



Jonathan Mintz  
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December 4, 2013

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*Via email to [OCArule208-14-a@nycourts.gov](mailto:OCArule208-14-a@nycourts.gov)*

Re: Proposed amendment of 22 NYCRR § 208.14-a and 22 NYCRR § 210.14-a, relating to adoption of statewide forms for the use in consumer credit actions seeking award of a default judgment.

Dear Mr. McConnell:

The New York City Department of Consumer Affairs (DCA) appreciates this opportunity to comment on proposed amendments to court rules governing consumer credit actions in New York. Protecting consumers against abusive debt collection practices requires holding debt collectors to rigorous standards of proof at both the pre-litigation phase and at the litigation phase of collection activity. We commend the Office of Court Administration (OCA) for seeking to standardize requirements in connection with entry of default judgments in consumer credit cases and to address deficiencies in proof provided by debt collectors in support of default judgments. Nonetheless, the proposed rules will allow collectors to continue to 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, and that the amount of indebtedness is accurate. DCA therefore urges OCA to revise substantially the proposed rules to include requirements that compel collectors seeking default judgments to provide admissible proof of debts. We offer suggestions for revisions to the forms consistent with this recommendation. Further, given the impact the proposed rules will have on consumers, businesses and the courts, and in anticipation of a substantial number of comments, we recommend that OCA issue revised proposed rules, allowing stakeholders an opportunity to again review and comment on the proposed forms.

#### **DCA's Regulation of Debt Collectors**

Debt collection agencies collecting personal or household debts from New York City consumers are required to have a DCA license, whether they collect directly or

indirectly through the services of another and regardless of where the agency is located.<sup>1</sup> DCA currently licenses more than 1,300 debt collection agencies, including debt buyers, from 46 states and 11 foreign countries. New York City's law and regulations impose rigorous requirements on collectors, including requirements regarding disclosures and recordkeeping.<sup>2</sup>

Collectors must furnish specific information in any permitted communication with consumers, whether oral or written, including the name of the collection agency, the originating creditor of the debt, and the amount of the debt at the time of the communication.<sup>3</sup> In addition, the law and regulations require a collector to disclose the consumer's rights regarding the statute of limitations when attempting to collect on an expired debt.<sup>4</sup> Collectors must provide consumers with written confirmation of payment schedules and payment plans within five days of an agreement regarding the debt.<sup>5</sup> Further, any debt collection agency attempting to collect a debt from a New Yorker must provide, at the consumer's request, evidence that the debt is owed.<sup>6</sup> Specifically, the collector must provide a copy of the original debt document or original written confirmation of the transaction resulting in the debt, a copy of the final account statement of the debt, and a document itemizing the remaining amount due, including any additional fees or charges claimed to be due and the basis of the consumer's obligation to pay them.<sup>7</sup>

New York City's rules also require collectors to maintain for six years<sup>8</sup> a file on each debt they collect that includes records of all communications with consumers; records of the name and address of the entity from whom the collector purchased a debt, the date of purchase, and the amount of the debt at the time of purchase; records of all cases filed in court to collect a debt; original copies of contracts with process servers; and a monthly log of all calls made to consumers.<sup>9</sup> The rules also require that collectors maintain recordings of at least 5% of calls received or made by the agency to consumers, selected at random.<sup>10</sup>

All collectors must also comply with specific New York City rules that govern the conduct of debt collectors, and which like the federal Fair Debt Collection Practices Act, prohibit unconscionable and deceptive trade practices in the collection of debts.<sup>11</sup> DCA investigates and prosecutes collectors; denies and revokes licenses; and obtains fines and restitution for aggrieved consumers.

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<sup>1</sup> N.Y. City Admin. Code § 20-490. As a result of the decision in *Eric M. Berman P.C. v. City of New York*, 895 F.Supp.2d (E.D.N.Y. 2012), law firms whose activities are supervised by an attorney currently registered with the New York State Unified Court System to practice law in New York State are not currently required to be licensed as a debt collection agency by DCA. Law firms whose activities are *not* supervised by an attorney currently registered with the New York State Unified Court System are required to be licensed as a Debt Collection Agency by DCA. This case is on appeal to the Second Circuit.

<sup>2</sup> See generally N.Y. City Admin. Code §§ 20-488 – 20-494.1; 6 RCNY §§ 2-190 – 2-194.

<sup>3</sup> N.Y. City Admin. Code § 20-493.1(a).

<sup>4</sup> N.Y. City Admin. Code § 20-493.2(b); 6 RCNY § 2-191.

<sup>5</sup> N.Y. City Admin. Code § 20-493.1; 6 RCNY § 2-192.

<sup>6</sup> N.Y. City Admin. Code § 20-493.2(a); 6 RCNY § 2-190.

<sup>7</sup> 6 RCNY § 2-190.

<sup>8</sup> 6 RCNY § 2-193(d).

<sup>9</sup> 6 RCNY § 2-193.

<sup>10</sup> *Id.*

<sup>11</sup> 6 RCNY § 5-77.

Despite New York City's strong law and rules governing pre-litigation collection activities and vigorous enforcement, abusive debt collection practices persist. In the past five 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 years, DCA's mediation has erased more than \$5 million in consumer debt.

In addition to our mediation efforts, DCA helps consumers address debt issues through its Office of Financial Empowerment's (OFE), Financial Empowerment Centers (FECs or Centers). Since the program began in 2008, the FECs have provided free, one-on-one, professional financial counseling to more than 25,000 New Yorkers, most of whom come to the Centers because of debt. Counselors at the Centers frequently assist clients who are being pursued by debt collectors or who have had default judgments entered against them, often without their knowledge. Clients at the Centers are also concerned about their credit scores. To that end, counselors have reviewed more than 19,300 credit reports with clients as they worked to correct errors and improve credit scores.

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. Nonetheless, these efforts cannot prevent debt collectors who are unable to lawfully collect from consumers without litigation from returning uncollected debts to creditors, re-selling debts to others, from using the court system to collect when pre-litigation efforts fail, or from filing consumer credit actions in court without a license.<sup>12</sup>

### **Collection Agencies' Use of the Court System to Collect Debts**

The surge in debt collection litigation in New York courts in recent years and the significant associated abuses are well documented. As the Consumer Financial Protection Bureau recently observed, "collectors more commonly use litigation as a collection strategy than they did when the FDCPA was enacted" 36 years ago.<sup>13</sup> Indeed, a study published this year by the New Economy Project found 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."<sup>14</sup> The study also found that, in 2011, debt collection lawsuits accounted for 80% of all default judgments entered and that courts entered default judgments in 42% of all debt collection lawsuits and in an estimated 62% of debt-buyer lawsuits.<sup>15</sup>

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<sup>12</sup> See, e.g., Federal Trade Commission, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration*, 5 (July 2010), available at [www.ftc.gov/os/2010/07/debtcollectionreport.pdf](http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf). The FTC notes that "much purchased debt is resold one or more times as it moves through the debt collection system" and that "if collection efforts are unsuccessful, the debt may be referred to a collection attorney to file a lawsuit to collect on the debt." See also *NYC Department of Consumer Affairs v. National Credit Adjusters, LLC*, LL 5333200 (October 24, 2013).

<sup>13</sup> Consumer Financial Protection Bureau, *Annual Report 2013: Fair Debt Collection Practices Act*, 9 (March 2013), available at [http://files.consumerfinance.gov/f/201303\\_cfpb\\_March\\_FDCPA\\_Report1.pdf](http://files.consumerfinance.gov/f/201303_cfpb_March_FDCPA_Report1.pdf).

<sup>14</sup> New Economy Project, *The Debt Collection Racket in New York*, 1 (June 2013), available at <http://www.nedap.org/resources/documents/DebtCollectionRacketNY.pdf>.

<sup>15</sup> *Id.* at 3.

Through its Centers, the Department sees first-hand the continuing harm illegally and improperly obtained default judgments cause consumers. Among other things, these judgments can lead to frozen bank accounts, garnished wages, and lasting, ruined credit scores that impair consumers' ability to obtain mortgages, housing, credit and employment.

### **Recommendations to ensure that default judgments are based on legally sufficient evidence**

We offer the following recommendations to ensure that debt buyers have legally sufficient proof to support a default judgment. Establishing specific documentation standards will protect consumers, provide needed clarity to courts, and establish clearer criteria for original creditors, debt buyers and the collection industry.

- a. 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.<sup>16</sup> The 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,<sup>17</sup> a default judgment should not be entered in the absence of this information and documentation.<sup>18</sup>
- b. Require affidavits by individuals competent to offer testimony. The rules should require the debt buyer seeking the default to submit affidavits completed by individuals with personal knowledge. Thus, for example, the rules should not permit a collector's employee to attest to the chain of custody of the account or the accuracy of the account as sold because the employee lacks personal knowledge to do so. Facts concerning the original debt are best provided by the original creditor based on personal knowledge of the records of the original creditor and that creditor's billing practices.
- c. Require legally admissible proof of the debt including:
  1. The debt agreement or contract. The debt buyer should be required to annex a copy of the agreement, contract or instrument of indebtedness with the debtor, as well as any revisions or amendments to these documents. If the debt buyer does not have this documentation, the debt buyer must state why another form of documentation satisfies this requirement. The rules should make clear that a generic contract lacking a name, account number or other identifying statements that would link the agreement to the debtor's account is insufficient. Debt buyers who collect from New York City consumers already must provide, upon request, copies of the debt document issued by the originating creditor. Computer generated documents, or

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<sup>16</sup> N.Y. City Admin. Code § 20-490.

<sup>17</sup> *Id.*

<sup>18</sup> 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.

electronic documents created after default, do not satisfy the Department's requirements.<sup>19</sup>

2. 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) the date the seller and debt buyer implemented these specific safeguards; and c) that the debt buyer and seller reviewed their files to confirm that no such notifications were made by a credit reporting agency with regard to the specific debtor.
- d. Require admissible proof that the debt buyer actually owns the debt, including:
1. Reliable and accurate proof of the chain of title of the debt by the original creditor and debt seller, including specific facts regarding the date of delivery of the specific debt account to successive buyers and to the collector. The Department also recommends requiring the debt buyer to attach the assignment to demonstrate ownership of the particular debt. In the case of successive assignments, we recommend requiring attachment of each assignment to show an unbroken chain of ownership. As with the contract or agreement, the assignment(s) should contain information that makes clear that the assignment is linked to the particular debt that is the subject of the action.
- e. Require admissible proof of the amount of the debt and that it is actually owing, including:
1. Specific facts regarding the debt in affidavits from the original creditor, seller of the debt and debt buyer.
    - a. The creditor and seller of the debt should be required to provide facts specific to the debt, not just general statements regarding the pool of accounts sold or assigned for collection, such as the date of charge-off of the debt, the amount of the debt at charge-off, the date of the last payment prior to sale or assignment to the collector, and an itemization of fees, charges and interest on the debt prior to its assignment. The debt buyer should be required to provide specific facts about the defaulted debt including an itemization of charges and fees claimed to be owed, an itemization of any post charge-off additions, the date and amount of last payment, and the amount of interest claimed and the basis for the interest

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<sup>19</sup> 6 RCNY § 2-190

charged. Debt buyers who collect from New York City consumers already must provide, upon request, copies of the debt document issued by the originating creditor, the final statement of account issued by the originating creditor, and a document itemizing the total principal balance and each additional charge and fee and the basis of the consumer's obligation,<sup>20</sup> so this should not create an additional burden for debt collectors.

- b. The creditor, seller of the debt and the debt buyer should be required to state whether the debt at issue was sold "as is" or with warranties.<sup>21</sup> If sold "as is," the debt buyer should be required to state the basis of its conclusion that the information conveyed by the creditor or seller concerning the amount claimed to be owed is accurate.
- c. The seller of the debt and the debt buyer should be required to state whether they took steps to determine whether any other action was brought against the debtor with regard to the debt and to disclose any prior litigation with regard to the debt and any judgments obtained against the debtor. Similarly, the seller of the debt and the debt buyer should be required to confirm that the debt was not discharged in bankruptcy.

2. Specific facts relevant to the amount of the debt:

- a. Documentation regarding settlements and payment plans. Debt buyers frequently offer and then finalize settlement agreements, but continue to seek the full balance through dunning or litigation.<sup>22</sup> Collectors also fail to convey information or documentation regarding payment plans or settlements to successive debt buyers.<sup>23</sup> Accordingly, a debt buyer should be required to a) state whether it maintains written documentation of all settlements and payment plans; b) state the date when the debt buyer began maintaining such documentation; c) state whether it has reviewed all such documentation; d) state whether written documentation on settlements and payment plans was included in the accounts it purchased that included the debtor's account; and e) include a copy of all documents pertaining to settlements and payment plans. The debt seller should be required to provide the same information and

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<sup>20</sup> 6 RCNY § 2-190

<sup>21</sup> See Federal Trade Commission, *The Structure and Practices of the Debt Buying Industry*, iii (January 2013), available at <http://ftc.gov/os/2013/01/debtbuyingreport.pdf>. The FTC report states:

In purchase and sale agreements obtained in the study, sellers generally disclaimed all representations and warranties with regard to the accuracy of the information they provided at the time of sale about individual debts – essentially selling debts, with some limited exceptions, "as is."

<sup>22</sup> See The National Consumer Law Center and the National Association of Consumer Advocates, Comments to the Federal Trade Commission Regarding the Fair Debt Collection Practices Act (June 6, 2007), 21, available at <http://www.ftc.gov/os/comments/debtcollectionworkshop/529233-00018.htm>.

<sup>23</sup> *Id.*

documentation with regard to the accounts it sold to the debt buyer and specifically, whether it provided any such documentation with regard to the specific debtor. Debt buyers who collect from New York City consumers already must maintain a copy of any debt payment schedule or settlement agreement reached with the consumer and records of each payment received,<sup>24</sup> so this requirement will not be burdensome to those collectors; moreover, these collectors must be held accountable for reviewing these documents to support the claim that a debt is actually owed.

- f. Require proof of service. Require license number of individual process server and process server agency. Process servers who serve process in the five boroughs must be licensed by DCA.<sup>25</sup> Process serving agencies that employ process servers must also be licensed.<sup>26</sup> New York City law and the Department's regulations impose significant requirements on process servers to prevent them from engaging in "sewer service."<sup>27</sup> For example, as of November 2011, process servers must record service on GPS devices.<sup>28</sup> The Department can work with OCA to discuss how these rules, or others, can reasonably incorporate the Department's documentation requirements.

We appreciate your consideration of these comments and look forward to working together to protect consumers in New York City and throughout the State from the abusive court collection practices. Please call General Counsel and Deputy Commissioner for Legal Affairs, Marla Tepper (212.436.0175) if you would like to discuss this further.

Respectfully,



Jonathan Mintz  
Commissioner

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<sup>24</sup> 6 RCNY § 2-193.

<sup>25</sup> N.Y. City Admin. Code § 20-403.

<sup>26</sup> *Id.*

<sup>27</sup> See generally N.Y. City Admin. Code §§ 20-403 – 20-410; 6 RCNY §§ 2-231 - 2-238.

<sup>28</sup> N.Y. City Admin. Code § 20-410; 6 RCNY § 2-233b.

# DC 37 MUNICIPAL EMPLOYEES LEGAL SERVICES

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December 4, 2013

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25 Beaver Street, 11<sup>th</sup> Floor  
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Re: Comments of District Council 37 Municipal Employees Legal Services  
on Proposed Amendments to 22 N.Y.C.R.R. §§208.14-a and 210.14-a to adopt  
the use of forms for default applications in consumer debt cases

Dear Mr. McConnell:

District Council 37 Municipal Employees Legal Services ("DC 37 MELS") appreciates the opportunity to submit these comments regarding the proposal to create statewide forms for debt collectors to use when seeking default judgments in consumer credit actions.

DC 37 MELS is a prepaid legal plan providing services to approximately 120,000 New York City employees and 35,000 retirees. The plan's coverage includes consumer and debt matters, and our lawyers handles hundreds of debt cases annually. Over the past several years, we have published various reports and studies based on data and information accumulated from representing our clients in debt-related matters.

## Summary of comments.

We oppose the proposed rule because:

- rather than remedy the problems associated with the "robo-signing" of affidavits, it would perpetuate those problems;
- the proposal is contrary to the laws of New York by allowing documents to be admitted and judgments to be granted based on hearsay;
- the proposed rule is completely out of sync with recent actions taken by regulators at the federal level and in New York State, by legislatures in other states, and with court administrators in other jurisdictions; and

- the rule runs counter to the recent strong action taken by OCA itself in the mortgage foreclosure context.

### **The Debt Collection and Debt Buying Crisis.**

Abuses in the debt collection industry, and particularly those associated with “debt buying”, are by now well documented. Over the past several years, there have been numerous reports and studies from around the country, hearings held by the Federal Trade Commission and other regulatory agencies, and enforcement actions based on the Fair Debt Collection Practices Act and other laws.<sup>1</sup>

Many of the reports and studies have been undertaken by organizations in New York State, based on the experiences of New York residents and on debt collection litigation in our state.<sup>2</sup> In 2009, DC 37 MELS conducted its own study of cases filed by debt buyers that we handled over an 18-month period. This study documented that in the vast majority of these lawsuits, debt buyers could not or would not produce documents to prove their case after filing suit.<sup>3</sup>

### **The Proposed Rule Would Institutionalize Robo-Signing**

As is also well documented and by now indisputable, the practice of “robo-signing” is not the exception, but the rule, in the debt-buying industry. When debt buyers purchase consumer debt for pennies on the dollar, they normally receive only computer spread sheets, which typically contain scanty information that is often replete with errors. As it comes time to file a lawsuit or apply for a default judgment, employees who have no knowledge of any relevant facts sign rubber-stamp affidavits at the rate of dozens or hundreds daily.

Rather than correct all the problems of robo-signing, the proposed rule would institutionalize and give legitimacy to these practices. It would sanction debt buyers being able to obtain default judgments based on flimsy documentation, which may not establish that the defendant owes the amount claimed, or any amount at all, and that the plaintiff even owns the alleged debt. Many judges in New York have refused to grant judgments in such situations, and

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<sup>1</sup> See, for example, Federal Trade Commission, *The Structure and Practices of the Debt Buying Industry* (January 2013); FTC, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* (July 2010); FTC, *Collecting Consumer Debts: The Challenges of Change* (February 2009).

<sup>2</sup> See, e.g., Urban Justice Center, *Debt Weight: The Consumer Credit Crisis in New York City and Its Impact on the Working Poor* (October 2007); MFY Legal Services et al, *Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers* (May 2010).

<sup>3</sup> DC 37 MELS, *Where’s the Proof? When Debt Buyers are Asked to Substantiate Their Claims in Collection Lawsuits Against NYC Employees and Retirees, They Don’t* (December 2009), available at [http://www.dc37.net/benefits/health/pdf/MELS\\_proof.pdf](http://www.dc37.net/benefits/health/pdf/MELS_proof.pdf). The study also found that debt buyers in many instances sued the wrong person, for the wrong amount, and when the statute of limitations had expired.

there is by now an ample body of such case law.<sup>4</sup> In promulgating a rule to create uniform forms, OCA should review and follow the legal principles in those cases.

There are glaring defects in the proposed affidavits. Here are but two: (1) The affidavits fail to establish that the plaintiff owns the debt. They do not require a debt buyer to establish a proper chain of title. The affidavits are vague and conclusory and lend themselves to robo-signing. (2) Two of the affidavits (Forms A and B) contain a representation as to an account stated. That bare-bones statement is insufficient to make out a claim. Moreover, to even include the statement in Form B – an affidavit of a debt buyer – makes no sense. The claimed obligation to pay would have accrued to the original creditor, not the debt buyer.

### **The Rule Is Grounded in Hearsay and is Thus Contrary to New York Law**

The law of the land in New York is that hearsay is inadmissible. The proposed affidavits would condone and sanction the use of hearsay. With all due respect – but with all candor – it is disconcerting that the court system would consider requiring the use of affidavits that are founded on hearsay. The affidavits do not require that the affiant establish personal knowledge of the facts being asserted. They do not require that the affiant state the basis of her or his claimed knowledge or how it was required. And they allow debt buyers to attest to facts of which they cannot possibly have knowledge – because those facts could only have originated with the original creditor.

The reference in the Memorandum to the Appellate Division cases of *Unifund CCR Partners v. Youngman* and *Palisades Collection LLC v. Kedik* is also puzzling. Those two cases stand squarely for the proposition that a debt buyer cannot lay a proper for business records by using hearsay. They hardly support the proposed rule.

We would also like to bring to OCA's attention that there are very special requirements for laying a foundation, thereby avoiding hearsay, for considering electronic records.<sup>5</sup> The affidavits contain repeated references to electronic records being transferred. A big part of the problem with the debt-buying industry is that its electronic records are rife with inaccuracies. The effect of the affidavits is that inaccuracies will be repeated over and over again when debts are sold, without there ever being a foundation for admission of those records.

### **OCA's Proposed Rule Runs Counter to Actions Taken by Other Government Bodies and to OCA's Own Approach to Foreclosures.**

We also urge OCA to take a step back and consider the proposed rule in the context of what actions other government bodies have been taking in this area. Succinctly stated, regulators at the federal level, in other states, and in New York; court administrators in other states; and legislatures in other states, have all focused on the problems associated with the debt buying industry. The Federal Trade Commission, for example, has issued report after

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<sup>4</sup> As but one example among many, see the recent decision in *2132 Presidential Assts v. Carrasquillo*, 965 N.Y.S.2d 694 (Civ. Ct. Bronx Co., 2013), and the cases cited therein, in which the judge refused to grant default judgment in a landlord-tenant setting based on robo-signed affidavits.

<sup>5</sup> See *In re Vinhnee*, 336 B.R. 437 (Bankruptcy Ct. 9<sup>th</sup> Cir. 2005).

report highlighting the harm to the public of practices in the collection of debts. Some states have enacted laws or regulations governing information that debt collectors must provide in collection efforts, including in some cases, litigation. And in New York, the State Department of Financial Services has proposed a rule that would govern pre-litigation conduct by debt collectors.

Lastly, the proposed rule runs counter to the strong action taken by OCA itself in the foreclosure arena. The recent steps taken by OCA to combat robo-signing and ensure that only valid actions are brought were commendable. There is every reason for OCA to take similar steps with respect to other consumer debts, and no reason not to. The rule of law applies across the board.

The effect of the rule that has been proposed by OCA would be to place New York greatly out of sync with practically everything that has been done to bring fairness to the public, and the rule of law to debt collection procedures.

### Conclusion

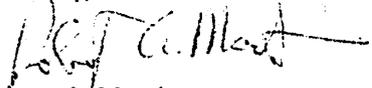
To our knowledge, this rule has been proposed without consultation with or the involvement of the wide spectrum of those lawyers and others in New York who have been involved in promoting fairness in debt collection. From a thorough review of the proposed rule, we conclude (and again, with all due respect) that it was probably conceived without a full consideration of its impact. The impact would clearly be detrimental and unfair to members of the public who are sued by debt collectors. The thrust of the proposed affidavits would also be contrary to the laws of this state.

The Memorandum accompanying the rule states that the forms "are intended to provide uniformity and to include a remedy for issues which have arisen...." Uniformity is fine – if and only if the forms are suitable and provide for fairness. They do not. It is also not clear what remedy these forms provide, and for which issues.

We oppose the proposed rule and strongly recommend that it be withdrawn, so that a proper study with full participation of a wide community of interests can be performed.

Thank you for the opportunity to comment on the proposed Rule. Please feel free to contact us if you have questions or require further information.

Sincerely,



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October 11, 2013

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Re: Comments related to adoption of statewide forms for use in consumer credit actions seeking default judgment -- Proposed amendment of 22 NYCRR § 208.14-a and 22 NYCRR § 210.14-a

Dear Mr. McConnell:

Lincoln Square Legal Services, Inc. (LSLS)<sup>1</sup> at Fordham University School of Law and its Consumer Litigation Clinic appreciate the opportunity to offer comments on the OCA's above-referenced proposed amendments, which would require use of statewide form affidavits in consumer credit cases as proof of ownership of the debt when the plaintiff seeks a default judgment.

LSLS is glad the OCA has turned its attention to debt collection litigation abuses, but we believe the proposed amendments will not remedy them. The proposed rules would expand statewide the form affidavits required by the NYC Civil Court when filing a default judgment. As documented in a recent New Economy Project report, there are numerous problems with the affidavits required by the NYC Civil Court.<sup>2</sup>

First, granting default judgments based on the proposed form affidavits would continue to allow plaintiffs to obtain default judgments without providing any documentary proof of their claims or ownership of their claims. Indeed, these form affidavits would fuel the debt

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<sup>1</sup> LSLS is the nonprofit legal services office through which our law students and clinical faculty serve low-income New Yorkers, including consumers.

<sup>2</sup> New Economy Project, THE DEBT COLLECTION RACKET IN NEW YORK (June 2013).

buyers' well-documented strategy of winning cases on default and avoiding resolution on the merits where, having bought charged-off debts for pennies on the dollar, they rarely have the requisite proof. Facilitating this system hurts New Yorkers, especially those in low-income communities.

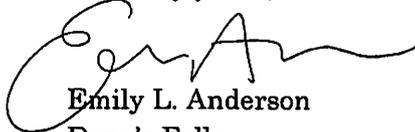
Second, the proposed form affidavits promote robo-signing. The affidavits are conclusory and include boilerplate references to books, records, and documents that, in LSLS and other NYC consumer advocates' experience, are never attached to the affidavit. Thus, the form affidavits provide "cover", with official imprimatur, for the well-documented failure of debt buyer affiants to actually review any records at all.

Finally, in addition to addressing the default application process, the OCA should focus on the root of the high default judgment numbers – bad service. Specifically, the OCA should expand statewide NYC Civil Court's pending litigation notice, which helps prevent some default judgments by identifying stale addresses. The OCA should also require GPS data or service location pictures to be filed with the default judgment application.

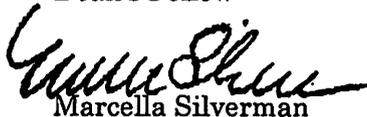
As an organization that provides direct legal services to New York consumers and assists countless consumer-debtors seeking to vacate default judgments entered against them without their knowledge, we ask the OCA to strengthen the proposed reforms and protect the integrity of the New York court system.

We thank you for your time and would be happy to address any questions you may have.

Sincerely yours,



Emily L. Anderson  
Dean's Fellow



Marcella Silverman  
Supervising Attorney

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**Commercial Lawyers Conference Inc.**  
**New York's Creditors' Bar Association**  
A Not-for-profit Corporation since 1964

[www-clc-ny.com](http://www-clc-ny.com)

December 2, 2013

John W. McConnell, Esq., Counsel  
Office of Court Administration  
25 Beaver Street, 11<sup>th</sup> Fl.  
New York, NY 10004

*RE: Proposed amendment of 22 NYCRR 208.14-a (Uniform Rules for the New York City Civil Court) and 22 NYCRR 210.14-a (Uniform Civil Rules for the Courts Outside New York City), relating to adoption of statewide forms for use in consumer credit actions seeking award of default judgment*

Dear Mr. McConnell,

The Commercial Lawyers Conference of New York ("CLC") is a duly organized Bar Association comprised of attorneys representing creditors in the practice of commercial collection law, consumer debt collection, medical debt collection and judgment enforcement.

We commend the Advisory Committee on Civil Practice for promulgating statewide affidavit forms for use in consumer credit cases where an action is brought by a debt purchaser who seeks entry of a default judgment. We believe that this effort will advance our shared goal of bringing consistency, clarity and transparency to courts throughout the state for the benefit of the consumer public.

We respectfully submit that these proposed rules require additional clarity to ensure that they are consistently applied by the many courts throughout the state. These proposed rules have been created to apply to the specific instance when a debt purchaser purchases charged-off consumer debt and then initiates a consumer credit lawsuit to recover the balance due. Our reading of Form C is consistent with this intent. However, as currently drafted, the proposed rules may be read to apply to any instance where there was a "transfer of the debt to the plaintiff." 208.14-1a(C).

As you know, there are many mechanisms which both small and large businesses utilize to assign loans, both pre and post charge off, other than by a sale of a pool of accounts. Several examples include auto finance companies, loan guarantors, as well as instances where businesses merge or are acquired. Applying this rule post-hoc to these businesses would greatly impair their legal rights if they must initiate a lawsuit to recover on their claims. It is our fear that some courts may begin to require additional affidavits in these routine circumstances which would result in the same inconsistent legal requirements throughout the state.

Accordingly, we recommend the adoption of the attached changes to the proposed rules to ensure that the rules are applied to the specific circumstance of a purchase of charged off consumer debt by a debt purchaser.

Very Truly Yours,

Timothy Wan,

President, Commercial Lawyers Conference

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Recommendation for Amendment to the Uniform Rules for the New York City Civil Court and the Uniform Civil Rules for the City Courts Outside of New York City

MEMORANDUM

Requiring the statewide use of certain forms in consumer credit matters for proof of default judgment (22 NYCRR 208.14-a & 22 NYCRR 210.14-a) (new)

The advisory Committee on Civil Practice recommends that the Uniform Rules for the New York City Civil Court (22 NYCRR 208.00 et seq.) and the Uniform Civil Rules for the City Courts Outside of New York City (22 NYCRR 210.00 et seq.) be amended to incorporate certain forms as official statewide forms for the use in consumer credit matters as proof of default judgment. There has been a proliferation of sales of debt involving multiple parties, covering multiple jurisdictions. As a result, Clerks of the various courts have instituted varying requirements, including affidavits, in order to successfully enter an inquest judgment based on the liquidated damages. Courts in various jurisdictions have ruled on the manner in which a plaintiff-assignee in an action stemming from the purchase of a consumer's debt must establish a foundation for the records of the non-party to use the records in an action against a debtor. See, e.g., Unifund CCR Partners v. Youngman, 89 A.D.3d 1377, 932 N.Y.S.2d 609 (2011), citing Palisades Collection, LLC v. Kedik, 67 A.D.3d 1329, 1330, 890 N.Y.S.2d 230 (2009). This proposal and the recommended mandatory forms are intended to provide uniformity and to include a remedy for issues which have arisen in the practice with respect to entering judgment on debt that has been sold or assigned after it was charged off by the creditor.

Deleted: purchased debt or assigned debt.

There are three scenarios requiring form affidavits:

- 1) where the plaintiff is not a debt collector or is the creditor at the time the debt was charged off, there is no need to prove chain of title - only one form is required - the Affidavit of Facts (FORM A);
- 2) where there is one sale of charged off consumer debt from the creditor to a debt purchaser, to prove chain of title - three forms are required - the Affidavit of Facts by the debt-buyer plaintiff (FORM B), the Affidavit of Sale of Account by Original Creditor (FORM C) and the Affidavit of the witness of the debt-buyer plaintiff (FORM D); and
- 3) where there is more than one sale of charged off consumer debt from the creditor to a debt purchaser who then resells the debt to a subsequent debt purchaser(s) - four forms are required - FORMS B, C, and D Plus the Affidavit of Sale of Account by debt seller (FORM E).

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**PROPOSED: 22 NYCRR §208.14-a. (new) and 22 NYCRR §210.14-a. (new)**

§208.14-a. Proof of Default Judgment in Consumer Credit Matters

(a) Definitions:

(i): Debt collector shall mean a person engaged in a business the principal purpose of which is to purchase charged off debt and who seeks to collect such debt either directly or through the services of another, including but not limited to, using legal process or other means to collect or attempt to collect such debt.

(ii): Persons or entities who guaranteed loans at the time they were issued are excluded from this legislation even if the loan was subsequently assigned to the guarantor after default.

(b) Applicability: When a plaintiff who is a debt collector requests entry of a default judgment to the clerk, in addition to the requirements of the CPLR section 3215, the filer must submit supplemental affidavits as required under this section.

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(c) If the plaintiff is not a debt collector, plaintiff, shall submit the Affidavit of Facts (FORM A) in substantially the following form:

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(d) If the debt collector plaintiff has purchased the debt after it was charged off by the original creditor and there has been only one transfer of the debt to the plaintiff, he or she must submit the following three forms, the Affidavit of Facts - Debt-Buyer Plaintiff (FORM B), the Affidavit of Sale of Account by Original Creditor (FORM C) and the Affidavit of Witness of Plaintiff (Debt-Buyer) (FORM D) in substantially the following form:

(e) If the debt collector plaintiff has purchased the debt after it was charged off by the original creditor and there has been more than one transfer of the debt to multiple debt-buyers and sellers, plaintiff, must submit the three forms required under paragraph (c) of this rule and the Affidavit of Sale of Account by Debt-Seller (FORM E) in substantially the following form: under paragraph (c) of this rule and the Affidavit of Sale of Account by Debt-Seller (FORM E) in substantially the following form

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NEW YORK STATE  
DEPARTMENT *of*  
FINANCIAL SERVICES

Andrew M. Cuomo  
Governor

Benjamin M. Lawsky  
Superintendent

October 18, 2013

Hon. A. Gail Prudenti  
Chief Administrative Judge of the Courts  
25 Beaver Street, 11<sup>th</sup> Floor  
New York, NY 10004

Re: Proposed rules for the use of statewide forms in consumer credit actions seeking award of a default judgment.

Dear Judge Prudenti:

The New York State Department of Financial Services (the "Department") appreciates the opportunity to comment on the proposed court rules requiring the use of standardized affidavits in consumer credit actions seeking default judgments. The Department is deeply engaged in fighting abusive and deceptive debt collection activity in New York. On July 25, 2013, the Department proposed a regulation that would address the most egregious pre-litigation collection abuses. The Department believes that reform of debt collectors' litigation abuses are also critical – and while the Court's proposed rules are a positive first step – we believe bolder reform is necessary. These reforms, as described further below, could include the following:

- Stronger affidavits to stop "robo-signing" and ensure debt collectors actually review a consumer's file
- Require debt collectors to include important information about these debts in the affidavit
- Require debt collectors to include documentation evidencing the debt with the complaint
- Requiring debt collectors to send consumers a pre-complaint notice before commencing a collection lawsuit
- Demanding demonstrable proof of service when a debt collector moves for a default judgment
- Provide consumers an opportunity to vacate a default judgment if a debt collector violates the Court's rules

In 2011, the former New York State Banking and Insurance Departments were merged to create a more modern and efficient regulator, and to fill regulatory gaps that would protect

consumers of financial products and services. The Financial Services Law created the new Department and empowered it with regulatory authority over financial products and services previously unsupervised by the predecessor departments. The Department's first major initiative pursuant to its "gap" authority was the August announcement of a proposed debt collection regulation.

The Department's proposed rules regulate *pre-litigation* collection activities. The principal ideas addressed are:

- Raise the requirements for information that must be provided to a consumer before collection activities can begin. Collectors of a charged off debt will need to provide a breakdown of each charge and fee added to the debt and each payment made after charge off.
- Provide greater protections to consumers when they dispute the validity of the alleged debt. Anytime a consumer disputes the validity of the debt, even on the phone, debt collectors will need to provide documentation proving that the debt is valid, such as a copy of the signed contract or documents evidencing the transaction resulting in the indebtedness, the final account statement, and a statement explaining the "chain-of-title" of the debt.
- Disclose to consumers their rights under the Exempt Income Protection Act so that consumers will know that some sources of income are protected from garnishment.
- If a debt collector tries to collect on a debt after the statute of limitations has expired, the collector will need to inform the alleged debtor of this fact and that this is an affirmative defense in the event of a suit. This is important since many alleged debtors are not represented by counsel and are surprised when collectors unearth very old debts that have gone uncollected for years.
- Provide consumers written confirmation of any debt settlement agreement to ensure that creditors honor any settlement agreements, including those made with debt buyers earlier in the chain-of-title.

While I am confident that this proposed regulation is an important step to rein in unscrupulous debt collectors and ensure safe and fair credit practices in New York, reforming how creditors collect debt in the New York courts is an important next step. We are encouraged to see that the Office of Court Administration is eager to reform debt collection litigation practices in New York. The Department believes, however, that the proposed rules could go much further to address the significant debt collection litigation abuses that have a profound impact on New Yorkers and the state court system.

Studies abound documenting the endemic abuses in debt collection litigation<sup>1</sup>. This research and the Department's consumer complaints show that debt collectors often file

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<sup>1</sup> Federal Trade Commission, Collecting Consumer Debts: The Challenges of Change (February 2009); The Legal Aid Society et al., Debt Deception: How Debt Buyers Abused the Legal System to Prey on Lower-Income New

collection lawsuits with little to no information supporting their claims. This is especially problematic in the rapidly growing debt buying market, where debts are sold off for pennies on the dollar and debt buyers aggressively work to get consumers to pay. To keep costs low, debt buyers typically purchase debts with little if any documentation as to ownership and amount owed. Due to the lack of records, consumers frequently complain that collectors are pursuing the wrong person or for the wrong amount of money. When a collector chooses to pursue litigation, collectors rarely provide, or can even access evidence of the debt beyond a few fields of data on a spreadsheet. Unscrupulous collectors have also been found to engage in “sewer service.” This all explains the collection industry’s litigation strategy, which relies on consumers failing to appear in court or if they do appear, being unrepresented by counsel. Should a consumer contest the action, debt collectors typically opt to drop the case completely. These practices are unacceptable. The Department believes that businesses should have the right to fairly collect their debts, and consumers should pay what they owe, but it is intolerable for professional collection companies to abuse the justice system and use the courts as a tool for collecting unverifiable debts from consumers who never had a fair opportunity to contest them.

The Court’s proposed rules expand statewide current New York City Civil Court requirements for prescribed affidavits when filing for a default judgment in a consumer credit action. A study by the New Economy Project in 2013, reviewed the effect of these requirements, and found that *none* of the sampled default judgment applications complied with the directives, even though default judgments were granted in 97% of these cases<sup>2</sup>. The New Economy Report also found that, among other problems, it was unclear who attested to the facts or who the affiant worked for, and affiants only attested to facts based “on information and belief,” not personal knowledge. The study raises significant concerns, particularly where in 2011, alone, 82,000 default judgments were granted in debt collection cases in New York. Accordingly, the Department respectfully submits that the proposed affidavits should not only require affiants to attest to “personal knowledge” of the plaintiff’s books and records, but should require affiants to specifically have personal knowledge of the alleged debtor’s records. Further, debt collectors should also allege important facts in the proposed affidavits, such as the date of charge off and the date of last payment, which are necessary to evaluate whether the statute of limitations on a debt has run.

Moreover, the Department urges the Office of Court Administration to adopt further reforms to protect consumers and New York’s justice system. Important reforms could include the following:

- Debt collectors should send consumers a pre-complaint notice, informing them of impending collection litigation, as well as disclosure of the consumer’s rights and basic

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Yorkers (May 2010); National Consumer Law Center, The Debt Machine: How The Collection Industry Hounds Consumers and Overwhelms Courts (July 2010); Federal Trade Commission, Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration (July 2010); Consumer Financial Protection Board, Fair Debt Collection Practices Act: CFOB Annual Report 2013 (March 2013).

<sup>2</sup> New Economy Project, The Debt Collection Racket in New York (June 2013).

information identifying the debt. This would provide an opportunity to the alleged debtor to request more information if needed to evaluate options, such as settling or hiring an attorney.

- Courts should require enhanced service standards for these consumer credit cases, where service has historically been poor and consumers have typically been unrepresented. If filing for a default judgment in a debt collection case, plaintiffs should provide demonstrable evidence of service, such as a GPS report or time-stamped pictures.
- Debt collectors should include some documentation evidencing the debt with a complaint, including a final statement sent to the consumer, and, where available, the signed contract or other terms and conditions attached to the debt. Pursuant to the Department's proposed regulation, these documents will be provided to consumers who request verification of a debt. Also, requiring these documents with a complaint is a logical extension of the regulation's pre-litigation requirement that would not add significant burden to creditors.
- Consumers should be provided an adequate opportunity to vacate a default judgment if a debt collector does not comply with the Court's rules.

The Department would welcome further discussion on these suggestions. The Department believes that its proposed regulation of pre-litigation debt collection activities can complement and strengthen the Court's efforts in this important area. Please feel free to contact Executive Deputy Superintendent Joy Feigenbaum at (212) 480-6082 to discuss this further.

Very truly yours,



Benjamin M. Lawsky  
Superintendent of Financial Services

cc:

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



CHAMBERS OF THE DISTRICT COURT  
COUNTY OF NASSAU  
99 MAIN STREET  
HEMPSTEAD, NEW YORK 11550

(516) 493-4313

HON. DAVID GOODSSELL  
JUDGE, DISTRICT COURT  
OF NASSAU COUNTY

November 29, 2013

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

Re: Comments to Uniform Rules

Dear Mr. McConnell:

The Nassau County District Court Judges Association and in particular, the judges sitting in civil parts of the Nassau County District court submit the following comments regarding the proposed amendments to the Uniform Rules for the New York City Civil Court (22 NYCRR 208.14-a), and for certain Courts Outside New York City (22 NYCRR 210.14-a), relating to adoption of statewide forms for use in consumer credit actions seeking award of a default judgment.

1. The rules as proposed would not apply to actions brought in District Court, where thousands of consumer credit actions are commenced annually. The proposed amendments to the rules would apply only to the Civil Court of the City of New York, which is subject to the provisions of 22 NYCRR Part 208, and the City Courts outside the City of New York which are subject to the provisions of 22 NYCRR Part 210. The rules of the District Court are contained in 22 NYCRR Part 212.

2. The proposed amendments, on their face, would require supplemental affidavits "in addition to the requirements of CPLR 3215." Phrased this way, the

proposed amendments could be subject to legal challenge on the ground that they intrude on legislative prerogatives (*see LaSalle Bank, NA v Pace*, 31 Misc3d 627 [Sup Ct Suffolk Co., Whelan, JJ]). If the amendments are to be approved, they should make clear that their intent is simply to regulate the form of the proof needed to partially satisfy CPLR 3215. The requirements for obtaining a default judgment should continue to be governed principally by case law interpretations of the language employed by the state legislature.

3. The "requirements of CPLR 3215" already demand submission of detailed first hand proof, from persons having personal knowledge of "the facts constituting the claim ... and the amount due" (CPLR 3215[f]). Under well settled appellate court precedent, a default judgment may not be granted unless the plaintiff submits "proof of liability" which establishes the "prima facie validity" of its cause of action (*Joosten v Gale*, 129 AD2d 531 [1<sup>st</sup> Dept 1987]). A court may not grant a default judgment unless it "has nonhearsay confirmation of the factual basis constituting a prima facie case" (*State of NY v Williams*, 44 AD3d 1149 [3d Dept 2007]). In actions involving assigned consumer debts arising from a contract, any default judgment application must include proof of "the underlying contract," proof of the assignment of that contract, and proof of "the particulars" of the claim (*Giordano v Berisha*, 45 AD3d 416 [1<sup>st</sup> Dept 2007]).

4. In cases involving an alleged credit card debt, the creditor cannot make out a prima facie case for breach of contract without submitting "proof itemizing the various purchases or transactions allegedly made with the credit card" (*Adverlight Card Services, NA v Naydensky*, 2009 NY Slip Op 52051 [App Term 2d Dept]; *accord, FIA Card Services, NA v Kodumal*, 2013 NY Slip Op 51099 [App Term 2d Dept]). The plaintiff must also submit "an affidavit sufficient to tender to the court the original agreement, as well as any revisions thereto, and the affidavit must aver that the documents were mailed to the card holder" (*Citibank v Martin*, 11 Misc3d 219 [Civ Ct NY Co. 2006]). The affidavit "must demonstrate personal knowledge of essential facts or the judgment will be assailable, even if the defendant defaults" (*id.*).

5. To make out a prima facie case upon an account stated cause of action, the creditor must submit "the monthly credit card billing statements which form the basis of its cause of action to recover on an account stated" (*American Express Centurion Bank v. Cutler*, 81 A.D.3d 761 [2d Dept. 2011]). In addition, it must submit proof by affidavit "showing that the defendant retained the subject billing statements for an unreasonable period of time without objecting to them, or that he made partial payments on the billing statements" (*id.*).

6. In assigned debt matters, the plaintiff cannot make out a prima facie case without evidence, from the original creditor, establishing all of the elements needed to establish a breach of contract or account stated cause of action, through business record proof (CPLR 4518) that the necessary contract documents and account statements were made and kept in the ordinary course of the original creditor's business (*Velocity Investment, LLC v. Cocina*, 77 A.D.3d 1306 (4<sup>th</sup> Dept. 2010); and *Palisades Collection, LLC v. Kedik*, 67 A.D.3d 1329 (4<sup>th</sup> Dept. 2009)). In addition, the plaintiff must provide proof of the assignment of the particular account in issue (*Citibank*

*v Martin, supra*; 6A NYJur2d Assignments §87). It also must prove that notice of the assignment was given to the debtor (*TPZ Corp. v. Dabbs*, 25 A.D.3d 787 [2d Dept. 2006]; *Caprara v. Charles Court Assocs.*, 216 A.D.2d 722 [3d Dept. 1995]).

6. The supplemental affidavits referenced in the proposed amendments would require submission of only a small part of the proof needed to make out a prima facie case for judgment upon a claimed consumer debt. While the amendments are well intended, we are concerned that adoption of the amendments might mislead lawyers and clerks into believing that applications for default judgments in such matters need not meet the more stringent requirements outlined above. Furthermore, the proposed rules might be misconstrued to constrain a court's inherent authority to vacate a default judgment in the interest of justice (*see Woodson v Mendon Leasing*, 100 NY2d 62 [2003] ) in cases where proof of the facts of the claim fails to satisfy CPLR 3215(f).

Thank you for allowing our organization to submit these views on the proposed changes to the Uniform Rules.

Very truly yours,

David Goodsell

President

Nassau County District Court Judges Association



Mitchell B. Nisonoff, Esq., Co-Chair  
Rachel A. Siskind, Esq., Co-Chair  
Civil Court Practice Section  
New York County Lawyers' Association  
14 Vesey Street  
New York, NY 10007

December 3, 2013

## **Comment on the Recommendation for Amendment to the Uniform Rules for the New York City Civil Court and the Uniform Rules for the City Courts Outside of New York City<sup>1</sup>**

At its regular meeting on November 19, 2013, the NYCLA Civil Court Practice Section reviewed the Advisory Committee on Civil Practice proposal as to amending the Uniform Rules for the New York Civil Court (22 NYCRR 208.00 et seq.) and the Uniform Rules for the Civil Courts Outside of New York City (22 NYCRR 210.00 et seq.) to incorporate certain forms as official statewide forms for use in consumer credit matters as proof of default judgments. The Section voted against adoption of the proposal as a court rule and recommends instead an amendment to the Civil Practice Law and Rules.

CPLR Section 3215(f) requires that an application for a default judgment include “proof by affidavit made by the party of the facts constituting the claim.” In the context of a default judgment, our Court of Appeals, in *Woodson v. Mendon Leasing Corporation*, 100 N.Y.2d 62 (2003), makes clear that an allegation of the facts is sufficient.

A verified complaint may be submitted instead of an affidavit when the complaint has been properly served (see CPLR 3215[f]). Given that in default proceedings the defendant has failed to appear and the plaintiff does not have the benefit of discovery, *the affidavit or verified complaint need only allege enough facts to enable a court to determine that a viable cause of action exists*. Indeed, defaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them.... [Citations omitted; emphasis added.]

Of particular note is that the Court of Appeals reversed the Appellate Division’s ruling that an application for default was insufficient where it did not have any “firsthand confirmation of the facts.” As interpreted by the Court of Appeals, CPLR Section 3215(f) simply does not contemplate the same type, competence or level of proof for the entry of a default judgment as would be required on a motion for summary judgment or at trial.

The Advisory Committee seeks to revise the current CPLR lower evidentiary standard for entry of default judgments in consumer credit matters. The Committee’s proposal, with a higher evidentiary standard, would enhance protection for consumers, a change the Section supports. The Advisory Committee proposal looks to incorporate recent case law involving summary judgment motions on the manner in which a plaintiff-assignee in an action stemming from the purchase of a consumer’s debt must establish a foundation for the records of the non-party to use

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<sup>1</sup> The views expressed are those of the Civil Court Practice Section only, have not been approved by the New York County Lawyers’ Association Board of Directors, and do not necessarily represent the views of the Board.

the records in an action against a debtor. It cites the case of *Unifund CCR Partners v. Youngman*, 89 A.D.3d 1377, 932 N.Y.S.2d 609 (4<sup>th</sup> Dep't 2011) (citing, in turn, *Palisades Collection, LLC v. Kedik*, 67 A.D.3d 1329 (4<sup>th</sup> Dep't 2009)).

The Committee's proposal would also codify directives of the Civil Court of the City of New York that currently require a default application to be accompanied by affidavits proving chain of title.

The Section believes that, for the reasons articulated by the Advisory Committee, the Committee's proposal has substantial merit. However, the Section respectfully submits that the New York City Civil Court's directives, and the Advisory Committee's proposal if adopted, are inconsistent with the practice and procedure on applications for default judgments provided by CPLR Section 3215(f) as interpreted by the Court of Appeals. For this reason, the Section urges that the Advisory Committee's recommendations be adopted not as a rule of the courts but rather pursued as an amendment to the CPLR.

2013



New York State  
Association of County Clerks

MEMORANDUM

December 3, 2013

To: Office of Court Administration  
Via email (OCArule208-14-a@nycourts.gov)

From: Elizabeth Larkin  
President, NYSACC  
Cortland County Clerk

CC: nyscountyclerks@nysac.us

Re: Response to OCA's proposed amendment of 22 NYCRR § 208.14-a (Uniform Rules for the New York City Civil Court) and 22 NYCRR § 210.14-a (Uniform Civil Rules for the Courts Outside New York City), relating to adoption of statewide forms for use in consumer credit actions seeking award of a default judgment.

The New York State Association of County Clerks appreciates the notification and request for comment on the above proposed rule change. Members of our Association expressed concern regarding the workload impact on the Office of the County Clerk in terms of the type of document and additional filings at a time of diminished personnel/human resources.

Notwithstanding the above concerns, the Association supports the change since the proposal adds proof of ownership. Additionally, the increased expansion of e-filing may well alleviate the workload concern.

Additionally, members of our Association inquire whether failure to comply with the instant amendment would require rejection by the Office of the County Clerk.



## **NEW YORKERS FOR RESPONSIBLE LENDING**

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c/o New Economy Project / 176 Grand Street / New York, NY 10013  
Tel: (212) 680-5100 / Fax: (212) 680-5104 / [nyrl@nedap.org](mailto:nyrl@nedap.org)

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December 4, 2013

By e-mail

John W. McConnell, Esq.  
Office of Court Administration  
25 Beaver St., 11<sup>th</sup> Floor  
New York, NY 10004  
[OCArule208-14a@nycourts.gov](mailto:OCArule208-14a@nycourts.gov)

RE: Proposed Amendments to 22 N.Y.C.C.R. §§ 208.14a and 210.14a, relating to adoption of statewide forms for use in consumer credit actions seeking award of a default judgment

Dear Mr. McConnell:

Thank you for the opportunity to comment on the proposal to create statewide forms for debt collectors to use when seeking default judgments in consumer credit actions. The undersigned members of the New Yorkers for Responsible Lending (NYRL) coalition request that OCA consider this comment letter to constitute 32 separate letters for the purpose of counting the total comments received on this proposal.

We appreciate OCA's effort to address the serious problems regarding "requirements of proof in consumer credit matters," particularly "proof of ownership of the debt." However, NYRL strongly opposes the proposed rule because it would enable debt collectors to obtain default judgments on the basis of false, robo-signed affidavits.

In the mortgage foreclosure context, OCA has taken bold action to combat robo-signing and ensure that only valid actions are brought. NYRL strongly supported those actions and urges OCA to adopt similar reforms in the consumer credit context.

NYRL is a state-wide coalition that promotes access to fair and affordable financial services and the preservation of assets for all New Yorkers and their communities. NYRL's 161 members include community development financial institutions, community-based organizations, affordable housing groups, advocates for seniors, legal services organizations, housing counselors, and community reinvestment, fair lending, labor and consumer advocacy groups.

For years, NYRL members have seen the profound harm that abusive debt collection practices have caused New Yorkers, particularly in lower-income communities and communities of color. Debt collectors routinely engage in unfair and deceptive tactics to collect on debts about which they have little or no documentation or other basic information. The worst of these tactics

includes obtaining default judgments against people on the basis of fraudulent affidavits, and then using these judgments to garnish people's wages and seize their bank accounts. The judgments also appear on people's credit reports and prevent them from obtaining housing, employment, mortgage modifications, and fairly-priced consumer credit.

Debt buyers purchase portfolios of debts for pennies on the dollar and obtain only spreadsheets with skeletal information; they do not have access to contracts, account statements, or other account-level documents.<sup>1</sup> Furthermore, in the purchase and sale agreements, the original creditors specifically disclaim the accuracy of the information in the spreadsheets, which are maintained in an unprotected format that can be changed by any person at any time, by accident or on purpose.

In its Memorandum describing the proposed rule, OCA states that the form affidavits "address the requirements of proof in consumer credit matters," particularly in debt buyer cases where the plaintiff must demonstrate "proof of ownership of the debt." Unfortunately, the proposed forms do not meet OCA's stated goals, and their adoption would only exacerbate the problem they are intended to address.

The proposed form affidavits have multiple problems, but the two most critical are:

- **The proposed affidavits fail to establish proper ownership of the debt.** A complete and accurate chain of title is essential to due process and prevents the court from entering judgments in cases in which the plaintiff does not actually own the debt. The proposed affidavits fail to establish a chain of title because they allow original creditors and debt sellers to state only that they sold "a pool of charged-off accounts" without confirming whether the particular debt at issue was part of the sale.
- **The proposed affidavits would allow debt buyers to obtain judgments based entirely on hearsay.** The proposed affidavits would allow debt buyers to testify to facts that are not within their knowledge. In the proposed forms, the debt buyer affirms, based on review of its books and records, that there was a credit agreement between the defendant and the original creditor, the defendant breached the agreement, and a certain amount is due and owing. However, as explained above, debt buyers' records do not contain sufficient information to support these assertions. It is the original creditor, and only the original creditor, that has the relevant information about the debt and is in the proper position to testify about it.

OCA has a critical opportunity to rewrite the proposed rule to ensure that debt collectors cannot take advantage of the court system to obtain default judgments based on robo-signed affidavits. Specifically, in order to obtain a default judgment in a consumer credit action, OCA should require a plaintiff to provide:

- An affidavit from the original creditor attesting to the basic facts of the debt.

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<sup>1</sup> Federal Trade Commission, *The Structure and Practices of the Debt Buying Industry* (Jan. 2013), available at <http://www.ftc.gov/os/2013/01/debtbuyingreport.pdf>.

- In assigned debt cases, an affidavit from the original creditor, and from each intervening debt seller, attesting to the sale of the specific debt at issue.

Alternatively, or additionally, OCA could consider imposing a requirement on collection attorneys similar to that imposed on foreclosure attorneys, requiring them to attach an unbroken chain of assignments to the complaint and to submit an affirmation that they have personally reviewed the key documents and believe that the action has merit and the statute of limitations has not expired.

Thank you for the opportunity to comment.

Sincerely,

Albany County Rural Housing Alliance  
Bedford-Stuyvesant Community Legal Services  
Brooklyn Cooperative Federal Credit Union  
CAMBA Legal Services, Inc.  
Central New York Citizens in Action  
Consumer Financial Advocacy Clinic, SUNY Buffalo Law School  
Consumer Justice for the Elderly: Litigation Clinic of St. John's University School of Law  
Cypress Hills Local Development Corporation  
DC37 Municipal Employees Legal Services  
Empire Justice Center  
Fair Housing Council of Central New York  
Fifth Avenue Committee  
Grow Brooklyn  
Housing Help Inc.  
Housing Resources of Columbia County, Inc.  
The Legal Aid Society  
Legal Services for the Elderly in Queens  
Legal Services NYC  
Legal Services NYC - Bronx  
Long Island Housing Services, Inc.  
Margert Community Corporation  
MFY Legal Services  
Neighbors Helping Neighbors  
New Economy Project  
New York Legal Assistance Group (NYLAG)  
New York Public Interest Research Group (NYPIRG)  
Pratt Area Community Council  
Queens Legal Services  
South Brooklyn Legal Services  
Syracuse University College of Law Securities Arbitration and Consumer Clinic  
Teamsters Local 237 Legal Services Plan  
Western New York Law Center



## New Economy Project

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December 4, 2013

### By e-mail

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[OCArule208-14a@nycourts.gov](mailto:OCArule208-14a@nycourts.gov)

RE: Proposed Amendments to 22 N.Y.C.C.R. §§ 208.14a and 210.14a, relating to adoption of statewide forms for use in consumer credit actions seeking award of a default judgment

Dear Mr. McConnell:

New Economy Project (formerly NEDAP) appreciates the opportunity to comment on the proposal to create statewide forms for debt collectors to use when seeking default judgments in consumer credit actions. However, we strongly oppose the proposed rule because it would enable debt collectors to obtain default judgments on the basis of false, robo-signed affidavits.

In the mortgage foreclosure context, OCA has taken bold action to combat robo-signing and ensure that only valid cases are brought. New Economy Project strongly supported those actions and urges OCA to adopt similar reforms in the consumer credit context.

New Economy Project works to promote community economic justice in New York City neighborhoods and to eliminate discriminatory economic practices that harm communities and perpetuate inequality and poverty. For years, we have operated a legal hotline serving low-income New Yorkers aggrieved by abusive debt collection practices. We have spoken to thousands of New Yorkers facing unfair and deceptive debt collection litigation practices. Abusive debt collection lawsuits have caused New Yorkers profound harm, particularly in lower-income communities and communities of color.

Debt collectors routinely engage in unfair and deceptive tactics to collect on debts about which they have little or no documentation or other basic information. The worst of these tactics includes obtaining default judgments against people on the basis of fraudulent affidavits, and then using these judgments to garnish people's wages and seize their bank accounts. The judgments also appear on people's credit reports and prevent them from obtaining housing, employment, mortgage modifications, and fairly-priced consumer credit.

## *Robo-Signing in Consumer Credit Litigation*

In the last decade, debt collectors have flooded New York courts with consumer credit lawsuits. Debt collectors secure tens of thousands of default judgments against New Yorkers each year. Unfortunately, debt collectors obtain the vast majority of those default judgments using false, robo-signed affidavits.

The problem is particularly acute in cases brought by debt buyers. Debt buyers purchase portfolios of debts for pennies on the dollar and obtain only spreadsheets with skeletal information; they do not have access to contracts, account statements, or other account-level documents.<sup>1</sup> Furthermore, in the purchase and sale agreements, the original creditors specifically disclaim the accuracy of the information in the spreadsheets, which are maintained in an unprotected format that can be changed by any person at any time, by accident or on purpose.<sup>2</sup>

It is common knowledge that debt buyers cannot prove their claims on the merits in contested cases. As a New York State judge recently remarked, “The judges of this Court, and the lawyers practicing before them, know all too well that debt buyers rarely have readily available proof to establish an assigned debt claim.”<sup>3</sup> Despite their inability to prove a case on the merits, however,

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<sup>1</sup> Federal Trade Commission, *The Structure and Practices of the Debt Buying Industry* (Jan. 2013), available at <http://www.ftc.gov/os/2013/01/dcbtbuyingreport.pdf>.

<sup>2</sup> *Id.* at ii-iv.

<sup>3</sup> *LR Credit 21 LLC v. Paryshkura*, 30821/10, N.Y. L.J. 1202477450341, at \*1 (N.Y. Dist. Ct. Dec. 22, 2010); see also *Midland Funding LLC v. Wallace*, 946 N.Y.S.2d 67 (City Ct. City of Mt. Vernon 2012) (“[P]laintiff [a debt buyer] took a default judgment against the defendant and did so, this Court believes, in bad faith, fully knowing what proof was required to prove its case, that it was not in possession of such proof, and, most significantly, that, in all likelihood, it could never obtain and produce the requisite proof”); *DNS Equity Group Inc. v. Lavallee*, 907 N.Y.S.2d 436 (Dist. Ct. Nassau County 2010) (“Given the frequency in which debt buyers are seeking to enforce alleged debts in this Court, and the frequency with which their moving papers fail to satisfy well established legal standards, it may be useful to restate, at some length, the applicable rules, and to explain why plaintiff’s papers fail to satisfy them.”); and see *Unifund CCR Partners v. Youngman*, 932 N.Y.S.2d 609 (4th Dep’t 2011); *Palisades Collection, LLC v. Kedik*, 67 A.D.3d 1329, 890 N.Y.S.2d 230 (4th Dep’t 2009); *PRA III, LLC v. Gonzalez*, 54 A.D.3d 917, 864 N.Y.S.2d 140 (2d Dep’t 2008); *Gemini Asset Recoveries, Inc. v. Portoff*, 23 Misc. 3d 139A (App. Term 1st Dep’t, 2009); *Centurion Capital Corp. v. Guarino*, 951 N.Y.S.2d 85 (Civ. Ct. Richmond County 2012); *Midland Funding LLC v. Loreto*, 950 N.Y.S.2d 492 (Civ. Ct. Richmond County 2012); *CACH LLC v. Fatima*, 936 N.Y.S.2d 58 (Dist. Ct. Nassau County 2011); *Resurgent Capital Svcs. v. Mackey*, 5/9/11 N.Y.L.J. (Dist. Ct. Nassau Co.); *Velocity Investments LLC v. McCaffrey*, 2/9/11 N.Y.L.J., 31 Misc. 3d 308 (Dist. Ct. Nassau Co.); *Collins Financial Svcs. v. Vigilante*, 30 Misc. 3d 908, 915 N.Y.S.2d 912 (Civ. Ct. Richmond County 2011); *CACH, LLC v. Sliss*, 28 Misc. 3d 1230A (City Ct., Auburn Co. 2010); *CACV of Colorado v. Santiago* 10/29/09 NYLJ 25:1 (Civ. Ct. N.Y. Co.); *Colorado Capital Investments, Inc. v. Villar*, 6/18/09 N.Y.L.J. 27: 2 (Civ. Ct. N.Y. Co.); *RAB Performance Recoveries v. Scorsonelli*, 242 N.Y.L.J. 16 (Sup. Ct. Richmond Co. 2009); *CACV of Colorado Capital Investments v. Pierog*, Index No. 64449/05 (Civ. Ct. N.Y. Co. 9/2/08); *Colorado, LLC v. Chowdhury*, Index No. 94642/07 (Civ. Ct. Bronx Co. 2/19/09); *CACH, LLC v. Cummings*, Index No. 22747/07 (Civ. Ct. N.Y. Co. 11/10/08); *Rushmore Recoveries X, LLC v. Skolnick*, 15 Misc.3d 1139(A), 841

debt buyers routinely submit false, robo-signed affidavits to the courts to secure default judgments. In a representative example, a debt buyer “obtained tens of thousands of default judgments in consumer debt actions [in NYC civil court], 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.”<sup>4</sup>

But debt buyers are not the only problem. Federal bank regulators have recently begun shining a spotlight on robo-signing by original creditors. The Office of the Comptroller of the Currency (OCC), concerned that the shoddy recordkeeping and robo-signing of affidavits so prevalent in foreclosure cases had also infected consumer credit collections, conducted an industry-wide review of debt collection practices.<sup>5</sup> After the review, the OCC and the California Attorney General brought enforcement actions against Chase,<sup>6</sup> and other major banks have undergone scrutiny as well.<sup>7</sup> The Consumer Financial Protection Bureau has also taken enforcement action to address robo-signing in state court debt collection actions, stating: “[R]obo-signing practices are illegal wherever they occur, and they need to stop – period.”<sup>8</sup>

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N.Y.S.2d 823, No. 21161/05, 2007 WL 1501643 (Dist. Ct. Nassau Co); *Palisades Collection, LLC v. Haque*, 4/13/06 N.Y.L.J. 20 (Civ. Ct. Queens Co.); *Palisades Collection, LLC v. Gonzalez*, 10 Misc.3d 1058(A), 809 N.Y.S.2d 482, No. 58564/04, 2005 WL 3372971 (Civ. Ct. N.Y. Co.).

<sup>4</sup> *Sykes v. Mel S. Harris and Associates*, 285 F.R.D. 279, 279 (S.D.N.Y. 2012).

<sup>5</sup> *Shining a Light on the Consumer Debt Industry: Hearing Before The Senate Banking, Housing, and Urban Affairs Subcomm. on Financial Institutions and Consumer Protection*, 113<sup>th</sup> Cong., 4-5 (2013) (statement of Thomas Curry, Comptroller of the Currency, the Office of the Comptroller of the Currency Provided to the Subcommittee on Financial Institutions and Consumer Protection Senate Committee on Banking, Housing, and Urban Affairs), [hereinafter Curry Testimony] available at <http://www.occ.gov/news-issuances/congressional-testimony/2013/pub-test-2013-116-oral.pdf>.

<sup>6</sup> Consent Order at 4-5, *In re JPMorgan Chase Bank, N.A.*, No. 2013-138 (Dep’t of Treas. Sept. 18, 2013), available at <http://www.occ.gov/static/enforcement-actions/ea2013-138.pdf>; Press Release, CA Att’y Gen., *Attorney General Kamala D. Harris Announces Suit Against JPMorgan Chase for Fraudulent and Unlawful Debt-Collection Practices* (May 9, 2013), available at <http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-suit-against-jpmorgan-chase>.

<sup>7</sup> See Jeff Horwitz & Maria Aspan, *OCC Pressures Banks to Clean Up Card Debt Sales*, Am. Banker, July 2, 2013, 1:24pm ET, available at [http://www.americanbanker.com/issues/178\\_127/occ-pressures-banks-to-clean-up-card-debt-sales-1060353-1.html](http://www.americanbanker.com/issues/178_127/occ-pressures-banks-to-clean-up-card-debt-sales-1060353-1.html); Maria Aspan, *Wells Fargo Halts Card Debt Sales as Scrutiny Mounts*, July 28, 2013 10:00 p.m. ET, available at [http://www.americanbanker.com/issues/178\\_144/wells-fargo-halts-card-debt-sales-as-scrutiny-mounts-1060922-1.html](http://www.americanbanker.com/issues/178_144/wells-fargo-halts-card-debt-sales-as-scrutiny-mounts-1060922-1.html); Jeff Horwitz, *Bank of America Sold Card Debts to Collectors Despite Faulty Records*, Am. Banker, Mar. 29, 2012 6:31 p.m. ET, available at [http://www.americanbanker.com/issues/177\\_62/bofa-credit-cards-collections-debts-faulty-records-1047992-1.html](http://www.americanbanker.com/issues/177_62/bofa-credit-cards-collections-debts-faulty-records-1047992-1.html).

<sup>8</sup> Prepared Remarks by Richard Cordray, Director of the Consumer Financial Protection Bureau, Cash America Enforcement Press Call, Nov. 20, 2013.

### *The Proposed Form Affidavits Would Only Exacerbate the Problem*

In its Memorandum describing the proposed rule, OCA states that the form affidavits “address the requirements of proof in consumer credit matters,” particularly in debt buyer cases where the plaintiff must demonstrate “proof of ownership of the debt.” Unfortunately, the proposed forms do not meet OCA’s stated goals, and their adoption would only exacerbate the problem they are intended to address.

The proposed form affidavits have multiple problems, including:

- **The proposed affidavits fail to establish proper ownership of the debt.** A complete and accurate chain of title is essential to due process and prevents the court from entering judgments in cases in which the plaintiff does not actually own the debt.<sup>9</sup> Existing caselaw has established that a debt buyer cannot obtain a judgment without establishing the chain of title for the specific debt at issue in the lawsuit.<sup>10</sup> The proposed affidavits fail to establish a chain of title because they allow original creditors and debt sellers to state only that they sold “a pool of charged-off accounts” without confirming whether the particular debt at issue was part of the sale.
- **The proposed affidavits would allow debt buyers to obtain judgments based entirely on hearsay.** Under CPLR 3215(f), in order to obtain a default judgment, a plaintiff must provide proof of the key facts in the form of an affidavit. The affidavit must be based on personal knowledge.<sup>11</sup> This requirement ensures that no judgment is entered, even on default, without at least “some firsthand confirmation of the facts.”<sup>12</sup> Evidence from someone without this firsthand knowledge is insufficient to meet this minimal standard.

The proposed affidavits do not comply with New York evidentiary law because they would allow debt buyers to testify to facts that are not within their knowledge. The proposed forms enable the debt buyer to affirm, based on review of its own records, that

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<sup>9</sup> See *Chase Bank USA, N.A. v. Cardello*, 896 N.Y.S.2d 856 (N.Y. Civ. Ct. Richmond County 2010) (“[O]n a regular basis this court encounters defendants being sued on the same debt by more than one creditor alleging they are the assignee of the original credit card obligation.”)

<sup>10</sup> *Fatima*, 936 N.Y.S.2d 58 (debt buyer failed to establish standing because the proof submitted “refers only to the sale of certain unspecified ‘loans’ identified in a ‘loan schedule.’ No competent proof is provided that defendant’s credit card account debt was intended to be treated as one of those ‘loans.’”); *Citibank (S.D.), N.A. v. Martin*, 807 N.Y.S.2d 284, 289 (N.Y. Civ. Ct. N.Y. County 2005) (“[A]n assignee must tender proof of assignment of a particular account.”); see also *Kedik*, 890 N.Y.S.2d 230 (plaintiff must proffer admissible evidence that original creditor “assigned its interest in defendant’s debt”)(emphasis added)

<sup>11</sup> *Dickerson v. Health Mgmt. Corp. of Am.*, 800 N.Y.S.2d 391 (1st Dep’t 2005); *Unifund CCR Partners v. Youngman*, 932 N.Y.S.2d 609,610 (4th Dep’t 2011); *Martin*, 807 N.Y.S.2d at 289.

<sup>12</sup> *Feffer v. Malpasso*, 619 N.Y.S.2d 46 (1st Dep’t 2004); see also *Zelnik v. Bidermann Industries U.S.A.*, 662 N.Y.S.2d 19, 19 (1st Dep’t 1997) (“No judgment, even in a small claims action, can rest entirely on hearsay evidence.”).

there was a credit agreement between the defendant and the original creditor, the defendant breached the agreement, and a certain amount is due and owing.

However, as explained above, debt buyers' records do not contain sufficient information to support these assertions. *The original creditor, and only the original creditor, has the relevant information about the debt and is in the proper position to testify about it.*

- **The proposed rule would create an unacceptable double standard.** The proposed rule would properly require original creditors seeking a default judgment to submit an affidavit on personal knowledge containing the essential facts in support of the cause of action, as required by New York law. Inexplicably, however, the proposed rule would lower evidentiary requirements for debt buyers. A debt buyer seeking a judgment on an assigned debt would not have to submit an affidavit from someone with personal knowledge, but instead would be allowed to obtain a judgment based entirely on hearsay. Debt buyers would be the only type of business excused from having to comply with the basic tenets of law applicable to all other litigants. Such a double standard is deeply problematic.
- **The proposed affidavits allow testimony from mere “authorized agents.”** The proposed affidavits allow for testimony by mere “authorized agents” – which could include employees of third-party debt servicers who do not work for the original creditor and/or the plaintiff and have no knowledge of their business practices, but simply receive electronic records for debt collection purposes long after they were created. Such an individual would not have the personal knowledge of the account required to comply with New York evidentiary law.<sup>13</sup>
- **The proposed affidavits allow for entry of judgment on an account stated claim without recitation of key elements of the claim.** The form affidavits wrongly allow for entry of a judgment on an account stated claim without recitation of the facts necessary to support an account stated cause of action. Specifically, to support an account stated cause of action, the affidavit must provide proof that statements were mailed to the defendant on a particular date and then retained without objection for an unreasonable period of time.<sup>14</sup>

### *Recommendations*

Current abusive practices threaten the integrity of our court system. Robo-signing “not only improperly denies defendant[s] the due process of law but is egregious, dishonest and unprofessional and holds the courts and the entire legal profession up for public scorn and ridicule.”<sup>15</sup> OCA has a critical opportunity to rewrite the proposed rule to ensure that debt

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<sup>13</sup> See *supra* n.11.

<sup>14</sup> See *Morrison Cohen Singer & Weinstein, LLP v. Brophy*, 798 N.Y.S.2d 379,380 (App. Div. 1st Dept. 2005); see also DRP-158, Entry of Judgment, Account Stated, available at <http://www.nycourts.gov/courts/nyc/SSI/directives/DRP/drp158.pdf>.

<sup>15</sup> *Wallace*, 946 N.Y.S.2d at 67; see also Robo Redux, *The New York Times* (Aug. 19, 2012), available at <http://www.nytimes.com/2012/08/20/opinion/robo-redux.html>.

collectors cannot take advantage of the court system to obtain default judgments based on robo-signed affidavits.

First, in order to obtain a default judgment in a consumer credit action, OCA should require a plaintiff to provide:

- An affidavit from the original creditor attesting to the essential elements of the cause of action.
- In assigned debt cases, an affidavit from the original creditor, and from each intervening debt seller, attesting to the sale of the specific debt at issue.

Second, OCA should ensure that form affidavits meet basic requirements of evidentiary law, including that the affiant have the requisite personal knowledge, set forth the basis for his or her knowledge, and state all facts necessary to support entry of judgment on the particular cause of action invoked. Furthermore, OCA should not allow affidavits from mere “authorized agents,” and instead require affidavits to be from original creditors’ employees who possess the requisite personal knowledge of the facts at issue.

Finally, OCA should also consider imposing a requirement on collection attorneys similar to that imposed on foreclosure attorneys, requiring them to attach an unbroken chain of assignments to the complaint and to submit an affirmation that they have personally reviewed the key documents and believe that the action has merit and the statute of limitations has not expired.

Thank you for the opportunity to comment.

Sincerely,

New Economy Project

Claudia Wilner  
Senior Staff Attorney

Susan Shin  
Staff Attorney

Josh Zinner  
Co-Director



Yisroel Schulman, Esq.  
*President & Attorney-In-Charge*

December 4, 2013

Via e-mail

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**RE: Proposed Amendments to 22 N.Y.C.C.R. §§ 208.14a and 210.14a, relating to adoption of statewide forms for use in consumer credit actions seeking award of a default judgment**

Dear Mr. McConnell:

NYLAG appreciates the opportunity to comment on the proposal to create statewide forms for debt collectors to use when seeking default judgments in consumer credit actions. NYLAG strongly opposes the proposed amendments because they would allow debt collectors to obtain default judgments on the basis of false, robo-signed, and unreliable affidavits, and because of the severe harm that consumer defendants suffer as a result of such judgments. The proposed form affidavits have multiple problems, but the two most critical are:

- The proposed affidavits fail to establish proper ownership of the debt. A complete and accurate chain of title is essential to due process and prevents the court from entering judgments in cases in which the plaintiff does not actually own the debt. The proposed affidavits fail to establish a chain of title because they allow original creditors and debt sellers to state only that they sold “a pool of charged-off accounts” without confirming whether the particular debt at issue was part of the sale.
- The proposed affidavits would allow debt buyers to obtain judgments based entirely on hearsay. The proposed affidavits would allow debt buyers to testify to facts that are not within their knowledge. In the proposed forms, the debt buyer affirms, based on review of its books and records, that there was a credit agreement between the defendant and the original creditor, the defendant breached the agreement, and a certain amount is due and owing. However, as explained above, debt buyers’ records do not contain sufficient information to support these assertions. It is the original creditor, and only the original creditor, that has the relevant information about the debt and is in the proper position to testify about it.

NYLAG is a non-profit organization that provides free legal services to low-income and otherwise vulnerable New Yorkers. NYLAG attorneys represent and advise several hundred individuals each year who have been sued by debt collectors in New York City, Westchester County, and Nassau County. NYLAG attorneys also represent individuals in class action cases challenging illegal debt collection practices, and in this capacity talk to and review the court files of many more people who suffer at the hands of unscrupulous debt collectors.

Through our extensive work with defendants in debt collection actions, NYLAG is all too familiar with the extreme hardship consumer debt judgments can cause in the lives of low-income New Yorkers. For example:

- Lucia<sup>1</sup> had been close to securing a job with the New York City Police Department when the investigator conducting a routine background screening discovered from her credit report that a debt buyer had obtained a judgment against her. The NYPD denied her employment application because of this problem with her credit history. Although Lucia was able to get the judgment vacated after three court appearances in which the debt-buyer never appeared, she had lost her chance to work for the NYPD.
- Martina, a disabled woman who speaks only Russian, was recently denied an accessible apartment in a subsidized Section 8 development in Brooklyn based upon her credit history. Martina has been struggling to make ends meet, since she must pay \$1100 rent out of her monthly \$1200 workers' compensation check while waiting for an accessible apartment to become available in a federally subsidized housing development. In July 2013, Martina was devastated to learn that, although she had reached the top of the waiting list, she had been denied an apartment—despite her perfect rent payment history—because of a consumer judgment against her. Although Martina, with NYLAG's help, has now successfully vacated the judgment, she must now return to the development's waiting list. This is significant because apartments rarely become available as people live in subsidized housing, once they obtain it, until they die.

At the same time, the trial courts of this state have acknowledged the prevalence of robo-signing in debt collection lawsuits, as well as the hearsay nature of debt-buyer witness's affidavits, and have accordingly refused to accept such affidavits into evidence. For example:

- In *Midland Funding LLC v. Loreto*, the Civil Court denied a debt buyer's summary judgment motion because it was based on an affidavit that bore hallmarks of robo-signing, a practice that had been found to violate the FDCPA; these indicia "ma[d]e[] the court question the independent basis of the submission." No. 008963/11, 2012 WL 638807, at \*6 (Civ. Ct. Richmond Co. Feb. 23, 2012). *See also Midland Funding LLC v. Brent*, 644 F. Supp. 2d 961, 966-69 (N.D. Ohio, 2009) (finding a similar affidavit false and misleading when affiant signed "200 to 400 per day" with no personal knowledge of each case).

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<sup>1</sup> Client names are altered to protect our clients' privacy.

- In *CACH LLC v. Fatima*, 936 N.Y.S.2d 58, 59 (N.Y. Dist. Ct. 2011), the court denied debt-buyer plaintiff’s motion for summary judgment where “Among other defects, the ‘Cardholder Agreement’ annexed to the moving affidavit of plaintiff’s custodian of records [...] is undated, incomplete, and lacks a proper business record foundation (CPLR 4518). Notably, no proof [was] submitted from a representative of Bank of America who has personal knowledge of the subject agreement and its issuance to defendant . . . . The February, 2010 credit card statement annexed to the Huber affidavit likewise lacks a proper business record foundation from a bank representative.”
- In *Capital One Bank USA NA v. Joseph*, No. CV-008157-13, 2013 WL 5663260 (Dist. Ct. Nassau Cty. Oct. 7, 2013), the court denied plaintiff’s summary judgment motion that was based on an affidavit that, “on its face, ha[d] the look and feel of a ‘robo-signed affidavit’ that was prepared in blank, in advance, without knowing the identity of the person who would be asked to sign it.”
- Several other cases have found that a debt-buyer witness lacks the personal knowledge to authenticate business records of another entity, and lacks any other basis for knowledge of the facts making out the plaintiff’s claim. *See, e.g., DNS Equity Group Inc. v. Lavallee*, 26 Misc.3d 1228(A) (N.Y. Dist. Ct. 2010); *Portfolio Recovery Associates III LLC v. MacDowell*, 2007 WL 1429026 at \*2 (Civ. Ct. Richmond Co. Mar. 16, 2007); *South Shore Adjustment Co. v. Pierre*, 32 Misc.3d 1227(A) (N.Y. City Civ. Ct. 2011); *Rushmore Recoveries X, LLC v. Skolnick*, 15 Misc.3d 1139(A) (N.Y. Dist. Ct. 2007).

Our representation of people being sued by debt buyers gives us the experience on which we base these comments. However, though we advise and represent hundreds of people sued in these cases, we are acutely aware that there are thousands more who must defend debt collection cases without any legal advice or representation. We are even more concerned about represented debt collectors taking advantage of these unrepresented individuals.

NYLAG is concerned that the proposed amendments will exacerbate the problems caused by robo-signing and faulty documentation in debt collection cases. It is now a well-documented fact that debt-buyer plaintiffs frequently commence litigation without having documents or information that would allow them legitimately to swear to the facts in these affidavits. OCA’s provision and requirement of these form affidavits would further enable these debt buyers to proceed without admissible evidence. It would encourage unscrupulous conduct.

NYLAG strongly urges OCA not to create the proposed forms and instead to take affirmative measures to curb robo-signing in debt collection lawsuits, to ensure that only meritorious actions are brought and that judgments are not entered in meritless actions. For example, OCA could assist consumers by imposing a requirement on collection attorneys similar to that imposed on foreclosure attorneys, requiring them to attach an unbroken chain of assignments to the complaint and to submit an affirmation (commonly referred to as the “Lippman affirmation”) that they have personally reviewed the key documents and believe that the action has merit and the statute of limitations has not expired. We hope that OCA will ensure the fair treatment of the thousands of unrepresented individuals sued in New York State courts by large, profit-making debt-buyers represented by collection lawyers. OCA has shown its concern for unrepresented

litigants in many ways; we hope it will not choose to undermine their rights by making it easier for collection lawyers to violate the rights of consumers.

Thank you for the opportunity to comment on these proposed rules.

Sincerely,

/s/ Daphne Schlick, Esq.  
Associate Director  
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## *50<sup>th</sup> Anniversary: Mobilizing for Justice*

By U.S. Mail and by email to [OCArule208-14-a@nycourts.gov](mailto:OCArule208-14-a@nycourts.gov)

December 4, 2013

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### **RE: Proposed Amendments to 22 N.Y.C.C.R. §§ 208.14a and 210.14a, relating to adoption of statewide forms for use in consumer credit actions seeking award of a default judgment**

MFY Legal Services, Inc. (MFY) appreciates the opportunity to comment on the Office of Court Administration's (OCA) proposal to create statewide forms for debt collectors to use when seeking default judgments in consumer credit actions. MFY also appreciates OCA's initiative in addressing the serious problems associated with default judgments in consumer credit transaction cases, particularly requiring "proof of ownership of the debt." However, for the reasons described below, MFY strongly opposes the proposed amendments because they would enable debt collectors to obtain default judgments based on "robo-signed" affidavits filled with hearsay and unverified information.

### **MFY'S CONSUMER RIGHTS PROJECT'S EXPERIENCE WITH DEFAULT JUDGMENTS IN CONSUMER DEBT CASES**

MFY envisions a society in which no one is denied justice because he or she cannot afford an attorney. To make this vision a reality, for 50 years MFY has provided free legal assistance to residents of New York City on a wide range of civil legal issues, prioritizing services to vulnerable and under-served populations, while simultaneously working to end the root causes of inequities through impact litigation, law reform and policy advocacy. We provide advice and representation to more than 8,000 New Yorkers each year.

MFY's Consumer Rights Project provides advice, counsel and representation to low-income New Yorkers on a range of consumer problems, including debt collection lawsuits. On a regular basis we see the acute problems people face as a result of the routine entry of default judgments based on faulty information and robo-signed affidavits. Through our weekly hotline, we take calls from New York City's most vulnerable populations, many of whom are calling because their wages

are being garnished or their bank accounts are frozen due to a default judgment that was entered against them on the basis of fraudulent affidavits. Others are denied housing or employment because of these judgments. Examples of default judgments that were improperly obtained against our clients include:

- Default judgments obtained on debts that had already been settled or dismissed with prejudice;
- Default judgments obtained on debts that were the result of identity theft or mistaken identity—about which the consumer complained to the original creditor, but which was not forwarded to the debt buyer—and where the debt buyer’s affiant swore that he or she reviewed the file and there were no disputes on record;
- Default judgments based on affirmations of debt collection *attorneys* who have no personal knowledge of the client debt buyers’ business practices, much less the original creditors’ practices;
- Default judgments where debt buyers’ affiants swear to have access to the original creditors’ records, yet when the judgments are vacated and the cases restored to the calendar, in fact the debt buyers are unable to provide virtually any records from the original creditor.

## **ISSUES WITH ROBO-SIGNING AND POOR RECORD-KEEPING IN DEBT COLLECTION CASES ABOUND THROUGHOUT THE COUNTRY**

These problems are not unique to New York. The problem of “robo-signing” and faulty information in debt collection litigation has increasingly caught the attention of federal and state regulators, enforcers, and other government actors. In July 2013, an official from the Consumer Financial Protection Bureau testified that, “[t]oo often, important information about a debt, including whether a consumer has disputed the debt, does not travel with the debt when it gets assigned to third party collectors or purchased by a debt buyer. And it is often either not present or available . . . when owners of a debt file claims or seek judgments in courts.”<sup>1</sup>

In April 2011, The Comptroller of the Currency (OCC) commenced a review of debt collection and sales activities across the large banks it regulates, focusing primarily on notary and affiant practices.<sup>2</sup> OCC’s “investigation into whether bank officials employed shoddy record-keeping and ‘robo-signing’ of affidavits and other documents in their own internal collection efforts” led to a disciplinary action against JPMorgan Bank.<sup>3</sup> Among the OCC’s findings were that JPMorgan Bank filed affidavits by its employees or third-party debt collectors that made assertions that their statements in the affidavits were based on personal knowledge or a review of the bank’s records, when, in fact, they were based on neither. The OCC also found that

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<sup>1</sup> *Shining a Light on the Consumer Debt Industry: Hearing Before The Senate Banking, Housing, and Urban Affairs Subcommittee on Financial Institutions and Consumer Protection*, 113th Cong., 3-4 (2013) (Testimony of Corey Stone, Assistant Director, Office of Deposits, Cash, Collections, and Reporting Markets, Consumer Financial Protection Bureau), *available at*

[http://www.banking.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing\\_ID=d69d5a6b-aa86-4f4e-8b73-88814703f473&Witness\\_ID=00a7a97f-5645-4de4-9abe-b292b9a976c5](http://www.banking.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=d69d5a6b-aa86-4f4e-8b73-88814703f473&Witness_ID=00a7a97f-5645-4de4-9abe-b292b9a976c5)).

<sup>2</sup> *Id.* at 5 (citations omitted).

<sup>3</sup> Jeff Horwitz and Maria Aspan, *OCC Pressures Banks to Clean Up Card Debt Sales*, *Am. Banker* (July 2, 2013, 1:24pm ET), *available at* [http://www.americanbanker.com/issues/178\\_127/occ-pressures-banks-to-clean-up-card-debt-sales-1060353-1.html?zkPrintable=true](http://www.americanbanker.com/issues/178_127/occ-pressures-banks-to-clean-up-card-debt-sales-1060353-1.html?zkPrintable=true).

JPMorgan Chase filed or caused to be filed sworn affidavits with financial errors in favor of the bank.

An article in American Banker found that, in 2009 and 2010, in a series of transactions, Bank of America (BOA) sold portfolios of credit card receivables to debt buyer CACH LLC.<sup>4</sup> BOA sold the debts “as is,” expressly without warranties about the accuracy or completeness of the debts’ records.<sup>5</sup> The article went on to note that “records declared unreliable [by BOA] yet sold to CACH were used to file thousands of lawsuits against consumers” with “[t]he overwhelming majority of cases end[ing] in default judgments.”<sup>6</sup> Notwithstanding the bank’s disclaimer as to the accuracy of its records, Bank of America employees submitted affidavits attesting to the validity of debts sold by the bank.<sup>7</sup> In thousands of state court actions, CACH appended a single page from the purchase agreement attesting to ownership of delinquent credit card debt (omitting the other pages containing the disclaimers as to the accuracy of the records), and attorneys cited the reliability of BOA records as the basis to obtain judgments.<sup>8</sup>

These few examples show the inherent unreliability of these accounts and the lack of available records to document legitimate debts. These examples also reinforce the need to ensure that creditors and debt buyers are not given free rein to use the courts as a way to legitimize questionable debts without having to prove their validity.

## **MFY’S OBJECTIONS TO THE PROPOSED FORMS**

The stated purpose of the proposed rules and the form affidavits is to “address the requirements of proof in consumer credit matters,” particularly in debt buyer cases where the plaintiff must demonstrate “proof of ownership of the debt.” While this is a laudable goal, for the following reasons we find that the proposed form affidavits would actually defeat this goal and make the current problems involving fraudulent default judgments even worse.

### **A. The proposed affidavits fail to establish a reliable chain of title for the debt.**

A complete and accurate chain of title is essential to due process and prevents the court from entering judgments in cases in which the plaintiff does not actually own the debt. The proposed affidavits fail to establish a reliable chain of title because they allow original creditor and debt sellers to state only that they sold “a pool of charged-off accounts” without confirming whether the particular debt at issue was part of the sale.

Other states, out of concern for due process and procedural rights, have required stronger showings of proof of standing by debt buyers. For example, North Carolina passed legislation in 2009, which among other things, requires debt buyers to provide proof of each assignment in an

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<sup>4</sup> Jeff Horwitz, *Bank of America Sold Card Debts to Collectors Despite Faulty Records*, Am. Banker (Mar. 29, 2012 6:31 p.m. ET), available at [http://www.americanbanker.com/issues/177\\_62/bofa-credit-cards-collections-debts-faulty-records-1047992-1.html?zkPrintable=true](http://www.americanbanker.com/issues/177_62/bofa-credit-cards-collections-debts-faulty-records-1047992-1.html?zkPrintable=true). On a monthly basis, CACH bought debts with a face value of up to \$65 million for 1.8 cents on the dollar. *Id.*

<sup>5</sup> *Id.*

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

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

unbroken chain of ownership.<sup>9</sup> Each assignment must contain the original account number of the debt purchased, and must clearly show the debtor's name associated with the account.<sup>10</sup>

In Connecticut, the Small Claims Bench/Bar Committee has promulgated a checklist for processing judgments in small claims courts. As required by the checklist, debt buyers must provide an admissible affidavit showing unbroken assignment of the particular account.<sup>11</sup> Importantly, the affidavit cannot be a "generic" affidavit of debt by the original creditor.<sup>12</sup>

The Maryland Court of Appeals approved similar changes to Maryland's Rules of Civil Procedure.<sup>13</sup> As proof of plaintiff's ownership, the debt buyer must provide in its affidavit a chronological listing of the names of all prior owners of the debt and the date of each transfer, and attach "a certified or other properly authenticated copy of the bill of sale or other document that transferred ownership of the debt to each successive owner."<sup>14</sup> The rule is clear that the bill of sale or other document must contain a "specific reference to the debt sued upon."<sup>15</sup>

**B. The proposed affidavits would allow debt buyers to obtain judgments based entirely on inadmissible hearsay.**

In the proposed form affidavits, it is the debt buyer that affirms that there was a credit agreement between the defendant and the original creditor, that the defendant breached the agreement, and that a certain amount is due and owing. The debt buyer makes these statements based on access to the debt buyer's own books and records. However, as the FTC has confirmed, the debt buyer has no information in its possession to support these assertions.<sup>16</sup>

Even if the debt buyer did have access to this information from the original creditor, which it does not, its testimony would be entirely based on hearsay. The proposed Affidavit of Facts for a Debt-Buyer Plaintiff states that "plaintiff's records were made in the regular course of business and it was the regular course of such business to make the records." However, it is not plaintiff's records that establish that there was a credit agreement between the defendant and the original creditor, that the defendant breached the agreement, and that a certain amount is due and owing. It is the original creditor's records that establish these facts. Debt buyers lack personal

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<sup>9</sup> N.C. Gen. Stat. §§ 58-70-150(1)-(2) ("Complaint of a debt buyer plaintiff must be accompanied by certain materials.").

<sup>10</sup> *Id.*

<sup>11</sup> Ct. Gen. Stat. § 52-118 (2013).

<sup>12</sup> Ct. Practice Book Sec. 24-24 (2013), available at <http://www.jud.ct.gov/Publications/PracticeBook/PB.pdf>.

<sup>13</sup> Md. Rule of Procedure 3-306(d)(1)-(4) (2013).

<sup>14</sup> Md. Rule of Procedure 3-306(d)(3).

<sup>15</sup> *Id.*

<sup>16</sup> See Federal Trade Commission, *Collecting Consumer Debts: The Challenges of Change* ii-iii (Feb. 2009), available at <http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf>. In a landmark study, the FTC's key findings included that:

- "Buyers paid an average of 4.0 cents per dollar of debt face value."
- "Buyers rarely received dispute history."
- "Buyers received few underlying documents about debts."
- "Accuracy of information provided about debts at time of sale [were] not guaranteed."
- "Accuracy of information in sellers' documents [were] not guaranteed."
- "Limitations were placed on debt buyer access to account documents." And,
- "Availability of documents [were] not guaranteed."

*Id.*

knowledge of original creditors' business and record-keeping practice, and therefore they are not in a position to authenticate original creditors' business records. It is the original creditor that has the relevant information about the debt, as well as its own business and record-keeping practices, and is thus in the proper position to attest to the basic facts about the alleged debt.

**C. The proposed affidavits would allow testimony from unknown "authorized agents."**

The original creditor and debt buyer affidavits would improperly allow an affiant to testify based on an assertion that he or she is a mere "authorized agent" of the plaintiff with "personal knowledge and access to plaintiff's books and records . . . of the account of the defendant." This statement does not restrict the universe of potential affiants to employees of the plaintiff. Instead, it would allow the affidavit to be completed by a third-party debt collector who has no formal affiliation with the plaintiff and no knowledge of its business practices, but merely receives electronic records long after they were created for the purposes of debt collection. Such an individual would not have personal knowledge of the account sufficient to comply with New York evidentiary law.<sup>17</sup> To comply with evidentiary law, the courts should not allow testimony by "authorized agents." Instead, OCA should require that the affiant be an employee of the original creditor, and that the affiant clearly set forth the basis for his or her knowledge.

**RECOMMENDATIONS**

Because of the great harms that improper default judgments can inflict – and have inflicted -- on New York's most vulnerable populations, it is essential that OCA adopt rules that ensure that debt collectors cannot take advantage of the court system to obtain default judgments based on "robo-signed" and legally insufficient affidavits. We recommend that OCA should not adopt the current proposed amendments and instead should propose amendments for comment that require a plaintiff to provide when seeking a default judgment in a consumer credit transaction:

- An affidavit from an employee of the original creditor attesting to the essential facts of the debt and the affiant's basis of knowledge of those facts;
- In assigned debt cases, an affidavit from the original creditor, and one from each intervening debt seller, attesting to the specific debt at issue.

In addition to these steps, MFY supports the recommendations made by the New York City Bar Association Consumer Affairs and Civil Court committees in their comments on the proposed rule amendment:

- OCA should actively support passage of the Consumer Credit Fairness Act (A.2678/S.2454), which, among other provisions, sets out the specific evidentiary support required for a debt buyer to obtain a default judgment, including an affidavit from the original creditor establishing the existence of the debt and the defendant's default, and affidavits proving all assignments of the debt. The bill also requires the plaintiff or

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<sup>17</sup> See *Unifund Ccr Partners v. Youngman*, 932 N.Y.S.2d 609,610 (App. Div. 4th Dept. 2011) (stating that affiant must have personal knowledge of business practices or procedures sufficient to establish how and by whom account documents are made and kept).

plaintiff's attorney to attest that based on reasonable inquiry, the statute of limitations has not expired.

- Applications for default judgments in consumer debt collection actions should include an affirmation by the plaintiff's attorney that that the attorney has reviewed the documentary evidence in support of the application and that it satisfies pertinent evidentiary and other legal requirements, as is the case with foreclosures.
- Because consumer debt collection actions do not involve "claim[s] . . . for a sum certain," entry of default action should occur following judicial inquest – either by hearing or on the papers submitted by the plaintiff.

Thank you for the opportunity to comment.

Sincerely,



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