

## **Consumer Debt Litigation Index**

## **Top Recommendations for Reform in West Virginia** West Virginia's Score: 17/100

### West Virginia's National Rank: 33rd

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. West Virginia requires creditors in magistrate courts to allege an itemization of the amount sought, but it does not require them to allege the name of the original creditor or the plaintiff's standing. Further, in other courts, there is not even a requirement to allege an itemization of the amount sought.

**How:** West Virginia should adopt a law or practice that requires plaintiffs in consumer debt cases in all courts 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:** 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. Alaska, Maine, New York, Washington, D.C., Washington State, and Wisconsin all require creditors to prove these essential elements with authenticated business records before a court may enter a default judgment. West Virginia requires creditors in magistrate courts to allege an itemization of the amount sought, but it does not require them to allege the name of the original creditor or the plaintiffs standing. Further, in other courts, there is not even a requirement to include an itemization of the amount sought.

**How:** West Virginia should adopt a law or practice that requires plaintiffs in consumer debt cases in all courts 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.

# 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 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. West Virginia, however, does not have self-executing bank account exemptions, and it has not increased garnishment and attachment exemptions sufficiently.

**How:** West Virginia 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; (b) a home, regardless of value, or at least the median price of a home in the state; and (c) 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 West Virginia were to Implement these Recommendations?

These three recommendations, if adopted by the state, would substantially increase West Virginia's score and ranking. For more on how West Virginia 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 West Virginia

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

#### **1 - Government Notice of Lawsuits**

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?

West Virginia does not meet this benchmark because it does not meet either sub-benchmark 1a or 1b. West Virginia does not meet Benchmark 1a because it permits the Plaintiff to choose between the sheriff or anyone who is not a party and is over the age of 18 to effect service. W. Va. R.C.P., Rule 4. West Virginia does not meet sub-benchmark 1b because it does not require that the court send supplemental or new notice to a defendant who has not appeared and against whom a default judgment is being awarded.

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
West Virginia does not meet this benchmark because West Virginia does not require that notice in a consumer debt lawsuit provide guidance to defendants on where to find help. See W. Va. R. Civ. P. 4(a).	

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

#### 3 - Simplified Answer

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

Score: 0/2

No

Score: 0/5

No

West Virginia does not meet this benchmark because it does not provide an Answer form for use by consumer debt defendants.

2	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
5	West Virginia meets this benchmark because it does not require that a pleading be verified except when specifically required by rule or statute. See W. Vir. R Civ. P. 11. No such rule or statute applies to an Answer in a consumer debt litigation.	
ŧ	5 - No Fee to Answer	Score: 5/5
1	Does the state permit the filing of an Answer in consumer debt lawsuits without charging a filing fee?	Yes
(	West Virginia meets the benchmark because the state does not charge a fee to file an answer, although the state does charge a fee for any filing that includes a counterclaim, cross claim or third-party claim. See W. Va. Code Ann. § 59-1-11(a)(6) (West).	
	ssue Area: Require the creditor to provide evidence of a valid	debt
clai		
clai		Score: 0/10
	im.	
	6 - Pleading Requirement 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	Score: 0/10 No
	<ul> <li>6 - Pleading Requirement</li> <li>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?</li> <li>West Virginia does not meet the benchmark because it generally does not have special pleading requirements for consumer debt claims to include (a) the name of the original creditor, (b) the basis of plaintiffs' standing, or (c) an itemization of the amount sought. See W. Va. R. Civ. P. 8(a) (establishing general pleading requirements). With respect to sub-benchmark (c), West Virginia magistrate courts – the state's small claims courts – do require that, upon commencement of a civil action, a commercial creditor file a statement including, but not limited to, "a setting forth of the amount of the original obligation, the portion thereof which constitutes principal, the portion thereof which represents interest, the date and amount of payments thereon, the amount, if any, credited for the sale of repossessed collateral, and the amount alleged to be due," in satisfaction of sub-benchmark (c). See W. Va. Code § 50-4-1 (establishing requirements for commencing a civil action in magistrate court). However, the pleading requirements in other West Virginia courts do not satisfy sub-</li> </ul>	Score: 0/10 No

No 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?

West Virginia does not meet the benchmark or any of the sub-benchmarks. The West Virginia Code provides that if a defendant in a civil action fails to appear or otherwise notify the magistrate court within the time limits prescribed that they wish to contest the action, the judge may render judgment as justice may require, "upon affidavit or sworn testimony reflecting the nature of the claim, whether or not it is for a sum certain or for a sum which can by computation be made certain, the defendant's failure to appear or otherwise notify the court within the time limits prescribed by section five of this article that he wishes to contest the action and supporting the relief sought. In the event the plaintiff's claim is not for a sum certain or for a sum which can by computation be made certain, there such further proof by affidavit or sworn testimony as is necessary to determine the propriety of the relief sought." Further, the West Virginia Rules of Civil Procedure do not require any of the sub-benchmarks to be proven. Thus, West Virginia does not meet this benchmark. W.Va. Code § 50-4-10; W.Va. R. Civ. P. 55

# 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 cla accrued; and c. date that statute of limitations expires?	<b>No</b> aim
West Virginia does not meet this benchmark because the statutes and rules of Wisconsin do not place the burden of pleading timeliness on the plaintiff and do 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 W. Va. R. Civ. P. 8(a),(c).	1)
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 pursue consumer debt collection: breach of contract (written or oral), open account, account stated, unjust enrichment, conversion, bad check?	
West Virginia does not meet this Benchmark because it does not impose a 4-year (or shorter) statute of	

enrichment going to the claim's staleness would be brought on a theory of laches); Province v. Province, 473 S.E.2d 894, 904 (W. Va. 1996) ("The elements of laches consist of (1) unreasonable delay and (2) prejudice."); • conversion: 3-year limitations period involving 2-year limitations period (WV Code § 55-2-12 (2022); Dunn v. Rockwell, 689 S.E.2d 255, 268 (W. Va. 2009).); and • passing a bad check: 3-year limitations period for sale of goods after dishonor of the check or 10 years after the date of the check, whichever period expires first (§46-3-118(c).).

#### 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 **No** payment toward a debt?

West Virginia does not meet this Benchmark because it makes a debt claim subject to renewal or revival even after the statute of limitations has run when a debtor provides written promise or written acknowledgement of the debt. See WV Code § 55-2-8 (2022) ("If any person against whom the right shall have so accrued on an award, or on any such contract, shall by writing signed by him or his agent promise payment of money on such award or contract, the person to whom the right shall have so accrued may maintain an action or suit for the moneys so promised within such number of years after such promise as it might originally have been maintained within upon the award or contract, and the plaintiff may either sue on such a promise, or on the original cause of action, and in the latter case, in answer to a plea under the sixth section, may, by way of replication, state such promise, and that such action was brought within such number of years thereafter; but no promise, except by writing as aforesaid, shall take any case out of the operation of the said sixth section, or deprive any party of the benefit thereof. An acknowledgment in writing as aforesaid, from which a promise of payment may be implied, shall be deemed to be such promise within the meaning of this section."); State ex rel. Battle v. Demkovich, 148 W. Va. 618, 622, 136 S.E.2d 895, 898 (1964) ("Code, 1931, 55–2–8, provides a new period of limitation which runs from the time of a new promise to pay a debt. This is not an extension of the limitation but is a complete revival of the remedy for the collection of a debt."); see also Wyatt v. Morris, 2 W. Va. 575, 577 (1866) ("A debt barred by statute of limitations may be revived by acknowledgment." (citations omitted)).

### 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 reciprocity in fee shifting?	provision or <b>No</b>
West Virginia does not meet the benchmark because it does not prohibit attorneys' fee shifting. No West Virginia provide a reciprocal right for prevailing defendants. Stonerise Healthcare, LLC v. Oa 0215, 2020 W. Va. LEXIS 388, at *14 (June 16, 2020).	
12 - Interest Caps	Score: 0/3
Does the state cap interest in consumer debt lawsuits (regardless of any contractual provision) as f Pre-judgment interest for debt buyers capped at an annual rate of 7% (or less); and b. Post-judgment for all creditors capped at 5% (or less) of the judgment?	

West Virginia does not meet this benchmark because, while it satisfies sub-benchmark (a), it does not satisfy sub-benchmark (b). West Virginia law provides that the rate of interest on judgments and decrees for the payment of money is set at two percentage points above the Fifth Federal Reserve District's secondary discount rate in effect on the second day of January of the year in which the judgment or decree is entered, not to exceed 9% per year or to be less than 4% per year. On January 2, 2023, the Fifth Federal Reserve District's secondary discount rate was 5% and as such, the rate of interest upon judgments and decrees entered in 2023 is 7%. This applies to both prejudgment and post-judgment interest. Thus, West Virginia meets the benchmark for prejudgment interest but not for post-judgment interest. W.Va. Code § 56-6-31. See administrative order located at: http://www.courtswv.gov/legal-community/pdfs/interest2023.pdf.

# 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: 5/5
Does the state in consumer debt lawsuits require a court order for garnishment and attachment? West Virginia meets this benchmark because for garnishment of wages a judgment creditor must apply to the court "for a suggested execution against any money due," and the court must issue a writ of fieri facias (writ of execution) for attachment. W. Va. Code §§ 38-5A-3; 38-4-5. Small claims courts are governed by the same procedural rules with respect to the enforcement of judgments and attachment. W. Va. Code §§ 50-6-1; 50-6-3.	Yes
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? West Virginia 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. W. Va. Code § 38-8-1(a)(4) provides an exemption for a debtor's deposits in a bank, up to \$1,100, but the exemption is not self-executing.	No
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
West Virginia does not meet the benchmark because none of the sub-benchmarks are met. West Virginia law provides as follows: (a) Income: West Virginia does not meet sub-benchmark (a) because it exempts 80% of a person's weekly disposable earnings or 50 times the federal minimum hourly wage in effect when the person is paid, whichever is more, subject to certain limited exceptions. W. Va. Code Ann. § 38-5A-3. Fifty times the federal minimum wage (\$7.25 per hour in 2023) is only \$362.50. State Minimum Wage Laws, U.S. Dep't of Labor (Sept. 30, 2023), https://www.dol.gov/agencies/whd/minimum-wage/state. (b) Home: West Virginia does not	

meet sub-benchmark (b) because a home that is the principal residence of a person, a person's spouse, or a dependent of a person is exempt only up to a value of \$5,000 subject to certain limited exceptions. W. Va. Code Ann. §§ 38-9-1 through 38-9-2; W. Va. Const. art. 16, § 28. (c) Car: West Virginia does not meet sub-benchmark (c) because the interest of a person or a dependent of a person in one car is exempt only up to a value of \$5,000. W. Va. Code Ann. § 38-8-1(a)(1). 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

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?

West Virginia does not meet this benchmark for wage garnishment from a private employer because it does not meet the sub-benchmarks. Specifically, it does not meet sub-benchmark (a) because the judgment debtor is only entitled to receive a copy of the execution issued, and such execution is not required to provide a list of exemptions; sub-benchmark (b) because the notice is not required to specify the manner in which to contest the order; or sub-benchmark (c) because the notice is not required to specify the manner in which to assert exemptions. See W. Va. Code Ann. §§ 38-5A-4, § 38-5A-3(b) (West 2023). West Virginia does not meet the benchmark for non-wage garnishment because the judgment debtor is not entitled to notice prior to garnishment/suggestion of their property. Id. at §§ 38-4-8, 38-4-10, § 38-7-8 (West 2023). The sub-benchmarks are not met because no form of notice is required so the judgment debtor is not provided with (a) a list of exemptions, (b) the manner in which to assert such exemptions or (c) the manner in which to contest the order.

### VII. Issue Area: Eliminate debtors' prison.

17 - Prohibit Incarceration for Failure to Obey a Court Order to Pay Consumer Debt	Score: 0/5
Does the state prohibit incarceration for contempt for failure to obey a court order to pay all or part of a consumer debt judgment?	No
West Virginia does not meet the benchmark because it does not prohibit incarceration for failure to obey a court order to pay all or part of a debt judgment. While West Virginia's constitution does not prohibit imprisonment for debt, the West Virginia Supreme Court has upheld incarceration for contempt for failure to obey an order to pay a debt and failure to provide evidence to support his assertion that he did not have the money to pay. Lee v. Davis, 12-0809, 2013 WL 6604448 (W. Va. Dec. 16, 2013).	
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

No

West Virginia does not meet the benchmark because the law provides that if a judgment debtor fails to appear at a debtor's examination, the court may order the person arrested and held until they answer. W. Va. Code  $\S$  38-5-5.

38-5-5.	
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
West Virginia meets the benchmark because it includes contempt of court in the list of proceedings in which people are eligible for a public defender. W. Va. Code § 29-21-2(2).	
III. Issue Area: Prevent government from undue intervention on I creditor.	oehalf
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
West Virginia does not meet the benchmark because its worthless check statute explicitly allows a prosecuting attorney to contract with private entities to conduct worthless check restitution programs, and the county can benefit financially from such contracts. W. Va. Code §§ 61-3-39m, 61-3-39p.	
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
West Virginia does not meet the benchmark because its laws do not expressly prohibit the use of bail or bond to pay a creditor. See W. Va. Code § 38-5-5.	
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
West Virginia does not meet the benchmark because, upon application of the creditor, to "ascertain the estate" of a debtor, the court shall issue a summons and require the debtor to appear and answer questions under oath. The law does not limit the frequency of such examinations. W. Va. Code §§ 38-5-1; 38-5-2.	

### 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
West Virginia does not meet the benchmark because West Virginia does not collect and publish statewide d on the number of consumer debt collection lawsuits nor on the types of dispositions of consumer debt collection lawsuits. West Virginia does publish annual reports and some annual statistical information, but reports do not provide specific details in respect to civil or consumer debt collection lawsuits. W. Va. Code § 1-17 (2022). W. Va. Code § 51-1-18 (2022). See http://www.courtswv.gov/public- resources/press/Publications/2021_Statistical_Annual_Report.pdf and http://www.courtswv.gov/public- resources/press/Publications/index.html.	the
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 de lawsuits?	ot <b>No</b>
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