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OFFICE OF THE ATTORNEY GENERAL

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May 30, 2014

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Dear Mr. McConnell:

On behalf of the Office of the Attorney General (“OAG”), we write in support of the Office of Court Administration’s (“OCA”) proposed reforms relating to consumer credit collection actions (the “Proposed Reforms”). Among other things, the Proposed Reforms would: (1) require plaintiffs to submit legally sufficient proof in order to obtain a judgment by default, including, in debt buyer actions, an affidavit from the original creditor of the account specific to the debt at issue; (2) require plaintiffs to submit an affidavit attesting to the non-expiration of the statute of limitations prior to obtaining a default judgment; (3) expand statewide existing New York City procedures for additional notice to defendants in consumer credit actions; and (4) expand statewide the use of certain standardized forms for use by unrepresented litigants in consumer credit cases.

The Proposed Reforms incorporate many of the OAG’s prior suggestions for improvements to the procedures governing consumer credit lawsuits in this State.¹ We believe that these changes will go far in remediating the substantial problems that OAG has identified in the consumer credit litigation process and we thus strongly urge OCA to implement the Proposed Reforms in their present form.

I. Background on Debt Collection Litigation

Every year, the OAG receives thousands of complaints from consumers about debt collection activity within the State, making debt collection one of the top consumer complaints received by our office.² Due in part to these complaints, over several decades the OAG has investigated unlawful or deceptive debt collection practices across a variety of players in the debt collection industry, including creditors, “debt buyers,” debt collection agencies, law firms, and process servers.

¹ See Letter from Jane M. Azia, Chief of OAG’s Bureau of Consumer Frauds & Protection, to John W. McConnell, OCA Counsel (Dec. 4, 2013) (on file with OAG).

² See Office of the New York Attorney General, *A.G. Schneiderman Releases Top Ten Consumer Frauds of 2012*, Press Release (Mar. 5, 2013), available at <http://www.ag.ny.gov/press-release/ag-schneiderman-releases-top-ten-consumer-frauds-2012>.

Many of these investigations have specifically targeted abuses by the debt collection industry in the context of consumer credit litigation in New York courts. For example, in 2009, the OAG indicted American Legal Process, a legal process server, for engaging in “sewer service,” whereby the company repeatedly failed to properly serve consumers with process in thousands of debt collection lawsuits throughout the State.³ Later that year, the OAG brought suit against more than three dozen law firms and debt collectors that had relied on American Legal Process for service of process.⁴ These companies subsequently entered into binding agreements with the OAG that set forth specific procedures to ensure proper service in the State.

More recently, earlier this month, the OAG announced settlements with two major debt collectors for repeatedly filing suit against New York consumers, and obtaining uncontested default judgments against those consumers who failed to respond, based on claims that were outside of the applicable statute of limitations.⁵ As part of these settlements, nearly three thousand improper judgments that had been entered against New York consumers, with a total outstanding balance of approximately \$16 million, will be vacated.

Through investigations like these, the OAG has identified several systemic problems that plague debt collection litigation in this State and we raised many of these issues with OCA by letter of December 4, 2013.⁶ We commend OCA for taking swift and decisive action to address these concerns through the Proposed Reforms.

A. Acquisition of Debts and Initiation of Actions

Each year, the debt collection industry files hundreds of thousands of consumer credit cases in New York courts.⁷ A majority of these actions are filed by debt buyers, companies that are in the business of purchasing portfolios of delinquent or charged-off debts from the original

³ See Office of the New York Attorney General, *The New York State Attorney General Andrew M. Cuomo Announces Arrest of Long Island Business Owner for Denying Thousands of New Yorkers Their Day in Court*, Press Release (Apr. 14, 2009), available at <http://www.ag.ny.gov/press-release/new-york-state-attorney-general-andrew-m-cuomo-announces-arrest-long-island-business>.

⁴ See Office of the New York Attorney General, *Attorney General Cuomo Sues to Throw Out Over 100,000 Faulty Judgments Entered Against New York Consumers in Next Stage of Debt Collection Investigation*, Press Release (July 22, 2009), available at <http://www.ag.ny.gov/press-release/attorney-general-cuomo-sues-throw-out-over-100000-faulty-judgments-entered-against-new>.

⁵ See Office of the New York Attorney General, *A.G. Schneiderman Announces Settlements with Two Major Consumer Debt Buyers for Unlawful Debt Collection Actions*, Press Release (May 8, 2014), available at <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-settlements-two-major-consumer-debt-buyers-unlawful-debt>.

⁶ See Letter from Jane M. Azia, Chief of OAG’s Bureau of Consumer Frauds & Protection, to John W. McConnell, OCA Counsel (Dec. 4, 2013) (on file with OAG).

⁷ According to data obtained from OCA by one organization, in 2011 alone, debt collectors filed 195,105 consumer credit cases in city and county courts in New York. See New Economy Project, *The Debt Collection Racket in New York* (Jun. 2013), at 3, available at <http://www.nedap.org/resources/documents/DebtCollectionRacketNY.pdf> (“NEP Report”).

creditor on the debt (“Original Creditor”) or another debt buyer, that then seek to collect on the debt from consumers.⁸ Prior to the acquisition of these portfolios, the debt buyers have no relationship with the consumers who are allegedly responsible for the underlying debts. Most Original Creditors do not even tell consumers when a debt is assigned to a debt buyer; instead, the first notification of such an assignment comes from the debt buyer itself.⁹

After purchasing a portfolio of debts, many debt buyers first attempt to collect on the debt through non-judicial methods, such as through collection calls and letters. If these efforts prove unsuccessful, the debt buyers often commence litigation against the consumers seeking the value of the debts assertedly owed. The largest debt buyers operating in this State each file tens of thousands of such collection actions in New York courts in any given year.¹⁰

The OAG has found that historically such debt collection actions were frequently commenced through “sewer service” in which the defendants were never properly served with the summons and complaint, or even made aware that a lawsuit had been filed against them. In some cases, process servers falsely swore in affidavits of service that they had made multiple unsuccessful attempts to serve the defendant personally or by substitute service before resorting to nail and mail service (as required by Section 308(4) of the Civil Practice Law and Rules), when they had not. This failure to properly serve defendants in debt collection actions deprives consumers of the opportunity to appear in court and assert valid defenses to the claims asserted against them.¹¹

In 2008, the Rules of the New York City Civil Court were amended in an effort to ensure that New York City residents were actually served with the summons and complaint in consumer credit actions. Under 22 NYCRR § 208.6(h), plaintiffs in consumer credit actions must now provide to the court an additional notice of the litigation which is then mailed to the defendant by the court at the address where process was served. Plaintiffs may not obtain a default judgment in New York City Civil Court unless they have complied with this requirement and at least

⁸ See NEP Report at 3.

⁹ See Advance Notice of Proposed Rulemaking by Consumer Financial Protection Bureau, *Debt Collection (Regulation F)*, 78 Fed. Reg. 67,847, 67,856 (Nov. 5, 2013), available at <https://www.federalregister.gov/articles/2013/11/12/2013-26875/debt-collection-regulation-f> (“[C]onsumers often become aware that their debts have been sold or placed with a third party for collection because they receive a communication to collect the debt or a written validation notice from the debt buyer or third party collector. Consumers may have difficulty recognizing a debt or knowing whom to pay because a debt may be sold and resold multiple times with different third-party collectors, with the result that a consumer may receive communications from several debt collectors, possibly naming several debt owners, over a period of several years.”).

¹⁰ For example, according to a search of the “eCourts” database of the New York State Unified Court System, Encore Capital Group, through its affiliate Midland Funding LLC, filed 32,314 debt collection actions in New York courts during the year 2012 alone. This total derives from aggregating the results of searches for the term “Midland Funding” within the “WebCivil Local” and “WebCivil Supreme” databases of the eCourts system.

¹¹ See New York City Bar Association, *Out of Service: A Call to Fix the Broken Process Service Industry* (April 2010), at 5, available at <http://www.nycbar.org/pdf/report/uploads/ProcessServiceReport4-10.pdf>.

twenty days have elapsed since the mailing by the clerk.¹² This additional mailing requirement is only in effect in New York City; there is no analogue to this requirement elsewhere in the State.

B. Applications for Default Judgment

The problem of “sewer service” undoubtedly contributes to the high default rate in consumer credit actions.¹³ The great majority of New York consumers do not respond to debt collection complaints.¹⁴ After a consumer fails to respond, debt buyers usually file with the court clerk boilerplate affidavits from their own employees in support of their applications for default judgments.¹⁵ In the affidavits, debt buyers typically attest to the consumer’s breach of the contract with the Original Creditor, notwithstanding the fact that the debt buyers acquired the debts after they had been charged off by the creditors, and the debt buyers, therefore, have no personal knowledge of the claimed breaches. Debt buyers frequently also attest that account

¹² 22 NYCRR § 208.6(h).

¹³ See Federal Trade Commission, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* (July 2010), at 10, available at <http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf> (“2010 FTC Report”) (“[T]he very high rate at which consumers do not appear and the service of process problems documented in some jurisdictions give the Commission a sufficient basis to conclude that efforts to improve service of process in debt collection litigation would benefit consumers in many locations.”); MFY Legal Services, Inc., *Justice Disserved: A Preliminary Analysis of the Exceptionally Low Appearance Rate by Defendants in Lawsuits Filed in the Civil Court of the City of New York* (June 2008), at 5, available at http://www.mfy.org/wp-content/uploads/reports/Justice_Disserved.pdf (concluding that the “exceptionally low rate of response by defendants to debt lawsuits” was “because they are unaware of the lawsuit due to improper service”).

¹⁴ Although estimates vary, it is likely that more than half of all debt collection lawsuits in New York, and perhaps up to 90% of such lawsuits, result in default judgments in favor of the plaintiff. See, e.g., 2010 FTC Report at 7 (noting that panelists in FTC roundtable “estimated that sixty percent to ninety-five percent of consumer debt collection lawsuits result in defaults, with most panelists indicating that the rate in their jurisdictions was close to ninety percent”); New York City Bar Association, *Out of Service: A Call to Fix the Broken Process Service Industry* (April 2010), at 4, available at <http://www.nycbar.org/pdf/report/uploads/ProcessServiceReport4-10.pdf> (finding 79% of consumer credit cases filed in New York City Civil Court in 2008 resulted in default judgments against the defendant); The Urban Justice Center, *Debt Weight: The Consumer Credit Crisis in New York City and Its Impact on the Working Poor* (October 2007), at 17-18, available at http://www.urbanjustice.org/pdf/publications/CDP_Debt_Weight.pdf (finding that 80% of cases within randomly selected sample of New York City Civil Court debt collection actions resulted in a final default judgment against the defendant).

¹⁵ Debt buyers typically assert that their claims are for a “sum certain,” which allows them to file their default judgment applications with the court clerk, rather than a judge, pursuant to CPLR § 3215(a). There is a significant question as to whether an action to collect on a credit card debt is one actually seeking a “sum certain,” given the accumulated interest and fees that is typically claimed on the debt. See Conor P. Duffy, Note, *A Sum Uncertain: Preserving Due Process and Preventing Default Judgments in Consumer Debt Buyer Lawsuits in New York*, 40 *Fordham Urb. L.J.* 1147, 1195 (March 2013) (opining that “[c]alculating a sum certain in consumer credit actions is not a simple task,” as the amount due “is typically the result of complicated, and often dynamic, contract terms and thus is based on several variables, including the principal borrowed for purchases, an interest rate that often changes several times, and numerous over-the-limit and other fees and charges”); see also *Collins Fin. Servs. v. Vigilante*, 915 N.Y.S.2d 912, 915 (Civ. Ct. Richm. Cnty. Jan. 6, 2011) (holding that the documentation submitted “in almost all applications for a default judgment in consumer credit cases fails to provide the necessary ‘requisite proof’ to support entry of judgment pursuant to CPLR 3215(a)” as a sum certain).

statements were sent by the Original Creditors to the consumers, thus allegedly creating an “account stated,” even though they again lack any personal knowledge of the mailing of such statements.¹⁶ With respect to some entities and individuals, these affidavits historically were often “robo-signed” en masse, without any review prior to the execution of either the affidavits or the underlying account records pertaining to the debts.¹⁷

The debt buyers purport to base their testimony on “business records” that they receive from the Original Creditors, but without an affidavit from the Original Creditor laying a proper foundation for these records such testimony constitutes inadmissible hearsay. The business records exception to the hearsay rule requires, among other things, that an affiant establish that the documents at issue were created and maintained in the ordinary course of business. A debt buyer cannot itself lay this foundation for documents received from another entity.¹⁸ The

¹⁶ “An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due. The agreement may be implied by the retention of account statements for an unreasonable period of time without objection.” *Citibank (South Dakota), N.A. v. Jones*, 272 A.D.2d 815, 815 (3d Dep’t 2000). To establish an account stated cause of action, the plaintiff must, among other things, “demonstrate mailing of the account or advance proof showing the account was received. Other elements of the cause of action – the lack of a protest and the failure to pay – must also be supported.” *Citibank (South Dakota), N.A. v. Martin*, 11 Misc. 3d 219, 226 (Civ. Ct. N.Y. Cnty. Dec. 16, 2005).

¹⁷ See *Sykes v. Mel Harris & Assocs.*, 285 F.R.D. 279, 282 (S.D.N.Y. 2012) (finding debt buyer and other defendants had “obtained tens of thousands of default judgments in consumer debt actions, based on thousands of affidavits attesting to the merits of the action that were generated en masse by sophisticated computer programs and signed by a law firm employee who did not read the vast majority of them and claimed to, but apparently did not, have personal knowledge of the facts to which he was attesting”); *Midland Funding LLC v. Brent*, 644 F. Supp. 2d 961, 966-67 (N.D. Ohio Aug. 11, 2009) (finding employees of debt buyer had signed between 200 and 400 computer-generated affidavits per day for use in debt collection actions without first reviewing any account records to confirm accuracy of affidavits); see also David Segal, *Debt Collectors Face a Hazard: Writer’s Cramp*, N.Y. Times, Oct. 31, 2010, available at http://www.nytimes.com/2010/11/01/business/01debt.html?pagewanted=all&_r=0 (citing testimony by employee of one debt buyer that she had signed 2,000 affidavits per day, or the equivalent of roughly one affidavit every 13 seconds when allowing for a half-hour break for lunch).

¹⁸ See, e.g., *Unifund CCR Partners v. Youngman*, 89 A.D.3d 1377, 1377-78 (4th Dep’t 2011); *Palisades Collection, LLC v. Kedik*, 67 A.D.3d 1329, 1331 (4th Dep’t 2009); *South Shore Adjustment Co. v. Pierre*, 96717-09, 2011 N.Y. Misc. LEXIS 3767, at *3 (Civ. Ct. Kings Cnty. Jul. 27, 2011); *Crescent Recovery, LLC v. Burton*, No. 301149QTS2009, 2010 WL 5559108 (Civ. Ct. Queens Cnty. Sept. 22, 2010); *Cach, LLC v. Sliss*, CV10-0155, 2010 WL 3463717, at *2 (Auburn City Ct. Sept. 3, 2010); *Rushmore Recoveries X, LLC v. Skolnick*, 21161/05, 2007 WL 1501643, at *3 (Nassau Dist. Ct. May 24, 2007); *Palisades Collection, LLC v. Gonzales*, No. 548564 CV 2004, 2005 WL 3372971, at *1 (Civ. Ct. N.Y. Cnty. Dec. 12, 2005). Although many of these cases were decided upon a motion for summary judgment, the requirement that the debt buyer submit admissible evidence in support of its claims is equally applicable at the default judgment stage. See *State v. Williams*, 44 A.D.3d 1149, 1151-52 (3d Dep’t 2007) (holding that on application for default judgment the plaintiff must provide “nonhearsay confirmation of the factual basis constituting a prima facie case”); *HSBC Bank USA v. Squitieri*, No. 232285/09, 2010 WL 4723444, at *3 (Sup. Ct. Kings Cnty. Oct. 22, 2010) (denying plaintiff’s motion for default judgment “because plaintiff has failed to furnish the court with evidentiary proof in admissible form, such as an affidavit of someone with personal knowledge, that the allegations made out against them in the complaint are true”); *Rivera v. Laporte*, 120 Misc. 2d 733, 735 (Sup. Ct. N.Y. Cnty. 1983) (“The court’s responsibility to assure that justice is done is not qualitatively different on a default than it is on a fully litigated motion. Thus, if proof is absent, insufficient, or untrustworthy [or] if proper procedure has not been followed . . . the moving party cannot presume entitlement to the requested relief, even on default.”).

affidavits submitted by the debt buyers typically also include an unitemized statement of the amounts allegedly owed on the debts without any explanation as to how those amounts were derived. The applications for default judgment rarely, if ever, include original documentation (such as the underlying credit card agreement or account statements).¹⁹

Since May 2009, a New York City Civil Court Directive has required that debt buyers in New York City, but not elsewhere in the State, file a short affidavit from the Original Creditor of the debt with their applications for default judgments.²⁰ This affidavit simply represents that on a specified date the Original Creditor sold a pool of debts to the debt buyer and transferred with that sale certain electronic records relating to that pool of debts. The affidavit provides no information about the individual debts included in the pool and fails to even confirm that the specific debt at issue in the lawsuit was included with the sale.²¹

C. Statute of Limitations

The OAG has found that the debt collection industry has repeatedly brought debt collection lawsuits based on claims that are outside of the applicable statute of limitations.²² As noted, the OAG just recently announced settlements with two major debt buyers that had obtained default judgments in thousands of lawsuits that were filed outside of the limitations periods for the underlying claims.²³ The OAG believes that this unlawful conduct extends beyond these two debt buyers to much of the debt collection industry.

For example, Section 202 of the Civil Practice Law and Rules requires that for an action that accrued outside of the State to be timely filed in this State the claim must be within both New York's statute of limitations and the statute of limitations of "the place without the state

¹⁹ Debt buyers fail to include original account documentation with their court filings even though such materials are increasingly available to debt buyers at little or no expense. Indeed, the Office of the Comptroller of the Currency, the primary regulator of national banks and federal savings associations, has advised that when a bank sells a portfolio of debts to a debt buyer, the seller should include "sufficient" account documentation "to allow the debt buyer to collect accounts in the normal course of business without having to request additional documentation." Statement of the Office of the Comptroller of the Currency Before the Senate Subcommittee on Financial Institutions and Consumer Protection (July 17, 2013), at 13, *available at* <http://www.occ.gov/news-issuances/congressional-testimony/2013/pub-test-2013-116-oral.pdf>. Any additional materials required by the debt buyer should then be provided by the bank "for no charge, or a minimal charge once a certain threshold is reached." *Id.*

²⁰ See *DRP-182 of Directives and Procedures of the Civil Court of the City of New York* (eff. May 13, 2009), *available at* <http://www.nycourts.gov/courts/nyc/SSI/directives/DRP/drp182.pdf> ("DRP-182").

²¹ See *DRP-182*.

²² *Cf.* 2010 FTC Report at 29 (noting that "[o]ne New York legal services provider analyzed a sample of all the debt collection cases in its office over an eighteen-month period and found that over fifty percent of the cases for which sufficient information was available were filed after the statute of limitations period had expired").

²³ See Office of the New York Attorney General, *A.G. Schneiderman Announces Settlements with Two Major Consumer Debt Buyers for Unlawful Debt Collection Actions*, Press Release (May 8, 2014), *available at* <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-settlements-two-major-consumer-debt-buyers-unlawful-debt>.

where the cause of action accrued.” CPLR § 202. Economic actions, such as consumer credit cases, accrue where the plaintiff – or in the case of a suit by a debt buyer, the Original Creditor – resides.²⁴ The OAG has found that until recently, the debt collection industry routinely failed to comply with the requirements of CPLR § 202 and instead only applied New York’s six-year statute of limitations for actions based on a contractual obligation (CPLR § 213(2)), regardless of where the causes of action accrued.²⁵ This resulted in the entry of default judgments on thousands of time-barred claims, as many states outside of New York have shorter statutes of limitations governing debt collection claims accruing in those jurisdictions.²⁶

In response to this behavior, in June 2010, the Chief Clerk for the Civil Court of the City of New York required that all requests that the Clerk enter a default judgment in consumer credit actions be accompanied by an affidavit stating: (1) where the cause of action accrued; (2) if the action accrued outside of New York, the statute of limitations for that jurisdiction; and (3) a statement that after reasonable inquiry, the debt collector has reason to believe that the applicable statute(s) of limitations for the claim has/have not expired.²⁷ This requirement, however, only pertains to actions filed in New York City Civil Court.

II. Debt Collection Litigation Initiatives by Other States

Other states have identified these same problems with debt collection litigation and have responded by implementing procedures governing consumer credit lawsuits in those jurisdictions. For example, the Maryland Office of the Attorney General and the Maryland judiciary recently collaborated in the drafting of new amendments to the Maryland judiciary rules to better address problems associated with debt collection litigation in that state. On September 8, 2011, the Court of Appeals of Maryland adopted these amendments and made them applicable to all actions commenced after January 1, 2012. Generally, the amendments require that affidavits submitted by debt buyers in connection with debt collection litigation attach proof

²⁴ See *Global Fin. Corp. v. Triarc Corp.*, 93 N.Y.2d 525, 529 (1999).

²⁵ In April 2010, the Court of Appeals reaffirmed in *Portfolio Recovery Assocs., LLC v. King*, 14 N.Y.3d 410, 415 (2010) that CPLR § 202 requires plaintiffs, including debt buyers, to file their actions within the statutes of limitations of both New York and the jurisdiction in which the cause of action accrued. The OAG has found that most debt collectors modified their litigation procedures to comply with the requirements of Section 202 after the Court’s decision in *King*.

²⁶ Many creditors are incorporated or have their principal place of business in Delaware, which has a three-year statute of limitations. See Del. Code Ann. Tit. 10, § 8106. Several other states have statutes of limitations of three or four years. See, e.g., Cal Code Civ. Proc. § 337 (four-year statute of limitations for breach of written contract and account stated causes of action in California); Kan. Stat. Ann. § 60-512 (three-year statute of limitations in Kansas); Md. Code Ann. Cts. & Jud. Proc. § 5-101 (three-year statute of limitations for breach of contract and account stated causes of action in Maryland); N.C. Civ. Proc. § 1-52.1 (three-year statute of limitations in North Carolina); N.H. Rev. Stat. Ann. § 508.4 (three-year statute of limitations in New Hampshire); 42 Pa. Cons. Stat. § 5525 (four-year statute of limitations in Pennsylvania); Tex. Civ. Prac. & Rem. Code Ann. § 16.004 (four-year statute of limitations in Texas).

²⁷ CCM-186A of Chief Clerk’s Memorandum of Civil Court of the City of New York (eff. Jun. 1, 2010), available at <https://www.nycourts.gov/COURTS/nyc/SSI/directives/CCM/CCM186A.pdf>.

relating to the existence and nature of the debt, the terms and conditions of the agreement sued upon, the plaintiff's ownership of the debt, and the itemized balance of the debt.²⁸

State legislatures have also responded to these concerns. In 2009, North Carolina passed the Consumer Economic Protection Act which, among other things, requires debt buyers to file a copy of the signed contract evidencing the original debt, as well as proof of ownership of the debt, with their lawsuits. In addition, the North Carolina statute requires that, in order to obtain a default judgment, the debt buyer must establish the debt through admissible evidence, including an itemization of the debt and all fees and charges.²⁹ In 2013, California passed the Fair Debt Buying Practice Acts. The California statute prohibits a debt buyer from obtaining a default judgment unless it submits admissible evidence establishing its ownership of the debt and the amount of the debt allegedly owed, as well as a properly-authenticated copy of the contract or other document evidencing the debtor's agreement to the debt.³⁰

Several other states have similarly acted to rein in abuses in debt collection litigation in those jurisdictions, whether through legislation, court rule, or administrative regulation.³¹

III. The Proposed Reforms

The Proposed Reforms borrow and improve upon many of the initiatives implemented by these other states and by the New York City Civil Courts and address several of the problems endemic to debt collection litigation in this State identified by the OAG. In particular, the Proposed Reforms would:

- Require all plaintiffs in consumer credit actions to submit enhanced proof in support of their applications for default judgment, including copies of the original contract upon which the action is based and of any written assignments of the debt.
- Require debt buyer plaintiffs in consumer credit actions to submit an affidavit from the Original Creditor of the debt with any application for default judgment, setting forth the facts constituting the asserted cause(s) of action and the amount allegedly owed to the Original Creditor at the time of assignment, as well as affidavits from any prior debt buyers that owned the debt.

²⁸ See September 8, 2011 Rules Order of the Court of Appeals of Maryland, available at <http://www.courts.state.md.us/rules/rodocs/ro171.pdf>.

²⁹ North Carolina Consumer Economic Protection Act of 2009, 2009 N.C. Sess. Laws 573 (N.C. 2009), available at <http://www.ncga.state.nc.us/Sessions/2009/Bills/Senate/PDF/S974v5.pdf>.

³⁰ California Fair Debt Buying Practices Act, 2013 Cal Stats. ch. 64 (Cal. 2013), available at http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0201-0250/sb_233_bill_20130711_chaptered.pdf.

³¹ See generally Center for Responsible Lending, *The State of Lending in America & Its Impact on U.S. Households: Debt Collection & Debt Buying* (April 2014), at 15-17, available at <http://www.responsiblelending.org/state-of-lending/reports/11-Debt-Collection.pdf> (summarizing debt collection regulations in other states).

- Require all plaintiffs in consumer credit actions to submit an affidavit with any application for default judgment attesting that the plaintiff has reason to believe that the action was filed within the applicable statute of limitations.
- Expand statewide the existing requirement of the Rules of the New York City Civil Court for the mailing by the court of an additional notice of a consumer credit action to the debtor at the address where process was served.
- Make available to consumers throughout the State comprehensible information and resources concerning consumer credit actions, including standardized user-friendly forms for consumers to respond to the claims asserted against them.
- Partner with bar associations and law schools to increase pro bono representation of borrowers in consumer credit cases.

We believe that these changes will go far toward redressing the problems associated with consumer credit litigation in this State and urge that they be implemented without delay. For years, plaintiffs in consumer credit litigations have obtained default judgments against consumers based upon boilerplate affidavits that offer nothing more than extremely limited, and often inadmissible, proof of the underlying claims. In many cases, these claims were also well beyond the governing statute of limitations. The Proposed Reforms would help put an end to these practices by requiring significant non-hearsay proof of the consumer's default and the amount allegedly owed on the debt. In particular, debt buyer plaintiffs would now be required to submit an affidavit from the Original Creditor of the debt – the entities with actual personal knowledge of the debt and the consumer's default – in order to obtain a default judgment. In addition, debt collection plaintiffs would be required to affirmatively establish the timeliness of their claims. These requirements should stop the current practice of entities that have no actual knowledge of the debts filing boilerplate affidavits in support of (often untimely) claims in thousands of consumer credit litigations throughout New York State.

The Proposed Reforms should also help reduce the needlessly high incidence of default judgments in this State. Far too many consumers do not respond to the debt collection lawsuits filed against them. There are likely many causes of the high default judgment rate, but the history of sewer service in this State is no doubt a contributor. Likewise, the fact that most borrowers in consumer credit actions are unrepresented and have neither the knowledge nor the resources to represent themselves is another contributing factor. The Proposed Reforms would take a multi-pronged approach to redressing this problem: first, by extending statewide the additional notice procedure of the New York City Civil Court; then, by encouraging greater pro bono representation in consumer credit cases; and finally, by making consumer-friendly resources available to borrowers who represent themselves. There is evidence from the New York City Civil Court system that changes like these lead to a higher consumer response rate and thereby help reduce the incidence of default judgments in consumer credit cases.³² OCA's

³² See Appleseed, *Due Process and Consumer Debt: Eliminating Barriers to Justice in Consumer Credit Cases* (2010), at 13-15, available at <http://appleseednetwork.org/wp-content/uploads/2012/05/Due-Process-and-Consumer-Debt.pdf> (finding that New York City Civil Court's additional notice requirement "brings more consumer debtor

proposal to extend these protections statewide is thus well advised.

IV. Conclusion

We commend OCA for its comprehensive and proactive approach to addressing the problems associated with consumer credit litigation in New York. We believe that the Proposed Reforms strike an appropriate balance between the legitimate rights of the debt collection industry and the need to protect consumers from the abuses that mar consumer credit litigation in this State. We therefore urge OCA to enact the Proposed Reforms without modification and stand ready to assist OCA in the reforms' implementation in whatever way we can.

Sincerely,



Jane M. Azia
Bureau Chief
Consumer Frauds & Protection Bureau

defendants into court, where they may take steps toward resolving the matter and obtaining advice to defend themselves” and has led “consequently, to a decline in the number of default judgments”).



NEW YORK STATE
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FINANCIAL SERVICES

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Governor

Benjamin M. Lawsby
Superintendent

May 30, 2014

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Re: Proposed reforms relating to consumer credit collection cases

Dear Mr. McConnell,

The New York State Department of Financial Services (the “Department”) appreciates the opportunity to comment on the proposed court rules relating to consumer credit cases (“proposed rules”). As you know, the Department has been working hard to stop abusive and deceptive debt collection practices in New York, including proposing nation-leading regulations and new oversight of pre-litigation debt collection activities in the state. The Department has appreciated the opportunity to meet with the Office of Court Administration (“OCA”) to discuss these proposed rules and we are pleased that many of our recommendations have been incorporated into the proposed rules. The Department applauds OCA’s proposed rules as a significant and necessary reform to address abusive debt collection litigation practices in the state.

The proposed rules require a debt collector to adequately prove the validity of an alleged debt and ensure that a collector has the right to collect on the alleged debt. Further, the proposed rules will curb “robo-signing,” which results in judgments against the wrong person or for the wrong amount of money, by requiring that an employee with personal knowledge and access to the creditor’s books and records attest to the facts in the complaint. These requirements mirror the Department’s pre-litigation proposed debt collection regulations. By requiring similar information, OCA and the Department are providing debt collectors consistent rules of the road, from the first collection attempt through potential litigation. Importantly, both rules require:

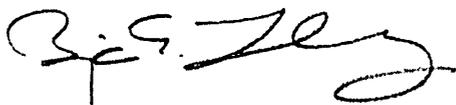
- When a debt has been charged-off by the original creditor, provide the name of the original creditor, the amount of debt at charge-off, and a itemization of all post-charge-off fees and interest added to the debt.
- When a debt has been sold by the original creditor, an explanation of chain-of-title for the alleged debt showing that the current creditor has the right to collect on the debt.

- Debt collectors must check to determine whether the statute of limitations on a debt has expired. DFS rules will require that, where the collector determines that the statute of limitations may have expired, the collector must disclose this to the consumer. If the collector is seeking a default judgment, OCA's rules require the collector to affirm to the court that the debt has not expired.

Further, OCA's proposed rules address the problem that far too many credit actions end in default judgment. This can be attributed in part to the collection industry's history of sewer service and that alleged debtors are typically unrepresented. The proposed rules require that plaintiffs in consumer credit actions provide clerks with stamped envelopes addressed to defendants, which will be used to send consumers an additional mailing of notice of an action. As the Department discussed in a meeting with your office, this will help ensure that consumers are properly sent the summons. Consumers will also be more likely to read mail from the Court instead of an unknown debt collector or law firm. The Department also supports the proposed model "Answer" for consumers to use to respond to consumer credit actions. Defendants will be able to easily respond to a complaint by checking-off whether they deny the claim, dispute proper service, or assert any of the listed defenses. This will give unrepresented consumers a fair opportunity assert their rights and get their day in court.

The Department commends OCA for proposing these rules and strongly supports their adoption. The Department also thanks you for the opportunity to work together on this important issue.

Very truly yours,



Benjamin M. Lawsky
Superintendent of Financial Services



Julie Menin
Commissioner

42 Broadway
8th Floor
New York, NY 10004

nyc.gov/consumers

May 30, 2014

John W. McConnell, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 11th Fl.
New York, NY 10004
Via email to rulecomments@nycourts.gov

Re: Proposed reforms relating to consumer credit collection cases

Dear Mr. McConnell:

The New York City Department of Consumer Affairs (DCA) commends the Office of Court Administration (OCA) for proposing strong rules to address widespread abusive practices by debt buyers who improperly seek default judgments in consumer credit collection cases. The surge in debt collection litigation in New York courts in recent years and the significant associated abuses are well documented.¹ Debt buyers, in particular, frequently abuse the court system to seek to collect on debts that they cannot prove through means other than through robo-signed affidavits of ownership.² These lawsuits frequently result in default judgments³ that cause considerable harm to consumers, leading to frozen bank accounts, garnished wages, and damaged credit scores that impair consumers' ability to obtain credit, housing and even employment.

Despite New York City's licensing of debt collectors (including debt buyers), strong laws and rules governing pre-litigation collection activities and vigorous enforcement, abusive debt collection practices persist. In the past five calendar years, DCA has received more than 3,000 complaints against debt collectors, making it the top complaint category for the past five years overall. A substantial portion of these complaints relate to wrongful collection and inadequate proof. Consequently, in the past five calendar years, DCA's mediation has erased more than \$5 million in consumer debt. DCA's enforcement, mediation of consumer complaints and financial counseling services provide consumers with significant protection from improper pre-litigation collection practices and help when such practices do occur. However, our efforts do not prevent debt collectors who are unable to lawfully collect from consumers from turning to the court system to seek default judgments when pre-litigation efforts fail.



OCA's proposed reforms complement DCA's efforts by ensuring debt buyers cannot obtain default judgments through robo-signed affidavits without legally sufficient proof that the consumer against whom a judgment is sought is, in fact, the individual associated with the original contract or agreement, that the amount of indebtedness is accurate and that the debt is not time-barred. OCA's proposed requirement that plaintiffs seeking default judgments must attach a true and correct copy of the original consumer credit agreement is particularly significant. DCA supports OCA's proposal and offers the following recommendations to further the goal of preventing unwarranted default judgments and ensuring a fair legal process:

- **Require DCA license number and license document.** A debt buyer must be licensed by DCA to bring a collection action against a New York City consumer.⁴ Accordingly, a debt buyer should be required to provide its DCA license number(s), the license expiration date and to annex a copy of its current license. Since it is illegal for a debt buyer to collect or attempt to collect a debt from New York City consumers without a DCA license,⁵ a default judgment should not be entered in the absence of this information and documentation.⁶ Although a debt buyer is required to state its license number at the time of filing, this additional requirement of including DCA license information as part of the required affidavits when seeking default judgments may prevent fraud in these filings.
- **Require confirmation that debt is not the result of identity theft.** When a credit reporting agency notifies a debt collector (or other furnisher of information to a credit reporting agency), pursuant to the procedures set forth in Section 605B of the Fair Credit Reporting Act ("FCRA"), 15 USC §§1681c, that a debt has resulted from identity theft, the furnisher may not sell or transfer the debt or place it for collection, FCRA § 615(f) (1), 15 U.S.C. § 1681m (f) (1). Debt buyers and sellers should therefore be required to a) describe the specific safeguards they have in place to prevent proscribed activities after receipt of this notification; b) state the date the seller and debt buyer implemented these specific safeguards; and c) confirm that the debt buyer and seller reviewed their files to ensure that no such notifications were made by a credit reporting agency with regard to the specific debtor.

We commend the OCA for its responsiveness to the feedback it received regarding its December 2013 proposal and urge the OCA to promptly finalize these proposed regulations to protect defendants in consumer credit cases in New York City and Statewide. We appreciate the OCA's consideration of DCA's additional recommendations and look forward to working together to protect consumers in New York City and throughout the State from the abusive court collection practices.

Respectfully,

A handwritten signature in black ink, appearing to read "Julie Menin". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Julie Menin
Commissioner

NYC
Department of
Consumer Affairs

¹ See, e.g., Consumer Financial Protection Bureau, *Annual Report 2013: Fair Debt Collection Practices Act*, (March 2013), available at http://files.consumerfinance.gov/f/201303_cfpb_March_FDCPA_Report1.pdf. (stating that “collectors more commonly use litigation as a collection strategy than they did when the FDCPA was enacted”). See also New Economy Project, *The Debt Collection Racket in New York*, I (June 2013), available at <http://www.nedap.org/resources/documents/DebtCollectionRacketNY.pdf>. (noting that “over the past decade, the number of debt collection lawsuits filed in New York’s courts has exploded, with upwards of 200,000 cases filed in 2011 alone). See also Center for Responsible Lending, *The State of Lending in America and its Impact on U.S. Households: Debt Collection and Debt Buying* (April 2014), available at <http://www.responsiblelending.org/state-of-lending/reports/11-Debt-Collection.pdf> (noting that “Among the four debt buyers that disclose proceeds from legal collections in their public filings, this income increased from \$582 million to just over \$1 billion between 2009 and 2012.”)

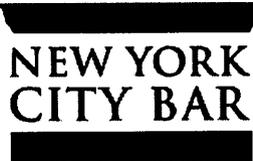
² See, e.g., National Consumer Law Center, et. al., Comments to the Bureau of Consumer Financial Protection Advanced Notice of Proposed Rulemaking Regarding Debt Collection (February 2014) available at http://www.nclc.org/images/pdf/debt_collection/comments-cfpb-debt-collection-anprm-2-28-14.pdf. (stating that “The failure of debt buyers to maintain adequate documentation that they own the debts they pursue leads them to abuse the court system by filing debt claims that they know they cannot prove unless they present false or robo-signed affidavits of ownership. It also subjects consumers to the risk of suit by entities that do not in fact own their debts.”)

³ See, e.g., Center for Responsible Lending, *The State of Lending in America and its Impact on U.S. Households: Debt Collection and Debt Buying* (April 2014), available at <http://www.responsiblelending.org/state-of-lending/reports/11-Debt-Collection.pdf> (noting that “Default judgments appear to be the norm in debt-collection lawsuits.”)

⁴ N.Y. City Admin. Code § 20-490.

⁵ *Id.*

⁶ The Department recently filed administrative charges against a debt buyer which continued to file consumer credit cases after the Department denied its application to renew its license. *NYC Department of Consumer Affairs v. National Credit Adjusters, LLC*, LL 5333200 (October 24, 2013). The debt buyer cited in its complaint its former license number, as well as the license number of an unrelated entity, demonstrating the need to annex a copy of the actual license.



**NEW YORK
CITY BAR**

Contact: Maria Cilenti - Director of Legislative Affairs - mcilenti@nycbar.org - (212) 382-6655

**CIVIL COURT COMMITTEE
CONSUMER AFFAIRS COMMITTEE**

**COMMENTS ON PROPOSED REFORMS RELATING TO
CONSUMER CREDIT CASES**

These comments relate to the New York State Office of Court Administration's (OCA) proposed reforms for consumer credit cases. The proposals include adoption of statewide affidavit forms for use in seeking entry of default judgments, expansion of notice requirements to defendants, and adoption of pro se court forms currently used in New York City.

OCA's proposed reforms present a historic step in the fair administration of justice in consumer credit transactions in New York State and indeed the nation. These proposals are a statement that New York is governed by the rule of law in adjudicating claims that affect ordinary consumers. The reforms will make consumer credit actions more equitable and will help prevent the devastating impacts of improper and illegal debt collection practices for tens of thousands of New York State residents.

OCA's proposed reforms will help ensure that both original creditors and debt buyers submit the evidence legally required to prove ownership of the debt. The reforms will address the nefarious practice of default judgments based on illegal "robo-signed" affidavits. The enhanced notice requirement will ameliorate the negative effects of improper service of process by making certain more defendants know of lawsuits filed against them and preventing entry of default judgments against those whom plaintiffs improperly served. Statewide adoption of the proposed court forms will improve access to justice for tens of thousands of unrepresented consumers who must defend themselves. We applaud OCA and strongly support the reforms and provide some comments and suggestions below.

FEATURES OF THE PROPOSED STATEWIDE REFORMS

Key provisions of the proposed statewide reforms include the following:

1. The proposed rule amendments to 22 N.Y.C.R.R. §§ 208.14-a, 210.14-a, and 212.14-a set out form affidavits that creditors must complete in order to apply for a default judgment. These include affidavit forms for an original-creditor plaintiff, a debt-buyer plaintiff, a debt buyer in connection with the purchase and sale of an account and a debt buyer in connection with the chain of title of an account; and an affidavit of non-expiration of the statute of limitations for all actions.

2. OCA proposes expanding to courts outside of New York City 22 N.Y.C.R.R. § 208.6(h), which requires creditors to submit to the court an additional notice of a consumer credit action to be mailed by the court to the defendant at the address where process was served. The court will not enter a default judgment in any case where the additional notice is returned to the court because of a wrong or unknown address.
3. OCA proposes expanding to courts outside of New York City two forms to be available to unrepresented defendants in consumer credit actions: a check-off answer form and an affidavit form in support of an Order to Show Cause to vacate a default judgment.

REASONS FOR APPROVAL OF THE REFORMS AND RECOMMENDED CHANGES

I. The Proposed Affidavit Forms Address “Robo-Signing” and Ensure Compliance With Evidentiary and Other Requirements

The Committees believe the proposed affidavit forms and required proof for entry of default judgments in consumer credit actions will prevent “robo-signed” affidavits and ensure that creditors obtain default judgments based on non-hearsay evidence necessary to establish a *prima facie* case. We recommend the following changes to ensure that the proposed reforms achieve their intended purpose.

With regard to the “Affidavit of Facts by Original Creditor (Original Creditor Actions),” we recommend that paragraph 4 be amended to include the following proof of the existence of the debt or account and proof of terms and conditions:

“[a] true and correct copy of the original agreement governing the account upon which the action is based, and any amendments thereto, *including or accompanied by supporting documents or statements containing evidence of the defendant’s consent to the terms and conditions of the agreement governing the account.*”

With regard to the “Affidavit of Facts by And Sale of Account by Original Creditor (Debt Buyer Actions),” the Committees recommend that paragraph 5 be amended to include the following:

“[a] true and correct copy of the original agreement governing the account upon which the action is based, and any amendments thereto, *including or accompanied by supporting documents or statements containing evidence of the defendant’s consent to the terms and conditions of the agreement governing the account.*”

With regard to the “Affidavit of Facts and Purchase of Account by Debt Buyer Plaintiff (Debt Buyer Actions), we recommend that paragraph 3 be amended to include the following: “True and correct copies of *the* written assignment of the Account are attached to this affidavit,

including the bill of sale and documents containing sufficient detail as to liability and damages.” In order to comply with evidentiary requirements, we recommend that each debt buyer in the chain of title attach copies of the applicable written assignment of the account and the necessary supporting documents.

The Committees believe that, in a consumer credit action, the causes of action accrue in one state rather than multiple states. With regard to the “Affidavit of Non-Expiration of Statute of Limitations (All Actions)”, we therefore recommend that paragraph 2 be amended as follows:

“The cause(s) of action accrued on _____ [date of default] in the state of _____. The statute(s) of limitations for the cause(s) of action asserted in the complaint is/are _____ years in New York and _____ years in _____ [state where cause of action accrued, if other than New York]. Based on my reasonable inquiry, I believe that the applicable statute(s) of limitations for the cause(s) of action asserted herein has/have not expired.”

In addition, because the calculation of the appropriate statute of limitations necessarily involves a legal analysis, we believe it would be more appropriate to require that the Affidavit of Non-Expiration of Statute of Limitations be completed in all cases by Plaintiff’s legal counsel.

Finally, the Committees note that not everybody sued is, in fact, a debtor. Many people sued do not owe the alleged debt because they are victims of identity theft or mistaken identity, or they have previously paid, settled or discharged the debt in bankruptcy. For this reason, we recommend that the affidavits refer to the person sued as the “Defendant” and not the “Debtor.”

II. The Proposed Statewide Notice Will Help Prevent Entry of Default Judgments Where Service of Process Involved An Incorrect Address

While Committee members have observed some improvements in service of process in New York City since local reforms went into effect in 2010, “sewer service” remains a significant concern.¹ The proposed expansion of New York City’s 22 N.Y.C.R.R. § 208.6(h) notice to the entire state will prevent entry of default judgments where the process server claims service at an incorrect or outdated address. The impact of default judgments on consumers is devastating, and problems with improper service of process are continuing. This proposed reform extends to New Yorkers an effective and fair measure that protects defendants’ procedural and due process rights. The Committees do not recommend any changes related to OCA’s proposed notice.

¹ See New York City Bar Association, *Out of Service: A Call to Fix the Broken Process Server Industry* 4 (Apr. 2010), available at <http://www.nycbar.org/pdf/report/uploads/ProcessServiceReport4-10.pdf>; MFY Legal Services, *Justice Disserved* 2 (June 2008), available at www.mfy.org/wp-content/uploads/reports/Justice_Disserved.pdf.

III. The Proposed Statewide Answer and Order to Show Cause Forms Constitute Significant Measures to Improve Access to Justice for Tens of Thousands of Unrepresented Defendants and Will Facilitate the Fair Adjudication of Consumer Credit Actions

An overwhelming majority of defendants in consumer credit actions are unrepresented.² Moreover, given the skyrocketing of filings of consumer credit actions over the last decade³ and the extraordinarily high rates of default, the Committees estimate a backlog of over 1 million default judgments in New York City Civil Court alone.⁴

In the experience of our members, the New York City forms benefit both the Civil Court and pro se litigants, but to varying degrees. The forms enable consumers to take two critically important steps: filing an answer or filing an order to show cause to vacate a default judgment. Both of these steps make it less likely that the consumer will either default entirely or forego the opportunity to assert potentially winning legal defenses.

Check-Off Answer Form. The proposed answer check-off form has been utilized effectively in New York City for many years. The Committees have two recommendations. Defense number 8 states: “The New York City Department of Consumer Affairs shows no record of plaintiff having a license to collect debt (only for cases filed in New York City).” Defense number 9 states: “Plaintiff does not allege a debt collector’s license number in the Complaint (only for cases filed in New York City.)” The City of Buffalo also has a licensing requirement for debt collectors⁵ and other local governments may adopt licensing requirements in the future. The Committees recommend amending these defenses in the check-off form as follows:

² According to data provided to the New York City Bar Association Civil Court Committee by the New York City Civil Court, in 2012, approximately 97% of consumers did not have counsel. A 2013 study of New York State consumer debt collection cases found that 98% of defendants were unrepresented. New Economy Project, *The Debt Collection Racket in New York: How the Industry Violates Due Process and Perpetuates Economic Inequality* 3 (June 2013), available at <http://www.nedap.org/resources/documents/DebtCollectionRacketNY.pdf>.

³ Consumer debt collection filings exploded in the last decade. In New York City Civil Court, filings peaked from 2006 to 2008, when debt collectors filed nearly 300,000 cases per year. The Legal Aid Society et al., *Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers* 6 (May 2010), available at http://www.nedap.org/pressroom/documents/DEBT_DECEPTION_FINAL_WEB.pdf. Notably, filings have decreased in New York City since 2008 but still account for sizable dockets, reaching in 2013 well over 79,000 in New York City and over 100,000 in New York State.

⁴ According to data provided to the New York City Bar Association Civil Court Committee by the New York City Civil Court, between 2009 and 2012, the New York City Civil Court alone entered 412,098 default judgments out of the 673,204 actions filed – averaging a default rate of 61% for the four-year period, which can be assumed to be primarily due to failure to file an answer as opposed to failure to comply with a stipulation. The Committees note that default judgment rates in New York City declined from 66% in 2009 to 49% in 2013. Between 2006 and 2008, creditors filed 1,036,468 documented cases in New York City Civil Court. Assuming the default rate for the three years was 70%, as reported by then-Administrative Judge, Justice Fern A. Fisher in 2008 for 2008, an additional 725,528 default judgments were entered. Justice Fisher has noted that the New York City Civil Court data for default judgments are not 100% accurate, but are sufficiently so that the statistics can be used reliably as an indication of default judgment rates.

⁵ Code of City of Buffalo § 140-1 (2014) (debt collectors required to be licensed).

- For defense number 8: “*The city or local government shows no record of plaintiff having a license to collect debt (only for cases filed in Buffalo or New York City).*”
- For defense number 9: “*Plaintiff does not allege a debt collector’s license number in the Complaint (only for cases filed in Buffalo or New York City).*”

Order to Show Cause Form. The proposed Order to Show Cause form to vacate a default judgment will certainly facilitate access to the courts for unrepresented New York State residents. The Committees, however, recommend several revisions.

First, the form should make more clear when defendants are seeking vacatur pursuant to C.P.L.R. § 5015(a)(4) based on lack of jurisdiction (typically personal jurisdiction in consumer credit actions) *and*, in the alternative, C.P.L.R. § 5015(a)(1) based on excusable default and meritorious defenses lack of jurisdiction (most frequently personal jurisdiction in consumer credit cases) versus C.P.L.R. § 5015(a)(1) alone.⁶ Moreover, established precedent requires courts to consider the C.P.L.R. § 5015(a)(4) jurisdictional basis first.⁷ We recommend adding “CPLR 5015(a)(4)” under “Service” and “CPLR 5015(a)(1)” under “Excusable Default”.

Second, whether seeking vacatur of the default judgment pursuant to either provision, where the defendant asserts that she was not served properly the court affidavit form needs to elicit detailed facts related to the review of the affidavit of service and the service of process. For example, some courts may reject “I did not receive the court papers” as conclusory and insufficient to refute the process server’s assertions.⁸

⁶ Ideally, the form should also include the opportunity for the defendant to move pursuant to C.P.L.R. § 317 to vacate the default judgment. The form should elicit facts related to compliance with the provision, including for example that service of the summons was not by personal delivery and that the defendant has a meritorious defense or defenses. The proposed form, when read in conjunction with the affidavit of service, meets these requirements.

⁷ See *Roberts v. Anka*, 45 A.D.3d 752, 846 N.Y.S.2d 280 (2d Dept. 2007); *Marable v. Williams*, 278 A.D.2d 459, 718 N.Y.S.2d 400, N.Y.A.D. (2d Dept., 2000). See also *Kiesha G.-S. v. Alphonso S.*, 57 A.D.3d 289, 289, 870 N.Y.S.2d 240, 240 (1st Dept., 2008) (citing *Chase Manhattan Bank, N.A., v. Carlson*, 113 A.D.2d 734, 493 N.Y.S.2d 339 (2d Dept. 1985) (“[a]bsent proper service of a summons, a default judgment is deemed a nullity and once it is shown that proper service was not effected the judgment must be unconditionally vacated”)); *Steele v. Hempstead Pub Taxi*, 305 A.D.2d 401, 402, 760 N.Y.S.2d 188, 189 (2d Dept. 2003) (same).

⁸ A very recent court decision illustrates this issue well. The court stated as follows:

The process server's affidavit established, prima facie, that defendant had been properly served pursuant to CPLR 308 (2). In support of his motion to vacate, defendant stated that the summons and complaint had not been properly served and that he had never received any court papers. Inasmuch as defendant's jurisdictional claim was wholly conclusory, he failed to establish that the court lacked personal jurisdiction over him (see CPLR 5015 [a] [4]).

Pinpoint Tech., LLC v Egan, NY Slip Op 50356 (App. Term, 2d Dept. Feb. 28, 2014), available at <http://law.justia.com/cases/new-york/appellate-term-second-department/2014/2014-ny-slip-op-50356-u.html>. See also *Roberts v. Anka*, 45 A.D.3d 752, 846 N.Y.S.2d 280 (2d Dept. 2007) (rejecting as insufficient defendant’s refutation that a relative did not “reside” in the premises, because the relative could nonetheless have accepted process); *Cavalry SPV I, LLC v. Cele*, 2014 WL 1757480 (Sup. Ct. Bronx Cty. Mar. 21, 2014) (denying application for vacatur where process server claimed service pursuant to C.P.L.R. 308(2) because defendant did not specifically

Furthermore, in New York City, due to budget cuts, defendants who file an order to show cause to vacate a default judgment must wait weeks and months before gaining access to the court file and affidavit of service. Currently, some defendants are penalized with denial of orders to show cause for failure to dispute the allegations of the affidavit of service with sufficient specificity, even though the lack of specificity is directly related to their inability to access to the court file or their lack of knowledge that such a thing as an affidavit of service exists, let alone that they must respond to it in their papers. This is particularly unfair when these litigants are facing the adverse impact of judgments such as wage garnishment, bank restraints, denial of credit, and adverse employment and housing decisions.⁹ Delays in access to court files (and the repercussions that flow from these delays) present a major due process concern.

To address these concerns, the Committees recommend the addition of the following to the “Service” section of the form:

c) I have read the Affidavit of Service, and I disagree with it because:

d) I requested the Affidavit of Service from the court, but it was not available.

The Committees also respectfully recommend that OCA remind trial and appellate judges that it is not equitable to penalize defendants whose first opportunity to review the affidavit of service is in creditors’ opposition papers by refusing to allow them to contest the affidavit of service in their reply papers.¹⁰

In addition, the Committees believe that some of the reasons included in the “Excusable Default” section would not be accepted by many courts, including: number 5, “I don’t owe the money”; and number 11, “I receive exempt income.” We recommend deletion of these sections.

Finally, with regard to the “Order to Show Cause Information Sheet on Defenses,” defenses 9 and 10, relating to licensure of debt collectors and inclusion of the license number in the pleadings, we make the same recommendations as with the check-off answer form noted above.

deny receipt of summons and complaint by mail and because defendant did not specifically refute the process server’s claim of delivery to a third party by stating that no person matching the third party’s description was present at the premises on the date service was alleged to have been effected).

⁹ See *Pinpoint Tech., LLC v Egan*, NY Slip Op 50356 (stating that “[w]e note that any matter improperly raised for the first time in reply papers will not be considered”).

¹⁰ See, e.g., *Palisades Collection, LLC v. Castellon*, NY Slip Op 50358(U) (App. Term, 2d Dept. Feb. 28, 2014) (stating that “[w]e note that we have not considered the new facts which defendant improperly set forth for the first time in his reply papers” (citation omitted)), available at <http://law.justia.com/cases/new-york/appellate-term-second-department/2014/2014-ny-slip-op-50358-u.html>; *Pinpoint Tech., LLC v Egan*, NY Slip Op 50356 (App. Term, 2d Dept. Feb. 28, 2014) (stating that “[w]e note that any matter improperly raised for the first time in reply papers will not be considered”).

CONCLUSION

The Committees applaud OCA for undertaking the critically important proposed reforms relating to consumer credit collection actions. Taken together, the proposed reforms will help ensure that plaintiffs meet the required evidentiary requirements for entry of default judgments and will facilitate the fair administration of justice in these cases by improving access to the courts for unrepresented defendants.

Dora Galacatos
Chair
Civil Court Committee

Thomas A. Cohn
Chair
Consumer Affairs Committee

May 2014



STATE OF NEW YORK UNIFIED COURT SYSTEM
SUFFOLK COUNTY DISTRICT COURT
400 Carleton Avenue, Central Islip, New York 11722
(631) 853-4530 - fax (631) 853-4505 - <http://nycourts.gov/suffolkdistrict>

C. RANDALL HINRICHS
District Administrative Judge

GLENN A. MURPHY
Supervising Judge

WARREN G. CLARK, Esq.
District Executive

MICHAEL PAPARATTO
Acting Chief Clerk

FROM: MICHAEL PAPARATTO - ACTING CHIEF CLERK DISTRICT COURT
DATE: May 20, 2014
SUBJECT: Proposed Commercial Credit Rules

The Suffolk County District Court appreciates the opportunity to comment on the Proposed Commercial Credit Rules. We would like to offer the following comments and suggestions:

- 1) The introductory memorandum states that no default judgment should be entered if the additional mailing to the defendant is returned to the court because of a wrong or unknown address. However, the actual proposed rule (found on the page entitled "Proposed Rule Relating to Additional Notice of Consumer Credit Action) contains no such instruction. If it is the intended policy of the state to refuse to enter defaults under these circumstances, then we believe that the rule should explicitly so state.
- 2) On some occasions our clerks have received summons and complaints for filing from plaintiff's attorneys which do not state that the underlying transaction is a consumer credit transaction. However, even a cursory review of the pleadings establishes that the case is in fact a consumer credit transaction. In prior communications with counsel's office we have been informed that the clerk has no authority to question the validity of the submitted pleadings. Given the clear intent evident in the proposed rules, should our clerks continue to take no action or should they return to plaintiff's attorney obviously incorrect pleadings. Another alternative would be to present the pleadings to a judge for a judicial determination as to further action .
- 3) The proposed affidavit in support of an order to show cause to vacate a default judgment contains a checklist of reasons which would establish an excusable default. One of the choices is, " I did not receive the court papers". However, case law appears to provide that if a facially valid affidavit of service has been filed by the process server, a conclusory statement that the defendant failed to receive the papers or that they were not served is insufficient to establish an excusable default (see e.g. LVNV Funding, LLC v. Gibson, 43 Misc. 3d 131 (A) [App. T. 9th and 10th Jud. Dist.] and cases cited therein). Also, it is at least doubtful whether some judges will accept unexplained excuses such as " I was sick" or "I don't owe the money"(which is actually not an excuse for the failure to answer).
- 4) Similarly, the defense section of the affidavit in support advises the defendant to review the attached information sheet on defenses and to write down any that applies. However, many of the "defenses" would clearly not support vacature of a judgment. For example, "general denial" is not specific enough to constitute a meritorious defense; as noted above conclusory allegations as to service would not constitute a defense; laches is not a defense to an action at law.

5) Item 19 on page 2 of the "Written Answer Consumer Credit Transaction" omits the Suffolk County District Court as does item 20 on the O.S.C. information sheet.

6) The affidavit in support of the O.S.C. contains a space for the defendant to request permission to serve the papers in person. However, the actual order does not contain a specific provision granting such permission.

7) We would suggest that 22 NYCRR 212.6 be amended so as to add a new subdivision specifying the content of the summons in a consumer credit transaction, particularly adding a heading such as is found in 22 NYCRR 208.6(d) as well as the explanatory material found in that section.

cc: Hon. C Randall Hinrichs
Hon. Glenn Murphy
Warren G. Clark



New York State Professional Process Servers Association

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May 6, 2014

John W. McConnell, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004

Mr. McConnell:

As President of the New York State Professional Process Servers Association (NYSPPSA), I submit the following comments in reference to **proposed reforms relating to consumer credit collection cases dated April 30, 2014.**

In 2009, the Civil Court of the City of New York adopted its 208.6(h) notice as a requirement to the entry of default judgments pursuant to CPLR sec 3215. At that time, the court took notice of the exception put forth by NYSPPSA, which allowed for default judgments to be entered when a NYSDMV address is evidenced in a certified abstract obtained from the New York State Department of Motor Vehicles and that address matches the address of service of the summons and complaint of the defendant, despite the return of the required 208.6 notice. I am attaching both the April 30, 2014 memorandum from the Court of Administration along with the Chief Clerk's memorandum dated April 21, 2009, which was the effective date of this directive from the NYC Civil Court.

Thank you for your consideration in this matter.

Respectfully submitted,

Larry Yellon

Larry Yellon
President
New York State Professional Process Servers Association
516-248-8270
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LY/bjk

Cc: email to rulecomments@nycourts.gov

CIVIL COURT OF THE CITY OF NEW YORK

CHIEF CLERK'S MEMORANDUM

Subject: NYSDMV Report Used to Validate Address

Class: CCM- 184

Category: GP-20

Eff. Date: April 21, 2009

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BACKGROUND

Recently we have received a number of calls from plaintiffs and process servers on how to proceed when a 208.6 (h) notice is returned to the court by the United States Post Office, as undeliverable. Our current practice is to reject the request for entry of a default judgment and advise the plaintiff's attorney to move by motion or file a notice of inquest so that the court can make a determination as to whether the defendant's address was sufficient. It has been brought to our attention that many envelopes returned as undeliverable are in fact addressed to the same address on record with the New York State Department of Motor Vehicles (NYSDMV). Vehicle and Traffic Law § 505 (5) requires that every Motor Vehicle licensee notify the Commissioner of Motor Vehicles of any change in residence within 10 days of the occurrence of this change. A party who fails to comply with this provision is estopped from challenging the propriety of service made to that address (see, *Sherrill v. Pettiford*, 172 A.D.2d 512, 513, 567, N.Y.S.2d 859; *Lavery v. Lopez*, 131 A.D.2d 820, 571 N.Y.S.2d 182). To allow for the processing of a default judgment after a 208.6 (h) notice is returned to the court as undeliverable we are instituting the following procedure.

DIRECTIVE

The judgment clerk will accept as a valid address the address of the defendant(s) on a Certified Abstract of Driving Record issued from the New York State Department of Motor Vehicles when the 208.6 (h) notice has been returned by the Post Office as undeliverable. A Certified Abstract of Driving Record is accessible using a Dial-in Search Account, available via the NYSDMV website.

When the judgment clerk receives notice of the defendant's address on the Certified Abstract of Driving Record, and that address matches the defendant's address on the returned envelope, if visible, or on the summons and/or affidavit of service, the clerk will disregard the returned 208.6 (h) notice and process the request for default judgment as per CPLR § 3215.

4/21/09

Date

/s/

Jack Baer
Chief Clerk



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Office of Court Administration
25 Beaver Street, 11th Floor
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Re: Proposed Reforms Relating to Consumer Credit Collection Cases

Dear Mr. McConnell:

PETER A. PISCITELLI (Ret)
ANTHONY P. PISCITELLI
VICTORIA CONTINO
Legislative Counsel

Upon review of the proposed reforms relating to consumer credit collection cases, the Marshal's Association of the City of New York concurs with the comments, concerns and changes proposed by the Commercial Lawyers Conference, Inc. (CLC).

As officers of the Civil, Supreme and Family Courts, the City Marshals enforce consumer credit judgments forwarded to us from members of the Commercial Lawyers Conference. A significant number of these judgments arise from debts purchased from banking institutions by debt buyers who then retain commercial lawyers to litigate them.

While we support reforms that will ensure that judgments on consumer credit debt are properly obtained, we also believe that the reforms as currently proposed will ultimately have the unintended result of limiting the ability of creditors to collect in New York State on debt legitimately owed them. This in turn will limit the purchase and sale of debt in the state which will ultimately result in restrictions on credit access to consumers.

We hope that the suggestions provided by the CLC are given favorable consideration and that a compromise can be reached. Thank you for your consideration.

Sincerely,

Martin A. Bienstock
Vice President, Marshal's Association