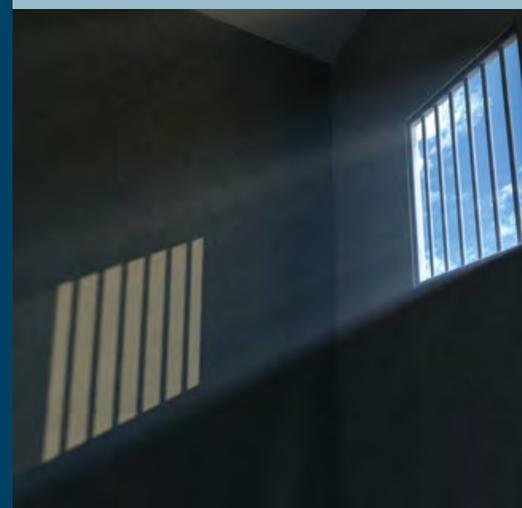


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Overall Court Improvements



Meeting the Challenges of High-Volume Civil Dockets

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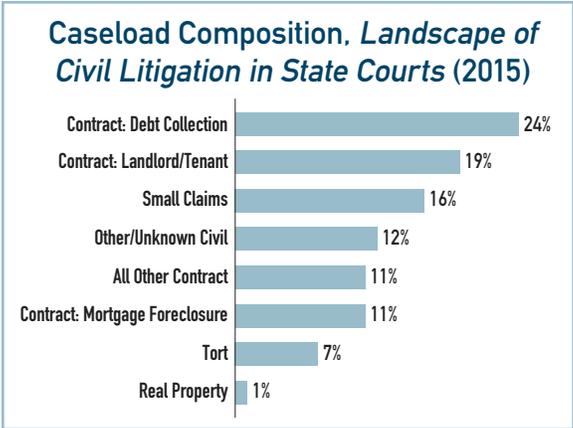
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Consumer-debt-collection, landlord/tenant, small-claims, and contract cases involving relatively small amounts comprise almost 80 percent of civil caseloads. This essay examines the challenges associated with high-volume civil dockets and summarizes recommendations to address these challenges and strengthen the integrity of the civil justice system.

Much of the focus of civil justice reform over the past two decades has been on reducing the costs and delay associated with complex tort and commercial-contract cases. Critics have complained about spiraling costs of e-discovery, the reliability of expert evidence, abusive discovery practices, and the legal and managerial complexity associated with class actions, mass torts, and multijurisdiction litigation. State courts have responded with new rules, administrative orders, pilot programs, and case management techniques intended to rein in costs, reduce disposition time, and improve litigant satisfaction.

Complex tort and contract cases certainly pose tremendous challenges for judges and lawyers. A new study by the National Center for State Courts (NCSC) suggests, however, that state court policymakers may have missed the forest for the trees. The protracted and expensive civil cases that have dominated discussions about civil justice reform comprise only a small proportion of civil cases filed in state courts each year. Instead, the majority of civil cases are consumer-debt-collection, landlord/tenant, small-claims, and small-contract cases. Nearly half of these cases are filed in limited-jurisdiction courts, often on high-volume trial calendars that

Excessive cost and delay are not the predominate challenges in [consumer-debt-collection, landlord/tenant, small-claims, and small-contract] cases. Instead, it is ensuring due process and just outcomes for cases in which large majorities of defendants are unrepresented and lack access to accurate information about court procedures.

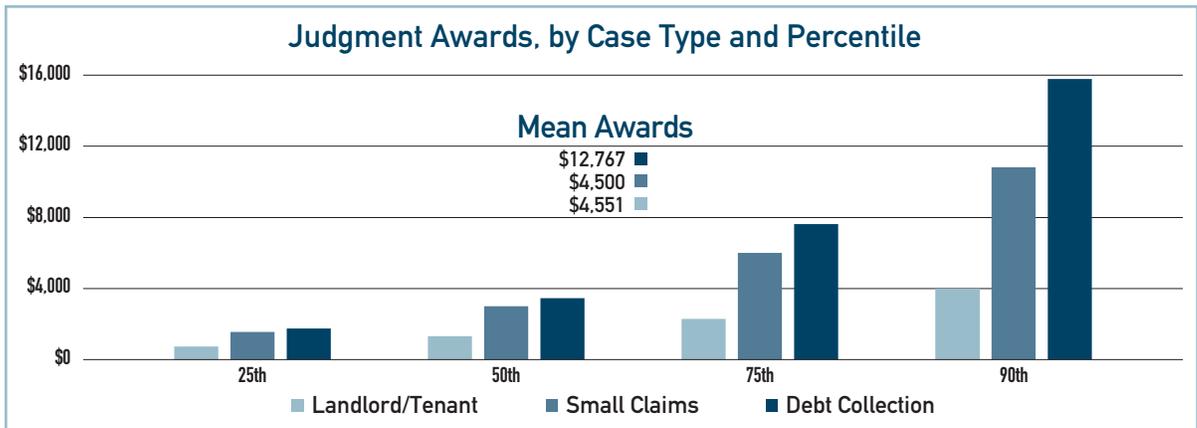


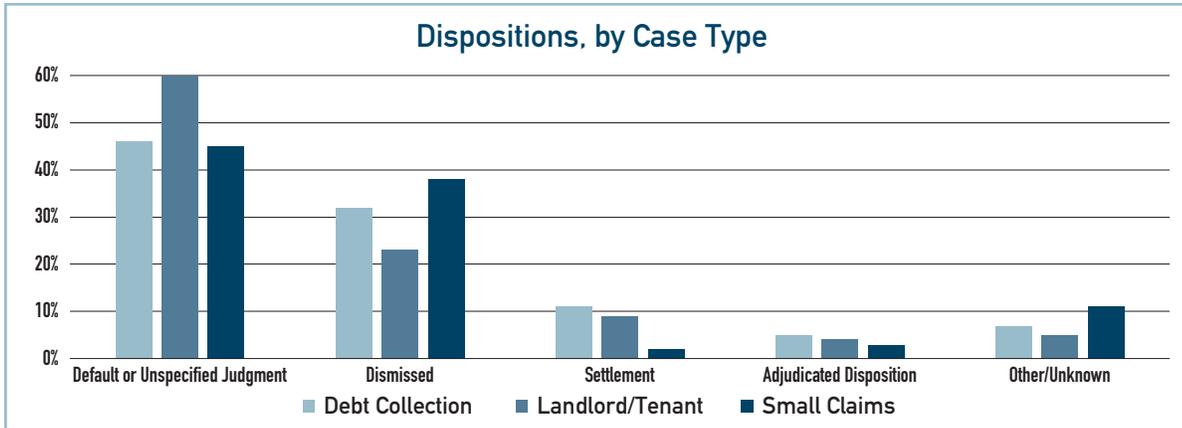
put a premium on expedited case processing. Excessive cost and delay are not the predominate challenges in these cases. Instead, it is ensuring due process and just outcomes for cases in which large majorities of defendants are unrepresented and lack access to accurate information about court procedures. In this essay, we summarize key findings from *The Landscape of Civil Litigation in State Courts* and describe the unique challenges that these cases pose for courts and for litigants. We conclude with recommendations about effective steps that courts can take to improve access and fairness for litigants.

The Landscape of Civil Litigation in State Courts

In 2013 NCSC undertook a study of civil cases to inform the deliberations of the Conference of Chief Justices (CCJ) Civil Justice Improvements Committee. This study, *The Landscape of Civil Litigation in State Courts*, examined case

characteristics and outcomes in nearly 1 million nondomestic civil cases disposed in ten urban counties between July 1, 2012 and June 30, 2013 (Hannaford-Agor, Graves, and Spacek-Miller, 2015). Contract cases comprised nearly two-thirds of civil caseloads (64 percent), and small claims and “other civil” comprised another 28 percent (16 percent and 12 percent, respectively). Tort and real-property cases, in contrast, comprised only 7 percent and 1 percent of civil caseloads, respectively. Most of the courts that participated in the *Landscape* study identified debt-collection, landlord/tenant, and mortgage-foreclosure cases as subcategories of their contract cases. Nearly one-fourth of all civil cases were debt-collection actions. Nearly one in five were landlord/tenant actions. Combined, debt-collection, landlord/tenant, and small-claims cases comprised almost two-thirds of all civil cases (58 percent) in the *Landscape* study.

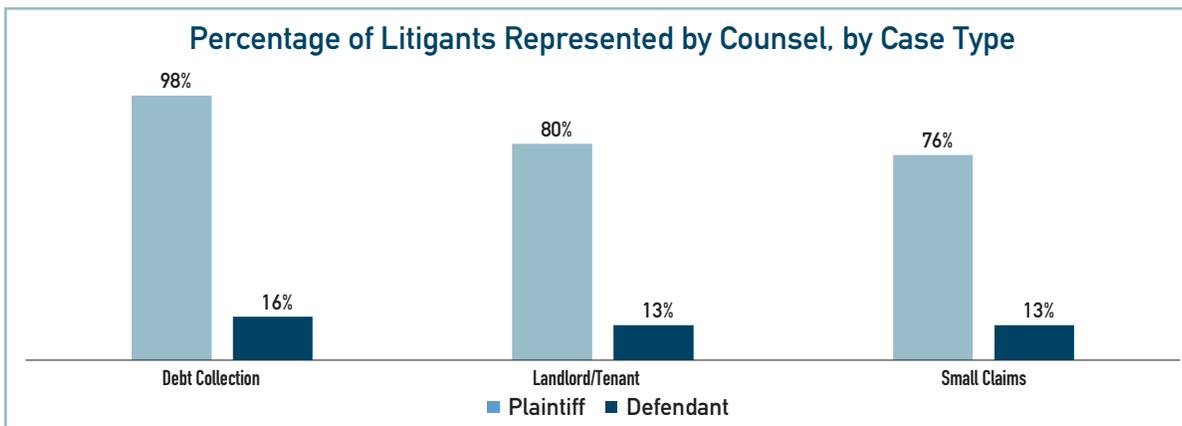




Debt-collection, landlord/tenant, and small-claims cases share a number of characteristics. Their monetary value is quite modest. The average debt-collection award was only \$12,767. This average is skewed upward by a few relatively large judgments; less than 10 percent of debt-collection judgments exceeded \$16,000, and less than 3 percent exceeded \$40,000. The average judgment for landlord/tenant cases was \$4,551, and the average small-claims judgment was \$4,500.

Very few cases were ultimately disposed through an adjudicatory proceeding, such as a bench trial, jury trial, or summary judgment. Settlements occurred in no more than one in ten cases. Instead, most cases resulted in a default or otherwise unspecified judgment or were dismissed administratively. Most cases received little, if any, judicial attention.

Finally, defendants in these cases were overwhelmingly unrepresented, while plaintiffs were overwhelming represented by attorneys, even in small-claims cases. Serious knowledge and power imbalances between plaintiffs and defendants can undermine procedural and substantive legal protections. Defendants are almost by definition persons of limited means, often hampered by limited literacy, limited English proficiency, distrust of an intimidating system, or cognitive impairments, including mental illness. Coming to court may mean losing wages, finding child care, or incurring transportation costs. Generally, unrepresented defendants face attorneys whose business model is based on processing huge numbers of cases with limited effort and whose insider knowledge often enables them to achieve one-sided outcomes through defaults or onerous settlements. After securing a judgment, plaintiffs’ lawyers are able to evict, garnish wages, and seize assets.





As background checkers comb court records for prospective employers and landlords, a civil judgment, even one obtained improperly, jeopardizes basic necessities.

Distinctive Challenges Associated with High-Volume Dockets

A number of studies by government entities, academicians, and investigative journalists have documented widespread problems in high-volume dockets.

Inadequate service. Recurrent examples of massive, systemic fraud have been documented in which defendants were not properly served and only discovered the lawsuit when faced with garnishment, asset seizure, eviction, or a judgment that appeared on a credit report. Studies show that many of these defendants have good-faith defenses; indeed, a defendant's appearance alone may result in dismissal (Spector, 2011; MFY Legal Services, 2008).

Inadequate pleading. In debt-collection cases in particular, complaints are often riddled with serious flaws, including erroneous facts, time-barred claims, or identification of the wrong person. Studies show that stricter pleading requirements result in fewer defaults (Hannaford-Agor et al., 2013).

Insufficient litigant information. Unrepresented litigants lack the knowledge to navigate court processes effectively or efficiently, frustrating the litigant and court staff. Frontline court staff often lack the time, training, or mandate to help litigants identify claims, preserve defenses, or present their facts effectively. The absence of a court-annexed resource to provide legal advice, as opposed to generic information, means that pro se litigants do not receive guidance tailored to their circumstances (Greiner, Pattanayak, and Hennessy, 2013). The challenges presented by the high numbers of unrepresented litigants call upon courts to reexamine traditional models, including the resources they provide, the functions staff perform, and the skills expected of court personnel.

Confusing, chaotic courtrooms. In high-volume dockets, large numbers of cases are often scheduled for the same time. Docket calls in crowded courtrooms are often fast-paced and hard to hear and understand. Default judgments are often sought and entered quickly after a defendant does not respond. Wait times before a case is called can be extremely long.

Hallway settlements. Attorneys who regularly handle landlord/tenant or consumer-debt cases may occupy desks or places in the well of the court, hallways, or public areas adjacent to the courtroom. Their positioning may suggest that they have an official court role; litigants may unnecessarily acquiesce to opposing-counsel demands because they mistakenly assume that the attorney is connected to the court. Studies have documented repeated instances of lawyers violating the ethical rules or misrepresenting the law in “hallway negotiations” (Greiner, Jiménez, and Lupica, 2015; Baldacci, 2006; Fox, 1996). Because plaintiffs’ attorneys dominate the courtroom colloquy, judges may not become aware of facts that would call the fairness of a hallway-negotiated settlement into question.

Litigation pitfalls. Often, the debt buyer’s counsel, who does not expect to actually litigate, seeks a continuance if a defendant appears. Each time the defendant comes back, the plaintiff’s counsel may seek a continuance, until the defendant misses a date, at which time the lawyer seeks a default judgment.

At trial, unrepresented litigants are often stymied by unfamiliar vocabulary, unable to overcome evidentiary objections, and unable to conduct effective examinations or have documents admitted. Judges, afraid of seeming to be coaching or favoring one side, may be reluctant to guide the litigant to elicit facts that prove legitimate defenses. With judgment in hand, creditors proceed to garnish wages, seize assets, and attach bank

accounts. Debt on the unpaid judgment continues to grow and blights future opportunities.

Addressing Distinctive Challenges

Both the Federal Trade Commission and the federal Consumer Financial Protection Bureau (CFPB) have documented the pervasiveness of these problems (Federal Trade Commission, 2010). The CFPB is expected to issue rules and guidance, which may reduce some of the problems generated by collection-related practices. However, there are opportunities for courts to change their operations, rules, and culture to substantially reduce inequities and abuses.

Improve service of process and other notifications. Technology, increased regulation, and oversight can substantially improve effective notice and accountability regarding service of process. Verification through the use of inexpensive, common technology, such as GPS records and smartphone photographs, can help servers document the accuracy of their work and prevent fraud. Modest additional notification requirements, as well as penalties for improper service or failure to adhere to bonding or licensing requirements, may also reduce the likelihood of sloppy or fraudulent service. Electronic notification for persons with known and verifiable email addresses may be an effective alternative to outdated and more expensive forms of service.

Require adequate pleading. Standardized complaint forms and required initial disclosures could include mandatory fields to safeguard against the most common, recurrent defects in initial filings and demonstrate standing, timeliness, accuracy of the claim, and the legitimacy of venue. Standardized answer/counterclaim forms, such as those a number of courts currently make available, help unrepresented defendants preserve common defenses.

Provide accessible and meaningful legal assistance to unrepresented persons.

Legal assistance, not just information, should be available to guide unrepresented litigants at every stage of the litigation. Courts need to take responsibility for ensuring that such assistance is readily available.

Remote access. Opportunities for remote access for filing papers online, obtaining assistance, and, in appropriate circumstances, conducting hearings or conferences online can reduce the cost and burden for litigants and lawyers, particularly those in rural communities. Courts can work with other stakeholders, including legal-aid organizations and law schools, to provide clinics, workshops, and assistance in the community.

Control the conduct of attorneys in the courthouse. Clear separation of counsel from court personnel and services, clear signage, electronic sign-in, and staggered appearance times are simple changes that will reduce confusion.

Settlement may be appropriate in cases in which the defendant understands the facts and claims, as well as the availability of defenses, and can therefore make meaningful decisions regarding settlement; but courts should not coerce defendants into settlement negotiations or discourage them from presenting their case to the judge. Courts can provide standardized guidelines for litigants and counsel regarding how settlement discussions are to be conducted at the courthouse and the consequences of settlement. Standardized settlement-agreement forms could incorporate explanations to prevent overreaching. Before accepting settlements, judges should ascertain that both parties understand the agreement. Their inquiry could follow a standardized set of questions and protocols to avoid an appearance of partiality.

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“Court Navigator” programs could assist unrepresented litigants in hallway settlement discussions. Letting litigants know the limits of permissible negotiation and providing opportunities for complaints may also deter improper conduct. However, responsibility for overzealous lawyering is also the responsibility of the bar. Local bar associations should consider adopting methods for ensuring adherence to established ethical rules.

Language access. Every communication or point of contact with the case or court, including signage and court forms, should be provided in English and the language of any significant non-English-speaking population. Every court should have access to interpreter services.

Judicial training. Judicial training can incorporate guidance to judges for appropriate ways to guide the fact-finding process in cases with unrepresented litigants. Guidelines could include explanations of the trial process; the elements of claims and defenses; burdens of proof; a focus on assessment of evidentiary weight, rather than technical admissibility; acceptance of narrative testimony; and ways to elicit germane information.

Protection against improper default judgments. It is inevitable that, even with the reforms outlined above, courts will continue to be faced with claims to which no defense has been entered. Simple, standardized forms can also be developed to require that default motions are not granted unless the supporting documentation reflects adherence to procedural and substantive standards and that the amount sought is documented and appears accurate.

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Procedural court reform will not level the playing field nor provide all civil litigants who want and could use a lawyer with one. Nor will it alleviate systemic problems that require a legislative response. But serious procedural reforms are necessary to ensure that our state civil courts do not perpetuate inequality in the guise of justice.

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