

Top Recommendations for Reform in South Dakota

South Dakota's Score: 14/100

South Dakota's National Rank: 39th

Consumer debt lawsuits <u>dominate civil court dockets</u> across the country. In an overwhelming number of cases—<u>more than 70% in many places</u>—the people sued do not respond or defend themselves. As a result, courts often enter default judgments without determining whether the defendant even knows about it, it is timely, or has merit. In turn, people face high fees and interest, onerous payment plans, seizure of wages and possessions, and potential imprisonment. States across the country have established laws and practices aimed at reducing unjust lawsuits and producing fairer outcomes. To support states in their respective efforts, the National Center for Access to Justice in 2024 created the <u>Consumer Debt Litigation Index</u> in consultation with a panel of experts. The Index ranks the states on their progress in adopting 24 best policies ("benchmarks") for fairness. See our Top Recommendations and Complete Findings, below.

1. Establish Pleading Requirements (Benchmark 6)

Why: People facing debt collection lawsuits often have difficulty understanding the claim against them. Lax pleading requirements also invite illegitimate lawsuits. Requiring complaints to name the original creditor, demonstrate ownership of the debt, and break out the specific amounts sought can deter meritless filings and enable defendants to assert legitimate defenses, promoting fairness. Delaware, New Mexico, New York, and Washington, D.C. all require complaints to include these key elements. South Dakota, however, does not yet have these key pleading requirements in place.

How: South Dakota should adopt a law or practice that requires plaintiffs in consumer debt cases to allege: (a) the name of the original creditor; (b) the plaintiff's standing (e.g. the chain of ownership of the debt); and (c) an itemization of the amount sought, including debt principal, interest, fees, costs, and other charges to date. If it does so, the state's score would increase 10 points.

2. Require Authenticated Business Records for A Default (Benchmark 7)

Why: Creditors too often bring legally insufficient cases, relying on the likelihood that many defendants will not respond (or "default") and that the merits of the creditors' claims will never be assessed by a court. Requiring creditors to establish — before a default judgment may be entered — (a) proof of service, (b) validity of the debt using authenticated business records, and (c) itemized amounts sought, also using authenticated business records, promotes fairness, as these required elements deter lawsuits that lack merit and lower the number of unwarranted default judgments. Alaska, Maine, New York, Washington, D.C., Washington State, and Wisconsin all require creditors to prove these essential elements before a court may enter a default judgment. South Dakota, however, does not yet have these key requirements in place.

How: South Dakota should adopt a law or practice that requires plaintiffs in consumer debt cases to establish the following before a court may enter a default judgment: (a) proof of service; (b) validity of the debt through authenticated business records (e.g. contract, account statements, or other evidence of obligation); and (c) amount of the judgment through authenticated business records, itemizing damages, court fees, attorneys' fees, and interest. If it does so, the state's score would increase 10 points.

3. Ensure that Garnishment Exemptions Are Self-Executing (Benchmark 14) and Update Garnishment and Attachment Exemptions (Benchmark 15)

Why: Without sufficient protections, garnishment and attachment orders to seize money or assets from a debtor to pay a creditor can leave people unhoused, unable to keep a car to drive to work, and stuck in cycles of poverty. Federal law exempts some funds from garnishment and some property from attachment, but debtors often do not learn what funds and property are exempt or how to assert exemptions. Further, the federal exemptions are out of date and inadequate to preserve even a very basic standard of living. Many states—including California, Idaho, Maryland and Wyoming—make some exemptions "self-executing", meaning that a bank must protect exempt funds even when the debtor does not assert exemptions (Benchmark 14). Other states have increased garnishment and asset exemptions (Benchmark 15). For example, in consumer debt cases Texas has garnishment exemptions that protect 100% of a person's wages, and attachment exemptions that protect a home (of any value) and personal property (including a car) up to a value of \$100,000 for a family or \$50,000 for an individual. South Dakota, however, does not have self-executing bank account exemptions, and it has not increased garnishment and attachment exemptions sufficiently.

How: South Dakota should make bank account exemptions self-executing. Further, the state should update and expand on garnishment and attachment provisions so that they protect at minimum: (a) Income of at least \$576.92 per week, the minimum to keep a family of four above the federal poverty level, as defined by the U.S. Federal Poverty Guidelines in 2023; and (b) a car valued up to at least \$15,000. If it does so, the state's score would increase 7 points.

What Would Happen if South Dakota were to Implement these Recommendations?

These three recommendations, if adopted by the state, would substantially increase South Dakota's score and ranking. For more on how South Dakota can do better, see the complete findings below and visit

NCAJ's <u>Consumer Debt Litigation Index</u> at https://ncaj.org/state-rankings/consumer-debt or reach out to NCAJ at NCAJ@fordham.edu.

Complete Consumer Debt Litigation Index Findings for South Dakota

I. Issue Area: Help people know when they are being sued and where to find help.

1 - Government Notice of Lawsuits

Score: 0/5

Does the state respond to the problem of ineffective or fraudulent ("sewer") service in consumer debt lawsuits by: a. Public Official Service - requiring that a public official (e.g. the court or the sheriff) handle service? or, b. Court Supplemental Notice - requiring the court to send the defendant, by first class mail, supplemental notice of a new consumer debt lawsuit and deny default judgment if that notice is returned as undeliverable?

No

South Dakota does not meet this benchmark because it does not meet either sub-benchmark 1a or 1b. First, it does not meet sub-benchmark 1a because, in addition to the sheriff South Dakota authorizes service by an "elector" - which is anyone qualified to vote in the state. See S.D. Codified Laws § 15-6-4(c) (2023). South Carolina does not meet sub-benchmark 1b because it does not require the court to send supplemental notice of a new consumer debt lawsuit and deny default judgment where such notice is returned as undeliverable.

2 - Guidance on Finding Help

Score: 0/5

Does the state require that notice to the defendant in a consumer debt lawsuit include guidance on where to seek help, including free legal assistance?

No

South Dakota does not meet this benchmark because South Dakota does not require that notice in a consumer debt lawsuit provide guidance to defendants on where to find help. See S.D. Codified Laws § 15-6-4(a).

II. Issue Area: Make it easier to respond to a lawsuit.

3 - Simplified Answer

Score: 2/2

Does the state provide a simple Answer process by making available an Answer form for use by unrepresented persons in consumer debt lawsuits?

Yes

South Dakota meets this benchmark because it provides an Answer form that can be used by a consumer debt defendant. See S.D. Codified Laws \S APP FORMS CH 15-6 Form 15; S.D. Codified Laws \S APP FORMS CH 15-6

Form 16.

4 - No Notarization Requirement to Answer

Score: 2/2

Does the state make it easier to respond to consumer debt lawsuits by never requiring defendants to have an Answer notarized before filing?

Yes

South Dakota meets this benchmark because "[e]xcept when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit." S.D. Codified Laws § 15-6-11(a) (2023). No rule or statute relevant to consumer debt cases appears to supply a verification requirement.

5 - No Fee to Answer Score: 0/5

Does the state permit the filing of an Answer in consumer debt lawsuits without charging a filing fee?

Nο

South Dakota does not meet the benchmark because the clerk of courts is permitted to charge a fee for filing answers. See S.D. Codified Laws § 16-2-29.

III. Issue Area: Require the creditor to provide evidence of a valid debt claim.

6 - Pleading Requirement

Score: 0/10

Does the state require consumer debt complaints to allege all of the following: a. Name of original creditor; b. Basis of plaintiff's standing (e.g. chain of ownership of debt); and c. Itemization of amount sought including debt principal, interest, fees, costs, and other charges to date?

No

South Dakota does not meet the benchmark because it does not have specific pleading requirements applicable to consumer debt complaints and, therefore, does not require a consumer debt Complaint to include (a) the name of the original creditor, (b) the basis of plaintiff's standing, or (c) an itemization of the amounts sought. See SDCL § 15-6-8(a).

7 - Authenticated Records for Default

Score: 0/10

Does the state require the following be established before a default judgment can be granted: a. Proof of Service b. Validity of debt through authenticated business records (e.g. contract, account statements, or other evidence of obligation); and c. Amount of judgment through authenticated business records, itemizing damages, court fees, attorneys' fees, and interest?

No

South Dakota does not meet this benchmark or any sub-benchmarks. South Dakota courts may grant default judgments pursuant to South Dakota Rule of Civil Procedure 55 which does not impose any of the requirements in sub-benchmarks (a) through (c). S.D. R. Civ. P. § 55. Note, however, that although the statutes do not specifically require proof of service before granting a default judgment, South Dakota does require proof of service in every civil case and that "no default judgment shall be rendered against a defendant until a

complaint has been on file at least twenty days unless the complaint has been served with a summons." S.D.Codified Laws § 15-6-55(b) (West 2023); S.D. Codified Laws § 15-6-4(g) (West 2023).

IV. Issue Area: Require consumer debt collection actions to be brought within a reasonable time of non-payment.

8 - Burden on Plaintiff to Allege Timeliness

Score: 0/2

Does the state place the pleading burden on the consumer debt plaintiff to allege in the Complaint the timeliness of each claim, including each of the following: a. applicable statute of limitations; b. date that claim accrued; and c. date that statute of limitations expires?

No

South Dakota does not meet the benchmark because it does not place the burden of pleading timeliness on the plaintiff and does not require that a debt collection complaint include (a) the applicable statute of limitations, (b) the date that the claim accrued, or (c) the date that the statute of limitations expires. See SDCL § 15-6-8(c).

9 - Four Year Statute of Limitations

Score: 0/5

Does the state require 4-year (or shorter) statute of limitations for the causes of action most commonly used to pursue consumer debt collection: breach of contract (written or oral), open account, account stated, unjust enrichment, conversion, bad check?

No

South Dakota does not meet this Benchmark because it does not impose a 4-year (or shorter) statute of limitations for all consumer debt claims. In particular, South Dakota has the following limitations periods: • breach of written contract: 6-year limitations period (SDCL §15-2-13(1)); • breach of oral contract: 6-year limitations period (SDCL §15-2-13); • account stated ("an action for any article charged on an account in a store"): 6-year limitations period (SDCL §15-2-13(1)); • unjust enrichment: 6-year limitations period (SDCL §15-2-13(1); Wissink v. Van De Stroet, 598 N.W. 2d 213, 216 (S.D. 1999); • conversion: 6-year limitations period (SDCL §15-2-13(4)); and • passing a bad check: 6-year limitations period (SDCL §15-2-13(4)) and SDCL §57A-3-118).

10 - Prohibit Revival of Time-Barred Claims

Score: 0/2

Does the state prohibit revival of time-barred consumer debt claims, even where defendant makes subsequent payment toward a debt?

No

South Dakota does not meet this benchmark because it makes consumer debt claims subject to revival even after the statute of limitations has run when, for instance, a debtor makes a subsequent payment toward the debt, explicitly acknowledges the debt, or expresses a new promise to pay the full debt. See, e.g., Arnoldy v. Mahoney, 791 N.W..2d 645 (S.D. 2010) (debts exceeded 6-year statute of limitations, but the defendants revived the debts by paying the creditors \$50).

V. Issue Area: Prohibit attorneys' fee shifting, and cap interest.

11 - Prohibit Attorneys' Fees Shifting

Score: 0/3

Does the state prohibit attorneys' fee shifting in consumer debt lawsuits regardless of contractual provision or reciprocity in fee shifting?

No

South Dakota does not meet the benchmark because it permits attorney fee shifting pursuant to statute or contractual provisions. The South Dakota Supreme Court has held that, even though an award of attorneys' fees are not the norm, an award of attorneys' fees is permitted when such fees are (a) stipulated to in a contract between the parties or (b) statutorily authorized. Credit Collection Servs. v. Pesicka, 721 N.W.2d 474, 475 (S.D. 2006). Note: the case law and code are silent when it comes to reciprocal rights.

12 - Interest Caps Score: 0/3

Does the state cap interest in consumer debt lawsuits (regardless of any contractual provision) as follows: a. Pre-judgment interest for debt buyers capped at an annual rate of 7% (or less); and b. Post-judgment interest for all creditors capped at 5% (or less) of the judgment?

No

South Dakota does not meet this benchmark because it does not satisfy the requirements of sub-benchmarks (a) or (b). Prejudgment and post-judgment interest is 10% per annum unless the contract specifies a different interest rate which will then apply instead. See S.D. Codified Laws §§ 21-1-13.1, 54-3-16. Thus, South Dakota does not cap prejudgment interest for debt buyers at an annual rate of 7% (or less) nor does it cap post-judgment interest for all creditors at 5% (or less) of the judgment.

VI. Issue Area: Reduce the likelihood that consumer debt collection actions leave people homeless, or perpetuate a cycle of debt.

13 - Require Court Order to Garnish or Attach

Score: 0/5

Does the state in consumer debt lawsuits require a court order for garnishment and attachment?

No

South Dakota does not meet the benchmark because the law provides that for garnishment the plaintiff, or a person acting on the plaintiff's behalf, may make an affidavit stating that "the plaintiff believes that a named person is indebted to, or has property, real or personal, in the person's possession or under the person's control belonging to the defendant," as well as and the amount of the claim. S.D. Stat. § 21-18-3. The plaintiff may then serve on the garnishee the garnishment affidavit with a garnishment summons signed by the plaintiff's attorney. S.D. Stat. §§ 21-18-6; 21-18-7.

14 - Bank Account Garnishment Exemptions Are Self Executing

Score: 0/2

Does state law require in consumer debt lawsuits that garnishment exemptions for bank accounts are self-executing?

No

South Dakota does not meet the benchmark because it does not require financial institutions to protect money deposited in bank accounts unless a judgment debtor asserts an exemption. S.D. Codified Laws § 43-45-4

provides an exemption for certain funds deposited in a bank account, but the exemption is not self-executing.

15 - Essential Exemptions

Score: 0/5

Does the state prevent people from becoming impoverished, unhoused, or unable to work by exempting income and assets from attachment and garnishment, as follows: a. Income of at least \$576.92 per week, the minimum to keep a family of four above the federal poverty level, as defined by the U.S. Federal Poverty Guidelines in 2023; b. Home, regardless of value, or at least the median price of a home in the state; and c. Car value, state exemption for, at least, the first \$15,000 in value?

No

South Dakota does not meet the benchmark because the sub-benchmarks (a) (income) and (c) (car) are not met. South Dakota law provides as follows: (a) Income: South Dakota does not meet sub-benchmark (a) because it exempts the greater of 75% of a person's weekly disposable earnings or 40 times the federal or state minimum hourly wage, whichever is less, in effect when the person is paid. In addition, it exempts \$25 per each dependent family member of the person who lives with the person. S.D. Codified Laws § 21-18-51. Forty times the federal minimum wage (\$7.25 per hour in 2023) is only \$290. State Minimum Wage Laws, U.S. Dep't of Labor (Sept. 30, 2023), https://www.dol.gov/agencies/whd/minimum-wage/state. (b) Home: South Dakota meets sub-benchmark (b) because it exempts one home, regardless of value, subject to certain limited exceptions. S.D. Codified Laws §§ 43-31-1 through 43-45-3. (c) Car: South Dakota does not meet sub-benchmark (c) because it does not offer any exemptions for a person's car(s). S.D. Codified Laws § 43-45-4 (although South Dakota offers a wildcard exemption for a person's personal property up to \$5,000 or \$7,000 if the person is the head of a family which may be applied to a person's car(s)). For more information on garnishment exemptions see Michael Best and Carolyn Carter, No Fresh Start 2023, National Consumer Law Center (Dec. 2023), https://www.nclc.org/wp-content/uploads/2023/12/2023_Report_No-Fresh-Start-3.pdf.

16 - Require Prior Notice of Garnishment

Score: 0/5

Does the state require notice to debtor prior to actual garnishment that explains all of the following: a. potential exemptions? b. how to challenge the order? and c. how to assert exemptions?

No

South Dakota does not meet this benchmark because a defendant is not required to receive notice prior to garnishment of their property (the garnishee summons and affidavit must be served on the defendant either before or within thirty days after service on a garnishee). See S.D. Codified Laws § 21--18-10 (2023). Also, even if notice were provided prior to garnishment, the state would not meet the sub-benchmarks because the garnishee summons, affidavit and garnishee answer forms that are required to be sent to a judgment debtor as notice of the garnishment are not required to: (a) list available exemptions, (b) specify the manner in which to challenge the order, or (c) describe the manner in which to assert exemptions. See id. at §§ 21--18-6, 21--18-14.1, 21--18-3.

VII. Issue Area: Eliminate debtors' prison.

17 - Prohibit Incarceration for Failure to Obey a Court Order to Pay Consumer Debt

Score: 5/5

Does the state prohibit incarceration for contempt for failure to obey a court order to pay all or part of a consumer debt judgment?

Yes

South Dakota meets the benchmark because it prohibits incarceration for failure to obey a court order to pay debt. The South Dakota Constitution states, "No person shall be imprisoned for debt arising out of or founded upon a contract." (S.D. Const. Art. VI, § 15). The South Dakota Supreme Court has held that this provision also prohibits imprisonment for contempt for failure to obey a court order to pay a debt. See Fritz v. Fritz, 45 S.D. 392 (S.D. 1922) (holding that a person may not be imprisoned for contempt related to an order to pay debt, but may be imprisoned for contempt for failing to abide by an order to pay alimony which is not "debt" for purposes of the state constitutional provision).

18 - Prohibit Incarceration for Failure to Obey a Court Order to Appear at a Debtor's Examination, Unless Nonappearance Was Willful

Score: 0/5

Does the state prohibit arrest and/or incarceration for contempt for failure to appear at a debtor's examination (i.e. a judgment enforcement proceeding), unless the person's failure to appear was willful?

No

South Dakota does not meet the benchmark because if a judgment debtor, duly served, fails to appear at a debtor's examination the judge may punish the person "as for contempt." S.D. Codified Laws §§ 15-20-1; 15-20-19.

19 - Provide Right to Counsel

Score: 5/5

Does the state provide a lawyer without charge in any contempt or other proceeding in which incarceration is a potential outcome in a consumer debt lawsuit?

Yes

South Dakota meets the benchmark because the Supreme Court has held that "Since the punishment for civil contempt could be imprisonment, the accused is entitled to representation by counsel as a matter of right." World Family Farms, Inc. v. Heartland Organic Foods, Inc., 661 N.W.2d 719 (S.D. 2003).

VIII. Issue Area: Prevent government from undue intervention on behalf of creditor.

20 - Prohibit Collaboration Between Creditors and Prosecutors

Score: 0/2

Does the state prohibit relationships (including financial relationships) in which prosecutors lend the authority of their offices to facilitate the activities of debt collectors (e.g. payments by creditors to prosecutors who threaten or bring criminal prosecutions in bad check cases)?

No

South Dakota does not meet this benchmark because there is no statutory or judicial prohibition on relationships or financial arrangements between prosecutors and debt collectors.

21 - Prohibit Paying Bail/Bond to Creditor

Score: 0/2

Does the state prohibit use of bail to pay the creditor in all contempt proceedings, or in other proceedings in a consumer debt lawsuit in which incarceration is a possible outcome?

No

South Dakota does not meet the benchmark because its laws do not expressly prohibit the use of bail or bond to pay a creditor. See S.D. Codified Laws § 15-20-1.

22 - Limit Frequency of Examinations

Score: 0/5

Does the state in consumer debt litigation schedule or otherwise limit financial examinations to no more than once per year?

No

South Dakota does not meet the benchmark because when a judgment for twenty-five dollars or more is returned unsatisfied in whole or in part, the judgment creditor "at any time after such return is entitled to an order from a judge of the circuit court within the county to which the execution was issued, requiring such judgment debtor to appear and answer concerning his property before such judge, within such county, at a time and place specified in the order." The law does not limit the frequency of such examinations. S.D. Codified Laws § 15-20-1.

IX. Issue Area: Collect data to improve the system.

23 - Data Collection: Number of Lawsuits

Score: 0/3

Do state courts at least annually collect and publish statewide data on number of consumer debt lawsuits?

No

South Dakota does not meet the benchmark because South Dakota courts do not collect or publish statewide data on the number of consumer debt lawsuits or the types of dispositions of consumer debt lawsuits. The only data provided by the South Dakota courts pertinent to debt collection is an aggregate number of small claims cases in a given fiscal year. See South Dakota Unified Judicial System, Civil Filings Statewide. See https://ujs.sd.gov/uploads/annual/fy2021/CivilFilingsStatewide.pdf.

24 - Data Collection: Disposition of Lawsuits

Score: 0/2

Do state courts at least annually collect and publish statewide data on types of dispositions of consumer debt lawsuits?

No

South Dakota does not meet the benchmark because South Dakota courts do not collect or publish statewide data on the number of consumer debt lawsuits or the types of dispositions of consumer debt lawsuits. The only data provided by the South Dakota courts pertinent to debt collection is an aggregate number of small claims cases in a given fiscal year. See South Dakota Unified Judicial System, Civil Filings Statewide. See https://ujs.sd.gov/uploads/annual/fy2021/CivilFilingsStatewide.pdf.

To learn more about the Consumer Debt Litigation Index, including how other states fared, visit https://ncaj.org/state-rankings/consumer-debt.

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