



# Consumer Protection and Court-Sponsored Online Dispute Resolution in Collection Lawsuits

July 2019

This issue brief considers what court-sponsored online dispute resolution (ODR) means for consumers who are sued in debt collection lawsuits and ways that courts may guard against potential problems. Court-sponsored ODR offers a way to resolve court cases online without ever setting foot in court.

While ODR has been used to resolve disputes on e-commerce websites, such as eBay, since 1999,<sup>1</sup> the earliest court-sponsored ODR efforts date back less than a decade.<sup>2</sup> In the United States, courts in at least 12 states are currently using ODR<sup>3</sup> and courts in other states are considering adopting it. Some of the courts that have adopted ODR are using it to resolve lawsuits to collect consumer debts.<sup>4</sup>

Court-sponsored ODR may appeal to state court administrators because of the sheer volume of collection lawsuits they must currently manage<sup>5</sup> and ODR designers may view collection lawsuits as “low stakes” cases without appreciating the long-term consequences that judgments impose on low-income consumers. However, adopting court-sponsored ODR for collection lawsuits raises a number of important consumer protection issues. If implemented, court-sponsored ODR needs to truly protect consumers from new and existing harms.

The following tables are intended to help courts and consumer advocates identify key problems that need to be addressed and solutions that courts should implement if they adopt court-sponsored ODR for collection lawsuits.

The five tables discuss:

- 1) general considerations for ODR system design,
- 2) using ODR to resolve disputes after a collection lawsuit is filed,
- 3) using ODR to resolve disputes without filing a collection lawsuit,
- 4) using ODR in collection lawsuits post-judgment, and
- 5) evaluation of ODR platforms for collection lawsuits.

## Table 1: General Considerations for ODR System Design

*This table discusses design issues that apply to any ODR system, whether or not it involves consumer debts.*

ISSUE	PROBLEM	SOLUTION(S)
<b>Legitimacy of the Courts</b>	In a 2018 survey, 54% of people believed that in-person court experiences were more likely to be fair and impartial compared to only 38% for online court experiences. <sup>6</sup> Court-sponsored ODR has not yet had time to build trust and establish legitimacy as a state-sponsored mechanism of dispute resolution.	Courts adopting ODR should make it optional and allow participants to opt in. Consumers should be able to try ODR without penalty and be allowed to easily transfer back to a traditional court at any time. There should be no consequence if a consumer does not opt in to ODR.
<b>Unequal Access to Online Resources</b>	Some participants may face a variety of barriers that make it difficult for them to access or use ODR platforms, including: limited access to the internet, low literacy, or disabilities that limit their ability to use the ODR platform.	<p>Courts adopting ODR should offer options, like telephonic participation, in addition to ODR for people who might need or prefer to participate remotely but who face barriers to using an online platform. The courts should remind users of these alternatives and offer them for no additional charge.</p> <p>ODR platforms need to be compliant with the Americans with Disabilities Act.<sup>7</sup></p> <p>All online access should be easily accessible through any type of mobile device.</p>
<b>Limited English Proficiency</b>	Limited English proficiency can be a barrier to accessing the courts. Traditional court interpretation services are not designed for ODR platforms, potentially limiting the ability of participants with limited English proficiency to access ODR.	ODR platforms should be designed to screen for users who have limited English proficiency by asking participants early in the process if they need translation services to participate in ODR or if they would prefer to participate telephonically or in person with the assistance of an interpreter.
<b>Readability</b>	Some participants may struggle to understand complicated or technical materials even though they can read English.	ODR platforms should prioritize readability to maximize consumer understanding. <sup>8</sup> As discussed in Lack of Legal Representation, access to legal representation is also critical to understand complex materials.

TABLE 1 (CONT.)

ISSUE	PROBLEM	SOLUTION(S)
<b>Accessing the Court Building</b>	Participants often have difficulty accessing the courts and participating in their cases due to inability to take time off work, lack of child care, lack of transportation, limited physical mobility, etc. These barriers may make it difficult to attend court, especially during the court's limited business hours, which may result in default judgments.	Court-sponsored ODR will not eliminate all defaults, <sup>9</sup> but it may make it easier for some participants to access the courts by allowing them to participate remotely and at times when the court is closed.
<b>Top-Down System Design</b>	ODR platforms are sometimes designed through processes that involve little feedback from end users.	Courts considering implementing ODR should work closely with individuals who use the system, including advocates for vulnerable populations, to design and test ODR systems.
<b>Data Security</b>	ODR platforms will contain sensitive participant information.	Courts that adopt ODR will need to develop clear data security protocols to prevent data breaches, to prevent data mining when using private companies to run ODR platforms, and to clearly define policies around the timely deletion of confidential information like private information exchanged during online negotiations.

**Table 2: Using ODR to Resolve Disputes after a Collection Lawsuit is Filed**

*This table focuses on issues that arise when using an ODR platform to resolve consumer debt lawsuits through negotiation, mediation, or facilitation via an ODR platform.*

ISSUE	PROBLEM	SOLUTION(S)
<b>Notice</b>	The notice that a consumer receives when a collection lawsuit is filed is often difficult to understand and typically does not give the consumer enough information about how to defend the case or get help. Inadequate notice can contribute to consumer defaults.	Courts adopting ODR will have to inform consumers about the availability of ODR through some type of notice, which must be simple to understand and provide easy access to information about the process. The adoption of ODR represents an opportunity to improve on current notice forms to ensure understanding.

TABLE 2 (CONT.)

ISSUE	PROBLEM	SOLUTION(S)
<b>Service of Process</b>	Problems with delivery of the notice may also contribute to consumer defaults in collection lawsuits, especially if service of process is not actually reaching consumers.	Courts adopting ODR should consider whether, in addition to reforms to the content of the notice, they also need to reform service of process requirements to make sure that consumers are actually receiving the notice.
<b>Information about the Debt</b>	Many courts do not require basic information or documentation about the debt to be filed with the complaint. As a result, consumers may lack basic information about the alleged debt. In cases in which the debt was purchased by another company, consumers may not even recognize the name of the company that is suing them.	<p>ODR platforms should require that basic information<sup>10</sup> about the debt, together with relevant documentation, be uploaded before a case can be filed.</p> <p>If a system limits when consumers can opt out of ODR (not recommended), this information and documentation must be accessible to consumers before their deadline to choose to remain in ODR or transfer the case back to a traditional court.</p>
<b>Asynchronous Communication</b>	<p>Features allowing for asynchronous communication in ODR platforms allow parties to communicate with each other at different times of day over a period of days or weeks.</p> <p>The asynchronous nature of ODR raises questions about how mass filers will manage large portfolios of lawsuits simultaneously. It may also impact the nature of certain limited representation agreements.</p>	<p>ODR platforms should be designed to minimize the likelihood that someone will convey information to the wrong person during multiple asynchronous communications.</p> <p>Courts adopting ODR may also need to re-think rules or forms related to limited representations. For example, if asynchronous ODR communications in collection lawsuits typically span multiple days, a lawyer-for-the-day model of unbundled legal services will not be sufficient. Courts may need to authorize a form of limited representation for only the ODR portion of a case.</p>
<b>Lack of Legal Representation</b>	Most consumers are not represented by attorneys in collection lawsuits. <sup>11</sup> In contrast, most creditors in collection lawsuits appear regularly in court and are almost always represented by attorneys.	Courts that adopt ODR should consider how platforms can be used to facilitate and improve consumer access to legal representation. For example, ODR platforms could screen for legal services eligibility and refer cases directly. They could also include a link to request a bar association referral to

TABLE 2 (CONT.)

ISSUE	PROBLEM	SOLUTION(S)
<p><b>Lack of Legal Representation</b> (Cont.)</p>		<p>an attorney and provide information about limited representation options.</p> <p>In order to facilitate legal representation, ODR platforms will also need to be designed to allow consumers' attorneys to participate, potentially representing multiple clients at the same time.</p>
<p><b>Lack of Information about Legal Rights, etc.</b></p>	<p>Without legal representation, consumers may not understand their rights, court procedures, or the possible defenses or counterclaims available to them.</p>	<p>ODR platforms should be designed in conjunction with information portals to provide relevant legal information using an interactive interface to help consumers identify, understand, and raise potential defenses and counterclaims. Systems can suggest certain language if a particular defense is present or even discontinue the ODR process entirely.<sup>12</sup> Systems should affirmatively screen for things, like exempt income and prior bankruptcy filings, and any neutrals should be permitted to refer consumers to appropriate legal information.</p>
<p><b>Power Imbalance</b></p>	<p>Even with efforts to provide more legal representation, it is likely that many consumers will still be unrepresented in collection lawsuits. As a result, there is a power imbalance between the unrepresented consumer on one side and the collection attorney on the other side who typically has extensive experience with collection lawsuits.</p>	<p>Some courts have attempted to mitigate the power imbalance by using mediators or other neutrals to facilitate conversations between parties in court-sponsored ODR for collection actions.<sup>13</sup> More research is needed to evaluate this approach. In addition, courts looking at these models need to make sure that any mediators are empowered to deal with abusive practices (see Abusive Practices). Moreover, court systems need to be committed to providing sufficient neutrals, who are genuinely neutral and are trained in implicit bias and cultural competency, to adequately cover all cases.</p>
<p><b>Abusive Practices</b></p>	<p>Consumers who appear for court dates for their collection lawsuit are often directed to unsupervised hallways and expected to</p>	<p>All chatroom spaces should be monitored by neutrals. These neutrals should be empowered to take action in response to abusive practices,</p>

TABLE 2 (CONT.)

ISSUE	PROBLEM	SOLUTION(S)
<b>Abusive Practices</b> (Cont.)	negotiate with collection attorneys to resolve their debts. The imbalance of knowledge and power between the parties in these conversations is often exacerbated by high pressure or abusive practices by attorneys seeking to get consumers to agree to settle the debt. <sup>14</sup> Unsupervised chatroom spaces in ODR platforms present the same opportunity for abusive practices.	including referring parties for sanctions or terminating the ODR session and referring the case for in-court resolution. Systems could also incorporate a “report a party” button. <sup>15</sup>  ODR confidentiality provisions should be carefully designed to permit evidence of abusive practices engaged in during ODR to be used in other proceedings, whether initiated by the consumer or government enforcement, while otherwise preserving confidentiality.
<b>Casual Environment</b>	ODR would allow debt collection lawsuits to be resolved from the consumer’s living room. The informal environment may make it easier for some people to engage in conversation about the alleged debt since they do not need to make a formal presentation to a judge or magistrate. However, due to the informal environment, some consumers may fall into a trap of not appreciating the seriousness of the matter. They may not recognize that the agreement that they are entering into on their phone in their pajamas is a legal agreement that can impact their lives for years or even decades.	Courts that adopt ODR should require waiting periods during which the consumer has the ability to cancel any settlement agreement without penalty and the opportunity to consult with an attorney, family, or friends.  ODR platforms should state clearly at all times that the platform is being used to resolve a lawsuit.
<b>Financial Literacy</b>	Many consumers have limited financial literacy, which may impact their understanding of the consequences of their agreements with creditors in ODR.	Courts that adopt ODR should build “reality checks” into the ODR system. For example, the ODR platform can show people how much a potential settlement will cost them over time, factoring in items like post-judgment interest, and project how long it will take to repay on the agreed-upon schedule.

TABLE 2 (CONT.)

ISSUE	PROBLEM	SOLUTION(S)
<b>Resolution of Disputes by Judges or Magistrates Post-ODR</b>	Courts that adopt ODR will need to decide what to do with collection lawsuits that are not resolved through negotiation, mediation, or other facilitation via ODR.	<p>Cases that do not resolve through alternative dispute resolution in the ODR platform should be referred back to court for a hearing or, in some platforms, may be resolved by a judge or magistrate through the ODR platform.<sup>16</sup> Courts should allow consumers to choose between continuing in the ODR platform (where available) and appearance by telephone, video conferencing, or in person in traditional court.</p> <p>Consumers should be able to decide what information they want to provide to the judge/magistrate; no evidence shared during settlement should be automatically transferred; and negotiation/mediation transcripts should remain confidential with a limited exception for abusive conduct.</p> <p>Consumers who participated in alternative dispute resolution via the ODR platform should retain full rights to challenge any evidence presented to the judge/magistrate.</p> <p>Consumers should have the same rights to appeal whether the judge/magistrate resolves the case online or in a traditional court.</p>

**Table 3: Using ODR to Resolve Disputes without Filing a Collection Lawsuit**

*This table discusses issues related to the use of ODR platforms to resolve disputes voluntarily when a lawsuit has not been filed.*

ISSUE	PROBLEM	SOLUTION(S)
<b>Confusion about Process</b>	Consumers might not understand the difference between voluntary dispute resolution and a lawsuit, especially if pre-filing ODR is hosted by the courts.	If ODR platforms can be used for dispute resolution without filing a lawsuit, the platform needs to clearly explain that this is a voluntary process and any agreements reached will be private settlements that are not filed in court.

TABLE 3 (CONT.)

ISSUE	PROBLEM	SOLUTION(S)
<b>Using ODR to Prepare for a Lawsuit</b>	Creditors might use court-sponsored dispute resolution to get information from consumers that can be used against them in a future lawsuit.	ODR platforms should guarantee confidentiality (except about abusive practices as previously described) and prohibit use of information gained from the ODR process in any lawsuit that is ultimately filed.
<b>Post-Judgment Collection</b>	A consumer against whom a judgment is entered is often subjected to harsh post-judgment collection remedies, such as wage or bank account garnishment, and high rates of post-judgment interest	Courts should evaluate whether allowing parties to use court-sponsored ODR platforms and resources without actually filing a lawsuit helps consumers avoid harsh post-judgment collection remedies.

**Table 4: Using ODR in Collection Lawsuits Post-Judgment**

*This table discusses ways that courts could use ODR platforms in collection lawsuits post-judgment.*

ISSUE	PROBLEM	SOLUTION(S)
<b>Post-Judgment Information Requests</b>	After a judgment has been entered, most states allow the creditor to summon the consumer to a proceeding to testify or to produce documents about the consumer’s income and assets. This procedure can create hardship for consumers and creditors can abuse it.	ODR platforms should inform consumers about reasons that their income and assets may be exempt from collection and make it easy to assert their exemptions electronically.  The ODR platform should also include the ability to respond to post-judgment information requests. This would allow consumers to respond without taking time off work or incurring the expense of travel in order to appear in court.
<b>Civil Arrest Warrants</b>	In 44 states, civil arrest warrants (also known as capias or bench warrants) can be issued for failure to appear at post-judgment proceedings. <sup>17</sup> Creditors may use this procedure to coerce payment of debts that the consumer cannot afford to pay, including those whose income and assets are exempt.	Before a civil arrest warrant is issued, the consumer should be offered the option of appearing in court or using the ODR platform to provide the missing information. Even after a capias is issued, a consumer should be allowed to get the capias withdrawn by supplying the missing information through the ODR platform.



## Table 5: Evaluation of ODR Platforms for Collection Lawsuits

*This table considers how courts should evaluate ODR platforms to resolve collection lawsuits.*

ISSUE	PROBLEM	SOLUTION(S)
<b>System Evaluation</b>	Many courts do not have basic statistics about collection lawsuits, making it difficult to evaluate the impact (or potential impact) of ODR on collection lawsuits or their resolution.	<p>Courts should collect data about the collection lawsuits currently filed in their courts and use that as a baseline to evaluate ODR in collection lawsuits.</p> <p>Some points for comparison include:</p> <ul style="list-style-type: none"> <li>▪ rate of default judgment;</li> <li>▪ percent of cases that reach a settlement;</li> <li>▪ percent of cases that end in the consumer's favor (e.g. dismissal);</li> <li>▪ dollar amount of settlements relative to amount initially sought;</li> <li>▪ rate of satisfaction of judgments or settlements; and</li> <li>▪ rate of wage and bank account garnishment.</li> </ul> <p>In addition to general consumer satisfaction surveys, courts should conduct in-depth interviews with a sample of users about their experiences with ODR.</p>

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## Endnotes

1. Jason Krause, [Settling It on the Web: New Technology, Lower Costs Enable Growth of Online Dispute Resolution](#), ABA Journal (Oct. 2007).
2. Joint Technology Committee, [Case Studies in ODR for Courts: A view from the front lines](#) (Nov. 29, 2017) (discussing early use of court-sponsored ODR in British Columbia, the Netherlands, and the United Kingdom).
3. ODR.INFO, [Courts Using ODR](#) (listing courts in Arkansas, California, Connecticut, Kentucky, Georgia, Illinois, Michigan, New Mexico, Nevada, Ohio, Texas, and Utah).
4. *See, e.g.*, State of Connecticut Judicial Branch, [Online Dispute Resolution](#); New Mexico Courts, [What is Online Dispute Resolution \(ODR\)?](#); Franklin County Municipal Court (Columbus, Ohio), [Online Dispute Resolution](#); Utah Courts, [Small Claims Online Dispute Resolution Pilot Project](#). *See also*, Community Legal Aid SoCal, [Orange County Small Claims Online Dispute Resolution](#) (small claims ODR administered by legal services).
5. *See* National Consumer Law Center, Fair Debt Collection §1.4.9.1 (9<sup>th</sup> ed. 2018) (compiling various references discussing the number of debt collection filings).
6. National Center for State Courts, [2018 State of the State Courts – Survey Analysis](#) (Dec. 3, 2018).
7. State courts have obligations under Title II of the Americans with Disabilities Act. 42 U.S.C. §§ 12131-12134. *See also* David Allen Larson, [Digital Accessibility and Disability Accommodations in Online Dispute Resolution: ODR for Everyone](#), 34 Ohio St. J. on Disp. Resol. (2019).
8. *See, e.g.*, Self-Represented Litigants Network, [Civil Resolution Tribunal Webinar](#) (Apr. 23, 2019) (discussing goal of writing at a sixth grade reading level for online legal information at the British Columbia Civil Resolution Tribunal).
9. *See, e.g.*, Civil Resolution Tribunal, [CRT Statistics Snapshot](#) (May 2019) (reporting that 2,628 out of 9,252 small claims disputes (28%) were resolved by default decision); Zack Quaintance, [SXSW 2019: Utah, ‘Pajama Court’ and Resolving Cases Online](#), Government Technology (March 11, 2019) (noting that in a pilot in Utah courts the default rate before ODR was 71 percent but went down to 53 percent in the ODR pilot “with officials noting that the majority of these cases are related to debt collection”); Alex Sanchez and MJ Cartwright, [ODR: Resources Saved, Justice Served](#) (Jan. 18, 2018) (citing 54% no appearance default rate in the 9 months before ODR and a 20% rate after launching ODR in small claims collection cases filed in Franklin County, OH).
10. For a discussion of what documents should be filed with and reviewed by the court before entering a default judgment, see the National Consumer Law Center’s [Model Family Financial Protection Act](#) at Section 1-106(b).
11. *See* National Consumer Law Center, Fair Debt Collection §1.4.9.4 (9<sup>th</sup> ed. 2018) (compiling statistics about consumer representation in collection lawsuits).
12. *See*, David Allen Larson, [Designing and Implementing a State Court ODR System: From Disappointment to Celebration](#), 2019 J. of Disp. Resol. 77, 88.
13. *See, e.g.*, State of Connecticut Judicial Branch, [Online Dispute Resolution](#); New Mexico Courts, [What is Online Dispute Resolution \(ODR\)?](#); Franklin County Municipal Court (Columbus, Ohio), [Online Dispute Resolution](#); Utah Courts, [Small Claims Online Dispute Resolution Pilot Project](#).

14. *See, e.g.*, Chris Albin-Lackey, [Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor](#), Human Rights Watch (Jan. 2016).
15. David Allen Larson, [Designing and Implementing a State Court ODR System: From Disappointment to Celebration](#), 2019 J. of Disp. Resol. 77, 93.
16. In the traffic court context, there are at least two courts where judges are making decisions based on information submitted through an ODR platform. [Faulkner and Van Buren County District Courts Online Case Review \(Conway, AR\)](#); [54B District Court Online Case Review \(East Lansing, MI\)](#).
17. Jennifer Turner, [A Pound of Flesh: The Criminalization of Private Debt](#), American Civil Liberties Union (2018).



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