



## DUE PROCESS AND CONSUMER DEBT:

Eliminating Barriers to Justice  
in Consumer Credit Cases



NewYorkAppleseed<sup>®</sup>

JONES  
DAY | One Firm Worldwide<sup>SM</sup>





## ***Introductory Letter***

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While debtors' prisons may have been abolished in the mid-1800s, many working families today find themselves in a virtual prison of debt. With household debt and credit default at an all-time high—and joblessness and underemployment on the rise—the effect of the current consumer credit crisis will be felt for the next decade. Although we no longer imprison debtors, the legal system and, specifically, the civil courts remain the epicenter in the cycle of debt. Hundreds of thousands of consumer credit cases are filed and adjudicated each year in the five boroughs of New York City alone, making it one of the busiest courts in the world. On a daily basis, thousands of New Yorkers find themselves in the city's legal system as a result of alleged unpaid debt, facing complicated litigation and a daunting courtroom battle. Almost 100 percent of these defendants lack counsel of their own.

The New York City Civil Court and its judiciary and staff have been national leaders in establishing practical programs and reforms aimed at improving litigant access to information, whether through computer terminals that explain consumer debt litigation procedures or clinics that provide litigants with legal advice. New York Appleseed is honored to have found an open- and reform-minded collaborative partner in the New York State Courts Access to Justice Program. Led by the Honorable Fern A. Fisher, Deputy Chief Administrative Judge for the New York City Courts, this innovative court program ensures access to justice in civil and criminal matters for New Yorkers of all incomes and backgrounds and those with special needs, by providing multiple resources, including self-help services, pro bono programs, and technological tools, and by securing stable and adequate nonprofit and government funding for civil and criminal legal service programs. For years, Judge Fisher has been a persistent leader in court-based innovations expanding the access of consumer debtor litigants to case information and providing clearer guidance on how proceedings move forward. Judge Fisher and her team have also created and supported robust volunteer attorney programs providing legal advice and assistance to unrepresented consumer debtor litigants.

Even with these notable improvements, however, the grim reality of limited public funding and resources, coupled with a dramatically increasing caseload, means that the courts are under great pressure. Many aspects of the pre-litigation and litigation process remain stacked against consumers. These barriers lead to higher rates of default judgments, settlement under pressure, and other lost opportunities for fair process. Through this report, New York Appleseed seeks to address (i) barriers consumer debt litigants face in going to court, (ii) barriers consumer debt litigants face in court, and (iii) continued systemic barriers to due process. Over the past year, the civil courts have allowed New York Appleseed and our pro bono partner, the law firm Jones Day, access to a tremendous number of case records. Jones Day attorneys have interviewed a wide range of judges, court clerks, advocates, and attorneys. This report highlights the accomplishments of the civil courts and recommends best practices for courts of other jurisdictions seeking similarly effective reforms. In addition, drawing on our interviews and research, we set forth below a range of short- and long-term recommendations to increase fairness and efficiency.

We are grateful to Judge Fisher and her team—Laurie Milder, Special Counsel for the New York State Courts Access to Justice Program; Ernesto M. Belzaguy; and Carol Alt—and to Stewart Feigel; Joseph Traynor; and Monica Dingle; *pro se* attorneys Autrey Johnson and Eric Tang; and the judges and clerks of the New York City Civil Courts in Queens, Kings, and New York Counties for their time and shared expertise. We also extend deep thanks to the legal advocates who graciously gave their time and shared their resources with us, including attorneys and staff from the Civil Legal Advice and Resource Office, the Feerick Center for Social Justice, Fifth Avenue Committee, the Neighborhood Economic Development Advocacy Project, South Brooklyn Legal Services, the Urban Justice Center, and University Settlement House. Special thanks to MFY Legal Services and staff attorney Carolyn E. Coffey for assistance in the compilation of this report.

In this era of tightened resources for all public institutions, New York Appleseed recognizes the significant accomplishments of the civil court, which has been on the front lines of the consumer debt crisis. We hope this report reflects our shared call for practical innovations and reforms that, however modest in the face of limited budgets, will nonetheless have a profound impact on the experience of unrepresented consumer debtors in the legal system.

*Betsy Cavendish*  
Appleseed Executive Director

*Jennifer Ching*  
New York Appleseed Director

## *Acknowledgments*

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In addition to our colleagues in the New York City Civil Courts, New York Appleseed gratefully acknowledges pro bono partner and project leader Jones Day, which is the principal author of this report. This project was a massive undertaking with a very ambitious schedule. It could not have been accomplished without the leadership and support of Jones Day. The Jones Day Team included 20 volunteer attorneys and seven legal assistants, who spent in excess of 1,600 hours conducting research, holding interviews, and reviewing case records. We thank every member of the team:

Thomas J. Barry	Allison B. Petrone
K. Adam Bloom	Jennifer L. Phillips**
Jordan Cerruti*	Andre J. Ray
Kathleen J. Choi	Miriam Reznik
Toni-Ann Citera	Julie A. Rosselot
Adobea Debrah-Dwamena	Benjamin A. Ruzow
Marguerite S. Dougherty	Jennifer B. Schramm
Craig Friedman	Joan M. Sim
Haben Goitom	Miles J. Sweet*
Marlon S. Grant	Vicki R. Walcott-Edim
Bart Green	Miriam S. Weiler*
Patrick Hernandez	Timothy R. Yang*
Andrew S. Kleinfeld*	
M.D. Kyuchukov	* Summer associate, 2009.
Alex P. McBride	** Former legal assistant.

We are particularly grateful to the team's project leaders, who provided the organization and vision for the wealth of topics analyzed and researched and for the individuals interviewed: Jones Day partner and Appleseed board member Willis Goldsmith; partner Toni-Ann Citera; and associates Marguerite S. Dougherty (principal author), Miriam Reznik, and Julie A. Rosselot.

## ***About Appleseed***

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**Appleseed** is a nonprofit network of 16 public interest justice centers in the U.S. and Mexico. Appleseed is dedicated to building a society where opportunities are genuine, access to the law is universal and equal, and government advances the public interest. Appleseed uncovers and corrects injustices and barriers to opportunity through legal, legislative, and market-based structural reform. Working with our extensive pro bono network, we identify, research, and analyze social injustices; make specific recommendations; and advocate for effective solutions to deep-seated structural problems. Together, Appleseed and the Appleseed Centers form a network for positive change, dedicated to building a society that provides each individual access to justice and a genuine opportunity to lead a full and productive life.

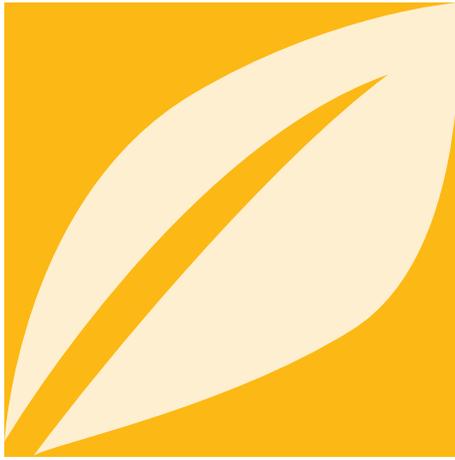
**New York Appleseed** solves problems affecting the daily lives of New Yorkers through projects expanding access to opportunity: economic, social, and legal. We work with volunteer attorneys, business leaders, government, and grass-roots advocates to identify critical issues, conduct thorough research, and advocate for effective solutions. We organize innovative public-private partnerships, publish legal and policy strategies, and are a nonpartisan, independent voice for reform. Our projects involve partnering community stakeholders with our pro bono volunteers to develop solutions to long-term, structural barriers to economic justice, affordable health care, housing, access to the courts, and education. New York Appleseed's Economic Opportunity Project advocates for broader access to financial justice for New York City's low-income communities. Our project leaders establish collaborative relationships between the public and private sectors to research, analyze, and develop strategic advocacy for pragmatic reforms in areas such as access to earned income tax credits, health care, and paths to financial security.

## ***About Jones Day***

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**Jones Day** has more than 2,500 attorneys in 32 locations worldwide and ranks among the world's largest and most geographically diverse law firms. Jones Day is one of the most recognized and respected law firms, counting more than 250 of the *Fortune* 500 among our clients. The Firm enjoys a long history of pro bono work, public service, and community involvement in all the locations in which we practice. Year after year, we continue to increase the pro bono legal services we provide to those in need. All 32 offices of the Firm have a partner in charge of pro bono to further develop the reach of our pro bono program and to fulfill our commitments in all our locations. And in January 2008, Laura Tuell Parcher was named the first full-time Partner in Charge of Pro Bono for the entire Firm. Our work ranges from complex cases with broad precedential impact to individual representations in local courts and administrative tribunals that are vital to needy individuals.

**Jones Day** is committed to increasing our contributions to serving and improving all of the communities served by the Firm.



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# EXECUTIVE SUMMARY



The financial crisis that began in 2007 has deeply affected a vast cross-section of New Yorkers, and its effects will ripple through the state—and its civil courts—for several years to come. Nationally, consumer debt increased rapidly over the past decade, particularly among low- and middle-income families. Increasingly, working families turned to consumer credit to pay for basic necessities. A recent nationwide survey of people with credit card debt revealed that 70 percent of low- and middle-income households reported using their credit cards as a safety net—relying on them to pay for car repairs, basic living expenses, medical expenses, or home repairs. With the collapse of the financial markets and the Great Recession, heavy job losses and underemployment have led to even greater reliance on consumer credit to make ends meet. In New York City, as working families fall further and further behind in bills, these debts will gradually make their way to the civil court system.



The New York City Civil Court is at the epicenter of the consumer credit crisis. Already one of the busiest courts in the world, over the past five years, the court has seen filings increase dramatically—in large part the result of consumer credit litigation. The extent of the problem is very broad. In October 2006, approximately 50,918 cases were filed in civil court in the five boroughs. In October 2007, 56,724 cases were filed, and in October 2008, 51,949 cases were filed. In each year, consumer debt litigations constituted approximately 40 to 60 percent of the filings. Without a doubt, these numbers will continue to escalate as the effects of the current economic crisis—including increased joblessness and loss of credit—develop into litigation in the months and years to come.

While consumer debt cases are brought by corporate creditors and institutions represented by private attorneys who specialize in the field, debtor defendants are virtually never represented by counsel. Moreover, persistent deficiencies in providing debtor defendants with notices of claims against them result in cases moving forward without defendants even *knowing* they have been sued. With limited legal services available, those who make it to court have nowhere to turn for legal advice or representation. Since all creditors are represented by counsel

and the defenses available to debtors can be complex, the gross disparity in representation means that debtors often never raise the overwhelming majority of legitimate defenses available to them. Creditors are able to obtain judgments against debtor defendants without ever needing to submit proof of the debt or the amount owed. More than 40 percent of these cases have resulted in default judgments against hundreds of thousands of New Yorkers. Indeed, in the 13,720 consumer debt cases filed in Kings and Queens Counties in October 2006, defendants filed answers in only 115 cases (or 0.8% of the total cases). In the 18,299 consumer debt cases filed in Kings and Queens Counties in October 2007, defendants filed answers in merely 1,062 cases (or 5.8% of the total cases). Finally, in the 14,171 cases filed in Kings and Queens Counties in October 2008, defendants filed answers in only 1,017 cases (or 7.2% of the total cases). While the figures have improved, the number of cases in which answers are filed is still very small.

The impact of these judgments can be devastating. A creditor with a judgment can garnish wages and freeze bank accounts. Once an account is frozen, the debtor may be unable to pay rent and utility bills, obtain medicine, or pay for food and other necessities. Often, due to additional penalties, interest, fees, and costs, the ultimate judgment obtained far exceeds any original debt that may have accrued. In some cases the defendant never owed the alleged debt, which may have been the result of identity theft, mistaken identity, clerical errors, or illegal fees and charges. In addition, when the judgment shows up on credit reports, it becomes difficult for the debtor to find an apartment, get a better job, and obtain credit. The result is that a single consumer credit judgment can severely impair a person's attempt to become self-sufficient, further perpetuating poverty.

Faced with this growing crisis, civil legal services attorneys and community justice advocates have called for a range of solutions to address the systemic inequities underlying the consumer debt industry. In response to advocates, the city council and state legislature have passed and are considering a number of reforms. Indeed, New York State judges have acted as vocal proponents of reforms that will ease the incredible burdens faced by the judiciary and court

personnel every day. Taking on leadership, the New York City Civil Court has instituted several creative reforms to provide debtor defendants with greater information and access to resources.

Over the past year, New York Appleseed and pro bono partner Jones Day have studied the consumer debt docket in the New York City Civil Courts to examine trends in consumer debt litigation, identify new and recurrent problem areas, document best practices implemented by the civil courts that should be replicated by other jurisdictions, and recommend improvements that would involve minimal expense in this era of fiscal constraint. Initially, we intended to focus on strategies for getting civil debt defendants to go to court. As the project progressed, however, our focus expanded to include ways to make the court proceedings more understandable. Additionally, our study of court filings indicated that many defendants who do file answers subsequently stop defending their cases, resulting in "default judgments" post-answer. Thus, our focus also grew to include how to encourage defendants to continue to follow cases they answer in court.

We found that most consumer debt issues can be broken down into three principal areas: (i) barriers consumer debt litigants face prior to coming to court, (ii) barriers consumer debt litigants face in court, and (iii) systemic barriers. The most substantial barrier litigants face prior to coming to court remains the intentional failure to serve defendants with legal process. This practice, known as "sewer service," contravenes statutory and constitutional law. Once in court, these defendants face a number of additional barriers, most of which stem from lack of information. Indeed, judges, court personnel, advocates, and civil litigants alike consistently reported that an information deficit exists that must be addressed. This lack of information gives the plaintiff leverage in a consumer debt case and disadvantages the consumer credit defendant. Nothing, however, disadvantages the consumer debt defendant more than the pervasive lack of representation—a problem for which there is no easy, cost-free solution.

Despite the immediate bleak outlook, at no time in recent memory have so many actors—governments, courts,

advocates, and creditors—been as acutely focused on the need for civil legal services and the plight of the unrepresented consumer debt defendant.

The following summary sets forth some of the challenges contributing to the inequities in consumer debt litigation, as well as key recommendations to help remedy the problems.

## ***Barriers to Court***

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### **Key Challenges**

- **Sewer Service.** Litigants, the court, the legislature, and advocates agree that sewer service (the intentional failure to serve a defendant) in consumer debt litigation remains a major problem.
- **Undeliverable Summons.** Between May 2008 and September 2009, 28,422 Rule 208.6 notice of action letters were returned to the court as undeliverable. Rule 208.6 of the Uniform Civil Rules for the New York City Civil Court, a recently implemented reform, requires court clerks to mail letters to consumer debt defendants notifying them of the actions filed against them.
- **Default Judgments.** In 2008, of the 618,528 cases filed in the New York City Civil Courts, 41%, or 255,187, ended in default judgments. In the first half of 2009, 264,585 cases were filed in the New York City Civil Courts, and 35%, or 92,265, ended in default judgments.

### **Key Recommendations**

- *Mandate the mailing of a pre-commencement letter as a precondition for instituting a suit against a consumer debtor and implement practices to address accuracy of service.*
- *Expand the use of Rule 208.6 notification letters to New York civil courts and their counterparts statewide.*

- *Improve upon the Rule 208.6 notices by translating certain parts into other languages, including information about currently available legal resources, and by requiring an address search for 208.6 notices returned as undeliverable.*
- *We urge the New York State Legislature to amend the New York Civil Practice Law Rules (“CPLR”) so that it requires process servers to be reimbursed for transportation costs to and from the service location and to utilize technology to document service attempts.*

## ***Barriers in Court***

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### **Key Challenges**

- The information deficit is one of the biggest hurdles an unrepresented consumer debt defendant faces in defending his or her case:
  - The summons provides the first concrete instruction to the defendant regarding what he/she must do upon receipt of the complaint. The language in the summons, however, appears only in English and Spanish. Also, due to the overuse of capitalization and punctuation, it may not appear to some defendants to be a formal legal document.
  - Complaints lack substantive information about the claim, *e.g.*, the date of default.
  - The consumer debt defendant typically, but incorrectly, assumes that an answer with defenses will trigger judicial inquiry.
  - Consumer debt defendants do not understand court proceedings.
- Repeated court appearances can be difficult for consumer debt defendants to attend, due to employment or family-care issues, and can lead to default judgments.

## Key Recommendations

- *We urge the Chief Administrative Judge of the New York State Unified Court System to amend the rules to change the language and appearance of the summons to look more formal yet be more readable and to translate the summons into other frequently spoken languages, such as Chinese, Korean, Russian, and French, in addition to Spanish.*
- *The New York State Legislature should amend the CPLR to require the pleading of certain fundamental allegations in the complaint.*
- *We encourage the Chief Administrative Judge of the New York State Unified Court System to create a “courthouse dictionary,” a pamphlet explaining vocabulary frequently used during proceedings, and to make it available in close proximity to the courtroom.*
- *Make certain discovery and court inquiries into the answer automatic upon the filing of certain defenses. For example, when a defendant pleads that he/she disagrees with the amount of the debt, document discovery of the plaintiff should be automatic. The plaintiff should be required to produce proof of the debt without the need for written requests by the defendant. Likewise, where a defendant pleads that he/she has paid the debt, it would be appropriate for the defendant to produce such proof.*
- *Create a model stipulation of settlement, including the account number, the original creditor, the total amount agreed to, and the monthly amount agreed to. Also, create a model allocution form that all civil court judges can use to promote consistency and help ensure that defendants understand the settlements they enter into and the rights they may waive by doing so.*
- *Limit adjournments in consumer debt litigations.*
- *Create evening hours to aid settlement and resolution of consumer credit matters. The courthouse could designate certain nights per week for resolution of consumer credit matters when consumer defendants acknowledge that they owe the debt and state on their answer forms that they*

would like to work out a payment plan. The court could ensure that these evenings overlap with existing advice and legal service programs.

- *Enact the proposed Consumer Credit Fairness Act in New York, which would incorporate significant and appropriate changes to the present state of consumer debt litigation practice and help level the playing field for unrepresented defendants.*

## Systemic Barriers

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### Key Challenges

- Studies show that less than 4 percent of defendants in consumer debt actions are represented by counsel, while 100 percent of plaintiffs bringing these actions have legal representation.

### Key Recommendations

- *We encourage the New York State Legislature and the New York City Council to increase funding directed at expanding existing volunteer/pro bono lawyer programs. Modest grants can expand representation of consumer debt defendants in a variety of forms, including recruiting law students or volunteer lawyers, whose responsibilities would mainly include negotiating payment plans for unrepresented litigants. In addition, expanding the operating hours for programs like the Civil Legal Advice and Resource Office (“CLARO”), which are now limited to only a few hours per week, would help the unrepresented. Similarly, expanding the Volunteer Lawyer for the Day Project (piloted this year in Manhattan and Kings Counties) to consumer debt cases would provide self-represented consumer debt litigants with legal advice and limited representation on the day of appearance.*
- *Expand statewide the recently enacted New York City Civil Court rules allowing law students to assist in advising*

*consumer debt litigants, currently in effect in the First and Second Departments.* In October 2009, the New York State Courts Access to Justice Program obtained a Student Practice Order authorizing student and recent graduate representation in the civil courts (as well as Civil, District, Village, and Town Justice Courts) for debt collection matters (among others) in the First and Second Departments. The program sets forth specific duties and is operated under the supervision of Access to Justice Program attorneys. We recommend statewide expansion of these orders, which enable law student and recent graduate volunteers to work within established volunteer programs to assist in providing legal services to consumer debt litigants.



## METHODOLOGY

This report reflects findings from our comprehensive evaluation of the consumer debt docket in the New York City Civil Court, in which we focused primarily on Kings and Queens Counties. This report is based on (i) a sampling of consumer debt cases filed in Kings and Queens Counties since 2006; (ii) interviews conducted throughout 2009 of civil court judges, civil court clerks, community advocates, and consumer debtors; and (iii) research regarding various issues at play in consumer debt litigation. We also made efforts to reach out to the plaintiffs' bar, contacting the law firms representing the majority of debt buyers and collectors in consumer credit proceedings. Those firms, however, generally rebuffed our efforts.

More specifically, at the outset of our project, we met with clerks in the civil court in New York, Kings, and Queens Counties. These meetings helped us to appreciate the procedural aspects of consumer debt litigation, including what happens when a consumer debt litigant appears in court for the first time, how the court clerks handle intake, and the court's methods of storing case files and electronic records.

In order to begin examining the trends in consumer debt cases, we obtained reports of cases filed by county in October 2006, October 2007, and October 2008. We chose October because it has relatively few holiday interruptions and is representative of a typical monthly docket in the courts. To narrow the scope of our results to the most instructive cases, we focused on consumer debt actions in Kings and Queens Counties, because of both the diversity of those counties' communities and the large number of consumer debt cases filed there. We limited our review to cases in which the defendant filed an answer because we sought to understand how a case proceeds through the civil court. Specifically, we wanted to examine at what point a defendant goes to court and determine what the catalysts are for a defendant's appearance. Of this pool, we analyzed the case files—including the summonses, complaints, affidavits of service, answers, judgments, and other filings—of roughly 400 cases in Kings County and 275 cases in Queens County. By outlining the contents of these files in a spreadsheet format, we were able to observe various trends regarding the consumer debt litigation process.



Prior to conducting our interviews, we created separate detailed interview questionnaires to be used as guides when interviewing judges, community advocates, consumer debtors, and the plaintiffs' bar. In the questionnaire used for interviewing judges, we included questions regarding the size and nature of their consumer debt dockets, judicial strategies, observations regarding consumer debt litigants, and recommendations for reform. In the questionnaire for community advocates, we included questions regarding recent trends in the civil court system, how community organizations can assist consumer debt litigants, and recommendations for reform. In the questionnaire for consumer debtors, we included questions regarding their consumer debt background, whether they had access to or used the internet, and their experiences in court and with consumer debt litigation in general. Finally, in the questionnaire used for interviewing members of the plaintiffs' bar, we included questions regarding the size of their consumer debt caseload, systemic issues in the civil court system, and suggestions for reform. These questionnaires served as a starting point for eliciting information regarding the consumer debt litigation process; as our project progressed, we asked more detailed and targeted questions.

In total, we conducted more than 40 interviews. Our interviewees included civil court judges with consumer debt dockets in New York, Kings, and Queens Counties; individuals connected with various community groups in New York City, including the Neighborhood Economic Development Advocacy Project ("NEDAP"), MFY Legal Services, Inc. ("MFY"), the Urban Justice Center ("UJC"), and CLARO, all of which concerned themselves with matters affecting consumer debt litigants, among other areas of focus; and participants of the CLARO and UJC consumer debt clinics. We made several attempts to interview members of the plaintiffs' bar. Only one plaintiff's attorney agreed to speak to us, and even that interview was cut short by the attorney shortly after it began.

To supplement our data findings and interviews, we independently researched various topics affecting the consumer debt litigation process. We examined legislation such as the Exempt Income Protection Act and the

Consumer Credit Fairness Act, including the legislative history behind those laws. We also researched other topics, including service of process, the process for vacating default judgments, and arbitration in consumer debt cases.

Upon evaluating the findings of our case review, the insight we received from judges, community advocates, and participants in consumer clinics, and our independent research, we formulated the recommendations discussed in this report.



# INTRODUCTION



In studying the consumer debt docket trend in the New York City Civil Court and interviewing judges, court personnel, members of a variety of civil legal services, and civil litigants, we aimed to examine, particularly in light of the current financial crisis, the trends in consumer debt litigation. We also sought to identify potential problems (new and recurrent) and recommend relatively inexpensive improvements. The reason for “inexpensive” improvements is obvious.



The effects of the biggest recession since the 1930s spread throughout the economy and every community. At least 25 court systems face budget shortfalls.<sup>1</sup> The depth of states’ funding deficits is substantial: New Hampshire suspended jury trials for a month, Utah is considering furloughing 1,000 court employees for 26 days, and New York has instituted a hiring freeze.<sup>2</sup> Funding for civil legal services has also taken a substantial cut: the IOLA Fund, a fiduciary fund administered through the State Comptroller that funds civil legal services, has indicated that it is in an unprecedented crisis. New York State cut financial aid to Civil Legal Aid by an additional \$2.2 million.<sup>3</sup>

Nationally, the unemployment rate more than doubled, increasing to 10.2 percent, with the number of unemployed now at 15.7 million.<sup>4</sup> Historically, a rise in unemployment correlates directly with increased credit card use because credit cards become a means for consumers, particularly middle- and lower-class consumers, to pay for basic living and medical expenses—a purpose for which credit cards were not intended.<sup>5</sup>

The amount of credit card debt in the United States is startling. At the end of 2008, Americans’ credit card debt reached \$972.73 billion; the average credit card debt per American household was \$8,329. Seventy-eight percent of American households had at least one credit card. In New York State, on average, individuals have 4.5 credit cards; 14.8 percent of New York residents are using half or more of their credit.

Unfortunately, a rise in unemployment also correlates directly with credit card default.<sup>6</sup> Credit card defaults from this crisis, however, will probably not materialize into lawsuits for several years because credit card debt is typically resold many times before a plaintiff actually files suit. Moreover, creditors currently have up to six years to bring an action in New York for credit card default. Credit card defaults occurring now are likely to burden civil courts across the country for several years to come. Yet the time is ripe for change; governments, courts, advocates, and creditors alike are focused on the need for civil legal services and the problems faced by unrepresented litigants in consumer debt transactions and litigation.

## ***Reports and Reforms***

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Over the last few years, New York courts, the city, the state, and a number of civil legal service groups have studied the impact and challenges in consumer debt litigation. For example:

- In June 2008, MFY published a report entitled *Justice Disserved: A Preliminary Analysis of the Exceptionally Low Appearance Rate by Defendants in Lawsuits Filed in the Civil Court of the City of New York*, which highlighted the fact that many defendants do not appear in court because they are unaware of the lawsuits filed against them due to improper service.<sup>7</sup>
- In October 2007, UJC published a report entitled *Debt Weight: The Consumer Credit Crisis in New York City and its Impact on the Working Poor*, which highlighted the fact that the majority of consumer debt cases filed resulted in default judgments and that those judgments were routinely granted on the basis of a legally insufficient showing.<sup>8</sup>
- In March 2009, the Office of the Deputy Chief Administrative Judge for Justice Initiatives published a 10-year report entitled *Expanding Access to Justice in New York State*, which emphasized the initiatives and goals of the judiciary to improve access to representation and education for civil litigants, including the creation of a

permanent funding source for civil legal services, bolstering pro bono programs, and improving the use of technology to serve unrepresented litigants, among others.<sup>9</sup>

As a result, New York courts, the state legislature, and the city have introduced a variety of solutions to address the concerns raised. For example:

- The Exempt Income Protection Act (“EIPA”) became effective in New York as of January 1, 2009. The EIPA may effect the most change concerning consumer debt litigation because it prohibits restraint of the first \$2,500 of an account that receives direct deposits of exempt funds (e.g., Social Security) and also prohibits restraint of the first \$1,716 of an account that does not receive exempt funds.<sup>10</sup>
- In April 2008, Section 208.6 of the Uniform Civil Rules for the New York City Civil Court was amended to add Subsection (h), requiring the plaintiff to submit an envelope containing a notice of the action (prescribed by the court), to be sent to the defendant by the court clerk (“208.6 Notice”) at the time the plaintiff files proof of service of the summons and complaint in a consumer debt transaction. If the EIPA was the single most effective change in the area of consumer debt, the requirement of the 208.6 Notice was easily the second most meaningful change.
- The New York State Legislature has introduced the Consumer Credit Fairness Act (“CCFA”) to strengthen consumer protections in debt collection proceedings. The CCFA would amend the CPLR in relation to consumer debt transactions and would, among other things, require proof of the debt, codify the 208.6 Notice, and reduce the statute of limitations from six years to three. The Assembly passed the bill, but it has not yet been adopted by the Senate.
- In late 2009, Mayor Michael R. Bloomberg signed into law a bill aimed at curtailing abuses by unregulated debt collectors. Introductory Bill Number 660-A broadens the ability of the New York City Department of Consumer Affairs (“DCA”) to license and oversee debt collectors.<sup>11</sup>
- In late 2009, the New York City Council held hearings on Introductory Bill Number 1037, another bill aimed at

strengthening the process server licensing laws enforced by the DCA. Specifically, Introductory Bill Number 1037 would, among other things, add a bond requirement as a condition of licensure. Individual process server licensees would be required to post a surety bond of \$10,000, and each licensed process service agency would be required to post a surety bond of \$100,000, to be used in the event fines are imposed for failure to comply with the Administrative Code.

In addition, New York State Attorney General Andrew Cuomo is pursuing an ongoing investigation and litigation into unlawful debt collection practices and has taken particular action to address sewer service in consumer debt cases. And during the last week of 2009, MFY, NEDAP, and the law firm of Emery Celli Brinckerhoff & Abady filed an amended class action complaint on behalf of more than 100,000 people who had default judgments entered against them as a result of sewer service. The suit names an entire debt collection chain, including five debt buyers, the law firm they hired to collect the debt, and the process-serving firm used to serve debtors.<sup>12</sup>



## CHAPTER 1: Barriers to Court



Jeff M., a 30-something divorced man, accrued significant debt during his short marriage. Jeff was never served with a summons and complaint and was shocked to learn that a judgment had been entered against him. He learned about the judgment when he received a notice from his bank that his bank account had been frozen. Jeff came to court to get a copy of the summons and complaint and discovered that he had allegedly been served at an address in Brooklyn where he resided more than 10 years ago.

Cathy S., a 58-year-old single woman, lives in Manhattan. Purely by chance, Cathy found the summons and complaint against her on the floor of her building's lobby.

Mary F., a 40-something single woman on disability and food stamps, owes her credit card company approximately \$6,000. Mary found out that a judgment for nearly \$6,500 had been entered against her when her bank account was frozen. The affidavit of service states that Mary's cotenant was served with the summons. Mary has lived alone for more than 10 years.



*“Over and over again we see hundreds of the most vulnerable New Yorkers—the elderly, disabled, and working poor—blindsided by default judgments in lawsuits that they never even knew about until after the cases were over. Our justice system is built on the basic premise that everyone has a right to be heard in court before a judgment can be entered against them, and the debt collection law firms that engage in sewer service deny New Yorkers this fundamental right.”*

Carolyn Coffey, Staff Attorney with MFY Legal Services

## ***Sewer Service***

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**Sewer Service, or the Intentional Failure to Serve a Defendant, Remains the Single Most Effective Barrier to Court.** While various reforms have been implemented to address the problem and have proved to be very effective, clearly more must be done. Consumer debt litigants, court personnel, and judges all confirm that the number of default judgments entered because the defendant was not actually served is unacceptably high. Several interviewees maintain that defective service is the most prominent issue in consumer debt litigation.

**The Scope of the Problem.** One judge commented that an “astonishing” number of default judgments resulted from improper service. Other judges noted that plaintiffs often attempt to serve defendants at old addresses, or even residences where the defendants never lived. Interviewed defendants repeatedly report that they never received a summons and complaint. Civil legal services and volunteer clinic attorneys and participants report a range of service-related issues.

**The Legal Landscape.** The CPLR provides three methods of service without the need for court intervention.<sup>13</sup> Pursuant to CPLR 308(1), service of the summons and complaint may be accomplished by personally serving the defendant. A plaintiff may also accomplish service of process pursuant to CPLR 308(2), which provides that service is effective when the plaintiff serves a person of suitable age and discretion at either the defendant’s residence or place of business, mails a copy of the summons and complaint to the defendant within 20 days of the service, and files a copy of the affidavit of service with the clerk of the court within 20 days of the mailing. This form of service is commonly referred to as “SAD” service. Alternatively, a defendant may be served by securing or “nailing” a copy of the summons and complaint to the door of the defendant’s residence or place of business, mailing a copy of the summons and complaint within 20 days of the “nailing,” and filing the affidavit of service with the clerk of the court within 20 days of the mailing in accordance with CPLR 308(4). This form of service is commonly referred to as “Nail and Mail.” Case law instructs that with respect to Nail and Mail, a process server must

make three attempts, at different times of day on different days, to serve the defendant before the server may use Nail and Mail service.<sup>14</sup> No such diligence is required for SAD service.

As discussed below, these alternative methods of personal service appear to promote so-called sewer service. Interestingly, however, legislative history and commentary suggest that SAD and Nail and Mail service were enacted to prevent sewer service. Indeed, these service forms were meant to “discourage” sewer service by “giving process servers an alternative to the sometimes difficult task of making personal delivery to the defendant herself.”<sup>15</sup> If anything, however, the modern amendments to CPLR 308 increase the risk that service on the defendant might be fraudulently obtained *because* they ease the means by which substituted service may be rendered.

## ***Advocates Weigh In***

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As discussed above, numerous prominent legal services and advocacy organizations, over the past few years, have analyzed the problem of sewer service and presented their findings in reports. These reports vividly demonstrate that the playing field in consumer debt cases is decidedly uneven.

**MFY’s Report.** As the number of civil court cases almost tripled from 2000 to 2007, MFY, in June 2008, published *Justice Disserved: A Preliminary Analysis of the Exceptionally Low Appearance Rate by Defendants in Lawsuits Filed in the Civil Court of the City of New York*. MFY’s report highlights the fact that many defendants do not appear in court because they are unaware of the lawsuits filed against them as a result of improper service.

In 2007, MFY provided advice to, and represented, more than 350 clients with debt collection cases brought against them. It found that none of these defendants had been properly served with a summons and complaint. Rather, the clients typically learned that lawsuits had been filed against them when their bank accounts were frozen. The lack of service in many of these cases led to default judgments

against the defendants, who were often low-income earners or relied solely on Social Security, Supplemental Security Income, veterans' benefits, or pensions for support.

MFY's report also examined the practices of process servers, finding that process-serving companies employ varying tactics to allegedly serve summons and complaints. According to MFY, process servers rarely make personal service; in most of the cases MFY examined, SAD service and Nail and Mail service were the standard practices. Furthermore, plaintiffs often allegedly made service on cotenants or relatives the defendants did not even know.

**The UJC's Report.** In October 2007, the UJC published *Debt Weight: The Consumer Credit Crisis in New York City and its Impact on the Working Poor* to highlight the fact that defendants in consumer debt litigations rarely appear in court to defend themselves.

The UJC studied 600 randomly selected consumer debt cases filed in February 2006 and found that 80 percent of the cases resulted in default judgments that had been routinely granted without requiring proof to establish the damages sought. According to the UJC, the materials submitted in support of applications for default judgments almost always constituted inadmissible hearsay and failed to meet CPLR standards of proof. In addition, third-party debt buyers brought the majority of these cases, submitting affidavits by their employees, who had no familiarity with the underlying debt and thus could not reasonably make any determination as to the existence or amount of the debt. Indeed, debt buyers that purchased the defaulted debt from the original creditors brought the vast majority of litigation. Therefore, most defendants were sued by companies with which they had no prior relationship. Additionally, only one-third of the debt buyers that filed lawsuits were licensed by the DCA, despite state and local laws requiring such licensing. Finally, the UJC found that counsel virtually never represented defendants—meaning these litigants rarely raised available legitimate defenses.

At the time of the UJC's report, a default judgment had the effect of allowing the judgment creditor to garnish the debtor defendant's wages or freeze the debtor defendant's bank

account. This action by the judgment creditor was typically the very first notice to the defendant that he/she had been sued and that a judgment had been entered on default. This was also usually the first time the defendant learned that his/her bank account had been frozen for up to twice the amount of the judgment in order to cover restraining fees, interest, and attorneys' fees. The UJC's report served as the catalyst for the most significant changes by the court and the legislature. Specifically, the report is credited for the enactment of the EIPA and the recent augmenting of the DCA's licensing of credit buyers.<sup>16</sup>

## ***Responses and Reforms***

### **The 208.6 Notice**

Interestingly, one of the most successful reforms has come not from the state or local legislatures, but from the New York City Civil Court, which has faced an enormous and growing docket of default judgments. The 208.6 Notice has not only provided another, earlier opportunity for the consumer debt defendant to receive notice of a pending litigation, but also served to underscore the persistent problem of sewer service.

In April 2008, Section 208.6 of the Uniform Civil Rules for the New York City Civil Court was amended through the addition of Subsection (h) (Appendix No. 1).<sup>17</sup> Subsection (h) creates a new notice form that the court must send to each defendant in a consumer debt case, informing the defendant that he/she has been sued and barring entry of a default judgment if the 208.6 Notice is returned as undelivered. Specifically, the new amendment requires that at the time of filing the proof of service of the summons and complaint in a consumer debt transaction, or any time thereafter, the plaintiff must submit an envelope containing a 208.6 Notice to the court clerk.<sup>18</sup> The Notice provides:

**ATTENTION: A SUMMONS AND COMPLAINT HAS BEEN FILED ON A CONSUMER CREDIT TRANSACTION ASKING THE COURT TO RENDER A JUDGMENT AGAINST YOU. YOU MAY WISH TO CONTACT AN ATTORNEY. YOU MUST ANSWER AT THE LOCATION**

**AND WITHIN THE TIME SPECIFIED ON THE SUMMONS. IF YOU DO NOT APPEAR IN COURT THE COURT MAY GRANT A JUDGMENT AGAINST YOU. IF A JUDGMENT IS GRANTED AGAINST YOU YOUR PROPERTY CAN BE TAKEN. PART OF YOUR PAY CAN BE TAKEN FROM YOU (GARNISHEED), AND YOUR CREDIT RATING CAN BE AFFECTED. IF YOU HAVE NOT RECEIVED THE SUMMONS AND COMPLAINT GO TO THE CIVIL COURT CLERK'S OFFICE SPECIFIED ON THE RETURN ADDRESS AND BRING THIS NOTICE WITH YOU.**

When the proof of service of the summons and complaint is filed, the court clerk must check the name and address of the defendant on the notice envelope against the affidavit of service.<sup>19</sup> If the information matches, the court clerk will stamp and file the affidavit as received and mail the 208.6 Notice to the defendant on the date of receipt. If the envelope is not submitted with the affidavit of service, the court clerk must stamp and file the affidavit as “no additional notice received.”<sup>20</sup> If a Notice is returned as undeliverable, the court then notifies the plaintiff (Appendix No. 2).<sup>21</sup>

Upon receipt of a request for the entry of default judgment in a consumer debt action, the court clerk must review the affidavit of service to ensure that it complies with the rules.<sup>22</sup> If the affidavit of service indicates that the plaintiff did not submit the 208.6 Notice, the court clerk must reject the request for a default judgment and inform the plaintiff that no default judgment shall be entered unless the rule is complied with and at least 20 days have elapsed from the date of mailing.<sup>23</sup> Similarly, if the Notice was returned to the clerk as “undeliverable,” the application for default judgment will be denied.<sup>24</sup> If the plaintiff submits an envelope with the Notice subsequent to a denial of default judgment, the clerk shall compare it with the affidavit of service pursuant to the procedure outlined above.

**The Impact of the 208.6 Notice.** The most significant accomplishment of the 208.6 Notice is that it brings more consumer debtor defendants into court, where they may take steps towards resolving the matter and obtaining advice to defend themselves.

Court personnel and civil legal services report that defendants now regularly appear in court with the 208.6 Notice in hand, at which point the court clerk makes a copy of the complaint, summons, and affidavit of service for the defendant. This has led to more defendants’ filing answers and, consequently, to a decline in the number of default judgments. The 208.6 Notice has also made it more likely that debtors will take advantage of free legal-advice clinics, such as CLARO, and on-site resources, including computer programs and assistance with answer preparation.

Beginning in May 2008, each of the five civil courts started to keep informal, manual statistics relating to the number of 208.6 Notices that were returned to the court as “undeliverable” and the number of 208.6 Notices that precipitated a defendant’s appearance in the court clerk’s office (as it constituted the first communication the defendant received informing him/her that an action against him/her had been commenced):

**208.6 NOTICES RETURNED  
AS UNDELIVERABLE**

County	May to December 2008	January to September 2009
New York	2,819	1,885
Queens	2,904	5,934
Kings	4,602	3,209
Bronx	3,750	2,195
Richmond	674	450
<b>TOTAL</b>	<b>14,749</b>	<b>13,673</b>

**208.6 NOTICES PRECIPITATING  
A DEFENDANT’S APPEARANCE**

**(and constituting the first notice received about the action)**

County	May to December 2008	January to September 2009
New York	436	403
Queens	435	1,671
Kings	956	684
Bronx	464	604
Richmond	69	157
<b>TOTAL</b>	<b>2,360</b>	<b>3,519</b>

Although the courts have not recorded the number of 208.6 Notices sent (and thus a true statistical analysis is not possible), the numbers themselves are interesting. In the last seven months of 2008, more than 17,000 defendants were likely not served with a summons and complaint (14,749 Notices were returned to the courts as undeliverable, while 2,360 defendants came to court with the Notice, indicating that it was the first paper they had received in the litigation). This number is probably much greater, since many Notices may have been delivered to valid addresses where the defendants did not reside and thus were not returned as “undeliverable.” More positively, however, the 208.6 Notice appears to have produced the desired effect—the number of Notices returned as “undeliverable” seems to have noticeably decreased in the first nine months of 2009. (*Compare* the 2008 monthly average of 1,843 undeliverable Notices *with* the 2009 monthly average of 1,519.) Even better, as a result of the 208.6 Notice, on average nearly 100 more defendants came to court during the first nine months of 2009 than did in 2008. (*Compare* the 2008 monthly average of 294 defendants appearing in court with the Notice *with* the 2009 monthly average of 391.)

One unintended consequence of the undelivered 208.6 Notice is that many of these cases remain on the court’s docket with no further action—a circumstance one judge referred to as “civil purgatory.” The court cannot dismiss actions in which no one has contested the affidavit of service, and therefore the cases languish on the court’s docket. The staggering number of undeliverable 208.6 Notices—28,422—clutters the already heavy docket.

The 208.6 Notice has achieved significant accomplishments. With certain additions, it can realize more changes. We recommend the expansion of such Notices to civil courts outside New York City as an effective and cost-sensitive method of increasing response rates by debtor defendants to pending litigation.

## RECOMMENDATIONS

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■ **Implement Practices to Address Accuracy by Mandating a Pre-Commencement Letter.** The civil court should establish a rule mandating that all consumer debt plaintiffs

send debtors a pre-commencement letter, by certified mail, as a precondition for instituting a suit against a debtor. Such a practice should be expanded statewide to civil courts outside New York City. The letter should be sent at least 60 days prior to the commencement of a lawsuit. The letter could be combined with or make reference to previous compliance with the Fair Debt Collection Practices Act, 15 U.S.C. § 1692g, which requires a creditor to send a debtor a validation notice giving detailed information about the debt owed and the consumer’s rights (including verification of the debt). In addition, the pre-commencement letter should suggest that the debtor contact the creditor if the debtor would like to discuss settlement, as typically debtors prefer to work out payment schedules rather than be subject to suit.

■ **Require an Address Search for 208.6 Notices Returned as Undeliverable.** In the event a 208.6 Notice is returned as undeliverable, counsel should be given the choice of: (i) conducting an appropriate search, one similar to what would be required for permission to serve by publication pursuant to CPLR 316, or (ii) discontinuing the action without prejudice. An appropriate search would consist of a (1) postal search, (2) board of elections search, (3) military search, and (4) Surrogate’s Court search. If, after an appropriate search, the address appears to be correct, the clerk should be permitted to enter a default judgment. If it appears that the address for the defendant is incorrect, the action should be dismissed without prejudice. For those cases that remain in “civil purgatory” for more than one year, the court should conduct a calendar call. If no other action has been taken in the matter, the case should be dismissed without costs for failure to prosecute (similar to the procedure set forth in CPLR 3404).

■ **Expand the Number of Languages in the Notice.** While many interviewees reported that the official wording in the 208.6 Notice effectively brought more debtors to court, the court should expand the number of languages used in the Notice. As the court has already recognized—its web site is available in Korean, Russian, Chinese, and French in addition to English and Spanish—New York has widely diverse demographics. The court should provide the Notice in summary form in the languages used on its

web site. These languages constitute the most commonly spoken languages in the five boroughs.

■ **Utilize the 208.6 Notice to Provide Litigants With Information About Currently Available Legal Resources.**

While the 208.6 Notice cannot advise defendants of legal approaches or strategies per se, it should at least include (whether as part of the Notice or in a separate brochure) (i) information about legal services, such as those provided by CLARO, the UJC, and other free clinics; (ii) a description of the adverse consequences for failure to respond to the Notice, such as frozen assets; (iii) language encouraging litigants to promptly respond and adhere to all court rules; and (iv) a list of the basic rights of every civil litigant, *e.g.*, a fair hearing and the burden of proof.

■ **Develop Computer Resources to Track the Rate of Return and Other Statistics Related to the 208.6 Notice.**

Currently, court clerks manually track the statistics relating to the 208.6 Notices. One cost-efficient way to alleviate this burden on personnel and increase reporting would be to add a field to the screen for case information that could record the date the 208.6 Notice was sent, the date it was returned (if appropriate), or the date the defendant appeared in court with the Notice (if appropriate).

■ **Rule 208.6 Should Be Instituted Across All Civil Courts in New York State.**

Currently, the 208.6 Notice requirements apply only to New York City Civil Court. We recommend that these requirements be adopted statewide by civil courts outside New York City. The CCFA would make the 208.6 Notice a statewide requirement. However, while the CCFA passed the Assembly, the Senate has not yet adopted it. The CCFA is discussed in more detail *infra*.

## Heightened Legal Advocacy

The civil courts have not acted alone in their response to sewer service-related issues. The Office of the New York State Attorney General and legal advocates MFY and NEDAP have made headlines in 2009.

**The Attorney General’s Investigation.** In April 2009, the Office of the New York State Attorney General announced criminal charges and filed a petition for an injunction against Long Island-based American Legal Process (“ALP”), along with its CEO, for a fraudulent business scheme in which the company failed to provide proper legal service and notification to thousands of New Yorkers sued for debt-related claims.<sup>25</sup> Fifteen law firms allegedly had hired ALP to serve debtor defendants. The allegations in the criminal complaint, if true, confirm without doubt what the courts, judges, court personnel, and advocates have maintained all along—plaintiffs do not properly serve defendants.

According to the criminal complaint:

- *On 407 occasions*, one or more of ALP’s process servers were at *two or more* locations at the same time;
- ALP process servers attempted to serve defendants with process *before* the documents had been transmitted to the process server;
- *On more than 500 occasions*, 22 ALP process servers attempted to serve a summons and complaint on a defendant *before* an index number had been purchased or the summons and complaint had been filed with the court;
- ALP process servers *fabricated* the number of attempts made to serve the defendant; and
- ALP’s affidavits of service were *never* signed by the servers.<sup>26</sup>

This complaint represents merely the tip of the iceberg. New York Attorney General Andrew Cuomo’s investigation remains ongoing. On July 22, 2009, Cuomo’s office sued 35 law firms and two debt collectors that relied on ALP to notify New York consumers that they faced debt-related lawsuits and then used ALP’s falsified affidavits to obtain default judgments. The lawsuit, filed on behalf of the Honorable Ann Pfau, Chief Administrative Judge of the New York State Unified Court System, is unprecedented. It invokes the administrative judge’s broad remedial powers to correct an estimated 100,000 improperly obtained default judgments.<sup>27</sup> Specifically, the suit seeks an order vacating all default judgments secured against New York consumers in cases in which the firms (i) used ALP to serve legal process in commencing a lawsuit, and (ii) were unable to provide

the court with any evidence, other than ALP's affidavit, that proper legal service was made.<sup>28</sup>

**The Impact of the Attorney General's Investigation.** The most direct impact of the Attorney General's investigation will be the possible dismissal of 100,000 judgments that were allegedly obtained without proper jurisdiction.<sup>29</sup> However, the Attorney General's investigation will likely have broader implications because it has brought significant attention to the problem of sewer service in New York State as evidenced by the suit filed by MFY and NEDAP.

**MFY's and NEDAP's Suit for the Deprivation of Due Process.** Legal advocates' efforts to address sewer service included an amended class action complaint filed at the end of 2009 by MFY and NEDAP.<sup>30</sup> The amended complaint alleges that more than 100,000 New York City residents have been victimized "by a massive scheme to deprive them of due process and fraudulently obtain and enforce thousands of default judgments worth millions of dollars." The "massive scheme" involved debt buyers and their attorneys, debt collectors, and process servers. The scheme was allegedly accomplished through sewer service, and each coconspirator perpetuated the instances of sewer service. For example, law firms representing debt buyers pay only for *completed* service, and even then, the process server is not paid more than \$6 per defendant served—a wage unchanged in nearly 25 years, amounting to neither the minimum wage nor a living one. In other words, a process server who attempts service on a debtor at a specific address only to find that the debtor does not reside or work there is not paid for that attempt. According to MFY and NEDAP, this practice only encourages process servers to falsify affidavits of service.

MFY and NEDAP attack not only the practice of sewer service, but also the lack of proof of the debt. For example, the amended complaint alleges that one defendant, an employee of a named law firm, executed approximately 40,000 affidavits of merit per year, or an average of 165 affidavits every workday. In each affidavit, the defendant claimed to be "fully and personally familiar with, and have personal knowledge of, the facts and proceedings relating to the within action."<sup>31</sup> It is alleged that these affidavits

are false and serve as the basis for a court's granting of a default judgment.

## RECOMMENDATIONS

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- **Require GPS Technology to Confirm Service.** As evidenced by the Attorney General's investigation and as alleged by MFY and NEDAP, some process servers do not even attempt to serve process properly. A few legal advocates have suggested that the DCA require process servers, as part of the licensing process, to carry camera phones equipped with GPS technology. When a process server goes to an address to serve a defendant, he/she would be required to take a picture of each service location, which would be automatically stamped with location, date, and time data. Plaintiffs could be required to submit the stamped picture to the clerk at the time they filed proof of service. Requiring such common and inexpensive technology is a relatively cost-effective, sensible solution to the problem of sewer service. We also recommend that the DCA conduct random spot checks to ensure that service is made properly.
- **Set a Fee Schedule for Process Servers.** As identified by MFY and NEDAP's class action complaint and other advocates, one way to combat sewer service is to require process servers to be paid for attempted service and to receive a living wage—or at least the minimum wage—for completed service. We recommend that the city legislature set a fee schedule for process servers.
- **Require Process Servers to Be Reimbursed for Transportation to and from the Service Location.** In response to the argument that high transportation costs discourage process servers from attempting to serve process, we recommend that the city legislature amend the Administrative Code to require process servers to be reimbursed for their transportation expenses, provided they offer photographic proof that they went to the service location.



# CHAPTER 2: Barriers in Court

## Overview

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Not only does a consumer debt defendant encounter obstacles prior to coming to court, but he/she faces multiple barriers once in court as well. The primary barrier, simply, is the enormous information deficit—including basic information about how a case proceeds through the civil court.

A consumer debt action begins when the plaintiff files a summons and complaint. The summons must include form language in English and Spanish explaining that the defendant is being sued on a consumer debt transaction. The summons does not give a date for a court appearance, nor does it give a date by which the defendant must answer. The complaint should plead the allegations underlying the debt. Because of simple pleading rules, however, complaints are often not terribly informative. The form language contained in the 208.6 Notice is the only instruction to the defendant to go to court to respond to the complaint. The defendant must then appear in court to file a form answer, checking off his/her defenses to the allegations set forth in the complaint.



If the defendant fails to appear in court to file an answer, he/she risks the possibility that the plaintiff will seek entry of a default judgment against him/her. In the event that the court enters a default judgment, the defendant may move for an order to show cause to vacate the default judgment and for leave to answer the complaint. Many defendants believe that once they answer, the court will review their allegations and defenses *sua sponte*.

Plaintiffs' counsel may pressure unrepresented defendants into unfavorable settlements. Furthermore, these defendants do not always understand or know that entering into a settlement effectively ends the litigation. Based on our interviews with judges and advocates, it appears that intervention by judges varies—some judges employ a high level of scrutiny in allocuting stipulations, while others do not.

The good news is that the practices advocated by the civil court to encourage access to the system are clearly having a positive effect, and like the Rule 208.6 Notice, they should be implemented by civil courts throughout New York State and the country as best practices in docket management.

## PART A: The First Filing

Stacy R. was being sued for an 11-year-old debt. Stacy went straight to CLARO after appearing in court on an order to show cause to vacate the judgment because she did not understand what had happened in court. Stacy recited what the judge had said: he adjourned the hearing to September 25 for the plaintiff to submit proof that Stacy owed the debt. The judge also commented on the age of the debt and said he was close to dismissing the entire action. The CLARO representative explained the judge's order to Stacy and cautioned her to make sure she returned to court on the adjourned date and to come back to CLARO for further assistance.

Bill G., a 46-year-old male with four children, is employed and earns between \$25,001 and \$40,000 per year. He rents his home and has a bank account and 10 credit cards. He pays either the minimum or slightly more than the minimum on his credit cards every month. Bill defaulted on his car loan and was served with a summons. Bill went to court, but he did not feel comfortable asking questions about what he had to do or what was going to happen. Bill felt that the proceedings were not intended to benefit him in any way.

## The Summons

Pursuant to 22 NYCRR 208.6, the summons in a consumer debt transaction must contain the following language (in

English and Spanish), prominently displayed in 12-point, upper-case letters:

### CONSUMER CREDIT TRANSACTION

#### IMPORTANT!! YOU ARE BEING SUED!!

**THIS IS A COURT PAPER—A SUMMONS! DON'T THROW IT AWAY!! TALK TO A LAWYER RIGHT AWAY!! PART OF YOUR PAY CAN BE TAKEN FROM YOU (GARNISHEED). IF YOU DO NOT BRING THIS TO COURT, OR SEE A LAWYER, YOUR PROPERTY CAN BE TAKEN AND YOUR CREDIT RATING CAN BE HURT!! YOU MAY HAVE TO PAY OTHER COSTS TOO!! IF YOU CAN'T PAY FOR YOUR OWN LAWYER, BRING THESE PAPERS TO THIS COURT RIGHT AWAY. THE CLERK (PERSONAL APPEARANCE) WILL HELP YOU!!**

This paragraph is very significant: it is really the only thing that gives the defendant concrete instructions on what he/she must do next. However, the language and the overuse of exclamation points make the document appear less official to many readers. Several interviewees commented that the summons should have a more formal appearance, reasoning that the summons looks more like junk mail than legal mail. In addition to the language above, many summonses are forms particular to a specific law firm and contain additional extraneous information crowded together on a single page, making them almost illegible.

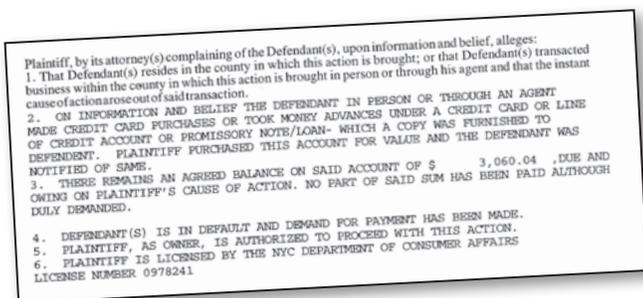
A number of summonses we reviewed looked like this one:

The image shows a sample summons form for a consumer credit transaction. The form is bilingual, with English and Spanish text. It includes a 'FEE PAID' stamp for \$12.00. The form contains fields for Plaintiff, Defendant, and Court information, many of which are redacted. The date is 9/07/06. The form is titled 'CONSUMER CREDIT TRANSACTION' and 'TRANSACCION DE CREDITO DEL CONSUMIDOR'. The form is dated 9/07/06 and includes a 'FEE PAID' stamp for \$12.00. The form is titled 'CONSUMER CREDIT TRANSACTION' and 'TRANSACCION DE CREDITO DEL CONSUMIDOR'. The form is dated 9/07/06 and includes a 'FEE PAID' stamp for \$12.00. The form is titled 'CONSUMER CREDIT TRANSACTION' and 'TRANSACCION DE CREDITO DEL CONSUMIDOR'.

## The Complaint

Lenders used to conduct their own collections. Now, however, selling debt—even “zombie debt” (debt for which the statute of limitations has long expired)—is big business.<sup>32</sup> Thus, it is now typical for consumer debt defendants to have no relationship to the debt purchasers; indeed, a defendant may have never even heard of the entity. Additionally, under the current pleading rules, complaints commonly do not offer the defendant or the court any information about the history of the debt. In almost all cases, and in every one of the nearly 700 files we reviewed, the complaints contained no allegations specifying the date of default or providing a breakout of the principal, interest, and fees constituting the amount alleged to be due and owing. Only seven complaints—about 1%—included any documents relating to proof of the underlying agreement. Fewer still contained allegations specifying the account number or the rate at which interest accrued.

A majority of the complaints we reviewed were very much like this:



## The Statute of Limitations

In New York, the statute of limitations for bringing a consumer debt action is currently six years.<sup>33</sup> This is a lengthy period, and as a result, several years often pass before a debt collection action is commenced. This situation can significantly disadvantage a debtor. Among the difficulties a debtor may face as a result of the six-year time lapse are the accumulation of interest and fees that may substantially exceed the amount originally owed; the increased likelihood

that the debtor may have moved to a different address, resulting in process-serving problems; repeated debt resale; and memory and evidence loss. On the other hand, such a delay also typically results in insufficient proof of the debt, which can be advantageous to a defendant if he/she understands how to use and exploit that deficiency.

## RECOMMENDATIONS

- **The Summons Language Required Pursuant to 208.6 Should Be Amended.** The required language should appear more formal so that the debtor defendant recognizes the official nature of the communication and does not wrongly assume that the document is a private-party mailing unrelated to a judicial proceeding.
- **The Summons Language Should Be in Chinese, Korean, Russian, and French in Addition to English and Spanish.** As noted above, the court already recognizes the diversity of its audience, making its web site available in all of these languages.
- **The Summons Should Be Legible.** Many summonses we reviewed were difficult to read because so much information was included on a single page. While we do not advocate waste, we see no reason for instructions in several languages to be crowded together on one sheet. The resulting visual overload may cause debtor defendants to ignore the notice or fail to glean the information they need to respond adequately.
- **Certain Information in Consumer Debt Litigations Should Be Required to Be Pleaded in the Complaint.** Given that the summons and complaint are typically the first notice that the defendant receives (or should be the first notice), they should provide significantly more information than they do under the present pleading rules. We discuss this more fully *infra*.

## PART B: The Information Deficit and the Response

Cathy S. appeared in court on two cases after finding the summons and complaint on the floor of her building's lobby by chance. She filed an answer in which she explained that she had not been served with the summons and complaint. In court, she heard her name called at the back of the courtroom. It was the plaintiff's counsel. He asked her to follow him out to the hallway. Cathy followed him out. He immediately became aggressive. Cathy felt very intimidated and agreed to settle the case. Following settlement, Cathy went to CLARO to find out when the court would consider her answer. The CLARO representative explained that the case was closed because Cathy had agreed to settle. Cathy asked how she could stop the settlement. The CLARO representative cautioned Cathy that she had settled for a low amount in relation to the amount that she was sued for and that having the judgment vacated might be detrimental because she could end up with a less favorable result. Cathy was very upset that her answer would not be addressed by the court.

### *The Information Deficit*

A lack of awareness and information presents a major hurdle for consumer debt defendants, second only to a lack of representation (discussed *infra*).

Most people who receive a summons and complaint do not understand what they need to do. They do not understand that the complaint merely states allegations and that the plaintiff bears the burden of proof. Based on our interviews,

it also appears that many defendants in consumer debt litigations do not understand the various aspects of the court proceedings. Moreover, once these defendants appear in court, they often do not understand what is happening and what steps they should take, if any.

One consumer debt defendant explained that he had not consulted a lawyer upon receiving a summons in the mail because he had not understood that he was required to appear in court, or that not doing so would result in a default judgment. Only after the court entered a default judgment against the defendant and froze his bank account did he realize that something was wrong and seek out the services of a civil legal service. Another litigant thought that once he had filed an answer in which he indicated that he had not been served with the summons and complaint, the case would be dismissed.

What is understandable for those dealing with these issues on a daily basis can be completely incomprehensible for those confronted with them on only one or two occasions. At the risk of belaboring the obvious, the process of a civil action as it winds its way through the court system is neither intuitive nor easily comprehensible to the uninitiated. For example, a consumer debt defendant who receives a summons in the mail may not realize that he/she must appear in court because the summons does not contain a court date.

Indeed, the court process can be confusing for junior attorneys, so for individuals from low-income households or those who have very limited reading and writing skills and/or know little English, the process can be especially daunting. Moreover, the resources available to assist consumer defendants in understanding court proceedings largely exist on the internet or at the courthouse itself. Not everyone has access to the internet, and going to court during business hours may mean lost wages or child-care expenses for low-income defendants. Furthermore, many individuals fear going to court because of their immigration status, among other reasons.

## ***Court Technology Resources***

In addition to broad statewide initiatives, the New York City Civil Court has tried to provide to litigants as much information about the process as it can. The court, through its web site, offers a wealth of information for the unrepresented litigant. The web site includes a detailed section entitled “Representing Yourself,” which provides civil defendants with information about the court process and internet links to legal services organizations.<sup>34</sup> The web site also contains at least 16 links to such topics as finding legal assistance, the volunteer lawyer program, free court forms, definitions, free child-care centers, frequently asked questions, and the oral answer form.<sup>35</sup> These initiatives, at both the state and local levels, help educate, inform, and direct civil litigants to available resources.

Unexpectedly, however, the civil litigants we interviewed either did not have access to the internet or never used it. These litigants were not even aware that the court offered online assistance or that various advocacy groups provided helpful information on their web sites. Moreover, navigating the vast amount of useful data available on the court’s web site proved challenging even for several of our team members. Nonetheless, the available online resources have been enormously helpful to community groups and clinics such as NEDAP in assisting unrepresented litigants and directing them to important resources—*e.g.*, the oral answer form.

In addition, public computer terminals, known as Access to Justice (“A2J”) terminals, have been installed throughout the civil courts in the five boroughs; the information provided by them is also offered online through the court web site. These terminals are available to unrepresented litigants and run programs that guide the litigant through the process of preparing a pleading, such as an answer. Although the terminals were designed for use by the litigant alone, advocates report that, as is the case with airport kiosks, not everyone can follow the process unaided. Advocates also have noted that the A2J terminals are not always in working order. They point out, however, that other court technology allowing litigants to enter their names and receive information about lawsuits against them is generally very efficient and easy to use.

## ***The Answer***

**Filing the Answer.** For a consumer debt defendant, filing an answer, which is either oral or in writing, is the first step in countering the claims against him/her—one that many consumer debt defendants never take. In cases filed in the five boroughs in October 2008, only 7.4% of consumer debt defendants filed an answer.

To file an oral answer, the defendant must come to court and speak to a court clerk. The court clerk then completes, on the basis of information provided by the defendant, a Consumer Credit Transaction Oral Answer Form (the “Oral Answer Form”) (Appendix No. 3). The Oral Answer Form includes a list of defenses that the defendant can assert, as well as space to make any counterclaims. To file a written answer, the defendant may use the Written Answer Form (Appendix No. 4), which is identical to the Oral Answer Form, or write his/her own answer. The forms include a list of defenses that can be checked off. A defendant may also utilize the A2J computer program to create an answer either at the courthouse or online.

**Available Defenses.** A variety of defenses is available on the New York City Civil Court forms, including the following:

1. A general denial.
2. No service.
3. Improper service.
4. “I do not owe the money.”
5. “I am a victim of identity theft or mistaken identity.”
6. Payment.
7. Incorrect amount.
8. Lack of standing.
9. “The NYC Department of Consumer Affairs shows no record of plaintiff having a license to collect debt.”
10. “There is no debt collection license number in the complaint.”
11. Statute of limitations.
12. The debt was discharged in bankruptcy.
13. The collateral was not sold at a commercially reasonable price.
14. Unjust enrichment.
15. Violation of the duty of good faith and fair dealing.
16. Unconscionability.

17. Laches.
18. The defendant is in the military.
19. Protected income.<sup>36</sup>

This list of defenses can be overwhelming, despite the addition of a booklet that attempts to explain what each answer means (Appendix No. 5). Interviewees suggested that the long list of defenses may confuse defendants or provide them with unrealistically high expectations of the defenses available to them. Some interviewees suggested amending the list to include only those defenses realistically available to defendants. Others thought the defenses should be clearer or include brief descriptions of their meanings. We note that the defenses can be somewhat inconsistent. For example, on several occasions we observed that “I do not owe the debt,” “I disagree with the amount of the debt,” and “I want to work out a payment schedule” were all checked off on a single answer form. While a lawyer may see the selection of these three defenses as pleading in the alternative, an unrepresented defendant probably does not share that view. The selection of multiple inconsistent defenses is more likely indicative of an unrepresented defendant’s confusion and misunderstanding.

Court clerks may not dispense legal advice and are responsible for moving litigants through the court process. The clerks cannot spend a significant amount of time helping just one person in the line—they have to keep the train running. Court clerks nonetheless try to be as helpful as possible while walking this thin line, leading to some curious results. For example, our review of filed answers showed that defendants most often selected “I owe this debt but would like to work out a payment schedule.” First, this response is not a defense but an admission. The defendant must write it out separately on the form. Second, the language of the response varies only slightly from the defense options on the form, raising questions about whether consumer debt defendants insert this admission independently. Third, our own and others’ observations suggest that the court often unknowingly elicits this admission.

Court personnel refer defendants to *pro se* resources, including CLARO or the court Help Center. However, defendants often have already entered the judicial process

by the time they receive any form of legal assistance. Again, most defendants have no contact with any attorneys other than the opposing counsel. Instances in which the defendant answers and raises a number of defenses but later fails to appear for a scheduled court appearance are particularly troubling. In all but one of the cases where this happened, the court granted the plaintiff a default judgment. In other words, it appears that the court disregarded the defendant’s answer because he/she failed to appear on a later date. Had an attorney filed the answer, however, the court would not have summarily disregarded it. Instead, the court would have required the plaintiff to make a motion *on notice to the defendant* for summary judgment pursuant to CPLR 3212.

Additionally, while it is a laudable goal to have defendants appear and answer, the answer does not appear to fulfill its purpose when defendants do not take any additional steps to defend their cases. Ultimately, answers may promote settlement because defendants fail to take any action in connection with the defenses they raise. In other words, because an unrepresented defendant does not know what the next step should be or how to take it (e.g., making a motion to dismiss), the answer does not serve as the catalyst for action that the defendant believes it will be.

## **Default Judgments**

The requisite proof necessary to enter a default judgment in a consumer debt litigation is minimal. As a result, plaintiffs seeking to collect debts from defendants who do not file an answer may obtain default judgments with relative ease. Pursuant to CPLR 3125, to obtain a judgment on default, (i) the defendant must have failed to appear within the legally allotted time frame, (ii) the application must contain an affidavit attesting that the defendant is not in the military, and (iii) the application must contain either an affidavit of fact or a complaint verified by a party with personal knowledge. Our review of approximately 700 complaints demonstrated that plaintiffs rarely provided an accounting identifying the principal, fees, and interest (rate and amount) of the amount alleged due and owing. Typically, the complaint or affidavit of fact/merit sets forth the total

amount alleged due and very little additional information. Moreover, as discussed above, given the lengthy statute of limitations and the propensity of creditors to sell and re-sell debt, documentation for the debt is rarely, if ever, provided.<sup>37</sup>

## ***Orders to Show Cause***

In older, pre-EIPA cases, many consumer debt defendants became aware that judgment had been entered against them when their bank accounts were frozen or their wages were garnished. Once a judgment is entered, it is simply too late for a consumer debtor to file an answer. He/she must move to vacate the default judgment. As one judge observed, unrepresented defendants are “behind the eight ball” from the moment they first come to court. Often, the court has already entered a judgment against the defendant, his/her bank account has been frozen, and the defendant has come to court to vacate the judgment and enter into a payment plan with the plaintiff. Interviewees reported, however, that judges are generally inclined to vacate default judgments, in part because of persistent issues regarding proper service. Plaintiffs’ counsel usually do not oppose motions to vacate default judgments because vacating the judgment opens up the case for settlement.

To vacate a default judgment, a defendant must move for an order to show cause (“OSC”) to vacate the default judgment and for leave to answer the complaint. The court’s web site has a program providing information on how to vacate a default judgment, including instructions on filing an OSC (Appendix No. 6). According to court personnel, the bulk of OSCs signed by civil court judges each day involve default judgments on consumer debt cases. The OSCs are typically returnable in two weeks, at which time the defendant can file an oral answer. If the OSC seeks to unfreeze the defendant’s assets, the OSC can be expedited and returned on an earlier date. The defendant may also seek injunctive and other relief in an OSC.

## ***Responses and Reforms***

**Directives From the Court.** Traditional court procedures were enacted long before the secondary sale of debt grew into a booming business. To address this new business norm, Judge Fisher issued a directive to apply in New York City Civil Court cases where the plaintiff purchased a consumer debt after September 1, 2009, and seeks entry of default judgment based upon the defendant’s failure to answer (Appendix No. 7). This directive does not apply to any civil courts outside New York City.

Judge Fisher’s directive requires that in addition to the requirements of CPLR 3215, the plaintiff must submit the following supplemental affidavits: (i) an Affidavit of Sale of Account by Original Creditor completed by the original lender, (ii) an Affidavit of the Sale of the Account by the Debt Seller for each subsequent sale, and (iii) an Affidavit of a Witness of the Plaintiff, which includes a chain of title of the accounts, completed by the plaintiff or the plaintiff’s witness.<sup>38</sup> Sample forms of these affidavits are attached to the directive.

Judge Fisher issued a second directive requiring the plaintiff’s application for a default judgment to be accompanied by an affidavit stating that “after reasonable inquiry, he or she has reason to believe that the statute of limitations has not expired” (Appendix No. 8).<sup>39</sup>

**The Consumer Credit Fairness Act.** The proposed CCFA, Assem B. 7558/S. 4398, Leg., 232 Sess. (N.Y. 2009), is a bill that has been introduced in New York to strengthen consumer protections in debt collection proceedings. The CCFA would amend the CPLR in relation to consumer debt transactions. The Assembly passed the bill with a vote of 104 to 40, but it languished in the Senate. At the time of this publication, whether the CCFA will be on the legislative agenda in 2010 is still unknown.

The CCFA is intended to level the playing field for consumer debt defendants. Specifically, the CCFA would amend CPLR 3215, 3016, 214-f, 306-c, and 3211. Thus, in an action arising out of a consumer debt transaction where a purchaser, borrower, or debtor is a defendant, the CCFA would require

the plaintiff to attach to the complaint the contract or other written instrument on which the action is based. The CCFA would further compel the plaintiff to include the following information in the complaint:

1. The name of the original creditor.
2. The last four digits of the original account number.
3. The date and amount of the last payment.
4. If the complaint contains a cause of action based on an account stated, the date that the final statement of account was mailed to the defendant.
5. An itemization of the amount sought, by (i) principal, (ii) finance charge or charges, (iii) fees imposed by the original creditor, (iv) collection costs, (v) attorneys' fees, (vi) interest, and (vii) any other fees and charges.
6. Whether the plaintiff is the original creditor. If not, the complaint must state (i) the date on which the debt was assigned to the plaintiff, and (ii) the name of each previous owner of the account and the date on which the debt was assigned to that owner.
7. Any matters required to be stated with particularity pursuant to CPLR 3015.

The CCFA “require[s] court papers to include basic information about the debt to ensure that [defendants] will be better able to identify the debt or account on which they are being sued.” The CCFA drafters suggest that requiring the debt collector to provide some proof of the debt owed would reduce unsubstantiated cases and frivolous claims and “eliminate a vast number of the cases that are burdening the courts and stripping valuable disposable income from low and moderate income households throughout the state.”<sup>40</sup>

Pursuant to the CCFA, judgments on default would require significantly more information than the law presently mandates. Similar to that required by the court directives, an application for a default judgment would have to contain:

1. Proof of service of the summons and complaint.
2. An affidavit that includes proof of the facts constituting the claim, the default, and the amount due.
3. An affidavit by the original creditor of the facts constituting the debt, the default in payment, the sale or assignment of the debt, and the amount due at the time of sale or assignment, if the plaintiff is not the original creditor.

4. An affidavit by the debt collector stating that after reasonable inquiry, he/she has reason to believe that the statute of limitations has not expired.

Other significant changes include reducing the statute of limitations from six to three years and making the 208.6 Notice a statewide requirement.

## RECOMMENDATIONS

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- **Enact the CCFA.** We join the chorus of advocates from many sectors who argue that the CCFA offers significant and appropriate changes to the present state of the law vis-à-vis consumer debt cases. The enactment of the CCFA would go a long way towards addressing the inequities faced by unrepresented defendants while providing consistency for plaintiffs and the court.
- **Make Information on the Court’s Web Site Available in Paper Form.** The court has a vast amount of useful information on its web site. This information should also be made available in traditional paper form to reach those individuals who cannot access the internet.
- **Booklets Created From the Court’s Web Site Should Be Available in the Communities.** Booklets or pamphlets containing information on, for example, “How to Answer a Debt Collection Case” should be available in a variety of places throughout local communities so that, at least initially, a consumer debt defendant need not incur a day of lost wages or child-care expense simply to gather information.
- **The Court’s Web Site Should Include a Direct Link From the Court System’s Main Page to “How to Answer a Consumer Debt Case.”** Our team found that navigating the court’s web site presented something of a challenge. Thus, we recommend an easy link from the court’s main page to the most pertinent consumer debt information.
- **The Court Should Not Grant a Default Judgment Without Notice Where the Defendant Has Filed an Answer.** In all but one instance where an answer was filed and the defendant thereafter failed to appear on a

scheduled court date, the court granted a default judgment and referred the matter to the Inquest Clerk. Judgment was then entered *without* notice to the defendant. The court should require the plaintiff to make a motion for entry of summary judgment on notice to a defendant who filed an answer to the complaint.

■ **Specific Defenses Should Automatically Trigger**

**Discovery.** Absent an attorney, a debtor defendant likely cannot invoke complicated procedural and substantive rights afforded to him/her, including the right to demand discovery. Advocates report that plaintiffs, however, regularly serve debtor defendants with a litany of discovery requests—intimidating and burdening debtor defendants with requests for information that may exceed the scope of the litigation. We recommend that the New York State Legislature amend the CPLR so that many of the defenses available to defendants trigger automatic discovery. For example, where a defendant pleads that he/she disagrees with the amount of the debt, that the statute of limitations has expired, or that the parties lack privity, the court should require the plaintiff to produce documents related to those issues. These documents will be fundamental to a plaintiff's *prima facie* case. Likewise, where a defendant pleads that he/she is a victim of identity theft, has paid the debt, or is a member of the military or that the debt was discharged in bankruptcy, the defendant should have the burden of producing document discovery to support such defenses. The court should require the parties to complete production within 30 to 45 days. A plaintiff should also possess all the necessary documentation underlying the alleged debt before bringing suit. If the plaintiff does not have evidence of the debt, it should not institute suit. On that basis, limiting the time period for document production would not prejudice plaintiffs.

■ **The Filing of an Answer Should Be a Catalyst for an Inquiry by the Court.** Once document discovery is complete, we recommend that the court institute a mechanism enabling it to make inquiry into the defenses raised by the defendant in his/her answer. Otherwise, the answer may lack purpose, since an unrepresented defendant often does not have the resources and information to pursue traditional litigation strategies. For example, the court could require the defendant to complete a form, relying on documentary evidence or the lack thereof, on the basis of which the court could ascertain whether the defendant's defenses had any merit. We believe a uniform series of questions related to a defendant's answer is a judicially ethical approach to protecting the rights of defendants in consumer credit proceedings.

## PART C: Enter the Judge

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Observed in the courtroom: When the calendar was read, the plaintiff and defendant announced their presence. One plaintiff's counsel after another stood and said, "Application." Each time, the clerk asked the defendant if he/she consented to the application. Each defendant consented. However, it was clear that the defendants did not understand what "Application" meant or whether there was an option to respond in the negative and, if so, what would happen.

Overheard in the hallway: Plaintiff's counsel tries to convince the debtor defendant to settle. "Trust me, ma'am, I do this every day of my life; I'm an expert. I know how this works, and this is the quickest way to end this."

Overheard in the hallway: Debtor defendant: "I want to read this," referring to a stipulation of settlement. Plaintiff's counsel: "Sorry, I only have one copy," quickly reciting what the terms of the settlement would be.

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### *Court Appearances*

Consumer debt advocates give high marks to New York City Civil Court judges for their handling of consumer debt litigations. Nonetheless, the deck remains stacked against defendants. Indeed, as we discuss *infra*, fairness can never be achieved as long as defendants are unrepresented by counsel. Intuitively, the lack of representation would seem to harm only the unrepresented defendant. But some members of the plaintiffs' bar feel aggrieved because they believe that the court does not hold unrepresented defendants to the standards to which they are held. While views on the harm suffered may differ, everyone agrees on one thing—information is the key equalizer.

Appearing before a judge can intimidate anyone, especially consumer debt defendants who have never been in a courtroom before and are likely to be uncertain of the process, including fundamental things such as where to sit or stand, when to speak, and what to say when called upon. Furthermore, they will almost surely not understand the terminology used—language that those familiar with the court do not even think of as "legal" language.

Additionally, it can be difficult for a consumer debt defendant to appear in court. Repeated court appearances present more hardship. For employed individuals or those responsible for the care of children or family members, attending a hearing may result in the loss of income or job security or added costs for child care. Some interviewees believe that some members of the plaintiffs' bar request adjournments tactically to encourage defendants to settle.

Repeated adjournments prevent the efficient resolution of a case and can and do lead to default judgments. Adjournment practices are judge-specific, and many variations exist. As discussed *supra*, we reviewed a number of cases in which the defendant answered but subsequently failed to appear. On several occasions, the case was marked final against the plaintiff on the adjourned date. In other words, if the plaintiff had not been ready to go forward with proving its claim on the next court date, the court would have dismissed the action. Instead, the court granted a default judgment because the defendant failed to appear on the next court date.

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### *Traverse Hearings*

If a defendant claims that he/she was never served with a summons and complaint, the court may choose to hold a traverse hearing to determine whether it has personal jurisdiction over the defendant. During the traverse hearing, the judge weighs evidence from both sides to determine whether the defendant was properly served. A process server's affidavit is *prima facie* evidence of service; the defendant must produce sufficient evidence to refute the affidavit of service for the judge to dismiss the case for improper service.<sup>41</sup> Even if the judge finds for the defendant

and dismisses the case, the plaintiff can simply re-file and start the litigation over again by serving the defendant personally as soon as he/she leaves the courthouse. This practice has contributed to a sense among some observers that traverse hearings are ultimately ineffective, costly, and time-consuming. The problems associated with traverse hearings may be the reason why the civil courts infrequently hold them.

Some interviewees expressed the strongly held belief that traverse hearings are far from futile exercises; rather, proponents believe that traverse hearings not only provide defendants with an opportunity to contest improper service, but often result in dismissals because process servers rarely appear. One judge commented that, despite scheduling many traverse hearings, she had never actually had the occasion to conduct one, since not a single process server had ever appeared. Another judge estimated that not more than 25 percent of process servers appear for traverse hearings. Advocates also claim that some consumer debt plaintiffs may not wish to go through the added time and expense to re-file a case following a traverse-hearing dismissal.

## ***Discovery***

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Discovery and motion practice—typical tools in litigation—can also create undue hardships for unrepresented defendants in consumer debt cases. Plaintiffs, who often lack the requisite proof themselves, can serve defendants with extensive discovery requests, including interrogatories, document requests, and Notices to Admit. In one case we reviewed, the plaintiff served 22 interrogatory requests and a Notice to Admit and subsequently moved to compel discovery when the unrepresented defendant did not respond to the requests. Unsurprisingly, unrepresented defendants are typically unable to respond effectively to these requests and either fail to respond altogether or make unknowing admissions.

One judge finds—similar to the allegations made by MFY and NEDAP in the recently filed amended class action complaint—that plaintiffs rarely have the relevant

documents.<sup>42</sup> Accordingly, this judge, believing that ordering discovery is not particularly helpful, rarely does so. Another judge, however, believes that creating model forms with language ordering “the plaintiff to provide the defendant with [x documents]” might give normative guidance to civil court judges and encourage defendants to take advantage of their rights to the discovery of evidence (Appendix No. 9). As discussed above, we agree that providing for automatic discovery in specific situations benefits all parties equally.

## ***Settlement***

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Although the consumer debt litigation system encourages settlement, a study by the UJC found that only 5.9% of all consumer debt cases are in fact settled. This is because, in the great majority of cases, defendants fail to appear and a default judgment is entered. However, our review of cases in which the defendant answered showed that in Kings County two-thirds of the cases, and in Queens County half of the cases, settled post-answer. We also found that while the amount owed, as pleaded in the complaint, ranged from \$144.62 to \$23,020.87, settlements ranged from \$100.00 to \$21,243.00. The average amount owed (according to the complaints) was \$3,644.62, while the average settlement amount was \$2,490.84.

Defendants who do appear in court may be called into the hallway by plaintiffs’ counsel for settlement negotiations. In this situation, the defendant may not immediately be aware that the person calling him/her out of the courtroom is the plaintiff’s counsel; typically, a defendant hearing his/her name called simply responds. Unrepresented defendants in these circumstances are at a significant disadvantage and can be pressured into one-sided settlements, settling for amounts similar to or greater than those demanded in the complaints, which may include unknown interest and fees. Advocates and judges alike are uncomfortable with what they see as the often heavy-handed approach to settlement by the plaintiffs’ bar.

The percentage of defendants who default on the settlement agreement also presents a sobering statistic. Of the 341

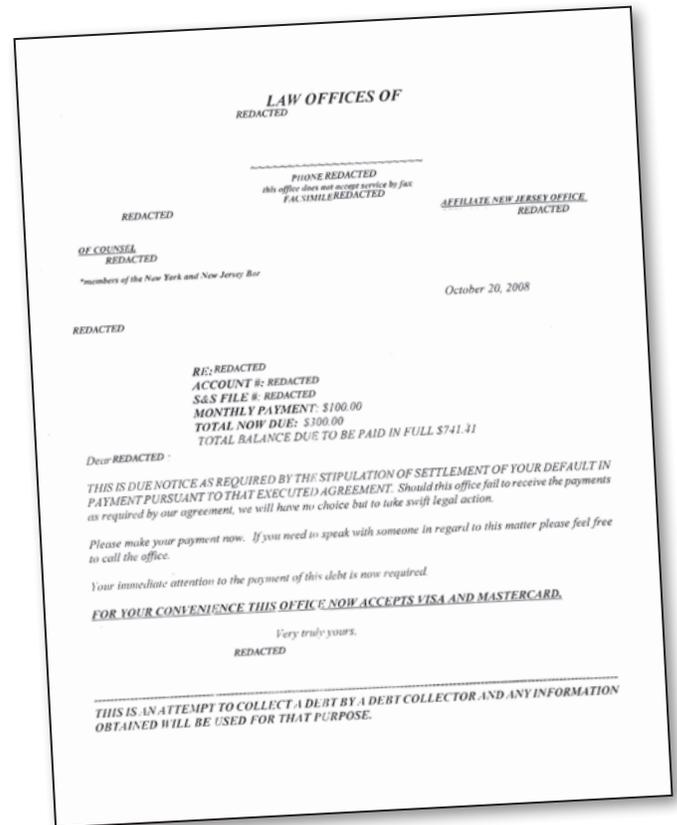
settlements we studied, 46 defendants (or 13%) failed to make payment pursuant to the agreement and the court subsequently entered judgment without notice to these defendants.

This circumstance raises difficult questions—can the debtor afford to make payments, and what level of judicial oversight is appropriate in the settlement process? Indeed, the extent to which judges can or should exert influence over the settlement process in consumer debt cases is much debated. Some judges we interviewed felt compelled to take an active role in settlement. Judges must walk a thin line between ensuring a fair legal resolution and becoming an advocate.

Most stipulations of settlement are ordered by the court. Some judges require the stipulation to list the account number and the breakdown between principal, interest, and fees. Problems appear in stipulations that do not bear the court's imprimatur. For example, we reviewed one stipulation that had the defendant paying interest on top of interest, with all payments going first to interest and then to principal. It was impossible for our team to determine when the debt would be fully paid.

All judges allocute the stipulation, ensuring that the defendant knows, understands, and agrees to the terms of the settlement. Judges take different approaches in how closely they scrutinize the settlement agreement. Some merely ask the defendant if he/she understands the terms of the agreement. Others ask the defendant not only if he/she agreed to each of the stipulated items, but also if, for example, he/she is confident that he/she is paying the right company, along with other, more probing questions. One judge uses the stipulation as an opportunity to see whether the defendant can afford to pay the amounts listed and asks the plaintiff's attorney for the lowest amount for which he/she has the authority to settle. Some judges have refused to so-order a stipulation where the terms appeared to be unfair. Other judges are hands-off in allocuting stipulations, assuming that the defendant is an adult able to make his/her own decisions and independently enter into a settlement agreement.

One example we came across during our review of cases in which the defendant defaulted on the settlement agreement underscored the dilemma of the consumer debt defendant: how can you make payments on the settlement when you do not have the money to do so? Use a credit card, of course!



## Mediation

Mediation is not widely used in consumer debt litigations. New York County has employed mediation with mixed results. Some believe that mediation is a fairer forum for settlement than the courthouse hallways and is effective for some defendants, particularly those who just want the litigation to end quickly. On the other hand, some defendants prefer to negotiate a payment plan rather than take a day off from work to return to court.

Mediation has its limitations, however. Mediators (i) must be indemnified by the court, (ii) are limited by time constraints, and (iii) can be ineffective. Some believe that a mediator takes the shortest route possible to settlement, which typically means splitting the

number down the middle and thus leaving both sides dissatisfied. One unrepresented defendant confirmed this type of short treatment. According to the defendant, “[Plaintiff’s counsel] said what he wanted, I said what I wanted, [and] the mediator split it down the middle.”

## ***Responses and Reforms***

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**Court-Initiated Advisory.** On June 21, 2008, Judge Fisher issued a memorandum advising judges of the New York City Civil Court that prior to ordering a stipulation between a represented plaintiff and an unrepresented defendant, the judge should allocute the stipulation. The judge should ascertain from the parties, for example, that the debt is not time-barred, that the defendant’s income is not exempt from garnishment and, most important, that the defendant understands what he/she is agreeing to (Appendix No. 10).

## **RECOMMENDATIONS**

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- **Increase Access to Information.** Steps should be taken to publicize the fact that information on navigating the court process exists at the courthouse and on the internet. This information should be available in businesses and other areas in local communities.
- **Create a Courthouse Dictionary.** We encourage the Chief Administrative Judge of the New York State Unified Court System to create a pamphlet explaining the vocabulary used during proceedings and to make it available right outside the courtroom.
- **Create Posters in Different Languages Explaining Defenses to a Consumer Debt Action.** For instance, the courthouse could put up signs in different languages, listing and explaining the available defenses, that unrepresented defendants could easily read while waiting in line.

- **Courts Should Encourage Traverse Hearings.** The vast majority of traverse hearings result in dismissed cases due to the process server’s failure to appear. Because these hearings quickly dispose of cases lacking jurisdiction, traverse hearings actually save resources. Judges should encourage and expand the use of traverse hearings.

- **Courts Should Limit Adjournments.** Taking a day off from work to attend to court-related matters may cost a defendant litigant more than the litigation in question, especially when the defendant’s job is in jeopardy. Plaintiffs can use repeated adjournments strategically, which may cause significant hardships for consumer debt defendants. Before a plaintiff brings suit, it should possess all of the documentation underlying the alleged debt. If it does not have evidence of the debt, then it should not institute suit. Courts should not permit suits without evidence of debt to proceed. On that basis, limiting adjournments would not prejudice plaintiffs and would offer certainty to defendants and plaintiffs alike.

- **A Model Stipulation of Settlement Should Be Created.** The model stipulation should include the account number, the original creditor, the total amount agreed to, the monthly payment amount agreed to, and the rate at which interest will accrue. If the defendant receives exempt income, the stipulation should indicate this fact. The form should also provide that in the event of default, a curative notice must be sent, and if the defendant fails to cure the default, the court may enter default judgment on the amount owing from the settlement on 10 days’ notice.

- **A Model Allocution Form Should Be Created.** We recommend the creation of a model allocution form that all civil court judges can use to help ensure that defendants understand the settlements they enter into and the rights they may waive by doing so. A model allocution form will promote consistency in the way judges treat settlements by unrepresented defendants.

- **Create Evening Hours to Aid Settlement and Resolution of Certain Consumer Credit Matters.** The courthouse could designate certain nights per week for resolution of consumer credit matters when consumer defendants acknowledge that they owe the debt and state on their answer forms that they would like to work out a payment plan. The court could ensure these evenings overlap with existing advice and legal service programs. We also recommend that the court and advocates explore possible mediation programs for *pro se* proceedings.



## CHAPTER 3: Systemic Barriers



Harry C., an elderly man suffering from obvious mental and physical disabilities, visited CLARO for assistance in dealing with five cases that had been brought against him. Harry appeared to have trouble focusing during the conversation. After many questions by the CLARO representative, the story finally emerged that the statute of limitations had run on all five cases and that Harry had proof. Although Harry understood that it was too late for these cases to be brought against him, it was clear to the CLARO representative that Harry would be unable to articulate this in court.



### *Lack of Legal Representation*

**The Number of Unrepresented Defendants Appearing in the New York Courts Is Shocking.** Approximately 1.8 million litigants appear each year without a lawyer in New York State courts.<sup>43</sup> Less than 4% of defendants in consumer debt actions are represented by counsel, while 100% of plaintiffs bringing these actions have legal representation.<sup>44</sup> Indeed, the UJC report found that only two defendants out of the 600 in its sampling had attorneys.<sup>45</sup> The vast majority of unrepresented defendants are overwhelmed by, and very often unable to navigate, the civil court system.

**The Legal Landscape.** For civil defendants, unlike criminal defendants, the “right to counsel” does not exist under either the United States or the New York State Constitution.<sup>46</sup> Advocates have litigated and lobbied to extend the right to counsel to civil cases, but to no avail.<sup>47</sup> As a result, economically disadvantaged civil litigants must independently seek out, and rely on, the limited services provided by legal-aid groups and pro bono programs. Civil defendants left without representation encompass not only consumer debt defendants but also

litigants facing housing, foreclosure, and domestic matters. Typically, consumer debt litigation is lower on the scale of importance, ranking behind custody and eviction cases—a fact that makes it even more difficult for unrepresented consumer debt litigants to receive legal assistance.

## ***Available Legal Resources***

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**CLARO.** The Civil Legal Advice and Resource Office is an organization that provides free legal advice to unrepresented consumer debt defendants. CLARO currently operates in four New York City boroughs in partnership with legal services and advocacy organizations. CLARO attorneys and law student volunteers guide litigants through the consumer debt litigation process by informing them of their rights, potential defenses, and how to file documents in court. CLARO frequently works with litigants to prepare answers to complaints and motions to vacate default judgments. It also assists defendants in using A2J computer terminals. CLARO holds weekly walk-in clinics for unrepresented consumer debt litigants in New York, Kings, Queens, and Bronx Counties; another clinic is scheduled to open soon in Richmond County.

Although clinic attendance varies, CLARO volunteers report that in general, more people seek assistance during the two-hour weekly sessions at the Queens clinic than the volunteers can handle. Similarly, in Kings County, between 30 and 35 people attend each four-hour weekly clinic, with 858 unrepresented defendants visiting the Kings County CLARO last year.

### **Civil Court Help Centers and *Pro Se* Attorney Program.**

The civil courts also have *pro se* attorneys on staff to assist unrepresented litigants. In addition, civil courts in New York and Kings Counties maintain Help Centers with regular attorney advice programs for unrepresented litigants. The courts' *pro se* attorneys answer questions, describe the steps for handling a case as an unrepresented litigant, and help unrepresented litigants navigate the judicial process. They do not, however, provide legal advice regarding legal strategy or similar substantive issues; *pro se* attorneys are authorized

to offer procedural information only. To illustrate, a *pro se* attorney may advise a litigant on the steps for filing an OSC, what the litigant must prove to the judge to issue the order, the defendant's obligations upon receiving written discovery requests, and the objections the defendant may assert to these requests. A *pro se* attorney may not, however, counsel a litigant on whether to file an OSC or how to respond to a specific discovery request.

The court *pro se* attorney is available to nonhousing litigants for a limited time period every day. In Kings County, the court attorney typically assists 15 to 20 unrepresented consumer debt defendants per week.

**“Lawyer for the Day” Pilot Project.** Because many of the resources serving consumer debt litigants are limited by their inability to provide legal advice, a need remains for more comprehensive legal services for unrepresented consumer credit defendants. The Lawyer for the Day program represents one proposed cost-effective solution. This program would pair consumer debt litigants with attorneys who would provide limited legal representation to litigants on the day of their court appearances if program volunteers are available. Unlike the *pro se* advice programs listed above, the Lawyer for the Day program provides individual litigants with a courtroom advocate for the purpose of negotiating a settlement and/or making a limited appearance before the judge. Such programs have both proponents and detractors, and consumer debt advocates voice strong opinions on both sides of the issue.

Some advocates believe that the Lawyer for the Day program may promote unnecessary and costly adjournments of the defendant's court date. A plaintiff's attorney could seek a hearing adjournment with the hope that an unrepresented defendant would not have a Lawyer for the Day at the next hearing. A Lawyer for the Day may also not be very helpful to a litigant whose case cannot be resolved by settlement or disposition in one day. Legal services advocates also voice concern that if defense attorneys become involved in the representation and negotiation of consumer debt cases without adequate preparation and factual knowledge, defendants may face difficulty if they later seek to set aside stipulations they improperly entered into on the advice of these attorneys.

Advocates who oppose the Lawyer for the Day program suggest that in most cases, litigants “just need an explanation of what is happening” and an understanding that even if they do owe the debt, the creditor’s attorney must meet his/her burden of proof. One advocate suggested that additional seminars for the public on consumer debt issues would offer more benefit than moving critical resources to limited legal representation. Others worry that participating lawyers would not be adequately trained or aware of the long-term context of consumer debt proceedings.

Conversely, other advocates believe that a Lawyer for the Day would provide a very helpful service for unrepresented defendants. The programs train and supervise experienced attorneys whose limited representation allows the most vulnerable defendants to negotiate fair settlements or obtain dismissals they would not be able to secure if unrepresented. Such training, supervised by the court, offers continuing legal education credit for qualifying participants. While these supporters strongly encourage educating consumer debtors, they warn that telling an unsophisticated defendant that the plaintiff must meet its burden of proof with admissible evidence communicates little other than legal jargon. The example of Harry C. above demonstrates the vital difference that properly trained lawyers can make.

In response to concerns that the Lawyer for the Day program encourages plaintiffs’ attorneys to seek adjournments, advocates argue that judges can screen out dilatory requests by asking plaintiffs for the reasons supporting their applications. Judges are probably more disposed than not to move a case forward to a date on which a defendant has a volunteer lawyer. Regarding a defendant’s ability to later vacate an improper settlement, the Lawyer for the Day program responds that a major purpose of the volunteer lawyer is to prevent defendants from entering settlements without proper preparation or all the facts. Volunteers should decrease, not increase, the number of improper settlements. Faced with incredibly limited resources and insufficient funds to guarantee counsel for every defendant, these advocates argue that a volunteer Lawyer for the Day program goes far to fill a large gap.

## Responses and Reforms

**Closely Monitored Pilot Projects.** In 2009, New York Applesseed and the New York City Civil Court launched a pilot project to provide limited legal representation under the Lawyer for the Day model for consumer debt defendants. Funded by the New York State Courts Access to Justice Program and the ACE Rule of Law Fund, the program features include a referral system, through which CLARO attorneys recommend defendants to the Lawyer for the Day program, and comprehensive training for volunteer lawyers to represent those defendants in court, primarily through assistance in the settlement context.

**Expanded Volunteer Programs.** Over the past few years, the New York State Courts Access to Justice Program has taken significant steps to open courtroom doors to volunteer attorneys. Through special pro bono projects and expanded CLE opportunities, as well as Student Practice Orders and programs targeting retired attorneys or “attorneys emeritus,” the courts now have the capacity to train hundreds of volunteers regularly to staff *pro se* clinics, CLARO and, most recently, the Lawyer for the Day program. Additionally, the current underemployment and unemployment situation for attorneys has yielded an unprecedented spike in volunteer lawyers for the civil court’s volunteer programs. Attendance at the court’s most recent training program exceeded 400.

## RECOMMENDATIONS

### ■ **Expand the Use of Pro Bono/Volunteer Lawyers.**

We recommend that the courts and legislature expand access to pro bono attorneys and volunteer programs, including CLARO, Help Centers, and pilot projects involving volunteer Lawyers for the Day. There is a variety of ways in which pro bono and volunteer lawyers could be used, including:

- **Negotiating Settlements.** Some believe the single best way to equalize the information disparity would be to have someone “in the know” stand up for the defendant when negotiating a stipulation. The pro bono or volunteer lawyer’s main responsibility would be to negotiate a settlement or payment plan for unrepresented litigants.

- **Providing Other Unbundled Legal Services.** Expand the use of unbundled legal services, allowing lawyers to participate in discrete counseling services such as those offered by the Lawyer for the Day program. These programs would provide unrepresented consumer debt litigants with legal representation on the day of their appearances.
- **Expand Student Practice to a Statewide Rule.** Expanding Student Practice Orders to allow law students and recent graduates to assist in advising consumer debt litigants offers another way to increase representation. Law student volunteers can work within established court programs, CLARO, or the Lawyer for the Day program to provide legal services to consumer debt litigants.

# Endnotes

- 1 John Gramlich, *Court Cuts Trigger Blunt Warnings*, STATELINE, Feb. 18, 2009, available at <http://www.pretrial.org/Docs/Documents/Court%20cuts%20trigger%20blunt%20warnings.pdf>.
- 2 *Id.*
- 3 Legal Aid Society, *Cuts in City and State Funds for 2010 Will Further Impair Legal Aid's Ability to Provide a Constitutional Defense*, Feb. 4, 2009, available at <http://www.legal-aid.org/en/mediaandpublicinformation/inthenews/cutsincityandstatefundsfor2010willfurtherimpairlegalaidsabilitytoprovideaconstitutionaldefense.aspx>.
- 4 Bureau of Labor Statistics, Economic Situation Summary, Nov. 6, 2009, available at <http://www.bls.gov/news.release/empst.nr0.htm>.
- 5 Robert W. Murphy, "Taming the Collection Tempest": A Primer on Federal and State Restraints on Consumer Debt Collection, Practising Law Institute Seminar (Mar. 26, 2009).
- 6 Juan Lagorio, *Capital One Credit Card Defaults Rise in September*, REUTERS (Lisa Von Ahn ed.), Oct. 15, 2009, available at <http://www.reuters.com/article/businessNews/idUSTRE59E25820091015>.
- 7 *Justice Disserved: A Preliminary Analysis of the Exceptionally Low Appearance Rate by Defendants in Lawsuits Filed in the Civil Court of the City of New York*, MFY Legal Services, Inc., Consumer Rights Project (June 2008), available at [http://www.mfy.org/Justice\\_Disserved.pdf](http://www.mfy.org/Justice_Disserved.pdf).
- 8 *Debt Weight: The Consumer Credit Crisis in New York City and its Impact on the Working Poor*, Urban Justice Center (Oct. 2007), available at [http://www.urbanjustice.org/pdf/publications/CDP\\_Debt\\_Weight.pdf](http://www.urbanjustice.org/pdf/publications/CDP_Debt_Weight.pdf).
- 9 *Expanding Access to Justice in New York State*, Office of the Deputy Chief Administrative Judge for Justice Initiatives (Mar. 2009), available at [http://www.abanet.org/legalservices/delivery/downloads/expanding\\_access\\_to\\_justice\\_in\\_new\\_york\\_state.pdf](http://www.abanet.org/legalservices/delivery/downloads/expanding_access_to_justice_in_new_york_state.pdf).
- 10 New York has long protected certain debtor assets from collection. But, as the UJC noted in its report, the ability of judgment creditors to freeze a judgment debtor's account prior to determining whether some or all were exempt often resulted in cumbersome and expensive litigation, in addition to debtor hardship. See *Debt Weight: The Consumer Credit Crisis in New York City and its Impact on the Working Poor*, *supra* note 8. The EIPA requires banks to determine, upon receipt of a restraining notice, which funds in the judgment debtor's accounts: (i) were deposited electronically, and (ii) are exempt. See N.Y. C.P.L.R. 5205(L)(1), 5222(H) (effective Jan. 1, 2009); see also Johnson M. Tyler, *Exempt Income Protection Act Better Protects Strapped Debtors*, N.Y.L.J., Jan. 27, 2009, at 4. Exempt funds include Social Security, including retirement, survivors', and disability benefits; Supplemental Security Income; child support payments; spousal support or maintenance; Veterans Administration benefits; public assistance; workers' compensation; unemployment insurance; public or private pensions; railroad retirement; and black lung benefits. State of N.Y. Banking Department, Industry Letters: Amendments Regarding Exempt Funds (Jan. 20, 2009), available at <http://www.banking.state.ny.us/il090120.htm>. If the account holds such deposits, the first \$2,500 of that account cannot be frozen, even if it also contains nonexempt deposits. If the account does not receive any direct deposits, the creditor may freeze only the balance exceeding \$1,716 (the equivalent of two months' minimum wage), regardless of the source of the deposit. If the balance is less than \$1,716, or \$2,500 for an exempt funds account, then the restraint is void. The Act also provides that a judgment creditor may impose only two restraining notices on a debtor account per year. Tyler, N.Y.L.J. at 5; see also N.Y. C.P.L.R. 5222(c) (effective Jan. 1, 2009). This deters "creditors from repeatedly restraining accounts that are exempt, as happens now." Tyler, N.Y.L.J. at 5. The Act also bars banks from charging fees on account balances below the automatic exemption floor (\$2,500 or \$1,716), "thereby voiding the restraint." *Id.*; see also N.Y. C.P.L.R. 5222(j) and 5232(f) (effective Jan. 1, 2009).
- 11 In addition to these measures, the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, regulates how debt collectors may conduct business, defines the rights of consumers, and prescribes penalties and remedies for violations of the Act. The FDCPA also requires that a debt collector must provide consumers with a validation notice informing consumers of certain rights afforded under the FDCPA, including the right to seek verification of the debt.
- 12 Ray Rivera, *Suit Claims Fraud by New York Debt Collectors*, N.Y. TIMES, Dec. 31, 2009; see also Sykes, *et al. v. Mel S. Harris and Associates LLC, et al.*, No. 09 Civ. 8486 (DC), Amended Class Action Complaint, S.D.N.Y. Dec. 28, 2009.
- 13 N.Y. C.P.L.R. 308(1), (2), and (4) (2008).
- 14 See, e.g., *Matos v. Knibbs*, 588 N.Y.S.2d 911 (N.Y. App. Div. 1992).
- 15 N.Y. C.P.L.R. 308, cmt. C308:3 (2008).
- 16 *Debt Weight: The Consumer Credit Crisis in New York City and its Impact on the Working Poor*, *supra* note 8.

- 17 See Chief Clerk's Memorandum CCM-176, GP-20, Civil Court of the City of New York (Apr. 1, 2008).
- 18 *Id.* A review of files at the civil court in Kings County revealed cases in which the 208.6 Notice was sent out some 30 days following the date of the mailing of the summons.
- 19 *Id.* Court clerks in the civil court in Kings County reported that about 350 208.6 Notices are mailed by the court each day.
- 20 After filing the affidavit of service of the summons and complaint, the plaintiff may file the additional 208.6 mailing envelope with the clerk. Chief Clerk's Memorandum CCM-176, *supra* note 17. The clerk must then update the court file and affidavit of service to select the date of that submission and promptly mail the envelope. *Id.*
- 21 Chief Clerk's Memorandum CCM-182, GP-10 & 20, Civil Court of the City of New York (Apr. 21, 2009).
- 22 Chief Clerk's Memorandum CCM-176, *supra* note 17.
- 23 *Id.*
- 24 See, e.g., *Asset Acceptance LLC APO Bally Total Fitness v. Miguel Bravo*, No. CV-011111-08 NY (Dec. 17, 2008 Judgment Rejection Notification) (listing numerous grounds for rejection of default judgment application pursuant to Rule 208.6, including post office stamps evidencing that the notice was undeliverable).
- 25 See *People of the State of New York v. Am. Legal Process, Inc., et al.*, No. 9277 (Dist. Ct. Nassau Cty.) (Felony Complaint, filed Apr. 14, 2009, and Petition for Injunction, filed Apr. 13, 2009); Press Release, Office of New York State Attorney General Andrew M. Cuomo, *Attorney General Cuomo Announces Arrest of Long Island Business Owner for Denying Thousands of New Yorkers Their Day in Court* (Apr. 14, 2009), available at [http://www.oag.state.ny.us/media\\_center/2009/apr/apr14a\\_09.html](http://www.oag.state.ny.us/media_center/2009/apr/apr14a_09.html).
- 26 See *People of the State of New York v. Am. Legal Process, Inc., et al.*, *supra* note 25; *Attorney General Cuomo Announces Arrest of Long Island Business Owner for Denying Thousands of New Yorkers Their Day in Court*, *supra* note 25.
- 27 See Press Release, Office of New York State Attorney General Andrew M. Cuomo, *Attorney General Cuomo Sues to Throw Out Over 100,000 Faulty Judgments Entered Against New York Consumers in Next Stage of Debt Collection Investigation* (July 22, 2009), available at <http://www.nydebthelp.com/home.html>.
- 28 See *id.*
- 29 Obviously, a number of issues will be raised; for example, will fees be repaid in instances of improperly frozen bank accounts? How will consumer debt defendants recover? How will the court get notice to them? Undoubtedly, this lawsuit and its aftermath will be closely followed by all.
- 30 See *Sykes, et al. v. Mel S. Harris and Associates LLC, et al.*, No. 09 Civ. 8486 (DC), Amended Class Action Complaint, S.D.N.Y. Dec. 28, 2009.
- 31 *Id.* ¶ 103.
- 32 Murphy, *supra* note 5.
- 33 N.Y. C.P.L.R. 213(2) (2008). New York is proposing to change the statute of limitations for consumer debt actions. The Consumer Credit Fairness Act proposes to shorten the statute of limitations from six years to three. See Consumer Credit Fairness Act § 3, A. 7558, S. 4398, 232d Leg. (2009). The Act was passed by the Assembly on June 22, 2009, and went to the Senate Committee on Rules on the same date. The Act has not been signed into law.
- 34 See *Representing Yourself*, New York City Civil Court, available at <http://www.courts.state.ny.us/courts/nyc/civil/represent.shtml> (last accessed Nov. 29, 2009).
- 35 *Id.*
- 36 See *Answering a Debt Collection Case*, New York City Civil Court, available at <http://nycourts.gov/courts/nyc/civil/consumercredit.shtml> (last accessed Nov. 29, 2009).
- 37 Indeed, appeal courts have dismissed a number of such deficient complaints. However, this happens only in cases where the defendant has answered and then appeals the decision of the trial court—an unusual occurrence. See, e.g., *PRA III, LLC v. Gonzalez*, 54 A.D. 3d 917 (N.Y. App. Div. 2008) (finding that the Supreme Court erred in granting plaintiff's motion for summary judgment on the grounds that plaintiff submitted insufficient evidence of (a) the existence of an agreement to extend credit to the defendant, (b) the issuance of credit cards at the defendant's address, (c) defendant's use of credit cards, (d) defendant's retention of account statements, or (e) defendant's payments on the account, as well as the assignment of defendant's alleged debt to plaintiff); *Citibank v. Martin*, 11 Misc. 3d 219 (N.Y. Civ. Ct. 2005) (explaining that in order to make its *prima facie* case for the purposes of a summary judgment motion, a credit card issuer must provide an affidavit sufficient to tender to the court the original agreement, as well as any revision thereto, averring that the documents were mailed to the card holder and typically advancing copies of credit card statements evidencing a buyer's subsequent use of the credit card and acceptance of the original or revised terms of credit).

- 38 Directives and Procedures DRP-182, GP-20, Civil Court of the City of New York (May 13, 2009), *available at* <http://www.nycourts.gov/courts/nyc/civil/directives/DRP/drp182.pdf>.
- 39 Chief Clerk's Memorandum CCM-186, GP-20, Civil Court of the City of New York (May 13, 2009).
- 40 *Empire Justice Memo of Support: Pass the Consumer Credit Fairness Act*, Empire Justice Center (June 8, 2009), *available at* <http://www.empirejustice.org/policy-advocacy/memos/empire-justice-memo-of-2.html>.
- 41 *See, e.g., Simonds v. Grobman*, 716 N.Y.S.2d 692 (N.Y. App. Div. 2000).
- 42 *See Sykes, et al. v. Mel S. Harris and Associates LLC, et al.*, No. 09 Civ. 8486 (DC), Amended Class Action Complaint, S.D.N.Y. Dec. 28, 2009.
- 43 *See Expanding Access to Justice in New York State*, *supra* note 9.
- 44 *Debt Weight: The Consumer Credit Crisis in New York City and its Impact on the Working Poor*, *supra* note 8.
- 45 *Id.*
- 46 Under the Sixth Amendment of the U.S. Constitution, state courts are required to provide legal counsel to criminal defendants who are otherwise unable to afford it. *See Gideon v. Wainwright*, 372 U.S. 335 (1963).
- 47 Courts are permitted to appoint counsel to civil litigants on a case-by-case basis, but no absolute right to counsel exists for defendants in civil cases. *See Lassiter v. Department of Social Services*, 452 U.S. 18 (1981).





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