

### **Top Recommendations for Reform in Wisconsin**

Wisconsin's Score: 30/100

Wisconsin's National Rank: 11th

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. Although Wisconsin requires merchants to itemize the amounts sought in a complaint, it does not require any of these key elements to be pleaded in other types of debt collection complaints, including those brought by debt buyers.

**How:** Wisconsin should adopt a law or practice that requires all plaintiffs in consumer debt cases (including debt buyers) 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 Government Notice of a Consumer Debt Lawsuit (Benchmark 1)

**Why:** All too often, process servers hired by debt collectors fail to serve a notice of a complaint to a defendant and then file a false affidavit claiming that the notice has been properly served. This practice—commonly referred to as "sewer service" because sometimes process servers literally throw the notice in the gutter—means that people never get notice that they are being sued. This makes it impossible to respond to the lawsuit and mount a defense. To address this issue, New York requires the court clerk to send to the defendant, by first class mail, an additional notice of a lawsuit arising out of a consumer credit transaction, and provides that default judgment will not be entered if the notice is returned as undeliverable. Washington, however, allows service by any adult resident of the state who is not a party to the action, and it does not require supplemental notice from the courts.

**How:** Wisconsin should fix the problem of ineffective or fraudulent ("sewer") service by adopting a law that either (a) requires a public official (such as a sheriff) to complete service; or (b) requires 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. If it does so, the state's score would increase 5 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. Wisconsin, however, does not have self-executing bank account exemptions, and it has not increased attachment exemptions sufficiently.

**How:** Wisconsin 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) a home, regardless of value, or at least the median price of a home in the state; 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 Wisconsin were to Implement these Recommendations?

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

# 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

Wisconsin 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 Wisconsin law permits service of process by "any adult resident of the state where service is made who is not a party to the action." Wis. Stat. § 801.10(1). Second, Wisconsin does not meet benchmark 1b because it does not require supplemental notice of a new consumer debt lawsuit nor does it expressly prohibit entry of default judgment if a summons and complaint 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

Wisconsin does not meet this benchmark because Wisconsin does not require that notice in a consumer debt lawsuit provide guidance to defendants on where to find help. See Wis. State. § 801.09(3).

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

#### 3 - Simplified Answer

Score: 0/2

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

No

Wisconsin does not meet this benchmark because the court system provides an Answer form for use in small claims court but not for use in the Circuit Court (Wisconsin's court of general jurisdiction). See Circuit Court

Forms: Self-Representation, Wisconsin Court System, https://www.wicourts.gov/forms1/circuit/ccform.jsp?page=1&FormName=&FormNumber=&beg\_date=&end\_date=&StatuteCite=&Category=51.

#### 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

Wisconsin meets this benchmark because it does not require that a pleading be verified except when specifically required by statute. Wis. Stat.  $\S$  802.05. No such rule or statute applies to an Answer in a consumer debt litigation.

5 - No Fee to Answer Score: 5/5

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

Yes

Wisconsin meets the benchmark because the state does not charge a fee to file an answer, although the state does charge a fee to file a counterclaim. See Wis. Stat. Ann. § 814.62(3)(b) (West) (setting forth filing fees for claims over \$5,000); id. § 814.61(3) (setting forth filing fees for claims under \$5,000).

# 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

Wisconsin does not meet this benchmark because although it requires that complaints brought by merchants (c) itemize the amount sought, it does not impose any of the benchmark requirements on other types of consumer debt collection complaints, including those brought by debt buyers. See Wis. Stat. Ann. § 425.109(1).

#### 7 - Authenticated Records for Default

Score: 10/10

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?

Yes

Wisconsin meets the benchmark. Wisconsin courts may grant default judgments pursuant to Wis. Stat. § 806.02 (2022), which provides that a court shall require proof of service of the summons before entering a judgment. Wis. Stat § 806.02 (3) (2022). In addition, a default judgment may not be entered upon a complaint

without accurate copies of the writings evidencing the debtor's obligation. Wis. Stat. § 425.109(1)(h) and (3) (2022).

# 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

Wisconsin does not meet this benchmark because the statutes and rules of Wisconsin do not place the burden of pleading timeliness on the plaintiff, see Wis. Stat. Ann.  $\S$  802.02(1), (3), 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 Wis. Stat. Ann.  $\S$  425.109(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 to pursue consumer debt collection: breach of contract (written or oral), open account, account stated, unjust enrichment, conversion, bad check?

No

Wisconsin 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, Wisconsin has the following limitations periods: • breach of written contract: 6-year limitations period (WI Stat § 893.43(1) (2022)); • breach of oral contract: 6-year limitations period (WI Stat § 893.43(1) (2022)); • open account: 6-year limitations period (Poeske v. Estreen, 55 Wis. 2d 238, 198 N.W.2d 625 (1972)); • account stated ("an action for any article charged on an account in a store"): 6-year limitations period (Poeske v. Estreen, 55 Wis. 2d 238, 198 N.W.2d 625 (1972)); • unjust enrichment: 6-year limitations period personal property (Smith v. Recordquest, LLC, 989 F.3d 513, 522 (7th Cir. 2021)); • conversion: 3-year limitations period for conversion involving sale of goods (WI Stat § 403.118(7)) or 6-year limitations period for conversion of personal property (WI Stat § 893.51(1) (2022)); 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 (WI Stat § 403.118(3) (2022)).

#### 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

Wisconsin does not meet this benchmark because it makes any debt claim under a contract subject to revival even after the statute of limitations has run when a debtor provides written promise or written acknowledgement of the debt. See WI Stat § 893.45 (2022) ("Acknowledgment or new promise. No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the cause out of the operation of this chapter, unless the same be contained in some writing signed by the party to

be charged thereby."); see also Alco Capital Grp. v. Whitehead, 375 Wis.2d 327 (Ct. App. 2017) citing St. Mary's Hospital Medical Center v. Tarkenton, 103 Wis. 2d 422, 424 (Ct. App. 1981); Estate of Hocking, 3 Wis.2d 79, 86, 87 N.W.2d 811, 815 (1958) ("It is well established in this state that in order to renew a debt once barred, an express acknowledgment of the debt with the intention to renew it as a legal obligation.'... A partial payment, to operate as a new promise and avoid the bar of the statute of limitations, must be made under such circumstances as to warrant a clear inference that the debtor recognized the debt as an existing liability, and indicated his willingness, or at least an obligation, to pay the balance.").

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

#### 11 - Prohibit Attorneys' Fees Shifting

Score: 3/3

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

Yes

Wisconsin meets this benchmark because it prohibits fee shifting. See 422.411 Attorney fees ("(1) Except as provided in subs. (2) and (2m), with respect to a consumer credit transaction no term of a writing may provide for the payment by the customer of attorney fees.").

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

Wisconsin does not meet this benchmark because it does not satisfy the requirements of sub-benchmarks (a) or (b). Regarding prejudgment interest, Wisconsin law states that the interest rate of a loan shall be 5% but a higher rate is allowed as long as such rate is expressed in writing. Wis. Stat. § 138.04 (2022). Therefore, Wisconsin does not limit prejudgment interest to 7% or less. Regarding post-judgment interest, Wisconsin law states that the interest rate on a judgment shall be 1% plus the prime rate. Wis. Stat. § 814.04 (4) (2022). Therefore, Wisconsin does not limit post-judgment interest to 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: 5/5

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

Yes

Wisconsin meets the benchmark because for garnishment a court clerk must issue an execution or a garnishee summons. Wis. Stat. Ann. §§ 815.05; 812.04; 812.35. In small claims actions, general rules of practice and procedure apply. Wis. Stat. Ann. § 799.04.

#### 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

Wisconsin 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. Wis. Stat. Ann.  $\S$  815.18(3)(k) provides an exemption for the debtor's deposits in a bank, up to \$5,000, 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

Wisconsin does not meet this benchmark because it does not meet sub-benchmarks (b) or (c). Wisconsin law provides as follows: (a) Income: Wisconsin meets sub-benchmark (a) because it provides that a debtor's earnings are entirely exempt from garnishment if the "debtor's household income is below the poverty line." Wis. Stat. §§ 812.34 (West 2024). For people whose income is above the poverty line, the law exempts 80 percent from garnishment, but it provides that if garnishment of the person's income would result in their household falling below the poverty line, "the amount of the garnishment is limited to the debtor's household income in excess of the poverty line before the garnishment is in effect." Id. (b) Home: Wisconsin does not meet sub-benchmark (b) because a home, including the land of no more than 40 acres on which the home is located, is exempt only up to a value of \$75,000. Wis. Stat. Ann. §§ 815.20, 990.01(13)–(14) (West 2023). (c) Car: Wisconsin does not meet sub-benchmark (c) because car(s) are exempt only up to an aggregate value of \$4,000 subject to a certain limited exception. Id. at § 815.18(3)(g). 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

Wisconsin does not meet this benchmark because notice to the judgment debtor is not required to be delivered prior to garnishment of the judgment debtor's property. Instead, notice to the judgment debtor is required to be served on the judgment debtor not later than 10 days after service on the garnishee. See Wis. Stat. Ann. §§ 812.44(4)–(5), 812.07(1) (West 2023). Additionally, even if notice were required prior to garnishment, the state would not meet sub-benchmark (a) because the court's form notice does not list potential exemptions; sub-benchmark (b) because the notice to the judgment debtor is not required to provide the manner in which to challenge the order; or sub-benchmark (c) since the notice does not specify the manner in which to assert exemptions. See Wis. Stat. Ann. §§ 812.44(4)–(5), 812.07(1), 812.07(4) (West 2023).

### 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

Wisconsin 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. Although the Wisconsin Constitution prohibits imprisonment for debt arising out of or founded on a contract, expressed or implied, Wyo. Const. art. I, § 5, Wisconsin case law permits incarceration for contempt for failure to obey a court order to pay a debt judgment. In In re Meggett, 105 Wis. 291, 81 N.W. 419, 422 (1900).

### 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

Wisconsin does not meet the benchmark because, if there is an alleged danger of a judgment debtor leaving the state or concealing themselves and there is reason to believe they have property they are unjustly withholding from the creditor, a judge may issue a warrant for the person's arrest, hold them on bond, and order their incarceration Wisc. Stat. Ann. §§ 816.05; 816.07.

#### 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

Wisconsin meets the benchmark because the Supreme Court has held that there is a right to counsel when a person charged with contempt faces incarceration. State v. Pultz, 556 N.W.2d 708 (Wis. 1996).

# 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

Wisconsin does not meet this benchmark because its worthless check statute explicitly allows a district attorney to contract with private entities to conduct worthless check deferred prosecution programs, and the county can benefit financially from such contracts. Wis. Stat. § 971.41.

#### 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

Wisconsin does not meet the benchmark because its laws do not expressly prohibit the use of bail or bond to pay a creditor. See Wis. Stat. Ann. § 816.05.

#### 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

Wisconsin does not meet the benchmark because a court may, upon a motion of the judgment creditor, require the judgment debtor to appear before the court and answer to the property. The statute does not limit the frequency of such examinations. Wis. Stat. § 816.03

### 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

Wisconsin does not meet this benchmark because Wisconsin state courts collect and publish data broken down by case categories, including data on "Money Judgment" and "Other Debtor Actions," but the state does not provide data specific to just consumer debt cases. Wisc. Jud. Branch, Civil Disposition Summary By Disposing Court Official, https://www.wicourts.gov/publications/statistics/circuit/docs/civildispostate21.pdf (last visited Jan. 31, 2024).

#### 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

Wisconsin does not meet this benchmark because Wisconsin state courts collect and publish data broken down by case categories, including data on "Money Judgment" and "Other Debtor Actions," but the state does not provide data specific to just consumer debt cases. Wisc. Jud. Branch, Civil Disposition Summary By Disposing Court Official, https://www.wicourts.gov/publications/statistics/circuit/docs/civildispostate21.pdf (last visited Jan. 31, 2024).

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

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