DEFENDANTS AND ONE-SHOTTERS WIN AFTER ALL: COMPLIANCE WITH COURT DECISIONS IN CIVIL CASES

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Repeat players and plaintiffs seem to have an advantage in the negotiation phase and in the trial phase of civil disputes. We suggest that their advantage may turn to a disadvantage after the court's judgment, when the award has to be collected. We contacted attorneys for all cases in three trial courts in The Netherlands in which the plaintiff's claim had been granted in whole or in part in a final decision three years earlier ($N=970$). We asked them to what extent the defendant complied with the judgment. The results show that plaintiffs have difficulty in collecting their awards. On average, only a little more than half the award is collected after three years. Repeat players continue to prevail if they are plaintiffs, but are worse off than one-shotters if they are defendants.

I. INTRODUCTION

After winning a lawsuit, the plaintiff must collect the promised award from the defendant. The decision of a court only grants the plaintiff the right to collect what has been awarded, assisted by the bailiff and, if necessary, with police force. Defendants, however, may evade payment:[1] They may die or leave the country, and they may simply not pay. In a minor case the costs of mobilizing further legal assistance to collect the award may exceed the profits if the defendant does not cooperate. Or the defendant may threaten the plaintiff with an appeal, forcing the plaintiff to agree to payment of a lesser amount against final discharge.

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[1] In the discussion it is assumed that disputes are about money, which is true for most disputes. In the present study, for instance, in 90 percent of the cases, only money was in dispute.

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Courts do not keep records on the extent to which their judgments are fulfilled and there are no systematic data on the defendants' payments. We report here on an empirical study of the effect of the courts' decisions in civil cases in The Netherlands and explore the factors that predict compliance with court decisions.[2] The study allows us to look from a new perspective at what kind of parties win disputes.

The literature on civil disputes routinely reports that repeat players tend to prevail (Galanter 1974; Hildebrandt, McNeely, and Mercer 1982; Sarat 1976). These results are usually based on an empirical assessment of the final court decisions. It is assumed that repeat players, on average, can command greater wealth which provides them with an advantage in civil disputes (Galanter 1974:98–101). This contention overlooks the execution phase of civil disputes. Some advantage may still exist for repeat players, if they are plaintiffs, in the phase of the dispute in which a court award has to be collected. But if a repeat player is a defendant, its wealth may become a disadvantage. Assets of repeat players may be more easily reached by a plaintiff and more often cover the judgment of the court than may the assets of one-shotters. By the same token, the assets of one-shotters may generally be so meager and hard to reach that any advantage of repeat players suing one-shotters in the court phase may evaporate during the execution phase of the dispute, because, as the Dutch saying goes, it is hard to pluck a featherless chicken.

The literature on civil disputes also routinely reports that plaintiffs win the vast majority of cases (e.g., Hildebrandt et al. 1982; McEwen and Maiman 1981, 1986; Ruhnka and Weller 1978; Sarat 1976; Yngvesson and Hennessey 1975). In these studies, any amount of money granted to the plaintiff is coded as a judgment in favor of the plaintiff. But as Vidmar (1984, 1987) showed, if the amount of liability admitted by the defendant in the negotiation phase of the dispute is taken into account, plaintiffs do not win more than defendants do (see also McEwen and Maiman 1986). Plaintiffs may even be worse off when the execution phase of the disputes is taken into account. Plaintiffs must take action to collect the award, while defendants can remain idle. Plaintiffs must find assets of defendants, and although defendants can be forced to reveal their assets, doing so requires a new formal court procedure with all of its attendant risks and costs.

We begin with the assumption that disputes can only be understood if the prior history of the case and the manner in which the parties anticipate its future are taken into account (Griffiths 1983). Usually, parties start negotiations after a dispute arises. A

[2] We also conducted a number of interviews with attorneys and encouraged the attorneys to describe cases and problems related to the execution in their own words. Below we use the interviews and descriptions to illustrate patterns we observed.

dispute only reaches the court if negotiations do not succeed—if one or both parties expect the court's decision to be more favorable than a settlement (Van Koppen 1990a).[3] For the plaintiff, not only the prospective court decision but also the likelihood of collecting a favorable judgment play a role. It can be assumed that both prior to and during a lawsuit a plaintiff will anticipate the possibilities of successfully collecting a favorable judgment. Vidmar (1987) argues that defendants also anticipate the likelihood of successful collection of an award. His study indicates that defendants do not appear in court if they expect the plaintiff to win *and* if they expect that the plaintiff cannot collect after a favorable decision anyway.

After the judgment, a sensible plaintiff will only take steps to enforce it if he or she is quite sure that the profits will exceed the costs. That means that the plaintiff must know what assets of the defendant are available for attachment and how much these assets will cover.

In some cases, the losing defendant pays without ado. There are many reasons to do so. The defendant will suffer additional costs if the plaintiff's enforcement is successful. Also, a defendant may be cooperative in order to maintain business relations.

Considering the arguments above, it is hypothesized that the extent to which defendants comply with a court decision and the extent to which plaintiffs are able to force defendants to comply are related to characteristics of the dispute and of the parties. Specifically, we expect that the advantage of repeat players in the first phases of a civil disputes turns to a disadvantage in the execution phase and that plaintiffs have so much difficulty in collecting the court's awards that defendants ultimately usually prevail.

II. METHOD

Execution of the court's decision in a civil case (the process of collecting an award) can take quite some time. We collected the data in the fall of 1989, including cases in which the courts rendered a final decision in 1986, to allow for an execution phase of at least three years. Data on characteristics of parties and cases and on court procedure were drawn from the courts' files. We contacted the attorneys for information on the execution phase of the disputes, which we were able to do because attorneys in The Netherlands usually remain involved in cases even after a final court decision.

[3] Sensible parties, of course, will also consider additional costs related to the court procedure.

A. Sample

For another study (as yet unpublished), the Research and Documentation Centre of the Dutch Ministry of Justice coded a large number of variables for all civil cases in which a final decision was given in 1986 by three out of the nineteen trial courts in The Netherlands: 's-Gravenhage (The Hague), Rotterdam, and Breda.[4] In The Netherlands, the trial courts decide, as a court of first instance, disputes with a value above *f*5,000. The trial courts also serve as appellate courts for decisions rendered by the small claims courts in its district.

The sample included all civil court cases except the so-called family cases (mostly divorce) and summary proceedings.[5] These 4,131 cases were coded from the files in the courts' archives. For the present study, we selected those cases in which the plaintiff's claim was granted wholly or partly by the court. In these 3,013 cases we tried to reach the attorney of each party.

The courts included in the sample—The Hague, Rotterdam, and Breda—more or less constitute a cross-section of the nineteen Dutch trial courts. Rotterdam, a strongly industrialized district, includes the largest harbor in the world and much industry and trade. The Hague is the government center (although Amsterdam is the capital of The Netherlands) with much less industry than Rotterdam. Both Rotterdam and The Hague are situated in the western part of the country, commonly known as Holland. Breda is a more rural district in the south.

B. Procedure

To protect the anonymity of both the attorneys and their clients, the database supplied by the Ministry of Justice was sent to a *notaris* (notary public).[6] We received only those variables necessary to identify the cases at the courts. With these data, we ex-

[4] The Dutch trial court (*arrondissementsrechtbank*) is the court of general jurisdiction. It hears all criminal and civil cases, except those that go to the cantonal court (*kantongerecht*), which are limited, in civil law, to lawsuits on amounts lower than *f*5,000 (at the time of the study about US$2,500), all labor and tenancy cases, and some oddities. The trial court, however, also hears appeals from decisions of the cantonal courts in its district. Decisions of the trial court sitting as a court of first instance, are appealable to the court of appeal (*gerechtshof*). In ordinary appeals, the cases are dealt with *de novo*. The cantonal courts, the trial courts, and the courts of appeal are structured hierarchically.

[5] In which the plaintiff asks the president of the court for an injunction.

[6] The Dutch *notaris* is a specialized government-appointed lawyer whose major function is to issue authentic legal documents in noncontentious proceedings. The service of a notary is compulsory for, e.g., real estate transactions and drafting wills. Because notaries are sworn to secrecy, they are the obvious persons to perform tasks in which confidence is paramount.

The procedure in the present study was the result of negotiations with the presidents of the trial courts and the presidents of the local bars in the three districts. As a result of these negotiations, we also removed questions concerning costs of legal counsel from the questionnaire.

tracted each court file and noted names of parties and of attorneys. We then sent out a questionnaire to each attorney with a cover sheet to identify the case. The attorneys returned the questionnaire to the notaris. He removed the identification cover sheet, attached the Ministry of Justice data on the case to the questionnaire, and forwarded the questionnaire and Ministry of Justice data to us without the individual information.[7]

C. Data

The original database, supplied by the Justice Department, included many variables on formal court proceedings, dates of specific actions, some summary variables on claims and counterclaims, and the decision of the court.

The questionnaire we sent to the attorneys included questions on what happened after the court's decision and two additional questions: whether a writ of sequestration was issued prior to the lawsuit and how much of the court's judgment was recovered by such means. The other questions concerned whether the defendant paid, when the defendants paid, whether formal execution took place after the court's decision, whether the parties negotiated after the court's decision and, if so, on what issues, and whether the case had been archived.[8]

In all cases in the study, the trial court gave a final decision between 1 January 1986 and 31 December 1986. We gathered our data in September and October 1989, about three years after the court's decision in each case.

III. RESULTS

A. Sample

The 3,013 cases extracted from the Ministry of Justice data constitute all cases in which the three trial courts granted all or part of the plaintiff's claim in 1986. It should be noted that not all these cases are victories for the plaintiff. Vidmar (1984:533) pointed out that in some cases the defendant denies all liability and then a court award to the plaintiff is indeed a victory. In other cases, however, the defendants admit partial liability and often the court grants only that part of the plaintiffs' claims. In some cases the defendant even admits full liability and the court procedure is only necessary, for instance, to allow the plaintiff to receive proceeds in a bankrupt estate. In the present study, we did not distinguish between these different kinds of disputes and took the courts' decisions as point of departure.

Theoretically, we could have sent questionnaires to attorneys

[7] We like to thank notaris R. A. Westen, J.D., of Batenburg, Westen & Koger in Beverwijk, The Netherlands, for his efficient support to the study.

[8] As a measure of conclusion of a case, we asked the attorneys whether they still kept the file in their offices or had it transferred to their archive.

for 6,026 parties, but in 2,001 cases the defendant did not appear. Thus, for these defendants, no attorney could be contacted. A second problem, peculiar to the Dutch legal system, also diminished the number of questionnaires we could send out. Formally, representation of parties at the trial court is divided between two types of lawyers. One, the attorney (the *advocaat*), is the legal counsel for the party, the other, the procurator (the *procureur*), formally executes all necessary acts before the court.[9] Each Dutch attorney can act as attorney in any court of law in the country but can only represent clients as procureur in the district where the attorney resides. Thus, if a case comes before the attorney's local trial court, the attorney can act both as attorney and as procureur; if, however, a case comes before another trial court, the attorney must hire a local procureur. In all cases, all documents are formally submitted and signed by the procureur but are written by the attorney. The attorney also presents the oral argument, after being introduced to the court by the procureur.[10] This difference between functions of attorneys posed the following problem in the present study: In the file at the court, the local procureur is named unless oral argumentation took place. Thus, in many cases we were unable to identify the attorney. Contacting the procureur was of no use, since the procureur, hired simply to submit documents, has no knowledge of the content of the case. In the remaining cases we knew who the attorney was because the attorney's name was in the file. If a party lived or the offices of the party were situated in the court's district, we assumed that the procureur and the advocaat were the same individual, unless the court documents indicated they were not. We were thus unable to identify the attorneys of 1,222 parties and therefore sent out 2,813 questionnaires to attorneys, of which 970 (34 percent) were completed and returned.[11] Using the database of the Ministry of Justice, we were able to test whether the returned cases were representative of the cases in which the plaintiff received a favorable judgment. The returned cases did not differ significantly from the others, except on the number of defaulted cases: Defaulted cases were underrepresented in the sample.

In forty cases, both the attorney for the plaintiff and the attorney for the defendant returned a questionnaire. We compared

[9] It should be noted that the distinction between advocaat and procureur is not equivalent to the distinction between barrister and solicitor in England and Wales.

[10] Most civil court procedure in The Netherlands is done by exchanging documents. Parties and their attorneys may go through the entire procedure without appearing in court.

[11] Attorneys who contacted or wrote us to explain why they could not cooperate either stated that the case files were buried in their archive, that they were not prepared to fill in that many forms (some attorneys had more than forty cases in the sample), or that they felt they needed the approval of their client and the client could not be reached.

their answers case by case and found that the answers from the attorneys differed only on minor points.[12] Therefore, we decided to treat answers coming from all the attorneys as representing the true course of affairs. To prevent double counting, we of course excluded the answers from the defendants' attorneys in the forty cases with responses from both attorneys.

We found differences between cases coming from the three courts in this study. All these differences, however, were confounded with the kind of cases handled by these courts. In Rotterdam, for instance, the judgments were higher (mean=*f*439,284)[13] than in the other two courts, but many of these cases were between two companies. Much more attachment through sequestration took place in Rotterdam, mostly ships or cargo that are put under embargo.[14] In Breda, conversely, the judgments were much lower (mean=*f*28,629), more negotiations took place, and attorneys more often still expected full payment to take place. The cases from the The Hague court fell between those from the other two courts on these variables. Because the differences among the three courts can be explained by the differences in the cases they handle, we do not discuss differences between the courts.

B. After the Judgment: The Disadvantage of Being Plaintiff

Payment

In 90 percent of the cases, only money was at stake. The mean judgment of the court to the plaintiff was *f*191,000.[15] In the remaining 10 percent the court usually imposed both money damages and some other performance on the defendant.[16] Wherever we discuss payment, these other performances are included, except of course when we are discussing percentages.

In 43 percent of the cases, the plaintiff received full payment within the three-year period (see Table 1). On average, these plaintiffs were fully paid after 208 days. In 35 percent of the cases, the plaintiff received nothing at all. In the remaining 22 percent of the cases, the plaintiff received partial payment, averaging 45 percent of the judgment.

The most important reason for failure of payment—given in 75 percent of the cases in which no full payment was received—

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[12] Disagreements were rare but came up occasionally on the reasons for not appealing the case or for nonpayment.

[13] One Dutch guilder equals about US$0.50.

[14] One attorney told us that he had trouble finding the files of cases with the names of the parties we supplied, because he files cases under the name of the attached ship.

[15] Ranging from *f*4,500 to *f*45,268,370.

[16] This other performance often pertained to something the defendant was forbidden to do, as, e.g., a court order to prevent a former husband from entering the house. If the defendant did not infringe on the court order in the three years after the judgment, the case was coded as fully paid.

Table 1. Relation between Compliance to Judgment by Defendant within Three Years and Measures to Have Defendant Comply (Percent; $N=930$)

	Action by Plaintiffs (Column Percents)				
Action by Defendants	Nothing Done	Execution Only	Negotiations Only	Both Execution and Negotiations	Total (n)
No compliance	45	25	26	21	35 (326)
(Row percent)	(65)	(11)	(17)	(6)	(99)
Partial compliance	8	32	35	49	22 (205)
(Row percent)	(19)	(22)	(37)	(22)	(100)
Full compliance	47	44	39	30	43 (399)
(Row percent)	(56)	(17)	(21)	(7)	(101)
Total	100%	100%	100%	100%	100% (930)
(Row percent)	(51%)	(16%)	(23%)	(10%)	(100%)
N	(473)	(149)	(214)	(94)	930

was lack of reachable assets of the defendant. In a typical case, one involving the execution of a *f*7500 claim, the plaintiff's attorney wrote us:

> This case had a typical course. After the judgment on default of the defendant, I summoned the defendant. He did not react; I sent the case to the bailiff; the debtor offered to pay 15 percent. My client wanted more, and urged me to press on. The defendant was declared bankrupt, I issued my claim with the receiver, but the claims of the IRS prevailed. I filed the case away and my client received nothing.[17]

In 13 percent of the cases, the defendant did not pay the whole judgment because a settlement was reached after the judgment.[18] In 8 percent an appeal was still going on, and in 12 percent the attorneys gave another reason. In some of these "other reason" cases, the attorney for the plaintiff showed clemency. In a suit on *f*26,352, the plaintiff's attorney wrote:

> This was a case between a father and his son from his first marriage. My client, the father, was growing demented fast. Communicating with him was extremely difficult and had to be done through his second wife. She, however, did not disclose that the father had let his son off most of the old debt. Although I had a judgment, execution proved impossible under these circumstances.

Sequestration

According to normative negotiation theory, plaintiffs should compare the offers made during negotiations with their court alternative (Van Koppen 1990a). Plaintiffs should then start a law-

[17] All quotes from attorneys are translated from Dutch.

[18] Settlements are more fully discussed below.

suit only after considering the probability (1) that the judge will grant their claim and (2) that they will recover the judgment from the defendant after a favorable court decision. One means to insure recovery of a prospective favorable judgment is to issue a writ of sequestration prior to the lawsuit. In 25 percent of the cases in the sample, such a writ had been issued; in the remaining cases, the plaintiff apparently expected or hoped to recover without such insurance. When a sequestration writ was issued prior to the lawsuit, the attached goods, after sale, covered on average 53 percent of the judgment.

Execution and Negotiations

After the judgment, some defendants paid without ado. Only 18 percent of the defendants had fully complied with the judgment within three months. That percentage grew to 29 percent after one year and to 43 percent after three years.

As Table 1 shows, 51 percent of the plaintiffs (473/930) took no specific action to induce the defendant to comply. Still, in almost half of these cases of plaintiff inaction, the defendants paid the full amount. In almost a quarter of all cases (213/930), the defendant had not paid anything after three years and the plaintiff had done nothing to induce payment. One explanation for this high percentage may be Galanter's (1974) suggestion that repeat-player plaintiffs are not so much interested in immediate gains in litigation but "play for the rules." If that is true, in these cases the legal precedent established by the court is more important than collecting the award. Once the judgment has been rendered in these cases, the plaintiffs may find that their goals for the litigation have already been met. It should be noted, however, that this study concerned decisions at the trial court level. To establish a precedent under the Dutch legal system, a decision of a court of appeal or the Supreme Court is immensely more valuable than a precedent set by a trial court. If legal precedents were a primary concern of plaintiffs who take no action to collect the award from an noncomplying defendant, a higher rate of appeal should be expected with such plaintiffs. The appeal rate in this category of cases, however, does not differ significantly from the appeal rate in the other cases, suggesting that this explanation is not the most important one. Most of these plaintiffs probably did not act because they could not reach assets of the defendants and considered a formal procedure to force the defendant to reveal the assets as too risky or too costly.

In 26 percent of all cases ((149+93)/930) the plaintiff did start formal execution of the judgment.[19] Executions did not appear to

[19] In 31 percent of these cases, a garnishment order was used; in 14 percent, there was a seizure of real estate; and in 19 percent, movable property was seized. Only in 6 percent did execution lead to the defendant's bankruptcy.

be very successful. While we anticipated that plaintiffs would commence formal execution only if they were quite sure that it would lead to recovery of an amount higher than the costs of execution, only 39 percent of the executions led to full payment of the judgment. Defendants were even less likely to fully comply in cases in which the plaintiff took additional steps (39 percent) than when the plaintiff did nothing (47 percent). On average, the goods recovered with a formal execution after the judgment yielded 54 percent of the award, almost the same percentage as was recovered when a writ of sequestration was issued before the trial.

Enforcement of court judgments can pose many problems to the plaintiff's attorney. Most of the time, the attorney has a vague idea what assets of the defendant are available, but even when these assets have been identified, they can be hard to reach, as can been seen from the two following examples.

1. Six cases in our sample concerned the same defendant but different plaintiffs, all Luxembourg banks that were represented by the same Dutch attorney. The total claim was about *f*120,000. The attorney for the Luxembourg banks wrote:

> Mr. S—— and Mr. M—— were two members of the Brussels underworld, who managed to have a series of Luxembourg banks to pay them large amounts of money on forged bonds. They used the same trick on banks in the southern part of The Netherlands and were caught there. On them, the police found *f*100,000 in cash. The Luxembourg banks took me as attorney, some other banks took another attorney. Together we issued a writ of sequestration under the Ministry of Justice for that money. Of course, we won the civil lawsuit, but it took a lot of time to have the Ministry to hand over the money. The Ministry was not prepared to release the money, fearing that other claims might turn up. In the end, we received the money, against the guarantee that we would grant claims from other aggrieved claimants.

2. On a *f*8,500 claim, the attorney for the plaintiff wrote:

> The defendant went bankrupt. Later, he appeared to be employed at an interior decorator. A garnishment order on his salary was fruitless, because the employer said the defendant's salary for his part-time job was below the minimum amount of income that is untouchable for attachment under the social security act. I could not check that without a new legal proceeding with all the costs and risk involved.

A judicial decision seems to give a final solution to the conflict between the parties. But in 33 percent of the cases, parties negotiated after the judgment. In 50 percent of all negotiated cases, the negotiators settled on payment in installments, usually because the defendant could not afford payment all at once. In 33 percent of the negotiated cases, the parties still negotiated on the amount that had to be paid. The other negotiations mainly concerned a

payment arrangement for legal fees (4 percent), whether or not one of the parties would appeal (2 percent), or special circumstances. For example, a plaintiff's attorney in a case with a *f*41,600 claim wrote us:

> Because of extralegal factors (divorce, problems with the guardianship of the defendant's son, two heart attacks after 1986 while he was not insured) we decided to keep the defendant by the short and curlies, but not to press too hard. Therefore, we offered a 10 percent reduction. Finally, in 1989 he himself offered full payment of the remaining 90 percent.

Considering the inherently compromising nature of negotiations, it could be expected that negotiations would result in partial payment more often than would formal execution. Compared to inaction of the plaintiff, negotiations indeed more often resulted in partial payment, but almost the same pattern of payment resulted from formal execution (see Table 1). It should be noted, however, that half the negotiations concerned the manner of payment rather than the amount to be paid by the defendant. If the parties agree to payment in installments, the award is collected all the same but over a longer period. Cases in which both formal executions and negotiations occurred more often resulted in partial payment than did cases in which only one of these measures took place ($\chi^2=8.9$, df$=2$, $p<.01$). This counterintuitive finding probably does not stem from the joint effect of execution and negotiations but from the kind of cases in which both measures to collect the award are applied. If the defendant did not yield enough during negotiations to the plaintiff's taste, formal execution could follow. But if the defendant did not give in because of a lack of money, formal execution usually will not result in full payment either.

Both formal execution and negotiations take place more often in cases against individual defendants ($\chi^2=19.8$, df$=2$, $p<.001$ and $\chi^2=11.8$, df$=2$, $p<.01$, respectively) than in cases against companies and governments.[20] But if either or both execution and negotiations take place in a case, these measures are as successful or unsuccesful against company defendants as against individual defendants.

Negotiations also occurred more often with poorer defendants ($\chi^2=7.44$, df$=2$, $p<.05$).[21] In negotiations with poor individuals, a

[20] If the relatively few cases against government defendants are excluded from the analyses, $\chi^2=16.5$, df$=1$, $p<.001$ and $\chi^2=12.3$, df$=1$, $p<.001$, respectively.

[21] We estimated the wealth of the defendant using his or her eligibility for legal aid. Note that we only know the wealth of defendants in the disputed cases, because in those cases the court has decided whether that defendant was eligible for legal aid. Defaulting defendants did not present themselves in court and thus did not apply for legal aid.

The Dutch legal aid system works with a sliding scale: poor people receive almost all their attorney fees from the government; the more a party earns,

special municipal institution, the town credit bank, often plays a role. That bank mediates between the defendant and the creditors. For example, an attorney for the defendant wrote, after his client lost a *f*20,331 suit:

> My client had debts up to about *f*65,000. The town credit bank negotiated with his creditors to agree with 37 percent payment. The creditors agreed, the bank paid off the creditors, and now my client is paying the bank *f*800 a month.

Appeals

One method of stalling payment is to appeal the decision of the trial court.[22] In 13 percent of the cases the losing defendant appealed. Company defendants were more likely to appeal than individual defendants ($\chi^2=11.18$, df$=1$, $p<.01$).[23] We asked attorneys to indicate why the losing party did *not* appeal in the other cases. The most-often-named reasons (72 percent) relate to the probability of winning the appeal: They said either that the trial court's decision was right or that the risk of an appeal was too high.

C. After the Judgment: Advantages and Disadvantages of Repeat Players

The apparent advantage of repeat players continued following the judgment if they were plaintiffs: Individual plaintiffs relatively often received nothing, while company and government plaintiffs usually received most or all of the judgment debt (see Table 2). As expected, the wealth of repeat players turned against them if they were defendants: Individual defendants paid lower proportions of the judgments entered against them than did company defendants—after three years, 48 and 57 percent of the judgment, respectively.[24] Government defendants paid best: On average they paid 86 percent of the judgment after three years.

Company defendants, however, were not uniformly worse off than individual defendants. We found an interaction between kind

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the less the government contributes, while above a certain level of income the government contributes nothing. If a defendant is on legal aid, he also receives a reduction of the court fees, either for three-quarters or half. These reductions on court fees are reflected in Table 2 and are used in the χ^2 test under discussion here.

[22] Appealing the trial court decision is not possible if the case already was an appeal of a small claims court decision. After all appeals, however, an appeal in cassation is possible to the Dutch Supreme Court (see Van Koppen 1990b).

[23] In the basic data supplied by the Ministry of Justice, a fairly rough distinction is made between individual parties, companies, and the government. The category "companies" includes the full range from small businesses and nonprofit organizations to multinationals. In the analyses, because of low frequency, the government parties are left out (see Table 2).

[24] The percentages were calculated by setting nonpayment at 0 percent, full payment at 100 percent.

Table 2. Influences on Whether or How Much Payment Had Taken Place within Three Years after the Judgment (Percent)

	Not Paid	Partly Paid	Fully Paid	Total (n)	Significance
Sequestration:					
No	38	19	43	100 (570)	$\chi^2=17.9$, df=2, $p<.001$
Yes	29	33	38	100 (194)	
Kind of plaintiff:					
Individual	40	16	43	100 (244)	$\chi^2=18.7$, df=4, $p<.001$; excluding government:
Company	34	26	39	100 (468)	$\chi^2=9.9$, df=2, $p<.01$
Government	41	—	59	100 (29)	
Kind of defendant:					
Individual:	37	27	36	100 (485)	$\chi^2=29.6$, df=4, $p<.001$; excluding government:
Company	36	13	51	100 (246)	$\chi^2=20.0$, df=2, $p<.001$
Government	9	9	82	100 (11)	
Legal aid plaintiff:					
Most	48	19	33	100 (67)	$\chi^2=7.6$, df=4, n.s.
Medium	17	17	68	100 (12)	
None	36	24	39	100 (599)	
Legal aid defendant:					
Most	48	30	22	100 (50)	$\chi^2=17.5$, df=4, $p<.001$
Medium	44	11	44	100 (9)	
None	34	14	52	100 (250)	
Kind of case:					
Defaulted	36	27	36	100 (401)	$\chi^2=16.9$, df=2, $p<.001$
Disputed	35	17	48	100 (363)	

NOTE: Not all categories add to 930 because of missing data.

of plaintiff and kind of defendant:[25] Individual plaintiffs do better against company defendants, collecting an average of 62 percent of the court's award than company plaintiffs who collect an average of 52 percent, but company plaintiffs do better against individual defendants (58 percent) than do individual plaintiffs (44 percent). Thus, although company defendants on average are worse off than individual defendants, they pay less in the end to company plaintiffs than individual defendants do.

Individual defendants not only paid worse, but it took a lot more trouble to get money from them. As said, execution writs against individuals were issued more often than against companies, and in cases against individual defendants, negotiations took place more often. And even if they paid the full amount, it took individuals much longer: 274 days versus 124 days for company defendants. Government defendants took an intermediate time (137 days; F (2,219)=7.65, $p<.001$). As could be expected, defendants who are on legal aid, the poorer ones, more often failed to pay the full judgment.

[25] The interaction is not reflected in Table 2: F (4,720)=3.13, $p<.01$.

D. Defaulting Defendants

In most cases in our sample, 54 percent, the judgment was entered on default of the defendant.[26] After a default judgment, typically only part of the judgment was paid; after a judgment in a disputed case the defendant more often paid the full amount. But the difference is not great. After three years, defaulting defendants had paid 48 percent of the judgment; the other defendants 56 percent. But collecting in a default case did pose greater difficulty for the plaintiff's attorney: in these cases formal execution was more likely ($\chi^2=47.56$, df$=1$, $p<.001$). And if the judgment was fully paid, it took substantially longer: 270 days in default cases as against 152 days in disputed cases (F (1,222)$=10.55$, $p<.001$). Vidmar's (1987) hypothesis that defaulting defendants do not appear in court because collecting money from them is more difficult in any case thus received support in our study. This difference between disputed and defaulted cases, however, may also result from the strategy attorneys use, as is illustrated by the following description an attorney presented to us as standard practice:[27]

> After I have written the first dunning letter to a defendant on behalf of my client, the defendant often appears at my office—without an attorney—and tries to settle the dispute for a lesser amount of money, payable in installments. Often, the defendant has good counterarguments against my client. I usually do the following: I agree to payment of a lesser amount in installments but advise the defendant that I will continue the lawsuit as an insurance measure. Such a defendant never appears in court and the court automatically grants my full claim. Usually such a defendant pays a few installments but fails to pay the rest. Then I have a court order for formal execution of the full amount. At that time, all deadlines for the defendant to appeal the court's decision have expired, he never was advised by legal counsel, and the defendant has passed over any opportunity to introduce whatever good arguments he may have had.

E. After Three Years

After three years, the plaintiffs in 57 percent of the cases still had not received all their money. Most of them by then had given up, because in only 24 percent of these cases did the attorneys report that they had not yet archived the case.

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[26] The defaulted cases constitute 48 percent of all final court decisions in the three courts. Since we drew our sample from the cases in which the plaintiffs claim was granted wholly or in part, the defaulted cases, of course, make up a larger proportion in the sample (compare Fig. 1).

[27] Although we tried to find independent confirmation of this attorney's strategy being a standard practice, no other attorneys were prepared to admit using the practice, which is at odds with the bar's ethics.

We asked all attorneys in cases without full payment whether they still expected the defendant to pay. They were much more optimistic for the individual defendants than for the companies ($\chi^2=14.51$, df$=2$, $p<.001$), and they were more optimistic on defaulted cases than in disputed cases ($\chi^2=4.80$, df$=1$, $p<.05$). Also, at the time of the study the attorneys had archived the cases against company defendants more often than against individual defendants ($\chi^2=7.42$, df$=1$, $p<.01$). This may relate to the finding that cases were negotiated with individual defendants after the court's decision more often than with company defendants. The result of these negotiations usually was that some kind of payment by installment was agreed on.

Of course, there may be other reasons not to archive the case. An attorney may, for instance, hope to stumble on assets of the defendant in the future. But also some attorneys were not sure what their client wanted to do with the judgment, as in the following example involving a *f*80,500 case:

> After the decision, the plaintiff and the defendant started to do business together. It is unlikely that in that relationship my client, the plaintiff, will pursue the execution of this judgment, but I have not filed the case yet.

IV. DISCUSSION

A. What Explains the Low Rate of Recovery?

Collecting money from defendants, even after a successful lawsuit, is burdensome for many plaintiffs. Defendants rarely pay within a short period after the court's decision without some pressure. Collecting the money proved impossible in one-third of the cases, even after costly execution procedures. We found no relation between compliance and the amount of the claim. It appears to be as difficult to recover a small amount of money as it is to collect a large amount.

Attorneys can be expected to consider the possibilities and probabilities of collecting after a successful lawsuit before they issue a writ in a case. Still, in only 43 percent of the cases had the defendant fully complied with the court's decision—with or without force—after three years. What explains this low rate of compliance? Why was an often expensive lawsuit undertaken by the plaintiff with so little reward? In taking a case, attorneys may give an accurate prediction, based on what they are told about the case, of both the chance of winning in court and the chance of collecting a favorable judgment. But when an attorney for the plaintiff takes a case, the attorney has heard only the client's version of the dispute. The case may turn out to be quite different once the defendant has given his or her arguments. At first, the defendant often is no more than a name and address to the plaintiff's attorney. In most cases, giving a good estimate of the chances in court, let alone

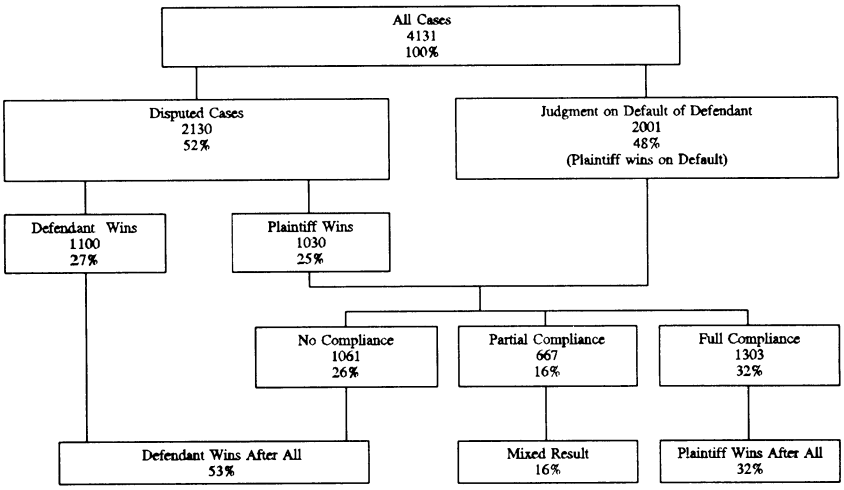

Figure 1. Estimate of winning and losing parties after execution phase

the chances of collecting a favorable court judgment, may prove impossible at that phase of the dispute.

It may be that the plaintiffs could supply attorneys with the necessary information, because plaintiffs usually know their opponents much better than their attorney does. For some plaintiffs, winning in court may be their primary concern, but we guess that most sue for the money. Some plaintiffs, professional creditors—for example, loan companies and mail order companies—can even choose which defendants to sue. These plaintiffs have a standard procedure for choosing which debtors to sue. In that procedure, recoverability is an essential factor (Jettinghoff 1991). Our study shows that they often choose the wrong defendants.

The system may also contribute to the low rate of recovery. During the interviews with attorneys, we specifically asked them to suggest improvements in the system for executing court judgments in civil cases. These questions resulted in only two suggestions, although they were made repeatedly: one for rich defendants, one for the poor. Some attorneys strongly favored improvements in execution of court decisions abroad. In some countries apparently a whole new court procedure is required to execute a Dutch court decision, entailing new risks and new costs. To get hold of somebody's bank account in, for instance, Switzerland or even nearby Luxembourg is almost impossible.

Executing court judgments against poor defendants is also a problem under Dutch law. Agencies that pay social security are uncooperative in providing attorneys with enough information to estimate the usefulness of issuing a writ of sequestration. Some attorneys described creative ways to get around the lack of information, but even if such a writ is successful, the Dutch social security

act extremely limits the amount that can be recovered in this manner.

The data we gathered, however, do suggest some variables that predict poor payment. Collecting money from individual defendants was more difficult than collecting it from company defendants, and defaulting defendants were less likely to pay than defendants who appeared in court. If the defendant was on legal aid, recovering the judgment was also more difficult.

B. Repeat Players

As expected, repeat players did not prevail uniformly in the execution phase of the dispute. Company litigants, if they were defendants, paid more than individual defendants, but company litigants, if they were plaintiffs, collected more than individual plaintiffs. Individual defendants appeared less often in court than company defendants and more often paid only part of the judgment—as a result of negotiations or simply because they did not have the money. The typical company defendant appeared in court and, on losing, either paid very easily or not at all, the latter usually because of bankruptcy. Our study thus supports the hypothesis that repeat-player plaintiffs continue to prevail in the execution phase of civil disputes, but on average have a disadvantage in that phase if they are defendants. If the plaintiff is also a company, however, company defendants are still better off against them than individual defendants.

C. The Plaintiffs' Nightmare

Our study does indicate an important new attack on the conventional image of the powerful plaintiff that extends beyond Vidmar's (1984, 1987) critique: The apparent dominance of the plaintiff deteriorates in the years following the court's decision. To give an impression of how plaintiffs fare in the execution phase of civil disputes, we combined the basic data supplied by the Ministry of Justice and our own data to give an estimate of how many defendants and plaintiffs prevail after the courts' judgments and how much they recover. The estimate is given in Figure 1, showing that fewer than half of the plaintiffs succeed in collecting any money and fewer than a third receive the full judgment (which in some cases is even less than the original claim).[28] The completely pre-

[28] The actual situation may even be worse for plaintiffs, because the number of plaintiffs prevailing in the execution phase may be overestimated in our study for two reasons: (1) In our study, cases with defaulting defendants were underrepresented. In these cases, however, defendants proved to pay worse than in contested cases. (2) As is explained in the Results, we had more trouble in finding the attorneys in nonlocal cases. It could be assumed that these cases involve greater logistical problems in collecting awards. If these nonlocal cases are indeed underrepresented in the sample, that would again mean that 32 percent is an overestimation of prevailing plaintiffs.

vailing plaintiff in the end is substantially outnumbered, two to one, by the winning and resisting defendants. In the end, defendants resist and even plaintiffs who win the court battle often lose the collection war.

REFERENCES

GALANTER, Marc (1974) "Why the 'Haves' Come out Ahead: Speculation on the Limits of Legal Change," 9 *Law & Society Review* 95.

GRIFFITHS, John (1983) "The General Theory of Litigation: A First Step," 5 *Zeitschrift für Rechtssoziologie* 145.

HILDEBRANDT, Kai, Brian McNEELY, and Peter P. MERCER (1982) "The Windsor Small Claims Court: An Empirical Study of Plaintiffs and Their Attitudes," 2 *Windsor Yearbook of Access to Justice* 87.

JETTINGHOFF, Alex (1991) "Daderprofielen in het Privaatrecht" [Profiles of Perpetrators in Civil Law], in P. J. van Koppen and H. F. M. Crombag (eds.), *De menselijke factor: Psychologie voor juristen*. Arnhem, The Netherlands: Gouda Quint.

McEWEN, Craig A., and Richard J. MAIMAN (1981) "Small Claims Mediation in Maine: An Empirical Assessment," 33 *Maine Law Review* 237.

——— (1986) "The Relative Significance of Disputing Forum and Dispute Characteristics for Outcome and Compliance," 20 *Law & Society Review* 439.

RUHNKA, John, and Steven WELLER (1978) *Small Claims Courts: A National Examination*. Williamsburg, VA: National Center for State Courts.

SARAT, Austin (1976) "Alternatives in Dispute Processing: Litigation in a Small Claims Court," 10 *Law & Society Review* 339.

VAN KOPPEN, Peter J. (1990a) "Risktaking in Civil Law Negotiations," 14 *Law and Human Behavior* 151.

——— (1990b) "The Dutch Supreme Court and Parliament: Political Decision-making versus Nonpolitical Appointments," 24 *Law & Society Review* 745.

VIDMAR, Neil (1984) "The Small Claims Court: A Reconceptualization of Disputes and an Empirical Investigation," 18 *Law & Society Review* 515.

——— (1987) "Assessing the Effects of Case Characteristics and Settlement Forum on Dispute Outcomes and Compliance," 21 *Law & Society Review* 155.

YNGVESSON, Barbara, and Patricia HENNESSEY (1975) "Small Claims, Complex Disputes: A Review of the Small Claims Literature," 9 *Law & Society Review* 219.