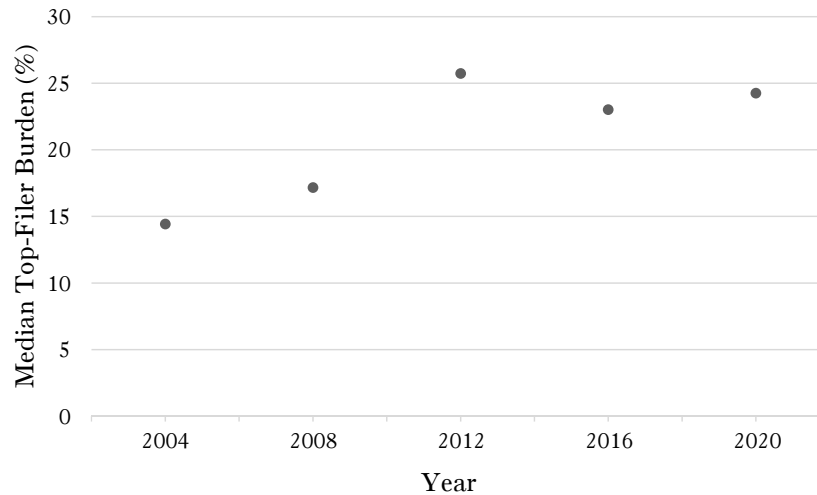
Table 3: Top-Filer Burden by State and Year¹²²

YEAR	2004	2008	2012	2016	2020
California	6.60	17.02	19.91	14.91	20.15
D.C.	29.83	2.61	32.14	27.43	23.05
Illinois	13.55	17.32	21.74	23.08	31.93
North Dakota	25.33	35.85	31.57	34.16	28.49
Oklahoma	16.37	24.86	29.82	25.15	25.47
Oregon	15.31	22.72	29.74	22.97	30.29
Tennessee	9.01	13.98	15.53	21.17	21.24
Washington	7.35	9.82	12.17	6.89	3.30
MEDIAN	14.43	17.17	25.74	23.02	24.26

¹²¹ Additionally, after data collection began, a problem arose in two states in which one or two years in the study did not have ten private companies listed in Westlaw's top participants. This required searching adjacent years to identify top private filers and using their filing numbers for the years in question as a workaround. Further details on this gap-filling approach are available in Appendix I; the approach was used to fill only six slots of the 400 total slots (10 filers * 5 study years * 8 states) across the longitudinal study. To the extent that this approach might bias the results, it would be because a true top filer was missed and a slightly lower filer's numbers used instead, causing the results to be slightly more conservative than the true top-filer burden in California in 2016 and in Illinois in 2008 and 2016.

¹²² The numbers reported here are reported as percents; the final row is the median of these values.

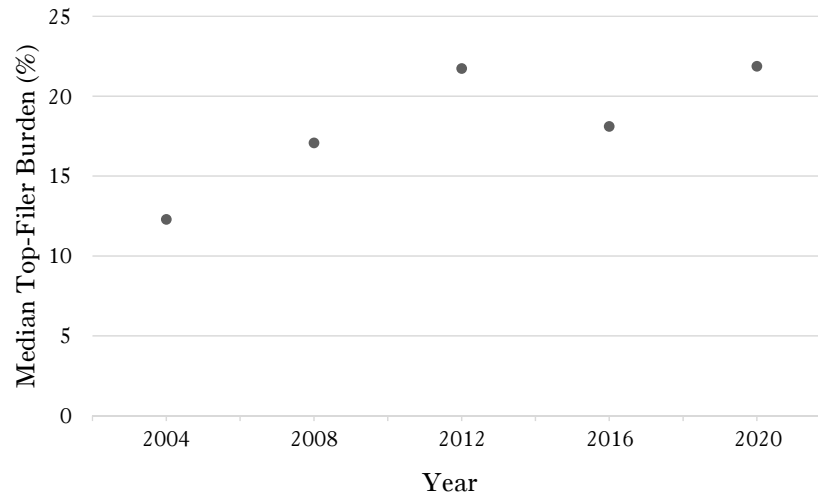
Figure 2: Median Top-Filer Burden over Time



As these figures both suggest, the overall trend in the sampled states is a relatively sharp increase in the top-filer burden from 2004 to 2012, followed by a mild decrease in 2016 and a mild increase in 2020. This overall trend is consistent with the story in most individual states as well. Six out of eight states had increases in the top-filer burden from 2004 to 2020, and most of those increases were steep: California, Illinois, Oregon, and Tennessee all saw their top-filer burden roughly double or more during this time period. Washington, D.C., one of the two jurisdictions that did not see an increase from 2004 to 2020, both started and ended the time period with a high burden in absolute terms.

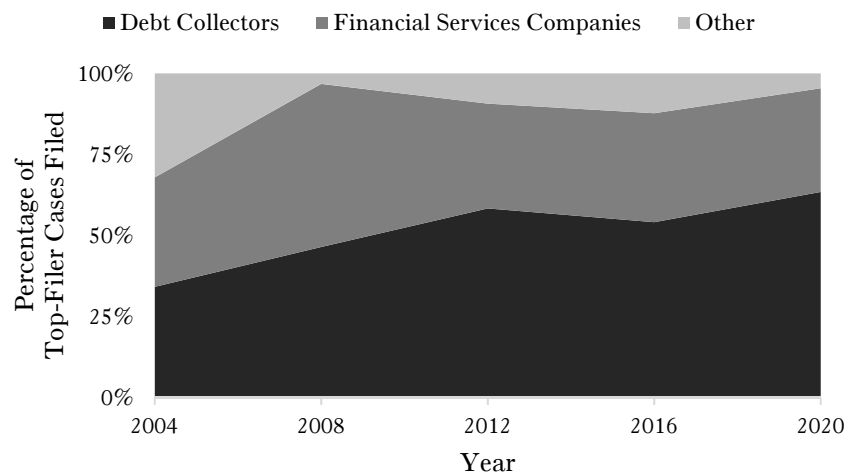
A similar story plays out when aggregating the data across the different states in the sample. Figure 3 presents what could be thought of as the “total” top-filer burden across the sample: the proportion of all civil cases, across all the jurisdictions in the survey, that are attributable to the top ten filers in the states in the survey. It depicts a similar trend to the one shown in Figure 2.

Figure 3: Total Top-Filer Cases as Percent of All Cases



Disaggregating these top-filer cases by filer type reveals a changing composition of top filers in the sample over time. In 2004, the top filers were roughly evenly divided between debt collectors, financial services companies, and other types of private plaintiffs; each of those three categories accounted for between 32% and 34% of the total cases attributable to top filers. But by 2020, “other” plaintiffs accounted for only about 5% of the top-filer caseload, with debt collectors accounting for 63%. Financial services companies had a spike in filings in 2008, but otherwise remained steadily in the 30%–33% range. Figure 4 shows the proportion of top-filer cases attributable to each of these three categories over time.

Figure 4: Top-Filer Cases by Filer Type



The relative growth in debt collector filings depicted in Figure 4 also reflects growth in the absolute number of filings attributable to debt collectors in the sample. Table 4 presents the total aggregate filings of debt collectors, financial services companies, and other filers for each of the study years. The total number of cases filed by debt collectors in the sample increased significantly from 2004 to 2020, as did the average number of cases per filer. There was a substantial increase in the number of filings from financial services companies from 2004 to 2008, but the number came down significantly over the subsequent two years. The number of financial services companies appearing across the top filers each year varied only slightly, while the number of debt collectors jumped dramatically in 2008 but fell back to a more moderate increase over 2004 levels in subsequent years.

Table 4: Total and Average Filings by Filer Type

	2004	2008	2012	2016	2020
DEBT COLLECTORS					
Number of filers	31	46	39	36	36
Total cases filed	35,325	82,806	112,806	74,881	84,877
Average per filer	1140	1784	2892	2080	2358
FINANCIAL SERVICES COMPANIES					
Number of filers	26	27	26	28	30
Total cases filed	34,857	88,808	62,443	46,450	42,725
Average per filer	1341	3289	2402	1659	1424
OTHER					
Number of filers	23	7	15	16	14
Total cases filed	33,127	5,753	18,108	17,025	6,205
Average per filer	1440	822	1207	1064	443

C. Docket-Level Study

1. *Methods Summary.* — In addition to the cross-sectional and longitudinal studies, a docket-level study was conducted to shed more light on the nature of the cases in which these top filers participate. This study examined various case-level details of cases selected from the 2019

cross-sectional study, such as the proportion of defendants who are represented and the amount of money involved in the dispute.

For this study, a 1000-case sample was generated from cases filed by top filers in 2019. This sample was not a random sample from the entirety of the 2019 cross-sectional study. Instead, four states from that study were selected due to the relatively high amount of docket information available on Westlaw, with some attempt to balance the geography and size of the chosen states. The states ultimately chosen were Connecticut, Illinois, Tennessee, and Washington.

To generate the sample, the top ten filers in each state were identified using the results from the 2019 cross-sectional study. Then, for each state, 250 cases were randomly selected from the universe of cases filed in the state by those top filers in 2019.¹²³ The dockets for each case were then individually examined and coded for a number of features, such as whether the defendant was a natural person, whether the defendant was represented, whether the case was dismissed, and so on.¹²⁴ In several instances, limitations on the information available required making judgments as to how to handle ambiguities that arose on the docket sheets; these are discussed in more detail in the next section, as well as in Appendix I.

At the start, it is worth noting that there are several limitations on what can be learned from this docket-level analysis. Part of this problem stems from the limitations inherent in using court records to make inferences about the real world — a case that is filed and then abandoned, for instance, may say nothing about the reasons why it was abandoned; the parties may have settled out of court, or the plaintiff may have realized there was an error in their case. And even among the data that can be gathered from the face of court dockets, there can be ambiguities, gaps, and flaws in the entry of docket-level information that leave an inherent degree of uncertainty. Some dockets, for instance, have entries that seem to be erroneous in some way, such as a motion to dismiss being granted three days before it is recorded as being filed.¹²⁵ Other dockets may have highly generic entries, such as “Motion on a Post Judgment Matter,” with no further detail.¹²⁶ I have noted in this discussion where particular assumptions regarding such ambiguities or spotty data have been made in the course of gathering and analyzing

¹²³ The sample was generated from all cases involving the top ten filers, including cases in which those parties were defendants, not plaintiffs. As noted below, in the overwhelming majority of cases — over 90% — the top filer was, in fact, the filer of the case and not the defendant.

¹²⁴ For more details regarding the coding of cases, see *infra* Appendix I.C.2, pp. 1782–86.

¹²⁵ See, e.g., *Discover Bank v. Long*, No. 19-2-11406-7 (Wash. Super. Ct. dismissed Dec. 31, 2019) (recording order of dismissal on December 27, 2019 and motion to dismiss on December 30, 2019).

¹²⁶ See, e.g., *Midland Funding LL v. Keeling*, No. 2019-M6-007408 (Ill. Cir. Ct. July 21, 2020) (“Motion on a Post Judgment Matter” entered on March 3, 2020).

the cases in the sample. But on top of these specific, noted caveats, it is important to be aware of the limitations of the underlying data.¹²⁷

2. *Results.* — Even with these limitations, the data paint a broad and consistent picture of top-filer cases as assembly-line litigation. One of the first results from the 1000-case sample is that the overwhelming majority of sampled cases fit a high-level description that is consistent with assembly-line litigation, although not fully diagnostic of it. In nearly every case, the top filer was acting as a plaintiff, and was the only plaintiff in the case;¹²⁸ there was only one defendant, and the defendant was a natural person, not a corporation. This set of features was shared by 932 of the 1000 cases. This set of 932 “core” cases became the set of cases used for the rest of the analysis that is discussed here.¹²⁹

Within these core cases, the defendants were overwhelmingly unrepresented. Out of 932 core cases, the defendant was unrepresented by an attorney in 895 cases — meaning that defendants were represented only about 4% of the time.¹³⁰ This number is consistent with other studies of similar litigation in individual state court systems that found extremely low rates of representation.¹³¹

¹²⁷ These limitations on the data available from formal court records are characteristic of state courts, *see generally* Yeazell, *supra* note 4, and can be difficult to overcome without in-person observations, *see, e.g.*, Carpenter et al., *supra* note 21 (manuscript at 5–6).

¹²⁸ “Top filer” here refers to parties designated as top filers in the 2019 cross-sectional study. Because the sample for this docket-level study was taken from the entire universe of cases involving these top filers, top filers appeared as both plaintiffs and defendants in the sample.

¹²⁹ The 68 “noncore” cases constituted a variety of types of cases. There were 33 cases in which the repeat player was not the plaintiff, often because it was a bank being sued as part of a foreclosure dispute. In addition to those cases, there were 28 cases in which the repeat party was the plaintiff but there was more than one defendant; these cases included a variety of types of suits as well, ranging from foreclosure and debt-collection suits to personal injury suits and general commercial litigation. Finally, there were 7 suits in which there was more than one plaintiff. There were no cases involving a repeat player as the sole plaintiff against a single defendant who was not a natural person.

¹³⁰ $(932 - 895) / 932 = 3.97\%$. In Washington State, some dockets listed attorneys without designating which party the attorney represented. Where only one attorney was listed, it was assumed that the attorney represented the plaintiff, as the plaintiff was a corporation and corporations are required to be represented to appear in court. *See, e.g.*, *Lloyd Enters., Inc. v. Longview Plumbing & Heating Co.*, 958 P.2d 1035, 1038 (Wash. Ct. App. 1998).

Where more than one attorney appeared, but no attorney was clearly associated with the defendant, the names of the attorneys were compared with other dockets in which attorneys were clearly associated either with the repeat-player plaintiff or a defendant. In ten cases, for instance, one of the attorneys appearing was Jonathan Baner, who explicitly appeared on behalf of defendants in several other cases; it was assumed that Baner represented the defendants in these ten cases as well. There were three remaining cases in which the defendant’s representation status was ambiguous because a lawyer appeared on the docket but it was unclear who the lawyer represented. These cases are not counted in the 895 number here, nor are they included in any of the statistics regarding representation status.

¹³¹ *See, e.g.*, Holland, *supra* note 7, at 203, 210 (finding that only 2% of defendants were represented in a study of debt-collection cases in Maryland state courts); Spector, *supra* note 7, at 258,

Next, the amount of money involved in these disputes tends to be relatively low. Out of the 932 core cases, 631 cases had some dollar value associated with them, either as the amount sought or the amount awarded.¹³² The median amount sought across all cases with that information available — 614 in total — was \$2133; the average was \$2800, with the difference between those two amounts reflecting a small number of higher-value cases. The amount sought was below \$8000 in 598 of these cases, and below \$3000 in 418 of them.

The amounts awarded tell a similar story. There were 207 total cases with information regarding judgment amount available; the median of the awards in these cases was \$1682, and the average was \$2829. One of these cases was a single massive outlier judgment of \$71,170; there were also five other judgments over \$10,000. With these six judgments removed, the median judgment value shrinks slightly to \$1673 and the average falls to \$2180.¹³³

Although the median judgment award is lower than the median amount sought, the cases in which both the amount sought and the amount awarded are available suggest that plaintiffs generally get the amount they seek. Of those 190 cases, only 10 involved judgment awards that were lower than the amount sought. In 115 cases, the amount awarded was exactly the amount sought. And in 65 cases, the judgment award was greater than the amount sought. In these 65 cases, the median difference between claim amount and judgment amount was \$351, a relatively low figure that could likely be explained by an award of costs, such as filing fees, and/or interest.

Next, the rate of participation of defendants in these cases is low. Determining conclusively whether defendants had participated in the cases was at times difficult, as some dockets, particularly those in Washington State, report events such as a filing without attributing it to either party. As a result, several assumptions were made during coding that particular types of very common filings — such as a complaint, a motion for default judgment, and an affidavit for garnishment — were

289 (finding that about 9% of all defendants in a study of debt-collection litigation in Dallas County, Texas, were represented by counsel).

¹³² These cases were not scattered randomly in the sample. Almost no dockets from Washington State included the amount sought, compared with nearly every docket in Illinois and Tennessee and slightly over half of the dockets from Connecticut.

¹³³ Although amount-in-controversy information is available for only a small number of cases in which the defendant was represented by a lawyer, those cases were ones in which more was at stake. That pool of cases was relatively small — only 34 of the 932 core cases, not counting the 3 ambiguous cases. *See supra* note 130. The specific amount sought was available for only 10 of them. But among those 10, the median amount sought was \$5953, and the average was \$5349. The case involving the \$71,170 judgment referenced in the main text was also a case in which the defendant was represented by a lawyer. *See Portfolio Recovery Assocs. v. Wong*, No. 19-2-14450-5 (Wash. Super. Ct. Jan. 25, 2021).

attributable to the repeat-player plaintiff, not the defendant.¹³⁴ Conversely, other filings that did not clearly indicate a side — such as a filing labeled only “Declaration” or “Motion” — were deemed to be inherently ambiguous as to which party had filed them.¹³⁵

Applying this method, 104 cases out of the 932 core cases were deemed to be ambiguous in terms of defendant participation. The 828 remaining cases trend deeply in the direction of defendant nonparticipation. In 656 of those cases, there were no motions, filings, or appearance by the defendant registered on the docket. In other words, defendants left some discernable trace on the docket — even if only an appearance — in just over 20% of the cases.¹³⁶ Even if all of the ambiguous filings were taken as evidence of defendants’ participation — which is highly unlikely — the participation rate climbs to just over 29%.¹³⁷ For a sizable supermajority of cases, then, only the plaintiff appeared in court, and the proceedings developed without any input from the defendant.

As for how those cases proceeded, one notable feature in the sample was the number of cases that involved service problems. There was evidence of service problems — such as repeated efforts to serve the same person, or a summons returned because of a faulty address — in 304 cases, about 33% of the core case sample.¹³⁸ In another 43 cases, there was not even evidence of attempted service by the plaintiff.¹³⁹ These results are consistent with the notorious service problems that have plagued these types of disputes for years.¹⁴⁰

In terms of case outcomes, the most common result by far was for some type of judgment to be entered — judgment was entered in 731 of the 932 core cases, about 78%. Additionally, 88 cases were open but had no activity on the docket for more than a year, and so were deemed abandoned. The remaining 113 were generally deemed to be still active, with no judgment entered and docket activity within the twelve months prior to coding.¹⁴¹

¹³⁴ For a full list of assumptions made with respect to particular motions, see *infra* Appendix I.C.2, pp. 1785–86.

¹³⁵ This approach likely has the effect of undercounting the case numbers in which defendants did not appear, as in many cases there were no other indicia whatsoever of a defendant’s appearance or participation.

¹³⁶ $172 / 828 = 20.77\%$.

¹³⁷ $(172 + 104) / 932 = 29.61\%$.

¹³⁸ $304 / 932 = 32.62\%$.

¹³⁹ Of these 43 cases, 5 were abandoned and 25 were dismissed. The remaining 13 cases proceeded in a variety of ways, including 6 cases in which a default judgment was entered, suggesting that the court was satisfied as to service in some way that was not apparent from the docket.

¹⁴⁰ See *infra* Part III, pp. 1743–56.

¹⁴¹ In addition to active cases, there were several cases among these 113 that did not fit neatly into general categories, such as cases that were transferred to arbitration or were in some sort of

As for the cases with judgments, there was an explicit default judgment entered in 308 of these cases, or 42% of all cases with judgments.¹⁴² Among the remaining cases, many had dockets that terminated with only a “Judgment Entered,” without indication as to the prevailing party. The lack of defendant participation in many cases suggests that at least some of these entered judgments may also effectively be default judgments, even if the docket does not explicitly designate them as such. Of the 423 cases in which a judgment was entered that was not explicitly a default judgment, the defendant had not filed an appearance, motion, or other filing in 247 cases, or about 58%.¹⁴³

While default judgments are a straightforward indicator of a plaintiff’s victory, there was no similar reliable indicator on the face of the dockets in the sample demonstrating that the defendant had won. The most obvious category would be dismissals; 193 cases ended in dismissal, or roughly 26% of cases with judgments.¹⁴⁴ But rather than reflecting a large portion of cases in which successful motions to dismiss were filed, many of these cases appear to have been dismissed either on the court’s initiative or voluntarily by the plaintiff. Of these 193 dismissals, 124 (64%) occurred in cases with no appearance or filings by the defendant on the docket.¹⁴⁵ Even where defendants did appear and the case eventually was dismissed, that did not necessarily reflect a successful defense raised by the defendant; for instance, a voluntary dismissal may have been entered along with a defendant’s stipulation to a payment schedule, or following the completion of the payment schedule.¹⁴⁶ Dismissals were therefore not a reliable indication of defendant success.¹⁴⁷

For a portion of these cases, the entry of judgment was not the end of docket activity. Judgments can be used for the garnishment of wages, bank accounts, or other assets. Such activity does not necessarily appear

procedural limbo, such as a motion for default that had been granted but without an entry of judgment reflected on the docket.

¹⁴² 308 / 731 = 42.13%. A judgment was determined to be an “explicit default judgment” if it was labeled on the docket as a default judgment or if it closely followed a motion for default without significant intervening activity. See *infra* Appendix I.C.2, p. 1784.

¹⁴³ Additionally, in 47 of these 423 cases it was ambiguous as to whether the defendant filed anything on the docket. See *supra* notes 134–135 and accompanying text.

¹⁴⁴ 193 / 731 = 26.40%.

¹⁴⁵ Additionally, in 37 of these cases it was ambiguous as to whether the defendant had appeared. See *supra* notes 134–135 and accompanying text.

¹⁴⁶ See, e.g., *LVNV Funding LLC v. Young*, 2019-MI-119337 (Ill. Cir. Ct. dismissed Aug. 12, 2019).

¹⁴⁷ Another potential indicator of defendant success may be that a case was abandoned by the plaintiff. These cases made up 88 of the cases in the core sample, or roughly 9%. These cases may have been abandoned because the defendant paid the plaintiff; but they also may have been abandoned because the plaintiff simply gave up or could not find the defendant.

on the docket of the case in which the judgment was obtained.¹⁴⁸ But garnishment activity can show up when a plaintiff involves the court in the garnishment process, such as when doing so is necessary to obtain a writ of garnishment or when there is some sort of dispute with the garnishee or defendant. Garnishment-related docket activity thus provides a sense of the minimum amount of garnishment activity that occurs after judgment is entered in these cases. Here, there was some form of evidence of garnishment activity in 214 cases, about 23% of the core sample and about 29% of the cases in which judgment was entered,¹⁴⁹ suggesting that garnishment is a relatively common occurrence.¹⁵⁰

D. Summary

The three studies described in this section document a world in which the top plaintiffs in civil courts can rightly be described as “assembly-line plaintiffs.” They bring massive numbers of cases — tens or hundreds of thousands per year — against individual defendants who are almost entirely unrepresented and who largely do not show up in court to defend themselves. In turn, these plaintiffs obtain large numbers of default judgments, which they can then use to garnish these defendants’ assets.

To be clear, there are a variety of interesting questions about assembly-line litigation that these studies do not answer. They do not measure the overall quantity of assembly-line litigation occurring in state courts, for instance. And because they focus on only the top filers in particular years, they cannot answer questions about the overall distribution of assembly-line litigation among different types of plaintiffs; debt collectors have accounted for an increasing portion of the top filers in recent years, but it may be that financial services companies, insurance companies, or property management companies have seen their shares of the overall caseload increasing outside of the top filers. And finally, these studies depict *what* is happening in courts around the country, but they do not purport to engage in any kind of causal analysis

¹⁴⁸ A judgment may, for instance, be taken to another jurisdiction for enforcement in that jurisdiction; or its existence may be enough to persuade a party to satisfy it without further court proceedings. Or it may be enforced through formal proceedings with other government entities, such as the establishment of a lien on real property by filing the judgment with a county recorder’s office. *See, e.g.*, 735 ILL. COMP. STAT. 5/12-101 (2021).

¹⁴⁹ 214 / 932 = 22.96%. 214 / 731 = 29.27%.

¹⁵⁰ An additional form of postjudgment docket activity was notification of the defendant’s bankruptcy. Bankruptcy notices were filed in 10 cases, sometimes before a judgment had been entered, and sometimes after. *See, e.g.*, Harpeth Fin. Servs. LLC dba Advance Fin. v. Carter, No. 19-GC-2420 (Tenn. Gen. Sess. Ct. July 17, 2019).

explaining *why* assembly-line litigation has become such a dominant force in state civil litigation.¹⁵¹

Nonetheless, the studies demonstrate that in the land of civil legal disputes, a significant portion of courts' dockets are dedicated to the near-automatic processing and granting of the claims of large corporations. In these cases, the civil justice system functions less as an arbiter of the merits of disputes, and instead as a site for private companies to petition the state for permission to redistribute others' assets to themselves — permission that appears to be granted frequently without much, if any, scrutiny.

III. THE PROBLEMS OF ASSEMBLY-LINE LITIGATION

As Part II documented, assembly-line litigation is a significant force in state courts across the country. But what should we make of that fact? It is clear that assembly-line litigation has some benefits. This type of litigation exists because it allows plaintiffs to reduce litigation costs, in turn allowing creditors to collect debts more efficiently. Although it is hard to know, it seems likely that a large number of the claims brought by assembly-line litigation — perhaps even a significant majority — are valid, and the reduction of litigation costs for the bringing of valid claims is generally a good thing from the perspective of the civil justice system.¹⁵² The increased ease of creditors recouping unpaid

¹⁵¹ Notably, high volumes of assembly-line litigation have continued over the last seventeen years despite legal changes over the same time period that have dramatically strengthened arbitration provisions in consumer contracts and led to the widespread use of those provisions in consumer contracts. See, e.g., Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233, 234 (2019). Some debt collectors may not have contractual relationships with the consumers whom they pursue in court; but many of the top plaintiffs identified here, particularly the financial services companies, have arbitration clauses in their consumer-facing contracts. See *id.* app. at 248–55. Yet, as their many filings indicate, these companies appear to be pursuing consumers in court rather than (or in addition to) private arbitration.

Two hypotheses may explain this phenomenon. First, if companies anticipate that most cases they bring will not be very procedurally intensive, arbitration's primary claimed benefit — cheaper procedures — will be relatively less attractive. Plus, even if companies were to go to an arbitral forum to obtain a judgment against a consumer, they may need to still proceed to a court to collect on that judgment via garnishment or other enforcement mechanisms. As a result, it may be more cost effective to go to court in the first place, obtain a cheap judgment when the defendant does not show up, and proceed directly to enforcement. Second, it may be that companies include arbitration clauses not because they believe arbitration will actually be significantly cheaper, but because arbitration clauses — and prohibitions on class actions in particular — will result in fewer claims being brought against the company in the first place. See, e.g., David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 240–42 (2012). If the primary motivation for consumer arbitration provisions is claim suppression, which is relevant largely only when consumers are plaintiffs, it should be unsurprising that companies do not use the arbitration provisions in their contracts when they are the plaintiffs and the consumers are the defendants.

¹⁵² See, e.g., Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 332–33 (2008).

debts, meanwhile, may also allow creditors to offer cheaper access to credit to consumers.¹⁵³

But those benefits do not make assembly-line litigation a success story for the civil justice system. Although the cheaper resolution of valid claims is an important goal, the way our nation's civil justice systems handle assembly-line litigation raises serious concerns about the enforcement of substantive and procedural protections for consumers, as well as the upstream incentives that such underenforcement has for plaintiffs to bring bad claims. This Part provides an overview of these concerns. It then considers the prospects for addressing these concerns, and concludes that assembly-line litigation poses a set of structural challenges — its high-volume nature and the low value of the claims involved — that many mainstream proposals for civil justice reform are not well equipped to handle.¹⁵⁴

A. *The Normative Concerns Raised by Assembly-Line Litigation*

First, and most basically, assembly-line litigation raises serious concerns about our judicial system's ability to accurately assess liability and enforce consumer protection laws. Accuracy is one of the chief lodestars of the civil justice system, whether one examines positive law or normative theories about the appropriate goals of civil justice policymaking.¹⁵⁵ It is also one of the frequently invoked values behind access-promoting principles and reforms.¹⁵⁶ But where vast numbers of defendants never show up and court systems do not probe plaintiffs' claims in the absence of a defendant, there are significant reasons to question whether some or many of the claims that end up being enforced are truly valid. These accuracy concerns are particularly acute where plaintiffs have built business models that are designed around the supposition that their

¹⁵³ See, e.g., Zywicki, *supra* note 61, at 167. But see Abbye Atkinson, *Rethinking Credit As Social Provision*, 71 STAN. L. REV. 1093, 1147–62 (2019) (raising doubts as to the value of access to credit as a primary goal for public policy regarding low-income consumers).

¹⁵⁴ Along the way, this Part focuses primarily on normative concerns that are related to the functioning of the civil justice system, as opposed to concerns that are more grounded in substantive social policy, such as the appropriate balance between credit access and debtor protections. Although there is a close relationship between procedural and substantive concerns, see, e.g., Bone, *supra* note 152, at 332–34, the rough model that I adopt here is one in which the actors determining substantive social policy take the primary role in setting, for example, the proper balance between creditors' and debtors' interests, and civil justice systems then strive to implement that balance through accurate law enforcement.

¹⁵⁵ See, e.g., *Heller v. Doe*, 509 U.S. 312, 332 (1993) (“At least to the extent protected by the Due Process Clause, the interest of a person subject to governmental action is in the accurate determination of the matters before the court, not in a result more favorable to him.”); *Goldberg v. Kelly*, 397 U.S. 254, 268–71 (1970); Bone, *supra* note 152, at 332.

¹⁵⁶ See, e.g., Spencer, *supra* note 19, at 354–58 (identifying the promotion of “merits-based or accurate resolutions” as part of the “liberal ethos” in civil procedure, *id.* at 354).

claims will usually go unchallenged. That expectation creates bad incentives, ranging from increasing the returns of outright fraud to decreasing the value to companies of investigating the validity of their own claims.

These concerns are not hypothetical. Over the last twenty years, significant evidence has built up of practices ranging from negligent to fraudulent in a variety of contexts in which assembly-line litigation is prevalent. In 2010, for instance, the owner of the process server American Legal Process pled guilty to criminal fraud for knowingly failing to serve defendants in tens of thousands of debt-collection lawsuits.¹⁵⁷ The New York Attorney General estimated that the company's actions resulted in wrongful default judgments in around 100,000 cases,¹⁵⁸ with an average of \$5474 seized by the plaintiff debt collector in each case.¹⁵⁹ A similar civil action against a different process server, as well as debt collectors and law firms using that server to file high volumes of debt-collection cases in state court, was settled in 2016.¹⁶⁰ That case had been brought by a class of individuals whose bank accounts or wages had been garnished as the result of debt-collection suits in which the plaintiffs used "sewer service" practices such as filing false affidavits of service.¹⁶¹ The district court found substantial evidence that sewer-service practices were a routine part of the debt-collection suits at issue, including hundreds of instances where process servers claimed to be in different places at the same time.¹⁶² The suit was ultimately settled for more than \$60 million as well as an agreement by the debt collectors to extinguish over \$1 billion in outstanding notes and judgments.¹⁶³ As these examples indicate, because debt-collection litigation is so high volume, the presence of a single bad actor willing to engage in fraudulent notice practices can have a huge impact, ensnaring thousands or tens of thousands of individual defendants over a period of just two or three years.

¹⁵⁷ Steven A. Meyerowitz, *N.Y. Process Server Pleads Guilty to Fraud for Failing to Properly Notify Defendants*, LEXISNEXIS LEGAL NEWSROOM (Jan. 19, 2010), <https://www.lexisnexis.com/legalnewsroom/financial-fraud-law/b/blog/posts/n-y-process-server-pleads-guilty-to-fraud-for-failing-to-properly-notify-defendants> [<https://perma.cc/DX6G-SQYQ>].

¹⁵⁸ *Id.*

¹⁵⁹ Jonathan D. Glater, *N.Y. Claims Collectors of Debt Used Fraud*, N.Y. TIMES (July 22, 2009), <https://www.nytimes.com/2009/07/23/business/23cuomo.html> [<https://perma.cc/6HXH-V2WS>].

¹⁶⁰ See *Sykes v. Harris*, No. 09-cv-08486, 2016 WL 3030156, at *1 (S.D.N.Y. May 24, 2016).

¹⁶¹ See Benjamin Mueller, *Victims of Debt Collection Scheme in New York Win \$59 Million in Settlement*, N.Y. TIMES (Nov. 13, 2015), <https://www.nytimes.com/2015/11/14/nyregion/victims-of-debt-collection-scheme-in-new-york-win-59-million-in-settlement.html> [<https://perma.cc/5WKR-95AQ>].

¹⁶² *Sykes v. Mel Harris & Assocs.*, 285 F.R.D. 279, 284 (S.D.N.Y. 2012), *aff'd sub nom.* *Sykes v. Mel S. Harris & Assocs.*, 780 F.3d 70 (2d Cir. 2015).

¹⁶³ *Sykes*, 2016 WL 3030156, at *1.

These problems do not just arise in the litigation context — the lack of judicial scrutiny has upstream consequences, too, on the transactions that lead to the claims that ultimately get litigated. For instance, as Professor Dalié Jiménez has shown, debt-purchasing agreements, which frequently form the basis for the plaintiff’s claim in debt-collection suits, often are faulty: they lack underlying documentation, are missing legally material information such as the date an account became delinquent, and frequently disclaim the accuracy of the underlying account statements, including disclaimers that the seller has title to the accounts to begin with.¹⁶⁴ Investigative accounts depict an “often-lawless marketplace” for consumer debts, in which buying consumer debt may mean little more than handing over cash for a spreadsheet; a seller may sell the same spreadsheet to multiple buyers, or alter the dates of the accounts in the spreadsheet to make the debt look more collectible than it actually is.¹⁶⁵ Companies not only have little incentive to uncover errors, but may also turn a willful blind eye when errors are identified. When one employee at JPMorgan Chase found 5000 accounts with incorrect information in a list of 23,000 accounts about to be sold, she was urged to go ahead with the deal — and then fired when she reported the information to the company’s legal counsel.¹⁶⁶

These accuracy concerns are not limited to the debt-collection context. In Baltimore, for instance, an analysis of several hundred rent disputes found a bevy of both technical and substantive defects in landlords’ claims, including defective service of process in more than half of the cases and false, misleading, or legally inadequate information provided by the landlord in 70%–80% of cases.¹⁶⁷ The study found that nearly 80% of renters reported living “amidst serious housing defects at the time they appeared at Rent Court,” suggesting the availability of a defense based on the warranty of habitability — but “not even a third of respondents with a defense ended up contesting their cases before a judge,” and only 8% succeeded.¹⁶⁸ The lack of legal assistance, the hands-off approach of judges, and the high rates of default judgments all contribute to a system in which repeat plaintiffs continue to make claims to which there may likely be valid defenses, because the odds that those defenses will be raised are extremely low.

¹⁶⁴ Jiménez, *supra* note 7, at 47, 69–83.

¹⁶⁵ Jake Halpern, *Paper Boys: Inside the Dark, Labyrinthine, and Extremely Lucrative World of Consumer Debt Collection*, N.Y. TIMES MAG. (Aug. 19, 2014), <https://www.nytimes.com/interactive/2014/08/15/magazine/bad-paper-debt-collector.html> [<https://perma.cc/9SUU-AKTX>].

¹⁶⁶ See David Segal, *Debt Collectors Face a Hazard: Writer’s Cramp*, N.Y. TIMES (Oct. 31, 2010), <https://www.nytimes.com/2010/11/01/business/01debt.html> [<https://perma.cc/W8NT-MUCG>].

¹⁶⁷ See PUB. JUST. CTR., JUSTICE DIVERTED: HOW RENTERS ARE PROCESSED IN THE BALTIMORE CITY RENT COURT 25–26 (2015); see also Steinberg, *supra* note 46, at 957 (discussing this study).

¹⁶⁸ PUB. JUST. CTR., *supra* note 167, at v, 36; see also Steinberg, *supra* note 46, at 968.

Second, assembly-line litigation also raises concerns about the effective enforcement of laws that place limits on judgment execution. This is a distinct type of accuracy concern, and one that may be less familiar than the normal question of whether a court “got it right” that Person *A* owes money to Person *B*. As some judgment-collection specialists say, obtaining a determination of liability “is only half the battle” of litigation.¹⁶⁹ Judgment execution — the second half of the battle — carries with it a range of problems for pro se defendants, many of which parallel problems that arise in the prejudgment phase of litigation. There are many potential legal defenses that a judgment debtor might benefit from asserting. Federal and state laws provide a wide range of possible defenses against collection for judgment debtors, particularly in the consumer context.¹⁷⁰ Federal law, for instance, caps the portion of a debtor’s income that a creditor may garnish;¹⁷¹ state laws may provide stricter caps as well.¹⁷² In addition to these income caps, state and federal laws also exempt particular income sources from garnishment — federal law prohibits the garnishment of Social Security income, for instance;¹⁷³ states, meanwhile, may choose to exempt a variety of wages from the definition of income, such as wages used to make contributions to retirement accounts or pay union dues,¹⁷⁴ or create greater exemptions for certain people, such as the head of a household.¹⁷⁵ And that’s just income. When it comes to a judgment debtor’s assets, there are also a wide range of potential exemptions, which vary from state to state.¹⁷⁶ And applying certain exemptions may require tracing funds from various types of income (Social Security, retirement account distributions, etc.) through different accounts.¹⁷⁷

These laws, which exist in federal and state statutes, regulations, court decisions, and even constitutions, form a complex web that can generate challenging legal issues even for relatively quotidian, low-dollar garnishment proceedings.¹⁷⁸ Some of the protections for judgment debtors are designed to be “self-executing,” such that the debtor

¹⁶⁹ ALAN M. AHART, CALIFORNIA PRACTICE GUIDE: ENFORCING JUDGMENTS AND DEBTS ¶ 1:1.1 (2021).

¹⁷⁰ See, e.g., 15 U.S.C. § 1673; THE PEW CHARITABLE TRS., *supra* note 99, at 18; Steven L. Willborn, *Wage Garnishment: Efficiency, Fairness, and the Uniform Act*, 49 SETON HALL L. REV. 847, 860–65 (2019).

¹⁷¹ 15 U.S.C. § 1673.

¹⁷² THE PEW CHARITABLE TRS., *supra* note 99, at 18.

¹⁷³ 42 U.S.C. § 407.

¹⁷⁴ See, e.g., CONN. GEN. STAT. ANN. §§ 52-350a(4), -361(a)(f) (West 2021).

¹⁷⁵ See, e.g., NEB. REV. STAT. ANN. § 25-1558(1)(c) (West 2022).

¹⁷⁶ See Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 617–18 (2006).

¹⁷⁷ See, e.g., AHART, *supra* note 169, ¶¶ 6:847–54.

¹⁷⁸ See, e.g., *First Nat’l Bank of Jasper v. Robinson (In re Robinson)*, 240 B.R. 70, 88 (Bankr. N.D. Ala. 1999); CAL. CONST. art. XX, § 1.5.

does not need to intervene to enforce the relevant protection.¹⁷⁹ But many are not, and require the judgment debtor to affirmatively claim an exemption, often by following a specific procedure.¹⁸⁰ Plus, even protections that are supposed to be self-executing as a matter of law may not be self-executing in reality: where a creditor attempts to collect on property that should automatically be exempt, as a practical matter the creditor may be able to do so successfully unless the judgment debtor asserts their legal right to the exemption.¹⁸¹ As a result, the set of laws that protect judgment debtors may go largely unenforced in litigation even where an accurate assessment of liability has been made.¹⁸²

Third, assembly-line litigation raises serious concerns about due process values and judicial legitimacy.¹⁸³ The story of due process in low-value consumer contexts is a long one, and one that was a core part of the “due process explosion” in the second half of the twentieth century.¹⁸⁴ But, as noted above, whatever individuals’ rights may be on paper, many assembly-line cases raise issues regarding whether these defen-

¹⁷⁹ See, e.g., *In re Robinson*, 240 B.R. at 95 (noting that employers of an employee subject to garnishment may apply the limits on garnishment without the employee claiming any exemptions); *Donovan v. Hamilton Cnty. Mun. Ct.*, 580 F. Supp. 554, 557 (S.D. Ohio 1984).

¹⁸⁰ See, e.g., AHART, *supra* note 169, ¶¶ 6:868–870.

¹⁸¹ See, e.g., *id.* ¶ 6:870 (“Theoretically, a claim of exemption should never have to be filed for property ‘exempt without making a claim.’ In practice, however, if such property is levied upon by the judgment creditor, a claim of exemption may have to be filed to obtain its release — unless the creditor can be persuaded to order it released.”). An additional, but distinct, problem is that some protections for judgment debtors are thin enough that they may be relatively easy for creditors to circumnavigate by changing their collection tactics — for instance, by going after income once it is deposited into a bank account rather than attempting to garnish it at the moment it is paid out as wages. See, e.g., Paul Kiel, *Old Debts, Fresh Pain: Weak Laws Offer Debtors Little Protection*, PROPUBLICA (Sept. 16, 2014, 5:00 AM), <https://www.propublica.org/article/old-debts-fresh-pain-weak-laws-offer-debtors-little-protection> [https://perma.cc/9XXB-Z563].

¹⁸² This problem can last for years, because judgments may continue to be executed long after they are initially obtained. See, e.g., Kiel, *supra* note 181. As a result, the problems of notice, funding a defense, and participating without representation in a complex legal system may extend years after a judgment is issued against a defendant. Practice manuals for judgment collectors encourage them to “maintain a long view of the collection process,” noting that judgments can be valid for as long as ten years, and renewable after that. AHART, *supra* note 169, ¶ 1:8. On the defendant’s side, this “long view” may mean years of financial uncertainty; judgment debtors report finding their bank accounts emptied unexpectedly by many-years-old debt, and living in fear that a creditor will attempt to collect in between when their paycheck is deposited and when they make critical purchases such as groceries or rent payments. See Kiel, *supra* note 181. Many of these problems arise only after the case is “litigated,” and the judgment debtors may, as a practical matter, have no way of knowing or asserting their legal defenses. And as a result, the problems never even show up on the court records of the hundreds of thousands of default judgments that issue across the country every year.

¹⁸³ See Matthew J.B. Lawrence, *Procedural Triage*, 84 FORDHAM L. REV. 79, 91–99 (2015) (describing ways that the value of participation may vary from claimant to claimant); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 273–305 (2004) (articulating an account of procedural justice that links the legitimacy of adjudications to participatory procedures).

¹⁸⁴ See, e.g., Henry J. Friendly, “*Some Kind of Hearing*,” 123 U. PA. L. REV. 1267, 1268, 1273–75 (1975) (discussing *Fuentes v. Shevin*, 407 U.S. 67 (1972), and other cases).

dants are given effective notice in practice. Without notice, individuals may be deprived of the ability to participate in adjudications that may affect their interests significantly.¹⁸⁵ And even where individuals have notice, the widespread unavailability and unaffordability of counsel may mean that they effectively lack a meaningful opportunity to be heard.¹⁸⁶ In cases such as *Lassiter v. Department of Social Services of Durham County*¹⁸⁷ and *Turner v. Rogers*,¹⁸⁸ the U.S. Supreme Court has consistently failed to require courts and governments to provide counsel in the vast majority of civil cases;¹⁸⁹ and although some states have begun to implement right-to-counsel regimes in some areas of civil law, those remain the exception to the rule.¹⁹⁰ Where litigants attempt to litigate without counsel, meanwhile, judges in state courts often remain largely passive or even recalcitrant, failing to assist lawyerless parties with understanding the basics of procedural and evidentiary rules.¹⁹¹ Assembly-line litigation is therefore unlikely to carry with it some of the most basic hallmarks of participatory justice and procedural fairness — notice and a meaningful opportunity to be heard — whether as a result of failures of notice, inaccessibility of counsel, or a court system that appears indifferent, un navigable, or even hostile.

Fourth, assembly-line litigation raises concerns about the content of the law and how it develops over time. Assembly-line litigation entails a large set of cases that will likely never reach the stage of written opinions, much less published, precedential appellate opinions. For the small portion of cases that have a chance to generate meaningful development of the law, the repeat-player plaintiffs have strong incentives to pursue only those cases that will be likely to result in changes that benefit them, and to drop cases that may result in adverse changes.¹⁹² As a result, the long-term effects of assembly-line litigation are likely to bias legal developments in a way that favors repeat players at the expense of the one-off defendants whom they pursue.¹⁹³

¹⁸⁵ See, e.g., *Greene v. Lindsey*, 456 U.S. 444, 449–50 (1982). See generally Robin J. Efron, *The Invisible Circumstances of Notice*, 99 N.C. L. REV. 1521 (2021) (describing the significance of notice as a due process right).

¹⁸⁶ See, e.g., Russell Engler, *And Justice for All — Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2022 (1999) (noting ways in which the current structure of adversarial litigation “prevent[s] unrepresented litigants from participating meaningfully in the legal system”).

¹⁸⁷ 452 U.S. 18 (1981).

¹⁸⁸ 564 U.S. 431 (2011).

¹⁸⁹ See *id.* at 448; *Lassiter*, 452 U.S. at 33.

¹⁹⁰ See Martha F. Davis, *Participation, Equality, and the Civil Right to Counsel: Lessons from Domestic and International Law*, 122 YALE L.J. 2260, 2266–74 (2013).

¹⁹¹ See Carpenter et al., *supra* note 21 (manuscript at 31–51).

¹⁹² See Galanter, *supra* note 18, at 100–03.

¹⁹³ See *id.*

Finally, each of these concerns is heightened by issues of social and distributive justice that arise in many of the circumstances accompanying assembly-line litigation.¹⁹⁴ The disputes underlying these cases are often both symptoms and causes of economic and social marginalization, and they are disproportionately likely to involve people of color and those on the edge of economic insolvency. One study in New York City, for instance, found that 95% of individuals with default judgments entered against them in debt-collection cases lived in low-income or moderate-income areas, a majority of which were in Black or Latinx neighborhoods.¹⁹⁵ Even adjusting for income, evidence suggests that default judgment rates are higher in Black neighborhoods than white ones.¹⁹⁶ Evictions, too, are heavily concentrated among lower-income and nonwhite groups.¹⁹⁷ And civil disputes involving debt collection and eviction are also disproportionately likely to involve women, particularly women of color.¹⁹⁸ These civil disputes may arise from economic hardship caused by social and economic marginalization of these groups.¹⁹⁹ And, in turn, the outcomes of the disputes — such as eviction or the garnishment of wages or assets — can contribute to the negative consequences of discrimination and economic distress.²⁰⁰ What's more,

¹⁹⁴ See Colleen F. Shanahan & Anna E. Carpenter, *Simplified Courts Can't Solve Inequality*, DAEDALUS, Winter 2019, at 128, 131 (“[M]any of the problems that civil courts handle are symptoms of inequality.”).

¹⁹⁵ THE PEW CHARITABLE TRS., *supra* note 99, at 17.

¹⁹⁶ *Id.*

¹⁹⁷ See, e.g., BENJAMIN F. TERESA, RVA EVICTION LAB, THE GEOGRAPHY OF EVICTION IN RICHMOND: BEYOND POVERTY (2018), <https://cura.vcu.edu/media/cura/pdfs/cura-documents/GeographiesofEviction.pdf> [<https://perma.cc/PQ9B-EZ4U>]; Tim Thomas, Ian Kennedy, Alex Ramiller, Ott Toomet & Jose Hernandez, *Baltimore Eviction Map*, THE EVICTIONS STUDY (May 8, 2020), <https://evictions.study/maryland/report/baltimore.html> [<https://perma.cc/JGN6-JPNE>]; Timothy A. Thomas, Ott Toomet, Ian Kennedy & Alex Ramiller, *The State of Evictions: Results from the University of Washington Evictions Project*, THE EVICTIONS STUDY (Jan. 6, 2020), <https://evictions.study/washington> [<https://perma.cc/3ULF-GHKW>].

¹⁹⁸ See Sabbeth & Steinberg, *supra* note 21 (manuscript at 9–23).

¹⁹⁹ Although an increase in debt may, of course, reflect increases in wealth, or debts taken on to finance beneficial long-term investments, there is reason to worry that the significant expansion of credit in recent decades does not reflect a proportionately increased ability for consumers to pay down their debts — particularly when it comes to socially and economically disadvantaged groups. See Atkinson, *supra* note 153, at 1133–44; see also Atif Mian & Amir Sufi, *The Macroeconomic Advantages of Softening Debt Contracts*, 11 HARV. L. & POL'Y REV. 11, 17 (2017) (“[D]ebt booms are driven by an increasing willingness of financial intermediaries to lend, not by an improvement in the actual position of borrowers.”). Low-income borrowers often use credit primarily to finance recurring expenses for basic necessities such as rent and utility payments, and slip into nonpayment when financial shocks prevent them from paying down their debts. See Atkinson, *supra* note 153, at 1152–53.

²⁰⁰ See Kathryn A. Sabbeth, *The Prioritization of Criminal over Civil Counsel and the Discounted Danger of Private Power*, 42 FLA. ST. U. L. REV. 889, 905–16 (2015) (discussing the collateral consequences of civil judgments).

in many states, civil judgments on private debt can also result in debtors being arrested and jailed.²⁰¹

This context is normatively relevant to the civil justice system — as opposed to merely being relevant to broader questions of social policy — for at least three distinct reasons. First, individuals with less financial and social capital may be less able to resolve disputes on favorable terms by relying on self help; the civil justice system may provide a more important dispute resolution backstop for them than it does for those with the resources to navigate financial, housing, or other disputes in a way that does not result in litigation. Second, the negative consequences of erroneous judgments against individuals who face more financial and housing insecurity are likely to be more severe, given the kinds of dislocations and disruptions that can result from the loss of even a few hundred dollars. As a result, the combination of a high likelihood of error and a high cost of error makes these cases a particular target for reformers' attention. And finally, the civil justice system is itself an important set of institutions through which society can either exacerbate or mitigate these kinds of marginalization. Where broader political and moral norms of distributive and social justice suggest that these communities deserve particular attention, the machinery of civil justice should be part of that focus.²⁰²

B. *The Structural Challenges of Assembly-Line Litigation*

As discussed above, high rates of assembly-line litigation are part of the broader rise in pro se litigation among civil justice systems in the United States. This rise, in turn, has resulted in a wave of recent interventions and proposals that aim to improve processes and outcomes for unrepresented parties. Among the most prominent proposals are increasing funding to legal aid services;²⁰³ developing a right to counsel in certain categories of civil litigation (sometimes referred to as a version of “civil *Gideon*”);²⁰⁴ revising the regulations governing legal services to reduce the market cost of legal assistance;²⁰⁵ changing the norms, duties,

²⁰¹ See, e.g., ACLU, A POUND OF FLESH: THE CRIMINALIZATION OF PRIVATE DEBT 5 (2018), https://www.aclu.org/sites/default/files/field_document/022118-debtreport.pdf [<https://perma.cc/68NA-SH5A>].

²⁰² See Matthew A. Shapiro, *Distributing Civil Justice*, 109 GEO. L.J. 1473, 1526–33 (2021) (describing the interaction between broader political theories of distributive justice and the various goods that the civil justice system provides).

²⁰³ See, e.g., Jonathan Lippman, *State Courts: Enabling Access*, DAEDALUS, Summer 2014, at 28, 31–35.

²⁰⁴ See, e.g., Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503, 503 (1998); *About*, NAT'L COAL. FOR A CIV. RIGHT TO COUNS., <http://civilrighttocounsel.org/about> [<https://perma.cc/SBS6-CTQJ>].

²⁰⁵ See, e.g., Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice Through the (Un)corporate Practice of Law*, 38 INT'L REV. L. & ECON. 43, 48–49 (2014).

and structures of civil judging to create more active judicial involvement in cases;²⁰⁶ creating staff positions such as “navigators” within courts to assist unrepresented litigants;²⁰⁷ deploying technology to reduce the costs of dispute resolution;²⁰⁸ and modifying substantive, procedural, or evidentiary rules in specific legal areas to mitigate recurring problems.²⁰⁹

As with any mix of policy proposals, these reforms each have strengths and weaknesses when it comes to improving the civil justice system as a whole. But assembly-line litigation in particular poses problems across the board for any reform effort. This section describes why the two main features of assembly-line litigation — the high volume of cases and the low value of the claims involved — pose challenges for reforms that aim to help unrepresented litigants more broadly. Understanding the distinct dynamics of assembly-line cases is important to ensure that civil justice–reform efforts address this set of cases that form such a large part of many courts’ dockets.

I. High Volume. — First, and perhaps most obviously, the high volume of claims that are being produced by assembly-line plaintiffs poses a significant challenge for reformers. On one hand, this is nothing new: the high cost of proposed reforms in the vein of civil *Gideon* is well understood. The right to civil counsel is often applied to only a subset of civil cases — ones with particularly high stakes — in part because of the astronomical price tag that would come from a broader delineation of the right.

But the high volume of assembly-line cases can cause massive cost barriers even for interventions that are leading contenders for reform in part because of their cost-efficiency. Consider, for instance, the range of proposals that involve fostering active judging, that is, an increased involvement by judges in day-to-day litigation in a way that helps unrepresented parties develop their facts and legal arguments.²¹⁰ Such an approach offers numerous potential benefits, including increasing litigants’ sense of being heard and treated fairly as well as generating more accurate outcomes due to courts’ improved ability to receive evidence

²⁰⁶ See, e.g., Carpenter, *supra* note 1, at 661–67; Carpenter et al., *supra* note 21 (manuscript at 10–13); Steinberg, *supra* note 7, at 1607–12 (suggesting the adoption of a “naming” paradigm on the model of drug courts, *id.* at 1607, that encourages judges to envision their role as more proactively solving particular social problems).

²⁰⁷ See generally REBECCA L. SANDEFUR & THOMAS M. CLARKE, AM. BAR FOUND., NAT’L CTR. FOR STATE CTS. & PUB. WELFARE FOUND., ROLES BEYOND LAWYERS (2016), http://www.americanbarfoundation.org/uploads/cms/documents/new_york_city_court_navigators_report_final_with_final_links_december_2016.pdf [https://perma.cc/P66U-APBY].

²⁰⁸ See, e.g., J.J. Prescott, *Improving Access to Justice in State Courts with Platform Technology*, 70 VAND. L. REV. 1993, 2018–26 (2017).

²⁰⁹ See, e.g., Stifler, *supra* note 7, at 119–37.

²¹⁰ See Carpenter, *supra* note 1, at 649 n.5, 667–72.

and argument. And such an approach may well be more cost-effective than a variety of other interventions, as simplified procedures and increased stewardship by courts reduce the need for legal counsel.²¹¹

But even given these benefits, the scale of assembly-line litigation means that small increases in the attention paid to individual cases can result in massive increased costs. Under one plausible recent estimate, there are about eight million contract suits filed in the United States by large companies against consumers every year.²¹² At that volume, increasing the amount of time spent on the average case by just fifteen minutes would require the work hours of more than an entire additional federal judiciary.²¹³ Such costs would, of course, be diffused across the many state judiciaries. But the broader point is that even though procedural enhancements may be cheaper than civil *Gideon*, implementing improved processes at scale can become extremely expensive very quickly.

In addition to weighing down reforms that require outlays of public funds, issues related to volume may also complicate reforms that aim to decrease the cost of legal services, such as permitting limited types of practice by nonlawyers to increase the supply of legal services and drive down prices.²¹⁴ Such reforms may bring significant value to litigants and the court system alike; if they allow for effective legal assistance at a lower cost, they can improve perceived and actual fairness as well as the accuracy of outcomes. But they also risk increasing the tide of assembly-line litigation. The cost of legal services is one of the key inputs to the operations of the massive, repeat-player plaintiffs who bring these cases. Reducing the costs of that input may, in turn, allow them to bring even more cases — for instance, lowering the threshold point at which it is profitable to sue to collect a debt. It is difficult to predict in advance what the net effect of any price change would be, but it is possible that lowering the cost of lawyers could increase, not decrease,

²¹¹ See, e.g., Steinberg, *supra* note 21, at 803 (“Demand side reform is likely to reduce the need for counsel in many cases and make a lawyer’s assistance less costly in others.”).

²¹² See Arbel, *supra* note 7, at 130–31, 131 n.42.

²¹³ 8,000,000 cases multiplied by 15 additional minutes per case yields 120,000,000 case minutes, or 2,000,000 case hours. Dividing 2,000,000 case hours by 2000 hours per year yields 1000 full-time equivalents. There are currently 870 authorized Article III federal judgeships. See *Authorized Judgeships*, U.S. CTS., <https://www.uscourts.gov/sites/default/files/allauth.pdf> [<https://perma.cc/X57X-WNQA>].

²¹⁴ I refer here to efforts to change the market price for lawyers’ services by increasing the supply of those who can provide those services. These reforms are distinct from efforts such as subsidized legal aid that aim to change who bears the cost of paying for legal services while not attempting to change the market structure underlying the provision of legal services more broadly. Targeted subsidies are unlikely to run the risks described in this paragraph because there is no particular reason to think that the plaintiffs in these cases would be the recipients of such subsidies. But as discussed below, subsidizing legal aid for defendants in assembly-line cases still runs into problems of high costs and negative-value defenses. See *infra* section III.B.2, pp. 1754–56.

the number of low-value claims involving unrepresented defendants in civil courts.

The high volume of assembly-line claims also suggests that the problem of cases that “fall through the cracks” of any particular solution may still be quite significant. Take, for instance, the possibility of online dispute resolution, a promising path toward lowering the costs of dispute resolution.²¹⁵ It is possible that by lowering the costs and inconvenience associated with raising a defense, such tools can help address the problem of no-show defendants. But even if these tools reduced the no-show rate by 50% — which would be an extraordinary accomplishment — the problem of no-show defendants would still be, in absolute numbers, vast.

2. *Low Claim Value.* — The other core structural feature of assembly-line litigation that poses problems for civil justice systems is the low value of the claims that are often brought by assembly-line plaintiffs. In discussions of the hardships experienced by unrepresented litigants, it is common to consider the fact that it is often difficult for litigants to afford paying for a lawyer.²¹⁶ But the ubiquity of low-value claims raises a distinct problem — the problem of defenses that are not worth paying for even if the funds to pay for a lawyer are available.

This problem — the “negative-value defense” problem — is the mirror image to the more-familiar example of the “negative-value claim” problem that arises in the world of plaintiff-side class actions. Such class actions exist because of the recognition that valid claims may go unheard if they are relatively small, and so cost more to litigate than they would be expected to bring in even if successful. Similarly, negative-value defenses pose a problem for the civil justice system because even if such a defense is entirely valid, the cost-benefit calculus for defendants is such that they are unlikely to make the defense to begin with. Even if a slam-dunk defense exists for the claim of \$800 being brought against you, it won’t make sense for you to bring it if raising the defense costs \$1000.²¹⁷ As a result, plaintiffs may be encouraged to bring weak claims that result in defendants paying money that they do not actually owe. And, as discussed below in Part IV, the class action device does not translate easily to the consumer-defense realm, making it unlikely that there is a quick fix for this problem.²¹⁸

²¹⁵ See Prescott, *supra* note 208, at 2018–26; see also J.J. Prescott & Alexander Sanchez, *Platform Procedure: Using Technology to Facilitate (Efficient) Civil Settlement*, in *SELECTION AND DECISION IN JUDICIAL PROCESS AROUND THE WORLD* 30, 65 (Yun-Chien Chang ed., 2020).

²¹⁶ See, e.g., Steinberg, *supra* note 21, at 752–53.

²¹⁷ This is, of course, a stylized example, and the story can get much more complicated. Fee-shifting provisions, for instance, can change this calculus. But it may also cost a significant amount to conduct the investigation into whether there is a valid defense or not in the first place; in those situations, fee shifting may be less useful, depending on whether the expected likelihood of finding a successful defense is high enough to justify the costs of investigation.

²¹⁸ See *infra* section IV.B, pp. 1761–68.

Although this problem can arise regardless of how much money a defendant has, it will often be exacerbated by a defendant's lack of income or wealth. A large part of the cost of mounting a defense may be finding the information about whether one is worth mounting in the first place and how to do so. People in lower-income communities may have access to fewer informal resources — friends or family members who have studied law, for instance — or more difficulty finding and navigating the limited public resources available for self help. As a result, even where an informed analysis could suggest that a defense is worth raising — say, incurring a \$500 cost for a 50% chance of defending against a \$1500 claim — many defendants are likely to be too information constrained and/or too budget constrained to raise the defense.

The problem of negative-value defenses also arises when it comes to questions of how public funders and aid organizations should tackle these cases. From a bird's-eye-view perspective, spending \$1000 in public funds to achieve \$800 in avoided debt payments is not an effective use of money — if the goal is debt reduction or consumer aid, the \$1000 could go directly to consumers via a debt-relief or public aid program, resulting in a 25% greater payout to the program's intended target for the same amount of spending. Of course, such a comparison is largely hypothetical — funding is often constrained by politics, private funders' priorities, or simply path dependency, and to the extent that reformers must choose between imperfect aid and no aid at all, it may well make sense to choose imperfect aid.²¹⁹ But even from the narrower perspective of funding that has already been allocated for legal aid, small-value consumer debt defenses are likely to frequently be low on the near-unlimited list of unmet legal needs, many of which are likely to involve stakes greater than the dollar values at issue in assembly-line cases.²²⁰

There is an important nuance here, which is that these low dollar values will, for many, not represent the overall stakes of the case. That's because the cash value at issue in a civil dispute does not accurately represent all of the potential costs associated with the lawsuit's outcome.²²¹ For instance, if \$1000 garnished from a defendant's bank account causes that person to lose their housing, the resulting displacement

²¹⁹ Cf. Zachary D. Liscow, *Redistribution for Realists*, 107 IOWA L. REV. 495, 528 (2022) (describing “imperfect fungibility” between redistributive policy options).

²²⁰ See, e.g., Shanahan & Carpenter, *supra* note 194, at 129 (“There are not, nor are there likely to be in the future, the resources to provide a lawyer in every civil matter before the courts.”); LEGAL SERVS. CORP., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 6 (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<https://perma.cc/U6S3-ARG9>] (“86% of the civil legal problems reported by low-income Americans in the past year received inadequate or no legal help.”).

²²¹ See, e.g., Sabbeth, *supra* note 200, at 912–16 (discussing the collateral consequences of civil judgments).

can have significant collateral consequences.²²² The enforcement of civil debt-collection judgments can cause severe disruptions to health and livelihood — a repossessed car, garnished wages, or an emptied bank account can all make it harder for a family to make ends meet, to stay in a home, or to continue showing up at work. For this reason, it may well be worth spending amounts of money on litigation greater than the amount at stake in the suit. This is one reason why civil *Gideon* proponents have focused on cases such as housing, where the stakes of civil suits are often quite high.²²³ But there will still be cases — likely many cases, given the volume of cases within the category of consumer contracts — where the dollar value of the claim is a more reasonable proxy for the stakes of the suit. These dollar values are likely to be significant to the defendants involved, particularly because these defendants are likely to be lower-income; but they may not rise to the same level of urgent need that exists in many places in our civil justice system.

As a result, although spending money on higher-stakes cases is an appropriate form of triage, it won't address the problems of the many assembly-line cases that truly have lower stakes but are nonetheless important. Instead, reform efforts aimed toward assembly-line litigation should focus on structural reforms that are addressed specifically at the problem of high-volume, low-value cases. The next Part discusses three types of policy changes that are designed to address these problems of size and scale.

IV. TOWARD STRUCTURAL REFORMS

The core problem of assembly-line litigation is that mass filings of low-value claims are going uninspected, creating bad incentives for plaintiffs and resulting in the underenforcement of substantive and procedural protections for the consumers who find themselves defendants in these suits. Solutions that are targeted toward this problem must find a way to promote accurate adjudication and the enforcement of consumer protections while also being cognizant of the problem of negative-value defenses and the mass nature of the claims involved. Increasing public subsidies for counsel or promoting deeper judicial involvement in every case are deeply expensive ways of tackling this problem, perhaps prohibitively so.

This Part considers the possibility of reforms that are targeted toward the structural features of assembly-line litigation in particular as opposed to pro se litigation broadly. It seems unlikely that any single comprehensive policy will address all of the problems of assembly-line

²²² See Kathryn Sabbeth, *Housing Defense as the New Gideon*, 41 HARV. J.L. & GENDER 55, 66–68 (2018).

²²³ See, e.g., *id.* at 56–57 (“Today’s civil right to counsel movement does not press for an absolute right, whereby counsel would be appointed in all civil matters, but targets select categories of cases in which basic needs or fundamental rights are at stake.”).

litigation while still allowing for the reasonable, cost-effective pursuit of valid low-value consumer debts. Instead, this Part offers a few potential blueprints for the types of reforms that could be useful. In doing so, it also shows the kinds of features that productive reforms are likely to have — in particular, a cost-conscious scalability that aims to improve the accuracy of adjudication and improve plaintiffs' incentives. The first two proposals, involving court funding and aggregate litigation, fit more easily into existing doctrines and institutional structures. The third, which seeks to shift courts away from one-case-at-a-time adjudication, would require a more significant institutional transformation. The ideas here are not at all designed to cover the field — there are plenty of other policy-reform ideas, such as increased efficiencies through computer-assisted procedures, or increased evidentiary requirements for debt collectors' initial filings, that are designed to reduce the per-case cost of adjudication and improve the accuracy of adjudication.²²⁴ Instead, these ideas are intended as a demonstration of approaching the problems of assembly-line litigation in a way that is designed to scale while addressing low claim value and high case volume in particular.

At the outset, it is worth noting the importance of pursuing these reforms in a targeted way. Because of default procedural norms of transsubstantivity, there is a risk that changing rules with an eye toward assembly-line plaintiffs in particular could create access-to-justice problems for other types of plaintiff.²²⁵ For this reason, many of the promising reforms that have been attempted so far have been relatively focused. The idea of increased evidentiary requirements, for instance, has been to require debt-collection plaintiffs to provide more evidence of the validity of the debt and the plaintiff's title to it, even if no defendant shows up.²²⁶ But those efforts have been focused on specific substantive case types — and not on raising pleading standards for plaintiffs across the board.²²⁷ Similarly, the kinds of policies discussed here are intended to be flexible, and not necessarily transsubstantive, even though that is often the default norm with procedural rules. As the Parts above indicate, assembly-line litigation is a significant

²²⁴ See, e.g., Stifler, *supra* note 7, at 131–33; *supra* note 215 and accompanying text.

²²⁵ It is also worth noting that assembly-line plaintiffs are dissimilarly situated to many other plaintiffs. They are sophisticated corporate enterprises, many of whom specifically acquire claims for the sake of pursuing them in litigation, in contrast to other plaintiffs whose claims arise from being directly wronged. Assembly-line plaintiffs' claims may be just as valid, and imposing costs on these plaintiffs may also raise normative concerns; but the normative concerns that are raised may be different because their possession of a claim is not independent of the cost structure of litigation. See, e.g., *infra* notes 233–235 and accompanying text.

²²⁶ This reform has been recommended by the FTC and adopted in a variety of states. See, e.g., FED. TRADE COMM'N, *supra* note 84, at iii; THE PEW CHARITABLE TRS., *supra* note 99, at 20–22.

²²⁷ See, e.g., N.Y. COMP. CODES R. & REGS. tit. 22, § 208.14-a (2021) (rule requiring additional documentation in consumer credit matters).

phenomenon in the civil justice system, and consists largely of cases within the same substantive area (consumer contract litigation), making it reasonable to consider this subset of litigation as a distinctive category for targeted reforms.

A. Congestion Pricing

As described above, one of the key limitations on certain types of interventions — from promoting court navigators to more active judicial case involvement — is funding. It's therefore worth considering ways that courts could scale their funding up to support a variety of reforms that are likely to draw on courts' coffers in pursuit of improving outcomes in assembly-line cases.

Indiscriminately raising court fees on plaintiffs creates access-to-justice concerns, and is not a good solution.²²⁸ But a more tailored option is worth considering: congestion pricing. Previous discussion of congestion pricing has focused on its possible use to manage time-intensive complex litigation.²²⁹ But the basic idea of congestion pricing can apply to assembly-line litigation in state courts as well: courts could implement a pricing regime in which a surcharge is added to plaintiffs who generate disproportionately large shares of courts' civil dockets.

Such a system has several justifications. First, the filing of assembly-line litigation generates negative externalities that congestion fees could help force plaintiffs to internalize. The first of these externalities is the burden caused by the high volume of case filings. When a single litigant files thousands of cases, that litigant imposes a significant cost in terms of judicial resources that affects the ability of judges and court staff to efficiently process other cases.

That congestion, on its own, could be enough to justify a congestion-pricing regime.²³⁰ But the additional difficulty of effectively processing assembly-line cases in particular presents a distinct type of externality. As noted above, the high volume of low-value cases, plus the correspondingly large number of default judgments, provides cover for cases that involve procedural wrongdoing and makes it more costly to adopt measures across cases that would catch these problems. Assembly-line litigation thus creates not just a typical kind of congestion for courts, but a congestion that generates the dilemma of either letting a potentially large number of problematic cases proceed undetected, or spending significant resources on weeding out those cases.

²²⁸ See, e.g., Judith Resnik, *Courts and Economic and Social Rights/Courts as Economic and Social Rights*, in *THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS* 259, 271 (Katharine G. Young ed., 2019).

²²⁹ See generally Ronen Avraham & William H.J. Hubbard, *Civil Procedure as the Regulation of Externalities: Toward a New Theory of Civil Litigation*, 89 U. CHI. L. REV. 1 (2022).

²³⁰ *Id.* at 24 ("A pricing mechanism can account for the systemic cost of congestion by making parties pay for more procedure.").

Congestion pricing would combat this problem on two fronts. First, it would provide a source of revenue to assist courts with implementing case-level reforms — such as more intense judicial scrutiny of the merits of cases or hiring dedicated court staff to assist unrepresented litigants. Second, by causing companies to internalize some of the costs of their filings, and by raising the price for some of those filings in the first place, congestion pricing would disincentivize companies from bringing claims with a lower likelihood of success. Assembly-line plaintiffs appear to be engaged in a form of “sorting by litigation,” in which a fair number of their claims end up being abandoned or dismissed, in essence using court filings in part to sort out remunerative claims from unprofitable ones. Congestion pricing therefore shifts some of the costs of sorting good claims from bad ones out of the court system and onto the plaintiffs’ pre-filing case assessments.

Next, congestion pricing responds to a concern about the appropriate distribution of the burdens of public funding. Courts are public institutions, funded by a combination of general tax revenue, fees, and fines.²³¹ Although filing a case usually requires a nonindigent plaintiff to pay some sort of filing fee, the fees charged by courts often cover only a fraction of the courts’ operating expenses.²³² Each case that is filed thus often entails a public subsidy, and large numbers of cases amount to a larger public subsidy.

There is nothing inherently objectionable about public institutions subsidizing private businesses, of course — roads, the postal service, and public education all involve significant public outlays that are aimed in part at promoting private enterprise. But where there is highly varied use among members of the public of a public institution, and a core set of users account for a significant portion of that use, principles of public financing and distributive justice often suggest that the individuals who benefit disproportionately from a public institution should bear a corresponding portion of the financial cost of funding the institution.²³³ Some, and possibly all, of the top assembly-line plaintiffs have developed and grown business models firmly around civil litigation.²³⁴ They buy and sell claims based on the availability of public institutions that will process those claims in a way that ends up being profitable. Congestion pricing operationalizes the normative intuition that these businesses should pay more to support those public institutions than

²³¹ See GEOFFREY MCGOVERN & MICHAEL D. GREENBERG, RAND INST. FOR CIV. JUST., WHO PAYS FOR JUSTICE? 10–11 (2014).

²³² See, e.g., *id.* at 16–17.

²³³ See, e.g., Clayton P. Gillette & Thomas D. Hopkins, *Federal User Fees: A Legal and Economic Analysis*, 67 B.U. L. REV. 795, 815 (1987) (“[A] traditional . . . tax equity principle is ‘that those who benefit most should bear a relatively large share of the costs.’” (quoting WILLIAM J. BAUMOL, *SUPERFAIRNESS* 148 (1986))).

²³⁴ See Stifler, *supra* note 7, at 97–98.

parties whose use of the institutions is limited, incidental, or not for private gain.

The efficacy of a congestion-pricing regime would depend heavily on its design. In particular, there would be a straightforward incentive for companies to evade congestion pricing through the use of subsidiaries or the sale of claims to other corporations to ensure that plaintiffs' filing numbers remain artificially low. For this reason, an intricate, tiered pricing system of increased rates for different volumes of cases, like the tax brackets within the federal income tax, is unlikely to succeed. Instead, a simpler approach is more likely to be successful: a flat surcharge applied to every case filed by a plaintiff within a given time period above a relatively low number, such as fifteen or twenty cases. For plaintiffs who file thousands or tens of thousands of cases, such a low ceiling would make it costly to use corporate shell games or revised contractual arrangements to evade the fee. Courts could also exempt nonprofits or other advocacy organizations, who may reliably file more than a minimal number of cases but do so in the public interest.

Aside from the congestion surcharge described above, courts could also consider a more radical approach toward dealing with congestion: the kind of cap-and-trade model suggested by Professors Ronen Avraham and William H.J. Hubbard as a way of allocating filing entitlements to the most valuable cases.²³⁵ Under such an approach, a court could set a low number of cases that any individual plaintiff could file, and then place a cap on the total number of additional cases it would hear in a given year across all filings. So, for instance, a court could say that any plaintiff could file up to 20 cases per year, but the court would hear only 50,000 additional cases total, across all parties.²³⁶ It could then auction off the right to those additional filings, and allow companies to purchase filing rights from each other after that initial auction. Such an approach would be a huge departure from existing filing norms, but would have the effect of allowing courts to place upper limits on docket congestion and would also allow market forces to channel the right to engage in mass filings to the plaintiffs with the highest-value claims. It would also likely have the effect of causing plaintiffs to engage in more internal scrutinizing of their claims before filing, which could decrease the filing rate of unsupported or otherwise problematic claims.

Congestion pricing would have some downsides. First, and most straightforwardly, increasing the cost of filing cases will likely deter the filing of some valid claims. Second, as discussed above, to the extent that congestion fees make it more expensive to recoup debts, they could

²³⁵ See Avraham & Hubbard, *supra* note 229, at 18–22.

²³⁶ Courts could exempt advocacy groups, governments, or even natural persons from the cap under this model as well.

increase the cost of credit for consumers *ex ante*. Third, making it harder to collect debts via civil dispute resolution procedures may have the effect of pushing more creditors to use informal methods of debt collection, which have many of their own problems of abuse.²³⁷ And fourth, if congestion pricing is designed in a way that allows the increased fees to be recovered by plaintiffs as part of the court costs associated with the case, some of their incidence will fall on defendants, not just plaintiffs.²³⁸ Anyone designing a congestion-pricing regime should be cognizant of these potential costs. The appropriate fee rate and structure will depend both on the magnitude of these costs and on the relative weighting of the particular goals — such as raising revenue or deterring bad filings — underlying the congestion-pricing regime for a given court.

But congestion pricing is still worth considering. Some of the deterrence effect of congestion pricing is a feature, not a bug — causing plaintiffs to internalize more of the external costs of their litigation should result in them scrutinizing their cases more closely and bringing fewer of them. And although it is possible that status quo practices lower the cost of credit, they do so at the expense of a functioning procedural system that accurately assesses the merits of claims and gives litigants a meaningful opportunity to be heard. Access to credit is important, but credit access can be managed intentionally through targeted substantive regulation — as opposed to the system we have now, which effectively provides backdoor subsidies to creditors as the incidental benefit of an ineffective court system.

Congestion pricing responds directly to the scale of assembly-line litigation. On its own, it is unlikely to solve all of the problems associated with this litigation. But it offers an approach that could decrease the total number of filings, increase the quality of those filings, and raise revenue for improved management of those filings.

B. From Defenses to Claims

As discussed above, one of the core structural problems raised by assembly-line litigation is the high likelihood of negative-value defenses: defenses that cost more to raise than they are worth. Just as aggregation is a common pathway for solving the problem of negative-value claims, then, it makes sense that aggregation would be one possible solution for facilitating the adjudication of negative-value defenses.

²³⁷ See Arbel, *supra* note 7, at 170–71.

²³⁸ One way around this result would be to structure congestion fees as unrecoverable even by victorious plaintiffs. Even if congestion fees were recoverable, though, much of the incidence would still be borne by plaintiffs because of the numerous cases in which plaintiffs are unable to recover. The availability of cost recovery in litigation therefore does not make plaintiffs insensitive to changes in court costs.

But facilitating aggregation in the context of assembly-line litigation is not so simple. Although defendant-side class actions may technically be possible,²³⁹ no reliable mechanism has been implemented that allows defendants to aggregate negative-value defenses.²⁴⁰ Defense classes have a number of significant shortcomings, particularly when it comes to the kind of high-volume consumer disputes that characterize assembly-line litigation. First, and perhaps most basically, defense classes in many consumer disputes would face significant problems finding common issues that predominate across the class. In legal areas such as contract disputes where many defenses are likely to depend on highly individualized facts — such as, roughly, “I paid that account already” or “a verbal misrepresentation was made to me during contract formation” — it is difficult to imagine an efficient way to proceed on a class-wide basis.²⁴¹ This problem is exacerbated in the debt-collection context, where the defendants may not have even transacted with any or many of the same businesses, and have only the shared feature of the same debt collector purchasing their accounts.²⁴² Amidst such heterogeneity, there will be many cases in which predominant common issues do not exist. And even where such issues *might* exist across defendants, it could take significant effort and factual development to determine which defendants in fact have the common defense.

Second, there are a number of problems with the incentives created by defense-side aggregation in the consumer context. Because plaintiffs choose their defendants, for instance, there would be strong incentives for a plaintiff facing a potential defense class to choose weak defendants.²⁴³ And plaintiffs will also be strongly incentivized to drop claims against defendants who raise defenses that could plausibly be more com-

²³⁹ See, e.g., FED. R. CIV. P. 23 (allowing members of a class to “sue or be sued”).

²⁴⁰ Although such mechanisms have not been implemented, they have been proposed. See, e.g., Assaf Hamdani & Alon Klement, *The Class Defense*, 93 CALIF. L. REV. 685, 731–34 (2005); Greg Reilly, *Aggregating Defendants*, 41 FLA. ST. U. L. REV. 1011, 1056–61 (2014); Nelson Rodrigues Netto, *The Optimal Law Enforcement with Mandatory Defendant Class Action*, 33 U. DAYTON L. REV. 59, 97–116 (2007); Francis X. Shen, *The Overlooked Utility of the Defendant Class Action*, 88 DENV. U. L. REV. 73, 112–26 (2010).

These proponents have tended to focus on the possibilities of defendant aggregation in contexts that look different from the extremely low-value claims involved in the assembly-line litigation discussed in this Article. See, e.g., Reilly, *supra*, at 1032 (describing \$400 as an “insubstantial” amount in relation to the value of a plaintiff’s claim and discussing depositions, hearings, expert reports, and other factors present in large, complex cases).

²⁴¹ See, e.g., NAT’L CONSUMER L. CTR., WILMERHALE LEGAL SERVS. CTR. OF HARV. L. SCH., VOLUNTEER LAWS. PROJECT, SENIOR PARTNERS FOR JUST. & THE BOS. BAR ASS’N, *SUBSTANTIVE DEFENSES TO CONSUMER DEBT COLLECTION SUITS* 13–20 (2010).

²⁴² See FELTNER ET AL., *supra* note 101, at 3.

²⁴³ See Hamdani & Klement, *supra* note 240, at 728–31. Additionally, provisions might have to be made to prevent plaintiffs from dropping the case if a successful certification on a sound defense theory occurs or seems imminent.

mon to a class, such as “all claims brought after a certain date are outside the limitations period.” There is thus an inherent tension between allowing defenses to develop (in order to identify common issues that could form the basis for class certification) versus certifying classes at an earlier stage (to prevent the plaintiff from dropping cases against individual defendants who raise potentially class-worthy defenses before a class is certified).²⁴⁴ Defendant classes are also unlikely to succeed as opt-in classes (because few would opt in to being sued) or as opt-out classes (because many would opt out).²⁴⁵ It is therefore unclear whether such classes would truly decrease the quantity of litigation unless they were made mandatory; that, in turn, could raise significant due process issues, and would put immense weight on the mechanisms for choosing, supervising, and compensating defense class counsel. Finally, even if a defense class device could be created that would fix these problems, there would still be the problem of judgment enforcement. A favorable judgment for the plaintiff in a defense class will still require the plaintiff to pursue collection against individual defendants, which might entail individualized suits to collect on a judgment; such a process could well end up looking similar to the assembly-line suits discussed above.²⁴⁶

These problems make it unlikely that defendant-side class actions will be developed that will solve the problems of assembly-line litigation.²⁴⁷ But a different type of aggregation is possible — what I call “turning defenses into claims.” This approach encompasses interventions that enable defendants to become plaintiffs, turning their legal defenses into actionable claims that, in turn, can be aggregated as a typical plaintiff-side class action. This type of aggregation avoids many of the procedural and incentives-based problems with defense-side aggregation. When plaintiffs possess a low-value claim, it is often in their interests to be members of a class pursuing that claim; and although there can still be principal-agent problems between members of a plaintiff

²⁴⁴ On the defense side, meanwhile, the fact that plaintiffs may simply drop the case against a defendant raising class defenses creates a disincentive for defendants to invest in the development of a class defense, even where fee shifting would otherwise reward such investment.

²⁴⁵ See, e.g., Hamdani & Klement, *supra* note 240, at 722; Reilly, *supra* note 240, at 1053–54; Rodrigues Netto, *supra* note 240, at 100–01 (arguing that defendant class actions should be mandatory).

²⁴⁶ Hamdani & Klement, *supra* note 240, at 727. Professors Assaf Hamdani and Alon Klement provide a proposed set of procedures to mitigate some of the problems described in these paragraphs. *Id.* at 731–34. But as they acknowledge, some of these problems are simply unavoidable, such as the increased liability risk for defendant class members who would otherwise be unlikely to be sued.

²⁴⁷ Additionally, one of the main justifications presented for defendant aggregation — deterring the conduct that defendants are accused of — may not apply as robustly in the assembly-line context. See Shen, *supra* note 240, at 76 (“[T]he utility of a defendant class action should be measured by its contribution to future deterrence of harms by the proposed defendant class.”). In an assembly-line context, the alternative to aggregation in many cases will be a judgment against the individual defendant, rather than no suit at all.

class and their attorneys, there are also a variety of mechanisms for aligning the interests of class members with each other and with their attorneys.²⁴⁸

The problem of predominance that was just mentioned will still limit this strategy — in many circumstances, there will be fact-specific defenses that are unsuitable for becoming actionable claims that would support a class action. But there is also reason to believe that there will be enough common wrongs that developing the incentives to investigate, discover, and litigate them should be part of the reform toolkit. The FDCPA, for instance, can be understood as adopting this approach in certain provisions. The FDCPA, among other things, provides a cause of action that allows consumers to go after debt collectors who engage in a specific list of common abusive actions.²⁴⁹ Many of its provisions aim at conduct unrelated to litigation, such as the threat of violence to collect a debt, the public shaming of debtors, or frequent communication with the intent to harass a debtor.²⁵⁰ But the FDCPA also contains several provisions that incorporate the law surrounding the debt obligation in some way: for instance, the FDCPA prohibits collecting debt amounts beyond those “expressly authorized by the agreement creating the debt or permitted by law”;²⁵¹ it also prohibits “[t]he false representation of . . . [the] legal status of any debt”;²⁵² and it contains a broad prohibition on using “false, deceptive, or misleading representation[s]” in connection with debt collection.²⁵³

These provisions have been interpreted in ways that effectively allow debtors to bring affirmative causes of action with legal arguments that previously could have been raised only defensively. For instance, some courts have held that where a debt collector attempts to collect a debt that is time-barred, a consumer can sue under the FDCPA — giving the consumer an option beyond raising the time bar defensively in collection litigation.²⁵⁴ The same is true for efforts to collect a debt that has been

²⁴⁸ See, e.g., Alex Atticus Parkinson, *Class Actions as Firms*, 2016 COLUM. BUS. L. REV. 740, 751–58 (describing ways in which courts “aggressively regulate” the principal-agent problems that arise in the class context, *id.* at 751).

²⁴⁹ See 15 U.S.C. § 1692k.

²⁵⁰ See *id.* § 1692d.

²⁵¹ *Id.* § 1692f(1).

²⁵² *Id.* § 1692e(2)(A).

²⁵³ *Id.* § 1692e.

²⁵⁴ See, e.g., *Tatis v. Allied Interstate, LLC*, 882 F.3d 422, 430 (3d Cir. 2018); *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1020 (7th Cir. 2014). The appropriateness of such a suit may depend on both the facts of the particular case and the court in which the claim is brought. Some courts have held, for instance, that efforts to collect time-barred debt may be permissible if the debt collector did not threaten to sue to collect the debt, but instead sought to collect the debt only outside of litigation. See *Holzman v. Malcolm S. Gerald & Assocs., Inc.*, 920 F.3d 1264, 1270–73 (11th Cir. 2019) (discussing distinct approaches taken by different federal circuit courts).

discharged in bankruptcy,²⁵⁵ or debt that is owed by someone other than the person from whom collection is sought.²⁵⁶

Such a model is generalizable to at least some other contexts, and can work with both procedural defenses and substantive defenses.²⁵⁷ Take, for instance, the problem of fraudulent service of process, which has appeared frequently in both housing litigation and debt-collection litigation.²⁵⁸ The FDCPA has been used to pursue settlements from debt-collection companies and process servers on behalf of classes of individuals who were affected by default judgments resulting from fraudulent notice practices.²⁵⁹ Similar legislation could create causes of action around fraudulent service in the housing context; or a freestanding, transsubstantive cause of action could be created against process servers (and perhaps those employing them) that engage in “sewer service” techniques. It is even possible that, without additional legislation, existing broad statutes such as those governing unfair and deceptive business practices could be leveraged to a similar effect. And other procedural problems, like the failure to observe limitations on garnishment or other forms of judgment enforcement, may be amenable to this approach as well.²⁶⁰

The model can also be extended to substantive defenses. As noted above, for instance, the FDCPA creates a cause of action for a variety of substantive defenses to a claim that someone owes a debt, including that the debt is time-barred, has been discharged in bankruptcy, or is owed by a third party. And in some jurisdictions in the United States, tenants can bring affirmative cases against their landlords if their residential lease terms contain unenforceable provisions.²⁶¹ Such an

²⁵⁵ See *Ross v. RJM Acquisitions Funding LLC*, 480 F.3d 493, 495 (7th Cir. 2007).

²⁵⁶ See, e.g., *Young v. NPAS, Inc.*, 361 F. Supp. 3d 1171, 1188 (D. Utah 2019).

²⁵⁷ The FDCPA itself may have been weakened in recent years due to the Supreme Court’s decision that one of the two definitions of “debt collector” does not apply to third-party debt collectors who purchase others’ claims and then collect on them. See *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1721–22 (2017). It is still unclear whether that decision will have or has had a significant effect, as the FDCPA’s other definition of “debt collector” may still apply to many actors. See, e.g., *Barbato v. Greystone All., LLC*, 916 F.3d 260, 266 (3d Cir. 2019); see also April Kuehnhoff, *Key Post-Henson Decision Holds Debt Buyer Is a “Principal Purpose” Debt Collector*, NAT’L CONSUMER L. CTR. DIGIT. LIBR. (Mar. 7, 2019), <https://library.nclc.org/key-post-henson-decision-holds-debt-buyer-principal-purpose-debt-collector> [<https://perma.cc/QG6E-WYB4>]. But in any event, the generalizability of the model means that it can be implemented in a number of ways, including through state FDCPA analogues or more general consumer protection statutes.

²⁵⁸ See *supra* notes 157–63 and accompanying text.

²⁵⁹ See, e.g., *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 76 (2d Cir. 2015).

²⁶⁰ Turning defenses into claims is one mechanism that would permit what Hamdani and Klement refer to as the “pay now, sue later” solution to the problem of negative-value defenses, see Hamdani & Klement, *supra* note 240, at 734, but is not limited to contexts in which a defendant has already paid money to the plaintiff.

²⁶¹ Meirav Furth-Matzkin, *The Harmful Effects of Unenforceable Contract Terms: Experimental Evidence*, 70 ALA. L. REV. 1031, 1064 (2019).

approach could be extended to consumer contracts of adhesion, allowing for legal actions against companies that include the kinds of unenforceable contract terms most likely to be the basis of spurious claims against consumers.²⁶²

Turning defenses into claims is most likely to be successful where a “least-cost avoider” type of reasoning can be followed, creating a claim that can be pursued against entities that are best-positioned to address the particular harm that is at issue. It can, for instance, be hard to guarantee systemically effective service of process across tens or hundreds of thousands of cases. Some of the evidence of sewer service comes from pointing out that individual process servers appear not to have visited the locations that they claim to have visited in court filings; it can be difficult to tell, without more, whether these failings are due to intentionally fraudulent systemic practices or due to indolence by a particular process server. But the companies that employ these process servers across hundreds or thousands of cases, or independent process-server companies that hire, train, and supervise the individual process servers, are undoubtedly in a better position to observe and prevent the sort of widespread failings of service of process that occur in housing, debt-collection, and other consumer contexts. The problem right now is that they often will not internalize the costs of these service failings — to the contrary, they are likely to benefit from them.

The defenses-into-claims approach is not a universal fix. Even though plaintiff-side aggregation is generally more feasible than defense-side aggregation, that does not mean it will always be an option. Many consumer contract claims and defenses alike are highly fact-specific, regarding the nuances of what was said during a transaction or the physical conditions of a rental housing unit. Where the core legal issues in a dispute turn on such fact-specific determinations, there may be no significant issues that the dispute has in common with others, and therefore no effective means of aggregation. And where there are contractual relationships between plaintiffs and defendants, the ubiquity of arbitration clauses with class action waivers will also be an impediment to effectively pursuing affirmative class actions.

But, as FDCPA litigation demonstrates, there will still be circumstances in which arbitration clauses don’t apply and there are issues that are aggregable on a class-wide basis. In those circumstances, turning defenses into claims has a number of benefits. Where a consumer debtor, tenant, or other type of common defendant is granted a claim, that claim can become the basis for a contingent fee, helping to finance the pursuit of the claim. The prospect of these aggregable claims, and

²⁶² *Id.*; see also Brady Williams, Note, *Unconscionability as a Sword: The Case for an Affirmative Cause of Action*, 107 CALIF. L. REV. 2015, 2018 (2019) (“[T]he doctrine of unconscionability must be recrafted into an offensive sword that provides affirmative relief to victims of unconscionable contracts.”).

the fees associated with them, may also incentivize investigation into the kinds of repeated wrongs — like editing the dates on many accounts in a single spreadsheet — that could serve as the basis for a common issue across many cases, helping address the predominance problem discussed above. Additionally, the possession of a claim changes the dynamics of prelitigation negotiations; a consumer who has an affirmative claim regarding a contractual term, for instance, can sue to pursue that claim, rather than having to risk breaching the term and then raising their argument as an affirmative defense in defensive litigation.

Turning defenses into claims also has distinct advantages when compared with other interventions that are not designed with assembly-line litigation in mind. First, aggregating claims is more cost-effective than approaches that just subsidize lower-income persons' legal defenses or require the case-by-case addition of more defendant-protective procedures. Where aggregation is appropriate, the per-person cost of asserting a defense-turned-claim can become quite low. In contrast, subsidizing legal assistance or increasing judicial responsiveness do not respond to the underlying problem of defenses or procedures that may cost more to pursue than they are worth. Similarly, although fee shifting in isolation may be useful to help finance lawyers for otherwise-unrepresented defendants with meritorious claims, such an approach likewise does not reduce the per-case cost of litigation.

Second, the type of affirmative litigation that this approach enables is already relatively familiar in legal systems around the country. This approach is therefore relatively easier to implement within existing civil justice institutions than interventions that require more radical overhauls to institutional procedures and design.

Third, turning defenses into claims is a policy tool that can be both focused and flexible, allowing it to be tailored to address specific substantive policy concerns in addition to the broader concern of assembly-line litigation. A cause of action regarding the inclusion of unconscionable contract terms, for instance, could be created only with respect to consumer credit-card transactions, or only against landlords with a minimum number of rental units. And remedies can be tailored, too; statutory damages provisions, for instance, can be set with floors or ceilings depending on a defendant's size and culpability.²⁶³ Such statutory damages in particular can be used both to make certain kinds of claims more appealing for lawyers to take on and to impose costs on wrongdoers that more accurately reflect broader negative consequences to their behavior, such as negative externalities that are not captured by traditional damages awards.

Finally, turning defenses into claims helps promote an enforcement environment in which private enforcers are incentivized to find, investigate, and pursue violations of the law. Such private enforcement is

²⁶³ See, e.g., 15 U.S.C. §§ 1681n, 1692k.

likely to provide improved deterrence and compensation compared to a regulatory regime that relies primarily or only on government enforcers.²⁶⁴ Private enforcers can help make up for resource and information constraints faced by public enforcers, and financial incentives can motivate private enforcers to pursue cases where public agencies are slow-footed or disinterested.²⁶⁵

The approach of turning defenses into claims is a limited one, and will not be able to solve all of the problems of assembly-line litigation. But for the disputes in which it is feasible to turn common defenses into aggregable claims, doing so offers a way to combat the downsides of assembly-line litigation, potentially using existing procedures or even substantive laws that are already on the books.

C. *Transforming Adjudication*

The prior two sections have addressed potential interventions that would fit relatively comfortably within many existing court structures. But the problems with assembly-line litigation are of a sufficient scale that it is worth considering more foundational changes to the institutional architecture used to resolve assembly-line claims.

In particular, the results documented in Part II suggest that a significant current function of state courts is no longer presiding over disputes in the traditional sense, but is instead receiving and processing one-sided petitions for the redistribution of financial assets. In the docket-level analysis, defendants did not file appearances or motions in between 70% and 80% of all cases. Default judgments were rampant. These figures suggest a reconceptualization away from assembly-line cases as ones in which two parties hash out a conflict. Instead, it may make more sense to think of assembly-line cases as petitions from a company to the state, in which third parties are permitted to play a role but rarely do so. This framing emphasizes the two entities that are always present — the plaintiff and the state.

Recognizing this arrangement suggests that important solutions may lie in a reordering of the relationship between the plaintiff's claim and the state's involvement. The most basic way to do this would be to have courts test plaintiffs' claims more rigorously, for instance by more actively eliciting facts from defendants. Such an approach has the potential benefit of promoting both accuracy and fairness.²⁶⁶ But there are real costs, too. As discussed above, the cost of court time is significant when extrapolated across the universe of civil cases.

²⁶⁴ See, e.g., Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103 (2006).

²⁶⁵ See, e.g., BRIAN T. FITZPATRICK, *THE CONSERVATIVE CASE FOR CLASS ACTIONS* 31–32 (2019); Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285, 308–10 (2016).

²⁶⁶ See, e.g., Steinberg, *supra* note 46, at 947–68.

But the more active probing of plaintiffs' claims does not necessarily need to occur within a traditional one-case-at-a-time adjudicative system. By departing from such a model, it would be possible to facilitate greater government oversight of claim processing while still managing costs. Such a transformation can be thought of as moving away from claim processing in the model of civil courts, and toward claim processing in the model of state agencies.²⁶⁷ This transition would carry two primary advantages. First, by abandoning the pretense of court-like procedures, including court-like neutrality, moving toward an agency model allows for an agency to be transparently and explicitly assigned the role of consumer protection. An agency could take on the mantle of notifying consumers of the claim against them and providing a simplified way of disputing the validity of that claim. And even in the absence of significant consumer participation, the agency could be tasked with assessing the validity of the claim based on general legal standards, such as compliance with the statute of limitations and proof of ownership of the debt.

Second, freed from the normal structures of litigation (and even aggregate litigation), new agencies or specialized courts could examine and resolve claims at larger scales, using tools such as batch processing, collective adjudication, and claim sampling. In this way, such new institutions could take advantage of economies of scale themselves, allowing for more effective claim processing than existing tools such as the appointment of special masters or inspectors.²⁶⁸

With batch processing, plaintiffs could submit many claims to a new "debt court" or "debt agency" all at the same time. A bank could, for instance, submit debts that arose out of the same type of underlying contractual transaction; a debt buyer could submit debts that were acquired via the same contract. Depending on the types of claims, the size of the plaintiffs, and the nature of the underlying transactions, the receiving agency could require claims to come in certain volumes and with certain types of standardized reporting or formatting, allowing for more efficient analysis and processing.

Receiving claims in batches, in turn, would allow for types of collective adjudication that would look strange in typical courts of general jurisdiction. When an agency receives a batch of cases, it could proceed to notify the defendants of the claims against them, and create a defined period of time in which the debtors are able to dispute the claim and provide testimony or documentary evidence to the agency. If existing

²⁶⁷ Professors Yonathan Arbel and Jessica Steinberg have each suggested incorporating administrative agencies into the civil justice system in the context of consumer debt. See Arbel, *supra* note 7, at 124; Steinberg, *supra* note 7, at 1612–16; see also *infra* notes 274–278 and accompanying text.

²⁶⁸ Cf. Steinberg, *supra* note 7, at 1613–20 (describing how amassing and sharing large amounts of information could assist courts by enabling "more vigorous scrutiny of habitual bad actors," *id.* at 1619).

court cases are any indication, only a small number of defendants are likely to participate. For the ones who do participate, the agency can engage in a full and active factfinding. Meanwhile, because the batched claims are all related in at least some loose way, the agency can examine the disputed claims for evidence of patterns — for instance, if there is a branch office of a bank where customers repeatedly allege that they were verbally misled about a product, or if there is one tranche of claims purchased by a debt buyer that repeatedly appears to include accounts that have already been collected on. Where such patterns exist, the agency could require more evidence from the plaintiff regarding other claims that may be similarly faulty, or could open an investigation into the plaintiff where there is evidence of fraud or other wrongdoing.

Collective adjudication thus has both epistemic and logistical benefits when compared with case-by-case adjudication. Epistemically, it allows an agency to arrive at a more informed view of a particular set of transactions, helping to overcome the limitations of a case-by-case adjudicative system in which many cases involve no defensive evidence whatsoever.²⁶⁹ Logistically, collective adjudication allows agencies to develop bespoke requirements for a batch of transactions, which permits agencies to address problems that arise across large numbers of cases without having to make a formal procedural or evidentiary rule that applies to *all* cases.²⁷⁰

Either as part of collective adjudication, or as a way of improving the processing of claims for which collective adjudication is infeasible, agencies could also engage in claim sampling.²⁷¹ Claim sampling entails taking a sample of a set of claims filed by a particular plaintiff and investigating them thoroughly.²⁷² Where the sampling reveals evidence of fraud, a disproportionate number of bad claims, or other types of predetermined problems, the agency could penalize the plaintiff. Potential penalties could include a fine, or a requirement that the plaintiff pay the agency to engage in a higher level of vetting of its current or

²⁶⁹ Some of these epistemic benefits could also be achieved without significant institutional overhauls of the kind described here. For instance, Steinberg has described how “reciprocal communication channels” could be developed between courts and consumer protection agencies such as the Consumer Financial Protection Bureau (CFPB) to help both agencies and courts identify bad actors and make more informed decisions. See Steinberg, *supra* note 7, at 1618–20.

²⁷⁰ Cf. Adam S. Zimmerman, *Surges and Delays in Mass Adjudication*, 53 GA. L. REV. 1335, 1345–51 (2019) (describing tools that federal agencies have used to develop new programs and procedures to deal with mass adjudication); Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767 (2017) (describing the ways in which courts and agencies change procedural rules to address case- and context-specific problems).

²⁷¹ See Arbel, *supra* note 7, at 146–51 (describing hypothetical ways that sampling could assist in the processing of debt-collection claims); cf. Michael Sant’Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 YALE L.J. 1634, 1676–80 (2017) (describing the use of sampling by the Office of Medicare Hearings and Appeals).

²⁷² See Arbel, *supra* note 7, at 146–51.

future filings. If done well, a regime of sampling and penalties could be a significant deterrent for filing bad claims and using fraudulent practices, increasing the quality of the claim pool overall and even saving time and money on adjudication on net.²⁷³

Professor Yonathan Arbel has proposed a form of claim sampling via what he calls the “adminization” of debt-collection cases.²⁷⁴ Arbel proposes addressing many of the problems of debt-collection litigation by having an administrative agency screen cases before they are processed by a court.²⁷⁵ Under Arbel’s proposal, an agency — such as the Consumer Financial Protection Bureau (CFPB) — would be notified of all filed lawsuits and would select a sample of those lawsuits to audit either randomly or based on an algorithmic assessment of case quality.²⁷⁶ Cases that are not audited would proceed in court, as would cases in which an audit does not find evidence of abuse or fraud.²⁷⁷ Such a mechanism would deter many of the worst practices of fraud that characterize lawsuits filed by debt buyers.²⁷⁸

Arbel’s proposal would be a significant improvement on the status quo. But there are two reasons that it may be better to restructure the institution doing the actual processing of claims rather than having an agency perform a limited investigatory function and then allowing cases to proceed to court largely as they currently do. First, although it is important to weed out outright fraud and abuse, plaintiffs also bring claims that are invalid for other reasons, such as simple mistakes of fact or invalid contractual provisions. It is possible that deterring fraud and abuse will result in a significant reduction in case volumes; but it also seems entirely possible that a significant volume of claims will remain, and the efficient and accurate processing of those claims will remain a worthwhile goal. Mechanisms such as batch processing and collective adjudication provide means of resolving large numbers of claims more efficiently than the case-by-case methods of assembly-line litigation in the status quo.

Second, it is important to provide improved protections to defendants at the judgment-enforcement phase in addition to the liability phase. Even if an agency does an excellent job of gatekeeping and sends predominantly valid claims along to a court, there could still be problems with courts failing to observe safeguards against judgment enforcement.²⁷⁹ The current role that judgment enforcement plays — the transferring of assets from the defendant to the plaintiff — is not

²⁷³ See *id.* at 157.

²⁷⁴ See *id.* at 146–51.

²⁷⁵ See *id.* at 142–43.

²⁷⁶ *Id.* at 147–48.

²⁷⁷ *Id.* at 143. Arbel also notes the possibility that litigation could continue to proceed after the plaintiff is fined in scenarios where the CFPB detects fraud or abuse. *Id.*

²⁷⁸ See *id.* at 157.

²⁷⁹ See *supra* notes 169–182 and accompanying text.

one that must necessarily reside in a court of general jurisdiction. It could instead be a function that is safeguarded by a specialized court or agency with an explicit consumer-protecting role. And failure by the agency to observe the safeguards around judgment enforcement could itself be the subject of judicial review, or even a “defenses-into-claims”-style lawsuit in which wronged judgment debtors could seek reimbursement from an agency with a pattern or practice of failing to follow the law.

There are a variety of institutional structures that could accommodate these reforms. They could be implemented by changing the procedures in existing courts; by creating new specialized courts; by creating new administrative agencies; or by giving new tasks to existing agencies. For agency-centric approaches, due process protections could be maintained by leaving open the possibility of judicial review of agency decisions. Such additional layers of review create obvious possible inefficiencies. But given that one of the main problems of assembly-line litigation is a lack of participation by defendants, it seems unlikely that a significant number of defendants would seek review of the agency’s handling of the claim against them. To the contrary, the most likely outcome is that there would be more oversight of claims brought against defendants, not less; and such oversight would come through more efficient structures than a case-by-case increase in procedural oversight.

It is also possible to imagine arrangements that could be adopted largely within existing court structures while attempting to harness some of the same benefits of departures from one-case-at-a-time processing. State courts could, for instance, audit random samples of filed cases, or appoint attorneys to a random sample of cases, and publish results lists of the proportion of claims filed by each major plaintiff that withstood increased scrutiny.²⁸⁰ In addition to generating useful information, such lists could themselves pressure major plaintiffs to improve their claim mix through the threat of increased targeting by public or private enforcement or public regulation. These types of mechanisms could thereby leverage limited resources without dramatic changes to existing procedural arrangements.

Many of the measures described here, though, would amount to a more radical restructuring of civil justice institutions than those described in the previous sections. They reflect the radical departure of assembly-line litigation from the adversarial norms around which our civil justice systems were built. The history of courts in the United States is full of a wide variety of reforms, particularly in the areas of

²⁸⁰ See Arbel, *supra* note 7, at 144–46 (discussing agency-run audits). Thanks to Professor Richard McAdams for the suggestion that such audits could be implemented by court-appointed lawyers without much change to existing institutional structures.

small claims.²⁸¹ Assembly-line litigation is a sizable phenomenon with serious shortcomings that has persisted for many years. Given that, questioning the structure of dispute resolution more foundationally is certainly appropriate, and reforms to that structure may ultimately be necessary.

CONCLUSION

Assembly-line plaintiffs show no sign of slowing down. Because of both the increases in consumer debt and the improvements in their litigation technology, they continue to grow: Public filings from two of the largest debt-collection companies, Encore Capital Group and Portfolio Recovery Associates, show an annualized increase in revenue of more than twenty percent every year from 2002 to 2015.²⁸² In recent years, the combined annual revenues from litigation of the top few debt buyers have routinely topped one billion dollars.²⁸³ That activity is expected to increase due to the ongoing pandemic; Encore Capital, for instance, announced during the second half of 2020 that it had doubled its previous record earnings for a single quarter.²⁸⁴

Improving the way that courts handle these cases will require both familiar and novel approaches. Some of the problems of assembly-line litigation sound in the familiar realm of improving due process for unrepresented defendants. Fraudulent or insufficient service of process undermines the efficacy of notice, while the inaccessibility and costs of civil litigation impair the meaningful opportunity to be heard. But other problems with assembly-line litigation suggest that promoting systemically accurate adjudication may require methods that go beyond improvements to the processes of notice and the mechanics of individual hearings. Where plaintiffs have developed efficient bureaucracies for the mass processing of claims, enforcing the law requires an adjudicative

²⁸¹ See, e.g., Judith Resnik, *Reinventing Courts as Democratic Institutions*, DAEDALUS, Summer 2014, at 9, 11; Eric H. Steele, *The Historical Context of Small Claims Courts*, 6 AM. BAR FOUND. RSCH. J. 293, 313–16 (1981).

²⁸² Stifler, *supra* note 7, at 96 & n.24.

²⁸³ *Id.* at 98; see also Encore Cap. Grp., Annual Report (Form 10-K), at 31 (Feb. 26, 2020); PRA Grp., Annual Report (Form 10-K), at 34 (Mar. 2, 2020). SquareTwo Financial, whose 10-K forms are analyzed in Stifler, *supra* note 7, at 98, went bankrupt in 2017, and sold its holdings to Resurgent LLC, a debt collector that is privately held and whose earnings are therefore not public. See Tim Bauer, *SquareTwo Announces Portfolio Asset Sale to Resurgent Holdings*, INSIDEARM (Mar. 20, 2017, 10:59 AM), <https://www.insidearm.com/news/00042715-squaretwo-announces-portfolio-asset-sale-> [<https://perma.cc/UP4C-86QG>].

²⁸⁴ See Paul Kiel & Jeff Ernsthause, *Debt Collectors Have Made a Fortune This Year. Now They're Coming for More.*, PROPUBLICA (Oct. 5, 2020, 5:00 AM), <https://www.propublica.org/article/debt-collectors-have-made-a-fortune-this-year-now-theyre-coming-for-more> [<https://perma.cc/768M-XWAW>]; see also Pamela Foohey, Dalié Jiménez & Christopher K. Oinet, *The Debt Collection Pandemic*, 11 CALIF. L. REV. ONLINE 222, 224 (2020) (“The coronavirus pandemic is set to metastasize into a debt collection pandemic.”).

system designed with cost and scale in mind. Ultimately, while comparing assembly-line litigation with the traditional model of adversarial litigation highlights the gap between that model and reality, solutions may be more likely to lie in embracing new ways of handling cases rather than seeking to reinforce these traditional forms.

APPENDIX I: METHODOLOGY

A. 2019 Cross-Sectional Study

The cross-sectional survey of the top-filer burden in state courts in 2019 was conducted using Westlaw Edge's "Litigation Analytics" tool. The trial courts of general jurisdiction in all fifty states and the District of Columbia were considered for inclusion within the survey. The survey proceeded in five main steps: (1) identifying whether Westlaw had data available for a given state's trial courts of general jurisdiction in 2019; (2) determining whether the data available for the state would allow for the determination of the top ten private filers of civil litigation in that state in 2019; (3) recording data involving the top private filers of civil litigation in the state in 2019; (4) determining what type of entity each of the top private filers were ("debt-collection company," "financial services company," or "other"); and (5) calculating the "top-filer burden" in each jurisdiction. In this section and the sections that follow, "the coder" refers to the person conducting the research and data entry, either the author of this Article or a research assistant.

1. *Identifying Available Data.* — Westlaw's Litigation Analytics tool contains a coverage table that lists its database's coverage, including the state, court type, court name, jurisdiction (for example, which county is covered), coverage type (for example, civil dockets or criminal dockets), and the years of the information available.²⁸⁵ Step (1) consisted of identifying the states with available civil dockets data at the trial court level. Every state that had at least one trial court jurisdiction listed with civil dockets coverage in 2019 was included for step (2). The number of jurisdictions with 2019 civil dockets coverage was then entered into the "Number of Jurisdictions" column on the results spreadsheet for that state. A list of the number of jurisdictions included for each state court system is appended at the end of this section.

2. *Finding Top Filers.* — Step (2) entailed engaging the Litigation Analytics tool for each state in turn as follows: Within the tool, the state's general jurisdiction trial court system was selected, and then "Experience" was selected from the main menu to navigate toward the "Docket Analytics" view.²⁸⁶ Within that view, using the "Filter by Category > Date > Date Range" tool, the dates for analysis were restricted to 01/01/2019 to 12/31/2019. The "Filter by Category > Court" tool was then selected to make sure that only data from the trial courts

²⁸⁵ Westlaw obtains this information from electronic copies of courts' dockets, as available. See *Litigation Analytics Coverage: Explanation of Coverage*, WESTLAW, [https://1.next.westlaw.com/Analytics/Coverage?transitionType=Default&contextData=\(sc.Default\)#/coverage/explanation](https://1.next.westlaw.com/Analytics/Coverage?transitionType=Default&contextData=(sc.Default)#/coverage/explanation) [<https://perma.cc/9EMC-MF6Y>].

²⁸⁶ Where a state had more than one general jurisdiction trial court system with data available in Westlaw, steps (2) through (5) were repeated separately for each court system.

for the state were being included; the number of jurisdictions listed below the trial court was then checked against the “Number of Jurisdictions” column in the state’s results spreadsheet to ensure a match. The “Filter by Category > Case Type” tool was then used to select every available case type other than “Criminal” and “Family Law.” At this point, the Litigation Analytics tool had loaded the relevant universe of cases: all civil cases filed between January 1 and December 31, 2019 (inclusive), in the relevant state trial court jurisdictions.

Next, the “Participants” option was selected to view the top participants in this universe of cases. Westlaw lists only twenty participants. The coder therefore determined whether there were at least ten private parties listed as participants. To do so, the coder excluded all entities whose names clearly referred to a state government, municipality, or government agency, such as “State of Michigan,” “City of Detroit,” or “Michigan Department of Revenue,” as well as generic stand-in terms such as “John Doe” or “Occupants.” If fewer than ten listed participants remained, the coder selected the “Filter by Category > Case Type” tool and deselected the “Tax” category, which would in some instances reduce the number of public participants on the list and add private parties. If, at this point, there were still not at least ten distinct private parties listed as top participants, the state would be removed from the survey.

If at least ten distinct private parties remained, the coder would then proceed to determine whether ten private “top filers” were identifiable from among the listed private participants. To do so, the coder considered each participant one at a time, selecting each participant’s name from the Docket Analytics tool to display only cases involving that participant, in sequential order. The coder then downloaded the list of dockets involving that participant in the Excel/CSV format.²⁸⁷ By comparing the “ROLE” column of this data with the “PARTICIPANT” column, it was possible to determine in each case whether the participant was a plaintiff in the case. To make this determination in bulk, the coder then ran the docket list through a program (a short script in the programming language R) that compared the information in those columns and identified the number of cases in which the participant was a plaintiff.

²⁸⁷ In some circumstances, the participant in question was involved in more than 1000 cases in 2019, preventing the coder from downloading the entire list of dockets for the year in a single file. In those circumstances, the coder adjusted the “date range” filter to obtain a time period in which the number of dockets was fewer than 1000, and downloaded the dockets for that period. This process was then repeated for subsequent date ranges until the entire 2019 period was covered and all dockets for the participant were downloaded. The docket lists were then combined into a single file for analysis.

This method was used to identify which participants were plaintiffs in at least 85% of their cases. These participants were dubbed “top filers.” If a state’s top-participants list for 2019 included at least eight top filers, the state was included in the study. This “85% rule” thus resulted in avoiding attempts to estimate the top-filer burden in states such as Michigan, where the top participants were almost all predominantly defendants and examining their filings would not give an accurate picture of either who the top repeat plaintiffs in the state were or the number of cases that they filed.²⁸⁸

After steps (1) and (2) were completed, there were twenty-two state trial courts of general jurisdiction across twenty total states remaining in the survey. Georgia and Indiana both had two state trial courts of general jurisdiction remaining in the survey, which is why the number of state courts exceeds the number of total states.

3. *Recording Data.* — Step (3) relied on the data gathered in step (2). For each state, the total number of civil cases listed in Westlaw within the universe of cases identified in step (2), including tax cases, was entered in the results spreadsheet. This number would become the denominator for the “top-filer burden” of that jurisdiction. The coder then created a list of ten participants for the state based on the ten parties identified in step (2) with the highest number of filed cases.

4. *Categorizing Top Filers.* — Step (4) primarily entailed conducting web searches to determine what type of company each “top filer” was: a debt collector, a financial services company, or another type of company. Most of the time, the company’s own website would be enough to make the relevant determination. Where the company did not appear

²⁸⁸ The 85% threshold was created to be permissive enough that it would be highly likely to include states in which large numbers of plaintiffs were identified via the top-participants list, but also strict enough that it would preserve confidence in the top-filer burden as a number that measured the filings of top plaintiffs, as opposed to top participants in general. An alternative threshold was considered, in which states would have been included if they had at least ten private parties listed in Westlaw’s top twenty parties, and at least a majority of those ten parties were plaintiffs in at least a majority of their cases. This metric would have resulted in the inclusion of two states that were not included in the cross-sectional study, Wisconsin and Hawaii. But in both of these states, numerous parties in the top participants returned by Westlaw were defendants in a supermajority of their cases, suggesting that Westlaw’s “top participants” listing might not be a reliable way of identifying top plaintiffs within the state. The 85% threshold was therefore used to preserve higher confidence that the top filers identified via Westlaw’s “top participants” list were truly the top filers in the state.

The number 85% was somewhat arbitrary, but it reflected the observation that top plaintiffs tended to be plaintiffs in an overwhelming proportion of their filings. For instance, of the fifteen private top participants in Georgia Superior Court in 2019, thirteen were plaintiffs in at least 98.5% of their cases, one was a plaintiff in about 95% of its cases, and one was a defendant in 100% of its cases. Similarly, in Indiana Circuit Court, fourteen of the fifteen private parties appearing in Westlaw’s top twenty participants were plaintiffs in over 95% of their cases, and the remaining party was plaintiff in about 94% of its cases. As a result, there were not many parties that were just below or just above the 85% cutoff, avoiding a result where the choice of a somewhat arbitrary cutoff included or excluded significant numbers of states compared to a threshold that was only a couple of percentage points higher or lower.

to have a functioning website that was easily returned via web search, the coder examined news reports, regulatory filings, consumer complaints, court cases, or agency adjudications to determine the appropriate categorization. Companies were only characterized as “debt collectors” where their self-characterization or multiple independent sources characterized one of their primary businesses as “collections,” “debt collection,” or the management or recovery of “accounts receivable.” Once a company was categorized, its name was added to a list for further reference in the coding of subsequent jurisdictions. The list of companies categorized as debt collectors or financial services companies can be found in Appendix II.

5. *Calculating the Top-Filer Burden.* — Finally, step (5) involved, for each state court system, dividing the total number of cases filed in 2019 by top filers by the number of nonfamily civil cases filed in 2019 overall. This number, depicted as a percent, was the “top-filer burden” for that jurisdiction in 2019. These numbers were then used to determine the average and median top-filer burdens across the states in the sample.

Beyond what is described in the main text, two more limitations are worth noting in more detail here, each of which is also likely to result in a more conservative estimate of the top-filer burden than actually exists. First, by only counting cases in trial courts of general jurisdiction, the top-filer burden numbers reported here miss the filings by repeat plaintiffs in small claims courts, at least in states where small claims courts are separated from trial courts of general jurisdiction.²⁸⁹ And evidence from several studies suggests that small claims courts can be overwhelmed by mass filings from a small number of repeat private filers — exactly the phenomenon being studied here.²⁹⁰ As a result, the top-filer burden in state courts of general jurisdiction may leave out an important part of the burden of assembly-line litigation in state courts as a whole. Second, because the aggregated totals on Westlaw depend on the automated detection of cases that have the same plaintiff, they are particularly susceptible to problems involving inconsistent entries and/or typos. For instance, while the Circuit Court of Illinois lists 3301 dockets in 2019 for “LVNV Funding LLC,” it also has 9 dockets for “LVNV Fudning,” 4 for “LVNV Funding” (without the “LLC”), and 1 each for “LVNV Fundig,” “LVNV Fundinc,” and “LVNV Funding LCC.”

²⁸⁹ In Connecticut Superior Court, for instance, small claims cases are heard within the general civil division. See *Divisions of Superior Court*, STATE OF CONN. JUD. BRANCH, <https://www.jud.ct.gov/external/super/divisions.htm> [<https://perma.cc/G9UE-76PV>].

²⁹⁰ See RICK JURGENS & ROBERT J. HOBBS, NAT’L CONSUMER L. CTR., *THE DEBT MACHINE: HOW THE COLLECTION INDUSTRY HOUNDS CONSUMERS AND OVERWHELMS COURTS* 12–16 (2010), https://www.nclc.org/images/pdf/debt_collection/debt-machine.pdf [<https://perma.cc/SMR4-Q6G5>].

Westlaw’s aggregation mechanisms appear to take some differentiations into account — identifying, for instance “Discover Financial Services d/b/a Discover Bank” as the same plaintiff as “Discover Financial Services.” But it was not feasible to search for every possible typo or different characterization of every top plaintiff’s name, and the total number of filings by some plaintiffs is likely an undercount for that reason.²⁹¹

The following table lists the number of jurisdictions available in each state for the 2019 study. For Alaska, Connecticut, Tennessee, and Washington, D.C., Westlaw does not divide the relevant court system into geographic jurisdictions, so the entry of a “1” in the “number of jurisdictions” reflects that data were available for this single unified listing within Westlaw.

Table 5: 2019 Available State Jurisdictions

STATE	COURT NAME	NUMBER OF JURISDICTIONS
Alaska	Superior Court of Alaska	1
California	California Superior Court	20
Connecticut	Superior Court of Connecticut	1
Florida	Florida Circuit Court	25
Georgia	Georgia State Court	2
Georgia	Georgia Superior Court	5
Illinois	Circuit Court of Illinois	3
Indiana	Indiana Circuit Court	64
Indiana	Indiana Superior Court	45
Kansas	Kansas District Court	6
Minnesota	Minnesota District Court	87
Missouri	Missouri Circuit Court	100
New Jersey	Superior Court of New Jersey	21
North Dakota	North Dakota District Court	53
Oklahoma	Oklahoma District Court	77
Oregon	Oregon Circuit Court	20

²⁹¹ It is also theoretically possible that Westlaw’s aggregation mechanisms could falsely identify two distinct plaintiffs as being the same entity. But in the course of coding 1000 individual case dockets for section II.C and examining spreadsheets involving tens of thousands more cases for sections II.A and II.B, no instances of this potential problem became apparent.

STATE	COURT NAME	NUMBER OF JURISDICTIONS
Tennessee	Circuit Court of Tennessee	1
Texas	Texas County Court	15
Washington	Washington Superior Court	39
Washington, D.C.	Superior Court of the District of Columbia	1
TOTAL		586

B. 2004–2020 Longitudinal Study

The longitudinal study proceeded largely as the cross-sectional study did but for the years 2004, 2008, 2012, 2016, and 2020 rather than the year 2019. The following steps note where differences occurred in the process.

1. *Identifying Available Data.* — Westlaw’s Litigation Analytics coverage table was consulted to identify state trial courts of general jurisdiction with continuous coverage from 2004 through 2020. Every state court system that had at least one jurisdiction with continuous coverage was included for step (2).

2. *Finding Top Filers.* — To narrow the universe of state court systems for which it was necessary to gather data for all five study years, court systems were included or excluded from the study based on whether, for that state system in 2004, it was possible to identify (a) ten private parties and (b) at least eight private parties who were plaintiffs in at least 85% of the cases in which they participated. The same methods for identifying top filers were used here as in the cross-sectional study, except that the universe of cases did not include every jurisdiction with data available in the year at issue. Instead, the “Filter by Category > Court” tool was used to select only those jurisdictions with data available for each study year, even though additional jurisdictions might be available in some subset of those years.

After court systems were excluded based on the analysis of filers in 2004, data were gathered for each study year. A problem arose in California in 2016 and in Illinois in 2008 and 2016, namely that in each of these years there were fewer than 10 private companies listed on Westlaw’s list of the top twenty participants.²⁹² In these states in these years, a separate method was employed to fill the empty “slots” necessary to come up with 10 private participants — 4 in California in 2016,

²⁹² In Illinois in 2008 and 2016, only 9 private companies were included, even after removing cases categorized as “Tax” and “Torts and Negligence” to remove public participants and generic stand-in terms (a strategy that yielded a ninth private filer in 2008); in California in 2016, only 6 private companies were included.

2 in Illinois in 2008, and 1 in Illinois in 2016. First, the private participants who appeared in each surrounding year but who did not appear as top participants in the year in question were identified. Next, using Westlaw's "Party" filter, these private participants' dockets for the year in question were obtained. Next, these dockets were downloaded, and the participants' filing rates were obtained and compared with each other.²⁹³ The participants with the most cases filed were then used to fill the empty slots.

This approach was used because it identified parties that were reasonably likely to have filed a large number of cases in the court system in question in the year in question; it may result in a low estimate of the top-filer burden for that year in that state, because it is possible that an unknown party filed more cases than the parties used to fill in the missing slots, but not enough cases to make it onto Westlaw's top participants list for the year. There was a relatively small difference between the number of cases filed by these proxies and the number of cases filed by the parties toward the bottom of Westlaw's list, suggesting that the parties added in this way were at least close to being on the list in the first place.²⁹⁴ Overall, this approach was used to fill only 6 slots out of the 400 slots across the longitudinal study; for each of these slots, the word "added" was entered into the notes column on the spreadsheet.

Steps (3) through (5) were the same for the longitudinal study as for the cross-sectional study.

C. Docket-Level Study

The docket-level study consisted of a docket-by-docket analysis of a sample of cases filed in 2019 by top filers identified in the 2019 cross-sectional study. This process proceeded in two steps: (1) constructing the sample, and (2) reading and coding the sample.

1. *Constructing the Sample.* — Among the state court systems analyzed within the 2019 cross-sectional study, access to the underlying filings within each suit was usually unavailable, limiting the docket-level analysis to information that was available on the face of the docket entry in Westlaw's Litigation Analytics database. In turn, there was a wide range of information available on these dockets. Ultimately, four states

²⁹³ For instance, American Express did not appear on the top participants list in California in 2016 (one of the problem years), but it did appear in 2012 and 2020. Conducting a search for American Express in the in-sample jurisdictions in California in 2016 revealed that it participated in 1750 cases that year; an examination of those cases found that it was the plaintiff in 1742 of them. After similar searches were run with the other parties that appeared on the 2012 and 2020 lists, but not the 2016 lists, the parties who were plaintiffs in the highest number of cases were used to fill the 2016 slots.

²⁹⁴ For instance, in Illinois in 2016, the added party was Resurgence Financial, which had filed 2699 cases; the next-highest filer, which was on Westlaw's original list, was Discover Financial Services, which had filed 2878 cases, a difference of less than 7%, comparable to most of the differences between parties on the list that year and in other years.

were selected to generate a sample based on the quantity and quality of information available on their dockets, as well as a desire to have some geographical and state-size variation within the sample. The four state court systems selected were the Superior Court of Connecticut, the Circuit Court of Illinois, the Circuit Court of Tennessee, and Washington Superior Court.

For each of these state court systems, the random number generator at random.org was used to randomly select 250 dockets from the universe of cases in which the top ten filers identified in the 2019 cross-sectional study were participants. This resulted in a sample of 1000 dockets, which were then analyzed and coded.

2. *Reading and Coding the Sample.* — Each of the dockets was read and coded for nineteen variables, which are listed below. For Connecticut, Washington, and Tennessee, the information used to code each case was limited to the information contained on Westlaw’s docket page for each case, plus any associated files linked to on that page that were accessible via Westlaw. For instance, in Tennessee, it was often possible to view the specific document associated with a court’s judgment. For Illinois, the docket information included information available on Westlaw as well as information available via the Circuit Court of Illinois’s online case search tool.

For each of these variables, “party” refers to the top-filer plaintiff, and “D” refers to the defendant in the case. Where variables had a yes or no answer, the coder input a “1” for a “yes,” a “0” for a “no,” and an “x” where the docket was ambiguous. Additional notes regarding each variable are included under that variable; additionally, certain state-specific considerations are listed later on.

- ◆ Original case number
- ◆ Case subtype
 - ◇ This variable relied on the subtype designation provided by the state court system, and used the narrowest categorization available. So, for instance, if a case was designated “Contracts > Credit Card,” this variable would be coded as “Credit Card.”
- ◆ Is party a plaintiff?
- ◆ Is party the only plaintiff?
- ◆ Is there only one defendant?
 - ◇ For purposes of this variable, a “garnishee defendant” (that is, an entity from whom a defendant’s garnishment was sought, such as the defendant’s employer or a bank) was not counted as a defendant.
- ◆ Is D a natural person?
- ◆ Is D represented?
 - ◇ A defendant was counted as represented if they were represented at any point during the case.

- ◆ Evidence of attempted service?
 - ◇ This variable counted any reference to a service attempt that appeared on the docket.
- ◆ Evidence of failed service?
 - ◇ This variable counts any evidence that a service attempt failed at any point, such as a return of a summons due to an incorrect address, even if there was subsequent evidence of successful service.
- ◆ Specific amount sought
 - ◇ An amount was only included for this variable where a specific amount was sought. So, for instance, although some dockets report a dollar-value range for the claim involved (for example, "\$1-\$5000"), these ranges were not included.
- ◆ Any motions, filings, or appearance by D prejudgment?
 - ◇ A "1" was coded here where there was a specific indication that a defendant had submitted something to the court or had appeared in court, even if there was no formal filing of an appearance or other motion. So, for instance, where a judgment form contained a defendant's signature, that was considered adequate for marking "1" here even if the docket did not reflect an appearance.
 - ◇ There were a number of potentially ambiguous situations regarding this variable, which are discussed in more detail below.
- ◆ Case closed?
 - ◇ This included any case that was marked as "closed," had a "termination" or "disposition" date, or had other similar language on the docket. It included cases that closed for any reason, including withdrawal, dismissal, judgment, and other similar dispositions.
 - ◇ Evidence of garnishment or other postjudgment activity did not prevent a case from being considered closed.
- ◆ Case withdrawn?
 - ◇ This included any mechanism by which a plaintiff withdrew a case, including a voluntary nonsuit, a voluntary dismissal, or a dismissal by stipulation or agreement.
- ◆ Open but abandoned?
 - ◇ This variable was coded "1" for any case that was not closed or withdrawn but had no docket activity after February 5, 2020 (a date selected because it was one year prior to when coding began).
- ◆ Case dismissed?
 - ◇ This variable was coded "1" if the case was disposed of in any way that involved use of the word "dismiss" or "dismissal," including voluntary dismissals.

- ◆ Judgment entered?
 - ◇ This variable was coded as “1” here wherever the docket indicated that a judgment had been entered; dismissals were included as judgments for purposes of this variable.
- ◆ Explicit default judgment?
 - ◇ This variable was coded “1” where a judgment (a) was labeled as a default judgment, or “ex parte” judgment in Illinois; (b) was entered with a citation to a court rule or statute specific to default judgments, such as “Judgment Pursuant to Rule 17-23” in Connecticut; or (c) was entered shortly after a motion requesting a default judgment or a finding of default and there was no intervening docket activity suggesting that the defendant may have appeared or submitted material to the court.
- ◆ Judgment amount
 - ◇ As with “specific amount sought,” a number was only entered here if the docket reflected a specific judgment amount, and not if only a range was given.
- ◆ If judgment winner stated, who was it?
 - ◇ This variable was only coded if the judgment was specifically labeled as being for the plaintiff or for the defendant; no inferences were made based on whether the judgment was a default judgment, a voluntary dismissal, or another similar disposition.
- ◆ Any evidence of garnishment or execution activity?
 - ◇ This variable was coded as “1” for any activity on the docket that occurred after the judgment and indicated that the judgment was being used in some way — for instance, it would be coded “1” where an order of garnishment issued, and also where a certified judgment was served on someone or a transcript of the judgment was requested.
 - ◇ This variable was not coded as “1” based solely on a docket entry noting that the judgment had been satisfied.

For the cases in Washington Superior Court, the dockets regularly did not attribute specific events, such as the filing of a motion, to a particular party. This led to significant ambiguity regarding whether defendants were represented and whether they had filed motions or appearances. These ambiguities were addressed as follows.

For determining whether a defendant was represented, if there was only one lawyer identified on the docket, it was attributed to the plaintiff because of the requirement that corporations use counsel to file.²⁹⁵

²⁹⁵ See, e.g., *Lloyd Enterprises, Inc. v. Longview Plumbing & Heating Co.*, 958 P.2d 1035, 1038 (Wash. Ct. App. 1998).

Where more than one attorney appeared, but no attorney was clearly associated with the defendant, the names of the attorneys were compared with other dockets in which attorneys were clearly associated either with the repeat-player plaintiff or a defendant. In ten cases, one of the attorneys appearing was Jonathan Baner, who appeared on behalf of defendants in several other cases; it was assumed that Baner represented the defendants in these ten cases as well. There were three remaining cases in which the defendant's representation status was ambiguous because a lawyer appeared on the docket but it was unclear whom the lawyer represented.

For determining whether the defendant had made an appearance or submitted filings, several assumptions were made as to what types of filings could reasonably be attributed to the plaintiff, or should be deemed ambiguous²⁹⁶:

- ◆ The following filings were assumed to be made by the plaintiff:
 - ◇ SMCMP: Summons and Complaint
 - ◇ MTFDL: Motion for Default
 - ◇ MTDJ: Motion for Default Judgment
 - ◇ AFNMS: Affidavit of Non-Military Service²⁹⁷
 - ◇ NTDMP: Notice of Dependent re Military Person
 - ◇ AFSR: Affidavit/DCLR/Cert of Service
 - ◇ RTSNF: Return of Service Not Found
 - ◇ Return of Service
 - ◇ Affidavit/Declaration of Non-Service
 - ◇ Dep't of Defense Printout
 - ◇ CMP: Complaint
 - ◇ SM: Summons
 - ◇ Case Information Cover Sheet
 - ◇ AF: Affidavit of Account Balance
 - ◇ AF: Affidavit of Claim
 - ◇ AF: Affidavit of Sum Certain
 - ◇ AFGAR: Affidavit for Garnishment
 - ◇ Writ of Garnishment
 - ◇ Cost Bill (in the absence of other filings by a D)
 - ◇ EXWACT: Ex Parte Action With Order

²⁹⁶ These assumptions were intended to be conservative, with this list containing only filing types that appeared to be overwhelmingly associated with plaintiffs. Many cases were coded as ambiguous for defendant appearance even if it appeared likely that a certain filing was associated with a plaintiff, out of a desire to keep the list of assumptions short and robust.

²⁹⁷ In collections litigation, for purposes of compliance with the Servicemembers Civil Relief Act, Pub. L. No. 108-189, 117 Stat. 2835 (2003) (codified as amended in scattered sections of 50 U.S.C.), it is common for a creditor to be required to submit an affidavit establishing that the defendant is not an active member of a military service. See, e.g., Roy L. Kaufmann, *The Military Affidavit in the Collection Process*, SERVICEMEMBERS CIV. RELIEF ACT CENTRALIZED VERIFICATION SERV., <https://www.servicememberscivilreliefact.com/blog/the-military-affidavit-in-the-collection-process> [<https://perma.cc/KVP8-EHEH>].

- ◆ The following filings were deemed inherently ambiguous:
 - ◇ DCLR: Declaration
 - ◇ Declaration of Mailing
 - ◇ Note for Motion Docket
 - ◇ Motion

APPENDIX II: LIST OF DEBT COLLECTORS
AND FINANCIAL SERVICES COMPANIES

Note: For purposes of these lists, a company is listed here by only a single designation, rather than by each way that it is identified within various court dockets. So, for instance, Wells Fargo Bank is listed here only once, and only as “Wells Fargo Bank,” without a separate listing for “Wells Fargo N.A.” or “Wells Fargo Bank N.A.”

DEBT COLLECTORS

Absolute Resolutions

AR Audit Services

Arrow Financial Services

Asset Acceptance

Asset Management Outsourcing

Asset Systems

Atlantic Credit and Finance

Baxter Financial

Bonneville Billing & Collections

Bureau of Medical Economics

CACH

Cavalry Portfolio Services

Cavalry SPV I LLC

CHF

Collection Center

Colorado Capital Investments

Columbia Collection Services

Columbia Collectors

Credigy Receivables Inc.

Credit Bureau of Bismarck, Inc.

Credit Collections Bureau

Credit Management Services

Credit Services of Oregon

Creditors Recovery Systems Inc.

Crown Asset Management

DCI Credit Services

Equable Ascent Financial

Financial Assistance Inc.

Hospital Services Incorporated

Jefferson Capital Systems

JPRD Investments

Laridian Consulting

LVNV Funding

Midland Credit Management

Midland Funding

Midwestern Health Management

MRC Receivables

New Century Financial Services

North Star Capital Acquisition

Palisades Collection

Portfolio Recovery Associates

Procollect Services LLC

Professional Finance Company

PSC

Quick Collect

Range Credit Bureau

Ray Klein, Inc.

Recovery Resources

Resurgence Financial

Trustmark Recovery Services

Tulsa Adjustment Bureau

Unifund CCR

United Accounts

Valley Credit Service Inc.

Vanz LLC

Velocity Investments

Wakefield & Associates

FINANCIAL SERVICES COMPANIES

Aeon Financial Service Co. Ltd.

American Express Bank

American Express Centurion Bank

Auto Advantage Finance of Tulsa LLC

Bank of America

Bank of Oklahoma

Boeing Employees Credit Union

Byrider Finance LLC

Capital One Bank

Chase Bank USA

Citibank

Citigroup

Concord Finance

Deutsche Bank

Discover Financial Services

FIA Card Services

Ford Motor Credit Company

Gault Financial

Harpeth Financial Services

JPMorgan Chase Bank

Lobel Financial

Monogram Credit Card Bank of Georgia

Oklahoma Motor Credit

Onemain Financial Group

Prestige Financial Services

Republic Finance

Synchrony Bank

Target National Bank

Tennessee Quick Cash

Tinker Federal Credit Union

US Bank

Wells Fargo Bank
