

Benchmarks Explained

Consumer Debt Litigation Index National Center for Access to Justice

February 16, 2024

Benchmarks	Benchmark Number	Benchmarks	Origins & Meanings	Weight
I. Help people know when they are being sued and where to find help.	1	<p>Government Notice of Lawsuits. Does the state respond to the problem of ineffective or fraudulent ("sewer") service in consumer debt lawsuits by:</p> <p>a. Public Official Service - requiring that a public official (e.g., the court or the sheriff) handle service? or,</p> <p>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?</p>	<p>Benchmark 1 is designed to protect against "sewer" service (the practice of a process server knowingly failing to serve the defendant but attesting in court that the person was served) or other ineffective service, by either requiring a public official (e.g., the court or the sheriff – but not a quasi-official such as a constable or marshal) to handle service, or requiring the court to mail a supplemental notice of the suit. In the first instance, service will not be complete if personal service cannot be effectuated and/or mail service is returned as undeliverable or return receipt is not provided. In the second instance, where supplemental notice is mailed by the court, service is technically complete, but return of the notice as undeliverable will prevent entry of a default. A state's adoption of either policy will result in credit. States did not receive credit if they require a marshal or other quasi-official to handle service because, while these quasi-officials have the imprimatur of government, they often have financial incentives to collect debt, which can compromise the integrity of the process more than if a public official handles service or the court mails supplemental service.</p>	5
	2	<p>Guidance on Finding Help. 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?</p>	<p>Benchmark 2 is designed to enhance the chances that a consumer debt defendant will avoid default by responding to the complaint (through answer or appearance) by receiving clear guidance on where to find free legal help (e.g., through self-help/pro se tools and information about free legal services providers).</p>	5

II. 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?	Benchmark 3 is designed to facilitate the answer process (and reduce the incidence of default) by providing a form Answer that can be easily completed by a consumer debt defendant.	2
	4	No Notarization Requirement to Answer. Does the state make it easier to respond to consumer debt lawsuits by never requiring defendants to have an Answer notarized before filing?	Benchmark 4 is designed to remove the hurdle of requiring that answers be notarized.	2
	5	No Fee to Answer. Does the state permit the filing of an Answer in consumer debt lawsuits without charging a filing fee?	Benchmark 5 eliminates filing fees which burden defendants and can deter a consumer debt defendant from filing an answer. A state will NOT get credit for this benchmark where it has a process for seeking a fee waiver because that process is burdensome and adds an unnecessary layer of complexity, which itself serves as a deterrent to answering.	5
III. Require the creditor to provide evidence of a valid debt claim.	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 debt principal, interest, fees, costs, and other charges to date?	Benchmark 6 is designed to ensure that debt litigation defendants have sufficient notice of the underlying facts to enable them to recognize and understand the claim against them and to formulate an Answer. A state will not receive credit unless all 3 of the required elements are met. a. name of creditor – addresses the concern that cases brought by debt buyers often don't identify the source of the original debt, making it difficult for the defendant to recognize what the suit is about or whether they actually owe the money; b. basis of plaintiff's standing – provides information as to whether the plaintiff has the right to sue on the debt, which is particularly important in cases brought by debt buyers; c. itemization of amounts sought – allows the alleged debtor to understand what is at stake, how that amount was determined, and how best to respond; and d. date of default –provides a basis to determine whether the claim is timely (which ties in with Benchmarks 8 & 9 on statutes of limitations).	10
	7	Authenticated Records for Default. 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	Benchmark 7 is designed to prevent entry of default judgment in non-meritorious cases based solely on a defendant's failure to answer or respond. Many creditors and debt buyers bring legally insufficient cases, or cases that they will not be able to prove, expecting that, because most defendants default, their claims for collection will never be tested. Benchmark 7 requires that the plaintiff present admissible evidence showing it is entitled to recover before obtaining a default, even where the defendant has not responded.	10

		c. Amount of judgment through authenticated business records, itemizing damages, court fees, attorneys' fees, and interest?		
IV. Require consumer debt collection actions to be brought within a reasonable time of non-payment.	8	Burden on Plaintiff to Allege Timeliness. 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?	Benchmark 8 is designed to decrease the common problem of creditors or debt buyers bringing time-barred collection suits. Benchmark 8 shifts the usual burden for asserting the statute of limitations as an affirmative defense from the defendant to the plaintiff, who must plead that the action is timely and provide a factual basis for that assertion, or face dismissal. Calculating the statute of limitations can be complex, and the plaintiff is - or should reasonably be - in possession of the information necessary for determining whether a suit is timely.	2
	9	Four Year Statute of Limitations. 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?	Benchmark 9 is designed to standardize the applicable statute of limitations for debt claims, reduce or eliminate "creative pleading" through causes of action with longer statutes of limitation, and cut down on the practice of selling stale debt to debt buyers.	5
	10	Prohibit Revival of Time-Barred Claims. Does the state prohibit revival of time-barred consumer debt claims, even where defendant makes subsequent payment toward a debt?	Benchmark 10 is designed to eliminate the practice where a creditor or debt buyer will induce a debtor to make a small payment on time-barred debt, so as to revive an otherwise expired claim.	2
V. Prohibit attorneys' fee shifting, and cap interest.	11	Prohibit Attorneys' Fees Shifting. Does the state prohibit attorneys' fee shifting in consumer debt lawsuits regardless of contractual provision or reciprocity in fee shifting?	Benchmark 11 recognizes that credit agreements often have a one-sided attorneys' fees provision that favors the creditor. This benchmark relieves debtors of the burden of paying creditors' attorneys' fees, which can sometimes exceed the amount of the debt and which can act as a disincentive to litigate and assert valid defenses. A state will NOT get credit for this benchmark where it shifts fees to either party, and thus does NOT get credit for a law that would create a reciprocal right to attorneys' fees in disputes in which the other party has a contractual right to attorneys' fees. States that provide for such reciprocal fee shifting did not receive credit because barring attorneys' fees altogether provides greater protection for debtors against high, contractually stipulated fees. Further, given that the vast majority of debtors are unrepresented, reciprocal fee shifting would not result in payments from creditors in most cases, even when the defendant wins.	3

	12	<p>Interest Caps. Does the state cap interest in consumer debt lawsuits (regardless of any contractual provision) as follows:</p> <p>a. Pre-judgment interest for debt buyers capped at an annual rate of 7% (or less); and</p> <p>b. Post-judgment interest for all creditors capped at 5% (or less) of the judgment?</p>	<p>Benchmark 12 is designed to limit punishing levels of pre-judgment interest for debt-buyers and of post-judgment interest for all creditors in consumer debt cases. Note that where the original creditor is the plaintiff, the benchmark does not alter the contractual interest rate (so as not to create an incentive for the defendant to default on the debt in order to get a lower interest rate).</p>	3
<p>VI. Reduce the likelihood that consumer debt collection actions leave people homeless, or perpetuate a cycle of debt.</p>	13	<p>Require Court Order to Garnish or Attach. Does the state in consumer debt lawsuits require a court order for garnishment and attachment?</p>	<p>Benchmark 13 imposes court supervision on the garnishment and attachment process, which provides a check against plaintiffs issuing their own garnishment or attachment orders by requiring that a judge or court clerk must sign off on the veracity and accuracy of the requested garnishment or attachment.</p>	5
	14	<p>Garnishment Exemptions Are Self Executing. Does state law require in consumer debt lawsuits that garnishment exemptions for bank accounts are self-executing?</p>	<p>Benchmark 14 protects a judgment debtor's exempt funds held in a bank account (such as social security and other public benefits) without requiring the judgment debtor to know that an exemption exists, to understand how to assert the exemption, and to go through a sometimes onerous process to do so.</p>	2
	15	<p>Essential Exemptions. Does the state prevent people from becoming impoverished, unhoused, or unable to work by exempting income and assets from attachment and garnishment, as follows:</p> <p>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;</p> <p>b. Home, regardless of value, or at least the median price of a home in the state; and</p> <p>c. Car value, state exemption for, at least, the first \$15,000 in value?</p>	<p>Benchmark 15 is designed to update and expand decades' old federal exemptions protecting from garnishment and attachment income and assets needed for a debtor to maintain a very basic standard of living and ability to work.</p>	5
	16	<p>Require Prior Notice of Garnishment. Does the state require notice to debtor prior to actual garnishment that explains all of the following:</p> <p>a. potential exemptions?</p> <p>b. how to challenge the garnishment order? And</p> <p>c. how to assert exemptions?</p>	<p>Benchmark 16 requires that states ensure that debtors are given advance warning of a planned act of garnishment, which includes information explaining how to assert their rights and protect their assets before they are seized. The benchmark seeks to provide safeguards against people learning of a lawsuit—or a garnishment order—only after money has been seized from their bank account or their paycheck.</p>	5

VII. Eliminate debtors' prison.	17	Prohibit Incarceration for Failure to Obey a Court Order to Pay Consumer Debt. Does the state prohibit incarceration for contempt for failure to obey a court order to pay all or part of a consumer debt judgment?	Benchmark 17 responds to the fact that although the United States outlawed debtor's prisons in the 1800s, some states still incarcerate individuals for contempt when they fail to obey a court order to pay. Benchmark 17 is designed to eliminate the possibility that a judgment debtor could be jailed for non-payment of a consumer debt, even if ordered by a court to do so.	5
	18	Prohibit Incarceration for Failure to Obey a Court Order to Appear at a Debtor's Examination, Unless Nonappearance was willful. 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?	Benchmark 18 recognizes that judgment debtors are often incarcerated for contempt for failure to obey a court order to appear, especially in debtor's examinations. Benchmark 18 requires that states do not permit incarceration for contempt for failure to appear, unless the state first finds that the failure to appear was willful. This benchmark seeks to limit incarceration only to cases where a judgment debtor willfully refuses to engage in the court process, and to eliminate incarceration in cases where a judgment debtor misses a court date inadvertently or through no fault of their own.	5
	19	Provide Right to Counsel. 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?	Benchmark 19 is designed to ensure that any time a consumer debt defendant or judgment debtor faces possible incarceration, the court will appoint counsel without charge. (This will almost always be in the context of a contempt hearing, but the benchmark is written broadly to encompass any potential incarceration).	5
VIII. Prevent government from undue intervention on behalf of creditor.	20	Prohibit Collaboration Between Creditors and Prosecutors. 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)?	Benchmark 20 is designed to prevent the practice in some states where prosecutors join forces with debt collectors, for example, by permitting debt collectors to use a prosecutor's letterhead to threaten prosecution if the debt is not paid, or by accepting payment from creditors when prosecutorial action results in payment of the debt. A state will not receive a credit for the benchmark just because the practice is believed not to occur in that state. Rather, the state must prohibit such arrangements to receive credit for the benchmark.	2
	21	Prohibit Paying Bail/Bond to Creditor. 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?	Benchmark 21 is designed to prevent the practice in which a court uses its contempt power to extract a bail payment from a debtor, to then pay the creditor by transferring to the creditor the bail payment that was obtained for securing release on a contempt charge. A state will not receive a credit for the benchmark just because the practice is believed not to occur in that state. Rather, the state must prohibit this practice to receive credit for the benchmark.	2
	22	Limit Frequency of Examinations. Does the state in consumer debt litigation schedule or otherwise limit financial examinations to no more than once per year?	Benchmark 22 recognizes that, often, creditors seek to require defendants to come to court frequently (as often as monthly) to undergo financial examinations intended to establish whether and how much the person can pay. Not only is attendance at these hearings burdensome, requiring time off	5

			from work, child care arrangements, costly transportation, etc., but they also can result in undue pressure on the judgment debtor to settle or agree to make payments the debtor cannot afford. The Benchmark is designed to curtail the abusive practice of requiring the debtor to appear frequently at such examinations.	
IX. Collect data to improve the system.	23	Data Collection: Number of Lawsuits: Do state courts at least annually collect and publish statewide data on number of consumer debt lawsuits?	Benchmarks 23 and 24 recognize that to solve or ameliorate problems in consumer debt claims litigation, it is important for court personnel, lawmakers, and communities to understand the scope of those problems and the impact of potential solutions. Ideally, state courts would publish additional information beyond benchmark 23's call for statewide data on the number of consumer debt lawsuits, and benchmark 24's call for statewide data on the types of dispositions of consumer debt lawsuits, but these benchmarks provide the bare minimum required for a basic understanding of the consumer debt litigation landscape. NCAJ credited a state with meeting the benchmark where the state publishes data that meets the benchmark criteria, even if it does not have a law requiring publication of such data. Last, the Justice Index did not award credit to states that publish debt collection data without identifying the portion of such data that pertains to consumer debt.	3
	24	Data Collection: Disposition of Lawsuits: Do state courts at least annually collect and publish statewide data on types of dispositions of consumer debt lawsuits?	Benchmarks 23 and 24 recognize that to solve or ameliorate problems in consumer debt claims litigation, it is important for court personnel, lawmakers, and communities to understand the scope of those problems and the impact of potential solutions. Ideally, state courts would publish additional information beyond benchmark 23's call for statewide data on the number of consumer debt lawsuits, and benchmark 24's call for statewide data on the types of dispositions of consumer debt lawsuits, but these benchmarks provide the bare minimum required for a basic understanding of the consumer debt litigation landscape. NCAJ credited a state with meeting the benchmark where the state publishes data that meets the benchmark criteria, even if it does not have a law requiring publication of such data. Last, the Justice Index did not award credit to states that publish debt collection data without identifying the portion of such data that pertains to consumer debt.	2
Total Weight:				100