

# Collection Texas-Style: An Analysis of Consumer Collection Practices in and out of the Courts

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*As many as forty-four percent of Texans with credit files have nonmortgage debt in collection; this is more than ten percent above the national average. The Authors provide a snapshot of collection practices employed in Texas over a two-year period following the enactment of new court rules governing the litigation of most collection cases. Using a combination of quantitative and qualitative methods, they consider data in three general categories: (1) consumer complaints to the state and federal agencies; (2) court outcomes over a two-year period along with related demographic data; and (3) court observations conducted in five counties with a review of the websites for each of the courts within those counties. The Authors find that for many Texans, consumer debt collection means threats and intimidation that disrupt their family and work lives. While they also found that the default judgment rate in consumer collection cases was slightly lower than reported in a previous study, they found that it appears to be growing, signaling that more work remains to be done. The Authors recommend a number of reform efforts that include steps to increase the quantity and quality of information provided to consumers at all stages of the collection process and to increase enforcement of existing protections. To the extent that court proceedings remain an integral part of that process, the Authors also recommend further standardization of court procedures to ensure only valid claims are raised. They also encourage courts to actively participate in efforts to ensure that the protection of consumer rights does not stop at the courthouse door.*

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### INTRODUCTION

Texans like to boast that everything is bigger in Texas. Unfortunately, when it comes to consumer debt in collection, they are correct. In July 2014, the Urban Institute reported that more than forty-four percent of Texans with credit files had some form of nonmortgage debt in collection.<sup>1</sup> That is eleven percentage points higher than the national average of thirty-three percent, putting Texas second only to Louisiana.<sup>2</sup> The average amount of the Texas consumer's debt in collection was slightly more than \$5000.<sup>3</sup>

One might consider the high rate of debt among Texas consumers to be consistent with Texas' long tradition of providing debtor protections. The 1836 Constitution of the Republic proclaimed, "No person shall be imprisoned for debt in consequence of inability to pay," a provision which remains a part of the state's constitution.<sup>4</sup> In addition, Texas protects significant personal assets from the reach of general creditors<sup>5</sup> and provides generous homestead protection for up to ten acres for an urban homestead and up to 200 acres for a rural homestead.<sup>6</sup> Texas is also one of just four states that protect current wages from garnishment, except in limited circumstances such as payment of child support.<sup>7</sup>

Despite this high level of post-judgment protection, debt collectors in the state use a number of tools, including litigation, to obtain payment.

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1. CAROLINE RATCLIFFE ET AL., URBAN INST., *DELINQUENT DEBT IN AMERICA* 1, 9 (2014) (using data from one of the three largest credit bureaus).

2. *Id.* at 9.

3. *Id.* "Debt in collection" as used above and as used in this Article includes all nonmortgage consumer debt, including credit card accounts unpaid for more than 180 days, payday loans, unpaid medical or utility bills, and child support obligations. *See id.* at 4 (discussing debt reported by the creditor to the credit reporting agency as being debt in collection). The Federal Reserve Board defines consumer credit as "most credit extended to individuals, excluding loans secured by real estate." *See* FED. RESERVE, CONSUMER CREDIT-G.19 2 n.1 (2016).

4. TEX. CONST. art. 1, § 18.

5. *See, e.g.*, TEX. PROP. CODE ANN. § 42.002 (West 2016).

6. *See id.* § 41.002(a) (exempting up to 10 acres for urban homestead); *id.* § 41.002(b) (exempting up to 200 acres for rural homestead).

7. *Id.* § 42.001(b). This provision prohibits all wage garnishments except for enforcement of court-ordered child support payments.

Beginning September 1, 2013, debt collectors could, for the first time, file their cases as “debt claim cases” in justice court—the state’s version of “people’s courts,” where nonlawyers may serve as judges and rules of evidence may not apply.<sup>8</sup> For a twelve-month period beginning September 1, 2013, more than 147,000 cases were filed in Texas trial courts to collect some form of debt.<sup>9</sup> Of those, approximately 90,000 cases (approximately fifty-seven percent of the total) were filed as debt claim cases in the justice courts.<sup>10</sup> That number grew by more than twenty percent to nearly 110,000 cases in the following twelve-month period, even as litigation to collect consumer debt declined in other states.<sup>11</sup>

This Article explores the experiences of Texas consumers throughout the debt collection process, from informal collection efforts through the conclusion of litigation. We attempt to assess the overall effectiveness of existing consumer protections and begin with an examination of complaints from Texas consumers filed with the Texas Attorney General and the Consumer Financial Protection Bureau (“CFPB”). We then analyze statistical information publicly available from the Texas Office of Court Administration about the volume and outcome of debt claim litigation together with demographic data from the U.S. Census Bureau. Our inquiry focuses on forty Texas counties with populations exceeding 100,000 and spans a two-year period beginning September 1, 2013.<sup>12</sup> We also collected qualitative data from court observations in five of the counties analyzed and began to explore

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8. Until September 1, 2013, there was some confusion regarding the filing of collection cases in courts presided over by a justice of the peace. New rules effective September 1, 2013, expressly permit the filing of debt claim cases in justice court, but have no effect in the courts of record. *See e.g.*, TEX. GOV'T CODE ANN. § 27.031 (West 2016); TEX. R. CIV. P. 508.1.

9. TEX. OFFICE OF COURT ADMIN., ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY: FISCAL YEAR 2014, at 116 (2014); *see infra* Part III.A.

10. TEX. OFFICE OF COURT ADMIN., *supra* note 9, at 116.

11. TEX. OFFICE OF COURT ADMIN., ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY: FISCAL YEAR 2015, at 44 (2015); *see infra* Part I.C.1 (discussing other states).

12. This data was produced at the justice court precinct level by the Texas Legislative Council using the 2010 Census Summary File 1, extracted from the Missouri Census Data Center for population, race, and gender data, and the 2008–2012 American Community Survey 5-Year Estimates for poverty and income data. *See Standard Summary File 1 (2010 Census) Extract Assistant*, MO. CENSUS DATA CTR., [http://mcdc.missouri.edu/cgi-bin/broker?\\_PROGRAM=websas.sf12010x\\_extract\\_menu.sas&\\_SERVICE=appdev&st=](http://mcdc.missouri.edu/cgi-bin/broker?_PROGRAM=websas.sf12010x_extract_menu.sas&_SERVICE=appdev&st=) (last visited May 29, 2016); *2008–2012 American Community Survey 5-Year Estimates*, U.S. CENSUS BUREAU, <http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last visited May 29, 2016). The data set is available and on file with authors and will hereinafter be referred to as the “Texas Legislative Council Data.” Our efforts focused on the justice court litigation because it is new. As a result, a direct comparison of litigation activity before and after the effective dates of the rules was impossible. Nevertheless, the results of a study of collection cases (“2011 Study”) filed in Dallas County in 2007 (“2007 Data”) provide only a rough benchmark. Mary Spector, *Debts, Details and Defaults: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. L. & BUS. REV. 257 (2011).

the quality and quantity of information those courts make available to consumers. The data considered falls into three general categories:

(1) Data regarding consumer complaints to the CFPB and a sample of 508 debt collection complaints out of the nearly 2000 made by Texans to the Texas Office of Attorney General during Fiscal Year (“FY”) 2014.

(2) Court outcome and demographic data from forty Texas counties with populations exceeding 100,000 as follows:

- 209 courts in 169 precincts in 2014, and
- 217 courts in 175 precincts in 2015.<sup>13</sup>

(3) 156 in-person court observations by volunteer lawyers and law students conducted in five counties<sup>14</sup> along with an examination of the court websites in each of those counties to begin to understand the application of the rules and the quality and quantity of information available to litigants.

Information obtained from each of these categories provides insight into the accessibility and quality of the justice being served by Texas courts as well as the quality of protection provided by applicable state and federal consumer protection laws. In short, we found that collection litigation in Texas grew by twenty percent during the two-year time period of the study—a rate that exceeded that of other states, many of whom saw a decline in collection litigation.<sup>15</sup> We also found that the dispositions grew at an even higher rate, but with disproportionate outcomes across the courts.<sup>16</sup> While courts appear to be increasingly efficient, it remains unclear the extent to which consumer protections remain intact in the rush to judgment.

Part I of the Article provides background information and a brief discussion of recent federal and state activity regarding the collection of consumer debts, with a special emphasis on recent changes in Texas law. It also discusses federal and state efforts to protect consumers through increased education, regulation, and enforcement. Part II explores consumer complaints regarding collector conduct outside of the litigation process through an examination of consumer complaints obtained from the Office of the Texas Attorney General and the CFPB Consumer Complaint Database. In Part III, the Article shifts to the litigation process to consider the court outcome and demographic data. Part IV considers 156 court observations to supplement the statistical analysis

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13. The Texas Legislative Council Data used in the analysis includes only courts that reported at least one debt claim case in the fiscal year analyzed. The difference in precincts and courts included is the result of differences in the number of courts reporting one or more debt claim cases in each of the years examined. *See* Texas Legislative Council Data, *supra* note 12.

14. Data from the observations was collated into a single data set on file with the authors and will hereinafter be referred to as the “2014 Court Observation Data.” References to specific data or comments will refer to the line number on which the data or comments can be found.

15. *See infra* notes 56–60 and accompanying text.

16. *See infra* notes 121–124 and accompanying text; *see also infra* Table 3.

with more detailed information about individual cases. Part V draws conclusions from the research and suggests areas for reform and additional research.

## I. BACKGROUND FOR REPORT<sup>17</sup>

### A. INCREASED SCRUTINY OF CONSUMER DEBT COLLECTION

In 1977, Congress enacted the Fair Debt Collections Practice Act (“FDCPA”), which became the primary federal law governing the collection of consumer debt.<sup>18</sup> Thirty years later, the Federal Trade Commission (“FTC”) convened a public workshop to explore technological and other changes in the industry and how they affected businesses and consumers.<sup>19</sup> Bringing together representatives of the finance and debt collection industries and consumer advocates, the workshop took place as consumer debt continued its historical climb.<sup>20</sup> It also took place against a backdrop of events leading to the economic downturn of 2008 and began a period of heightened scrutiny of practices within the consumer finance industry in general, and the debt collection industry in particular.<sup>21</sup>

In 2007, consumer complaints to the FTC regarding third-party collectors amounted to more than twenty percent of all complaints it received and continued to increase annually both in numbers of complaints and as a percentage of complaints received.<sup>22</sup> Since 2011, when the CFPB assumed primary regulatory authority for consumer financial protection including debt collection, complaints regarding debt collection exceeded all other complaints it received, averaging more than 6700 each month.<sup>23</sup> Many of the complaints alleged conduct that is already specifically prohibited by the FDCPA.<sup>24</sup>

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17. Much of this Part is taken from Mary Spector, *From Representation to Research and Back Again: Reflections on Developing an Empirical Project*, 16 UDC/DCSL L. REV. 55, 62–68 (2012) (describing historical events of mid-2000s that contributed to growing interest in consumer debt collection).

18. Other federal laws providing consumer protections in connection with consumer credit and its collection.

19. See FED. TRADE COMM’N, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE, A WORKSHOP REPORT 13 (2009) (summarizing the FTC’s 2007 Workshop); see also FED. TRADE COMM’N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION 6 (2010) [hereinafter FED. TRADE COMM’N, BROKEN SYSTEM].

20. FED. RESERVE, *supra* note 3. Data from the Federal Reserve document a consistent increase in consumer debt as far back as the 1950s.

21. See Spector, *supra* note 12, at 264–65 (referencing the 2011 Study).

22. FED. TRADE COMM’N, FEDERAL TRADE COMMISSION ANNUAL REPORT 2011: FAIR DEBT COLLECTION PRACTICES ACT 4–5 (2011).

23. CONSUMER FIN. PROT. BUREAU, DECEMBER 2015: MONTHLY COMPLAINT REPORT 5 (2015).

24. Such conduct includes demanding payment of an amount not authorized by law, harassment, threats of unlawful conduct, and unlawfully contacting third parties without permission of the debtor.

That conduct was also the subject of private FDCPA litigation, which nearly tripled between 2007 and 2011.<sup>25</sup> Although numbers of new FDCPA cases began to decline in 2012, numbers for 2014 remain nearly double their 2007 levels.<sup>26</sup> Through private FDCPA litigation, courts have clarified definitions such as who is a collector<sup>27</sup> and what is consumer debt,<sup>28</sup> as well as collectors' obligations regarding collection of time-barred debt,<sup>29</sup> disclosure of information about the debt prior to litigation,<sup>30</sup> and the level of evidence necessary to prove a debt in litigation to collect it.<sup>31</sup> Courts also certified classes of consumers seeking redress for statutory violations regarding misleading and fraudulent collection practices in the litigation process.<sup>32</sup> One court even limited the reach of the National Banking Act's preemption, holding that third-party collectors that are not national banks must comply with a state's usury laws, even when they are collecting debt originally owed to a bank.<sup>33</sup> Consumers' success in private litigation set the stage for enhanced enforcement and reforms at both federal and state levels.

#### B. FEDERAL REGULATORY AND SUPERVISORY AUTHORITIES ENHANCE EFFORTS TO PROTECT CONSUMERS' RIGHTS IN DEBT COLLECTION

In its 2011 report to Congress, the FTC reported a multipronged enforcement strategy involving litigation against individuals and companies

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FDCPA, 15 U.S.C. §§ 1692–1692p (2016). *See infra* Part II for more detailed discussion of the complaints.

25. *Debt Collection Litigation and CFPB Complaint Statistics, December 2014 and Year in Review*, WEBRECON LLC, <http://dev.webrecon.com/debt-collection-litigation-cfpb-complaint-statistics-december-2014-and-year-in-review/> (last visited May 29, 2016).

26. *Id.*

27. *E.g.*, *Obot v. Sallie Mae*, 602 F. App'x 844, 845 (2d Cir. 2015) (noting Sallie Mae not a collector); *Green v. Brice, Vander Linden & Werneck, P.C.*, No. 3:11-cv-1498-N-BN, 2015 WL 2167996, at \*2 (N.D. Tex. May 7, 2015) (noting servicers not collectors).

28. *E.g.*, *Eades v. Kennedy*, PC Law Offices, 799 F.3d 161, 170 (2d Cir. 2015) (regarding nursing home debt).

29. *Cf. McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1020 (7th Cir. 2014) (finding offer to "settle" debt has potential to confuse or mislead consumers about enforceability of the debt). *Compare Buchanan v. Northland Grp., Inc.*, 776 F.3d 393, 399 (6th Cir. 2015) (holding no overt reference to litigation is necessary to create confusion about status of time-barred debt), *with Altman v. J.C. Christensen & Assocs., Inc.*, 786 F.3d 191, 194 (2d Cir. 2015) (finding offer to settle debt without warning debtor about possible tax consequences is not a misleading attempt to settle time-barred debt).

30. *Clark v. Absolute Collection Serv., Inc.* 741 F.3d 487, 490–91 (5th Cir. 2014) (finding collector must provide details); *Haddad v. Alexander, Zelmanski, Danner & Fioritto, PLLC*, 758 F.3d 777, 784 (6th Cir. 2014).

31. *Alphonse v. Arch Bay Holdings, LLC*, 548 Fed. App'x 979, 985 (5th Cir. 2013).

32. *See id.* (involving robo-signed affidavits); *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 99 (2d Cir. 2015) (affirming certification of two classes of plaintiffs claiming default judgments entered against them based on "sewer service"); *see also Suesz v. Med-1 Solutions, LLC*, 757 F.3d 636, 656 (7th Cir. 2014) (reversing dismissal of putative class action holding that venue provisions of FDCPA required collection suits be filed in smallest geographic area relevant for venue purposes).

33. *Madden v. Midland Funding, LLC*, 786 F.3d 246, 350 (2d Cir. 2015).

to remedy violations, seeking civil penalties as well as injunctive relief and consumer redress.<sup>34</sup> In 2013 it initiated or resolved more than nine cases, an agency record at the time, and obtained injunctive relief in seven others, including cases targeting “phantom” payday loan debts.<sup>35</sup> In 2014, it initiated ten new cases and continued its efforts to warn consumers about telephone scammers who masquerade as law enforcement officials or attorneys to intimidate consumers into paying payday loan and other debts the consumers say they do not owe.<sup>36</sup>

In January 2013, the CFPB began to exercise supervisory authority over larger participants in the debt collection industry in accordance with the Dodd-Frank Act.<sup>37</sup> This was a first for a federal agency.<sup>38</sup> Later that year, the CFPB issued an Advance Notice of Proposed Rulemaking “to potentially develop rules to enhance protection for consumers without imposing undue costs on collectors.”<sup>39</sup> The Notice runs 114 pages and poses more than 160 questions seeking information ranging from the quality and quantity of information in the debt collection system to how that information is transferred and accessed.<sup>40</sup> The Notice also seeks information on validation notices, disputes, and investigation as well as information about collectors’ conduct in interactions with consumers throughout the collection process. Before closing the comment period in February 2014, the Bureau received more than 20,000 responses and also provided additional space for more informal remarks.<sup>41</sup> Proposed regulations are still forthcoming.<sup>42</sup>

Meanwhile, like the FTC, the CFPB continues aggressive enforcement at all stages of the collection process. In the second half of 2015 alone, the CFPB announced three major enforcement actions. The first, in July 2015, was a consent agreement with JPMorgan Chase to stop collection efforts on more than 500,000 accounts and to cease the sale of

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34. FED. TRADE COMM’N, *supra* note 22, at 10–11.

35. Letter from Donald S. Clark, Sec’y, Fed. Trade Comm’n, to Richard Cordray, Dir., Consumer Fin. Prot. Bureau (Feb. 21, 2014) (on file with authors). As part of a 2015 settlement, the court entered a judgment of more than \$4 million and banned the defendants from the debt collection business. Separate criminal charges were also filed.

36. Letter from Donald S. Clark, Sec’y, Fed. Trade Comm’n, to Richard Cordray, Dir., Consumer Fin. Prot. Bureau (Feb. 5, 2014) (on file with authors); *see also* *Consumer Information: Fake Debt Collectors*, FED. TRADE COMMISSION, <http://www.consumer.ftc.gov/articles/0258-fake-debt-collectors> (last visited May 29, 2016).

37. *See* 12 C.F.R. § 1090 (2016).

38. *See* Edward Wyatt, *New Federal Rules for Debt Collectors*, N.Y. TIMES, Oct. 24, 2012, at B1.

39. CONSUMER FIN. PROT. BUREAU, FAIR DEBT COLLECTION PRACTICES ACT: CFPB ANNUAL REPORT 2014, at 2 (2014).

40. *See* Advance Notice of Proposed Rulemaking, 12 C.F.R. § 1006 (2013).

41. CONSUMER FIN. PROT. BUREAU, *supra* note 39, at 46.

42. *CFPB Takes Action Against the Two Largest Debt Buyers for Using Deceptive Tactics to Collect Bad Debts*, CONSUMER FIN. PROT. BUREAU (Sept. 9, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-the-two-largest-debt-buyers-for-using-deceptive-tactics-to-collect-bad-debts/>.

uncollectible debt.<sup>43</sup> The second, in September 2015, was a settlement obtaining \$61 million in refunds from consumers from national debt buyers Encore and Portfolio Recovery Associates stemming from numerous violations of the FDCPA for, among other things, collecting debts informally that they knew or should have known were not enforceable.<sup>44</sup> The third, in December 2015, held a law firm accountable for using the courts to engage in intimidation through deceptive court filings and the knowing use of faulty evidence.<sup>45</sup>

The FTC and CFPB have not been the only federal agencies involved in protection of consumers' rights in debt collection. In 2011, the Treasury Department ordered that banks receiving garnishment orders directed at customer accounts must take certain procedural steps before freezing accounts to ensure exempt funds are not seized.<sup>46</sup> That same year, the Office of the Comptroller of the Currency ("OCC") began to explore safety and soundness practices in banks' sales of debt to third parties intending to collect the debt.<sup>47</sup> Its efforts culminated in August 2014, when it directed national banks and federal savings associations to take steps to, among other things, ensure due diligence when selecting debt buyers and to ensure the accuracy and integrity of the data sold.<sup>48</sup>

Still, these enhanced protections provided by federal agencies could not fix the systems in place in the states where most of the litigation to collect consumer debt occurred. By 2010, the FTC concluded many of the states' systems were broken.<sup>49</sup> It expressed concern about large numbers of default judgments in collection cases, particularly those brought by debt buyers who disclosed little information about the underlying debt. The FTC was also concerned about litigation of time-barred debt and the protection of consumer assets in post-judgment collection procedures.<sup>50</sup> Noting a shortage of empirical data, the FTC nevertheless urged states—where the majority of such litigation occurred—to fix the broken systems

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43. *In re Chase Bank, USA N.A.*, No. 2015-CFPB-0013 (July 8, 2015).

44. See *CFPB Takes Action Against the Two Largest Debt Buyers*, *supra* note 42 (providing links to the Encore and Portfolio Recovery Associates consent orders).

45. See *CFPB Takes Action to Stop Illegal Debt Collection Lawsuit Mill*, CONSUMER FIN. PROTECTION BUREAU (Dec. 28, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-takes-action-to-stop-illegal-debt-collection-lawsuit-mill/> (providing links to the district court's final consent order).

46. See DEP'T OF TREASURY, FIN. MGMT. SERV., GUIDELINES FOR GARNISHMENT OF ACCOUNTS CONTAINING FEDERAL BENEFIT PAYMENTS (2011).

47. U.S. DEP'T OF THE TREASURY, OFFICE OF THE COMPTROLLER OF THE CURRENCY, OCC BULL. NO. 2014-37, CONSUMER DEBT SALES: RISK MANAGEMENT GUIDANCE (2014).

48. *Id.*

49. See FED. TRADE COMM'N, BROKEN SYSTEM, *supra* note 19, at iii–iv.

50. *Id.* at iii–iv, 14–21 (discussing information regarding underlying debt); *id.* at 22–31 (discussing suits on time-barred debt); *id.* at 31–36 (discussing post-judgment garnishment of bank accounts).

and take steps necessary to adequately safeguard consumers' rights in the litigation process.<sup>51</sup>

### C. ACTIVITY IN THE STATES

#### 1. *States Adopt a Variety of Approaches*

By 2011, although a number of states already provided consumers with general protection from abusive collection practices,<sup>52</sup> few had enacted provisions specifically designed to protect consumers in the litigation system. By the summer of 2011, however, some state and local jurisdictions had taken action to safeguard consumers' interests in formal collection litigation. For example, North Carolina prohibited the filing of a lawsuit to collect time-barred debt.<sup>53</sup> Maryland promulgated rules requiring that pleadings contain specific information about the underlying debt to give consumers adequate notice of the claims against them.<sup>54</sup> A California rule now requires a debt buyer to have a specific form of evidence establishing that "the debt buyer is the sole owner of the specific debt at issue, the amount of debt, and the name of the creditor at the time the debt was charged off, among other things."<sup>55</sup>

In New York, reform efforts occurred at multiple levels, over a period of years. In the City of New York, consumer debt cases neared 300,000 in 2008.<sup>56</sup> Beginning in 2009, the administrative arm of the civil courts issued a number of directives requiring, among other things enhanced notice to consumers prior to the entry of default judgments, affidavits of creditors establishing ownership of the debts as well as the good faith belief that the debt was not time-barred.<sup>57</sup> These directives coupled with other initiatives, such as "lawyer-for-the-day" programs<sup>58</sup> and the development of online interactive tools to assist consumers to respond to collection cases, to decrease collection cases in New York

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51. *Id.* at 7.

52. For example, North Carolina, Pennsylvania, South Carolina, and Texas all protect a consumer's wages from garnishment for most consumer debts. See NAT'L CONSUMER LAW CTR., NO FRESH START: HOW STATES LET DEBT COLLECTORS PUSH FAMILIES INTO POVERTY (2013).

53. 2009 N.C. Sess. Laws 5 (prohibiting the filing of a lawsuit to collect a debt after expiration of the statute of limitations).

54. See MD. CODE ANN., CTS. & JUD. PROC. §§ 3-306, 308, 509 (West 2012); Letter from Advisory Committee to the Court of Appeals (July 1, 2011) (describing proposed rule changes) (on file with authors).

55. S.B. 890, 2011–2012 Leg., Reg. Sess. (Cal. 2012).

56. Fern A. Fisher, *Ensuring Justice: The Role of State Court Systems in Responding to the Consumer Debt Crisis*, 20 GEO. J. ON POVERTY L. & POL'Y 509, 512 (2013).

57. *Id.* at 510–11.

58. The Volunteer Lawyer for the Day Program for Consumer Debt provides unbundled services to unrepresented consumers for one day only. See *Volunteer Lawyer for the Day Program—Consumer Debt*, NYCOURTS.GOV, [https://www.nycourts.gov/courts/nyc/civil/vlfd\\_civil.shtml](https://www.nycourts.gov/courts/nyc/civil/vlfd_civil.shtml) (last visited May 29, 2016).

City to just over 96,000 by the end of 2009.<sup>59</sup> Similar changes were enacted on a statewide basis in 2014.<sup>60</sup>

## 2. *Texas Changes Rules for Litigation of Collection Cases*

In Texas the trajectory for change appeared to take a different path. Historically, debt collectors in most Texas counties could choose to initiate collection cases in one of several jurisdictions.<sup>61</sup> However, prior to 2013, they were expressly excluded from the jurisdiction of small claims courts, known to many as “people’s courts,” which barred claims brought by assignees or other entities collecting debts on behalf of another.<sup>62</sup> Presiding over the small claims courts were justices of the peace who also exercised jurisdiction over evictions and other special proceedings.<sup>63</sup> The dual nature of the justice of the peace’s jurisdiction had the potential for confusion, especially for parties unfamiliar with the technicalities who found it difficult to understand how a single judge could hear a collection case by a justice of the peace on one docket but could not do so on a small claims docket.

In 2011, the Texas legislature consolidated the two types of jurisdiction into a single justice court with jurisdiction over small claims cases as well as evictions and debt claims eliminating confusion under prior law.<sup>64</sup> The legislature also directed the supreme court to promulgate rules of procedure to govern them and other cases in the justice court.<sup>65</sup> The Texas Supreme Court then appointed a Task Force to develop a set of rules for consideration by the court’s standing Advisory Committee.<sup>66</sup> In its report accompanying the proposed rules, the Task Force stated its goal “was to reward plaintiffs who have all the necessary proof with an expedient, predictable, inexpensive process, while also protecting defendants from many of the inherent problems in these suits, including an often disturbing lack of proof.”<sup>67</sup>

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59. See Fisher, *supra* note 57, at 512.

60. See James C. McKinley, Jr., *Top State Judge Tightens Rules on Debt Collection*, N.Y. TIMES, May 1, 2014, at A20.

61. See TEX. GOV’T CODE ANN. § 24.007 (West 2016) (district courts); *id.* § 25.0003 (statutory county courts-at-law); *id.* § 25.0592(a) (providing Dallas county courts-at-law concurrent jurisdiction with district courts over civil matters regardless of amount in controversy); *id.* § 26.042(a) (constitutional county courts); *id.* § 27.031(a)(1) (justice courts). In all of the courts except justice courts, entities must appear through an attorney; only individuals may appear pro se. See *id.* § 27.031(d) (providing that corporations need not appear by attorney in justice court).

62. See TEX. GOV’T CODE ANN. §§ 28.001–28.003 (West 2012) (repealed 2013).

63. See TEX. GOV’T CODE ANN. § 28.003 (West 2012) (repealed 2013).

64. See TEX. GOV’T CODE ANN. §§ 27.031–27.060 (West 2016).

65. H.R. 79, 82d Leg., 1st Spec. Sess. § 5.02, TEX. GOV’T CODE ANN. § 27.060 (West 2016).

66. See Final Approval of Rules for Justice Court Cases, No. 13-9049 (Tex. 2013).

67. See BRONSON TUCKER, TEX. JUSTICE COURT TRAINING CTR., JUSTICE COURT RULES TASK FORCE REPORT 9 (2012).

The Task Force delivered to the Committee proposed rules, which appeared to satisfy its twin goals. The proposed rules contained a number of features consistent with the approach taken in other states<sup>68</sup> including enhanced pleading standards increasing the level of specificity generally required in Texas litigation.<sup>69</sup> For example, the proposed rules directed plaintiffs to specifically plead the date of default or last payment,<sup>70</sup> and that third party collectors specifically plead compliance with the bonding requirements of the Texas Finance Code.<sup>71</sup> The Task Force also unanimously recommended that the court require documentary proof of an underlying debt accompanied by a sworn statement from the original creditor.<sup>72</sup>

After considering the Task Force's proposed rules in open meetings during the summer and fall of 2012, the supreme court published its own draft rules by order dated February 2013 and its final draft in April 2013.<sup>73</sup> Effective September 1, 2013,<sup>74</sup> the final rules retained some of the heightened pleading rules contained in the Task Force Draft, but diluted or eliminated others.<sup>75</sup> For example, although the final rules require that

68. See *supra* Part I.C.1.

69. See generally TEX. R. CIV. P. 47 (adopting a notice pleading standard in most cases).

70. TEX. R. CIV. P. 577(a)(5) (Proposed Official Draft 2012), [http://www.txcourts.gov/All\\_Archived\\_Documents/SupremeCourtAdvisoryCommittee/Meetings/2012/supplementary/sc09282012.pdf](http://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/Meetings/2012/supplementary/sc09282012.pdf).

71. TEX. R. CIV. P. 577(c) (Proposed Official Draft 2012), [http://www.txcourts.gov/All\\_Archived\\_Documents/SupremeCourtAdvisoryCommittee/Meetings/2012/supplementary/sc09282012.pdf](http://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/Meetings/2012/supplementary/sc09282012.pdf).

72. TUCKER, *supra* note 67. The report expressly adopted the rule stated in *Martinez v. Midland Credit Management, Inc.*, 250 S.W.3d 481 (Tex. App. 2008). It rejected the rule of *Simien v. Unifund CCR Partners*, 321 S.W. 3d 235, 245 (Tex. App. 2010), which held that an affidavit made by an employee of a debt buyer offered to establish the existence and amount of debt it purchased from another satisfied the business records exception to the hearsay rule.

73. See Final Approval of Rules for Justice Court Cases, *supra* note 66.

74. *Id.*

75. TEX. R. CIV. P. 508.2(a)(1)(D). Rule 508.2 governs petitions in debt claim cases and contains the following requirements for cases involving a credit card:

(a) *Contents*. In addition to the information required by Rule 502.2, a petition filed in a lawsuit governed by this rule must contain the following information:

(1) Credit Accounts. In a claim based upon a credit card, revolving credit, or open account, the petition must state:

- (A) the account name or credit card name;
- (B) the account number (which may be masked);
- (C) the date of issue or origination of the account, if known;
- (D) the date of charge-off or breach of the account, if known;
- (E) the amount owed as of a date certain; and
- (F) whether the plaintiff seeks ongoing interest.

*Id.* In debt claim cases in which the plaintiff seeks to recover an assigned or transferred claim, Rule 508.2 requires that the petition contain additional information:

(4) Assigned Debt. If the debt that is the subject of the claim has been assigned or transferred, the petition must also state:

- (A) that the debt claim has been transferred or assigned;

plaintiffs plead the date of default, they need do so only if the date is known.<sup>76</sup> Further, the final rules completely eliminated the provision requiring third-party collectors to specifically plead compliance with the Finance Code's bonding requirement.<sup>77</sup> The final rules also rejected the proposal regarding documentary evidence of a debt.<sup>78</sup> Instead they specifically permit proof of a debt by a sworn statement of someone other than the original creditor, including the plaintiff, its representative, or a prior holder of the debt.<sup>79</sup> In addition, the rules authorize entities to be represented by nonattorney employees, owners, partners, or officers in all cases, but only allow individuals to be represented by nonattorneys in eviction cases or upon the court's determination of "good cause."<sup>80</sup>

As a result, the Texas rules appear to promote efficiency over consumer protection by keeping evidentiary burdens at a minimum, enabling non-attorney representation of corporate entities as a matter of course, and permitting expedited disposition without the need for a hearing. Before analyzing the impact of the Texas rules on debt collection litigation in FY 2014 and FY 2015 in Part III, we explore consumer complaints made to both the CFPB and the Texas Attorney General during the same period. Because much of the conduct that forms the substance of the complaints takes place outside of the litigation process, the complaints provide an important frame for the litigation data explored in Part III.

## II. COLLECTION CONDUCT OUTSIDE OF THE LITIGATION PROCESS

### A. DATA FROM CFPB

In 2013, the CFPB expanded its database of consumer complaints to include complaints regarding debt collection. By 2014, the CFPB logged more than 88,000 complaints regarding debt collection, making it the leading subject of complaints received by the Bureau.<sup>81</sup> By December 2015, the number of complaints more than doubled to more than 198,000.<sup>82</sup> We analyzed the CFPB complaint database for the year ending

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- (B) the date of the transfer or assignment;
  - (C) the name of any prior holders of the debt; and
  - (D) the name or a description of the original creditor.

*Id.*

76. *Id.*

77. *See id.*; *see also* TEX. FIN. CODE ANN. § 392.301 (West 2016).

78. TUCKER, *supra* note 67; *see* TEX. R. CIV. P. 508.3.

79. TEX. R. CIV. P. 508.3.

80. TEX. R. CIV. P. 500.4.

81. CONSUMER FIN. PROT. BUREAU, FAIR DEBT COLLECTION PRACTICES ACT: CFPB ANNUAL REPORT 2015, at 2 (2015).

82. CONSUMER FIN. PROT. BUREAU, *supra* note 23, at 5. The CFPB's complaints form a portion of the FTC's Consumer Sentinel Network, a database maintained by the FTC for law enforcement

August 31, 2014, and found 3344 nonmortgage debt collection complaints from Texas, twenty-nine percent of all complaints received from consumers in the state.<sup>83</sup> These complaints fall into six primary categories and twenty-six subcategories, including communication tactics, taking or threatening illegal action, and improperly contacting third parties. All such conduct is potentially prohibited by the FDCPA.<sup>84</sup> Approximately seventy percent of the CFPB complaints fell into just six categories. Leading the pack at 26% were complaints about continued attempts to collect a debt that consumers claimed was not theirs. The remaining five categories in descending order were complaints that the consumer was not given enough information to verify the debt (14%), the consumer received frequent or repeated phone calls (12%), the debt was already paid (9%), the collections were for the wrong amount (5%), and collectors used false statements or threats of jail for nonpayment of civil debts.<sup>85</sup> Of the specific types of debt catalogued, credit card debt was the top source of complaint, at 20%, followed by payday loans at 11% and medical debt at 10%.<sup>86</sup>

TABLE I: BREAKDOWN OF TOP TEXAS COMPLAINTS TO THE CFPB, FY 2014

Conduct	Percent Reported by Consumers
Collecting debt not owed	26%
Insufficient information to verify debt	14%
Frequent or repeated phone calls	12%
Debt already paid	9%
Wrong amount	5%

purposes. See *Consumer Sentinel Network*, FED. TRADE COMMISSION, <https://www.ftc.gov/enforcement/consumer-sentinel-network> (last visited May 29, 2016). The Sentinel Network includes complaints from a number of federal and state agencies as well as private sources such as the Better Business Bureau. In 2014, the Consumer Sentinel Network logged more than 280,000 complaints regarding debt collection from all sources, accounting for eleven percent of all complaints. Debt collection complaints were surpassed only by complaints regarding identity theft, which accounted for thirteen percent of all complaints. FED. TRADE COMM'N, CONSUMER SENTINEL NETWORK DATA BOOK FOR JANUARY—DECEMBER 2014, at 6 (2015).

83. See *Consumer Complaints*, CONSUMER FIN. PROTECTION BUREAU, <https://data.consumerfinance.gov/dataset/Consumer-Complaints/s6ew-h6mp> (last visited May 29, 2016).

84. See generally 15 U.S.C. §§ 1692–1692p (2016) (covering full scope of debt collection practices).

85. *Consumer Complaints*, *supra* note 83.

86. The CFPB logged more than 473 complaints from consumers in Dallas County during the twelve months ending on September 1, 2014. Just over 25% of the complaints stated they were being contacted to collect debt that was not theirs; 13.9% complained that the collector improperly communicated with them after hours or improperly contacted a third party of employer about the debt; and 11.6% complained of frequent or repeated phone calls; and 10% complained that the debt had been paid or was discharged in bankruptcy.

False or fraudulent statements and threats of jail	4%
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Complaints made to the Texas Office of the Attorney General during the twelve months beginning September 1, 2013 tell a similar story. They also provide important insight into the problems Texas consumers shared with their own elected officials and are discussed in the next Subpart.<sup>87</sup>

#### B. COMPLAINTS TO THE TEXAS ATTORNEY GENERAL

Unlike the CFPB complaints, which are publicly available on the CFPB's website, the complaints made to the Texas Office of the Attorney General are available only through an Open Records Request.<sup>88</sup> We obtained "summaries" of 1908 complaints, most of which were written in the first person and appeared to contain the complainant's own words.<sup>89</sup>

Because of the richness of the narratives, grouping the summaries into just one of the six main categories used by the CFPB was a challenge. We reviewed 508 complaints, chosen at random, amounting to twenty-six percent of the 1908 complaints received.<sup>90</sup> We assigned each complaint at least one of the six main categories used by the CFPB to label the nature of the complaints. The results were roughly consistent with the CFPB data. For example, approximately twenty-nine percent of the sample involved complaints about attempts to collect on debts that

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87. We made these calculations by converting the PDF files to Word documents, then searching for unique terms for each complaint, such as "Complainant Information" or "Analyst." The search revealed the number of matches for each file, which we then used to identify unique complaints. This method identified a total of 1908 complaints contained in twelve separate files as follows:

File Number	Number of Complaints
37337	208
37549	213
37741	189
37910	116
38091	171
39552	155
39307	144
39068	159
39772	172
38814	119
38558	135
38296	127

88. Letter from Douglas Luippold to Jordan Hale, Pub. Info. Coordinator, Office of Att'y Gen. (Nov. 12, 2014) (copy on file with authors).

89. For example, one summary stated, "I asked them repeatedly not to [call my job, and] yesterday [they called] and harassed my boss." TEX. OFFICE OF THE ATTORNEY GEN., COMPLAINT 435184, CONSUMER PROTECTION COMPLAINT GATHERING SUMMARY (2013).

90. See *supra* note 87.

were not theirs as compared to approximately twenty-six percent of those complaining to the CFPB. If a complaint fell into more than one category, we placed it in every category that was relevant. Table 2 illustrates the breakdown of the Texas complaints.

TABLE 2: BREAKDOWN OF TEXAS COMPLAINTS TO ATTORNEY GENERAL, FY 2014

Conduct	Percent Reported by Consumers
Communication tactics	39.5%
Attempts to collect debts not owed	36.6%
Disclosure or verification of debt	21.6%
Taking or threatening illegal action	14.7%
False statements or misrepresentation	9.4%
Improper contact or sharing of information	1.9%

While the substance of the complaints varied, many consumers reported debt collectors' use of obscene and vile language, including racial epithets and name-calling,<sup>91</sup> as well as calls to third persons including family members and employers.<sup>92</sup> Other complaints involved collectors who refused to provide verification of the debt,<sup>93</sup> or multiple collectors collecting the same debt.<sup>94</sup> For example, one consumer reported that a lawsuit to collect a debt was filed even after she presented the collector with evidence showing she had paid the debt to another collector.<sup>95</sup> Several complaints involved calls to their places of employment, which consumers described as "embarrassing"<sup>96</sup> and placing

91. TEX. OFFICE OF ATT'Y GEN., CONSUMER PROTECTION MEDIATION COMPLAINT REPORT, COMPLAINT 448085 (2014) (citing debt collector told the consumer to "[p]ay your bills, you ass dumb black n----r" and "I'll call your black ass anytime I want you stupid n----r" and that he would "blow your black f--king head off").

92. TEX. OFFICE OF ATT'Y GEN., CONSUMER PROTECTION COMPLAINT GATHERING SUMMARY, COMPLAINT 435140 (2013) (reporting harassing calls to consumer's husband, elderly father, and employer).

93. TEX. OFFICE OF ATT'Y GEN., CONSUMER PROTECTION COMPLAINT GATHERING SUMMARY, COMPLAINT 434385 (2013) (citing collector called repeatedly to collect old debt and refused to provide verification).

94. TEX. OFFICE OF ATT'Y GEN., CONSUMER PROTECTION MEDIATION COMPLAINT REPORT, COMPLAINT 436587 (2013) (citing two collectors attempting to collect the same debt).

95. TEX. OFFICE OF ATT'Y GEN., CONSUMER PROTECTION MEDIATION COMPLAINT REPORT, COMPLAINT 435813 (2013); *see also* TEX. OFFICE OF ATT'Y GEN., CONSUMER PROTECTION MEDIATION COMPLAINT REPORT, COMPLAINT 436208 (2013) (making payments on a debt and another company is attempting to collect on it).

96. TEX. OFFICE OF ATT'Y GEN., CONSUMER PROTECTION MEDIATION COMPLAINT REPORT, COMPLAINT 449163 (2014) ("I am totally embarrassed and sadden [sic] that now my employer thinks that I am a dead beat since they have been made aware about a personal issue."); TEX. OFFICE OF ATT'Y GEN., CONSUMER PROTECTION COMPLAINT GATHERING SUMMARY, COMPLAINT 435485 (2013)

their employment at risk.<sup>97</sup> A few complaints even came from employers of consumers expressing frustration with collectors' repeated contact during work hours resulting in the disruption of their business.<sup>98</sup>

### C. SCAMMERS AND COLLECTION OF PHANTOM DEBT

Although complaints regarding the use of false statements and misrepresentations were not the largest category of complaints to either the CFPB or the Office of the Attorney General, they shared a similar pattern. Consumers' reports of attempts to collect debts not owed and threats of legal action often resembled the FTC's description of conduct used by scammers or fraudsters engaged in the collection of phantom debt. Consistent with the FTC's reports,<sup>99</sup> consumers reported callers claiming to be connected with a government agency as in the case of someone posing to be an associate with the Texas Attorney General's Office, a police officer,<sup>100</sup> a paralegal,<sup>101</sup> and even someone with a local power company.<sup>102</sup>

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(reporting collector actually got ahold of the superintendent, and this left the complainant feeling humiliated).

97. TEX. OFFICE OF ATT'Y GEN., CONSUMER PROTECTION MEDIATION COMPLAINT REPORT, COMPLAINT 448045 (2014) ("MY EMPLOYER IS THREATENING TO TERMINATE ME SIMPLY BECAUSE THEY ARE TIRED OF RECEIVING CALLS."); *see also* TEX. OFFICE OF ATT'Y GEN., CONSUMER PROTECTION MEDIATION COMPLAINT REPORT, COMPLAINT 439094 (2013) (noting consumer reported being "beyond outraged" after receiving calls at work and eventually paid debt to avoid threatened felony charge, only to have collector call back four days later to tell consumer's supervisor "they should be careful with me because I could be a threat to the company").

98. TEX. OFFICE OF ATT'Y GEN., CONSUMER PROTECTION MEDIATION COMPLAINT REPORT, COMPLAINT 440165 (2013) ("One of our employees owes money to a business" and when "we tell them that the person they need to speak with is not here[] and we do not take calls for collections[. . . [t]hey then call continually for several minutes, (up to 30 minutes). We have to answer the calls because this is a business and nothing we do or say makes them stop. This happens every day. . . . Can you help us?").

99. *See* Letter from Donald S. Clark, *supra* note 35 and accompanying text (discussing FTC's actions against phantom debt).

100. TEX. OFFICE OF ATT'Y GEN., CONSUMER PROTECTION MEDIATION COMPLAINT REPORT, COMPLAINT 439758 (2013) ("Was contacted by someone claiming to be from the Houston Police Dept [sic]" and "was told that I need to pay more as the Texas Attorney General had not accepted the first payment."); TEX. OFFICE OF ATT'Y GEN., CONSUMER PROTECTION MEDIATION COMPLAINT REPORT, COMPLAINT 440893 (2014) ("THEN AFTER A WHILE A GUY WITH A BAD AMERICAN ACCENT, ALMOST A MIX OF VALLEY GIRL-JERSEY SHORE GETS ON THE PHONE AND INSISTS HE IS THE TEXAS STATE ATTORNEY GENERAL."); TEX. OFFICE OF ATT'Y GEN., CONSUMER PROTECTION MEDIATION COMPLAINT REPORT, COMPLAINT 447618 (2014) ("I received multiple harassing phone calls from a Indian man by the name of Brandon Gabriel. Claims that he was Sr [sic] Counsel with the Texas Atty [sic] General's office. That there was a complaint filed by a payday loan company and there was a warrant for my arrest if I did not pay the \$1600 restitution. Got threats from a lady who claimed that she was from the collin [sic] county sheriff's office as well."). For more complaints citing collectors claiming to be connected with government agencies, *see* complaint numbers 447677, 447757, 447758, 447797, 447845, 447977, 448100, 448551, 448563, 448788, 448872, 448930, 449518, 449619, 449683, 450106, 454624, and 454937. TEX. OFFICE OF ATT'Y GEN., CONSUMER PROTECTION MEDIATION COMPLAINT REPORT (2013).

One consumer reported giving his banking information to a collector after receiving a call from something called the “Department of Investigation.”<sup>103</sup> Another consumer reported that a debt collector threatened arrest and that he would “serve a warrant at [her] job or home, and/or press federal criminal charges.”<sup>104</sup> One collector reportedly threatened to press fraud charges against the consumer for cancelling a payment<sup>105</sup> and another threatened of legal action when the consumer refused to provide her Social Security number over the telephone.<sup>106</sup>

Consumers reported callers having personal information such as all or part of their Social Security number<sup>107</sup> as well as contact information for their relatives.<sup>108</sup> While it is unknown precisely how scammers obtain consumers’ personal information, some believe it is a result of sloppy procedures in connection with the transfer of consumer data.<sup>109</sup> Unfortunately, consumers might not realize the fraud until too late.<sup>110</sup>

101. TEX. OFFICE OF ATT’Y GEN., CONSUMER PROTECTION MEDIATION COMPLAINT REPORT, COMPLAINT 449162 (2013) (involving paralegal with the Attorney General’s office).

102. TEX. OFFICE OF ATT’Y GEN., CONSUMER PROTECTION MEDIATION COMPLAINT REPORT, COMPLAINT 436273 (2013) (impersonating a TXU official).

103. TEX. OFFICE OF ATT’Y GEN., CONSUMER PROTECTION MEDIATION COMPLAINT REPORT, COMPLAINT 435673 (2013) (“[Clinton Smith] [r]eceived a call from Department of Investigation and said they were holding an arrest warrant [sic] for me in regards to a payday loan from about 8 years ago. [Smith] advised that [he] had resolved the issue . . . [and] was transferred from the operator to Jim Foster that advised that [Smith] had two options[:] pay [\$1355.44] or face an arrest warrant. [Foster] was willing to accept [\$]438.44 and [\$]239.28 in 15 days and the remaining 50% in 30 days. [Smith] didn’t feel comfortable but had already given the banking info [sic]. . . . [Smith] recalled [his] permission but [Foster] said what is done is done and if the card doesn’t charge [Smith] would be arrested [that] afternoon.”).

104. TEX. OFFICE OF ATT’Y GEN., CONSUMER PROTECTION MEDIATION COMPLAINT REPORT, COMPLAINT 442830 (2014).

105. TEX. OFFICE OF ATT’Y GEN., CONSUMER PROTECTION MEDIATION COMPLAINT REPORT, COMPLAINT 438049 (2014) (threatening fraud charges for canceling payment).

106. TEX. OFFICE OF ATT’Y GEN., CONSUMER PROTECTION MEDIATION COMPLAINT REPORT, COMPLAINT 437663 (2013) (refusing to provide the debt collector with her social security number, and the debt collector said that the consumer was being uncooperative and that an agent would be there to serve her).

107. For complaints of callers having the consumer’s entire social security number, see TEX. OFFICE OF ATT’Y GEN., CONSUMER PROTECTION MEDIATION COMPLAINT REPORT, COMPLAINTS 434826, 448930, 449683, 439318 (2014). For complaints of callers having the consumer’s last four digits of the consumer’s social security number, see TEX. OFFICE OF ATT’Y GEN., CONSUMER PROTECTION MEDIATION COMPLAINT REPORT, COMPLAINTS 447977, 438164, 439208 (2014).

108. TEX. OFFICE OF ATT’Y GEN., CONSUMER PROTECTION MEDIATION COMPLAINT REPORT, COMPLAINT 436057 (2013) (complaining that collector knew her name, employer’s name, address, work number, and Social Security number, and that she was delinquent on a payday loan).

109. See, e.g., *CFPB Takes Action Against Lead Aggregators for Online Trafficking of Personal Information*, CONSUMER FIN. PROTECTION BUREAU (Dec. 17, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-lead-aggregators-for-online-trafficking-of-personal-information/>.

110. In at least one case a lawyer reported that his name was being used without his permission. TEX. OFFICE OF ATTORNEY GEN., CONSUMER PROTECTION MEDIATION COMPLAINT REPORT, COMPLAINT 449574 (2014). His complaint stated that “a concerned Texan” sent him an e-mail notifying him that a debt collector was pretending to be him; by the time of the attorney’s complaint to the Attorney General, he had received calls from more than twenty people calling him about the scam. *Id.* The complaint stated “some scammers are calling people trying to get information and money using the

This was true for one woman who paid the caller after receiving threats of wage garnishment, a practice generally prohibited under Texas law.<sup>111</sup>

The complaints contained evidence of fraud in other contexts as well, including complaints regarding accounts created as a result of identity theft.<sup>112</sup> One consumer complained that the collectors were so effective that family members of the consumer paid a debt that was not hers.<sup>113</sup>

Consumers can find it difficult to discern the illegitimate fraudster from the unscrupulous collector. For example, it is considered a wrongful use of the courts to criminally prosecute a debtor for a bad check when the check is given in connection with a preexisting loan.<sup>114</sup> Nevertheless, one recent study showed that payday lenders and collectors pursuing legitimate debts improperly prosecuted consumers for bad checks in some Texas justice courts at an alarming rate.<sup>115</sup> Although legitimate collectors attempt to distance themselves from this conduct, it can be frightening for the consumer who has no way of knowing whether the threatened court action may actually take place. This is especially true because court action in the form of a civil lawsuit can be the next legitimate step a collector takes after informal collection attempts fail.<sup>116</sup>

### III. LITIGATION UNDER THE NEW RULES

Our analysis of the debt collection litigation focuses on debt claim cases filed in the justice courts after September 1, 2013.<sup>117</sup> We analyzed data collected by the Texas Office of Court Administration (“OCA”) in forty of the largest counties in Texas.<sup>118</sup> Those counties include eighty-three percent of the Texas population and eighty-seven percent of all

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name of the Texas Attorney General Office and my name as an attorney. I have attached the latest email. In the past month I have had over 20 people contact me about this scam.” *Id.* The attorney explained that when he called the impersonator, the person who answered the phone posed as a member of the Attorney General’s office. *Id.* When he asked to speak to the person with his name, he was placed on hold and the same person answered the phone. *Id.* When the real attorney identified himself, the impersonator responded crudely and hung up. *Id.*

111. Both the FDCPA and the Texas Unfair Collection Act prohibit threats of garnishment and other actions that are prohibited by law. *See* 15 U.S.C. § 1692e(5) (2016); TEX. FIN. CODE § 392.301(3) (West 2016).

112. TEX. OFFICE OF ATT’Y GEN., CONSUMER PROTECTION MEDIATION COMPLAINT REPORT, COMPLAINT 43428 (2013); *see also* TEX. OFFICE OF ATT’Y GEN., CONSUMER PROTECTION MEDIATION COMPLAINT REPORT, COMPLAINT 437095 (2013) (involving propane account).

113. TEX. OFFICE OF ATT’Y GEN., CONSUMER PROTECTION MEDIATION COMPLAINT REPORT, COMPLAINT 436315 (2013).

114. Letter from Deborah Fowler, Deputy Dir. and Ann Baddour, Dir., Fair Fin. Servs. Program, Texas Applesseed, to Richard Cordray, Dir., Consumer Fin. Prot. Bureau et al. (Dec. 17, 2014) (on file with authors).

115. *Id.* at 1.

116. TEX. OFFICE OF COURT ADMIN., *supra* note 9.

117. We excluded collection cases in the county and district courts.

118. TEX. OFFICE OF COURT ADMIN., *supra* note 9.

justice court debt claim dispositions for each of the two years.<sup>119</sup> We also considered U.S. Census data for each of the justice court precincts examined in an effort to analyze possible associations between precinct demographic characteristics and court outcomes.<sup>120</sup> Although perfect comparisons with data examined in the 2011 Study are not possible, the latter provides a rough benchmark for assessing the results of the new court data analyzed in this study.

#### A. OVERVIEW OF COURT DATA

The OCA reported 147,191 new debt collection cases filed in all Texas courts in FY 2014, with slightly more than 90,000 filed as debt claim cases in justice courts alone.<sup>121</sup> In FY 2015, the total number of suits filed to collect a debt statewide grew by approximately fifteen percent to 170,409, while the number filed in justice courts alone grew by nearly twenty-two percent to 109,888.<sup>122</sup> The number of debt claim dispositions also grew, with a total of 115,847 in all courts in 2014 to 153,920 in 2015, reflecting a thirty-three percent increase. Debt claims dispositions in justice courts grew at a faster rate, from 45,682 to 77,928 in 2015, reflecting a seventy-one percent increase.

There was significant variation in the number of debt claim dispositions by individual justice courts, ranging from one to more than 3000 in a one-year period. Some of this disparity in caseload might be due to differences in population at the precinct level. The Texas Constitution establishes ranges for the number of justice court precincts required in a county based on county population, but leaves the decision of the exact number and borders of the precincts to the County Commissioners and the County Commissioners' Court.<sup>123</sup> The precinct populations in this study ranged from 2409 to over one million, with an

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119. According to the 2010 U.S. Census, the Texas population is 25,145,561. See *American Fact Finder*, U.S. CENSUS BUREAU, <http://factfinder.census.gov> (last visited May 29, 2016). The forty counties in this study have a total population of 20,803,802. The Texas Office of Court Administration lists 54,407 debt claim dispositions for the state of Texas for the 2014 study period and 92,520 for the 2015 period. *Id.*

120. *American Fact Finder*, *supra* note 119; 2008–2012 *American Community Survey 5-Year Estimates*, *supra* note 12. The counties included in this study are: Bell, Bexar, Bowie, Brazoria, Brazos, Cameron, Collin, Comal, Dallas, Denton, Ector, El Paso, Ellis, Fort Bend, Grayson, Gregg, Guadalupe, Harris, Hays, Hidalgo, Jefferson, Johnson, Kaufman, Lubbock, McLennan, Midland, Montgomery, Nueces, Parker, Potter, Randall, Smith, Tarrant, Taylor, Tom Green, Travis, Victoria, Webb, Wichita, and Williamson.

121. The sum is the total of debt claims cases filed in the constitutional county courts, the county-courts-at-law and the district courts, as well as the justice courts. TEX. OFFICE OF COURT ADMIN., *supra* note 9.

122. TEX. OFFICE OF COURT ADMIN., *supra* note 11.

123. TEX. CONST. art. 5, § 18.

average of 118,864. Other factors not considered here, such as collectors' preferences for one court or another could also play a role.<sup>124</sup>

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124. Though selection of venue for debt claims cases is limited by court rules, some collectors might have some leeway and might opt, where a choice is possible, for a more convenient court for the plaintiff or a court where the plaintiff has had a large number of cases and therefore is familiar with the judge and court staff.

TABLE 3: OVERVIEW OF COURTS IN SAMPLE

	2014	2015	Percent Change
Total counties represented	40	40	--
Total number of precincts <sup>125</sup>	169	175	4%
Total number of courts reporting data	209	217	4%
Total dispositions by all courts in sample	45,682	77,928	71%
Mean dispositions by court	219	359	64%
Median dispositions by court	104	155	49%
Maximum dispositions by court	3155	3259	3%
Minimum dispositions by court	1	1	0%

#### B. GENERAL COURT OUTCOMES

According to the 2010 FTC debt collection study, between sixty and ninety-five percent of debt collection cases filed against consumers resulted in default judgments.<sup>126</sup> The 2011 Study of debt claim cases in Dallas County Court found 39.46% of the cases resulted in default judgments.<sup>127</sup> As illustrated in Table 4 below, in both 2014 and 2015, default judgments in debt claim cases filed in justice court hovered around thirty percent, below the 2011 Study findings.<sup>128</sup> Despite the evidence of improvement, this rate is more than twice the rate of default judgments entered in other cases in the justice court.<sup>129</sup>

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125. Some precincts include one court and some include multiple courts (identified as places). This sample does not include precincts with courts that reported zero debt claim cases for the year. In 2014, twelve courts reported zero dispositions. In 2015, three courts reported zero dispositions.

126. FED. TRADE COMM'N, *BROKEN SYSTEM*, *supra* note 19, at 7.

127. Spector, *supra* note 12, at 296.

128. *Id.* This study documented a 39.46% default judgment rate.

129. Small claims data offers a helpful point of comparison because these cases are also heard in justice court and reflect the same precinct makeup as the debt claim cases.

TABLE 4: CASES BY OUTCOME, FY 2014 AND FY 2015

Outcome	FY 2014 Cases		FY 2015 Cases		Change in 2014-2015
	Number	Percent	Number	Percent	
Nonsuited or Dismissed by Plaintiff	14,567	31.9%	28,921	37.1%	5.2%
Default Judgments	13,572	29.7%	24,636	31.6%	1.9%
Agreed Judgments	5606	12.3%	8231	10.6%	-1.7%
Trial/Hearing by Judge	5042	11.0%	7355	9.4%	-1.6%
Dismissed for Want of Prosecution	2609	5.7%	4523	5.8%	0.1%
Trial by Jury	95	0.2%	49	0.1%	-0.1%
All Other	4191	9.2%	4213	5.4%	-3.8%
<b>Total</b>	<b>45,682</b>	<b>100%</b>	<b>77,928</b>	<b>100%</b>	--

Consistent with the 2011 Study, Table 4 shows that default judgments were reported slightly less than cases nonsuited or dismissed by the plaintiff in both FY 2014 and FY 2015.<sup>130</sup> Cases nonsuited or dismissed by plaintiff increased by a five percent margin from FY 2014 to FY 2015, from 31.9% to 37.1%. Even with the increase, the percentage of outcomes in the nonsuited or dismissed by plaintiff category is lower than the 2011 Study findings, which found 53.37% of all cases were dismissed for want of prosecution or nonsuited or dismissed by plaintiff (with or without prejudice).<sup>131</sup> Those two categories made up 37.6% of all debt claim dispositions in FY 2014 and 42.9% in FY 2015. In the 2011 Study, cases dismissed with prejudice made up only 2.02% of all outcomes.<sup>132</sup>

In reporting the current debt claims data, the OCA does not distinguish between dismissals with and without prejudice. As a result, it is hard to assess whether the decrease in dismissals compared to the 2011 Study is positive or negative for defendants, but the continued high rates of nonsuits and dismissals is likely related to the often-cited problem of debt claim cases being filed without sufficient documentation of the debt.<sup>133</sup>

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<sup>130</sup>. Spector, *supra* note 12, at 296.

<sup>131</sup>. *Id.*

<sup>132</sup>. *Id.*

<sup>133</sup>. Only two percent of dismissed debt cases were dismissed with prejudice. *See id.* In the Spring 2014 Supervisory Highlights examining debt collection, “[e]xaminers found that in 70% of the cases, when the consumer filed an answer, the entity [debt collector] would dismiss the suit because it was unable to locate documentation to support its claims.” CONSUMER FIN. PROT. BUREAU, SUPERVISORY HIGHLIGHT 14 (2014).

Other case outcomes saw a more modest increase or decrease from FY 2014 to FY 2015. The remaining outcomes shown in Table 4 (not including default judgments and those that were nonsuited or dismissed by the plaintiff) together comprised between thirty-two and forty percent of all outcomes over the two-year study period. Agreed judgments<sup>134</sup> and trial or hearing by judge each comprised approximately ten percent of the outcomes and the rate of both outcomes decreased from FY 2014 to FY 2015. Dismissals for want of prosecution held steady, around six percent of the total dispositions. Trial by jury is rarely used, making up less than one percent of all case outcomes.

### C. A CLOSER LOOK AT THE NUMBERS BEHIND THE OUTCOMES

When we looked more closely at the data, we found the distribution of the outcomes varied greatly among the courts. For example, although the default judgment rate averaged 31.6% of all dispositions in FY 2014, individual courts reported default judgment rates ranging from zero percent to 100%.<sup>135</sup> To determine whether the courts at the upper and lower ends of the spectrum were simply outliers, we grouped the courts in four categories according to the rate of each of the top four types of outcome. For each court category, we then explored the proportionality of the outcome within the group. The top four outcome categories we analyzed were: (1) nonsuit/dismissed by plaintiff; (2) default judgment; (3) agreed judgment; and (4) trial/hearing by judge. The four court groupings we used were: (1) courts with zero percent of dispositions falling into the outcome category; (2) courts with greater than zero percent but less than twenty-five percent of dispositions falling into the outcome category; (3) courts with twenty-five to fifty percent of dispositions falling into the outcome category; and (4) courts with greater than fifty percent of dispositions falling into the outcome category.

#### 1. *Nonsuited or Dismissed by Plaintiff*

The largest outcome category was nonsuited or dismissed by plaintiff. In this category we found unexpected concentrations of disproportionate outcomes in the court groups. Courts in the first two groups, with a rate from zero percent to less than twenty-five percent, represented thirty-six

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<sup>134</sup> An agreed judgment is an agreement signed by the parties, which is drafted in the form of a judgment and signed by the judge.

<sup>135</sup> In 2014, twenty-three courts had zero default judgments, and in 2015, twenty-two courts had zero default judgments. Only one court with two total dispositions fell into the 100% default judgment category in 2014. In 2015, two courts had a seventy-five percent default judgment rate, with 204 dispositions for both courts. The court with the highest number of default judgments in 2014 had 950 default judgments, making up thirty percent of the total dispositions by that court for the year. In 2015, the number was 1106 default judgments, making up thirty-six percent of the total dispositions by that court for the year.

percent of the total dispositions in FY 2014. If outcomes were proportional across all courts, we would have expected to find thirty-six percent of the total nonsuits in these two categories. Instead, we found just 18.3% of the total nonsuits. Similar results were found in FY 2015, though the volume of cases in these categories decreased to 13.6% of total dispositions, and four percent of total nonsuits. The opposite trend held for courts with nonsuit rates of twenty-five percent or greater. Those courts represented sixty-four percent of all dispositions in FY 2014, but 81.6% of nonsuits. In FY 2015, courts with nonsuit rates of twenty-five percent or greater represented 86.5% of all cases but ninety-six percent of all nonsuited or dismissed by plaintiff dispositions. This analysis suggests that the likelihood of a nonsuit or dismissal by plaintiff varies depending on the court in which the case is filed.

TABLE 5: NONSUITED OR DISMISSED BY PLAINTIFF OUTCOME RATE  
ANALYSIS BY COURT GROUPINGS

Court Nonsuited or Dismissed by Plaintiff Rates <i>Nonsuited or Dismissed by Plaintiff as Percent of Total Dispositions</i>	FY 2014 Court Data			FY 2015 Court Data		
	Percent of All Dispositions Sample	Percent of Nonsuited or Dismissed by Plaintiff Dispositions in Sample	Diff-erence	Percent of All Dispositions in Sample	Percent of Nonsuited or Dismissed by Plaintiff Dispositions in Sample	Diff-erence
Courts with a 0% Nonsuited or Dismissed by Plaintiff Rate	1.8%	0.0%	-1.8%	0.7%	0.0%	-0.7%
Courts Nonsuited or Dismissed by Plaintiff Rate of >0%–<25%	34.2%	18.3%	-15.8%	12.9%	4.0%	-8.9%
Courts Nonsuited or Dismissed by Plaintiff Rate of 25%–50%	56.6%	68.1%	11.5%	76.1%	80.8%	4.8%
Courts Nonsuited or Dismissed by Plaintiff Rate of >50%	7.4%	13.5%	6.1%	10.4%	15.2%	4.8%

## 2. Default Judgments

Similar patterns hold for the next most common outcome category: default judgment.<sup>136</sup> Courts with a zero percent to less than twenty-five percent default judgment rate represented 33.2% of all dispositions, but just 16.5% of all default judgments for FY 2014. For FY 2015, courts with the same default judgment rates represented 22.7% of all dispositions, and 11.4% of default judgments. Courts with a 25% or more default judgment rate, represented 67.8% of all dispositions and 83.5% of all default judgments for FY 2014 and 77.4% of all dispositions, but 88.6% of all default judgments for FY 2015.

TABLE 6: DEFAULT JUDGMENT OUTCOME RATE ANALYSIS BY COURT GROUPINGS

Court Default Judgment Rates <i>Default Judgments as a Percent of Total Dispositions</i>	FY 2014			FY 2015		
	Percent of All Dispositions in Sample	Percent of Default Judgment Dispositions in Sample	Diff-erence	Percent of All Dispositions in Sample	Percent of Default Judgment Dispositions in Sample	Diff-erence
Courts with a 0% Default Judgment Rate	3.3%	0.0%	-3.3%	2.8%	0.0%	-2.8%
Courts Default Judgment Rate of >0%–<25%	28.9%	16.5%	-12.3%	19.9%	11.4%	-8.4%
Courts Default Judgment Rate of 25%–50%	64.6%	76.8%	12.2%	73.4%	81.4%	8.0%
Courts Default Judgment Rate of >50%	3.2%	6.7%	3.4%	4.0%	7.2%	3.2%

136. In 2014, twenty-three courts had zero default judgments, and in 2015, twenty-two courts had zero default judgments. Only one court with two total dispositions fell into the 100% default judgment category in 2014. In 2015, two courts had a seventy-five percent default judgment rate, with 204 dispositions for both courts. The court with the highest number of default judgments in 2014 had 950 default judgments, making up thirty percent of the total dispositions by that court for the year. In 2015, the number was 1106 default judgments, making up thirty-six percent of the total dispositions by that court for the year.

### 3. *Trial/Hearing by Judge*

Trial or hearing by judge shows similarly disproportionate outcomes by court to those for default judgments and nonsuited or dismissed by plaintiff outcomes. Trial or hearing by judge court outcome rates ranged from 0% to 100% for both years of the study.<sup>137</sup> Courts with a 0% to less than 25% rate represented 92.1% of all dispositions, but just 71.2% of all trials/hearings by a judge for 2014. For 2015, courts with the same rate of trials or hearings by judge represented 94.4% of all dispositions, and just 77% of trials/hearings by judge. Courts with 25% and higher trial or hearing by judge case outcome rates represented 7.9% of total dispositions in FY 2014, but 28.8% of all cases in the outcome category. In FY 2015, the percentages were 5.6% of total cases, and 22.9% of all cases with the trial or hearing by judge outcome.

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<sup>137</sup> In both 2014 and 2015, twenty-nine courts had zero trial/hearing by judge case outcomes. Only one court with 104 total dispositions fell into the 100% trial/hearing by judge category in 2014. In 2015, one court had a 100% trial/hearing by judge case outcome rate, with just one disposition for the court. The court with the highest number of trial/hearing by judge outcomes in 2014 totaled 402, making up nineteen percent of the total dispositions by that court for the year. In 2015, the number was 717 trials/hearings by judge, making up twenty-four percent of the total dispositions by that court for the year.

TABLE 7: TRIAL/HEARING BY JUDGE OUTCOME RATE ANALYSIS BY COURT GROUPINGS

Court Trial/ Hearing by Judge Rates <i>Trial/ Hearing by Judge as a Percent of Total Dispositions</i>	FY 2014			FY 2015		
	Percent of All Dispositions in Sample	Percent of Trial / Hearing by Judge Dispositions in Sample	Diff- erence	Percent of All Dispositions in Sample	Percent of Trial / Hearing by Judge Dispositions in Sample	Diff- erence
Courts with a 0% Trial/ Hearing by Judge	3.3%	0.0%	-3.3%	3.5%	0.0%	-3.5%
Courts Trial/ Hearing by Judge Rate of >0%– >25%	88.8%	71.2%	-17.6%	90.9%	77.0%	-13.9%
Courts Trial/ Hearing by Judge of 25%–50%	5.7%	16.9%	11.2%	5.1%	19.6%	14.5%
Courts Trial/ Hearing by Judge Rate of >50%	2.2%	11.9%	9.7%	0.5%	3.3%	2.8%

#### 4. Agreed Judgments<sup>138</sup>

Agreed judgments, particularly in the FY 2015 data, differ from the other two outcome categories in that outcomes are more proportional to total case volumes by court, as shown in Table 7 below. In FY 2015, courts with above zero percent and less than twenty-five percent of the

138. Agreed judgment is the name used to describe a disposition in “cases in which the court entered a judgment based upon the mutual agreement of the parties involved in the suit.” OFFICE OF COURT ADMIN., TEX. JUDICIARY COUNCIL, OFFICIAL JUSTICE OF THE PEACE MONTHLY REPORT INSTRUCTIONS 15 (2015).

agreed judgment outcomes in the sample made up 98.1% of dispositions and 98.1% of agreed judgments. The FY 2014 rates were only slightly different for the same court grouping.

TABLE 8: AGREED JUDGMENT OUTCOME RATE ANALYSIS BY COURT GROUPINGS

Court Agreed Judgment Rates <i>Agreed Judgments as a Percent of Total Dispositions</i>	FY 2014			FY 2015		
	Percent of All Dispositions in Sample	Percent of Agreed Judgment Dispositions in Sample	Diff-erence	Percent of All Dispositions in Sample	Percent of Agreed Judgment Dispositions in Sample	Diff-erence
Courts with a 0% Agreed Judgment Rate	2.1%	0.0%	-2.1%	1.2%	0.0%	-1.2%
Courts Agreed Judgment Rate of >0%–>25%	95.5%	94.0%	-1.5%	98.1%	98.1%	0.0%
Courts Agreed Judgment Rate of 25%–50%	2.4%	5.9%	3.6%	0.7%	1.8%	1.2%
Courts Agreed Judgment Rate of >50%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%

This analysis of court outcomes, examining a two-year comparison of the four most common outcomes, demonstrates that outcomes are not evenly distributed across all courts. Certain outcomes tend to be concentrated in particular courts or precincts. The following Subpart explores demographics as a possible explanation of the disproportionate outcomes observed.

#### D. EXAMINING IMPACTS OF RACE AND INCOME CHARACTERISTICS ON COURT OUTCOMES

Disparities in outcomes at the court level in other states have been associated with differences in the demographic characteristics of the

jurisdiction.<sup>139</sup> A recent study looking at the number and locations of defendants in debt collection court judgments in the St. Louis area, Chicago, and Newark found twice the rate of judgments in African American communities than it found in majority White communities when controlling for income.<sup>140</sup> Other studies focus on disproportionately negative collections outcomes in lower income communities.<sup>141</sup> However, the Texas data paint a somewhat different picture.

The forty counties sampled in this study largely reflect the demographics of the state.<sup>142</sup> The overall population of the forty-county sample is forty-two percent White, twelve percent African American, thirty-nine percent Latino, and four percent Asian, with a median household income of \$57,000 and seventeen percent poverty rate.<sup>143</sup>

To assess the impact of demographic and household characteristics on court outcomes, the study uses data from the 2010 U.S. Census and the 2008–2012 American Community Survey Five Year Estimate. The study compiled the data at the precinct level and compared it with case outcome rates in the court or courts in the precinct.<sup>144</sup> Table 9 shows the results of a correlation analysis at the precinct level between each of the court outcomes and the demographic, household, and income data.<sup>145</sup>

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139. See, e.g., LEGAL AID SOC'Y ET AL., *DEBT DECEPTION: HOW DEBT BUYERS ABUSE THE LEGAL SYSTEM TO PREY ON LOWER-INCOME NEW YORKERS 2* (2010) (studying debt collections suits in New York City and finding that sixty-nine percent of people sued by debt buyers were low-income Latinos or African Americans).

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

141. A 2008 study found strong correlations between poverty and unemployment and the log of civil filings measures used in the study. See Richard M. Hynes, *Broke but Not Bankrupt: Consumer Debt Collection in State Courts*, 60 FLA. L. REV. 1, 41–42 (2008).

142. The median income for the sample is higher than the state average, as is the poverty rate, perhaps because the sample captures urban communities with both greater wealth and greater poverty than the state average.

143. According to the 2010 U.S. Census, Texas is 45% White, 12% African American, 38% Latino, and 4% Asian. See *American Fact Finder*, *supra* note 119. According to the 2008–2012 American Community Survey, median household income for Texas is \$51,563, and the poverty rate is 13.5%. *2008–2012 American Community Survey 5-Year Estimates*, *supra* note 12.

144. The demographic and household variables used in this study were selected based on a preliminary county-based study completed in the spring of 2014, with six months of court outcome data.

145. As part of this study, percent male householder, percent female householder, and percent below poverty were examined, in addition to the variables included in the table. They were not included in the final analysis, because percent male householder and percent female householder did not show any robust correlations with the court outcomes in the study. Percent below poverty, in the 2015 data, did show a statistically significant negative correlation of .32 with nonsuit/dismissed by plaintiff category. It is not included in this analysis, because median income, which is a similar variable and is included in the final analysis, had a more robust outcome. Both correlations point to a trend of a higher likelihood of nonsuit or dismissed by plaintiff in higher income precincts.

TABLE 9: CORRELATIONS OF RACE AND INCOME CHARACTERISTICS WITH FY 2014 AND FY 2015 COURT OUTCOMES<sup>146</sup>

	Percent White		Percent African American		Percent Hispanic		Percent Asian		Median Income (2012)	
	2014	2015	2014	2015	2014	2015	2014	2015	2014	2015
Percent Default Judgment	-.03	-.25**	0.0	.05	.03	.21**	.03	.06	0.0	-.05
Percent Agreed Judgment	.02	.12*	-.11	-.24**	.03	.00	-.02	-.07	.04	.07
Percent Trial/Hearing by Judge	-.12	-.04	.06	.14*	.10	-.05	-.03	.01	-.22**	-.21**
Percent Trial by Jury	-.17**	.07	0.0	.14*	.18**	-.12*	-.05	-.06	-.08	.02
Percent Dismissed for Want of Pros.	.06	.07	-.07	-.03	-.01	-.04	-.08	-.09	.02	0.0
Percent Nonsuit or Dismissed by Plaintiff	.06	.17*	-.09	-.23**	-.04	-.08	.11	.13*	.30**	.40**
% Other	-.04	.03	.15*	.14*	-.09	-.07	-.08	-.09	-.16**	-.13*

*\*Significant at the 0.1 level; \*\*Significant at the 0.05 level.*

Although some correlations are statistically significant at the .1 or .05 level, for the most part, the variables have a low level of correlation with the outcomes. Median income appears to have the strongest correlation with the court outcome category of nonsuited or dismissed by plaintiff. From 2014 to 2015, the correlation increased from .30 to .40. The trend in correlation points to a pattern: the rate of nonsuits or dismissals increases as precinct median income increases. The 2015 data in Table 9 also shows a negative correlation of .25 between the percentage of White population in a precinct and the percentage of default judgment case outcomes, indicating a somewhat higher likelihood of default judgments in precincts with a higher non-White population.

146. This correlation analysis included 167 precincts for the 2014 analysis and 174 precincts in the 2015 analysis.

This finding, which is consistent with other studies<sup>147</sup> that show race as a significant factor in negative outcomes in debt collection proceedings, is not reflected in 2014 data.<sup>148</sup> Based on this analysis, race and income appear to have a small role in explaining disproportionate court outcomes. Unfortunately, their role appears to be more significant in 2015, and this is a trend that should be watched.

#### E. EXAMINING COURTS AS A VARIABLE AFFECTING OUTCOMES

The data do not offer specific information about practices by court. A comparative examination of outcomes focused on courts with the highest rates of default judgments and courts with the highest rates of nonsuits or dismissals by plaintiffs, however, sheds some light on patterns of outcomes where court practice—such as a judge’s standards for plaintiffs to document the underlying debt in a debt claim proceeding—could have important impacts on the case outcomes.<sup>149</sup> The data show that in courts with high rates of default judgments there were lower than average rates of nonsuits/dismissals by plaintiff. In cases with high rates of nonsuit or dismissal by plaintiffs, default judgment rates were lower than average.

TABLE 10: OUTCOMES IN COURTS WITH HIGH RATES OF DEFAULT JUDGMENTS AND NONSUITED OR DISMISSED BY PLAINTIFF

Outcome	Courts with >50% Default Judgment <sup>150</sup>		Courts with >50% Nonsuited or Dismissed by Plaintiff <sup>151</sup>	
	2014	2015	2014	2015
Default Judgments	61.0%	56.9%	15.1%	24.9%
Nonsuited or Dismissed by Plaintiff	19.9%	26.8%	58.3%	54.5%
All Other*	19.2%	16.3%	26.6%	20.6%

*\*Includes agreed judgments, trial/hearing by judge, trial by jury, dismissed for want of prosecution, and other dispositions.*

147. See *e.g.*, *supra* notes 139–38; see *e.g.*, *infra* note 165.

148. An analysis that looked at the correlations of the number of judgments per 1000 of population with demographic and household characteristics supported the connection between median income and nonsuit/dismissal, but did not find a statistically significant correlation between default judgments and race.

149. See *supra* note 75 (documenting the standards in the Texas Rules of Civil Procedure 508.2 for documenting a debt in Texas justice courts). However, the way the standards are applied can vary from court to court, as demonstrated through court observations discussed later in Part IV below.

150. The 2014 and 2015 data each include data from fifteen courts with default judgment rates above fifty percent.

151. The 2014 data includes data from twenty-six courts with a nonsuit or dismissal by plaintiff rate of above fifty percent. The 2015 data includes data from twenty-nine courts with a nonsuit or dismissal by plaintiff rate of above fifty percent.

There are multiple possible explanations for this finding. For example, fewer default judgments might result from higher rates of appearance by the defendant. Higher appearance rates might relate to the amount and quality of information the collector or court makes available to the consumer. Fewer default judgments even in the absence of a defendant's appearance might also mean that courts are holding debt collectors to higher evidentiary standards to prove the debt, leading to higher rates of nonsuit or dismissal when the evidence falls short. These interpretations, as well as others, suggest that the individual court in which a case is heard is a determinant in its outcome.

In order to better understand the litigation of debt claim cases in specific courts, we considered additional factors that might explain differences in outcomes. First, we supervised 156 court observations by volunteer lawyers and law students in justice courts in five counties. We also explored the websites for the courts in those counties to determine whether differences in court management, including available resources for the litigants might explain the differences in outcomes. The next Part explores the findings obtained from these data sources.

#### IV. COURTROOM CONDUCT AND OTHER FACTORS AFFECTING COLLECTION LITIGATION

Courtroom observations occurred in Collin, Dallas, El Paso, Tarrant, and Travis counties in the summer of 2014, before the first anniversary of the new rules. At the outset, it should be noted that observers did not match the proceedings they attended to the statistical data obtained from the court, which was analyzed in the previous Part. Rather, the proceedings observed were selected at the convenience of the observer and were not selected according to any identifiable pattern.

Observers recorded their observations in thirty-two categories that corresponded roughly to the categories of information sought in the 2011 Study<sup>152</sup> to allow us to make general comparisons with the previous data. Data recorded included the identity of the parties and their attorneys, whether the parties appeared, the amount of the claim, whether the plaintiff was the original creditor, and the outcome in addition to comments made by the observer on the process.<sup>153</sup> Together with information obtained from court websites, the observations provided additional insight into collection litigation in the justice courts.

##### A. DIFFERENCES AMONG THE COURT PROCEEDINGS

Observers found many judges actively involved in the disposition of cases on the docket. In some cases, judges cautioned consumers to make

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152. Spector, *supra* note 12, at 277–78.

153. See 2014 Court Observation Data, *supra* note 14.

sure to read settlement documents before signing.<sup>154</sup> In others, judges appeared to freely continue the proceedings to enable the parties to finalize a settlement,<sup>155</sup> provide a plaintiff additional time to obtain evidence of the debt, or to allow a defendant additional time to show the debt was not hers.<sup>156</sup> In some courts, it is the practice that judges handled all potential defaults in chambers.<sup>157</sup> In another, the observer reported that the judge expressed frustration with the failure of both parties to appear and was considering taking a more strict view of both parties' failure to appear.<sup>158</sup>

Some observers reported frank discussions with judges about the effectiveness of the new rules. One observer reported a judge's opinion that he "doesn't think having special debt collection rules make sense."<sup>159</sup> Another reported an opposite view, stating that the new rules provided judges with effective tools to ensure plaintiffs presented sufficient evidence to support their claims.<sup>160</sup> Yet another expressed the view that the new rules made it easier for collectors to recover a judgment.<sup>161</sup> One observer opined that the process "needs some improvement" and commented that the "system is designed for those who show up."<sup>162</sup> He added that the debtor's failure to appear might be a symptom of a larger problem.<sup>163</sup>

#### B. JUSTICE IS SPEEDY

Consistent with the statistical data, observers reported that very few cases were resolved through a formal hearing or trial. Instead, court observers found a variety of types of hearings being conducted. They included pre-trial hearings, hearings for post-judgment discovery, requests for continuances, discovery motions, and motions to transfer or dismiss on grounds of venue or bankruptcy. Regardless of the type of hearings observed, 90% of the proceedings were completed in less than fifteen minutes, and 63% in less than five minutes. Only one hearing extended beyond thirty minutes.

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154. *Id.* at l. 15.

155. *Id.* at l. 16.

156. *Id.* at l. 14 (defendant given additional time).

157. Reported in student observations (Summer 2015).

158. Exit memorandum from Student to Professor Mary Spector (Summer 2014) (on file with authors).

159. Memorandum from Ryan Snow on Debt Collection to Ann Baddour et al. (Aug. 13, 2014) (on file with authors).

160. Memorandum from Ryan Durham on Discussion with Judge Michael Windham to Mary Spector (Oct. 14, 2014) (on file with authors).

161. Memorandum from Michael F. Steve (Aug. 19, 2014) (on file with authors).

162. Memorandum from Matthew Gilleland on Debt Collection to Mary Spector et al. (Aug. 27, 2014) (on file with authors).

163. *Id.*

TABLE II: LENGTH OF PROCEEDINGS (VALUES)<sup>164</sup>

Defendant Present	<5 mins	5-10 mins	11-15 mins	16-20 mins	21-30 mins	30-60 mins	Unknown
Yes Pro Se	36	11	4	3	1	0	0
	37.11%	35.48%	36.36%	50.00%	33.33%	0.00%	0.00%
Yes Attorney	18	5	1	0	1	0	1
	18.56%	16.13%	9.09%	0.00%	33.33%	0.00%	20.00%
No	43	15	6	3	1	1	4
	44.33%	48.39%	54.55%	50.00%	33.33%	100.00%	80.00%

### C. DEFENDANTS APPEAR IN COURT

Defendants appeared in fifty-two percent of the cases observed, higher than reported in other studies.<sup>165</sup> Because courts can dispose of cases without a hearing when defendants do not appear, it might be expected that most of the cases observed were ones in which the defendant had made an appearance at some point in the litigation. Still, the appearance rate was more than twice the rate found in the 2011 Study.<sup>166</sup>

The presence of the defendant at the hearing seemed to result in a higher likelihood of success for the defendant or, at the very least, a lower rate of success for the plaintiff. In the fifty-four cases in which a defendant appeared pro se, three of the defendants were non-English speakers without translators, two claimed the debt was not theirs, three reported issues related to divorce associated with debt. Five of the defendants were offered and accepted payment plans, and four admitted they could not pay. In five of the seven cases in which a pro se defendant prevailed, the plaintiff failed to appear.

In cases in which the defendant appeared with an attorney, the likelihood of the defendant's success was greater. In cases coded as "neither won," observations revealed a range of outcomes. For example, some resulted in continuances, five were set for trial at a later date, and one resulted in the granting of a motion for pretrial discovery.

164. Percentages represent proportion of each form of representation for a certain range of length of proceedings.

165. See Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 LOY. CONSUMER L. REV. 179, 183, 226 (2014) (reporting typical default judgment rates of seventy-three to ninety-five percent as identified in various studies of court litigation throughout the country).

166. Spector, *supra* note 12, at 288.

TABLE 12: DEFENDANT PRESENT VERSUS WHO WON<sup>167</sup>

<b>Defendant Present</b>	<b>Plaintiff Won</b>	<b>Defendant Won</b>	<b>Neither</b>	<b>Settled Before</b>	<b>Unknown</b>
Yes Pro Se	52.73%	12.73%	27.27%	7.27%	0.00%
Yes Attorney	15.38%	26.92%	50.00%	7.69%	0.00%
No	75.34%	4.11%	8.22%	5.48%	6.85%

#### D. COURT WEBSITES

One explanation for a heightened level of consumer participation in the cases observed is the quality and ease of information available to the consumer. Whether such information comes from the court or the collector, it is believed that more information about the individual lawsuit, as well as about the litigation process in general, leads to higher levels of consumer participation.<sup>168</sup>

As one measure of the quantity and quality of information available to consumers, we examined the websites of each of the counties in which we observed a court, as well as the websites of each individual court observed. The results were as varied as the proceedings observed and suggest the possibility that information inconsistencies might contribute to the disparate outcomes observed in the data.

Each of the counties reviewed provide links to the statutory text of the Texas Rules of Civil Procedure that govern justice court litigation.<sup>169</sup> Beyond links to the statutory language, however, individual courts and counties varied greatly in the quality and quantity of information provided to litigants. Very few courts offered interactive or other web-based materials for litigants. All courts in Travis County and one court in Collin County provided a “Guide and File for Pro Se Litigants” link directing users to “efiletxas.gov,” a web application electronic filing of petitions in Small Claims, Evictions, and Repair and Remedy cases.<sup>170</sup> The site lacked any comparable options for self-represented defendants seeking to dispute a plaintiff’s claim and protect their rights, and had no options of any kind for plaintiffs or defendants in debt claim cases.

The primary websites for Bexar, El Paso, and Dallas Counties, and the remaining Collin County justice courts lacked any information or instructions for pro se litigants other than links to the Texas Rules of Civil Procedure.

167. Percentages represent proportion of each case outcome for each form of representation.

168. See FED. TRADE COMM’N, *BROKEN SYSTEM*, *supra* note 19.

169. See Final Approval of Rules for Justice Court Cases, *supra* note 66.

170. *Guide and File for Pro Se Litigants*, TRAVIS COUNTY TX, <https://www.traviscountytx.gov/justices-of-peace/guide-file-for-pro-se-litigants> (last visited May 29, 2016); *Justices of the Peace*, COLLIN COUNTY, [http://www.collincountytx.gov/justices\\_peace/Pages/default.aspx](http://www.collincountytx.gov/justices_peace/Pages/default.aspx) (last visited May 29, 2016).

In all of the counties surveyed, some courts provided online forms, including debt claim petitions, but other information and forms varied from county to county and from court to court within the county.<sup>171</sup> Collin County provides links to twenty-two different forms, including petitions for the four claims over which Texas justice courts retain jurisdiction, a generic Original Answer to all claims, and fifteen other forms.<sup>172</sup> In Collin, El Paso, and Bexar counties, debt claim petitions are available on the main Justice Court webpage. On the other hand, in Dallas and Travis County, form petitions are provided on the websites of only some of the precincts, but not in others. Four of the ten Dallas County precincts provide forms for debt claim petitions and Original Answers.<sup>173</sup> In El Paso County, six of the eight individual court websites provide forms including debt collection petitions and original answers.<sup>174</sup> While the six form answers vary from court to court, the remaining two precincts do not provide form answers at all.<sup>175</sup>

Differences in the existence and quality of information available to justice court litigants including consumer defendants in just five Texas counties suggest the inconsistencies are not isolated.<sup>176</sup> They may contribute to inequities that exist among frequent users of courts and others as well as some of the disproportionate outcomes observed in the data.

## V. SUMMARY FINDINGS AND RECOMMENDATIONS

This study attempts to provide a snapshot of the collection practices employed in Texas over the last two years. It examines the snapshot through a lens that has witnessed rigorous enforcement of consumer protections in the collection process at the national level as well as changes in court rules at state level. Though data is not available to reach

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171. *Petition: Debt Claim Case*, BEXAR COUNTY, [http://home.bexar.org/jp/docs/PETITION\\_DEBT\\_CLAIM%20CASE.pdf](http://home.bexar.org/jp/docs/PETITION_DEBT_CLAIM%20CASE.pdf) (last visited May 29, 2016); *Petition: Debt Claim Case*, COLLIN COUNTY, [http://www.collincountytx.gov/justices\\_peace/Documents/debt\\_claim\\_petition.pdf](http://www.collincountytx.gov/justices_peace/Documents/debt_claim_petition.pdf) (last visited May 29, 2016); *Plaintiff's Original Petition*, TRAVIS COUNTY, [https://www.traviscountytx.gov/images/justices\\_of\\_peace/Doc/debt-small-claim-jp2.pdf](https://www.traviscountytx.gov/images/justices_of_peace/Doc/debt-small-claim-jp2.pdf) (last visited May 29, 2016); *Petition: Debt Claim Case*, EL PASO COUNTY, <http://www.epcounty.com/jp/documents/El%20Paso%20Debt%20Claim%20Petition.pdf> (last visited May 29, 2016); *Justice Court Civil Case Information Sheet*, DALLAS COUNTY, [http://www.dallascounty.org/department/jpcourts/12/documents/DebtClaimPetition\\_020314\\_NEW.pdf](http://www.dallascounty.org/department/jpcourts/12/documents/DebtClaimPetition_020314_NEW.pdf) (last visited May 29, 2016).

172. *Justices of the Peace: Forms*, COLLIN COUNTY, [http://www.collincountytx.gov/justices\\_peace/Pages/jpforms.aspx](http://www.collincountytx.gov/justices_peace/Pages/jpforms.aspx) (last visited May 29, 2016).

173. *Defendant's Original Answer*, DALLAS COUNTY, [http://www.dallascounty.org/department/jpcourts/1-2/documents/090113\\_JS\\_JX\\_ANSWER.pdf](http://www.dallascounty.org/department/jpcourts/1-2/documents/090113_JS_JX_ANSWER.pdf) (last visited May 29, 2016) (citing to precincts and places 1-2, 2-1, 3-1, 4-2).

174. *Justices of the Peace*, EL PASO COUNTY, <http://www.epcounty.com/jp/jp2.htm> (last visited May 29, 2016).

175. *Defendant's Original Answer*, *supra* note 173 (citing to precincts and places 1, 4, 5, 6-1, 6-2, 7).

176. The Authors expanded their investigation to include at least twelve counties and their ongoing research supports this assertion. They expect to publish the results of their expanded research by late summer 2016.

firm conclusions regarding changes in court outcomes for consumers, some trends can be identified.

A. DEBT COLLECTION PROBLEMS CONTINUE TO PLAGUE TEXANS

Texas consumers continue to report the existence of unwanted communication and unlawful conduct by debt collectors, including attempts to collect debts not owed. They also report conduct that appears to mirror the conduct of collectors of imposter or scam debt. The pervasiveness of this conduct calls for increased enforcement of existing law, and if necessary the promulgation of new law to safeguard consumers' private personal and financial information.

B. DEBT COLLECTION LITIGATION CONTINUES TO GROW IN TEXAS DESPITE A SLOWDOWN IN OTHER AREAS OF THE COUNTRY

Litigation to collect consumer debt grew by more than twenty percent over the two-year period examined. While the number of cases increased, so too did the courts' ability to dispose of the case, which grew by eighty-one percent. To the extent new rules of court procedures were designed to promote efficiency, they could be considered successful. However, there is no evidence to suggest that the rules offer consumers any additional protection to "the inherent problems in these suits, including an often disturbing lack of proof."<sup>177</sup> Indeed, to the extent that the default judgment rate increased slightly over the two-year period, the conclusion might be just the opposite.

C. TEXAS DEBTORS APPEAR TO FARE BETTER IN COURT PROCEEDINGS COMPARED TO DEBTORS IN OTHER STATES,<sup>178</sup> BUT THEY DO NOT NECESSARILY FARE WELL

A possible explanation of the lower than average default judgment rates is the protection against wage garnishment from most creditors and the existence of broad personal property exemptions, leaving many Texans essentially judgment proof. Because of these important protections, debt collectors are likely more discerning about the cases that they bring to court.

Though default judgment rates are low compared to other states, default judgments still account for nearly one in three of all debt claim court outcomes in Texas. Given the well-documented problems of some collectors filing debt claim cases without sufficient documentation of the debt, a thirty percent default judgment rate raises serious concerns.

The implications for consumers of the relatively high rates of cases nonsuited or dismissed by plaintiff are difficult to decipher. Cases

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<sup>177</sup>. See TUCKER, *supra* note 67, at 9.

<sup>178</sup>. See FED. TRADE COMM'N, *BROKEN SYSTEM*, *supra* note 19.

dismissed without prejudice, might indicate short-term relief, but potential negative impacts in the long term.<sup>179</sup> On the positive side, the high dismissal rate might indicate either that borrowers are engaged enough in the proceedings to discredit the validity of the debt or judges are scrutinizing the debt documentation and finding that it does not meet the legal threshold to proceed. However, to the extent that such dispositions are made without prejudice to the plaintiff, it also suggests that borrowers remain susceptible to future claims based on the same debt.

#### D. COURT-SPECIFIC DATA SHOWS A PICTURE OF DISPARATE OUTCOMES AT THE COURT LEVEL

The substantial variations in outcomes from court to court reveal that each of the outcomes is disproportionately over or underrepresented by court grouping. Notably, the magnitude of the disproportionate outcomes decreased from 2014 to 2015, which could indicate a positive trend toward consistency in how courts apply the new debt claim case standards. However, important disparities still exist in outcomes at the court level. With the exception of the “Agreed Judgment” outcome category, the data reflect a decreasing, but ongoing pattern of disparate outcomes based on the court. For a consumer, it could mean a higher likelihood of a particular outcome based solely on the court in which a case is filed. This dynamic can work to the consumer’s benefit or detriment depending on the court. Ideally, consumers should expect consistent, balanced outcomes court to court.

#### E. THE QUALITY AND QUANTITY OF INFORMATION AVAILABLE TO CONSUMERS BY THE COURTS MUST BE IMPROVED

Differences in the existence and quality of information available to justice, court litigants including consumer-defendants in just five Texas counties suggest the information inequities are not isolated. They might not only contribute to inequities that already exist among frequent users of courts and others, but they might also contribute to some of the disproportionate outcomes observed in the data. Detailed analysis of the quality and quantity of information available to consumers is beyond the scope of this Article, however, we believe more research is necessary to determine the role that such information might play and to identify best practices to ensure access to justice for all Texans.

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179. Only two percent of dismissed debt cases were dismissed with prejudice. *See Spector, supra* note 12, at 7. In the Spring 2014 Supervisory Highlights examining debt collection, “Examiners found that in 70% of the cases, when the consumer filed an answer, the entity [debt collector] would dismiss the suit because it was unable to locate documentation to support its claims.” *See supra* note 133.

The precinct level demographic analysis is instructive. Though a more granular analysis looking at actual debt claims cases filed by census tract or address of the defendant could lead to other findings, the lack of any strong influence of demographics or income at the precinct level is a positive finding. Again, the strong debtor protections from asset and wage garnishment in Texas likely play an important role in this finding and could provide one explanation for differences we see in Texas as compared to other states.

#### CONCLUSION

In sum, debt collections, Texas-style, are a mixed bag. Families report numerous complaints about threats and intimidation in the collection process, disrupting their lives at home and at work. On the other hand, consumers seem to fare better in Texas courtrooms than consumers in other states. Still there remains substantial room for improvement. Rigorous enforcement of existing debtor protections at the state and federal level should continue as regulators and lawmakers develop clear rules that define the boundaries of permissible conduct both in and out of the courtroom. Effective enforcement together with responsible regulation can enhance protections for consumers, while protecting legitimate debt collection conduct. Reform efforts at the federal and state levels should also include steps to increase the quantity and quality of information provided to consumers at all stages of the collection process—from the initial contact by the collector, through the conclusion of any litigation to collect the debt. Courts should not be passive participants in this process. They are important and necessary actors and must actively work to ensure effective and meaningful access to justice for all.