



After the Fact | The Pandemic's Impact on America's Civil Courts

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TRANSCRIPT

Erika Rickard, project director, civil legal system modernization, The Pew Charitable Trusts: The way that our court system operates, it's supposed to hear both sides on an issue and a decision based on those two sides. But if only one side is in the room, only one side gets heard.

Dan LeDuc: That's Erika Rickard talking about civil courts in America today. She leads Pew's work to modernize the nation's civil legal system, which, even before the pandemic, has seen a dramatic rise in debt collection cases. Sometimes the people being sued don't even know it.

Music break

For The Pew Charitable Trusts, I'm Dan LeDuc, and this is "After the Fact." If you haven't been in a courtroom, you've at least seen one on TV. A judge sitting on high, tables with lawyers, a jury of your peers. But civil courts—where cases like debt collections, evictions, and personal disputes may end up—can be different from criminal court. And as you'll hear in today's episode—with the COVID-19 pandemic continuing to disrupt our economy, experts expect cases to rise.

And that makes a major gap in the system even more concerning. Most individuals involved in these cases don't even know that they have a lawsuit filed against them. As a result, 70% of debt collection cases result in a default judgment, or another way of saying it—an automatic win to the creditors, simply because the defendant didn't show up. And that's our data point for this episode. Here's Erika Rickard.

Music break

Erika Rickard: Our state and local courts hear about 100 million cases every year. And that includes criminal cases. That includes traffic cases. And it also includes about over 20 million civil cases, and that includes everything from contract disputes to personal injury cases to family law issues like divorce or contested wills. Who does use our court system and which companies feel comfortable bringing court cases and using the courts for lawsuits has really consolidated to business-to-consumer lawsuits. That can include mortgage foreclosures, evictions, and debt collection lawsuits. Taken together, those represent more than half of all the civil caseload. Debt



collection cases are the single most common type of civil court case today. And they've doubled in size since the 1990s. Debt collection cases are growing both in their total number and in their overall share. So they've went from 1 in 9 civil court cases in the 1990s to now 1 in 4 civil cases.

Dan LeDuc: That's pretty dramatic. That to me seems like our civil court system looks like a totally different entity than maybe it did 30 or 40 years ago.

Erika Rickard: In criminal cases, you're probably familiar with the idea that you have a right to an attorney. And if you can't afford an attorney, one will be provided for you. But in the civil context, that's not the case. So we actually see that in about 3 out of every 4 civil court cases, at least one side is not represented by a lawyer.

Dan LeDuc: So why don't they have attorneys?

Erika Rickard: Well, there's a few different reasons why. What we've found is that in the jurisdictions where we can actually look and see who was represented and who wasn't, about 90% of the time the debt collector or the company bringing the lawsuit is represented by a lawyer. And the consumer is not. And some of the reasons could be that the amount of the debt is even lower than the cost of a lawyer. So if someone can't settle a \$5,000 student loan debt or medical debt, then they're probably not going to be able to afford an attorney to be able to litigate that case. Another reason is simply that people aren't aware that they're being sued in the first place. So they can't go out and hire a lawyer to represent them.

Dan LeDuc: And so what happens if I'm sued for a debt, and I never heard about it? I don't get my day in court, but the people suing me do?

Erika Rickard: Unfortunately, in most jurisdictions, that's exactly what happens. So in the states where we've been able to look at court data, what we found is that 7 out of 10 debt collection cases ends in what's called a default judgment, which means that the debt collector wins by default. They don't have to prove their case. They just win because they're in the room and the consumer didn't respond to the lawsuit. So the judge never reviews to make sure the right person was sued for the right amount. They just stamp the case in favor of the debt collector.

Dan LeDuc: Do we know why they're not responding?

Erika Rickard: What we've uncovered in our research is that actually a significant number of these cases are resulting in a default judgment because the consumer wasn't aware that they were being sued. The rules for how to get notified about a court case and the rules for how a debt collection judgment can be enforced are really, really different from one another. So a debt collector might be able to find your employer and garnish your paycheck as a result of doing



some investigation after the court case. But that wouldn't be the same way that they would be required to make sure that you knew about the court case in the first place.

Dan LeDuc: And we should be clear here that, in some cases, obviously some of these people have the debt. They should be paying their debt. It's what we want to see happen in society. But if there is a dispute where you think you don't owe somebody, and you've walked away from a debt, that doesn't necessarily mean your troubles are over because this sort of litigation can continue.

Erika Rickard: Right. The way that our court system operates, it's supposed to hear both sides on an issue and a decision based on those two sides. But if only one side is in the room, only one side gets heard. And this is something that has been flying under the radar until relatively recently. Even though these cases have been on the rise and even though so many cases end in a default judgment and in post-judgment collection actions, we really haven't been seeing what this volume might mean for us. So most courts don't actually collect and report on detailed information about what's actually happening inside the courthouse. So policymakers and other leaders haven't been as cued into this key issue until relatively recently.

Dan LeDuc: States you say are starting to recognize this issue. What are some of the ways they're starting to address it and maybe try to make things better?

Erika Rickard: What's heartening to me about this is that once state leaders start to understand what's actually happening in their state, there are a range of different actions that leaders can take and that transcend branch of government. They transcend political party.

Music break

Dan LeDuc: And Texas' Supreme Court Chief Justice Nathan Hecht is one of those leaders taking innovative steps to modernize the civil court system. His state is one of only a few that is tracking data about debt claim cases.

Dan LeDuc: You, sir, have been on the court—you are the longest-serving member of the Texas Supreme Court and the longest in the state's history. So let me ask you: How has the civil system changed in recent decades?

Chief Justice Nathan L. Hecht, 27th chief justice of the Supreme Court of Texas: The number of cases has grown. The complexity of some cases on the civil side has grown, also on the criminal side. And of particular interest here, in the last few years the number of cases filed to collect debt, usually consumer debt, has greatly multiplied. It really has been a phenomenon.

Over the last five years in Texas, which is all we have numbers for, debt collection cases have increased 55% in our general jurisdiction courts—that's the big court that handles everything—



but 162% in small claims courts. So they more than doubled in the last five years. Now, this immediate past year, 2020, as you might expect, everything is down, so civil filings in Texas were down about 40% across the board. And debt collection cases were only down 12.5%, so that shows you that there are still lots of them, even in a hard year, even when other civil filings were down, even when you wonder whether collectors really had much expectation of collecting, given the pandemic and the difficult circumstances.

Dan LeDuc: I would imagine a lot of folks don't actually recognize the consequences they can face for failure to respond to these sorts of things. Are we looking at a bigger systemic question then about an educated consumer and ways to improve how to provide notice to them and what they need to know?

Chief Justice Hecht: When there weren't so many debt collection cases, there were still these problems. They were getting worse. But a lot of what's made them worse is the number of them. There's just so many more of them affecting so many more people. But now it becomes the operation of the justice system with respect to these cases, eviction cases, a lot of other cases. The way the system operates has a societal impact. It's affecting everybody around you. It's affecting life in your community, and it's having a broader effect. And that's why the justice system is being constrained right now to try to figure out better ways to process these cases that are fair and that are more efficient.

Dan LeDuc: Could you explain a little bit more about the societal impact? What is the residual impact that spreads out in society that affects the rest of us?

Chief Justice Hecht: If debt collection cases are harder for creditors to pursue, then their collections are going to go down, and the cost of credit is going to go up. And then they're going to be more careful about who they extend credit to, so that includes you living down the street. You don't have any of these problems, but all of a sudden it's going to begin to affect you. On the other side, which is more the problem that we have right this minute, if it's too easy to get a default judgment against a debtor, then the failure already of his ability to repay the debt that he's incurred just grows. So the default judgment will be for the debt, for interest in the past and in the future, for court costs. And so this will put a pressured people under even more pressure. There are really two ways of thinking about these issues. One is, how can we make court procedures more efficient? That's not so hard.

What's harder is to weigh the impacts of these things on society, on a community. How free do we want debt to be? Courts don't have any idea what the answer to that question is. We're not policymakers. We're just used to following the rules, following the law, but those are real questions that you have to consider when you're trying to handle as many cases as we're talking about. In Texas, 371,000 cases last year, and that's just one state.



Dan LeDuc: As you mentioned, the courts, of course, are used to sitting in judgment. That's your job. Facts come to you. You're more a receptacle process rather than taking the lead. Is this a place where you're starting to see your fellow judges and justices recognizing that they have a perspective that needs to be shared so that maybe things can be done differently?

Chief Justice Hecht: Yes. Again, this is a little bit of a cultural thing for the justice system. The justice system in the United States is—you've probably heard it called the adversary system. That means one side comes in and poses the other side, and they do battle. And the judge is the referee, and just sits there, and calls the balls and strikes. In most of the rest of the world—there are four other countries that have something of the system that we do, but almost all the rest of the world has what's called an inquisitorial system, and that means that the system is not so much about fighting as it is about finding out the facts and what happened. Now, you can say, well, why doesn't everybody do that? Well, the inquisitorial system has its weaknesses, and the adversary system we're used to, and we used it for years. But it sometimes doesn't work, and it doesn't work in debt collection cases where one side of the docket, the debtors, almost never have a lawyer. So they're not really very much of an adversary.

And so when you say, well, what are we going to do about that? Well, 30 years ago, 40 years ago, we would have said, nothing. That's the system that we've got. You don't have a lawyer; you don't have a lawyer. You should get one. But now, particularly with a number of cases but also as we have begun to see the justice system develop, you have to ask yourself, are there better ways to do this that are not so much adversarial? And that's hard for a lot of judges to get used to because it means that they're not going to be purely referees. It means that they're going to be looking at the realities of the case and trying to make sure it reaches a fair result.

Dan LeDuc: I'm wondering if we are at some sort of almost historic moment then in our nation's legal history. Back in the '60s we had the famous *Gideon v. Wainwright* case that ensured, if I was charged with a crime where my liberty was at stake, I was going to get a lawyer. Far from well-to-do person who might have debt issues, having a judgment against them and not being represented can be just as crushing as losing their liberty. Are we at a time like that in the country?

Chief Justice Hecht: Well, I think we're at a time where we've got to look at the operation of the system and reconsider what's fair because we want to be sure that debtors are fairly protected, but creditors have rights, too. You signed up. You owe the money. You should pay it. It's just trying to readjust on the lawyer side. *Gideon v. Wainwright* in the early '60s said that every criminal defendant gets a lawyer appointed by the government and paid by the government, and the U.S. Supreme Court said, under the U.S. Constitution, liberty is too precious an interest to jeopardize when criminal defendants don't have lawyers.



OK, we've gotten used to that. Everybody who's watched one single crime show knows that the police are going to tell you right off the bat, you got the right to a lawyer. If you can't afford a lawyer, one will be appointed for you.

What about on the civil side? Should the government pay lawyers to keep people from paying their debts, or keep people from being evicted, or lots of other situations, or maybe just across the board so that if you're too poor to afford a lawyer the government will pay for one for you?

There's a lot of different views on that. Some people say, no, liberty's not at stake. The government has no business in that. Other people say, why should you ever suffer any adverse ruling in a court system without the protection of legal counsel? We're still struggling with that. That's just a hard issue.

Dan LeDuc: This feels like it needs policymakers, legislators, consumer advocates, business interests. So what's the forum to try to make progress when you have those sorts of disparate voices?

Chief Justice Hecht: Well, I think if you're talking about court procedures, the courts are pretty good at that. And it's coming slowly, but we're making progress. So what's an example? Ordinarily when you get served in a civil case, someone hands you—some official or paid person hands you a notice that the lawsuit has been filed and gives you a copy of it, of the pleading that they will file at the courthouse, and that's all you have. And the pleading may be pretty much legalese. So you read it, and you're not sure what's happening.

So how can we improve that? The court can require that the defendant be given a more plain-language, exhaustive statement in very simple terms, you have been sued for debt, this is what they say you owe, here's what's going to happen next, and after that, this is going to happen, and just take people through it. It gives them more information.

Now, courts have not been used to giving people that much information because it sounds like legal advice. You know judges kind of say, do we really want to do that? But why not? You got to tell them something. Why would you tell them something that confuses and discourages when you can tell them something that at least gives more people more information that they can use?

Dan LeDuc: The judge's role, of course, also though, is to ensure justice, and is that what we're getting at here, maybe a new perspective based on numbers and impact on society that judges have to take into account?

Chief Justice Hecht: Now, that's exactly what we're getting at because at the end of the day, you want the public to think to themselves, thank goodness for the courts. They're doing their job.



They're fair to everybody, they're there when we need them. And we want people instinctively to feel that. And justice is not just about efficiency. Justice is a moral virtue, and people need to feel in their hearts that justice is being done. It's very important to do all you can to maintain public trust and confidence in the justice system.

Music break

Dan LeDuc: To learn more about efforts to modernize the nation's civil courts, visit pewtrusts.org/afterthefact. We'll be back this spring with a new season, so stay tuned, and stay safe. Thanks for listening.

For The Pew Charitable Trusts, I'm Dan LeDuc, and this is "After the Fact."