

State Court Debt Collection in the Old Dominion: Too Broke for Bankruptcy?

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Virginia, with a population of approximately seven million, has averaged more than a million civil filings a year since the late 1980s. The overwhelming majority of these suits seek to collect debts from consumers, and most judgments go unpaid. Yet civil litigation appears to be only tenuously related to consumer bankruptcy whether one looks at Virginia or at the nation as a whole. Nationally, the bankruptcy filing rate rose by more than 350% between 1980 and 2002 while the civil filing rose by about 12%. Prior research suggests that relatively few bankrupt debtors have been sued by their creditors in state court, most bankrupt debtors are drawn from the “middle class”, and bankrupt debtors own homes at nearly the same rate as the general population. This article finds that few civil defendants file for bankruptcy, civil litigation is concentrated in cities and counties with lower socio-economic characteristics and civil defendants have dramatically lower rates of homeownership than the general population. In other words, the bankruptcy statistics omit many defaulting and insolvent consumers, and these consumers are disproportionately those with nothing to protect.

I.	The Role of State Courts in the Collection Process	7
A.	A Brief Description of the Collection Process	7
B.	Implications: Choosing Bankruptcy and Choosing Suit	14
1	The Debtor’s Choice to File for Bankruptcy	16
2	The Creditor’s Choice to Sue	20
II.	The Extent of Civil Litigation in the United States	23
A.	Prior Literature on Civil Filing Rates	24
B.	Differences in Civil Filing Rates Across States	32
C.	The Relative Stability in Civil Filing Rates Over Time	34
III.	Examining Differences in Civil Litigation within Virginia	38
A.	Excluding Two Explanations for Virginia’s High Filing Rate	39
B.	Who Are the Defendants?	40
IV.	Lessons from the Individual Court Filings	45
A.	Sources of Data	46
B.	Each Year Hundreds of Thousands of Virginia Consumers are Sued	47
1.	Accounting for Subsequent Actions	47
2.	Consumer Debt Collection Dominates the Civil Docket	49
3.	Few Filings Name the Same Defendant	56
4.	Most Judgments Are Relatively Small	57
C.	Most Judgments Are Not Satisfied, But Most Debtors Don’t File for Bankruptcy	59
1.	Most Judgments Are Not Satisfied	60
2.	Few Judgment Debtors File for Bankruptcy	61
3.	Post-Judgment Actions are Surprisingly Limited	62
4.	Are Many Civil Defendants Judgment Proof?	64
VI.	Conclusion	65

Each year, millions of Americans decide that they cannot, or will not, repay their debts in full. Because the publicly available data does not reveal how many Americans fail to repay, scholars have relied on non-business bankruptcy filing statistics as a measure of the financial well-being of consumers.¹ Bankruptcy is not, however, synonymous with default or insolvency. Default and insolvency are not modern innovations; in early America debtor's prison may have been nearly as common as bankruptcy is today.² The United States lacked a bankruptcy law for much of its history.³ Even today many, and probably most, consumers who do not repay their debts do not file for bankruptcy but instead simply refuse to pay and seek relief in a system of "informal bankruptcy."⁴ About two-thirds of all consumer credit loans that banks charge off as uncollectible are not owed by consumers in bankruptcy,⁵ and a similar percentage of credit card bad debt losses are charged-off before the debtor files for bankruptcy.⁶

¹ See, e.g., Elizabeth Warren, *The New Economics of the American Family*, 12 AM. BANKR. INST. L. REV. 1, 37 (2004) (arguing that the bankruptcy filing rate is a "a thermometer, recording the economic temperature of American families.")

² See, e.g., CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 52 n.8 (1935) ("As late as 1833, however, it was estimated that 75,000 persons were annually sent to jail for debt . . ."). In 1833 there were roughly fourteen million Americans, See U.S. DEPARTMENT OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES COLONIAL TIMES TO 1970, A6-8 (1975) (reporting a population of approximately 14,162,000), suggesting that a debtor's prison rate of approximately 5.4 per thousand. In 2005 there were 2,039,214 non-business bankruptcy filings, a total that was almost certainly inflated by the rush to file before the change in the law. See American Bankruptcy Institute, <http://www.abiworld.org>. (last visited Jan. 20, 2007) Even so, this is "just" a rate of 6.9 per thousand as there approximately 295,507,000 Americans in 2005. Statistical Abstract: Estimates and Projections by Age, Sex, Race/Ethnicity, http://www.census.gov/compendia/statab/population/estimates_and_projections_by_age_sex_raceethnicity/ (last visited Jan. 18, 2007).

³ The United States has had a bankruptcy law in effect since 1898, Congress passed three other bankruptcy acts in the nineteenth century, but it quickly repealed each of these. Congress repealed the Bankruptcy Act of 1800 in 1803, 2 Stat. 248 (1803), the Bankruptcy Act of 1841 in 1843, Act of March 3, 1843, 5 Stat. 614 (1843), and the Bankruptcy Act of 1867 in 1878. Act of June 7, 1878, 20 Stat. 99 (1878).

⁴ See Amanda E. Dawsey & Lawrence M. Ausubel, *Informal Bankruptcy* (Working Paper 2004), available at <http://www.ausubel.com/creditcard-papers/informal-bankruptcy.pdf>.

⁵ See, e.g., AM. BANKER'S ASS'N, 1997 INSTALLMENT CREDIT SURVEY REPORT 109 (9th ed. 1997) (reporting that approximately seventy percent of all bank consumer credit losses occur outside of bankruptcy).

⁶ 1999 Annual Bankruptcy Survey, Visa U.S.A. Inc., September 2000 (reporting that two-thirds of credit card loans charged-off as uncollectible not attributable to bankruptcy).

It is hard to study defaulting consumers who do not choose bankruptcy. Credit reports are not publicly available,⁷ and defaulting consumers often do not want to be found. Many collection methods, such as telephone calls and dunning letters, leave no trace in the public record. This article focuses on one collection device that does leave a paper trail – state lawsuits.

Specifically, this article examines the civil courts of the Commonwealth of Virginia and finds a staggering amount of consumer debt collection litigation. Virginia courts have averaged over one million civil filings a year since the late 1980s,⁸ and the overwhelming majority of these filings seek to collect debt from consumers.⁹ Most complaints result in a judgment for the plaintiff,¹⁰ and most judgments are apparently never paid.¹¹ Virginia is somewhat unique; its rate of civil litigation is sharply higher than that of nearly every other state.¹² However, there are signs that state lawsuits comprise an important element of consumer debt collection in many states.¹³

There appears to be surprisingly little overlap between the populations of bankrupt debtors and state court civil defendants. Prior research suggests that less than

⁷ The Philadelphia office of the Federal Reserve have obtained access to some of these records, but its scholars have not directly addressed the questions addressed in this article. See Robert B. Avery, et al, *An Overview of Consumer Data and Credit Reporting*, 89 FED. RES. BULL. 47 (2003) [hereinafter Consumer Data]; Robert B. Avery, et al, *Credit Report Accuracy and Access to Credit*, 90 FED. RES. BULL. 297 (2004) [hereinafter Credit Report Accuracy]; David K. Musto, *What Happens When Information Leaves a Market? Evidence from Post-Bankruptcy Consumers*, 77 J. BUS. 725 (2004); David K. Musto & Nicolas S. Souleles, *A Portfolio View of Consumer Credit*, (September, 2005) (unpublished working paper, on file with author). For a history of the credit reporting industry, see Robert M. Hunt, *A Century of Consumer Credit Reporting in America*, (June, 2005) (unpublished working paper, on file with author)

⁸ See *infra* Figure II.4.

⁹ See *infra* Tables IV.2 through IV.4 and accompanying text.

¹⁰ See *infra* Table IV.7

¹¹ See *infra* Table IV.9

¹² See *infra* Table II.2

¹³ See *infra* notes 141-143, and accompanying text.

one-third of bankrupt debtors were sued by their creditors in state court.¹⁴ This article finds that less than twenty percent of defendants sued in 2001 filed for bankruptcy by 2006, and this remains true even if we restrict our sample to those defendants who have failed to pay a judgment.¹⁵ This lack of overlap between bankrupt debtors and civil defendants is not new. A 1971 study found that just eighteen percent of bankrupt debtors cited actual litigation as an immediate cause of their bankruptcy filing,¹⁶ and a 1974 study found that just seven percent of defendants sued for defaulting on consumer debt filed for bankruptcy.¹⁷

The results of this Article also suggest that the populations of bankrupt debtors and civil defendants differ in a very predictable manner. Prior research argues that bankrupt debtors are largely drawn from the middle class.¹⁸ Significantly, this research suggests that bankrupt debtors own homes at almost the same rate as the general population, though their homes are typically worth less.¹⁹ By contrast, this article finds

¹⁴ See TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS 305 (1989).

¹⁵ See *infra* Table IV.10.

¹⁶ See D. STANLEY & M. GIRTH, BANKRUPTCY: PROBLEM, PROCESS REFORM 48 (1971). This does not mean, however, that the threat of state court debt collection is an unimportant determinant of consumer bankruptcy. Stanley and Girth found that 43% of debtors cited the threat of legal action as an immediate cause of bankruptcy. *Id.*

¹⁷ See DAVID CAPLOVITZ, CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT 274 (1974)

¹⁸ See, e.g., TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 3 (2000) (“bankrupts do represent a fair cross-section of the American middle class.”); Elizabeth Warren, *The Economics of Race: When Making it to the Middle Class is Not Enough*, 61 WASH. & LEE L. REV. 1777, 1781-82 (2004) (“More than 90% of those who filed for bankruptcy either attended college, had a job in the upper 80% of all occupations in the United States, or had bought a home. Two-thirds of the families met two or more criteria, and almost 30% met all three. . . . That is, about 91% to 93% of bankrupt white families, Hispanic families, and black families were solidly middle class.”)

¹⁹ SULLIVAN, WARREN & WESTBROOK, *supra* note 14, at 129 (finding that roughly 52% of bankrupt debtors owned homes while 62% of the general population owned homes but that the declared median value of homes in bankruptcy (\$35,000) was substantially lower than that of the general population (\$56,100)); Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 213, 225-26 (2006) (Noting that the homeownership rates among 2001 bankrupt debtors was about 52.5%

that civil litigation is disproportionately concentrated in cities and counties with lower median income and homeownership rates and higher incidences of poverty and crime as well as higher concentrations of relatively young and minority residents.²⁰ This article also finds that civil defendants have much lower rates of homeownership than bankrupt debtors and the general population.²¹ In short, the bankruptcy statistics represent just a portion of those in financial distress, and the insolvent debtors who do not file may be too broke for bankruptcy.

The disconnect between bankruptcy and civil litigation extends beyond the lack of overlap between bankrupt debtors and civil defendants. In a prior Article I showed that the rate of garnishment (an important post-judgment remedy) in Virginia and Cook County, Illinois has been stable or declining in recent years while the bankruptcy filing rate has risen sharply.²² Section II of this Article looks at civil litigation more broadly and discovers the same basic pattern. In the states for which we have data, the average civil filing rate grew just twelve percent between 1980 and 2002 while the non-business bankruptcy filing rate grew by over two hundred seventy-five percent.²³ This divergence could have been caused by an increased willingness of consumers in financial distress to file for bankruptcy or a decreased willingness of creditors to sue defaulting debtors who do not file for bankruptcy.

This Article's finding that civil defendants are far less likely to be drawn from the middle class than are bankrupt debtors suggests that future research must consider

but that the declared median home value of debtor's in bankruptcy was just 60.9% of that of the general population.)

²⁰ See *infra* Section III.C.

²¹ See *infra* Section IV.C.4.

²² See Richard M. Hynes, *Bankruptcy and State Collections, The Case of the Missing Garnishments*, 91 CORNELL L. REV. 603 (2006).

²³ See *infra* Table II.3.

another explanation for the different growth rates. The most vocal proponents of the theory that rising bankruptcy filings reflect rising financial distress focus specifically on financial distress within the middle class.²⁴ It is possible that financial distress among the middle class has increased markedly but that financial distress among the poor has not. The villains of today, the payday lender and the check cashing stores,²⁵ may have simply displaced the villains of yesterday, the small loan company, the direct seller and the low-income retailer.²⁶

Section I briefly describes the collection system and uses this description to generate predictions that are largely consistent with what we observe in the data and in the previous literature. Section II uses data from the National Center for State Courts to demonstrate that: i) there is a very large amount of civil litigation, ii) the civil filing rate varies dramatically by state, and iii) the civil filing rate has grown much more slowly than the non-business bankruptcy filing rate. Section III uses data on the dispersion of civil suits across Virginia to demonstrate that civil litigation is concentrated in areas with more disadvantaged residents. Section IV uses individual court filings to demonstrate that: i) the overwhelming majority of civil litigation in Virginia attempts to collect debt from individuals; ii) surprisingly few complaints name the same defendant—civil litigation reaches a very large number of Virginians; iii) contract claims dominate the civil docket; iv) most filings result in a judgment; v) though most judgments are for less than \$1,000, most are never satisfied; vi) few judgment debtors seek protection in

²⁴ See, e.g., SULLIVAN, WARREN & WESTBROOK, *supra* note 18 at 238 (“Bankruptcy is a middle-class phenomenon, and the dramatic increase in bankruptcy filings must be understood to reveal a middle-class pathology.”)

²⁵ Numerous authors have alleged that payday lenders exploit the poor. See, e.g., Lisa Blaylock Moss, *In Memoriam: Frank M. Johnson Jr.: Modern Day Loan Sharking: Deferred Presentment Transactions and the Need for Regulation*, 51 ALA. L. REV. 1725 (2000); Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending*, 87 MINN. L. REV. 1 (2002).

²⁶ See CAPLOVITZ, *supra* note 17, at 30-34.

bankruptcy, but creditors appear to abandon legal procedures to collect their judgments after one or two years, and vii) homeownership rates among civil defendants are dramatically lower than homeownership rates among bankrupt Americans and the general population. Section V concludes.

I. The Role of State Courts in the Collection Process

Debtors and their creditors do not always behave rationally. Defaulting consumers may fail to address their insolvency, hoping that their problems will resolve themselves. Their creditors may fail to listen to reason, stubbornly pursuing debts that the consumer just can't pay. However, if we assume everyone behaves rationally, we can generate implications that are reasonably consistent with what we observe in the world.

A. A Brief Description of the Collection Process

Assume a consumer is having financial difficulty and is deciding whether to miss a payment on unsecured obligations such as a credit card or a dentist bill.²⁷ The consumer may decide to file for bankruptcy.²⁸ A bankruptcy filing will invoke the automatic stay and prevent his creditors from engaging in any collection activity.²⁹ If all of the requirements of bankruptcy are met, the debtor will be given a discharge that will free his future income from the claims of nearly all of his creditors.³⁰ In theory, the debtor's property is taken for distribution to his creditors,³¹ but federal and state laws provide substantial exemptions.³² In reality, distributions to general creditors from non-

²⁷ For simplicity, we ignore issues specific to secured debt.

²⁸ The consumer will have the choice among several bankruptcy chapters, but we can ignore this level of detail.

²⁹ Bankruptcy Act, 11 U.S.C. § 362 (2000 & Supp. 2006),

³⁰ Some claims, such as family law claims, are exempt from the discharge. *Id.* at § 523.

³¹ *Id.* at § 541.

³² The bankruptcy code provides specific property exemptions, but it also allows each state to "opt-out" and deny its citizens the right to use these exemptions. *Id.* at § 522. About two-thirds of states have done so. See Richard M. Hynes, ET AL., *The Political Economy of State Property Exemptions*, 47 J. L. & ECON. 19

exempt assets are rare.³³ Bankruptcy does have costs, however. The fee for the most common form of bankruptcy, Chapter 7, is now \$299,³⁴ and a lawyer may charge hundreds more to complete the necessary paperwork. The automatic stay will limit the debtor's ability to continue paying preferred creditors,³⁵ though the debtor may be able to reaffirm some of these obligations with his creditors' consent.³⁶ Finally, the bankruptcy filing will stay in the consumer's credit file for ten years,³⁷ and the consumer's ability to obtain another bankruptcy discharge will be limited for the next eight years.³⁸

A defaulting debtor has another option – he can choose “informal bankruptcy” by simply refusing to pay and waiting for his creditors to pursue him.³⁹ The choice of informal bankruptcy is not irreversible; the consumer can file for bankruptcy at any time if pressure from his creditors becomes too great. His creditors may begin with a reminder of the obligations, and the ensuing telephone calls and letters may not be so gentle in tone. Many large creditors will routinely report the consumer's account activity,⁴⁰ and the default will leave a mark on the consumer's creditor report for seven years.⁴¹ The creditor may decide to hire a collection agency or it may sell the debt to a distressed debt buyer. The collection agency or distressed debt buyer will likely report the default to the credit bureaus, and they will try to convince the debtor to repay. The Fair Debt

(2004). Section 522 also gives each debtor the right to use the exemptions that would be available in a state collection proceeding. These exemptions are discussed below. *See infra* notes 59-60, 65, and accompanying text.

³³ *See, e.g.*, Executive Office for United States Trustees, *United States Trustee Program: Preliminary Report on Chapter 7 Asset Cases 1994 to 2000*, 7 (2001) available at <http://www.usdoj.gov/ust/library/chapter07/assetcases/Publicat.pdf> (explaining that “[h]istorically, the vast majority (about 95 to 97 percent) of chapter 7 cases yield no assets.”).

³⁴ <http://www.uscourts.gov/bankruptcycourts/fees.html>

³⁵ Fair Credit Reporting Act, 15 U.S.C. § 1681c (2000).

³⁶ 11 U.S.C. § 524(c) (2000).

³⁷ *Id.* § 362

³⁸ *Id.* § 727.

³⁹ *See* Dawsey & Ausubel, *supra* note 4.

⁴⁰ *See* Consumer Data, *supra* note 7, at 50.

⁴¹ Fair Credit Reporting Act, 15 U.S.C. § 1681c (2000).

Collections Practices Act limits the collection efforts of these third parties (the collection agency or the bad debt buyer).⁴² If the original creditor is collecting, however, the consumer will need to look to state law for protection.⁴³

Regardless of who is applying the pressure, some consumers will not pay. At that point the lender (or its assignee) must decide whether to seek a judgment in state court⁴⁴ or to abandon collection efforts and save the expense of litigation. The cost of filing a claim varies significantly from state to state. The filing fee for a \$1,000 claim is as low as \$29 in Virginia⁴⁵ and \$30 in Maryland⁴⁶ and as high as \$100 in California⁴⁷ and \$130 in Illinois.⁴⁸ Victorious creditors can add these costs to the amount owed,⁴⁹ but this means little if the creditor cannot collect the judgment. Lawsuits may also entail substantial administrative costs. If the FDCPA applies, the creditor must sue the

⁴² Fair Debt Collections Practices Act, 15 U.S.C. §1692a (6)(A) (2000). Note that an attorney may be deemed to be a debt collector. *See* Heintz. v. Jenkins, 514 U.S. 291 (1995) (finding that an attorney who regularly attempts to collect debts for a client, even if the collection is indirect through litigation, is a debt collector according to the FDCPA).

⁴³ For a brief summary of these state laws, *see* Hynes, *supra* note 22, at 622.

⁴⁴ The lender is unlikely to be able to file an involuntary bankruptcy petition by itself, and may be unable to file in conjunction with other creditors. Unless Consumer has fewer than twelve qualifying creditors, three creditors must file the petition and their claims must be in aggregate of \$12,300. Even if Consumer has fewer than twelve creditors, Lender must be owed at least \$12,300. *See* Bankruptcy Act, 11 U.S.C. § 303 (2000 & Supp. 2006). Involuntary cases are very rare. H.R. NO. 108-110, at 2 (2003) (“Fewer than one percent of all bankruptcy case filings are commenced involuntarily.”). If the lender resides in a state different than that of the consumer, the lender could possibly sue in federal court pursuant to diversity jurisdiction. 28 U.S.C. § 1332. However, federal courts will not hear diversity suits of less than \$75,000, *id.*, and thus the lender will almost certainly file in state court.

⁴⁵ *Id.* at 171 (“The cost of initiating an action in general district court is about one-third of the cost of a circuit court action.”). The filing fee for a civil complaint in James City County/Williamsburg General District Court is \$29 (plus an additional \$12 for service). Telephone call to James City County/Williamsburg Courthouse Automated Information System (Oct. 2, 2006). The filing fee in James City County/Williamsburg Circuit Court for a legal complaint up to \$50,000, a contract complaint up to \$50,000, a detinue action up to \$50,000 and an unlawful detainer action up to \$50,000 is \$77. James City County/Williamsburg Circuit Court Fee Schedule, (last viewed Oct. 2, 2006).

⁴⁶ District Court of Maryland Civil Cost Schedule, <http://www.courts.state.md.us/district/forms/civil/dccv12.pdf> (last visited Jan. 19, 2007).

⁴⁷ Superior Court of California County of San Benito County, http://www.sanbenito.courts.ca.gov/filing_fees.htm (last visited Jan. 19, 2007).

⁴⁸ The Office of the Clerk of the Court in DuPage County, http://www.dupageco.org/courtclerk/generic.cfm?doc_id=389 (last visited Jan. 19, 2007).

⁴⁹ *See, e.g.*, VA. CODE § 16.1-9.48:4; 17-601.

consumer in a judicial district in which the consumer “resides at the commencement of the action” or “signed the contract sued upon”.⁵⁰ The FDCPA does not, however, apply to suits brought by the creditor who originated the loan or a creditor who purchased the loan before it was in default.⁵¹ Many states, including Virginia, have more liberal venue rules and allow the creditor to sue the consumer where the creditor is located.⁵² Large creditors can (and do) sue Virginia residents from across the state in a single court, greatly reducing the creditors’ costs of litigation.

Credit bureaus do not typically note civil suits in their file, but they do record judgments.⁵³ These judgments remain in the consumer’s credit report for seven years or until enforcement of the judgment is barred by the statute of limitations.⁵⁴ The plaintiff must take further action to enforce its judgment. Unfortunately for the plaintiff, judgments are often easier to obtain than to enforce. We typically think of bankruptcy as the refuge for those who “cannot” pay, but non-bankruptcy law also limits the enforcement of judgments to protect the insolvent.

⁵⁰ Fair Debt Collections Practices Act, 15 USC §1692(i) (2000). If the debt collector is suing for an interest in real property, the collector can also bring the action where the property is located. *Id.* The Fair Debt Collections Practices Act applies to outside counsel when counsel is a debt collector. *See, e.g., Heintz*, 514 U.S. 291.

⁵¹ *See* Fair Debt Collection Practices Act, *supra* note 42

⁵² Virginia allows the creditor to sue the consumer in the city or county in which the consumer resides or has her principal place of employment or where the contract was formed. VA. CODE ANN. § 8.01-261 (2001). More significantly, Virginia allows the creditor to file where the contract was breached, VA CODE ANN. §8.01-262(4) (2001) (allowing suit where “the cause of action arose”), and courts have interpreted this to mean the location of the creditor’s home office because that was where payment was due. *Vill. Auto Ctr. v. Apple Auto Glass, Inc.*, 51 Va. Cir. 471 (Rockingham 2000). Additionally, Virginia courts generally respect agreements as to venue. *Paul Business Systems, Inc. v. Canon U.S.A. Inc.*, 397 S.E.2d 804 (Va. Sup. Ct. 1990). Some states restrict the plaintiff’s choice of venue significantly. *See, e.g., ALA. CODE §6-3-2* (LexisNexis 2006) (“All actions on contracts, except as may be otherwise provided, must be commenced in the county in which the defendant or one of the defendants resides if such defendant has within the state a permanent residence.”); GA. CONST. art. VI, § II, para. VI (“All other civil cases, except juvenile court cases as may otherwise be provided by the Juvenile Court Code of Georgia, shall be tried in the county where the defendant resides”)

⁵³ *See* Consumer Data, *supra* note 7, at 67.

⁵⁴ Fair Credit Reporting Act, 15 U.S.C. § 1681c.

Consider first the ability of a plaintiff to levy on real property owned by a consumer. Virginia law allows the plaintiff to obtain a lien on real property by recording the judgment in the circuit court of the county or city in which the property is located and paying a small fee, currently about \$8.⁵⁵ Most other states have similar laws or allow the judgment itself to serve as a lien against the defendant's property.⁵⁶ Often the lien will be sufficient to induce the defendant to repay as it will limit the ability of the defendant to sell or refinance her home. The plaintiff can also force a sale of the home to satisfy the lien. In Virginia this requires another suit,⁵⁷ and the process is difficult, expensive and risky.⁵⁸ Creditors with senior liens must be paid before the plaintiff receives any of the proceeds, and Virginia law allows a consumer to exempt \$5,000 (\$11,000 for a family of four) of any property from execution.⁵⁹ Many states allow the defendant to exempt much more home equity; in a few states the plaintiff simply cannot force a sale of the defendant's home.⁶⁰ Virginia⁶¹ and a number of other states⁶² also effectively exempt the home from attachment by a plaintiff who has a claim against just one spouse if the property is held in the form of tenancy by the entireties. Finally, many defendants will

⁵⁵ See ROBERT A. PUSTILNIK, ET AL, DEBT COLLECTION FOR VIRGINIA LAWYERS 206.29 (2006).

⁵⁶ See, e.g., CAL CIV.PRO. § 697.310 (2006) ("Except as otherwise provided by statute, a judgment lien on real property is created under this section by recording an abstract of a money judgment with the county recorder."); CONN. GEN. STAT. § 52-380a (2006) (A judgment lien, securing the unpaid amount of any money judgment, including interest and costs, may be placed on any real property by recording, in the town clerk's office in the town where the real property lies, a judgment lien certificate, signed by the judgment creditor or his attorney or personal representative."); OHIO REV. CODE ANN. § 2329.02 (2006) ("Any judgment or decree rendered by any court of general jurisdiction, including district courts of the United States, within this state shall be a lien upon lands and tenements of each judgment debtor within any county of this state from the time there is filed in the office of the clerk of the court of common pleas of such county a certificate of such judgment . . .").

⁵⁷ VA CODE ANN. §8.01-462; see PUSTILNIK, *supra* note 55, at 312.

⁵⁸ See PUSTILNIK, *supra* note 55, at 313.

⁵⁹ See VA CODE ANN. § 34-4 (2001). (exempting \$5,000 for each spouse plus \$500 for each dependent child).

⁶⁰ See, e.g., TEX. PROP. CODE ANN. § 41.001 (2000); FLA. CONST. art. X § 4(a)(1).

⁶¹ See PUSTILNIK, *supra* note 55, at 316.10 (Under Virginia law, "property held as tenants by the entireties is exempt from the claims of individual creditors of the owners of the property").

⁶² An excellent, though somewhat dated, description of this doctrine can be found in *Sawada v. Endo*, 561 P.2d 1291, 1294-95 (HI 1977).

not own any real estate at all, and the plaintiff may need to look to the defendant's personal property for satisfaction.

The satisfaction of a judgment from the defendant's personal property typically requires two steps. First, the plaintiff will ask the court to issue a writ ordering the sheriff to levy on the defendant's personal property.⁶³ If the defendant still does not pay the judgment, the plaintiff can force a sale of the property and apply the proceeds to satisfy the debt.⁶⁴ This remedy is seldom used in Virginia. Like all other states, Virginia protects some of the defendant's personal property from seizure, and these exemptions will protect the meager assets of many defaulting debtors.⁶⁵ In addition, the property that is seized may generate very little cash once the costs of sale are deducted. Finally, creditors may use this remedy infrequently because a better remedy, garnishment, is available.

The debtor's most liquid assets are likely to be claims against third parties: a checking or savings account at a bank or unpaid wages in the hands of an employer. A plaintiff with a judgment can force an employer or a bank to pay the plaintiff instead of the consumer by bringing a garnishment action. There are, however, limits on the amount of wages or bank deposits that a plaintiff can seize. Federal law prohibits a general creditor from taking more than the lesser of 25% of the debtor's take-home pay or the amount by which the debtor's weekly take-home pay exceeds thirty times the

⁶³In Virginia, this is the writ of fieri facias and it will cost the plaintiff an additional \$37. See PUSTILNIK, *supra* note 55, at 285 ("The clerk of the general district court will collect a total of \$37: \$12 for issuing the writ and \$25 for the sheriff's service.").

⁶⁴ See PUSTILNIK, *supra* note 55, at 292.

⁶⁵ See VA CODE ANN. § 34-26 (2001) (describing articles which are exempt under the poor debtor's exemption); PUSTILNIK, *supra* note 55, at 286.(listing exemptions applying to the third party debts of an individual including "almost all household furnishings up to a value of \$5000, wearing apparel up to a value of \$1000, tools and equipment used in the householder's business up to a value of \$10,000 and \$2000 in equity in a vehicle not used in business"). These exemptions, like the real property exemptions mentioned above, are typically the same exemptions available in bankruptcy.

federal minimum wage.⁶⁶ Some states place much greater limits on wage garnishment or even prohibit it altogether,⁶⁷ but Virginia's law is only marginally more restrictive than the federal law.⁶⁸ Bank deposits are also protected if the debtor can show that such deposits were exempt wages or exempt income support payments.⁶⁹

A creditor cannot use garnishment if the debtor has no bank account and works for cash compensation. In addition, the creditor may not know the identity of the defendant's employer or the location of the defendant's bank account. Even if the plaintiff collected this information when it extended the loan, the information is likely to be dated at the time of default. Assuming the plaintiff can find the defendant, the plaintiff can use an interrogatory to compel the consumer to come to court and disclose the location of his assets.⁷⁰ If the defendant fails to attend the interrogatory, the plaintiff can ask the court to issue an order compelling the defendant to show cause for why he did not appear at the interrogatory.⁷¹ If the defendant does not appear to show cause, the plaintiff can ask the court to issue a *capias* (essentially an action for contempt of court) to have the defendant arrested.⁷²

⁶⁶ 15 U.S.C. §§ 1671-1677 (2004). Funds deposited in the debtor's bank account may also be exempt if they are from social security or disability payments or even the debtor's wages. *See, e.g.*, VA CODE ANN. § 34-29 (2001); PUSTILNIK, *supra* note 55, at 316.7.

⁶⁷ *See, e.g.*, FLA. STAT. ANN. § 222.11 (West 2004); N.C. GEN. STAT. § 120-4.29 (exempting legislative retirement system from garnishment); N. C. GEN. STAT. § 135-9 (exempting retirement system for teachers and state employees); PA. CONS. STAT. §§8122-8127 (2007); S.C. CODE ANN. § 37-5-104; TEX. CIV. PRAC. & REM. CODE ANN. §63.004 (2006).

⁶⁸ Virginia protects the greater of seventy-five percent of the debtor's take home pay or forty times the federal minimum wage. *See* VA CODE ANN. § 34-29 (2001).

⁶⁹ *See* PUSTILNIK, *supra* note 55, at 296, at 306.

⁷⁰ VA CODE ANN. §8.01-506 (2001).

⁷¹ *See* VA CODE ANN. § 801-508 (2001)..

⁷²*Id.*

Virginia courts, and the courts of nearly every other state, rely on the plaintiff to tell the court when the defendant has paid.⁷³ However, the penalty for failing to report payment is often small. The penalty for failing to notify the Virginia courts is just \$50, and this penalty is imposed only if the debtor makes a written request and the creditor fails to act within ten days.⁷⁴ As a result, court records undercount the number of paid judgments.

Judgments that are not paid may remain in force indefinitely; the need to free the debtor from this cloud of liability is the primary justification for bankruptcy's "fresh start."⁷⁵ Every state places a statute of limitations on judgments;⁷⁶ Virginia general district court judgments remain effective for ten years.⁷⁷ Plaintiffs can, however, take steps to extend the life of their judgments.⁷⁸ Plaintiffs in nearly every other state can pursue their judgments indefinitely.⁷⁹

B. Implications: Choosing Bankruptcy and Choosing Suit

⁷³ In Virginia the plaintiff must notify the court to release the judgment within thirty days of payment. VA CODE ANN. § 8.01-454 (2001).

⁷⁴ *Id.*

⁷⁵ *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (Bankruptcy gives "the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.")

⁷⁶ See THOMAS D. CRANDALL, ET AL, THE LAW OF DEBTORS AND CREDITORS § 6.-226- 6-234 (2005).

⁷⁷ VA CODE ANN. § 16.1-69.55(B)(4) (2001).

⁷⁸ Virginia plaintiffs can bring a motion in general district court to extend the life of the judgment another ten years, VA CODE ANN. § 8.01-251(G) (2001), and can also docket an abstract of the judgment in circuit court and thereby extend the life of the judgment to twenty years. *Id. at* 8.01-251(G)

⁷⁹ See THOMAS D. CRANDALL, ET AL, THE LAW OF DEBTORS § 6-226-6-234 (2002). A few states do not allow plaintiffs to pursue judgments indefinitely. N.D. CENT. CODE § 28-20-35 (2002) (requiring the cancellation of all judgments or renewals after twenty years); OR. REV. STAT. § 18.360(1) (Supp. 2001) (limiting a judgment lien to ten years with one renewal permitted); WASH. REV. CODE ANN. §§ 4.56.210(1), (3), 6.17.020(3) (West 1989) (limiting a judgment lien to ten years with one renewal permitted).

Economists typically assume that consumers must choose between repaying their debts and filing for bankruptcy.⁸⁰ This focus on bankruptcy is understandable; data on bankrupt debtors is publicly available while data on those who default without filing is not. However, a recent working paper by Dawsey & Ausubel obtained proprietary data from a major credit card issuer and modeled the consumer's choice as between three options – repayment, bankruptcy and “informal bankruptcy” - simply refusing to pay.⁸¹ This working paper finds very interesting results. First, nearly half of the individuals in their sample who did not repay did not file for bankruptcy.⁸² Second, the prior literature may significantly understate state law's influence on the bankruptcy decision. In particular, consumers who live in states that do not allow garnishment are much less likely to file for bankruptcy.⁸³ Finally, prior studies significantly understate the rate of default and insolvency in African-American neighborhoods because debtors in these neighborhoods tend to choose informal bankruptcy rather than bankruptcy.⁸⁴

This Article serves as a complement to the paper by Dawsey & Ausubel. Dawsey & Ausubel analyze a sample of gold credit card accounts, and they estimate that the holders of these accounts have above average credit scores.⁸⁵ To test whether the bankruptcy statistics miss a substantial amount of insolvency among disadvantaged groups, however, we need a data set that includes these disadvantaged groups. Second, Dawsey & Ausubel focus solely on a failure to pay a credit card account,⁸⁶ and borrowers may choose to default on other obligations for strategic reasons. For example, the literature on credit

⁸⁰ See, e.g., Scott Fay, Erik Hurst & Michelle J. White, *The Household Bankruptcy Decision*, 92 AMER. ECON. REV. 706 (2002)

⁸¹ See Dawsey & Ausubel, *supra* note 4.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

reports suggests that defaults on medical obligations carry less of a penalty than defaults on financial obligations.⁸⁷

Unlike Dawsey & Ausubel, however, this Article focuses only on those consumers who are sued in state court. Our count of state civil actions undercounts those who choose informal bankruptcy because some consumers who choose informal bankruptcy are not sued. In addition, the consumers who choose informal bankruptcy and are sued may differ significantly from those who are not sued. This section models the consumer's and creditor's choices so we can predict the nature of these biases.

1 The Debtor's Choice to File for Bankruptcy

As noted above, Dawsey & Ausubel find that choice between formal and informal bankruptcy varies by state and by race. They do not explain why African-Americans are more likely to choose informal bankruptcy, though they hint that this may be due to a greater use of informal economic practices such as the payment of wages in cash and the use of check cashing institutions instead of bank accounts.⁸⁸ This section explores additional theories that may explain why some consumers choose informal bankruptcy instead of bankruptcy.

Consider three factors that are likely to affect the choice between bankruptcy and informal bankruptcy – the consumer's wealth and income, the stability of the consumer, and the amount and types of debt owed. Each of these factors suggests that we should find greater concentrations of middle class debtors in bankruptcy and greater concentrations of poor debtors in informal bankruptcy.

⁸⁷ See Credit Report Accuracy, *supra* note 7, at 312.

⁸⁸ See Dawsey & Ausubel, *supra* note 4.

Bankruptcy costs money and protects the consumer's assets and future income. Therefore, we may expect consumers with greater wealth or future income to be more likely to choose bankruptcy over informal bankruptcy. We also think of middle class debtors as more stable than the poor.⁸⁹ A consumer who changes jobs or residences frequently may hope that his creditors will be unable to find him and simply abandon their collection efforts. The consumer may also hope that the credit bureaus will miss the fact that the John Smith who lived on Oak Street and failed to pay his dentist bill is now the John Smith who lives on Elm Street. Credit bureaus employ various algorithms to identify consumers after they have moved, but some estimate that credit bureaus cannot adequately track address changes for close to half of lower-income Americans because these individuals do not use traditional forms of credit.⁹⁰ If the consumer lacks a bank account and either frequently changes jobs or is paid in cash, his creditors can't use garnishment. Similarly, consumers who do not own a home will have an easier time hiding their assets than those who do. Finally, middle class consumers may be less likely to face future financial problems than the poor, and thus the loss of easy access to another bankruptcy discharge for eight years is less painful.

The amount and type of debt that the consumer owes should also play a role in his choice. The consumer should not file for bankruptcy if the amount he owes is less than the filing fee and attorneys fees. In addition, if the consumer owes just a small amount of debt, the creditor is more likely to abandon collection efforts if it cannot locate the debtor. Prior scholarship suggests that a default on a debt owed to a financial institution

⁸⁹ See SULLIVAN, WARREN & WESTBROOK, *supra* note 18, at 238 (“Stability is the essence of the middle class.”)

⁹⁰ See Todd B. Hilsee, et al, *Hurricanes, Mobility, and Due Process: the “Desire to Inform” Requirement for Effective Class Action Notice Is Highlighted by Katrina*, 80 TUL. L. REV. 1771, 1792-93 (2006).

causes greater damage to a consumer's credit score than a default on a medical bill.⁹¹ One would therefore expect consumers who are defaulting on medical debts to be more likely to choose informal bankruptcy because the relative reputational cost of bankruptcy is greater. The consumer may even hope that a default on non-financial debt will not affect his credit rating at all. Many small vendors and service providers will not regularly report payment histories directly to the credit bureaus;⁹² the credit bureaus will only learn of the default if the creditor assigns the account to a collection agency or obtains a judgment. Moreover, these creditors may not know the consumer's social security number, and the credit bureaus may have difficulty identifying the consumer if he has moved.

We can find some evidence that bankrupt debtors and civil defendants were significantly different as far back as the late 1960s. David Caplovitz studied a population of consumers who were sued in state court in 1967 and, based on a consideration of income, education, age and race, he described the individuals he studied as "marginal poor."⁹³ Stanley & Girth studied a sample of consumers who filed for bankruptcy in 1964, and based on variables similar to those used by David Caplovitz, they described their consumers as "a picture neither of poverty nor instability".⁹⁴ Unfortunately, the data collected by Stanley & Girth are not directly comparable to the data collected by Caplovitz, and thus one cannot say for certain that the two groups were very different at the time.⁹⁵

⁹¹ See Credit Report Accurate, *supra* note 7, at 312.

⁹² See Consumer Data, *supra* note 7, at 50.

⁹³ See CAPLOVITZ, *supra* note 17, at 325-26.

⁹⁴ See STANLEY & GIRTH, *supra* note 16, at 43.

⁹⁵ For example, Caplovitz tells us the percentage of defaulting debtors who graduated from high school, CAPLOVITZ *supra* note 17, at 19, but STANLEY & GIRTH present data on education in a manner that does not allow the computation of this statistic. Stanley & Girth, *supra* note 94, at 43. In addition, the two studies

The above analysis also fits well with the finding of Sullivan, Warren & Westbrook that most bankrupt families can be fairly described as “middle class.”⁹⁶ Though bankrupt debtors had lower incomes than the general population, they had roughly comparable levels of occupational prestige,⁹⁷ years of education⁹⁸ and homeownership rates.⁹⁹ Whites were slightly overrepresented in their sample of bankrupt debtors, though blacks were overrepresented as well; all other minority groups were underrepresented.¹⁰⁰ They also find that credit cards and other obligations to financial institutions comprise a very large portion of the amount owed by the bankrupt debtors.¹⁰¹

The above analysis is, however, possibly inconsistent with Sullivan, Warren & Westbrook’s own interpretation of their results. They view fact that the middle class dominates bankruptcy as evidence that the middle class has access to enough credit to put them at financial risk. Curiously, they do not explain why the poor are not also found in bankruptcy, and imply that disadvantaged groups may not need bankruptcy because they lack access to enough credit to put them at risk.¹⁰² Perhaps their argument helps explain why there are so many middle class consumers in bankruptcy, but it cannot explain why the poor do not file for bankruptcy. The results of Dawsey & Ausubel and the results of

focused on different cities with only some overlap, and any difference may be due to geography rather than the legal process.

⁹⁶ See *supra* note 18, and the accompanying text.

⁹⁷ See SULLIVAN, WARREN & WESTBROOK, *supra* note 14, at 91 (“The debtors in bankruptcy work alongside other Americans, in roughly the same industries and jobs, and with nearly the same general occupational prestige . . .”)

⁹⁸ See SULLIVAN, WARREN & WESTBROOK, *supra* note 18, at 53.

⁹⁹ See *supra* note 18, and accompanying text.

¹⁰⁰ See SULLIVAN, WARREN & WESTBROOK, *supra* note 18, at 46.

¹⁰¹ *Id.* at 131 (finding that credit card debt was typically one half of all unsecured debt).

¹⁰² See, e.g., SULLIVAN, WARREN & WESTBROOK, *supra* note 96, at 42 (“In addition, redlining and other restrictive credit practices have limited the amount of financial risk that minorities have been permitted to take. . . . As a result, minority group members have had less access to credit, lower levels of debt, and hence less need for bankruptcy.”)

this Article suggest that millions of individuals outside the middle class do obtain enough decide to default; they just don't file for bankruptcy.

The above framework may also help us explain one other apparent inconsistency between the work of Sullivan, Warren & Westbrook and that of Dawsey & Ausubel. Recall that Sullivan, Warren & Westbrook's find that only about one-third of bankrupt debtors had been sued in state court,¹⁰³ but Dawsey & Ausubel find that state garnishment law plays a significant role in determining whether the debtor will file for bankruptcy.¹⁰⁴ These findings are not, of course, necessarily inconsistent as we can interpret Dawsey & Ausubel's finding to mean that the *threat* of garnishment drives individuals into bankruptcy. Consumers who file for bankruptcy may not wait until they are actually sued; they may file for bankruptcy once the threat of suit is credible. There is some support for this theory in the literature. For example, in 1971 Stanley & Girth found that just 18% of bankrupt debtors cited actual litigation as an immediate cause of bankruptcy but that 43% cited threatened litigation.¹⁰⁵

2 The Creditor's Choice to Sue

The above analysis suggests that many defaulting debtors who choose informal bankruptcy are effectively judgment proof, and we must explain why so many creditors bother to sue. One obvious theory is that not all consumers will be completely judgment proof, and the creditor may hope to recover some money through garnishment or some other means. Even if the creditor will not collect immediately, it may reason that a judgment will serve as an option that will payoff if the consumer's condition improves before the statute of limitations runs out. This option may yield a significant return if the

¹⁰³ See SULLIVAN, WARREN & WESTBROOK, *supra* note 14, at 305.

¹⁰⁴ See Dawsey & Ausubel, *supra* note 4.

¹⁰⁵ See Stanley & Girth, *supra* note 16, at 48.

creditor is owed a large amount. This option will, of course, come at the expense of the debtor. However, the value of this option may not exceed the costs of filing for bankruptcy, and the debtor may lack the liquidity needed to settle with the creditor by paying the value of the option at the time of suit.

This theory yields testable implications. First, the rate of satisfaction of judgments should be rather low in Virginia. A creditor will sue whenever the expected return exceeds the cost of filing. In Virginia, the filing fee is just \$29¹⁰⁶ and the sheriff will serve process for an additional \$12.¹⁰⁷ Second, the rate of satisfaction should vary with the cost of filing. Because we have data from just one state, we cannot test this hypothesis. Third, a sample of civil defendants is less likely to be judgment proof than the larger population of consumers who chose informal bankruptcy. Unfortunately, we lack the data necessary to test this theory as well.

A creditor may decide to sue even if it knows that its debtor is judgment proof and will always be judgment proof. First, some creditors may believe, perhaps erroneously, that they need a judgment for tax or regulatory purposes. The Internal Revenue Service does not require that the creditor sue to demonstrate that a debt is worthless, but some may believe that they need to sue. Some have alleged that federal Medicare related laws encourage hospitals to use aggressive debt collection techniques, but the federal government denies this.¹⁰⁸ Our data does allow us to test whether medical creditors behave differently than other creditors. We do not find strong evidence that they do.

¹⁰⁶ See *supra* notes 45, and accompanying text.

¹⁰⁷ VA. CODE. ANN. § 17.1-272.

¹⁰⁸ See Melissa B. Jacoby & Elizabeth Warren, *Beyond Hospital Misbehavior: An Alternative Account of Medical-Related Financial Distress*, 100 NW. U. L. REV. 535, 568 (2006).

Even absent perceived regulatory requirements, a creditor may still decide to sue a judgment proof consumer because the judgment itself will impose costs on the consumer by damaging the consumer's credit rating. Note that a damaged credit rating does more than merely raise the consumer's cost of credit. A damaged credit score can make it difficult to rent an apartment, find a job or even purchase automobile insurance.¹⁰⁹ Thus, creditors may routinely sue their debtors to maintain a reputation as a "tough" debt-collector and discourage other debtors from defaulting. The filing of the suit may also help convince the current defendant to pay. As noted above, credit reports typically do not record the filing of the lawsuit, but they do record judgments. Therefore, a civil filing serves as a credible threat to inflict harm on the defendant and may induce the defendant to pay.

The threat-based theories of suit yield empirical predictions, and we test some of these predictions below. Again, these theories suggest that many judgments will remain unpaid. A creditor who wishes to gain a reputation for tough behavior must sue when recovery is very unlikely. If the civil filing serves as a threat, then actual judgments would represent cases where the threat did not successfully induce payment.

The theories also suggest that different creditors should exhibit different behavior. Many large financial creditors regularly report their debtor's payment history to the credit bureaus, and so they do not need to file suit to credibly threaten to damage the debtor's reputation. We should therefore observe fewer suits by these debtors as they would primarily sue when the planned to enforce their judgment. We cannot test this theory using our data, but we can test two related theories. If non-financial creditors file suit in hope of inducing a settlement prior to judgment, we should observe fewer dismissals of

¹⁰⁹ See Consumer Data, et al, *supra* note 7, at [___].

filings by financial institutions. In addition, financial institutions should be more likely to take steps to enforce judgments that they do obtain.

In evaluating the threat value of a judgment, one must remember that even the small creditor does not need to sue the consumer to record the default in the consumer's credit report. The assignment of the debt to a collection agency serves the same purpose as these collection agents report the default to the credit bureau.¹¹⁰ This suggests that the use of civil suits should be highly dependent on the cost of suit and state regulations that restrict the use of collection agents. I hope to test this theory in a future draft. For now, I simply show that the rate of civil litigation varies tremendously by state.

II. The Extent of Civil Litigation in the United States

Creditors cannot sue bankrupt debtors,¹¹¹ and so this section uses the rate of civil litigation as a proxy for the number of debtors who choose informal bankruptcy. Section IV shows that in Virginia the overwhelming majority of civil suits are consumer debt collection, and there is some evidence that suggests that consumer debt collection plays an important role in the civil dockets of other states.¹¹² Of course, consumer debt collection will not dominate the docket in every state, and the civil litigation statistics will also not record those consumers who default but are not sued. Despite these limitations, the civil filing statistics provide geographic and temporal variation that is unavailable in any other publicly available dataset besides the bankruptcy statistics.

The civil litigation statistics, taken from the National Center for State Courts, establish three clear facts. First, there is a tremendous amount of civil litigation, suggesting that the bankruptcy statistics may miss a great deal of default and insolvency.

¹¹⁰ See Consumer Data, *supra* note 7, at 68-70.

¹¹¹ 11 U.S.C. § 362.

¹¹² See *infra* notes 141-142, and the accompanying text.

Second, the rate of civil litigation varies widely from state to state, and Virginia has one of the highest rates in the country. Third, the civil litigation rate of every state has remained dramatically more stable than the non-business bankruptcy filing rate.

A. Prior Literature on Civil Filing Rates

Two recent articles by scholars at the Federal Reserve provide data on evidence of judgments in credit records. The first article uses a 1999 sample of credit reports and finds that 12.3% of the individuals had a “public record” in their file.¹¹³ The second article uses a 2003 sample and finds that 12.2% of the individuals had a public record in their file.¹¹⁴ These public records include bankruptcy filings (22.7% of the 1999 public records), liens (34.1%), judgments (34.1%) and lawsuits.¹¹⁵ Remember that these are not yearly figures; bankruptcy may remain in the credit reports for ten years while judgments can remain for seven years or until their statute of limitations expires.¹¹⁶ About 37% of those consumers with public records in their file have more than one.¹¹⁷ While the credit reports reveal a large number of judgments, very few (15.8%) of these judgments appear to have been paid.¹¹⁸ Of those that have been not satisfied, the median amount outstanding is somewhere between \$500 and \$1,000.¹¹⁹ Just 3.1% are for more than \$10,000.¹²⁰ Finally, they classify the creditors who obtained the judgments: 17.7%

¹¹³ See Consumer Data, *supra* note 7, at 51.

¹¹⁴ See Credit Report Accuracy, *supra* note 7, at 303.

¹¹⁵ See Consumer Data, *supra* note 1, at 67. There are very few lawsuits in the sample because credit reporting agencies typically wait for a judgment. Avery, *et al*, do not provide a similar breakdown for 2003, but the bankruptcy records should have comprised a larger portion of the total. There were approximately 10.1 million bankruptcy filings in the ten years prior to 1999 and 12.6 million bankruptcy filings in the ten years prior to 2003. American Bankruptcy Institute, abiworld.org (last visited Jan. 20, 2007).

¹¹⁶ 15 U.S.C. § 1681c (2000).

¹¹⁷ See Consumer Data, *supra* note 7, at 51.

¹¹⁸ *Id.* at 67.

¹¹⁹ *Id.*

¹²⁰ *Id.*

medical, 4.5% utility, 3.9% government, 5.7% collections agency, 25.4% creditor and 42.9% other.¹²¹

Their results are largely consistent with the analysis of Section I, but many questions are left unanswered. They find evidence of a large number of unpaid judgments, suggesting that a great many consumers default without filing for bankruptcy. However, we do not know how often multiple judgments are entered against the same individual,¹²² and so we do not know how many individuals are sued. We also do not know how many judgment debtors later file for bankruptcy. The authors find a very large number of unpaid judgments, but we don't know what steps creditors take to enforce these judgments. They find that most judgments have rather small balances remaining, but we do not know the original amount of the judgments. Perhaps more importantly, these statistics do not tell us why some defaulting debtors file for bankruptcy and others do not. Finally, their studies do not tell us how the judgments are distributed across states or across time.

Though there are no easily accessible statistics on debt collection litigation, there are data on the amount of civil litigation across states and across times. Unfortunately, these statistics are not found in most of the prior empirical literature on civil litigation. Most of the empirical articles examining civil litigation in state courts have little relevance to consumer insolvency because they focus on courts of “general jurisdiction.”¹²³ Despite the label, many of these courts lack jurisdiction to hear most

¹²¹ *Id.* Creditor “[i]ncludes large retailers, banking institutions, and finance companies.” Other “[i]ncludes small retailers, law firms, individuals, educational institutions.”

¹²² They do report how frequently individuals have more than one “public record” in their file, *id.*, but they do not identify judgments separately from other public records.

¹²³ See generally, Brian J. Ostrom, Shauna M. Strickland, and Paula L. Hannaford-Agor, *Examining Trial Trends in State Courts: 1976-2002*, 1 J. EMP. LEGAL STUD. 755 (2004); WAYNE M. MCINTOSH, THE

consumer debt collection cases because they cannot hear claims less than a few thousand dollars.¹²⁴ In addition, most states provide their trial courts with overlapping jurisdiction, and their courts of limited jurisdiction are authorized to hear claims of up to \$10,000 or more.¹²⁵ As a result, most unsecured consumer debts fit comfortably within the jurisdiction of the limited jurisdiction courts,¹²⁶ and the overwhelming majority of suits

APPEAL OF CIVIL LAW: A POLITICAL-ECONOMIC ANALYSIS OF LITIGATION (1990); FRANCIS W. LAURENT, THE BUSINESS OF A TRIAL COURT: 100 YEARS OF CASES (1959); SELVI & PATRICIA EBNER, RAND INSTITUTE FOR CIVIL JUSTICE, MANAGING THE UNMANAGEABLE: A HISTORY OF CIVIL DELAY IN LOS ANGELES SUPERIOR COURT 44 (1984); CAROL J. DEFRANCES & STEVEN K. SMITH, US. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, CIVIL JUSTICE SURVEY OF STATE COURTS (1992); CAROL J. DEFRANCES & STEVEN K. SMITH, US. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CONTRACT CASES IN LARGE COUNTIES: CIVIL JUSTICE SURVEY OF STATE COURTS (1996); Theodore Eisenberg, John Goerdt, Brian Ostrom & David Rottman, *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 SEATTLE U. L. REV. 433 (1995-1996); Lawrence M. Friedman & Robert V. Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 LAW & SOC'Y REV. 323 (1984) Marc Galanter, *Contract in Court; Or Almost Everything You May or May Not Want to Know About Contract Litigation*, 2001 WIS. L. REV. 577 (2001).

¹²⁴ See, National Center for State Courts, Jurisdiction and State Court Reporting Practices 12-17 (2003), available at http://www.ncsconline.org/D_Research/csp/2003_Files/2003_SCCS_Figures.pdf. A number of articles focus on courts at the other end of the spectrum, small claims courts. For a good, but dated, overview of this literature, see Barbara Yngvesson and Patricia Hennessey, *Small Claims, Complex Disputes: A Review of the Small Claims Literature*, 9 LAW & SOC. REV. 219 (1975). For useful articles published more recently, see JOHN A. GOERDT, SMALL CLAIMS AND TRAFFIC COURTS: CASE MANAGEMENT PROCEDURES, CASE CHARACTERISTICS, AND OUTCOMES IN 12 URBAN JURISDICTIONS, National Center for State Courts (1992); JOHN C. RUHNKA AND STEVEN WELLER, SMALL CLAIMS COURTS: A NATIONAL EXAMINATION (1978); *The Iowa Small Claims Court: An Empirical Analysis*, 75 IOWA L. REV. 433 (1989-90); Thomas L. Eovaldi & Peter R. Meyers, *The Pro Se Claims Court in Chicago: Justice for the "Little Guy"?* 72 NW. U. L. REV. 947 (1977-78). Unfortunately, most of these articles focus on just one state and do not track changes in the use of these courts over time. One recent exception is a series of articles by the Boston Globe. Walter V. Robinson & Beth Healy, *Regulators, Policy Makers Seldom Intervene*, BOSTON GLOBE, Aug. 2, 2006, at A1. This series purports to find a "tidal wave" of lawsuits, *id.* at A1, but there data tell a very different story. They report a twelve percent increase in the number of small claims in Massachusetts "over the last decade". *Id.* at [__]. Assuming that they are measuring the change in civil litigation from 1995 to 2005, this represents an increase in the rate of civil litigation (small claims per thousand population) of about 7.5%, or just 0.7% a year. By contrast, the number of non-business bankruptcies filed in Massachusetts per thousand population increased by 83% during this same time period. The population of Massachusetts was approximately 6,141,000 in 1995 and 6,399,000 in 2005. See Resident Population--States: 1980 to 2004 http://www.census.gov/compendia/statab/population/estimates_and_projectionsstates_metropolitan_areas_cities/. The total number of non-business bankruptcies grew from 13,796 in 1995 to 26,308 in 2005. American Bankruptcy Institute Annual U.S. Filings, http://www.abiworld.org/AM/Template.cfm?Section=Annual_U_S_Filings&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=62&ContentID=34621 (last visited Jan. 22, 2007).

¹²⁵ See, Jurisdiction and State Court Reporting Practices available at http://www.ncsconline.org/D_Research/csp/2003_Files/2003_SCCS_Figures.pdf

¹²⁶ As noted above, the credit reports suggest that just 3.1% of outstanding judgments are greater than \$10,000, though more of the initial judgments may have exceeded this threshold. See *supra* note 120, and accompanying text.

are filed in these courts when they are available. For example, over ninety percent of civil filings in Idaho, Maryland, Michigan, Massachusetts, Nebraska and Virginia are made in courts of limited jurisdiction, and over seventy percent of civil suits are filed in courts of limited jurisdiction in at least thirteen other states.¹²⁷ Thus the exclusion of the courts of limited jurisdiction renders most prior studies inapplicable to the questions of how much consumer debt collection litigation exists and how it has changed over time.¹²⁸

Three prior articles examine changes in the amount of civil litigation more generally. In 1984 Robert Kagan claimed to find a decline in debt collection litigation from the end of World War II until the early 1980s.¹²⁹ Kagan's result is consistent with one of the major results of this article (the lack of a sharp increase in civil litigation to match the rise in the bankruptcy filing rate). However, most of the data he used to show a decline in debt collection litigation was drawn from courts of general jurisdiction,¹³⁰ the courts that lacked jurisdiction to hear most consumer debt collection cases. He does present some data from municipal and small claims courts in California, but this data shows an increase in the civil filing rate of approximately seventy-five percent over the

¹²⁷ National Center for State Courts, Examining the Work of State Courts at 23. *available at* http://www.ncsconline.org/D_Research/csp/2005_files/4-EWCivil_final_1.pdf. The thirteen states are: Georgia, Rhode Island, New York, Delaware, South Carolina, Colorado, Nevada, Arizona, Alabama, New Hampshire, Alaska, Pennsylvania, and Texas.

¹²⁸In 1983 Professor Galanter tried to correct for the omission of courts of limited jurisdiction, but his estimates were likely wrong by an order of magnitude. See Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. Rev. 4 (1983-1984) He estimated that there were about four hundred forty civil filings per hundred thousand population. *Id.* at 55. The National Center for State Courts did report the amount of civil filings in 1984, however, and the *least* litigious state in the nation had a civil filing rate that was ten times greater (Hawaii had a civil filing rate of 4,381 per hundred thousand in 1984) and Virginia had a civil litigation rate of 14,265 per hundred thousand in 1984. See National Center for State Courts.

¹²⁹ Robert A. Kagan, *The Routinization of Debt Collection: An Essay on Social Change and Conflict in the Courts*, 18 LAW & SOC. REV. 323, 331 (1984).

¹³⁰ *Id.* at 332, 334.

fifteen year period from 1965 to 1980.¹³¹ Second, the non-business bankruptcy filing rate rose by more than three hundred percent between 1984 and 2004,¹³² suggesting that there have been radical changes in debt collection since the publication of his paper. Third, one of the major explanations he offers for the decline in litigation contrasts sharply with much of the current bankruptcy scholarship. He argues that a major cause of the decline in civil litigation is the increase in “systematic stabilization” that has made consumers less vulnerable to financial shocks.¹³³ Many modern bankruptcy scholars have argued that the recent rise in the bankruptcy filing rate proves that consumers are *more* vulnerable to financial shocks.¹³⁴

Writing a little over ten years ago, Ostrom and Marvell examined courts of limited jurisdiction and found a decline in civil filings from 1992 to 1994.¹³⁵ Though this paper also supports one of the findings of this article, it is still worth revisiting the data. First, the number of bankruptcy filings doubled between 1994 and 2004, suggesting that the collection process may have changed substantially.¹³⁶ Second, their conclusion is

¹³¹ *Id.* at 336, Table 4 (showing an increase in the combined debt collection litigation rate from 13.7 per thousand population in 1965 to 24 per thousand in 1980).

¹³² I use 2004 as a basis for comparison because the 2005 and 2006 bankruptcy statistics were likely affected by the large number of individuals who filed in anticipation of the recent bankruptcy reforms. There were 284,517 non-business bankruptcies in 1984 and 1,563,145 in 2004. American Bankruptcy Institute U.S. Bankruptcy Filings 1980-2004, <http://www.abiworld.org/AM/AMTemplate.cfm?Section=Home&CONTENTID=35631&TEMPLATE=/CM/ContentDisplay.cfm> (last visited Jan. 22, 2007). The population of the United States increased from 235,825,000 in 1984 to 293,657,000 in 2004. Statistical Abstract, http://www.census.gov/compendia/statab/population/estimates_and_projections_by_age_sex_raceethnicity/ (last visited Jan. 22, 2007).

¹³³ See Kagan, *supra* note 129, at 355-57. He also argues that there has been a “legal rationalization” of credit transactions as institutional lenders are more willing to absorb bad debt losses rather than litigate, and consumers are more willing to file for bankruptcy to avoid collection efforts. Finally, he argues that legal changes, such as the Fair Debt Collections Practices Act, have raised the cost of litigation for creditors.

¹³⁴ See *e.g.*, Warren, *supra* note 1.

¹³⁵ Brian J. Ostrom & Thomas B. Marvell, The collapse in Contract Case Filings Since 1991, 17 JUST. SYS. J. 221 (1994-95).

¹³⁶ See American Bankruptcy Institute U.S. Bankruptcy Filings 1980-2004, <http://www.abiworld.org/AM/AMTemplate.cfm?Section=Home&CONTENTID=35631&TEMPLATE=/CM/ContentDisplay.cfm> (last visited Jan. 22, 2007).

based on just three years of data. Finally, they attribute the decline in filings to the recession of the early 1990s.¹³⁷ If they identified the actual cause of the stagnant civil filing rate, the amount of litigation should have expanded during the economic prosperity of the late 1990s. As shown below, it did not.

In a recent article I found a similar stability or an actual decline in the rate of garnishment in two jurisdictions, the Commonwealth of Virginia and Cook County, Illinois.¹³⁸ Since the publication of my article, the Virginia courts and the Administrative Office of the U.S. Courts have released data that reflects the change in civil litigation and bankruptcy since the implementation of the latest bankruptcy reforms. The Bankruptcy Reform Act of 2005 went into effect in October of 2005 and had an immediate and dramatic effect on the number of bankruptcy filings. The number of bankruptcy filings dropped from 645,663 in the fourth quarter of 2005 to just 112,685 in the first quarter of 2006; the number of filings in the first half of 2006 was just twenty-seven percent of the number of filings in the first half of 2005.¹³⁹

One might expect these reforms to increase the amount of civil litigation. To the extent that financially distressed consumers cannot file for bankruptcy, they remain vulnerable to suit. Figure II.6 presents the garnishment and civil filing rate for Virginia general district courts for each year since 1996; 2006 presents an annualized value based on the first three quarters.¹⁴⁰ The amount of civil litigation actually declined in 2006. Of course, this is just one observation based on a partial year, and the decline appears to be a continuation of a general downward trend in civil litigation in Virginia. Moreover, the

¹³⁷ See Ostrom & Marvell, *supra* note 135, at 225.

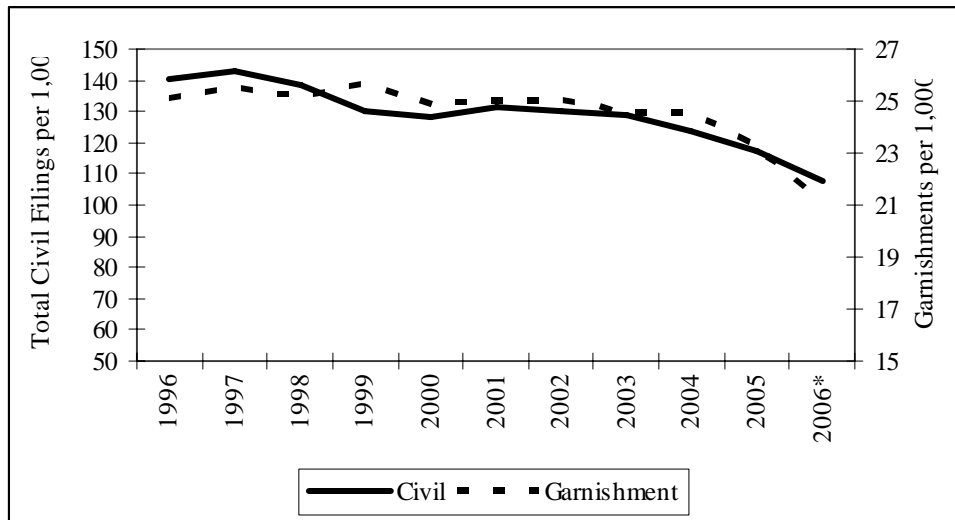
¹³⁸ See Hynes, *supra* note 22.

¹³⁹ abiworld.org.

¹⁴⁰ Civil filing statistics are taken from <http://www.courts.state.va.us/>. Population statistics are taken from the statistical abstract.

demand for bankruptcy in 2006 may have been artificially low because so many debtors rushed to beat the filing deadline in 2005. We will have to wait to determine if the bankruptcy reforms had any meaningful effect on the amount of civil litigation.

Figure II.1: Total Civil Filing Rate and Garnishment Rate in Virginia



My prior article focused on garnishment on the theory that this remedy was most closely related to consumer debt collection. Section IV suggests that, at least in Virginia, the overwhelming majority of all civil filings are consumer debt collection. We do not know if this is true elsewhere, but there are a number of indications that consumer debt collection plays an important role in the civil docket of many states. First, the credit report data discussed above suggests that Americans have millions of unpaid judgments entered against them.¹⁴¹ Second, others have noted that debt collection plays an important or even dominant role in the civil dockets of specific states.¹⁴² Third, the vast

¹⁴¹ See *supra* notes 113-115, and accompanying text.

¹⁴² Walter V. Robinson & Beth Healy, *Regulators, Policy Makers Seldom Intervene*, BOSTON GLOBE, Aug. 2, 2006, at A1.

majority of civil filings tend to be made in courts that can only hear claims of less than a few thousand dollars when these courts are available.¹⁴³

B. The National Center for State Court Data

The National Center for State Courts (NCSC) published data on the amount of civil litigation in both general and limited jurisdiction courts from 1976 to 1981 and from 1984 to 2004.¹⁴⁴ The data is not complete in that many states are missing data for some or all of their courts in some years, and the NCSC published no data for 1982 and 1983. Though the NCSC exercises great care in collecting this data, there are several problems that limit the comparability of the data, particularly across states. For example, a few states count subsequent actions such as garnishment in their totals while most states do not, and a few states exclude small claims from their totals while most do not.¹⁴⁵ Comparisons of the same state across time present fewer problems, but they still exist. For example, in some years a small number of courts within a state will fail to report their totals; because the NCSC does not report which courts failed to report, there is no way to estimate the importance of these omissions. Most seriously, the NCSC significantly changed its counting methods in 2003, and the 2003 and 2004 data are not comparable to prior years.¹⁴⁶

Even allowing for these difficulties, the NCSC data seem to demonstrate three facts about civil litigation in the United States. First, civil courts are extremely active. The median civil filing rate is roughly five filings for every hundred individuals, and

¹⁴³ See *supra* notes 127-128, and accompanying text.

¹⁴⁴ NATIONAL CENTER FOR STATE COURTS, STATE CASELOAD STATISTICS: ANNUAL REPORT, 1976-2004.

¹⁴⁵ For a summary of these counting differences, see <http://www.ncsconline.org10-Research/csp/2003-Files/2003-SCCS-Figures.pdf>.

¹⁴⁶ They may have just stopped including domestic relations cases in the total. If so, I should be able to correct for this.

some states have rates that are roughly three times this amount.¹⁴⁷ Second, the rate of civil litigation varies dramatically across states. The reported civil litigation rate of the most litigious state (Maryland) is roughly seven times as high as that of the least litigious state (Hawaii), and Virginia has one of the highest rates of litigation.¹⁴⁸ Third, the civil filing rate of most states has remained remarkably stable since the mid-1970s when compared to the growth in the bankruptcy filing rate.¹⁴⁹

B. Differences in Civil Filing Rates Across States

Table II.2 presents civil filings rate (exclusive of domestic relations) per hundred thousand population for each state and reveals an astonishing amount of civil litigation. Even median states such as Idaho and Kentucky receive more than one civil filing for every twenty individuals each year, and the highly litigious states, such as Maryland and Virginia, receive more than one filing for every eight residents each year.

Table II.2: Civil and Non-Business Bankruptcy Filings per 100,000 in 2004¹⁵⁰

	Civil	Bankruptcy		Civil	Bankruptcy
Maryland	17,647	519	Kentucky	5,236	666
District of Columbia	14,602	344	Nebraska	5,134	499
Virginia	13,376	525	Iowa	5,097	429
New Jersey	9,676	466	Arizona	4,949	520

¹⁴⁷ See *infra* Table II.2.

¹⁴⁸ See *infra* Table II.2.

¹⁴⁹ See *infra* Table II.3.

¹⁵⁰ The civil filing statistics are taken from the National Center for State Courts. http://www.ncsconline.org/D_Research/csp/CSP_Main_Page.html . Mississippi, Oklahoma, and Wyoming did not report civil data to the National Center for State Courts in 2004. This table also excludes Oregon, Maine and Tennessee because the National Center for State Courts omits data for courts of limited jurisdiction from these states. The bankruptcy statistics are taken from the American Bankruptcy Institute. American Bankruptcy Institute Filings by State, http://www.abiworld.org/AM/Template.cfm?Section=Filings_by_State&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=61&ContentID=34624 (last visited Jan. 23, 2007). Population statistics are taken from the Statistical Abstract of the United States. Statistical Abstract, http://www.census.gov/compendia/statab/population/estimates_and_projectionsstates_metropolitan_areas_cities/ (last visited Jan. 23, 2007).

Georgia	8,605	836	Rhode Island	4,888	378
New York	8,353	394	Arkansas	4,808	860
Indiana	7,607	860	Missouri	4,627	642
Kansas	7,433	584	Wisconsin	4,514	482
Delaware	7,350	402	Illinois	4,418	621
Michigan	7,207	628	Alabama	4,391	914
Ohio	7,148	771	West Virginia	4,354	621
South Carolina	7,036	359	North Dakota	4,226	346
Louisiana	7,021	646	New Hampshire	4,164	343
South Dakota	6,892	350	Alaska	3,954	218
Colorado	6,841	587	New Mexico	3,858	456
Connecticut	6,589	322	Washington	3,848	600
Nevada	6,319	690	Pennsylvania	3,411	468
North Carolina	6,247	416	Texas	3,250	397
Idaho	5,954	653	Vermont	3,177	259
Florida	5,863	476	California	2,888	329
Montana	5,828	451	Minnesota	2,627	240
Utah	5,576	825	Hawaii	2,127	323
Massachusetts	5,504	283			

Table II.2 also reveals a tremendous variance in civil filing rates across states. Even allowing for substantial differences in the method used to count filings, the extremely large variance suggests that some states have dramatically higher filing rates than others. Significantly, Virginia has a rate that is more than two and a half times that of the median state, and only part of this difference is likely due to its method of counting filings. Section IV suggests that after adjusting the Virginia filing rate to remove subsequent filings such as garnishment from the total, Virginia's filing rate would still be about 10,000 per hundred thousand.¹⁵¹ This is still well above the rate of nearly every other state. One must remember the fact that Virginia is an outlier in interpreting the

¹⁵¹ See *infra* notes 163-166, Table IV.1 and accompanying text.

findings of Section IV.¹⁵² An explanation for the difference in the civil filing rate across the various states is left to future research.¹⁵³

Table II.2 also reveals that the civil filing rate and the non-business bankruptcy filing rate of each state are only weakly correlated (0.12). However, the National Center casts some doubt on the litigation statistics from the three most litigious states,¹⁵⁴ and if one excludes these states the correlation between civil litigation and bankruptcy improves to 0.32. It is not clear that we should expect a higher correlation between civil litigation and bankruptcy across states. Though the civil litigation rate may serve as a proxy for the rate of default and the credibility of a creditor's threat to sue, a large number of bankruptcy filings will mean that a large number of defaulting consumers cannot be sued. Second, states employ different methodologies when counting the number of civil filings.¹⁵⁵ Third, at least some civil litigation has nothing to do with consumer financial distress. Finally, and perhaps most significantly, creditors can switch to other collection methods if a state makes its litigation process too expensive or ineffective.

C. The Relative Stability in Civil Filing Rates Over Time

¹⁵² These statistics also suggest that we may wish to revisit Sullivan, Warren & Westbrook's finding that few bankrupt debtors have been subject to civil litigation. See SULLIVAN, WARREN, & WESTBROOK, *supra* note 14, at 305 (finding that only one-third of debtors had a lawsuit filed against them prior to bankruptcy and only one in ten had been subject to garnishment or another effort to enforce a judgment.") They based this observation on a study of bankrupt debtors in California, Illinois, Pennsylvania, Tennessee and Texas, *Id.* at 18, and Table III.2 reveals that each of these jurisdictions has below-average litigation rates.

¹⁵³ As noted in Section I, we should test whether this variation is correlated with the cost of filing suit and the availability of remedies.

¹⁵⁴ See Examining the Work of State Courts, *supra* note 127, at 22 ("Maryland reports an unusually high number of landlord/tenant cases that largely originate from the city of Baltimore. Virginia . . . counts every civil petition and subsequent action as a separate filing . . . The District of Columbia's small resident population . . . fails to account for all of the out-of-District residents from Virginia and Maryland who are often embroiled in civil litigation there.") One might argue, however, that these reasons are insufficient to exclude these states. The landlord/tenant disputes of Baltimore may be unusually common, but they do exist. This article demonstrates that Virginia's civil litigation docket is extremely active even after one removes the subsequent filings. If it is true that the District of Columbia's civil litigation rate is overestimated due to the presence of residents of Virginia and Maryland, this suggests that the litigation rate of these two states (the two most litigious) are *underestimated*.

¹⁵⁵ See *supra* note 145, and accompanying text.

Table II.3 presents the rate of change in the civil and bankruptcy filing rates for every state for which the National Center for State Courts (NCSC) provides data in 1980, 1990 and 2002. In contrast to Table II.2, Table II.3 includes domestic relations cases.¹⁵⁶ The primary lesson of Table II.3 is that the civil filing rate has been markedly more stable than the non-business bankruptcy filing rate. The median civil filing rate rose just 24% between 1980 and 2002, and the average civil filing rate (weighted by population) rose by just 12%. In contrast, the median bankruptcy filing rate in these states rose by 362% and the weighted average rose by 276%.

Table II.3: Percent Change in Civil and Non-Business Bankruptcy Filing Rates

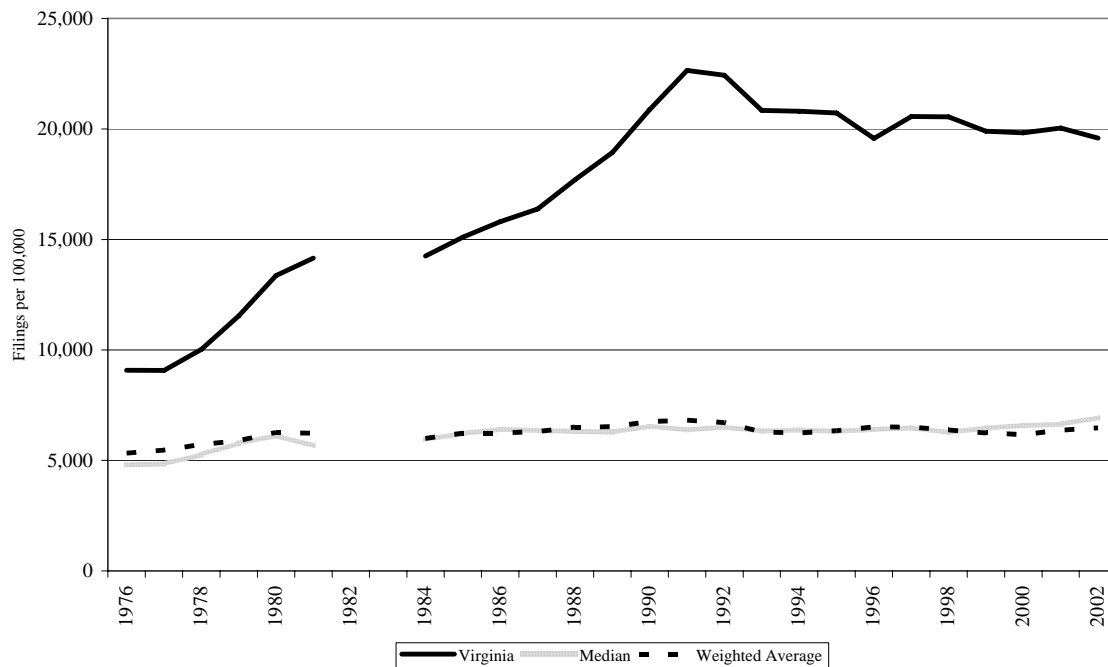
	1980 to 2002		1990 to 2002			1990 to 2002		1990 to 2002	
	Civil	Bankruptcy	Civil	Bankruptcy		Civil	Bankruptcy	Civil	Bankruptcy
AK	-3%	302%	-1%	19%	MN	-8%	269%	-10%	16%
AZ	12%	349%	-11%	23%	MO	21%	356%	5%	126%
CA	-33%	148%	-26%	23%	NH	-30%	386%	-45%	61%
CO	29%	174%	26%	-2%	NC	17%	272%	-15%	152%
CT	9%	468%	5%	113%	ND	83%	456%	31%	126%
DE	46%	426%	10%	174%	OH	41%	206%	15%	94%
DC	-19%	398%	-21%	174%	PA	46%	699%	14%	221%
FL	69%	963%	25%	109%	SD	73%	481%	48%	111%
HI	-8%	508%	-23%	395%	VT	46%	723%	-2%	205%
ID	24%	259%	14%	75%	VA	46%	287%	-6%	92%
IL	-11%	201%	-7%	106%	WA	-9%	326%	-4%	121%
IA	4%	300%	5%	128%	WV	38%	657%	31%	205%
KS	74%	246%	34%	63%	WI	21%	388%	-19%	134%
KY	38%	235%	18%	81%	Median	24%	362%	8%	129%
					Average, Weighted by Population				
MA	-7%	476%	-14%	92%		12%	276%	-3%	80%

Table II.3 also suggests that much of the increase in the civil filing rate occurred prior to 1990. The average civil filing rate was approximately the same in 2002 as it was in 1990. Virginia's experience was particularly dramatic. Figure II.4 presents the civil

¹⁵⁶ The National Center for State Courts did not separate domestic relations from other civil filings in many of the years between 1980 and 2002.

filing rate in Virginia from 1976 to 1981 and 1984 to 2002 as well as the median and weighted average of all states for which we have data in each of those years. Nine states from Table II.3 are excluded from Figure II.4 because the NCSC was missing data for these states in some of the years.¹⁵⁷ Virginia's civil filing rate roughly doubled between 1976 and 1990 but then declined slightly (about eight percent) between 1990 and 2002. Unfortunately, I do not know the cause of the increase in the civil filing rate during the 1980s, and general district courts do not retain court records that are more than ten years old.

Figure II.4: Civil Filing Rates Reported by NCSC



In a recent publication, the NCSC presents a graph similar to Figure II.4 that limits the analysis to the years 1995 to 2004, excludes domestic relations cases, and makes use of supplemental data that they have not published. Their graph also relies on

¹⁵⁷ Colorado, Massachusetts, Minnesota, North Dakota, Pennsylvania, South Dakota, Vermont, West Virginia and Wisconsin are excluded because the NCSC is missing data for some years.

estimates of the number of civil filings for some state-years for which they have no data. Their graph reports a fifteen percent increase in annual civil filings between 1995 and 2004. As a practical matter there is not much difference between the NCSC's results and those of Table II.3 or Figure II.4. The NCSC does not reveal which states and courts are included in their analysis, but assuming that the included jurisdictions experienced the same 10.3% increase in population as the nation as a whole, their analysis shows a 4.3% total increase in the civil litigation rate over ten years.¹⁵⁸ By contrast, the national bankruptcy filing rate increased by over sixty-two percent between 1994 and 2004.¹⁵⁹

Table II.3 also suggests that there is substantial variance in the change in civil litigation across states. Some states experienced a sharp increase in civil litigation, North Dakota's rate increased by 83% between 1980 and 2002, and a few states, like California and New Hampshire, experienced a decrease in civil litigation. Interestingly, the rate of change in civil litigation is moderately correlated with the rate of change in the bankruptcy filing rate (0.37) if one measures the change from 1980 to 2002. This suggests that some of the factors that have caused an increase in the non-business bankruptcy filing rate may have had an effect on civil filing rates. However, if one measures the change from 1990 to 2002, the two measures are uncorrelated (-0.04).

¹⁵⁸ The United States population was approximately 266,278,000 in 1995 and 293,657,000 in 2004. Statistical Abstract, http://www.census.gov/compendia/statab/population/estimates_and_projections_by_age_sex_raceethnicity/ (last visited Jan. 23, 2007).

¹⁵⁹ The United States population was approximately 226,546,000 in 1980 and 287,985,000 in 2002. *Id.* Americans filed 287,570 non-business bankruptcy filings in 1980, 874,642 in 1995, 1,539,111 in 2002, and 1,563,145 in 2004. See Annual Business and Non-Business Filings by Year (1980-2005), available at <http://www.abiworld.org/AM/AMTemplate.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=35631> (last visited Jan. 23, 2007).

In a prior article I discussed possible reasons for why the civil filing rate and the bankruptcy rate may exhibit sharply different trends.¹⁶⁰ Many have argued that consumers are more willing to file for bankruptcy than in the past,¹⁶¹ and the data is certainly consistent with this view. On the other hand, it is possible that the creditors' willingness to sue has decreased.¹⁶² The results of this article suggest that perhaps a third possibility should be considered. The work of Sullivan, Warren & Westbrook stress an increase in financial distress among the middle class.¹⁶³ It is possible that the financial condition of the middle class has deteriorated sharply while the financial condition of the poor has remained fairly stable. Unfortunately, however, our data does not allow us to test this theory.

III. Examining Differences in Civil Litigation within Virginia

The next two sections examine civil litigation within a single state, Virginia.¹⁶⁴ Table III.1 lists the civil filing rate in each judicial district in Virginia in 2000 as well as the percentage of all Virginia filings that each judicial district receives. Nearly every judicial district has a civil filing rate that is well above that of most states. However, some districts have civil filing rates that are dramatically higher than others. This variation can be used to demonstrate that Virginia's high filing rate cannot be explained by its proximity to the District of Columbia or to an overly aggressive use of forum selection clauses to sue consumers in other states. More importantly, by comparing the

¹⁶⁰ See Hynes, *supra* note 22.

¹⁶¹ *Id.* at 610-615.

¹⁶² *Id.* at 635-651.

¹⁶³ See, e.g., SULLIVAN, WARREN & WESTBROOK, *supra* note 19, at 238 ("Bankruptcy is a middle-class phenomenon, and the dramatic increases in bankruptcy filings must be understood to reveal a middle-class pathology")

¹⁶⁴ This article starts with a single state to make the project manageable. Virginia makes its court dockets available on the internet in searchable form, greatly enhancing the ability to gather data. See. Virginia's Judicial System, <http://www.courts.state.va.us/> (last visited Jan. 23, 2007). Court data from 2000 are used to facilitate comparisons to other variables.

filing rates with demographic variables for each judicial district or county we can gain some insight as to the likely characteristics of the defendants.

Table III.1: Virginia Civil Litigation by District in 2000

Judicial District	Civil Filings per 100,000	Percent of Total	Judicial District	Civil Filings per 100,000	Percent of Total
1	16,446	3.6%	16	10,221	3.1%
2	18,532	8.7%	17	5,308	1.2%
2A	9,092	0.5%	18	9,867	1.4%
3	17,832	2.0%	19	4,590	5.0%
4	36,089	9.3%	20	4,415	1.1%
5	14,712	2.6%	21	14,754	1.6%
6	11,276	1.4%	22	13,236	1.7%
7	23,990	4.8%	23	16,923	3.8%
8	20,934	3.4%	24	12,259	3.1%
9	8,614	2.1%	25	8,759	2.0%
10	11,651	2.0%	26	12,716	4.1%
11	15,061	1.8%	27	7,876	2.2%
12	10,847	3.3%	28	7,978	0.9%
13	48,861	10.6%	29	7,838	1.0%
14	12,812	3.7%	30	4,723	0.5%
15	10,863	4.6%	31	8,432	3.0%

A. Excluding Two Explanations for Virginia’s High Filing Rate

Section IV uses individual court filings to address a number of possible explanations for Virginia’s unusually high filing rate, but two possible explanations can be rejected with the aggregate data. First, Virginia’s high rate of litigation may stem from its proximity to the District of Columbia.¹⁶⁵ This explanation can be quickly

¹⁶⁵ This could be true if a substantial portion of the litigation were public interest litigation. The data presented in Section IV demonstrate that this is clearly not the case. As an aside, the National Center for State Courts argues that the high filing rate in the District of Columbia could be due to a large number of residents of Virginia and Maryland (or perhaps other states) who are entangled in litigation in the District. *See Examining the Work of State Courts, supra* note [], at 22. Residents of the District of Columbia could, however, become entangled in litigation in Virginia and Maryland, and this litigation would not be included in the National Center’s civil filing rate for the District of Columbia. Therefore, their speculation really amounts to an assertion that the number of residents of Virginia and Maryland who become involved in suits in the District of Columbia is greater than the number of residents of the District of Columbia who become involved in suits in Virginia and Maryland. They do not explain why this would be true.

dismissed as the litigation rates in the suburbs of northern Virginia (Districts 17, 18, 19 and 31) are substantially lower than the state average.

A second explanation for Virginia's extremely high litigation rates rests on a potentially aggressive use of a forum selection clause that allows a national creditor, such as a credit card company, to sue customers nationwide and then enforce these judgments as foreign judgments where their customers reside. If this theory were true, one would expect an unusual concentration of litigation in Richmond, Virginia's banking center. Table III.1 provides very limited support for the forum selection hypothesis. Richmond's docket is just 10.6 percent of the total litigation in general district courts. Therefore, even if banks were using a forum selection clause to sue consumers from across the country in Richmond, this would not explain a very large portion of Virginia's filings. The individual level data discussed more fully in Section IV further undercuts the forum selection hypothesis. While almost forty-two percent of the defendants in Richmond general district court reside outside of Richmond, less than three percent reside outside of Virginia.

B. Who Are the Defendants?

All Virginia judicial districts have active civil litigation dockets, but some dockets are much more active than others. For example, Hampton (district 8), Newport News (district 7) and Norfolk (district 4) all had litigation rates in excess of twenty thousand per hundred thousand residents while the neighboring 9th district receives less than nine thousand civil filings per hundred thousand.

By comparing the filing rates in the cities and counties of Virginia to demographic variables for those locations, we can gain some insight as to the likely

characteristics of the defendants. Table III.2 sets forth the variables, their meanings, and the summary statistics. In addition to demographic variables suggested by Caplovitz, Stanley & Girth and Sullivan, Warren & Westbrook, I include variables capturing population density, the crime rate, the number of physicians per thousand population and measures of the importance of the retail and banking sector. Prior scholars have argued that consumer bankruptcy increases with the degree of urbanization,¹⁶⁶ and I include population density to test whether this effect extends to civil litigation. The measures of the concentration of doctors, retail trade and banking are included because Virginia places few limits on the plaintiff's choice of venue.¹⁶⁷

One of the most important debates in the consumer bankruptcy literature is whether a decline in “stigma” has caused the increase in the bankruptcy filing rate.¹⁶⁸ If lessened stigma leads to more defaults, it could affect the rate of civil litigation as well. Unfortunately, however, no one has developed a universally accepted proxy for stigma.¹⁶⁹ One approach is to use a variable like the divorce rate that arguably increases as social stigma declines.¹⁷⁰ These variables do not, however, isolate the effects of stigma because they either have a direct effect on financial distress (divorce strains the family finances and increases the cost of living)¹⁷¹ or because they may be caused by other variables that should increase financial distress. On the other hand, omitting any control for stigma could arguably bias the results. I therefore include the crime rate in some of the

¹⁶⁶ See, e.g., Kim Kowalewski, *Personal Bankruptcy: A Literature Review* (Congressional Budget Office Paper No. 2421 September 2000) available at

<http://www.cbo.gov/showdoc.cfm?index=2421&sequence=0>)

¹⁶⁷ See *supra* note 52, and the accompanying text.

¹⁶⁸ See Kowalewski, *supra* note 166.

¹⁶⁹ *Id.*

¹⁷⁰ See F. H. Buckley & Margaret F. Brinig, *The Bankruptcy Puzzle*, 27 J. LEGAL STUD. 187, 201-02, 205 (1998).

¹⁷¹ *Id.* at 201-202.

regressions presented below. Though the crime rate does not present a clear indicator of social stigma (it may reflect poverty or other social problems that could have a direct effect on the rate of civil litigation), its inclusion helps reduce the possibility of omitted variable bias.

Table III.2: Variables¹⁷² and Definitions

Variable	Definition	Mean by District	Std. Dev. by District
Civil	Total civil filings per 100,000 population in 2000	13,672.0	9,044.2
Garnish	Garnishments per 100,000 population in 2000	2,680.4	2,391.7
HS	Percent of population in 1990 with high school degree or higher	71.1	12.0
College	Percent of population in 1990 with bachelor's degree or higher	20.0	11.8
Income	Median family income in 1997	39,256	11,924
Young	Percent of population between the ages of 18 and 44 in 2000	27.3	3.1
Poverty	Percent of population in poverty in 1997	14.0	5.8
Rent	Percent of homes or apartments that were not owner-occupied in 2000	32.2	11.2
Popdens	Population per square mile in 2000	1,299.3	2,098.3
Non-White	Percent of population not listed as white in 2000	28.9	16.2
Crime	Crime rate (FBI) in 1999	3,365	1,495
Unemp	Unemployment rate in 2000	2.9	1.6
Retail	Retail sales per capita in 1997	8,719	2,452
Bank	Banks per 100,000 population	36.3	8.5
Med	Physicians per 100,000 population	264.6	127.7

Table III.4 presents the correlations between the log of the civil filing and garnishment rates and the log of each of the various explanatory variables.¹⁷³ The first

¹⁷² The filings data is from the Virginia Courts. The number of doctors is taken from the Virginia Board of Medicine's Practitioner Information website, <http://www.Vahealthprovider.com> All other data is from <http://fisher.lib.virginia.edu/collections/stats/ccdb/>.

¹⁷³ I use log transformations of the civil filing rate and the garnishment rate because they will ultimately be used as dependent variables and they are not normally distributed. I use log transformations of the other variables because a number of variables have extreme outliers on the high end and there is likely to be diminishing returns in these variables. For example, an increase in population density from 100 persons per square mile to 600 persons per square mile is likely to be much more significant than an increase from

two columns present the correlations based on judicial districts; the second two columns present correlations based on cities or counties. The two measures of litigation are highly correlated with each other. Both are positively correlated with poverty, the percentage of the population that is non-white and the percentage of the population that rents their home. Both are negatively correlated with median income. Note that income represents the median income in the city or county of the district and not the defendant’s income. Therefore, we cannot attribute this result to the idea that defendants are more likely to be sued when they suffer a temporary shock to their income. These results suggest that civil defendants are unlikely to resemble the “middle class.” The litigation measures are also strongly correlated with the crime rate. As noted before, it is unclear whether this represents the importance of stigma or various other social problems. Finally, the measures are strongly correlated with the concentration of physicians, suggesting that medical debt may play a significant role in civil litigation. We confirm this in Section IV below.

Table III.3: Pairwise Correlations

	District Data		County Data	
	Ln(civil)	Ln(garnish)	Ln(civil)	Ln(garnish)
Ln(Garnish)	0.93***		0.94***	
Ln(HS)	-0.01	-0.06	0.18**	0.18**
Ln(College)	-0.14	-0.17	0.24***	0.27***
Ln(Income)	-0.37**	-0.35**	-0.18**	-0.16*
Ln(Young)	0.48***	0.38**	0.24***	0.23**
Ln(Poverty)	0.47***	0.40**	0.33***	0.32***
Ln(Rent)	0.45***	0.32*	0.61***	0.59***
Ln(Popdens)	0.35*	0.18	0.52***	0.53***
Ln(Non-white)	0.55***	0.57***	0.39***	0.51***
Ln(Crime)	0.69***	0.57***	0.64***	0.65***

7,100 persons per square mile to 7,600 persons per square mile. Using non-transformed variables does not radically change the results of the correlations. These results do not weight each county by its population; I should do that.

Ln(Unemp)	0.27	0.20	0.17*	0.08
Ln(Retail)	-0.08	-0.09	0.47***	0.56***
Ln(Bank)	-0.20	-0.08	0.34***	0.40***
Ln(Med)	0.43**	0.34*	0.61***	0.58**

* Significant at 10%; ** Significant at 5%; *** Significant at 1%

Many of the explanatory variables are obviously correlated with one another, and Table III.4 presents a few basic regressions.¹⁷⁴ Because we have so few observations, only some of the variables are included. The most robustly significant variables are median income, the percentage of the population that is non-white,¹⁷⁵ and the crime rate. Models with just these three variables explain at least seventy percent of the variance in the filing rate. On balance, these results suggest that civil defendants may be disproportionately (but not exclusively) drawn from disadvantaged elements of our society and may therefore be relevantly different from the “middle class” bankrupt debtors. Section IV provides further evidence for this possibility in the form of very low homeownership rates among civil defendants.¹⁷⁶

Table III.4: Regressions – Civil Filing Rate

	Ln(Civil)	Ln(Civil)	Ln(Civil)	Ln(Garn)	Ln(Civil)	Ln(Civil)	Ln(Civil)	Ln(Garn)
Ln(Non-White)	0.21	0.32	0.22	0.48	0.23	0.35	0.25	0.52
	[.000]***	[.000]***	[.001]***	[.000]***	[.029]**	[.004]***	[.022]**	[.005]***
Ln(Young)		0.56	0.22	0.24		1.57	1.46	1.50
		[.257]	[.627]	[.690]		[.007]***	[.004]***	[.060]*
Ln(Income)	-0.84	-1.67	-1.18	-1.61	-0.99	-1.72	-1.25	-1.53
	[.000]***	[.000]***	[.000]***	[.000]***	[.000]***	[.000]***	[.001]***	[.007]***
Ln(Rent)		-0.36	-0.29	-0.62		-0.40	-0.42	-0.46
		[.190]	[.240]	[.059]*		[.315]	[.224]	[.412]
Ln(Popdens)		0.12	0.06	0.01		0.08	0.03	-0.12
		[.041]**	[.241]	[.848]		[.318]	[.649]	[.334]
Ln(Retail)		0.23	0.04	0.47		0.43	0.33	0.85
		[.052]*	[.715]	[.003]***		[.198]	[.256]	[.079]*

¹⁷⁴ The regressions weight each county by its population in 2000. The results do not change markedly if Richmond is excluded from the sample.

¹⁷⁵ This result is consistent with Dawsey & Ausubel’s finding that debtors are much more likely to choose informal bankruptcy if they live in a zip code with a large minority population.

¹⁷⁶ See *infra* Section IV.4.

Ln(Med)		0.21	0.16	0.15		0.18	0.12	0.23
		[.003]***	[.013]**	[.083]*		[.319]	[.426]	[.367]
Ln(Crime)	0.77		0.56	0.62	0.67		0.57	0.75
	[.000]***		[.000]***	[.000]***	[.001]***		[.006]***	[.024]**
Constant	11.40	21.08	15.13	14.31	13.85	17.32	10.00	4.45
	[.000]***	[.000]***	[.000]***	[.000]***	[.000]***	[.002]***	[.058]*	[.595]
Observations	126	125	125	123	32	32	32	32
R-squared	0.70	0.67	0.73	0.72	0.77	0.81	0.86	0.79
p values in brackets								
* significant at 10%; ** significant at 5%; *** significant at 1%								

IV. Lessons from the Individual Court Filings

Section I suggests that a preoccupation with bankruptcy will cause us to overlook a substantial number of defaulting and insolvent consumers. The civil litigation statistics presented in the prior two sections suggest that this is indeed the case. Of course, there are more civil filings than consumers who are sued. First, Virginia includes subsequent filings like garnishment in its total, and so the number of complaints is less than the number of filings. Second, some of the filings will name institutions as defendants. Third, a few defendants will be named in multiple suits. Unfortunately, however, these explanations account for fewer of Virginia’s civil filings than one would like. Consumer debt collection litigation appears to be extremely pervasive.

Our examination of individual filings also allows us to confirm some of the predictions of Section I. Most of the judgments are for relatively small amounts, and yet very few judgments are paid in full. Very few consumers file for bankruptcy once they are sued, and the percentage does not change markedly if we focus on those consumers who still have not paid a judgment after five years. These debtors do not obtain a “fresh start”, and their creditors could pursue the judgments for a potentially unlimited period of

time.¹⁷⁷ However, the vast majority of court records show no collection activity beyond the first two years after the judgment. This suggests that many debtors obtain an informal discharge without filing for bankruptcy. Some creditors appear to be more aggressive than others. Consistent with our discussion in Section I, financial creditors are twice as likely to take steps to enforce their judgment as are other creditors. Finally, we find further evidence that civil defendants are likely to be substantially different than bankrupt debtors. While prior research suggests that bankrupt debtors resemble the middle class and have similar rates of homeownership, a search of the paper records from Richmond suggests that civil defendants have a dramatically lower rate of homeownership than bankrupt debtors and the general population.

A. Sources of Data

This section supplements the aggregate data with individual filings from general district courts in Virginia. The Virginia courts post electronic records of civil filings on the internet,¹⁷⁸ and we collected random samples¹⁷⁹ from 1997, 2001 and 2005. We did not gather records prior to 1997 because courts can (and do) destroy records that are more than 10 years old.¹⁸⁰ Although the electronic records allow us to construct a random sample of civil filings in Virginia, they are incomplete. The electronic records omit any documentation attached to the initial complaint, and the courts remove personally identifiable information such as the defendant's address from the electronic records.

¹⁷⁷ See *supra* note 78-79, and accompanying text.

¹⁷⁸ <http://www.courts.state.va.us/>

¹⁷⁹ The samples were created in three steps. First, we estimated the total number of complaints in each county. In 2001 and 2005 this was done by determining the largest case number in each county. For a description of the case numbering system employed, see *infra* notes 184, and accompanying text. Second, we randomly allocated the cases to each county based on the number of complaints received. A few courts did not follow the case numbering system in 1997, and so we weighted each county by the total number of civil filings in that year. Third, we randomly selected case numbers within each county. Fourth, we collected the initial complaint and all subsequent filings corresponding to that complaint.

¹⁸⁰ VA. CODE ANN. § 16.1-69.55.

Therefore, this Article also draws a sample of paper records from the Richmond general district court.

B. Each Year Hundreds of Thousands of Virginia Consumers are Sued

There are obviously more civil filings in Virginia than there are Virginians who are sued. Some filings are efforts to collect previously entered judgments, some filings seek to collect money from businesses, and a few Virginians have a large number of suits filed against them. Even accounting for these factors, however, it is clear that hundreds of thousands of Virginians are sued for defaulting on consumer debts.

1. Accounting for Subsequent Actions

Consider first the fact that Virginia includes subsequent actions, such as garnishments or interrogatories, in its total number of civil filings while most other states count only initial complaints.¹⁸¹ In Virginia a plaintiff can file a civil suit in either circuit court (claims greater than \$4,500) or general district court (claims less than \$15,000).¹⁸² The first column of Table IV.1 reports the number of complaints received by Virginia circuit courts exclusive of appeals from general district and family law courts and exclusive of other family law claims.¹⁸³ General district courts do not report the number of complaints that they receive, and general district courts receive the overwhelming majority of filings. General district courts do, however, report the number of garnishments separately from all other filings.¹⁸⁴ Table IV.11 (below) suggests that

¹⁸¹ See, e.g., National Center for State Courts, Jurisdiction and State Court Reporting Practices

¹⁸² See VA. CODE ANN. § 16.1-77 (providing general district courts with exclusive jurisdiction over claims of less than \$4,500 and concurrent jurisdiction over claims between \$4,500 and \$15,000). For an overview of the Virginia Court System see Courts in Brief, <http://www.courts.state.va.us/cib/cib.htm> (last visited Sept. 2, 2006)

¹⁸³ See <http://www.courts.state.va.us/csi/home.html#circui>. This figure does not include: appeals from general district courts and JD&R courts, reinstatements, garnishments, divorce or other equity suits.

¹⁸⁴ The number of garnishments may actually stand for the total number of subsequent proceedings. According to the data published on the courts web page, the total number of civil filings equals the number

garnishments account for about eighty-seven percent of all filings made after the initial complaint. Therefore, one can estimate the number of civil complaints in general district court by simply subtracting 1.15 times the number of garnishments from the total number of filings. This estimate is provided in the fourth column of Table IV.1.

We provide an alternative estimation of the number of complaints that is based on Virginia's case numbering system. Virginia courts assign each new complaint a case number that identifies the year in which the complaint was filed and the order in which the complaints were received. For example, the first filing that a general district court in a particular county receives in 2007 would be numbered "GV07000001-00." Any subsequent actions (such as garnishments) related to that complaint would be given the same initial number but would have a different suffix. The first garnishment would be numbered "GV07000001-01" and the second would be numbered "GV07000001-02." The second complaint received by that county court would be numbered "GV07000002-00". To the extent that courts do not skip case numbers,¹⁸⁵ the highest case number should equal the number of complaints in that court, and we can estimate the number of complaints by determining the highest case number in each city or county. This total is given in the last column of Table IV.1. Though not identical, the third and fourth columns exhibit similar scale and a similar trend.

of warrants in debt and unlawful detainer actions plus the number of motions for judgment and the number of garnishments. This can't be right as it implies that there were no other complaints (detinue, etc.) and no other subsequent actions (interrogatories, etc.). An analyst at the Virginia courts confirmed that detinue is included with warrant in debt and unlawful detainer. He was unsure if interrogatories and other subsequent filings were included with garnishments. To the extent that they are, Table IV.1 understates the number of complaints in Virginia.

¹⁸⁵ Our searches suggest that courts rarely skip case numbers. For example, in 2001 only one of three hundred case numbers that we search yielded no records. An additional four case numbers yielded no complaint. However, there was a subsequent garnishment that corresponded to each of these case numbers, and the plaintiff in each case was the state of Virginia. There were, however, exceptions to this rule. In 1997 two counties, Mathews and Middlesex, skipped very large numbers of cases. Because these counties typically receive very few filings, we simply excluded them from the totals listed in Table IV.1

Table IV.1: Number of Complaints in Virginia

	CIRCUIT COURTS	GENERAL DISTRICT COURTS			
		From Virginia Court's Reports			From This Study
	Civil Filings in Circuit Court	Total civil filings (Virginia Courts)	Garnishments (Virginia Courts)	Total Filings Less Estimated Subsequent Filings	Estimated Complaints
1997	41,825	974,615	174,048	774,460	747,631
2001	41,860	944,283	179,932	737,361	719,601
2005	40,894	888,940	175,583	687,020	672,001

Regardless of the estimation method, two facts emerge from Table IV.1. First, the overwhelming majority of complaints are filed in general district court, and so the rest of this Article will focus solely on general district courts. Second, Virginia courts receive a staggering number of complaints. In 2001 Virginia courts received somewhere between 760,000 and 780,000 civil complaints, or approximately 10,500 to 10,800 complaints per hundred thousand population.¹⁸⁶ This filing rate is still much higher than that of nearly every other state.¹⁸⁷ More importantly, Virginia's civil filing rate still represents more than one complaint for every ten Virginians every year.

2. Consumer Debt Collection Dominates the Civil Docket

Table IV.2 demonstrates that nearly all general district court filings seek a remedy from an individual. Some of these cases could be business disputes; not all businesses operate in corporate form, and many entrepreneurs guarantee the debts of their corporations.¹⁸⁸ However, there is little reason to believe that these business debts

¹⁸⁶ In 2001 Virginia had a population of approximately 7,194,952. http://www.census.gov/compendia/statab/population/estimates_and_projections/states_metropolitan_areas_cities/

¹⁸⁷ See *infra* Table II.2.

¹⁸⁸ This problem is not unique to civil litigation. Bankruptcy scholars argue that a significant number of bankruptcies that are categorized as "non-business" in the official statistics are in fact business

comprise a large portion of the courts' docket. Less than one percent of the claims listed both an individual and the name of a business and less than three percent of the claims listed an individual doing business under a trade name. In addition, the nature of the complaints does not indicate a large portion of business debts.

Table IV.2: Defendant Type

	1997	2001	2005
Claims listing business only	2.2% (9 filings)	2.0% (6 cases)	3.0% (9 filings)
Claims listing individual with d/b/a name	0.5% (2 filing)	2.7% (8 filings)	1.0%(3 filings)
Claims listing business and individual	1% (4 filing)	0.7% (2 filings)	1.0% (3 filings)
Claims listing single individual	86.1% (346 filings)	85.0% (255 filings)	82.0% (246 filings)
Claims listing two or more individuals	10.2%(41 filings)	9.7% (29 filings)	13.0% (39 filings)
Total Filings	402	300	300

The electronic records do not contain any factual allegations, and so we cannot determine the actual nature of each claim. We can, however, gain some insight as to the nature of the claim by looking at the form of complaint the plaintiff chose. Table IV.3 presents the rate at which each form appears in our sample.

Table IV.3: Percent of Claims by Type (Number of Filings)

	1997	2001	2005
Debt	59.7% (240)	63.3% (190)	63.0% (189)
Unlawful Detainer	21.4% (86)	19.0% (57)	23.7% (71)
Motion for Judgment	5.2% (21)	4.0% (12)	2.3% (7)
Detinue	3.7% (15)	4.7% (14)	4%.0 (12)
Other	10% (40)	9.0% (27)	7.0% (21)

bankruptcies. See Robert M. Lawless and Elizabeth Warren, *The Myth of the Disappearing Business Bankruptcies*, 93 CAL. L. REV. 743 (2005).

A warrant in debt seeks the payment of money, and these actions account for roughly sixty percent of the civil filings in Virginia. Warrants in unlawful detainer are typically landlord-tenant disputes, and they account for another twenty percent of the filings. A motion for judgment is an extremely general form, and the plaintiff may use this form to ask for almost any type of relief. A warrant in detinue seeks the return of specific property such as a couch that has been rented or sold subject to a security interest. There are relatively few motions for judgment and warrants in detinue. Finally, there are a significant number of “other” claims, almost ten percent of the total. These include subsequent actions, such as a garnishment, for which we could find no corresponding complaint. Nearly all of these “other” claims were brought by the government, and most are probably not consumer debt collection.¹⁸⁹

A warrant in debt could be used by tort plaintiffs and so may not be considered consumer debt collection. However, tort suits probably do not account for a large share of the civil filings. Although the electronic records do not contain the factual allegations, they do list the name of the plaintiff. Table IV.4 classifies the plaintiffs in the electronic records into broad categories.¹⁹⁰

Table IV.4 Type of Plaintiff – Percentage (Number of Claims)

	Electronic Records – Statewide	Richmond
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¹⁸⁹ When speaking of consumer debt collection, most people probably envision the definition used in the Fair Debt Collections Practices Act. This Act defines “debt” to mean “any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.” 15 U.S.C. §1692a. Some of the paper records of filings brought by the government did not seek any money at all but rather suspended licenses or imposed other punishment.

¹⁹⁰ I created my tables before I found the article in the Federal Reserve Bulletin. I will try to conform my categories to theirs.

	1997	2001	2005	2001
Housing (includes individuals filing unlawful detainer)	23.1% (93)	20.7% (62)	23.7% (71)	25.7% (3)
Medical	18.7% (75)	22.0% (66)	23.3% (73)	16.0% (49)
Finance credit card other	15.9% (64)	16.0% (48)	18.3 % (55)	35.2% (108) (87) (21)
Business-Other	16.4% (66)	15.0% (45)	15.0% (45)	9.1% (28)
Government	20.1% (81)	18.0% (54)	12.3% (37)	10.4% (32)
Individual (not unlawful detainer) Tort	5.0% (20)	6.7% (20)	5.3% (16)	3.3%(10) (7)
Lawyer	0.7% (3)	1.3% (4)	1.0% (3)	0
Unknown	0	0.3% (1)	0	0.3% (1)

Table IV.4 groups plaintiffs into rough categories, but even this level of generality provides important lessons. The nature of the plaintiffs suggests that the overwhelming majority of claims are contract claims. Together, Housing, Medical, Finance and Business-Other account for roughly seventy to eighty percent of all claims while individuals (other than landlords) account for less than ten percent of all claims.

Medical service providers filed between eighteen and twenty-four percent of all filings in our sample. This is roughly consistent with the finding of the Federal Reserve that roughly eighteen percent of all judgments are in favor of medical plaintiffs.¹⁹¹ Medical service providers have received a great deal of criticism in recent years for aggressive collection techniques, including lawsuits.¹⁹² Because we only have records of court filings, we cannot determine if medical providers are more likely to sue than other

¹⁹¹ See Consumer Data, *supra* note 7, at 67.

¹⁹² See Melissa B. Jacoby & Elizabeth Warren, *Beyond Hospital Misbehavior: An Alternative Account of Medical-Related Financial Distress*, 100 NW. U. L. REV. 535 (2006) (arguing that these criticisms are largely misplaced).

creditors. We can, however, ask whether they are more likely to aggressively pursue their judgments.¹⁹³

Some of the conclusions below are based on a sample of paper records collected from the Richmond general district court. Table IV.4 suggests that these results should be interpreted with caution because Richmond is not necessarily representative of the state as a whole. Recall from Table III.1 that Richmond (district 13) has a dramatically higher filing rate than every other general district court in Virginia. One reason for its unusual filing rate is that it is the forum of choice of a major credit card issuer, Capital One. Capital One accounted for seventy-five of the eighty-seven credit card claims in Richmond and about twenty-five percent of all complaints in the Richmond sample.¹⁹⁴ This does not completely account for Richmond's unusually high filing rate, however. Richmond's civil filing rate is over four times that of the median district.

Although Capital One plays a major role in Richmond's docket, credit card issuers do not appear to account for a substantial portion of the civil filings in Virginia. The relative absence of credit card issuers contrasts sharply with the prominence of these lenders in the recent consumer bankruptcy literature. A number of scholars have pointed to the growth in credit card debt as a major cause of the increase in the bankruptcy filing rate.¹⁹⁵ Using 1997 data, Sullivan, Warren & Westbrook found that about half of all unsecured debt (by value) in their sample was credit card debt.¹⁹⁶

¹⁹³ See *infra* notes 225, and the accompanying text.

¹⁹⁴ We drew three hundred six records in Richmond. Other creditors seemed to dominate the docket in other counties. For example, the University of Virginia's medical center accounted for over a third of the civil filings in a sample taken at the Albemarle County courthouse.

¹⁹⁵ See SULLIVAN, WARREN & WESTBROOK, *supra* note 18, at 108.

¹⁹⁶ *Id.* at 131.

The credit card market was relatively fragmented at the beginning of the period studied,¹⁹⁷ and so it is difficult to identify which complaints were related to credit card debt. However, by 2004 the top ten credit card issuers accounted for almost 90% of the credit card market.¹⁹⁸ In 2005 these ten credit card issuers brought just seven of the three hundred claims in our sample (2.3%); six of these claims were brought by Capital One. Unfortunately, the Federal Reserve studies combine credit card issuers with several other types of creditors and we cannot confirm this result.¹⁹⁹

One possible explanation for the lack of credit card debt in the sample is that other credit card issuers may sell their distressed debt, and these debt buyers bring suit. Despite the expansion in the market for distressed consumer debt²⁰⁰ and the reputation of these debt buyers for aggressive collection techniques,²⁰¹ we find that relatively few suits are brought by distressed debt buyers. We focus solely on warrants in debt and motions for judgment because these are the claims that would plausibly be filed by a buyer of distressed credit card debt. We test for the presence of distressed debt buyers in two ways. The electronic records contain a field in which the plaintiff is to list the original assignor of the debt, if any. The first row presents the results using this measure. To the extent that plaintiffs neglect to list the assignor on the complaint or the court neglects to enter the assignor in the proper field in the electronic records, this first measure will understate the degree of assignment. On the other hand, this measure may overstate the presence of distressed debt buyers in our sample because some assignments are made to a

¹⁹⁷ <http://www.pbs.org/wgbh/pages/frontline//shows/credit/more/marketshare.html>

¹⁹⁸ *Id.* Cite 2005 American Banker for names.

¹⁹⁹ See Consumer Data, *supra* note 7, at 67.

²⁰⁰ http://www.washingtonpost.com/wp-dyn/content/article/2005/07/27/AR2005072702473_2.html

²⁰¹ See, e.g., Boston Globe, *supra* note [___].

related party or are made well before the debt becomes distressed.²⁰² To correct for these problems we offer a different measure. The second row includes all plaintiffs who: i) are listed in as a debt buyer in one of a number of industry surveys,²⁰³ ii) contain the word “recovery” or “receivables” in their name, or iii) received an assignment of another claim in our sample that could plausibly be recorded as a distressed debt purchase. The second row excludes assignments that were obviously not credit card debt or obviously between related parties.

Table IV.5: Percent of Warrant in Debt Claims by Assignees – Electronic Records

	1997	2001	2005
Assignment reported in electronic records	2.5% (10 claims)	4.2% (8 of 190)	4.6% (9 of 196)
Assignment reported or received assignment in other records or “known” debt buyers ²⁰⁴	0	6.8% (13 of 190)	9.2% (18 of 196)

²⁰² In 1997 there were just seven assignments disclosed. Three of these assignments were from one bank to another bank that acquired the first bank’s credit card business. Another assignment was from Sprint Cellular to Sprint Corporation. The fifth assignment was from an individual to a bank, and a sixth was from an individual to a hospital. Only one assignment even remotely resembled the typical model of a bad debt buyer: a satellite television company assigned its claim to a bank. In 2001 two of the eight assignments were probably not related to the purchase of distressed debt. One assignment was from Discover Financial Services to Discover Bank, and another assignment was from a Hospital to nursing school. All nine of the assignees in 2005 were to plausible distressed debt buyers.

²⁰³ Largest U.S. Collection Agencies, 1998, Collections & Credit Risk, Nov. 1999 at 48, available at http://galenet.galegroup.com/servlet/BCRC?vrsn=155&locID=viva_wm&srchtp=ind&ids; Largest U.S. Collectors of Consumer Debt, 1998, Collections & Credit Risk, Nov. 1999 at 49, available at http://galenet.galegroup.com/servlet/BCRC?vrsn=155&locID=viva_wm&srchtp=ind&ids; Largest U.S. Collectors of Commercial Debt, 1998, Collections & Credit Risk, Nov. 1999 at 50, available at http://galenet.galegroup.com/servlet/BCRC?vrsn=155&locID=viva_wm&srchtp=ind&ids; Debt Connection, Debt Buyers, <http://www.debtconnection.com/debtbuyers.asp> (last visited Dec. 15, 2006); Credit-Repair Central: "Junk Debt Buyers," Beware of These Questionable Collection Agencies, <http://www.credit-repaircentral.com/junkdebtbuyers.html> (last visited Dec. 15, 2006); Junk Debt Buyers, http://www.expert-credit-advice.com/junk_debt.htm (last visited Dec. 15, 2006); DBA International 2006 Conference Attendee List, http://www.dbainternational.org/confInfo/2006_conf_attendees.aspx (last visited Dec. 15, 2006).

²⁰⁴ The 1997 and 2001 figures are based on an old methodology and are not necessarily comparable. I will update this table.

Regardless of the measure, the proportion of warrants in debt that are brought by distressed debt buyers remains relatively low (under ten percent), though this percentage is increasing. Our estimates are somewhat consistent with the Federal Reserve's finding that only 5.6% of judgments in the credit records were in favor of collection agents.²⁰⁵ The apparent lack of credit card filings is consistent with the analysis in Section I. However, we do not have a sample of defaults that did not lead to a suit, and so we cannot test whether credit card issuers are less likely to sue. In addition, the relatively small percentage of suits brought by credit card issuers and collections agents still translates into a fairly large number of suits. If we assume that 11.5% (9.2%+2.3%) of the 2005 warrants in debt were brought by these creditors and that sixty-three percent of complaints were warrants in debt, this translates into 49,774 filings by credit card companies and collection agencies. This is roughly equivalent to the 44,621 non-business bankruptcies filed by Virginians in that year.²⁰⁶ Some of the "missing" suits may simply reflect the extremely large number of other filings from other creditors.

3. Few Filings Name the Same Defendant

Consumers who default on one obligation may have difficulty paying their other bills, and so one might expect that most civil defendants will have a very large number of suits filed against them. Table IV.6 presents our attempt to estimate whether a small number of defendants are responsible for a large number of Virginia's filings. We searched the electronic court records for other complaints filed in 2001 against the individuals in our 2001 sample. The Virginia courts database presents filings by county,

²⁰⁵ See Consumer Data, *supra* note 7, at 67.

²⁰⁶ Abiworld.org.

and so we searched the county where the defendant was originally sued as well as Richmond. This search method is imperfect. It will contain false positives to the extent that two different individuals with the same name (“John Smith”)²⁰⁷ are sued. It will contain false negatives to the extent that an individual is sued in two different counties (other than Richmond). Therefore, Table IV.6 is intended to provide a rough estimate of the extent of the problem.

Table IV.6 Other Filings Against Same Name in 2001 in Same County or Richmond

	Debt, Motion for Judgment & Detinue	Unlawful Detainer	All Other
0	83	15	13
1	22	11	2
2	9	6	2
3	5	2	1
4	3	4	0
5+	0	2	0
6+	2 (6,6)	4 (7,8,11,12)	2 (10, 15)

Table IV.6 suggests that relatively few debtors have more than one or two suits filed against them in a single year, and many of the records of multiple suits in Table IV.6 arise out of an on-going dispute between the same plaintiff and defendant. Consider, for example, the two names that had more than 10 matches. Each was a warrant in unlawful detainer (landlord-tenant), and in each case all but one of the other filings were warrants in unlawful detainer filed by the same plaintiff.

4. Most Judgments Are Relatively Small

²⁰⁷ We are deliberately over-inclusive. We include as a match any name that is not inconsistent. For example, if our original was “John Smith”, we include both “John Smith” and “John A. Smith.” If there are listings for both “John A. Smith” and “John B. Smith”, we include the name with the higher number of filings.

Section I suggests that consumers most judgments should be small relative to amounts owed by bankrupt debtors, and indeed this is what we find. In a study of consumers who filed for bankruptcy in Ohio in 1997, Sullivan, Warren & Westbrook found that the median amount of credit card debt was roughly \$9,345²⁰⁸ (\$11,371 in 2001 dollars).²⁰⁹ They also found that credit card debt was just one half of the unsecured debt of the bankrupt consumers.²¹⁰ The court records do not allow a direct comparison as they do not tell us the total amount that the debtor owes, only the amount of one particular judgment. Moreover, the court records do not record the amount of the original claim, only the amount of actual judgments. Table IV.7 suggests that about sixty percent of warrant in debt complaints result in a judgment.

Table IV.7: Percent of Claims Resulting in Judgment

	1997	2001	2005
Debt	60.7% (145 of 239) ²¹¹	63.7% (121 of 190)	66.2% (125 of 189)
Unlawful Detainer	49.4% (42 of 85) ²¹²	57.9% (33 of 57)	52.1% (37 of 71)
Detinue	80% (12 of 15)	30.8% (4 of 13) ²¹³	58.3% (7 of 12)
Motion for Judgment	47.6% (10 of 21)	58.3% (7 of 12)	85.7% (6 of 7)

Although plaintiffs could have sued for up to \$15,000 in general district court,²¹⁴ half of the 2005 warrant in debt judgments were less than \$895. Even claims by financial institutions had a median value of just \$1,849. A significant number of judgments were for much smaller amounts. About one-quarter of the warrant in debt judgments in 2005

²⁰⁸ See SULLIVAN, WARREN & WESTBROOK, *supra* note 18, at 122.

²⁰⁹ <http://www.bls.gov/bls/inflation.htm>

²¹⁰ See SULLIVAN, WARREN & WESTBROOK, *supra* note 18, at 131.

²¹¹ This total excludes one warrant in debt that was removed to circuit court.

²¹² This excludes one judgment that was appealed.

²¹³ This excludes one judgment that was appealed.

²¹⁴ See VA. CODE ANN. § 16.1-77.

were for less than three hundred dollars. These findings are consistent with those of the Federal Reserve studies discussed above. They found that the median value for all judgments and the median value of six of their seven categories (Medical, Utility, Government, Collection Agency and Other) was between \$500 and \$1,000.²¹⁵ “Creditor” judgments were somewhat larger with a median between \$1,001 and \$5,000.²¹⁶

Table IV.8: Average (Median) Judgment

	1997	2001	2005
Detinue	\$1,121.29 (\$442.38)	1,003.65/ 609.65	1122.87/ 873.58
Motion for Judgment	\$493.87 (\$401.58)	420.62/ 230.95	246.51/ 154.05
Warrant in Debt	\$1340.18 (\$451.56)	1,295.30/ 548.18	2,206.57/ 895
Medical	\$455.69 (\$352.10)	765.05/ 420	1384.80/ 493.60
Finance	\$2,913.57 (\$1,616.31)	\$2,653.85/ \$553.75	3434.28/ 1849.24
Business-Other	\$989.65 (\$614.96)	1,085.19/ 548.18	1937.22/ 873.58
Government	\$458.22 (\$135)	575.86/ 155	478.08/ 215.60

C. Most Judgments Are Not Satisfied, But Most Debtors Don’t File for Bankruptcy

Tables IV.6 and IV.8 suggest that most civil defendants have just one judgment entered against them in a given year and that many of these judgments are for relatively modest amounts. According to court records, however, the vast majority of these judgments are never paid. Despite the existence of these unpaid judgments, very few of the debtors in our sample sought bankruptcy protection. Virginia general district court judgments do not expire for ten years, and the creditor can renew the judgment as long as she likes.²¹⁷ However, we find very little collection activity two years after an unpaid

²¹⁵ See Consumer Data, *supra* note 7, at 67.

²¹⁶ *Id.*

²¹⁷ See *supra* note 76, and the accompanying text.

judgment has been entered. It appears that a great many debtors have achieved an informal discharge of their debts.

1. Most Judgments Are Not Satisfied

Table IV.8 suggests that many judgments are for relatively modest amounts. Unfortunately, Table IV.9 suggests that the defendants have difficulty repaying these judgments, or at least the law makes it difficult for the plaintiffs to collect these judgments. It is perhaps too soon to expect the satisfaction of the 2005 judgments, so we focus on the judgments entered in 2001. Although the plaintiffs have had five years to collect their judgments, less than one quarter of their judgments are reported as paid in full as of the end of 2006. In addition, very few judgments are repaid after the first two years, suggesting that is unlikely that the repayment rate for these judgments will rise substantially.

Table IV.9: Satisfaction of Judgments

	1997	2001	2005
Percent of All Judgments	20.3%	19.7% (31 of 152)	14.8% (19 of 128)
Excluding unlawful detainer and “other”	22.8%	25.0% (33 of 132)	17%
Of Satisfied, Percent Satisfied Within 2 years	n/a ²¹⁸	87.9% (29 of 33)	n/a

The Federal Reserve study discussed above finds a similarly low rate of judgment satisfaction (15.8%).²¹⁹ Of course, both their data and ours rely on the accuracy of the court records, and the court records rely on the plaintiff to report when the judgment has been paid. David Caplovitz’s study does, however, offer some support for the proposition that a substantial portion of judgments will go unpaid. In a survey of debtors

²¹⁸ About half of the records from 1997 that were marked satisfied had no satisfaction date.

²¹⁹ See Consumer Data, *supra* note 7 at 67.

who were sued in 1967 for defaulting on a consumer loan, David Caplovitz found that only twenty-two percent reported paying their debt in full and thirty-eight percent reported making some payments.²²⁰ Forty percent reported making no payments at all.²²¹ Of course we should not rely too heavily on Caplovitz's data as participation in the survey was voluntary and the data is forty years old.

2. Few Judgment Debtors File for Bankruptcy

Although the court records suggest that most judgments remain unpaid, the overwhelming majority of defendants in our sample did not file for bankruptcy. Table IV.10 presents the results of a search of our records against the Virginia bankruptcy filing database retained by Lexis.²²² The search of the electronic records creates a significant risk of false positives; because we lack personally identifiable information about the debtor beyond his or her name, we do not know if a "John Smith" in the Lexis database is the same "John Smith" in the civil filings sample. We mitigate this risk by only searching names for which we have a middle name or middle initial. However, we count as a match any bankruptcy record that does not have an inconsistent middle name or initial. For example, if our civil filing record is "John A. Smith", a bankruptcy filing by "John Smith" would be a match but a bankruptcy filing by "John B. Smith" would not. Some of the Richmond paper records allow us to avoid this problem because they list the debtor's social security number on the complaint, and we can compare the first five digits of these social security numbers to the Lexis database. This sample is unlikely to be representative of the state's filings as a whole, however. Filings that included the

²²⁰ See CAPLOVITZ, *supra* note 17, at 46.

²²¹ *Id.*

²²² Virginia Current Filings.

defendant's social security number were almost exclusively made by financial institutions or the government.

Table IV.10: Number of Debtors Who Filed For Bankruptcy After Judgment

	All Judgments		Unpaid Judgments	
	Electronic	Richmond	Electronic	Richmond
Never	47	78	37	44
Filing prior to 2001	10	13	7	7
2001 to 2003	6	9	3	5
Filing 2004 or Later	4	2	3	1
Total Searched ²²³	61	108	49	57

Less than 10% of the names in our electronic sample appear in the Lexis bankruptcy database between January 1, 2001 and December 31, 2003. Even if we expand our bankruptcy filing period to the end of 2006 this percentage rises to just 16.4%. Limiting the sample to those debtors with unpaid judgments actually causes the percentage to fall slightly to just 12.2%. Though surprising, these results are corroborated by David Caplovitz's survey of consumers sued in 1967; he found that just seven percent filed for bankruptcy.²²⁴

3. Post-Judgment Actions are Surprisingly Limited

The data suggest that a great many debtors fail to repay their judgments but do not seek bankruptcy protection. These debtors are therefore vulnerable to garnishment or other collections efforts for a potentially unlimited amount of time. We cannot observe all of the techniques that creditors may employ to enforce their judgments; we can only observe the rate at which creditors bring a subsequent proceedings such as garnishments

²²³ The total is less than the sum of the prior rows because some records returned multiple bankruptcies.

²²⁴ See Caplovitz, *supra* note 17, at 274.

and interrogatories. Table IV.11 suggests that the subsequent proceedings are almost exclusively garnishment proceedings.

Table IV.11: Distribution of Subsequent Filings

	1997	2001	2005
Garnishments	89	85	53
Interrogatory	17	13	3
Show Cause	2	4	0
Capias	0	0	0
Other	1	1	2
Total	108	103	

Perhaps the most significant facts about the subsequent proceedings are that there are relatively few of them and creditors seem to cease bringing these actions fairly soon after the judgment is entered. Table IV.12 presents the total number of subsequent actions per unpaid judgment, and Table IV.13 presents the time from the initial judgment to the last collection proceeding in the file.

Table IV.12: Subsequent Actions per Unpaid Judgment (Excluding Unlawful Detainer and Other)

	1997	2001	2005
0	96	71	89
1	23	18	26
2	7	4	3
3	1	0	2
4	1	3	0
5-7	3	1	0
8-10	0	0	0
10+	0	0	0

Table IV.13: Time from Last Hearing to Last Recorded Collection Action to Collect Unpaid Judgment (Excluding Unlawful Detainer and Other)

	1997	2001
No Subsequent Actions	96	71
Less than 1 Year	20	13
1 to 2 years	5	6
2 to 3 years	4	3
3 to 4 years	0	1

More than 4 years	1	0
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The analysis of Section I suggests that financial plaintiffs should behave differently than other plaintiffs. In particular, they should be more likely to take steps to enforce the judgments that they obtain. We test this by examining the warrant in debt judgments entered in 2001. Because medical creditors have received harsh criticism for aggressive collection techniques, we also test whether they are more likely to use subsequent proceedings to enforce their judgments. Our regression has just one hundred six observations, and so our confidence intervals are quite large.²²⁵ We find that, controlling for judgment size, finance creditors are two and a half times more likely to bring a subsequent proceeding to enforce their judgments than are other creditors (individuals, lawyers, other business and government), and this effect is statistically significant. The odds ratio for medical plaintiffs is also greater than one, but this effect is not statistically significant.

Variable	Odds Ratio	Pr> z
Finance	2.68	0.05
Medical	1.23	0.78
Judgment	1.00	0.38
Judgment Squared	0.99	0.29
Observations	106	
Pseudo R2	0.04	

4. Are Many Civil Defendants Judgment Proof?

One explanation for the relatively low rate of judgment satisfaction and the unwillingness of many creditors to actively enforce their judgments is that a very large proportion of the civil defendants are effectively judgment proof. Section III provides strong support for this theory in that Virginia's civil litigation is concentrated in areas

²²⁵ I plan to expand my sample to correct this. I excluded judgments with a judgment amount listed as zero.

with a greater proportion of disadvantaged individuals. This section provides further evidence in the form of an unusually low homeownership rate among civil defendants.

Civil filings do not disclose whether the defendant owns a home, and the electronic records do not even disclose the defendant's address. However, the paper records do list the defendant's address, and the City of Richmond places property tax records on the internet. We compared the paper records of filings made in Richmond general district court against these property tax records to determine if the defendant owed the property listed as his or her address in 2001, the year of the suit. Less than fourteen percent of the defendants owned their home, well below the state average of 75.1%²²⁶ and the Richmond average of about 69.7%.²²⁷ This does not mean that very few homeowners are sued in state court. Even if the fourteen percent homeownership rate applies statewide, this would still translate into over one hundred thousand civil suits in 2001.²²⁸

VI. Conclusion

In 1980 Americans filed 287,570 non-business bankruptcies; by 2005 this number had grown to 2,039,214.²²⁹ These stark statistics fueled a decade-long fight over bankruptcy reform that ultimately culminated in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.²³⁰ These statistics also fueled a boom in bankruptcy scholarship that has taught us a great deal about bankrupt debtors. One of the prominent

²²⁶ <http://www.census.gov/hhes/www/housing/hvs/annual04/ann04t13.html>

²²⁷ <http://www.census.gov/hhes/www/housing/hvs/annual05/ann05t14.html>.

²²⁸ See *supra* Table IV.1.

²²⁹ Abiworld.org.

²³⁰ Pub. L. No. 109-8, 119 Stat. 26 (codified as amended in scattered section of 11 U.S.C.)

lessons of this scholarship is that bankrupt debtors are drawn almost exclusively from the “middle class.”²³¹

Prior scholars therefore concluded that financial distress is a “middle class pathology.”²³² If financial distress is a middle-class pathology, it is not exclusively so. Our focus on bankruptcy has obscured the fact that defaulting consumers can simply refuse to pay. We do not know precisely how many Americans choose this “informal bankruptcy” system,²³³ but the data suggests that they may easily outnumber the bankrupt debtors.²³⁴ This Article looks to state court civil filings to get a sense of how many Americans default without choosing bankruptcy, and the numbers are staggering. Virginia alone has averaged more than one million civil filings a year for more the last twenty years,²³⁵ and the overwhelming majority of these filings seek to collect debts from consumers.

This Article also finds that civil defendants and bankrupt defendants differ in very predictable ways. Stated simply, the bankrupt debtors are those debtors who have something to protect. Thus, limiting our focus to bankruptcy not only causes us to underestimate financial distress generally, but the defaulting and insolvent Americans whom we overlook are the most disadvantaged members of our society. The implications of this Article are not entirely grim, however. While the bankruptcy filing rate has risen dramatically over the past few decades, the rate of civil litigation appears to have changed very little.

²³¹ See SULLIVAN, WARREN & WESTBROOK, *supra* note 18.

²³² See SULLIVAN, WARREN & WESTBROOK, *supra* note 18, at 238.

²³³ This term is taken from Dawsey & Ausubel, *supra* note 4.

²³⁴ See *supra* notes 5-6, and the accompanying text.

²³⁵ See *supra* Table II.2.

The debate over consumer bankruptcy reform will certainly continue. This debate must consider what, if anything, should be done to encourage the consumers who have chosen informal bankruptcy to choose instead to repay their debts or to file a bankruptcy petition. This question requires information about the financial condition of these debtors that we do not yet have. However, if we wish to understand default and insolvency we cannot restrict ourselves to the bankruptcy courts merely because the light is brighter.