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## Why Consumer Defendants Lump It

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## *Why Consumer Defendants Lump It*

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# Why Consumer Defendants Lump It

Emily S. Taylor Poppe\*

## ABSTRACT

*Contrary to popular claims about Americans' litigiousness, one of the most common responses to civil legal problems is lumping it: choosing to do nothing even when there is legal action that might be taken. A substantial body of socio-legal scholarship investigates this phenomenon, but has focused almost exclusively on individuals' willingness and ability to initiate legal actions as plaintiffs. Similarly, research on consumers' participation in civil litigation is primarily concerned with the actions of consumer plaintiffs. Yet individuals also are named as defendants in civil actions, including many who are sued for claims arising out of consumer transactions. The majority of these suits are attempts to collect on consumer debts, and in most cases, the consumer defendant will never appear in court. By failing to appear, consumer defendants forego the opportunity to raise affirmative substantive or procedural defenses, negotiate with the plaintiff, or seek the court's favor in discretionary rulings.*

*This Article takes a novel approach by considering how incentive structures and structural inequalities in litigation contribute to the limited legal participation of consumer defendants. To illustrate the impact of these forces, this Article presents an empirical study of the residential foreclosure process. Using an original dataset of more than 900 foreclosure cases filed in New York City, this Article tracks defendant homeowners' participation in civil actions to foreclose. In situations such as those, consumer defendants' participation not only potentially influences case outcomes, but also plays an important role in monitoring and enforcing procedural and substantive law. Recognizing the significance of legal action by consumer defendants, this Article offers reforms to address their limited participation in civil litigation. In doing so, it opens new areas of inquiry for consumer law scholars, as well as those concerned with access to justice.*

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## INTRODUCTION

“Should is a futile word. It’s about what didn’t happen.”<sup>1</sup>

“Typically, the homeowner who . . . faces a foreclosure suit is not interested in testing state or federal jurisdictional requirements . . . Their focus is either, ‘how do I save my home,’ or ‘if I have to give it up, I’ll simply leave and find somewhere else to live.’”<sup>2</sup>

Over a five-month period in the fall and winter of 2014–2015, law firms hired by Transworld Systems, Inc. (Transworld) initiated more than 37,000 civil actions against consumers to collect on student loans held by the National Collegiate Student Loan Trusts.<sup>3</sup> In support of many of these lawsuits, Transworld relied on false or misleading affidavits and testimony.<sup>4</sup> As a result of these allegedly unfair and deceptive practices,<sup>5</sup> consumers made payments on debts, including through garnished wages and bank accounts, which were actually unenforceable.<sup>6</sup> In response to action by the Consumer Finance Protection Bureau, Transworld agreed to a settlement of over \$21 million.<sup>7</sup> Yet this amount represents only a tiny fraction of the trusts’ \$12 billion holdings<sup>8</sup> and an even smaller share of more than \$1.5 trillion in outstanding student loan debt nationally.<sup>9</sup>

In the majority of actions to collect on consumer debts, default judgments are entered against consumer borrowers who fail to appear, even when there are flaws in the creditors’ claims.<sup>10</sup> By failing to participate in these lawsuits, consumer defendants forego the opportunity to raise affirmative substantive or procedural defenses, negotiate with the plaintiff, or seek the court’s favor in discretionary rulings. Given the potential benefits afforded by participation in the litigation, why do so many consumer defendants choose not to appear? Prior research has established that “lumping it”—doing nothing in response to a legal problem even where there is legal action that might be taken—is not

<sup>1</sup> MARGARET ATWOOD, *THE BLIND ASSASSIN* 428 (2000).

<sup>2</sup> *In re Foreclosure Cases*, No. 1:07-CV-2282, 2007 WL 3232430, at \*3 n.3 (N.D. Ohio Oct. 31, 2007).

<sup>3</sup> Transworld Sys., Inc., CFPB No. 2017-CFPB-0018, 4, 6 (Sept. 15, 2017) [hereinafter Consent Order]. Over a three-year period between 2014 and 2017, Transworld filed more than 38,000 suits on behalf of the trusts. Stacy Cowley & Jessica Silver-Greenberg, *Behind the Lucrative Assembly Line of Student Debt Lawsuits*, N.Y. TIMES (Nov. 13, 2017), <https://www.nytimes.com/2017/11/13/business/dealbook/student-debt-lawsuits.html>.

<sup>4</sup> Consent Order, *supra* note 3, at 10.

<sup>5</sup> *Id.* at 11–12.

<sup>6</sup> *Id.* at 12.

<sup>7</sup> *Id.*; Danielle Douglas-Gabriel, *Student Loan Companies Reach \$21.6 Million Settlement over Dubious Debt Collection Lawsuits*, WASH. POST (Sept. 18, 2017), [https://www.washingtonpost.com/news/grade-point/wp/2017/09/18/student-loan-companies-reach-21-6-million-settlement-over-dubious-debt-collection-lawsuits/?utm\\_term=.2fc97f849419](https://www.washingtonpost.com/news/grade-point/wp/2017/09/18/student-loan-companies-reach-21-6-million-settlement-over-dubious-debt-collection-lawsuits/?utm_term=.2fc97f849419).

<sup>8</sup> When established, the trusts held more than 874,000 student loans amounting to \$12 billion in principal. Shahren Nasiripour, *Wall Street Is Fighting a CFPB Deal over Billions in Defaulted Student Loans*, BLOOMBERG (Nov. 8, 2017, 5:00 AM), <https://www.bloomberg.com/news/articles/2017-11-08/wall-street-is-fighting-a-cfpb-deal-over-billions-in-defaulted-student-loans>.

<sup>9</sup> *Consumer Credit Outstanding (Levels)*, FED. RESERVE BANK, [https://www.federalreserve.gov/releases/g19/HIST/cc\\_hist\\_memo\\_levels.html](https://www.federalreserve.gov/releases/g19/HIST/cc_hist_memo_levels.html) (last updated Dec. 7, 2018).

<sup>10</sup> See sources cited *infra* note 18.

uncommon.<sup>11</sup> However, this research has focused almost exclusively on the behavior of potential plaintiffs. Similarly, scholarship on consumer litigation has primarily been concerned with enhancing legal action by consumer plaintiffs.<sup>12</sup>

This Article takes a novel approach by focusing on the behavior of consumer defendants. More specifically, the Article considers the social, economic, legal, and structural forces that contribute to individual defendants' limited participation in litigation arising out of consumer transactions. In doing so, this Article extends socio-legal scholarship on individuals' actions in response to legal problems, as well as research on structural inequalities in litigation and consumer law enforcement.

To illustrate how these hindrances shape legal action by consumer defendants, I present an empirical study of the residential foreclosure process. Using an original dataset of more than 900 residential foreclosure cases initiated in New York City, the study documents defendant homeowners' limited participation in the foreclosure process, the absence of legal representation for most homeowners, and the challenges presented by the heavy reliance on solo practitioners among those homeowners who obtain legal counsel. In contrast, I find that many of the plaintiffs are among the most powerful financial institutions in the world and enjoy the benefit of access to low-cost, specialized legal counsel. I also describe the outcomes of the cases, noting how plaintiffs' ability to engage in litigation selectively influences the resolution of individual cases and the development of precedent.

Recognizing that by participating in civil litigation, consumer defendants not only protect their interests, but also serve important monitoring and enforcement functions, I offer a series of proposals to address their limited legal action. While regulatory actions can also serve to deter and punish violations of substantive and procedural law, enforcement varies significantly by administration.<sup>13</sup> In eras of limited regulatory enforcement, legal action by consumer defendants may become particularly significant.

By considering the legal action of consumer defendants, this Article addresses a topic of doctrinal and policy import that has largely been overlooked. In doing so, this Article proceeds as follows: Part I describes the context in which consumers are sued,

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<sup>11</sup> See William L.F. Felstiner, *Influences of Social Organization on Dispute Processing*, 9 L. & SOC'Y REV. 63, 81 (1974) (defining "lumping it" as a form of avoidance in which the wronged party ignores the dispute even though the complaint has not been satisfied); see also Rebecca L. Sandefur, *The Importance of Doing Nothing: Everyday Problems and Responses of Inaction*, in TRANSFORMING LIVES: LAW AND SOCIAL PROCESS 112, 123 (Pascoe Pleasence et al. eds., 2007); sources cited *infra* note 22.

<sup>12</sup> See KATHERINE PORTER, MODERN CONSUMER LAW 518 (2016) ("Underenforcement via private lawsuit is perhaps the most vexing problem in consumer law."); see also Stephen B. Burbank et al., *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 707–08 (2013).

<sup>13</sup> See Gillian B. White, *Mick Mulvaney Is Pretending Everything's Totally Normal at Work*, ATLANTIC (Nov. 28, 2017), <https://www.theatlantic.com/business/archive/2017/11/mulvaney-cfpb/546917/> (quoting Mick Mulvaney, President Trump's appointee to head the Consumer Financial Protection Bureau: "[A]nybody who thinks that a Trump administration CFPB would be the same as an Obama administration CFPB is simply naive. Elections have consequences."); see also Gillian B. White, *The CFPB's New Mission*, ATLANTIC (Jan. 25, 2018), <https://www.theatlantic.com/business/archive/2018/01/cfpb-trump-mulvaney/551504/> (discussing memo by Mulvaney describing the new mission of the CFPB); Memorandum from Mick Mulvaney, Acting Dir., CFPB, to CFPB Staff 1 (Jan. 23, 2018), <https://www.documentcloud.org/documents/4357880-Mulvaney-Memo.html> ("[W]e work for the people. And that means everyone: those who use credit cards, and those who provide those cards; those who take loans, and those who make them . . .").

explains how the situation of consumer defendants differs from that of consumer plaintiffs, and considers how these differences generate challenges to legal participation by consumer defendants. To illustrate these challenges, Part II presents an empirical study of the residential foreclosure process in New York City. Drawing on the theoretical and empirical insights, Part III describes several avenues for addressing consumer defendants' limited legal action.

## I. CONSUMER DEFENDANTS

As Professor Katherine Porter notes, consumers' willingness and ability to obtain legal relief depends "not just on the substantive remedies, but on recognizing that those remedies are imbedded in a system of actors, including consumers, lawyers, and judges."<sup>14</sup> This section considers how these realities apply to the particular case of consumer defendants.

### A. *When Consumers Get Sued*

The classic example of consumer litigation involves a consumer or class of consumers filing suit against a business over harms arising from a transaction between the business and the consumer. This situation, which I refer to as "offensive consumer litigation," has generally been the focus of scholars concerned with legal action by consumers. It is also representative of the typical form of litigation addressed by research on individuals' dispute processing behavior and structural inequalities in litigation.

However, consumer litigation also takes another form, when consumers are sued by businesses, which I term "defensive consumer litigation." In this type of litigation, consumers are defendants, rather than plaintiffs. Defensive consumer litigation is epitomized by debt collection actions, in which creditors access enforcement remedies through the court system.<sup>15</sup> In these cases, lenders or third-party debt collectors initiate legal action to enforce loans that are either unsecured (e.g., student loans, credit card balances) or secured (e.g., mortgages).

Debt collection cases are significant for a number of reasons. First, they are increasingly prevalent—consumer issues are among the most common types of legal problems experienced by individuals, and many of these issues revolve around the collection of debt.<sup>16</sup> Indeed, a substantial proportion of civil litigation is now comprised

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<sup>14</sup> PORTER, *supra* note 12, at 536; Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1416, 1424 (2011) (describing how social inequalities result in underenforcement of the Individuals with Disabilities Education Act by private individuals).

<sup>15</sup> For a discussion of the foreclosure context, see *infra* Part II. Many landlord–tenant cases exhibit a similar structure but are less central to conceptions of consumer law.

<sup>16</sup> CONSORTIUM ON LEGAL SERVS. & THE PUB., AM. BAR ASS'N, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS App'x B (1994), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/downloads/legalneedstudy.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/downloads/legalneedstudy.authcheckdam.pdf); CONSUMER FIN. PROT. BUREAU, CONSUMER RESPONSE ANNUAL REPORT 14 (2016), [https://files.consumerfinance.gov/f/documents/201703\\_cfpb\\_Consumer-Response-Annual-Report-2016.PDF](https://files.consumerfinance.gov/f/documents/201703_cfpb_Consumer-Response-Annual-Report-2016.PDF) (noting that debt-related issues are the largest sources of complaints made to the agency); REBECCA L. SANDEFUR, AM. BAR ASS'N, ASSESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 8 (2014),

of debt collection cases.<sup>17</sup> Additionally, a growing body of research documents widespread and persistent problems with the claims of creditors in these cases.<sup>18</sup> Despite this, most debtors fail to engage in the legal process.<sup>19</sup> As a result, default judgments are entered against them, allowing creditors to access enforcement mechanisms. Finally, debt collection cases are important given the significant implications for individuals and families, and, as the Great Recession made clear, for the larger economy.<sup>20</sup>

### B. *Why Consumer Defending is Different*

The situations of consumer defendants and consumer plaintiffs differ in important ways.<sup>21</sup> The litigation decisions and the resulting consequences faced by consumer respondents are different from those of consumer claimants. Moreover, the role of structural inequalities inherent in consumer litigation may have different implications in defensive consumer litigation. Finally, the substance of their disputes and its relation to substantive consumer law also differ. This section considers each of these issues in turn.

#### 1. Consumer Defendant Dispute Processing

Socio-legal scholars have devoted considerable attention to individuals' responses to problems implicating civil legal issues.<sup>22</sup> Drawing largely on influential work

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[http://www.americanbarfoundation.org/uploads/cms/documents/sandefur\\_accessing\\_justice\\_in\\_the\\_contemporary\\_usa.\\_aug.\\_2014.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa._aug._2014.pdf).

<sup>17</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, CREDIT CARDS: FAIR DEBT COLLECTION PRACTICES ACT COULD BETTER REFLECT THE EVOLVING DEBT COLLECTION MARKETPLACE AND USE OF TECHNOLOGY 41 (2009), <https://www.gao.gov/new.items/d09748.pdf> [hereinafter GAO 2009] (citing Federal Trade Commission finding that "the majority of cases on many state court dockets on any given day are debt collection cases").

<sup>18</sup> Judith Fox, *Do We Have a Debt Collection Crisis? — Some Cautionary Tales of Debt Collection in Indiana*, 24 LOY. CONSUMER L. REV. 355, 377 (2012); Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 J. BUS. & TECH. L. 259, 268 (2011); Mary Spector, *Debts, Defaults and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. L. & BUS. REV. 257, 291–94 (2011).

<sup>19</sup> See DAVID CAPLOVITZ, CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT 205 (1974); GAO 2009, *supra* note 17, at 41 (citing Urban Justice Center finding that default judgments were entered in 80% of a sample of debt-collection cases filed in New York City); Fox, *supra* note 18, at 377 (noting that 83% of defendants failed to respond in a sample of Indiana debt-collection cases); Spector, *supra* note 18, at 289; Hillard M. Sterling & Philip G. Schrag, *Default Judgments Against Consumers: Has the System Failed?*, 67 DENV. L. REV. 357, 361 (1990) (noting that default judgments were entered by 74% of consumers in a sample of small-claims consumer cases).

<sup>20</sup> See *infra* Part II.

<sup>21</sup> Of course, there are also many obstacles to consumer litigation that both consumer plaintiffs and defendants face, including contract terms that limit rights or require arbitration.

<sup>22</sup> One body of research focuses on the emergence and trajectory of disputes. See, e.g., DAVID S. COWAN ET AL., THE APPEAL OF INTERNAL REVIEW: LAW, ADMINISTRATIVE JUSTICE AND THE (NON-) EMERGENCE OF DISPUTES (2003); Russell Engler, *When Does Representation Matter?*, in BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA 71 (Samuel Estreicher & Joy Radice eds., 2016); William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. & SOC'Y REV. 631 (1980–1981); Marc S. 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); Herbert M. Kritzer et al., *The Aftermath of Injury: Cultural Factors in Compensation Seeking in Canada and the United States*, 25 L. & SOC'Y REV. 499 (1991); Herbert M. Kritzer et al., *To Confront or Not to Confront: Measuring Claiming Rates in Discrimination Grievances*, 25 L. & SOC'Y REV. 875 (1991); Sally

developed through the Civil Litigation Research Project, this research describes the process through which events ultimately become (or do not become) legal disputes. These studies propose that dispute processing begins when occurrences are named as injurious experiences.<sup>23</sup> Next, individuals who perceive an experience as injurious may blame another.<sup>24</sup> This turns the dispute into a grievance, which means that the individual feels that “he or she . . . is entitled to a resource which someone else may grant or deny.”<sup>25</sup> In order to register this sentiment and seek recompense, the individual must make a claim.<sup>26</sup> If the individual is not satisfied with the other party’s response to the claim, a dispute arises.<sup>27</sup>

In offensive consumer litigation, it is the consumer who initiates private litigation after naming an event as harmful, blaming a business for the event and resulting harm, and seeking relief by making a claim. To consider the actions of consumer defendants, one must extend this framework<sup>28</sup> because defensive consumer litigation involves a different set of questions faced by consumer defendants after business plaintiffs have named, blamed, and claimed.

In that situation, the consumer defendant must decide whether to acquiesce to the demands of the claimant or escalate the conflict.<sup>29</sup> Acquiescence requires that the defendant satisfy the plaintiff, by surrendering all of what was requested or the portion thereof that the plaintiff finds acceptable. If that occurs, the issue is settled before further

Lloyd-Bostock, *Propensity to Sue in England and the United States of America: The Role of Attribution Processes*, 18 J. L. & SOC’Y 428 (1991); Marlynn L. May & Daniel B. Stengel, *Who Sues Their Doctors? — How Patients Handle Medical Grievances*, 24 L. & SOC’Y REV. 105 (1990); Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 L. & SOC’Y REV. 525 (1980–1981); Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? — An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663 (2005); Jack Ladinsky & Charles Susmilch, *Conceptual and Operational Issues in Measuring Consumer Disputing Behavior* (Disputes Processing Resolution Program, Univ. of Wis.-Madison Law Sch., Working Paper No. 1981-3, 1981). A related, but distinct, literature focuses on individuals’ legal needs. *See, e.g.*, AM. BAR ASS’N, *supra* note 16; BARBARA A. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY* (1977); HAZEL GENN, *PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW* (1999); SANDEFUR, *supra* note 16; W.A. Bogart & Neil Vidmar, *Problems and Experiences with the Ontario Civil Justice System: An Empirical Assessment*, in *ACCESS TO CIVIL JUSTICE 1* (Allan C. Hutchinson ed., 1990); Leon Mayhew & Albert J. Reiss Jr., *The Social Organization of Legal Contacts*, 34 AM. SOCIOLOG. REV. 309 (1969); Masayuki Murayama, *Experiences of Problems and Disputing Behavior in Japan*, 14 MEIJI L.J. 1 (2007).

<sup>23</sup> Felstiner et al., *supra* note 22, at 633.

<sup>24</sup> *Id.* at 635.

<sup>25</sup> Miller & Sarat, *supra* note 22, at 527.

<sup>26</sup> Felstiner et al., *supra* note 22, at 635–36.

<sup>27</sup> *Id.* Other research emphasizes the importance of interactions between the parties and the endogeneity between the disputing process and perceptions of disputes. Sally Lloyd-Bostock & Linda Mulcahy, *The Social Psychology of Making and Responding to Hospital Complaints: An Account Model of Complaint Processes*, 16 LAW & POL’Y 123, 130 (1994).

<sup>28</sup> While empirical work has documented differences in dispute processing between individuals who are claimants and those who are respondents, GENN, *supra* note 22, at 152, conceptual work has focused almost exclusively on the actions of individual claimants.

<sup>29</sup> *See* JOHN M. CONLEY & WILLIAM M. O’BARR, *JUST WORDS: LAW, LANGUAGE, AND POWER* 96 (2d ed. 2005) (offering a similar expansion to Felstiner et al.’s Naming, Blaming, Claiming model, proposing that two outcomes are possible after a claim is made: “acceptance, leading to agreement, and denial, leading to argument”).

conflict emerges and never ripens into a dispute. Alternatively, the defendant could escalate the conflict by refusing to comply with the demands of the plaintiff, attempting unsuccessfully to satisfy the plaintiff, or by failing to respond.

If the defendant chooses to escalate the conflict, the conflict still may not become a dispute because it is up to the claimant to move forward. Some plaintiffs, despite not receiving an acceptable response from the respondent, may decide to “clump it”—foregoing further action and lumping it after having made a claim.<sup>30</sup> If the plaintiff does decide to move forward, the conflict will become a dispute. At this point, the defendant must decide whether to defend against the claim or default. In order to defend themselves, defendants must answer the claim and fulfill any other procedurally-mandated requirements.<sup>31</sup> Those who fail to do so default, losing their right to participate in the proceedings.<sup>32</sup>

Thus, consumer defendants who decide not to engage in a legal dispute initiated by a business plaintiff face consequences imposed by the adjudicator. In this way, consumer defendants who default differ from consumer plaintiffs who lump it and suffer nothing worse than the status quo. In addition, although the adjudicator imposes consequences on defendants who attempt to defend themselves and are unsuccessful and those who default, the outcome may be mediated where defendants participate, either as a result of negotiation with the plaintiff or through the court’s discretion.

Among those defendants who decide to defend, some will lawyer up and obtain legal counsel, while others will go it alone. This need not follow the other decisions temporally; some individuals retain legal counsel immediately upon being notified of a claim and many will hire lawyers at the initiation of a legal dispute to avoid defaulting. The presence of legal counsel, however, reflects not only the desire and ability of the defendant to seek legal representation, but a lawyer’s agreement to become involved in the case. Lawyers may serve as catalysts, assisting in the progression of disputes, or as gatekeepers, diffusing disputes and channeling them away from the formal legal progress.<sup>33</sup> In this way, lawyers may influence the trajectory of a dispute as well as its outcome.

Thus, the dispute process for consumer defendants involves decisions—acquiesce or escalate, defend or default—that diverge from those of consumer plaintiffs deciding whether to name, blame, and claim. Several different factors influence their decisions, and potentially encourage or discourage consumer defending. One factor that encourages consumer defensive action, while potentially limiting legal action among consumer plaintiffs, is the fact that the issue facing them has been defined as a legal problem. Among individual plaintiffs, the failure to perceive the problem they are experiencing as a legal problem is a common explanation for their legal inaction.<sup>34</sup> For consumer defendants, the presence of a legal problem is clear: they have been sued.

The stakes involved can also influence legal behavior. Individuals are more likely to engage in the legal process and to obtain legal representation when there is more at

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<sup>30</sup> Ladinsky & Susmilch, *supra* note 22, at 14.

<sup>31</sup> JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 5.19 (5th ed. 2015).

<sup>32</sup> *Id.*

<sup>33</sup> Galanter, *supra* note 22, at 19.

<sup>34</sup> SANDEFUR, *supra* note 16, at 14.

stake,<sup>35</sup> which is likely a factor for consumers as both plaintiffs and defendants.<sup>36</sup> The qualitative nature of what is at stake may also influence behavior<sup>37</sup> as does the cultural meaning of the dispute,<sup>38</sup> particularly when triggering feelings of self-blame and limiting the desirability of engaging in a legal dispute.<sup>39</sup> On these dimensions, there may be important differences between consumer plaintiffs and defendants. In debt collection cases, in particular, raising an affirmative substantive defense or a procedural defense requires that the consumer defendant acknowledge his or her failure to live up to financial obligations. The moral dimensions of this process may serve to discourage legal action by consumer defendants, even where a valid defense exists.<sup>40</sup>

A third factor influencing individuals' willingness and ability to engage in litigation is the burden imposed by participation.<sup>41</sup> As an initial matter, consumers may not understand how to participate in the action.<sup>42</sup> Even when they are able to determine what is necessary to engage in the litigation, participation requires debtors to find their way to unfamiliar or inconvenient courthouses, which may also interfere with work or childcare schedules.<sup>43</sup> Additionally, attorney costs serve as deterrents to legal action by consumers, particularly where the stakes are low relative to the likely fees.<sup>44</sup>

Thus, the series of decisions that consumer defendants face, and the factors that may influence their decisions, differ from consumer plaintiffs. The next section considers how structural inequalities in the litigation process may also differentially influence the trajectory of their disputes.

## 2. Structural Inequalities in Defensive Consumer Litigation

The inequalities between businesses and consumers that give rise to consumer protections in transactions<sup>45</sup> are paralleled in the civil litigation context. In part, this

<sup>35</sup> Herbert M. Kritzer, *To Lawyer or Not to Lawyer: Is that the Question?*, 5 J. EMPIRICAL LEGAL STUD. 875, 899 (2008); Miller & Sarat, *supra* note 22, at 547.

<sup>36</sup> DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW § 1.2 (2017).

<sup>37</sup> Julie Macfarlane, *Why Do People Settle?*, 46 MCGILL L.J. 663, 667 (2001).

<sup>38</sup> Sally Engle Merry & Susan S. Silbey, *What Do Plaintiffs Want? — Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151, 157 (1984).

<sup>39</sup> KITTY CALAVITA & VALERIE JENNESS, APPEALING TO JUSTICE: PRISONER GRIEVANCES, RIGHTS, AND CARCERAL LOGIC 78 (2014); Dan Coates & Steven Penrod, *Social Psychology and the Emergence of Disputes*, 15 L. & SOC'Y REV. 655, 665 (1980–1981).

<sup>40</sup> See, e.g., Teresa A. Sullivan et al., *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 213, 239 (2006) (noting the history of stigma associated with bankruptcy and its continued impact); Brent T. White, *Underwater and Not Walking Away: Shame, Fear, and the Social Management of the Housing Crisis*, 45 WAKE FOREST L. REV. 971, 972 (2010).

<sup>41</sup> MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 200, 227 (1979) (investigating the deterrent effect of procedural burdens); see also Arthur Best & Alan R. Andreasen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress*, 11 L. & SOC'Y REV. 701, 715 (1977) (noting that consumer complaints are “made against the background of widespread knowledge that complaining can be difficult and costly”).

<sup>42</sup> CAPLOVITZ, *supra* note 19, at 206–10.

<sup>43</sup> See generally FEELEY, *supra* note 41; see also CAPLOVITZ, *supra* note 19, at 202, 207–11.

<sup>44</sup> CAPLOVITZ, *supra* note 19, at 222.

<sup>45</sup> Consumer protections are often justified as responses to market failures that result from consumers' limited bargaining power relative to that of businesses. Todd J. Zywicki, *The Law and Economics of Consumer Debt Collection and Its Regulation*, 28 LOY. CONSUMER L. REV. 167, 198–99 (2016).

derives from businesses' status as "repeat players" and consumers' role as "one-shotters." As Professor Marc Galanter describes in his foundational work, repeat players are parties—often larger and with significant resources—who litigate frequently and evaluate individual disputes in the context of a portfolio of cases.<sup>46</sup> One-shotters, in contrast, are parties who rarely litigate, and for whom the stakes in a given case are high.

As a result of repeated exposure to the courts, repeat players enjoy a number of advantages, including the benefit of accumulated prior knowledge, access to experts, and the ability to protect long-term interests through the development of favorable precedent.<sup>47</sup> These advantages help to explain why repeat players—the "haves" in litigation—so often come out ahead.<sup>48</sup> One-shotters, in contrast, enjoy none of these advantages: they have no familiarity with the process, no easy access to legal counsel, and no input in the development of relevant precedent.<sup>49</sup>

These structural inequalities between repeat player businesses and one-shotter consumers are well-recognized in consumer law.<sup>50</sup> However, a further distinction has been afforded less attention. Varying the identities of the plaintiff and defendant generates four types of litigation: repeat player versus repeat player (RP v. RP); one-shotter versus one-shotter (OS v. OS); one-shotter versus repeat player (OS v. RP); and repeat player versus one-shotter (RP v. OS).<sup>51</sup> Most research on structural inequalities in litigation is focused on OS v. RP litigation and seeks to understand whether and why repeat players are more likely to win.<sup>52</sup> Consistent with this theme, scholarship on legal action by consumers has generally considered obstacles to the ability of consumers to bring legal action against businesses.<sup>53</sup>

By focusing on consumer defendants, this Article instead considers a form of RP v. OS litigation<sup>54</sup> and seeks to understand how the advantages of repeat players influence the quantity and quality of legal action by consumer defendants. In particular, this Article considers how advanced intelligence, access to specialists, and the ability to engage in selective litigation may limit consumer defendants' legal action.

In consumer transactions, it is the business that is generally able to shape the transaction.<sup>55</sup> Savvy businesses anticipate future litigation when structuring the initial transaction, and are thus able to shape the dispute process.<sup>56</sup> This includes the use of provisions requiring mandatory arbitration, determining choice of law, limiting the availability of class actions, and allocating fees and costs.<sup>57</sup> In the case of defensive

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<sup>46</sup> Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 97–98 (1974).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> PRIDGEN & ALDERMAN, *supra* note 36, § 1.2.

<sup>51</sup> Galanter, *supra* note 46, at 107.

<sup>52</sup> For an overview, see Shaubin Talesh, *How the "Haves" Come out Ahead in the Twenty-First Century*, 62 DEPAUL L. REV. 519, 524–25 (2013).

<sup>53</sup> See, e.g., Mark E. Budnitz, *The Federalization and Privatization of Public Consumer Protection Law in the United States: Their Effect on Litigation and Enforcement*, 24 GA. ST. U. L. REV. 663 (2008).

<sup>54</sup> This type of litigation involves the "routine processing of claims by parties for whom the making of such claims is a regular business activity." Galanter, *supra* note 46, at 108.

<sup>55</sup> CAPLOVITZ, *supra* note 19, at 3; PRIDGEN & ALDERMAN, *supra* note 36, § 1.1.

<sup>56</sup> PRIDGEN & ALDERMAN, *supra* note 36, § 1.2.

<sup>57</sup> *Id.*

consumer litigation, this benefit is exacerbated by a business's ability to also choose the venue and forum, and to control the timing of the litigation (subject, of course, to civil procedural rules and challenges).<sup>58</sup>

Access to specialists is another benefit enjoyed by repeat players—and generally not enjoyed by one-shotters—that may be especially relevant in the context of defensive consumer litigation. Repeat players not only have access to lawyers, but also to specialists. In contrast, one-shotter consumers are likely to have less access to legal counsel and the lawyers available to them are less likely to have elite credentials or practice in prestigious settings. While these lawyers may be specialists in the relevant area of law, the “episodic and isolated nature” of their work for a given one-shotter limits their ability to develop optimizing strategies because they must manage each case individually.<sup>59</sup>

These inequalities are implicit in any case involving repeat players and one-shotters. However, in RP v. OS litigation, where the one-shotter is the defendant, the consequences are likely more extreme. Consumer plaintiffs benefit from the availability of contingent fee lawyers, high-volume practices,<sup>60</sup> and class actions; consumer defendants do not. This has implications not only for consumer defendants' ability to obtain legal counsel, but also the kind of counsel available to them. Moreover, it means that consumer defendants are more likely to experience all of the burdens of litigation—attending court hearings, meeting filing deadlines, and drafting legal documents—personally, without the assistance of legal counsel.

Finally, repeat players are able to engage in strategically selective litigation, which may further disadvantage consumer respondents. Businesses bringing suit against consumers can set the pace of litigation and can choose to settle or litigate individual cases. This may limit awareness of systemic issues and, over time, can influence the development of law. While this can occur in all litigation between repeat players and one-shotters, the effects may be magnified in RP v. OS litigation, where, as plaintiff, the repeat player enjoys greater control of the litigation.

### 3. Substantive Consumer and Procedural Defenses

The distinction between defensive and offensive consumer law, as forms of OS v. RP and RP v. OS litigation, also has important implications for the substance and form of legal action undertaken by consumers.<sup>61</sup> Consumer plaintiffs initiate legal action on the basis of causes of action provided by substantive consumer law. Consumer defendants may also invoke substantive consumer law, but in the form of affirmative substantive defenses.<sup>62</sup> For example, consumer defendants may be entitled to relief as a result of flaws in the underlying transaction or the use of unfair or deceptive debt collection

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<sup>58</sup> See Edward A. Purcell Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. REV. 423 (1992) (discussing the practical significance of forum selection generally and the potential benefits it affords to plaintiffs).

<sup>59</sup> Galanter, *supra* note 46, at 117.

<sup>60</sup> Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 829 (2011).

<sup>61</sup> See PORTER, *supra* note 12, at 425 (“It matters dramatically to the design of the remedies [in consumer law] whether the business or consumer is more likely to be the party that files the lawsuit.”).

<sup>62</sup> Some situations may also give rise to causes of action that consumers may pursue through offensive consumer litigation.

practices.<sup>63</sup> Consumer defendants may also raise procedural defenses, such as lack of standing, statutes of limitation, and evidentiary defenses.<sup>64</sup> In this way, legal action by consumer defendants can serve an important monitoring and enforcement function for both substantive and procedural law, but one that differs from that offered by consumer plaintiffs.

### C. *Optimizing Consumer Defending*

Consumer defendants' failure to participate in civil litigation may result not only in harms to the consumer,<sup>65</sup> but uncurbed illegal behavior.<sup>66</sup> Defensive consumer litigation can prevent abuses of the civil legal system and ensure that all parties—even powerful ones—comply with procedural and legal requirements.<sup>67</sup> Even if such enforcement does not alter the outcome of a given case, ensuring adherence to civil processes may enhance the expressive function of law.<sup>68</sup>

This raises empirical and normative questions about the optimal level of legal action among consumer defendants.<sup>69</sup> Determining this level requires consideration of all aspects of the applicable enforcement regime, including regulatory action and public litigation, and will vary across substantive areas. The goal of this Article is to identify forces that impact the quantity and quality of legal action among consumer defendants. This, in turn, has implications for policymakers' efforts to generate optimal levels of legal action.

## II. AN EMPIRICAL ILLUSTRATION: THE RESIDENTIAL FORECLOSURE PROCESS

The foregoing highlights the unique circumstances of consumer defendants. This Part offers an empirical illustration of the behavior of consumer defendants in response to a legal claim filed against them in one type of case: residential foreclosures. Using an original dataset of residential foreclosure cases initiated in New York City between 2007 and 2011, this Part illustrates how incentives and structural inequalities discourage defensive legal activity among these consumer defendants. More specifically, the empirical study describes the actions of homeowner defendants and lender plaintiffs within the legal foreclosure process, including their use of legal representation, and also explores the outcomes obtained in each case. The study offers insights into the foreclosure process, with implications for understanding defensive consumer litigation

<sup>63</sup> For an overview, see Peter A. Holland, *Defending Junk-Debt-Buyer Lawsuits*, 46 CLEARINGHOUSE REV.: J. POVERTY L. & POL'Y 12 (2012); Clinton Rooney, *Defense of Assigned Consumer Debts*, 43 CLEARINGHOUSE REV.: J. POVERTY L. & POL'Y 542 (2010).

<sup>64</sup> Holland, *supra* note 63; Rooney, *supra* note 63.

<sup>65</sup> These can be direct or indirect. See, e.g., Jessica Silver-Greenberg et al., *When Unpaid Student Loan Bills Mean You Can No Longer Work*, N.Y. TIMES (Nov. 18, 2017), <https://www.nytimes.com/2017/11/18/business/student-loans-licenses.html>.

<sup>66</sup> See David A. Dana, *Why Mortgage "Formalities" Matter*, 24 LOY. CONSUMER L. REV. 505, 507 (2012) (arguing that enforcing compliance with foreclosure formalities is important for reforming the behavior of lenders and servicers); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1152, 1176, 1189 (2012); Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1404 (1998).

<sup>67</sup> Dana, *supra* note 66, at 507.

<sup>68</sup> *Id.* at 508.

<sup>69</sup> This is similar to debates about the optimal level of private enforcement. Glover, *supra* note 66, at 1189.

more broadly.

A residential foreclosure action terminates a borrower's ability to repay a promissory note secured by a mortgage on a residential property as a result of the borrower's failure to comply with the terms of the promissory note (generally by failing to make timely payments). After foreclosing the right of repayment, the property is sold to allow the plaintiff to recover the unpaid principal and any outstanding interest or fees.

Residential foreclosures have significant implications not only for individual homeowners and families, but also more broadly. Homeowners who lose their home to foreclosure may lose equity invested in the home and have reduced access to credit.<sup>70</sup> In addition, individuals who experience foreclosure face a forced relocation that may lead to declines in housing quality,<sup>71</sup> which can have detrimental consequences for affected family members.<sup>72</sup> The significance of foreclosure is also evidenced by its association with increases in the risk of mental and physical health problems.<sup>73</sup> This, of course, is not to mention repercussions for neighborhoods,<sup>74</sup> including increased racial residential segregation,<sup>75</sup> declines in housing values,<sup>76</sup> increases in crime,<sup>77</sup> and reduced civil

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<sup>70</sup> See White, *supra* note 40, at 983 n.49 (reporting an estimated decline in credit rating of up to 400 points from late payments and foreclosure); Kenneth P. Brevoort & Cheryl R. Cooper, *Foreclosure's Wake: The Credit Experiences of Individuals Following Foreclosure* 15 (Fed. Reserve Bd., Fin. & Econ. Discussion Series, Working Paper No. 2010-59, 2010), <https://www.federalreserve.gov/pubs/feds/2010/201059/201059pap.pdf>. However, White also argues that the "actual financial cost of having a poor credit score for a few years . . . is not likely to be significant for most individuals" relative to the potential costs of staying in an underwater mortgage. White, *supra* note 40, at 984–85.

<sup>71</sup> Matthew Hall et al., *Foreclosure Migration and Neighborhood Outcomes: Moving Toward Segregation and Disadvantage*, 70 SOC. SCI. RESEARCH 107, 113 (2017) (finding that foreclosure-induced moves were linked to migration to more racially segregated and disadvantaged neighborhoods); Raven Molloy & Hui Shan, *The Post-Foreclosure Experience of U.S. Households in the Current Housing Market Downturn*, 41 REAL ESTATE ECON. 225, 228 (2013) (noting that individuals who have experienced foreclosure are more likely to move to denser areas with lower homeownership rates and lower household incomes, although the magnitude of the differences was limited); Anne Julian Martin, *After Foreclosure: The Social and Spatial Reconstruction of Everyday Lives in the San Francisco Bay Area* (Fall 2012) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with author) (observing that, although individuals did not move far from their foreclosed homes, they still "had to make difficult compromises in terms of the [new] housing or location, in order to take what was offered").

<sup>72</sup> See JULIA B. ISAACS, BROOKINGS INST., *THE ONGOING IMPACT OF FORECLOSURES ON CHILDREN* 3 (2012); NAT'L ASSOC. FOR THE EDUC. OF HOMELESS CHILDREN & YOUTH, *A CRITICAL MOMENT: CHILD AND YOUTH HOMELESSNESS IN OUR NATION'S SCHOOLS* 2 (2010) (reporting that thirty-eight percent of school districts cited the foreclosure crisis as the reason for an increase in homelessness among children enrolled in schools).

<sup>73</sup> Jason N. Houle, *Mental Health in the Foreclosure Crisis*, 118 SOC. SCI. & MED. 1, 5 (2014); Jason N. Houle & Michael T. Light, *The Home Foreclosure Crisis and Rising Suicide Rates, 2005 to 2010*, 104 AM. J. PUB. HEALTH 1073, 1075 (2014); Craig Evan Pollack & Julia Lynch, *Health Status of People Undergoing Foreclosure in the Philadelphia Region*, 99 AM. J. PUB. HEALTH 1833, 1835 (2009); Craig Evan Pollack et al., *A Case-Controlled Study of Home Foreclosure, Health Conditions, and Health Care Utilization*, 88 J. URB. HEALTH 469, 474–75 (2011); Janet Currie & Erdal Tekin, *Is the Foreclosure Crisis Making Us Sick?* 22 (Nat'l Bureau of Econ. Research, Working Paper No. 17310, 2011).

<sup>74</sup> DAN IMMERGLUCK, *FORECLOSED: HIGH-RISK LENDING, DEREGULATION, AND THE UNDERMINING OF AMERICA'S MORTGAGE MARKET* 146 (2009).

<sup>75</sup> Hall et al., *supra* note 71, at 108.

participation.<sup>78</sup> And, as the 2008 Financial Crisis made clear, residential foreclosures can also have widespread implications for the stability of the housing market and the wider economy.

This study focuses on the foreclosure process in New York City before and during the Financial Crisis. I begin by describing the significance of this setting, which I argue is particularly well suited to evaluating the willingness and ability of consumer defendants to engage in defensive consumer litigation. I then describe the unique dataset of residential foreclosure cases used in the analysis before presenting the results. In the final section, I briefly consider the implications of the findings.

### A. Empirical Study Setting

The genesis of the Financial Crisis and its relationship to residential foreclosures and the parallel Foreclosure Crisis are well established. As the housing bubble of the early 2000s burst, rates of mortgage default and foreclosure increased dramatically.<sup>79</sup> The value of mortgage-backed securities declined precipitously as a result, setting off a chain of events that in 2008 destabilized the global markets.<sup>80</sup> This study focuses on foreclosure cases that arose out of *lis pendens* filed between 2007 and 2011, as the Foreclosure Crisis began and expanded. The aim of the sections below is to highlight the characteristics that make this time period a valuable context in which to evaluate defensive consumer litigation. The section also describes the benefits of the study's jurisdictional focus on New York State and the sampling frame, which generates a representative sample of foreclosure cases in New York City.

#### 1. The Foreclosure Crisis

During the Financial Crisis and the related Foreclosure Crisis, there were a number of events that may have increased rates of homeowner participation in the litigation process.<sup>81</sup> These include increased incentives to litigate and greater awareness among

<sup>76</sup> Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17 HOUSING POL'Y DEBATE 57, 69 (2006); cf. Kristopher Gerardi et al., *Foreclosure Externalities: Some New Evidence*, 87 J. URB. ECON. 42, 43 (2015) (finding that delinquent mortgages are associated with only small decreases in nearby home values and that the effect is tied to the condition of the distressed property).

<sup>77</sup> See e.g., Ingrid Gould Ellen et al., *Do Foreclosures Cause Crime?*, 74 J. URB. ECON. 59, 68 (2012); but see David S. Kirk & Derek S. Hyra, *Home Foreclosures and Community Crime: Causal or Spurious Association?*, 93 SOC. SCI. Q. 648, 663 (2012) (concluding that the positive association between residential foreclosure and crime in Chicago is spurious).

<sup>78</sup> Vanesa Estrada-Correa & Martin Johnson, *Foreclosure Depresses Voter Turnout: Neighborhood Disruption and the 2008 Presidential Election in California*, 93 SOC. SCI. Q. 559, 573 (2012).

<sup>79</sup> FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT 402 (2011); see also Press Release, CoreLogic, Inc., CoreLogic Reports 57,000 Completed Foreclosures in September (Oct. 31, 2012) (on file with author) (reporting 83,000 completed foreclosures nationwide in September 2011, compared to an average of 21,000 per month between 2000 and 2006).

<sup>80</sup> IMMERGLUCK, *supra* note 74, at 3 (noting that investors in mortgage-backed securities suffered direct losses between \$350 and \$420 billion, with total losses estimated at \$2 trillion or more); David S. Hilzenrath, *2010 Worst Year for Bank Failures Since 1992*, WASH. POST (Dec. 28, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/28/AR2010122803649.html>.

<sup>81</sup> Depressed home values and the restriction of credit during the Financial Crisis served as countervailing forces. We lack data on homeowner participation in the foreclosure legal process over time, making it

consumers of potential defenses, as well as a decline in the stigma associated with defensive consumer legal action. Because these circumstances may have made legal action by consumer defendants more likely, this time period offers a unique opportunity to observe potential variation in the actions of consumer defendants.

When deciding whether to participate in litigation brought against them, consumer defendants must consider the costs of participation and the potential benefits offered by such engagement. For many homeowners, this calculus likely changed during the Financial Crisis. Borrowers who are able to obtain alternate financing have generally been able to satisfy the debt to avoid foreclosure.<sup>82</sup> And, lenders have always had the option of agreeing to a short sale, in which the homeowner sells the home and turns the proceeds over to the lender, avoiding the additional financial repercussions of foreclosure.<sup>83</sup> However, during the Financial Crisis, another alternative outcome became more salient: loan modifications designed to allow homeowners to remain in their homes by renegotiating the terms of the loan.<sup>84</sup> Although some modifications were the result of private loss mitigation efforts, many were a function of government interventions.<sup>85</sup> Some of these programs generated a defense to foreclosure because lenders were required to review a homeowner's application prior to completing a foreclosure. Of course, if the homeowner failed to qualify for a loan modification, the lender could still move forward with the foreclosure.<sup>86</sup> In fact, many homeowners who applied for loan modifications were denied,<sup>87</sup> meaning that the defense represented merely a delay. Nevertheless, it

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impossible to assess historical trends. We also have a limited understanding of how patterns of homeowner behavior in response to foreclosure differ during times of financial crisis relative to more stable periods, when there are fewer foreclosures. This study provides a first step toward addressing these questions.

<sup>82</sup> GRANT S. NELSON ET AL., REAL ESTATE FINANCE LAW § 6.1 (6th ed. 2015).

<sup>83</sup> *Id.* § 6.20.

<sup>84</sup> See HOME AFFORDABLE MODIFICATION PROGRAM, INTRODUCTION OF THE HOME AFFORDABLE MODIFICATION PROGRAM 1 (2009), [https://www.hmpadmin.com/portal/programs/docs/hamp\\_servicer/sd0901.pdf](https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd0901.pdf) (introducing HAMP); Letter from Brian D. Montgomery, Fed. Hous. Comm'r, to HUD-approved mortgagees and appraisers (Oct. 1, 2008), [https://www.nclc.org/images/pdf/foreclosure\\_mortgage/loan\\_mod/hope/lmp\\_hope\\_origination\\_guidelines.pdf](https://www.nclc.org/images/pdf/foreclosure_mortgage/loan_mod/hope/lmp_hope_origination_guidelines.pdf) (introducing the H4H Program); Press Release, Fed. Hous. & Fin. Agency, FHFA Authorizes Fannie Mae and Freddie Mac to Expand Home Affordable Refinance Program to 125 Percent Loan-to-Value (July 1, 2009), <https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Authorizes-Fannie-Mae-and-Freddie-Mac-to-Expand-Home-Affordable-Refinance-Program-to-125-Percent-Loan-to-Value.aspx> (describing the expansion of HARP).

<sup>85</sup> HOME AFFORDABLE MODIFICATION PROGRAM, *supra* note 84; Letter from Brian D. Montgomery to all HUD-approved mortgagees and appraisers, *supra* note 84; Press Release, Fed. Housing & Fin. Agency, *supra* note 84.

<sup>86</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, FORECLOSURE MITIGATION: AGENCIES COULD IMPROVE EFFECTIVENESS OF FEDERAL EFFORTS WITH ADDITIONAL DATA COLLECTION AND ANALYSIS 18–19 (2012), <https://www.gao.gov/assets/600/592028.pdf>.

<sup>87</sup> In part, this reflected the role of securitization in mortgage lending and the failure of servicers to engage in loss-mitigation efforts. See CONGRESSIONAL OVERSIGHT PANEL, EVALUATING PROGRESS ON TARP FORECLOSURE MITIGATION PROGRAMS 72 (2010), <https://www.govinfo.gov/content/pkg/CPRT-111JPRT55737/pdf/CPRT-111JPRT55737.pdf> (In noting the limited success of HAMP, the Panel asked, "So the following question arises: why is HAMP not resulting in more loan modifications? It appears that in many cases the program's incentive structure is not sufficient to overcome other disincentives that are affecting the decisions made by servicers and investors."); Samuel Kruger, *The Effect of Mortgage Securitization on Foreclosure and Modification*, 129 J. FIN. ECON. 586, 587 (2018) (noting that securitized loans in default were more likely to be foreclosed and less likely to be modified, and noting that the results

offered an additional incentive for homeowners to participate in the foreclosure process.

The realization that the chains of title giving rise to some lenders' interests were incomplete or invalid offered another incentive for homeowners to contest foreclosures. Mortgage securitization and increased activity in the secondary mortgage market, combined with banks' use of a private company—Mortgage Electronic Registration Services, Inc. (MERS)—to track interests in mortgage loans resulted in the potential for gaps in the chain of title from loan origination to current holder.<sup>88</sup> To plug these gaps, some lenders engaged in “robo-signing” to generate fraudulent documents in the chain of assignments. Accordingly, some plaintiffs that were unable to prove their interest in the note were found to lack standing to bring the foreclosure action.<sup>89</sup>

In other cases, lenders incorrectly calculated fees or improperly applied payments. A government audit of the fourteen largest mortgage servicers, which accounted for more than two-thirds of the servicing market, found “critical weaknesses” in the servicers' processes that “resulted in unsafe and unsound practices and violations of applicable federal and state law and requirements.”<sup>90</sup> Professor Katherine Porter documented the impact of these practices in bankruptcy court, where many families attempted to save their homes from foreclosure.<sup>91</sup> In a review of 1,700 bankruptcy filings, she found that lenders frequently failed to comply with bankruptcy law requirements regarding the substantiation and calculation of amounts due.<sup>92</sup> Studies of MERS's records<sup>93</sup> and foreclosure filings<sup>94</sup> also documented irregularities.

The existence of foreclosure defenses was widely noted, and may have increased homeowners' likelihood of engaging in the foreclosure process. In addition, some states

“imply that approximately 950,000 of the 5.3 million foreclosures experienced since the start of the Financial Crisis were caused by securitization”); Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1, 12 n.26 (2011); Tomasz Piskorski et al., *Securitization and Distressed Loan Renegotiation: Evidence from the Subprime Mortgage Crisis*, 97 J. FIN. ECON. 369, 377 (2010) (noting that securitized mortgage loans in default are less likely to be modified than non-securitized loans with similar characteristics); Sumit Agarwal et al., *Market-Based Loss Mitigation Practices for Troubled Mortgages Following the Financial Crisis* 16 (Fed. Reserve Bank of Chi., Working Paper No. 2011-03, 2011)

<sup>88</sup> NELSON ET AL., *supra* note 82, § 5.34.

<sup>89</sup> See Eric A. Zacks & Dustin A. Zacks, *A Standing Question: Mortgages, Assignment, and Foreclosure*, 40 J. CORP. L. 705, 719 (2015) (noting potential standing defenses and criticizing courts' unwillingness to allow defendants to raise them).

<sup>90</sup> See OFFICE OF THE COMPTROLLER OF THE CURRENCY & OFFICE OF THRIFT SUPERVISION, FED. RESERVE SYS., INTERAGENCY REVIEW OF FORECLOSURE POLICIES AND PRACTICES 2–3 (2011) (finding that in most cases the servicer possessed documentation sufficient to establish the foreclosing party's interest in the note, but that the documentation was not always present in foreclosure files and there was insufficient oversight in the preparation of affidavits asserting the party's interest).

<sup>91</sup> Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 TEX. L. REV. 121, 123 (2008).

<sup>92</sup> *Id.* at 146–52.

<sup>93</sup> Alan M. White, *Losing the Paper — Mortgage Assignments, Note Transfers, and Consumer Protection*, 24 LOY. CONSUMER L. REV. 468, 474–76 (2012).

<sup>94</sup> See James Geoffrey Durham, *Avoiding a Lawyers' Race to the Foreclosure Bottom: Some Advice to Lawyers for Lenders and Borrowers on Their Roles in Foreclosure Litigation*, 32 N. ILL. U. L. REV. 419, 421–26 (2012) (summarizing the findings of an audit of non-judicial foreclosures in San Francisco by the San Francisco Office of the Assessor-Recorder); Megan Barnett & Abigail Field, *At Bank of America, More Incomplete Mortgage Docs Raise More Questions*, FORTUNE (June 3, 2011), <http://fortune.com/2011/06/03/at-bank-of-america-more-incomplete-mortgage-docs-raise-more-questions>.

adopted procedural protections for homeowners in the wake of the Financial Crisis, including enhanced notice and pleading requirements, settlement conferences, and housing counseling.<sup>95</sup> These procedural protections also encouraged greater participation among homeowners facing foreclosure.

Finally, homeowners facing foreclosure during this time period may have been better equipped to overcome the stigma that is often associated with defensive consumer litigation. While foreclosure is associated with feelings of mistrust, insecurity, anxiety,<sup>96</sup> and shame that can shape homeowners' behavior,<sup>97</sup> the Financial Crisis was a unique period. Awareness of the frequency of mortgage default and the role of lenders in precipitating the Foreclosure Crisis may have eased homeowners' feelings of self-blame, increasing their likelihood of engaging in the foreclosure process.<sup>98</sup>

Together, these trends may have encouraged homeowner participation in the foreclosure process.<sup>99</sup> This differentiates foreclosures from other types of defensive consumer litigation, where one would expect higher rates of default. In this way, the study offers a valuable situation in which to evaluate legal action among consumer defendants.

## 2. The Residential Foreclosure Process in New York, New York

This study's focus on foreclosures in New York City under New York state law offers further analytic benefits. Foreclosures happen as of right outside of the court system in many states,<sup>100</sup> making it nearly impossible to track the actions of homeowners in response. However, twenty-one states, including New York, require that lenders file a civil legal action to foreclose.<sup>101</sup> This generates a public court record that makes it possible to track the behavior of lenders and homeowners in the legal foreclosure process. Because the judicial foreclosure process is seen as more favorable to participation by homeowners, it also generates conservative estimates of legal inaction among homeowners.<sup>102</sup>

<sup>95</sup> See Heather Morton, *Foreclosures 2016 Legislation*, NAT'L CONFERENCE OF STATE LEGISLATURES (Apr. 21, 2016), <http://www.ncsl.org/research/financial-services-and-commerce/foreclosures-2016-legislation.aspx> (identifying foreclosure legislation adopted by state legislatures, by year); sources cited *infra* note 140 (describing the procedural reforms adopted in New York state).

<sup>96</sup> Lauren M. Ross & Gregory D. Squires, *The Personal Costs of Subprime Lending and the Foreclosure Crisis: A Matter of Trust, Insecurity, and Institutional Deception*, 92 SOC. SCI. Q. 140, 151–52 (2011).

<sup>97</sup> See Lindsay A. Owens, *Intrinsically Advantageous? Reexamining the Production of Class Advantage in the Case of Home Mortgage Modification*, 93 SOC. FORCES 1185, 1198–1200 (2015) (documenting feelings of shame among homeowners experiencing foreclosure and these feelings' influence over middle-class homeowners' actions).

<sup>98</sup> See Karen McCormack, *Credit and Credibility: Homeownership and Identity Management in the Midst of the Foreclosure Crisis*, 55 SOC. Q. 261, 279 (2014).

<sup>99</sup> On the other hand, high rates of default and foreclosure were a function of decreased housing values that may have depressed consumer defendants' willingness to engage in litigation.

<sup>100</sup> NELSON ET AL., *supra* note 82, § 7.20.

<sup>101</sup> *Id.*

<sup>102</sup> See JOHN RAO & GEOFF WALSH, NAT'L CONSUMER L. CTR., *FORECLOSING A DREAM: STATE LAWS DEPRIVE HOMEOWNERS OF BASIC PROTECTIONS* 3–4 (2009) (arguing that some nonjudicial-foreclosure states offer homeowners fewer protections than renters); Timothy A. Froehle, *Standing in the Wake of the Foreclosure Crisis: Why Procedural Requirements Are Necessary to Prevent Further Loss to Homeowners*, 96 IOWA L. REV. 1719, 1724 (2011); Elizabeth Renuart, *Property Title Trouble in Non-Judicial Foreclosure States: The Ibanez Time Bomb?*, 4 WM. & MARY L. REV. 111, 139 (2013) (discussing the

The majority of foreclosures in New York are filed in the state’s trial court—the New York State Supreme Court.<sup>103</sup> A case begins when the lender files a *lis pendens*<sup>104</sup> in the land records in the county where the property is located, providing notice of the impending litigation.<sup>105</sup> The lender must provide notice and serve all necessary parties with a summons and complaint<sup>106</sup> before filing the proof of service and a Request for Judicial Intervention with the court. The homeowner can respond by filing an answer. If the homeowner answers the complaint, the lender will generally move for summary judgment. If the court grants the lender’s motion for summary judgment, or if the homeowner does not file an answer or admits the allegations of the complaint, then the court will appoint a referee. The referee computes the balance due to the bank, which is confirmed in the order of reference.<sup>107</sup> A judgment of foreclosure and sale is then entered, giving the lender the right to sell the property at a court-sanctioned auction. If, in contrast, the homeowner and lender are able to negotiate an alternative to foreclosure, the lender may discontinue the case, generally without prejudice.<sup>108</sup> During the Financial Crisis, the New York State foreclosure process was reformed to include settlement conferences, expanded notice requirements, and heightened pleading requirements; it is now one of the lengthiest foreclosure processes in the nation.<sup>109</sup>

To limit court variation while generating a sample that is representative of a sizable portion of all foreclosure cases filed in the state,<sup>110</sup> this study is focused on residential foreclosure cases filed in the five boroughs of New York City: the Bronx, Brooklyn (Kings County), Queens, Manhattan (New York County), and Staten Island (Richmond County). This sample also encompasses a diverse housing stock and population.

### B. Residential Foreclosure Case Dataset

To generate a representative sample of New York City foreclosure cases, I began with a proprietary dataset acquired from RealtyTrac. RealtyTrac is a private company that collects public data from land records, including information about properties that enter the foreclosure process, to sell to potential investors.<sup>111</sup> The dataset identified all *lis pendens* filed between 2007 and 2011 in connection with residential properties in the five

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potential implications of faulty assignments for the stability of foreclosure sales in nonjudicial-foreclosure states).

<sup>103</sup> See Justin Wagner, *Assisting Distressed Homeowners to Avoid Foreclosure: An Advocate’s Role in an Evolving Judicial and Policy Environment*, 17 GEO. J. ON POVERTY L. & POL’Y 423, 427 (2010) (noting that while foreclosure cases can be filed in other courts, they rarely are).

<sup>104</sup> N.Y. REAL PROP. ACTS. LAW § 1331 (McKinney 1962); N.Y. C.P.L.R. 6501 (McKinney 1993).

<sup>105</sup> N.Y. C.P.L.R. 507 (McKinney 1962).

<sup>106</sup> N.Y. REAL PROP. ACTS. LAW § 1303 (McKinney 2016).

<sup>107</sup> N.Y. REAL PROP. ACTS. LAW § 1321 (McKinney 1962).

<sup>108</sup> N.Y. C.P.L.R. 3217(c) (McKinney 2012).

<sup>109</sup> *New York Foreclosure Laws*, REALTYTRAC, <http://www.realtytrac.com/real-estate-guides/foreclosure-laws/new-york-foreclosure-laws/> (last visited Oct. 23, 2018) (“New York foreclosures can take up to 15 months, which is longer than most other states.”).

<sup>110</sup> JUDGE ANN PFAU, STATE OF N.Y. UNIFIED COURT SYS., 2010 REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS 4 (2010), <http://ww2.nycourts.gov/sites/default/files/document/files/2018-06/foreclosurereportnov2010.pdf> (reporting that New York City foreclosures account for nearly 30% of all foreclosure filings in the state).

<sup>111</sup> “RealtyTrac offers a one-stop shop for homes buyers, investors, and other real estate professionals. You’ll get access to the largest selection of foreclosures, foreclosed homes for sale, MLS listings, auctions and bank-owned homes.” REALTYTRAC, <https://www.realtytrac.com/> (last visited Oct. 23, 2018).

boroughs of New York City. Because a *lis pendens* is filed prior to the initiation of a foreclosure case in New York State, this identified the universe of potential foreclosure cases. From this dataset, I drew a random sample of *lis pendens*, stratified by year and county.<sup>112</sup>

I matched the *lis pendens* to court cases by plaintiff and defendant name and date of filing using the New York State Court System's online case summary. In doing so, I excluded non-foreclosure cases and foreclosure cases involving non-individual defendants and non-lender plaintiffs (e.g., tax liens). For those cases remaining in the sample where a court case was identified, the court records were retrieved from online sources (Brooklyn and Manhattan) and county clerks' offices (Bronx, Queens, and Staten Island).

These court records, including the complaint and any appearance, answer, order, order of reference, or judgment of foreclosure and sale, were then reviewed. From this review, the identities of the parties and their representatives were coded, as was information about the timing, form, and content of any pleadings they filed. The outcome of each case was also determined. In addition, the terms of the loan and its history, from origination through default, were noted. The location of the property that secured the loan was drawn from the complaint and matched to Census data, providing information about the characteristics of the population in the areas where the properties are located.

The resulting dataset reveals the identities and characteristics of the lender plaintiffs, defendant homeowners, and any legal counsel involved. It also includes information about the form and content of pleadings the parties filed and the outcome of the case. Because I was unable to collect documents for some cases, I rely on a slightly reduced analytic sample for most analyses ( $n=938$ ). Appendix Table 1 describes the proportion of cases in the sample filed in each county and year of case filing.<sup>113</sup> There is often a delay between the filing of the *lis pendens* in anticipation of the civil action and the filing of the Request for Judicial Intervention, so the year of case filing ranges from 2007 to 2013, even though the sample of *lis pendens* ranged from 2007 to 2011.

### C. Empirical Study Results

Using this original dataset, the descriptive analyses below identify ways in which limited incentives and structural inequalities contribute to diminished legal participation among homeowner defendants. More specifically, the analysis considers the status of lenders and homeowners as repeat players and one-shotters, respectively. It then compares the use of legal representation among homeowner defendants and lender plaintiffs, and the types of lawyers available to each group. Next, it evaluates the actions taken by homeowners and lawyers within the legal process and concludes by describing the outcomes of the foreclosure cases.

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<sup>112</sup> Counties with a lower incidence of foreclosure were sampled at a higher rate in order to generate a sample size sufficient for statistical analysis. The sampling rate for each year in Bronx was 1.6%, Brooklyn 0.8%, Manhattan 4.1%, Queens 0.8%, and Staten Island 1.6%. The observations are weighted in all analyses to make them representative of the population of foreclosure cases.

<sup>113</sup> The year of case filing is the year in which the request for judicial intervention was filed, or if none ( $n = 24$ ), the date on which the complaint was signed.

## 1. Repeat Players and One-Shotters

The lender plaintiffs in foreclosure actions are advantaged in multiple ways over the defaulted debtor because they are larger, have more resources, and routinely use the enforcement process. The identities of the plaintiffs in this sample of foreclosure cases highlight these inequalities. Many of the plaintiffs in these foreclosure actions are among the most powerful financial institutions in the world. The majority of the foreclosure actions were brought by large national banks, and just five banks—Wells Fargo, US Bank, Deutsche Bank, JP Morgan Chase, and HSBC—account for more than half of all foreclosure cases.<sup>114</sup> With thousands of pending foreclosures, the stakes in any given case are low for these plaintiffs.

The opposite is likely true for the one-shotter homeowners, who may be further disadvantaged by their socioeconomic status. Because the data were drawn from court records, I know the identities, but not the demographic or socioeconomic characteristics of the defendant homeowners. However, I am able to describe the terms of the underlying loans and the characteristics of the locations of the properties subject to foreclosure.<sup>115</sup> The attributes of the neighborhood where the property is located offer important insights into the likely characteristics of the homeowners.

The properties involved in the foreclosure cases are not randomly distributed across New York City, but are clustered in areas with higher concentrations of minority populations.<sup>116</sup> Figure 1 maps the location of each property and indicates the proportion of the population on the block who are Black. It shows that properties in foreclosure are more prevalent in areas with more concentrated Black populations.<sup>117</sup> On average, 42% of the population on the blocks where the properties are located are Black, compared with just 23% citywide.<sup>118</sup> Figure 2 is a similar figure but indicates the rate of Hispanic population. While Figure 2 is consistent with clustering in minority areas, the link between the incidence of foreclosure and Hispanic population is less clear. And, on average, 24% of the population on the blocks where the properties are located is Hispanic, which is lower than the percent of residents that are Hispanic citywide (29%).

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<sup>114</sup> See *infra* App'x Table 2.

<sup>115</sup> By geocoding the locations of the properties, I was able to match the location of each foreclosure property to 2010 U.S. Census data. I use the most fine-grained data available for each variable of interest. In some cases, the data is at the block level, and other variables are available at the block-group level.

<sup>116</sup> In addition to suggesting the potential social disadvantage of homeowners, these patterns also raise concerns regarding discriminatory lending.

<sup>117</sup> Both Figure 1 and Figure 2 display results for the full sample of 955 cases.

<sup>118</sup> CENSUS BUREAU, RACE AND HISPANIC OR LATINO ORIGIN BY RACE, 2010, Prepared by Social Explorer, <https://www.socialexplorer.com/tables/C2010/R11586843>.

Figure 1. Foreclosure Case Property Locations with Proportion of Block Population that is Black

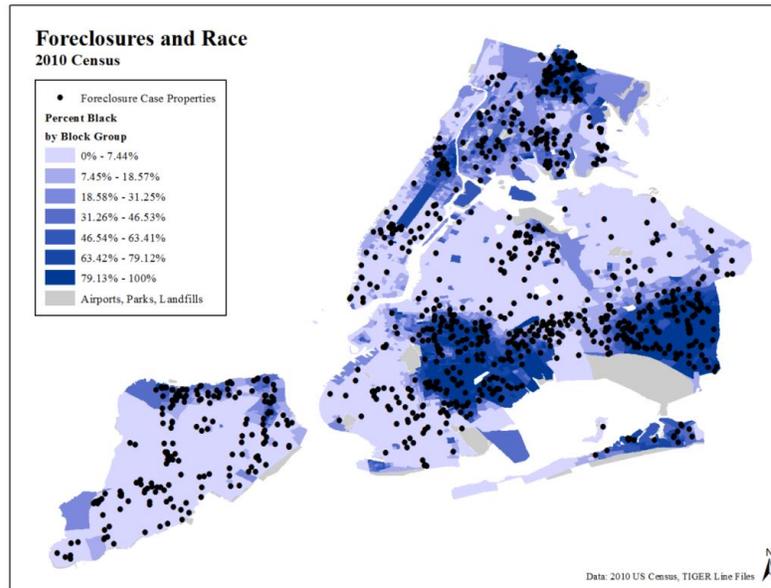
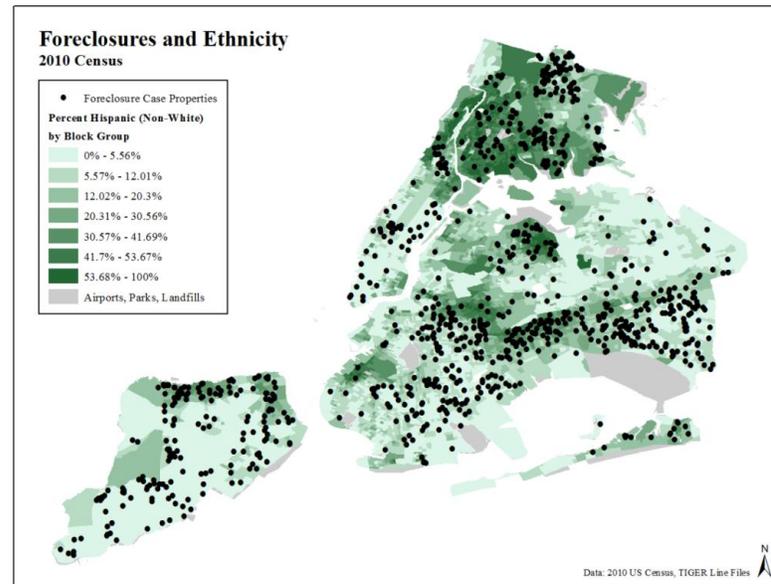


Figure 2. Foreclosure Case Property Locations with Proportion of Block Population that is Hispanic



While higher rates of foreclosure appear to be clustered in minority neighborhoods, the link between foreclosure and indicators of socio-economic disadvantage is less clear. The data do not provide strong evidence that the foreclosures were disproportionately located in economically disadvantaged areas. The median annual household income in the block groups where the properties are located was \$57,680, in

2012 inflation-adjusted dollars, which is close to the median household income citywide at the same time.<sup>119</sup> In addition, there is little evidence that the underlying loans were for the purchase or refinancing of low-cost homes, relative to housing values citywide. Given that most loans are for an amount less than the full value of the home, the average principal amount of the loans, \$444,102, is not drastically lower than the median housing value for owner-occupied housing units citywide at that time, \$500,790.<sup>120</sup>

However, other features of the underlying loans offer evidence of homeowners' economic disadvantage. First, the time between origination and default is generally short, with some homeowners defaulting as early as the first month after origination. This may be indicative of homeowners' limited economic resources, but it also raises questions about the quality of the underlying loans. Raising further concerns about the lending practices that generated these loans is the fact that most of the loans in the sample (regardless of the year in which the foreclosure case was filed) were originated in late 2006. This is notable in light of patterns of mortgage lending in the period preceding the Financial Crisis. Rising housing values, decreased underwriting standards, and increased demand for mortgage-backed securities allowed borrowers who had lower credit scores, who were unable to fully document their income and assets, or who financed a greater proportion of the house's purchase price (a higher loan-to-value ratio) to qualify for non-traditional, sub-prime loans.<sup>121</sup> The competition for borrowers created a race to the bottom in mortgage lending standards that reached its nadir in 2006, when most of the loans in the sample were originated.

To offset the higher risks of lending to subprime borrowers, loans included higher interest rates and/or adjustable interest rates (often with a low introductory teaser rates that reset as quickly as one month after origination).<sup>122</sup> For the loans in this sample of foreclosure cases, the average interest rate in effect when the foreclosure case was initiated was 7.26%.<sup>123</sup> In comparison, the average rate for a 30-year, fixed-rate mortgage in 2006 was just 6.41%. Subprime borrowers are more likely to default on their loans, not only as a result of their economic characteristics, but also because of the features of the loans that they obtain.<sup>124</sup> During the period when most of the loans in this study were originated, subprime lending was more prevalent among communities of color and

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<sup>119</sup> 48.6% of the population of New York City had an annual household income of \$49,999 or below while 44.4% had an annual household income of \$60,000 or above. CENSUS BUREAU, HOUSEHOLD INCOME, ACS 2012 (5-YEAR ESTIMATES), Prepared using Social Explorer, [https://www.socialexplorer.com/tables/ACS2012\\_5yr/R11586847](https://www.socialexplorer.com/tables/ACS2012_5yr/R11586847) (Author downloaded and filtered the data utilizing Social Explorer to analyze information limited to the five boroughs surround New York City).

<sup>120</sup> The median housing values at that time were as follows: Bronx, \$380,900; Brooklyn, \$562,600; Manhattan \$827,300; Queens, \$462,800; and Staten Island, \$449,400. ACS 2012 (5-Year Estimates), SOCIAL EXPLORER, tbl. 100 ("House Value for All Owner-Occupied Housing Units"), [https://www.socialexplorer.com/tables/ACS2012\\_5yr/R11586847](https://www.socialexplorer.com/tables/ACS2012_5yr/R11586847) (last visited Oct. 23, 2018).

<sup>121</sup> IMMERGLUCK, *supra* note 74, at 84–98.

<sup>122</sup> *Id.* at 85.

<sup>123</sup> Because many of the loans had interest rates that were subject to adjustment, the original interest rate may have been different and, had the homeowner not defaulted, it might have changed over time.

<sup>124</sup> See IMMERGLUCK, *supra* note 74, at 136; Kristopher Gerardi et al., *Subprime Outcomes: Risky Mortgages, Homeownership Experiences, and Foreclosures* 1, 21–22 (Fed. Reserve Bank of Bos., Working Paper No. 07-15, 2008).

among economically marginalized borrowers.<sup>125</sup> Many of the loans in this study exhibit characteristics consistent with non-traditional lending and involve properties that are located in areas with higher Black populations. These findings suggest that economic and social inequality contributed to defendant homeowners' entry into the foreclosure process. In the next section, I consider how inequalities shape the behavior of parties within the legal process.

## 2. Differential Access to Legal Representation

Exacerbating the disparity in resources between one-shotters and repeat players is their differential access to legal representation. As a result of their frequent participation in litigation, repeat players are likely to enjoy easy access to specialized legal counsel, while one-shotters face obstacles in obtaining legal representation, usually from less prestigious providers. In the case of RP v. OS disputes, one-shotters' access to legal representation is further inhibited by their structural position as defendants. These dynamics are well illustrated by the foreclosure context.

Corporations must be represented in civil actions in New York State,<sup>126</sup> and all plaintiffs in the sample have representation. Although there are seventy-three different law firms that represented the plaintiffs,<sup>127</sup> just three firms served as counsel in more than half of all cases: Steven J. Baum, P.C. represented the plaintiff in 29% of cases; Rosicki, Rosicki & Associates appeared in 14% of cases; and Fein, Such & Crane, LLP was plaintiff's counsel in 10% of cases. These firms specialize in foreclosure cases and have largely automated, and in some cases even outsourced, the preparation of standardized pleadings.<sup>128</sup> This high-volume "foreclosure mill" approach minimizes costs.<sup>129</sup> These economies of scale benefit plaintiff lenders, who as repeat players, routinely handle similar cases by accessing specialized low-cost legal representation.<sup>130</sup>

On the other hand, mass producing litigation disincentivizes more in-depth attention to each case. The Stephen J. Baum Firm and its affiliated business, Pillar Processing, LLC, were investigated by the New York State Attorney General and agreed to pay \$4 million in penalties, costs, and fees before closing in 2011.<sup>131</sup> The Attorney General found that the firm routinely filed foreclosures without verifying the accuracy of the plaintiffs' claims, relied on non-attorney employees to prepare complaints, and had

<sup>125</sup> IMMERGLUCK, *supra* note 74, at 78.

<sup>126</sup> N.Y. C.P.L.R. 321(a) (MCKINNEY 1991).

<sup>127</sup> See *infra* App'x Table 23.

<sup>128</sup> Amir Efrati, *Judges Tackle 'Foreclosure Mills': High-Volume Firms That Cut Corners Are Rebuked, Fined*, WALL ST. J., <https://www.wsj.com/articles/SB119639697577209194> (last updated Nov. 30, 2007, 11:59 PM).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*; Gretchen Morgenson & Jonathan D. Glater, *Foreclosure Machine Thrives on Woes*, N.Y. TIMES (Mar. 30, 2008), <https://www.nytimes.com/2008/03/30/business/30mills.html>.

<sup>131</sup> Press Release, N.Y. State Attorney Gen., A.G. Schneiderman Announces \$4 Million Settlement with New York Foreclosure Law Firm Steven J. Baum P.C. and Pillar Processing LLC (Mar. 22, 2012), <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-4-million-settlement-new-york-foreclosure-law-firm-steven-j>. The firm also attracted national attention through a series of articles in the *New York Times*, which included a column that incorporated photos from a Halloween party at the firm showing costumes and decorations mocking homeowners facing foreclosure. Joe Nocera, *What the Costumes Reveal*, N.Y. TIMES (Oct. 28, 2011), [http://www.nytimes.com/2011/10/29/opinion/what-the-costumes-reveal.html?\\_r=0](http://www.nytimes.com/2011/10/29/opinion/what-the-costumes-reveal.html?_r=0).

employee attorneys pre-sign complaint verifications and other legal documents to be notarized later without the presence of the signing attorney. Despite this, there was no additional oversight required in cases where the firm had represented the plaintiff. Thus, in nearly one-third of the cases in this sample, the plaintiff was represented by a law firm known to have consistently engaged in unlawful practices, yet the legal pleadings were not subject to additional scrutiny.<sup>132</sup>

In contrast to plaintiffs, who enjoy the benefits of high-efficiency (although questionably accurate) specialized legal representation, homeowner defendants face numerous obstacles with regard to access to counsel. In fact, most homeowners were unrepresented. Only 21% of homeowners had some form of legal representation, including representation limited to drafting an answer or appearing at a settlement conference. The number of homeowners who had traditional attorney-client relationships with lawyers was even lower. Although use of lawyers increased over time—only 7% of homeowners had representation among cases filed in 2007, compared with a high of 39% among cases filed in 2011—the majority of homeowners remained pro se even among the later cases.<sup>133</sup> Among those homeowners who had legal representation, 60% were represented by solo practitioners.<sup>134</sup> Lawyers who are part of law firms provided representation in 20% of cases with homeowner representation, while legal aid and pro bono programs represented homeowners in 15% of cases where the homeowner had representation. In another five cases, homeowners who had representation obtained counsel through a union prepaid legal assistance plan (3% of cases with legal representation for the homeowner).

While only a few firms represented most of the plaintiffs, there was far less consolidation among lawyers representing the defendant homeowners. One hundred fifty-eight solo practitioners or law firms provided representation in the 198 cases where the homeowners were represented. Only seventeen of these lawyers or law firms appeared in more than one case, and the legal provider who appeared most often appeared in only six cases.<sup>135</sup> This lack of consolidation among foreclosure defense counsel may be consequential. Because the private foreclosure defense bar is so diffuse, comprised primarily of solo practitioners, it may limit defendants' ability to identify and respond to patterns of behavior among plaintiffs.

It is important to recognize that with these data, it is impossible to identify the reason why any individual homeowner did or did not obtain counsel.<sup>136</sup> Unrepresented homeowners may not have wanted legal counsel or they may have been unsuccessful in

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<sup>132</sup> Perhaps law firms can be too big to fail; in this situation, pleadings prepared by an enterprise known to have engaged in fraud were allowed to stand, perhaps because it would be too disruptive to question them. Or, the court system may assume that lawyers taking over the cases reviewed the pleadings and responded appropriately.

<sup>133</sup> See *infra* Figure 3.

<sup>134</sup> See *infra* App'x Table 4 (identifying lawyers and law firms that appeared on behalf of defendant homeowners in at least two cases).

<sup>135</sup> Because each homeowner in the sample is unique but some plaintiffs appear in multiple cases, it is not surprising that the network between homeowners and their lawyers is less centralized than that of plaintiffs and their legal representatives. However, this disparity is also indicative of the structural context of foreclosure litigation.

<sup>136</sup> For additional discussion and analysis, see Emily S. Taylor Poppe, *Homeowner Legal Representation in the Foreclosure Crisis*, 13 J. EMPIRICAL LEGAL STUD. 809 (2016).

attempts to hire lawyers. However, the differential usage of specialized legal counsel by lender plaintiffs and defendant homeowners are consistent with the structural inequalities predicted in RP v. OS litigation.

### 3. Strategic Litigation

A further advantage accruing to repeat players is their ability to engage in strategic litigation, which includes their ability to play the odds, focusing less attention on easier cases, and devoting greater resources to cases that involve rules. Over time, through repeat players' focus on establishing precedent and their repeated presence in litigation, they shape what is defined as legal behavior. The foreclosure context helps to illustrate the results of that process.

Lenders' failure to assign notes, the use of fraudulent documents to recreate missing chains of title, and the discovery that records maintained by MERS were incomplete raised concerns during the Financial Crisis about plaintiffs' standing to enforce the notes being foreclosed.<sup>137</sup> Without investigating facts of each case not available in court records, it is impossible to verify the plaintiffs' interests in the notes they were seeking to foreclose. However, the court records show the facts and documentary evidence provided by plaintiffs to the court in support of their complaints, and the records suggest the practices that were generally accepted by courts.

While filing the note fulfills one of the requirements for establishing a prima facie case for foreclosure<sup>138</sup> and offers important information about the plaintiffs' interest and right to fees and costs, it was not required prior to 2013 in New York State. As Table 1 indicates, plaintiffs provided a copy of the note as an exhibit to the complaint in only 28% of cases.

*Table 1: Foreclosure Complaint Content*

	Yes (%)	No (%)	Unclear (%)
Note Attached as Exhibit	28	70	2
Mortgage Recorded at Complaint Date	27	46	27
Description of Chain of Title for Loan			
Origination Details Present	55	44	<1
Intermediate Details Present	28	63	9
Current Details Present	91	8	0
Non-MERS Plaintiff	99	1	0
Mortgage Never Held by MERS	67	33	0
No Complaint Issues	10	86	4

N = 938.

It is also impossible to trace the chain of ownership in the notes from the information provided to the court in most cases. The plaintiff did not originate the

<sup>137</sup> See *supra* Part II.A.1.

<sup>138</sup> Mark C. Dillon, *Unsettled Times Make Well-Settled Law: Recent Developments in New York State's Residential Mortgage Foreclosure Statutes and Case Law*, 76 ALB. L. REV. 1085, 1096 (2012–2013).

underlying loan in at least 76% of the cases.<sup>139</sup> However, most complaints provided a limited description of the chain of assignments giving rise to the plaintiff's interest in the note: 91% of cases described the most recent transaction, but only 55% of complaints described the origination of the loan, and only 28% provide information about any intervening transfers. In addition, at least 33% of the loans were assigned to MERS at some point, further obfuscating the chain of ownership.

Recording a mortgage in the land records is another way of providing a record of interests in notes and in the underlying real property, although it is not required for a foreclosure claim. In only 27% of cases does the complaint indicate that the assignment transferring the mortgage to the plaintiff was recorded prior to the date of the complaint. In 46% of cases, the complaint alleges that the plaintiff has the right to enforce the note, but the mortgage "is to be assigned" or the assignment "is to be recorded." In 27% of cases, it is not clear from the complaint when, or if, the mortgage assignment was recorded.

New York civil procedural rules require that after filing the complaint, the plaintiff file a Request for Judicial Intervention. In response to high rates of homeowner default, the New York legislature established foreclosure settlement conferences in 2008.<sup>140</sup> It is the filing of the Request for Judicial Intervention that triggers the court to schedule a settlement conference in eligible cases and gives the court jurisdiction over the matter.<sup>141</sup> Court administrators and legal aid attorneys found that after the adoption of the settlement conferences, there was a "Shadow Docket" of foreclosure cases in which complaints had been filed, but there was no Request for Judicial Intervention.<sup>142</sup> The rise of this Shadow Docket meant that many homeowners were denied access to these conferences due to plaintiffs' failures to prosecute foreclosure actions.<sup>143</sup>

In this sample, there are twenty-four cases in which no Request for Judicial Intervention was ever filed. In many other cases, it was filed, but after a delay. The

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<sup>139</sup> The number may be even higher. If the complaint does not indicate whether the plaintiff originated the loan or subsequently acquired it, it is impossible to determine from the court records whether the loan has been assigned. The complaints also reveal the increased complexity of plaintiffs' legal interests: 57% of cases identify a lender as the plaintiff; 37% name a trustee and the underlying security; 2% identify both a lender and a servicer; and nearly 4% name a trustee but not the security, or the servicer but neither a trustee nor a lender.

<sup>140</sup> The 2008 legislation required that the court schedule a mandatory settlement conference within sixty days of the filing of proof of service of the complaint in all residential foreclosure cases involving a "subprime" or "high-cost" loan originated between 2003 and 2008 where the defendant was a resident of the property. This legislation also permitted defendant homeowners in similar ongoing cases to request a settlement conference. N.Y. C.P.L.R. 3408(a)–(b) (MCKINNEY 2008). This program was expanded to require mandatory settlement conferences in all new residential foreclosure cases where the defendant occupied the property, regardless of loan type, as of February 13, 2010, and permitted defendant homeowners in similar ongoing cases to request settlement conferences. N.Y. C.P.L.R. 3408(a) (MCKINNEY 2010).

<sup>141</sup> N.Y. C.P.L.R. 3408(a) (MCKINNEY 2017).

<sup>142</sup> MFY LEGAL SERVS., INC., JUSTICE DECEIVED: HOW LARGE FORECLOSURE FIRMS SUBVERT STATE REGULATIONS PROTECTING HOMEOWNERS 14–16 (2011), <http://mobilizationforjustice.org/wp-content/uploads/MFY-White-Paper-JUSTICE-DECEIVED.pdf>.

<sup>143</sup> N.Y. STATE DEP'T OF FIN. SERVS., REPORT ON NEW YORK'S FORECLOSURE PROCESS 7 (2015), [https://www.dfs.ny.gov/reportpub/banking/fore\\_proc\\_report\\_052015.pdf](https://www.dfs.ny.gov/reportpub/banking/fore_proc_report_052015.pdf) (describing the timing and sources of delays in the foreclosure process).

median time between the date on which the complaint was signed and the filing of the Request for Judicial Intervention was a little over three months. Because of the time required for notice, one would expect a period of time to elapse. However, 10% of cases involved a period of more than a year between the verification of the complaint and the filing of the Request for Judicial Intervention. The longest delays lasted for years, with up to four and one-half years passing between the complaint date and the filing of the Request for Judicial Intervention.

All of this is in contrast to the formalized image of the foreclosure process that one might expect.<sup>144</sup> After all, the process is driven by highly sophisticated financial institutions. It also relates to transfers in land, which are notorious for their embrace of formalism. Moreover, the process imposes severe consequences including eviction and the forced sale of a home. The next section considers how homeowner defendants respond to the pleadings put forth by the plaintiff lenders.

#### 4. Homeowner Action

The central phenomenon of interest in this Article is the limited legal action taken by consumer defendants. Homeowner defendants facing foreclosure fit many of the patterns observed in other forms of defensive consumer litigation, and RP v. OS litigation more broadly. The formal means of challenging a plaintiff's right to foreclose is through an answer,<sup>145</sup> which is essential for raising defenses and avoiding default, and may facilitate opportunities for negotiation or discretion. However, homeowners filed an answer in only 24% of cases.

As Figure 3 illustrates, the rate of homeowner participation increased over time. Given the small number of cases filed in 2012 and 2013 (because this sample focused on *lis pendens* filed between 2007 and 2011), the apparent decline in rates of participation among cases filed in those years should be interpreted with some caution. Regardless, it is important to note that most homeowners did not file an answer, even in 2011, when homeowner participation reached its peak.

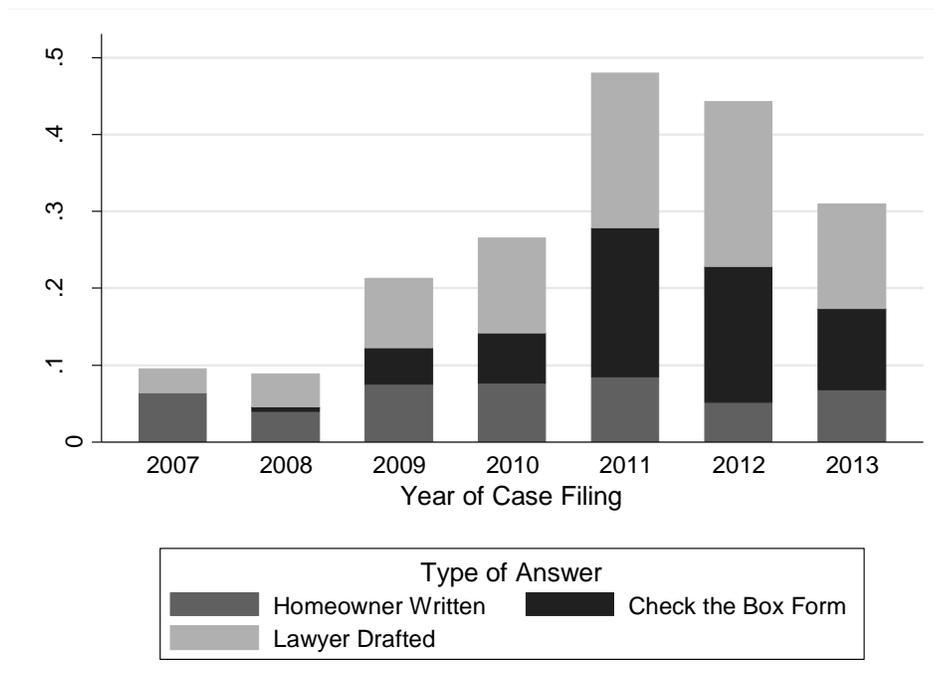
It is also important to note the types of answers filed by homeowners. Although lawyers drafted 44% of the answers filed by homeowners, 27% were check-the-box forms, and homeowners without legal assistance wrote 29% of the answers. As Figure 3 indicates, much of the increase in the proportion of cases involving an answer was the result of increased use of check-the-box answer forms. If homeowners are able to file these answers but unable to defeat a plaintiff's motion for summary judgment, they may not influence the outcome of the case. On the other hand, having raised defenses to the action may provide homeowners an advantage in negotiating an alternative to foreclosure, even if they are not able to prove the defenses raised. This highlights the importance of understanding not only the quantity, but also the quality of defendant participation in civil actions, and suggests an important area for future research.

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<sup>144</sup> Zacks & Zacks, *supra* note 89, at 711.

<sup>145</sup> N.Y. C.P.L.R. 3018 (McKINNEY 1980); N.Y. C.P.L.R. 3215 (McKINNEY 2007).

*Figure 3: Proportion of Cases with Homeowner Answer, by Answer Type and Year of Case Filing*



Within the answers filed by defendant homeowners, lack of standing was the most common defense raised, with half of all answers (50.3%) including this defense (about 12% of all homeowners in the sample). In most answers, homeowners raise multiple defenses or counterclaims. Homeowners allege that the plaintiff failed to provide proper notice to the homeowner in 46% of answers. In 28% of answers, the homeowner claims to be entitled to, or in the process of being considered for, a loan modification under the HAMP program. Twenty-six percent of answers raised allegations regarding predatory lending, and 20% claimed that the plaintiff failed to credit payments received. In addition, 16% of answers sought equitable relief on the basis of bad faith on the part of the plaintiff in a variety of circumstances. Nearly half of all answers also included additional defenses or claims not described here that may or may not have been legally valid defenses.

These results show that there was limited legal action taken by defendant homeowners. This raises a question as to whether homeowners’ action (or inaction) is the result of strategic behavior or whether homeowners fail to realize the applicability of potential defenses. With these observational data, it is impossible to determine this for any individual case. However, it is useful to explore whether homeowners are more likely to file answers when the complaint fails to offer documentary evidence supporting its claim or references situations that may indicate lapses in the chain of assignment giving rise to its interest.

To assess this possibility, I estimated a series of logistic regression models using the presence of these issues to predict the probability of a homeowner answer.<sup>146</sup> These statistical models estimate the probability that a homeowner filed an answer (relative to the probability that they did not), taking into account the presence of these potential issues. A strong association between indicators of the potential availability of a legal defense and the probability of a homeowner filing an answer would suggest that homeowners were responding to these issues in deciding to file an answer. This would be consistent with the idea of homeowners policing foreclosure formalities. Because homeowners' decisions to file an answer might be influenced by other factors, I also adjusted for additional case characteristics: the county where the case was filed; eligibility for settlement conferences during the period when the case was filed; the plaintiffs' legal representative; the characteristics of the loan; and the characteristics of the area where the property was located.<sup>147</sup>

I found that the settlement conference eligibility requirements in effect at the time a case was filed were associated with the presence of an answer, and there was variation across counties in levels of representation.<sup>148</sup> However, I find virtually no statistically significant relationship between the contents of the complaint and the probability that the homeowner filed an answer.<sup>149</sup> This offers little evidence that the minority of homeowners who engaged in the foreclosure process were strategically responding to observable actions by the plaintiff.

## 5. Win, Lose, or Draw

Of the 938 cases in this sample, 16% (n=153) were still ongoing at the end of data collection, 20% (n=189) ended in foreclosure, and 64% (n=596) were discontinued or dismissed, nearly all without prejudice.<sup>150</sup> The high rate of discontinuance is consistent with other research,<sup>151</sup> and reflects a number of different factual scenarios. Table 6 describes the reasons for which cases were discontinued. Just over 7% of cases (n=70) were discontinued because the loan was reinstated or satisfied, or another settlement was reached. Another 17% (n=162) of cases involved loan modifications, short sales, forbearance, or bankruptcy. Just under 10% of cases (n=93) were dismissed due to improper action on the part of the plaintiff, including 6% of cases (n=60) being dismissed for failure to prosecute and 1% of cases (n=9) in which the plaintiff lacked standing.

As Table 6 demonstrates, the remaining discontinued cases—which account for

<sup>146</sup> Estimated coefficients reported *infra* App'x Table 5.

<sup>147</sup> The analytic sample excludes two cases where it was not clear whether MERS had ever held the mortgage, and I present the results for all cases: those in which the homeowner had legal representation and those in which the homeowner was pro se.

<sup>148</sup> Individual bivariate analyses yield similar findings.

<sup>149</sup> The results do indicate that among cases where the homeowner had legal representation, the homeowner is more likely to have filed an answer if the mortgage was held by MERS at some point.

<sup>150</sup> Dismissals are rare relative to discontinuances, however, and since both are without prejudice, there is little substantive difference between them.

<sup>151</sup> See MFY LEGAL SERVS., INC., JUSTICE UNSETTLED: HOW THE FORECLOSURE SHADOW DOCKET & DISCONTINUANCES PREVENT NEW YORKERS FROM SAVING THEIR HOMES 2 (2012), <http://mobilizationforjustice.org/wp-content/uploads/Justice-Unsettled-plus-APP.pdf>; Sewin Chan et al., *Pathways After Default: What Happens to Distressed Mortgage Borrowers and Their Homes?* 48 J. REAL ESTATE & FINAN. ECON. 342, 351 (2014).

nearly 30% of the entire sample (n=281)—were discontinued without reason. In these cases, the affidavit filed by the plaintiff in support of the Stipulation of Discontinuance typically states that the “plaintiff elected not to move forward with the case,” without further detail. The court records and dockets in these cases include no references to loan modifications, loan reinstatements, or other negotiated alternatives to foreclosure, suggesting that they were discontinued for other reasons. The explanation commonly held by practitioners was that plaintiffs were unable to move forward with these foreclosure actions because of flaws in the underlying documentation.

If the plaintiff is able to correct these flaws, the cases can be re-filed, resulting in a delay that may be beneficial to homeowners or may make it more difficult for them to avoid foreclosure.<sup>152</sup> Even if the cases are not re-filed, they can result in “zombie” debt.<sup>153</sup> Either case involves a period of uncertainty that can have negative implications for homeowners, lenders, and the housing market more generally. It is entirely within the control of lenders to resolve these situations, making them an example of their ability to engage in strategic litigation.

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<sup>152</sup> MFY LEGAL SERVS., *supra* note 151, at 2. (“In our experience, when a foreclosure action is filed but later discontinued without settlement, a homeowner has more difficulty negotiating a loan modification than he would had he not been sued in the first instance.”). Although there has been economic analysis of the costs and benefits of delaying foreclosure, *see* CHARLES CALOMIRIS & ERIC HIGGINS, POLICY BRIEFING: ARE DELAYS TO THE FORECLOSURE PROCESS A GOOD THING? (2011), there is less evidence on the effects of delay—including non-economic costs—for consumers.

<sup>153</sup> Neil L. Sobol, *Protecting Consumers from Zombie-Debt Collectors*, 44 N.M. L. REV. 327, 327 (2014) (noting that “by obtaining judgments, or persuading consumers to pay a portion” of debts that are unenforceable or that have already been satisfied, debt collectors effectively resurrect the debts).

*Table 6: Distribution of Foreclosure Case Outcomes*

	N	%
Discontinued or Dismissed		
Loan Reinstated	27	2.88
Loan Satisfied	24	2.57
Loan Reinstated or Satisfied	1	0.12
Settled	18	1.91
Loan modification	124	13.20
Short sale	34	3.66
Forebearance	3	0.28
Bankruptcy	1	0.06
Dismissed for Failure to Prosecute	60	6.39
Lack of Standing	9	1.01
Improper Notice	8	0.90
Plaintiff Default	2	0.19
Prior Action Ongoing	1	0.16
Lack of Signature	1	0.16
Service Members Civil Relief Act	1	0.12
Reason for Discontinuance Unclear	281	29.97
Foreclosure	189	20.14
Ongoing	153	16.28
Total	938	100.00

#### *D. Significance of the Results*

In an opinion dismissing a series of foreclosure cases brought in the Northern District of Ohio during this time period, Judge Christopher Boyko described the foreclosure process as a “quasi-monopolistic system [that] financial institutions have traditionally controlled, and still control.”<sup>154</sup> The results of this empirical study are consistent with this characterization. In an era of widespread robo-signing and missing notes, lenders used high-volume, low-cost specialized law firms to mass produce complaints that lacked documentary evidence of the underlying loan. Regardless of these factors, and in spite of the potential for loan modifications and other outcomes more favorable than foreclosure, only a fraction of homeowner defendants participated in the process. Even fewer had legal representation, and those who did relied primarily on solo practitioners. Nevertheless, as Table 6 demonstrated, a large proportion of cases were discontinued—pushing final resolution to another day, and raising questions about the validity of the uncontested plaintiffs’ claims.

This empirical study illustrates the low rate of legal activity among consumer

<sup>154</sup> In re Foreclosure Cases, No. 1:07-CV-2282, 2007 WL 3232430, at \*3 n.3 (N.D. Ohio Oct. 31, 2007).

defendants in a context where one might anticipate greater participation. The frequency and type of legal representation obtained by the plaintiffs and defendants is consistent with the structural inequalities inherent in RP v. OS litigation. However, the high rate of discontinuances is a marked difference from the high rate of default judgments observed in other types of debt collection actions. On the other hand, this may reflect strategic decisions on the part of plaintiffs whose pleadings were insufficient as originally filed or who had a financial interest in delaying the foreclosure. These findings highlight the potential role of consumer defendants as monitors of civil procedures and enforcers of substantive consumer laws, while illustrating the obstacles that limit their participation in civil litigation.

While the salience of foreclosures as a socio-legal problem has diminished since the Financial Crisis, many of the observed phenomena remain relevant. The secondary mortgage market remains active, and mortgage securitization continues, requiring frequent assignments of interests in loans and mortgages.<sup>155</sup> The incentive among lenders to minimizing costs in the foreclosure process is unchanged.<sup>156</sup> Moreover, both the limited incentives for homeowners to challenge potential defects in foreclosure and the difficulties faced in doing so still remain.<sup>157</sup> Indeed, as attention to foreclosures wanes, public awareness of these issues declines, and while the stigma of foreclosure increases,<sup>158</sup> support for policy interventions diminishes.<sup>159</sup>

### III. ENHANCING CONSUMER DEFENDING

As this Article argues, and the empirical study illustrates, inadequate incentives and structural inequalities may contribute to diminished levels of legal action among consumer defendants. While these dynamics are well illustrated by foreclosures, they are not limited to the mortgage enforcement context; rather, these patterns are typical of defensive consumer litigation and RP v. OS disputes more broadly.<sup>160</sup> The low rate of legal activity among consumer defendants is concerning not only because it can result in unresolved harm to consumers, but also because we rely on consumer defendants to

<sup>155</sup> Dale A. Whitman, *How Negotiability Has Fouled Up the Secondary Mortgage Market, and What to Do About It*, 37 PEPP. L. REV. 737, 740 (2010).

<sup>156</sup> Matthew Goldstein et al., *How Housing's New Players Spiraled into Banks' Old Mistakes*, N.Y. TIMES (June 26, 2016), <https://www.nytimes.com/2016/06/27/business/dealbook/private-equity-housing-missteps.html>.

<sup>157</sup> See, e.g., Harold L. Levine, *A Day in the Life of a Residential Mortgage Defendant*, 36 J. MARSHALL L. REV. 687, 694–95, 698–99 (2003) (describing the challenges facing foreclosure defendants prior to the foreclosure crisis).

<sup>158</sup> See McCormack, *supra* note 98, at 278.

<sup>159</sup> For example, the New York state procedural reforms are set to sunset in 2020, N.Y. C.P.L.R. 3408(a) (MCKINNEY 2017), and the state used proceeds from the national mortgage settlement to cover the costs of housing counseling and legal-aid programs, Shaila Dewan, *Needy States Use Housing Aid Cash to Plug Budgets*, N.Y. TIMES (May 15, 2012), <https://www.nytimes.com/2012/05/16/business/states-diverting-mortgage-settlement-money-to-other-uses.html>. See also PHILLIP SWAGEL, THE FINANCIAL CRISIS: AN INSIDE VIEW 62 (2009), [https://www.brookings.edu/wp-content/uploads/2009/03/2009a\\_bpea\\_swagel.pdf](https://www.brookings.edu/wp-content/uploads/2009/03/2009a_bpea_swagel.pdf) (noting the importance of maintaining public support for interventions designed to address the Financial Crisis in the context of the financial system).

<sup>160</sup> See, e.g., Fox, *supra* note 18, at 372, 377–79, 387 (documenting similar patterns in debt-collection cases in Indiana); Cowley & Silver-Greenberg, *supra* note 3 (noting similarities between subprime-mortgage foreclosures and student-loan collections).

monitor and enforce procedural rules and substantive consumer laws. This section describes the following three approaches to addressing the challenge of limited legal activity among consumer defendants: procedures to increase legal participation by consumer defendants; mechanisms to enhance the availability and effectiveness of legal counsel for consumer defendants; and burden-shifting to mediate the impact of consumer defendants' inactivity.

#### A. *Procedural Reforms*

High rates of default pose a considerable challenge to the enforcement of procedural rules and substantive consumer protections by consumer defendants. Procedural reforms that encourage legal action among consumer defendants offer one approach to addressing this issue. Here, the New York State foreclosure context provides a helpful example. As noted above, the state adopted a program of court-mandated settlement conferences in foreclosure cases to address the high rate of default among defendant homeowners. After the adoption of the program, there was a substantial decline in rates of default among homeowners.<sup>161</sup> In addition, the settlement conferences were associated with an increase in the probability that a homeowner filed an answer and with a decrease in the probability that a case ended in foreclosure.<sup>162</sup> Research on unsecured debt collection cases also finds a link between civil procedural design and debtor participation.<sup>163</sup> There is more work to be done to understand the mechanisms that underlie these results, but they are consistent with the idea that court processes can increase legal action on the part of consumer defendants.

However, enhanced participation by consumer defendants may not be uniformly favorable. Where a consumer defendant has no cognizable defense, a default judgment is an efficient resolution; if participation is costly, it could actually leave the consumer defendant worse off. On the other hand, a calculus that takes into account only the availability of legal defenses may not accurately capture the benefits of avoiding default, for the consumer defendant or more broadly. By appearing in court, consumer defendants may have an opportunity to mediate the ultimate outcome through negotiation with the plaintiff or as a result of the court's discretion. Participation may also offer less tangible benefits, such as increasing the defendants' perception of procedural justice. In addition, by bringing facts to the court's attention, the consumer defendant may raise awareness of unethical or abusive behavior. These benefits can offset the costs of participation for the consumer defendant as well as the additional court burden imposed by increased legal action.

#### B. *Access to Specialized Counsel*

A second approach to expanding consumer defendants' legal activity is to enhance their access to legal counsel. As the foreclosure study highlights, consumer defendants' structural position means that they are doubly disadvantaged with regard to legal

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<sup>161</sup> This finding in the empirical study is confirmed by aggregate state data. See PFAU, *supra* note 110, at 4 (“Following the 2009 and 2010 legislation and the court system’s extensive public outreach efforts, the default rate dropped significantly.”).

<sup>162</sup> See Taylor Poppe, *supra* note 136, at 822–23 (finding that the probability of foreclosure is lower among cases initiated after the implementation of foreclosure-settlement conferences).

<sup>163</sup> CAPLOVITZ, *supra* note 19, at 204.

representation. While their litigation opponents enjoy the economies of scale generated by the high-volume, low-cost production of standardized complaints, consumer defendants require more customized and costly representation. Unlike consumer plaintiffs, consumer defendants are not able to obtain legal representation through class actions and contingency-fee arrangements. And, because consumer defendants' cases are not aggregated and they rely disproportionately on solo practitioners, there is a lack of coordinated legal work aimed at addressing systemic issues affecting consumer defendants.

On top of these structural inequalities restricting their access to counsel, consumer defendants often have limited incentive to bring legal defenses. A homeowner facing foreclosure, for example, may not have received proper service, or the complaint may not include all information necessary to establish a *prima facie* case for foreclosure, or the plaintiff may not arrive at a settlement conference with the requisite knowledge about the case. However, the homeowner defendant has limited incentive to pursue defenses generated by these failures if they are unlikely to alter the ultimate disposition of the case. As a result, there is less effective monitoring and enforcement of the debt collection process.

One way to address these structural inequalities and enhance the incentive for raising defenses is fee-shifting.<sup>164</sup> If plaintiffs were liable for the costs defendants incur in raising affirmative substantive defenses, it would modify the incentive structure that discourages such action by consumer defendants. In addition, it would offer an incentive for lawyers to take on greater representation of consumers in defensive consumer litigation. This, in turn, could help to establish a more organized consumer defense bar.

A second approach is to increase the availability of legal aid for consumer defendants. As it stands, legal aid and consumer advocate organizations are responsible for identifying many of the issues affecting consumer defendants. In the New York foreclosure context, for example, it was legal aid organizations that identified many plaintiffs' practice of not filing a Request for Judicial Intervention and the resulting Shadow Docket. The organizations were also responsible for highlighting plaintiffs' role in delays in the foreclosure process and plaintiffs' failure to comply with statutory provisions that their representatives possessed knowledge and authority to settle at conferences.<sup>165</sup> Not surprisingly given their expertise, representation by a legal aid organization is also associated with more favorable outcomes than representation by a for-profit legal aid provider.<sup>166</sup>

Familiarity with the issues facing a group of similar defendants can lead not only to

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<sup>164</sup> Froehle, *supra* note 102, at 1741–42.

<sup>165</sup> LEGAL SERVS. FOR THE ELDERLY IN QUEENS ET AL., STALLED SETTLEMENT CONFERENCES: BANKS FRUSTRATE NEW YORK'S FORECLOSURE SETTLEMENT CONFERENCES 4 (2014), <http://mobilizationforjustice.org/wp-content/uploads/Stalled-Settlement-Conferences.pdf> (hereinafter STALLED SETTLEMENT CONFERENCES) (finding that 36% of lenders' representatives appeared at foreclosure-settlement conferences without required information and 44% appeared without authority to settle, as required by statute).

<sup>166</sup> In other analyses based on the foreclosure-cases dataset used in this Article, I find that representation by a legal-aid lawyer was associated with a greater probability of avoiding foreclosure than representation by a private attorney. Taylor Poppe, *supra* note 136, at 826.

effective representation, but legal change.<sup>167</sup> However, the scope of legal aid for consumer defendants is a function of available resources. During the Financial Crisis, additional funds were temporarily allotted to organizations that assisted homeowners. But the general trend in funding for legal aid is negative, and efforts to expand access to civil justice often focus on plaintiffs. Moreover, traditional financial eligibility requirements may limit consumer defendants' access to legal aid, while they remain unable to afford legal counsel given their precarious financial position. Thus, there is room to enhance access to legal counsel on behalf of consumer defendants.

### C. *Burden-Shifting*

Finally, an alternate approach is to mediate the impact of consumer defendants' limited legal action through burden-shifting.<sup>168</sup> Scholars have documented the legal insufficiency and inaccuracy of claims brought against consumers in unsecured debt collection cases, foreclosure actions, and bankruptcy. However, the consumer defendant typically carries the burden of contesting the claim.<sup>169</sup> Increased pleading and evidentiary standards can help to shift this burden away from the consumer. Given the typical information asymmetry between the consumer defendant and the plaintiff, this places the burden on the party best equipped to provide detail on the underlying obligation.

The New York State foreclosure process again offers an example of this type of reform. The state began requiring plaintiffs in foreclosure actions to provide to the court a copy of the note and all related documents establishing the plaintiff's interest in the note. Adopted in response to the robo-signing scandal, this increased the evidence required to establish the plaintiff's prima facie case for foreclosure.<sup>170</sup> In addition, foreclosure prosecution lawyers were required to sign a certificate of merit attesting to their review of the underlying documents, providing incentive beyond ethical obligations to ensure the veracity of complaints.<sup>171</sup> After the adoption of this affirmation requirement, foreclosure filings dropped precipitously, from 3,500 new foreclosure filings each month to only 775.<sup>172</sup> This drop in foreclosure filings after the adoption of these reforms suggests that they had an impact on plaintiffs' behavior.<sup>173</sup> Had the complaints filed by plaintiffs

<sup>167</sup> Alexandra Natapoff, *Gideon's Servants and the Criminalization of Poverty*, 12 OHIO ST. J. CRIM. L. 445, 461–62 (2015).

<sup>168</sup> Ensuring that legal burdens are imposed on the party best able to bear them is a common concern of regulatory design, such as in the employment-discrimination context, *see e.g.*, Sandra Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 74–75 (2011) (discussing Congressional intervention in the development of anti-discrimination evidentiary burden-shifting practices), and the environmental-law context, *see, e.g.*, ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 327–29 (8th ed. 2018).

<sup>169</sup> *See supra* Part II.

<sup>170</sup> Admin. Order 548-10 (Oct. 20, 2010). This order was modified nunc pro tunc on March 2, 2011 by Admin. Order 431-11.

<sup>171</sup> N.Y. C.P.L.R. 3012-b(a) (MCKINNEY 2013).

<sup>172</sup> PFAU, *supra* note 110, at 2. Although foreclosure moratoria adopted by some banks also impacted foreclosure rates during this period, the timing is consistent with impact of the law. In addition, litigation challenging the validity of this order shows that lenders viewed it as imposing additional burdens. George Bundy Smith & Thomas J. Hall, *Limitations on Chief Administrative Judge's Rule-Making Authority*, NORTON ROSE FULBRIGHT (Apr. 15, 2011), [http://www.nortonrosefulbright.com/files/chadbourne/publications/smith\\_hall%20nylj\\_april2011.pdf](http://www.nortonrosefulbright.com/files/chadbourne/publications/smith_hall%20nylj_april2011.pdf).

<sup>173</sup> *See* PFAU, *supra* note 110, at 2 (describing the dramatic decline in foreclosure filings after the imposition of the affirmation requirement).

already met these standards, or had plaintiffs easily been able to meet these requirements, one would not have expected such a dramatic decline in filings.

Thus, burden-shifting can be used to mediate the impact of consumer defendants' failure to respond to plaintiffs' claims. To the extent that consumer defendants' inactivity results in uncontested violations of procedural, evidentiary, or substantive law, burden-shifting offers an alternate form of enforcement. However, the potential of this approach should not be overstated, given the limits of formal law to protect consumers.<sup>174</sup> Moreover, burden-shifting requirements can have unanticipated consequences. For example, increased formalism that benefits consumer defendants may have negative repercussions for consumer plaintiffs,<sup>175</sup> and higher debt enforcement costs reduce access to credit.<sup>176</sup> Thus, the costs and benefits of this approach must be carefully balanced.

While pro-defendant civil procedures, expanded access to legal counsel, and burden-shifting reforms can help to address consumer defendants' lack of legal activity, they are not the only solutions. In many cases, regulatory action and the expansion of consumer protections through substantive legal reform offer more direct responses.<sup>177</sup> However, in eras of diminished consumer protections and regulatory action, enabling consumer defensive litigation may be one of the more feasible options available.

## CONCLUSION

As the quote at the outset of this Article warns, imagining what should happen is of less value than understanding what does. This is particularly true in the context of defensive consumer litigation. Exemplified by debt collection cases, this form of litigation involves the filing of legal claims arising out of consumer transactions against individual defendants whose response is generally to lump it. While under-enforcement by consumer plaintiffs is well recognized as a challenge to consumer law, the inaction of consumer defendants has received less attention. This Article further develops existing scholarship by describing how defensive consumer litigation differs from that in which consumers are the plaintiff. Using the empirical study of the residential foreclosure

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<sup>174</sup> See, e.g., STALLED SETTLEMENT CONFERENCES, *supra* note 165, at 4–5 (reporting high rates of non-compliance among lenders in foreclosure-settlement conferences); Porter, *supra* note 91, at 124 (noting that “Far from serving as a significant check against mistake or misbehavior, the bankruptcy system routinely processes mortgage claims that cannot be validated and are not, in fact, lawful.”).

<sup>175</sup> Nestor M. Davidson, *New Formalism in the Aftermath of the Housing Crisis*, 93 B.U. L. REV. 389, 402 (2013).

<sup>176</sup> Terrence M. Clauretie & Thomas Herzog, *The Effect of State Foreclosure Laws on Loan Losses: Evidence from the Mortgage Insurance Industry*, 22 J. MONEY CREDIT & BANKING 221, 231 (1990); Karen M. Pence, *Foreclosing on Opportunity: State Laws and Mortgage Credit*, 88 REV. ECON. & STAT. 177, 180, 182 (2006) (finding that comparable loans are smaller in judicial-foreclosure states and concluding that the judicial-foreclosure process imposes higher costs on borrowers).

<sup>177</sup> For example, improprieties in the foreclosure process resulting from poor record-keeping within the mortgage industry that give rise to affirmative defenses for homeowners could also be addressed by reforming the process through which transfers of mortgage interests are effected and recorded. James M. Davis, *Paper Weight: Problems in the Documentation and Enforcement of Transferred Mortgage Loans, and a Proposal for an Electronic Solution*, 87 AM. BANKR. L.J. 305, 366 (2013) (proposing an electronic registry for transferable notes); Tanya Marsh, *Foreclosures and the Failure of the American Land Title Recording System*, 111 COLUM. L. REV. SIDEBAR 19, 24 (2011) (proposing a federal land-title system); Dale A. Whitman, *A Proposal for a National Mortgage Registry: MERS Done Right*, 78 MO. L. REV. 1, 46 (2013) (proposing a national alternative to MERS).

process in New York City as an illustrative example, this Article highlights how incentive structures and structural inequalities contribute to low rates of legal action among consumer defendants. This inactivity not only has implications for individual consumers, but restricts their ability to monitor and enforce procedural and substantive law. For this reason, additional attention to consumer defendants' propensity to lump it is warranted. Regulatory action and the expansion of consumer protections through substantive legal reform could all help to address these issues, as might procedural reforms, interventions to expand access to counsel, and burden-shifting.

## APPENDIX

Appendix Table 1. Distribution of Foreclosure Cases by County and Year of Filing

	N	%
<b>County</b>		
Bronx	123	0.13
Brooklyn	351	0.37
Manhattan	37	0.04
Queens	326	0.35
Staten Island	102	0.11
<b>Year of Case Filing</b>		
2007	111	0.12
2008	190	0.20
2009	268	0.29
2010	198	0.21
2011	72	0.08
2012	72	0.08
2013	27	0.03
<b>Total</b>	<b>938</b>	<b>100</b>

Appendix Table 2. Plaintiffs

	N	%
Wells Fargo	134	14.26
US Bank	127	13.59
Deutsche Bank	113	12.01
JP Morgan Chase	84	8.96
HSBC	71	7.54
Bank of America	53	5.65
Citibank	52	5.53
Bank of New York Trust Company	33	3.53
Onewest Bank	22	2.37
LaSalle Bank	22	2.31
Aurora	19	2.02
IndyMac Bank	15	1.58
GMAC Mortgage	10	1.05
Countrywide	10	1.02
Washington Mutual	9	1.01
Flagstar Bank	8	0.82
Emigrant Mortgage Company	7	0.77
Freemont Investment and Loan	7	0.70
Wachovia	6	0.65
Nationstar Mortgage	6	0.59
Meritt Funding	5	0.59
Other (86 other plaintiffs named)	126	13.47
Total	938	100.00

Note: Each of the plaintiffs listed appeared in at least five cases. Subsidiaries and parent companies are joined, and there is no distinction made between lenders, servicers, and trustees. Plaintiffs are identified as described in the foreclosure case complaints and do not account for subsequent changes in ownership.

Appendix Table 3. Plaintiffs' Lawyers

	N	%
Steven J. Baum P.C.	269	28.70
Rosicki, Rosicki & Associates	131	13.99
Fein, Such & Crane, LLP	92	9.86
Shapiro & DiCaro [and Barak]*, LLP	60	6.40
Frenkel, Lambert, Weiss, Weisman	54	5.78
McCabe, Weisberg & Conway, P.C.	40	4.26
Druckman Law Group	25	2.63
Berkman, Henoch, Peterson [& Peddy]	25	2.63
Stein, Wiener & Roth, LLP	21	2.23
Sweeney, Gallo, Reich & Bolz	19	2.00
Jordan S. Katz, Esq.	17	1.82
Gross, Polowy & Orleans	15	1.65
Knuckles & Komosinski [& Elliott], P.C.	15	1.64
Davidson Fink [Cook, Kelly], LLP	15	1.59
Stiene & Associates, P.C.	13	1.44
Leopold & Associates, PLLC	12	1.32
Alan H. Weinreb	11	1.21
Sheldon, May & Associates, P.C.	10	1.03
Zavatsky Mendelsohn & Levy	7	0.73
Doonan & Graves [Longoria], Esqs.	6	0.68
Other (53 firms)	79	8.41
Total	938	100.00

\*Barak was added to the firm's name during the observation period.

Appendix Table 4. Homeowners' Lawyers

	N	%
Todd P. Arbesfeld, Esq.	6	3.04
DC 37 Municipal Employees Legal Services	5	2.53
Cabanillas & Associates, P.C.	5	2.37
Brooklyn Legal Services Corporation A	4	2.20
The Legal Aid Society	4	1.86
Rubin & Licatesi, P.C.	3	1.31
Staten Island Legal Services	2	1.16
MFY Legal Services, Inc.	2	1.16
Urban Justice Center	2	1.15
Queens Legal Services	2	1.15
Queens Volunteer Lawyers Project, Inc.	2	1.15
Cohen & Slamowitz, LLP	2	1.09
Alice A. Nicholson, Esq.	2	1.09
Warren Sussman, Esq.	2	0.93
Boris H. Linares, Esq.	2	0.93
Jose A. Polcano, Esq.	2	0.93
PLC Law Group, LLP	2	0.93
Craig A. Fine, Esq.	2	0.87
Other (139 lawyers or firms)	145	74.14
Total	198	100.00

Appendix Table 5. Estimated Coefficients from Logistic Regression  
Model Predicting the Presence of a Homeowner Answer

	<i>Pro Se</i>		Represented			
	Homeowners		Homeowners		All Homeowners	
	<i>Model 1</i>	<i>Model 2</i>	<i>Model 3</i>	<i>Model 4</i>	<i>Model 4</i>	<i>Model 6</i>
Note Attached as Exhibit	0.07 (0.27)	-0.03 (0.37)	-0.42 (0.40)	-0.92 (0.71)	-0.15 (0.19)	-0.04 (0.24)
MERS Has Held Mortgage	0.17 (0.28)	0.03 (0.30)	0.56 (0.37)	1.26* (0.53)	0.31 (0.19)	0.32 (0.21)
Mortgage Recorded						
Yes	0.08 (0.30)	0.03 (0.33)	0.28 (0.52)	0.20 (0.59)	0.08 (0.21)	0.06 (0.24)
Unclear	-0.01 (0.31)	-0.01 (0.38)	-0.40 (0.41)	-0.76 (0.57)	-0.08 (0.22)	-0.16 (0.26)
Mortgage History						
Origination History Present	0.01 (0.29)	-0.06 (0.34)	0.11 (0.48)	0.18 (0.64)	-0.03 (0.20)	-0.38 (0.26)
Intermediate History Present	-0.27 (0.31)	-0.31 (0.33)	-0.26 (0.45)	-0.14 (0.55)	0.06 (0.20)	0.01 (0.22)
Most Recent Ownership Present	0.30 (0.41)	0.22 (0.46)	-0.04 (0.69)	-0.84 (0.97)	0.31 (0.31)	0.05 (0.35)
Court						
Bronx		0.13 (0.41)		-0.57 (0.63)		-0.03 (0.29)
Brooklyn		0.10 (0.36)		-1.60** (0.51)		-0.25 (0.24)
Manhattan		0.35 (0.50)		-0.69 (1.08)		-0.38 (0.38)
Queens ( <i>ref.</i> )		---		---		---
Staten_Island		0.37 (0.40)		-1.37 (0.71)		-0.24 (0.30)
Settlement Conference Period						
Pre-reform, No Conferences ( <i>ref.</i> )		---		---		---
Varied Conference Eligibility		0.29 (0.47)		2.72** (0.96)		1.03* (0.42)
Mandatory Conferences		1.32** (0.51)		3.68*** (0.99)		2.15*** (0.44)
Additional Variables						
Loan Characteristics	No	Yes	No	Yes	No	Yes
Property Block Characteristics	No	Yes	No	Yes	No	Yes
Constant	-2.26	-6.15	0.73	-12.81	-1.51	-6.70
LRX <sup>2</sup> (df)	2.80(7)	45.82(26)	8.41(7)	86.38(26)	9.69(7)	143.82(26)
N	740		196		936	