



New Economy Project

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May 30, 2014

By e-mail

John W. McConnell, Esq.
Office of Court Administration
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rulecomments@nycourts.gov

RE: Proposed reforms relating to consumer credit collection cases

Dear Mr. McConnell:

Thank you for the opportunity to comment on the proposed reforms relating to consumer credit collection cases. New Economy Project strongly supports the proposed rules and makes some recommendations that we believe will strengthen the proposed reforms.

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 and have spoken to thousands of people aggrieved by unfair, deceptive, and abusive debt collection practices. These practices have caused New Yorkers profound harm, particularly in lower-income communities and communities of color.

Debt collectors, especially debt buyers, routinely collect on debts about which they have little or no documentation or other basic information. One of their worst tactics involves 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.

New Economy Project strongly supports the proposed court rules because they would help prevent debt collectors from routinely violating the due process rights of hundreds of thousands of New Yorkers each year. The proposed reforms make explicit *what is already required of all plaintiffs by law* and echo those that OCA has already implemented in the mortgage foreclosure

context to curb robo-signing. By enacting the proposed changes, OCA would set a national standard for due process protections in debt collection lawsuits.

In its Memorandum describing the proposed rules, OCA states that the reforms would “prevent unwarranted default judgments and ensure a fair legal process.” We are confident that the proposed changes would further these goals. We strongly support those aspects of the proposed rules that would:

- **Prevent debt buyers from obtaining default judgments using “robo-signed” affidavits based on hearsay.** New York law requires all plaintiffs to submit an affidavit of facts based on *personal*, or firsthand, knowledge when applying for a default judgment. Debt buyers routinely flout this requirement by submitting robo-signed affidavits in which they claim, based on a review of their books and records, 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. However, debt buyers obtain little to no documentation about the debts they purchase, and their records virtually never contain any basis to support such assertions. Nor do debt buyers have the requisite firsthand knowledge of these alleged facts; rather, it is the original creditor, and only the original creditor, that has firsthand knowledge of the facts and is in the proper position to testify about them. The proposed reforms would prevent debt buyers from continuing to evade this fundamental evidentiary requirement, by requiring them to submit an affidavit of facts from the original creditor when applying for a default judgment.
- **Help to address the problem of “sewer service” and level the playing field for unrepresented New Yorkers.** The proposed expansion to courts outside New York City of the “additional notice” requirement under 22 NYCRR § 208.6(h) would help to ensure that more New Yorkers receive notice that they have been sued. The proposed adoption by all courts of certain user-friendly forms – namely, an answer form with a simple checklist of possible defenses and a form affidavit that explains, in layman terms, what a defendant needs to tell the court when seeking to vacate a default judgment (“Affidavit in Support of Order to Show Cause”) – would help the 98% of defendants across the state who are unrepresented in debt collection lawsuits.

New Economy Project also makes the following recommendations to strengthen the proposed rules:

1. **Strengthen the provisions relating to chain of title.** The proposed form affidavits require that the *Debt Buyer Plaintiff* attach “[t]rue and correct copies of all written assignments of the Account” to its Affidavit of Facts and Purchase of Account. While we strongly endorse the concept of requiring debt buyers to establish ownership of the debt

as a condition of obtaining a default judgment, we see two fundamental problems with the rule as drafted:

- a. Currently, when debt buyers include in their application for a default judgment a copy of a bill of sale or assignment, *it does not refer to the specific account on which the debt buyer is seeking a default judgment*. Without reference to the specific account being sued on, any bill of sale or assignment indicates only that *some* portfolio of debts was bought and sold on a particular date, and has no probative value with respect to the account at issue. For this reason, we recommend that the rule be amended to require documentation that *the specific account being sued on* was part of the sale or assignment. (See, e.g., *CACH LLC v. Fatima*, 936 N.Y.S.2d 58 (Dist. Ct. Nassau County 2011) (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.”); *Kedik*, 890 N.Y.S.2d 230 (plaintiff must proffer admissible evidence that original creditor “assigned its interest *in defendant’s debt*”) (emphasis added).)
 - b. The proposed rule would require the debt buyer plaintiff to attach all the prior bills of sale to its own affidavit. However, the Debt Buyer Plaintiff has personal knowledge only of any sale or assignment to which it was a party, and not to any prior sale or assignment to which its predecessor(s), *i.e.*, Debt Seller(s), would have been a party. The Debt Seller, and not the Debt Buyer Plaintiff, is the proper entity to attest to the authenticity of any written assignment related to a prior sale. To comply with evidentiary law, each Debt Seller should be required to attach to its affidavit a copy of the bill of sale or assignment, together with proof that the account at issue was part of that sale or assignment.
2. **Refer to the person sued as “Defendant,” not “Debtor.”** We recommend referring to the person sued as “Defendant,” not “Debtor,” throughout the form affidavits. In our experience advising and representing thousands of New Yorkers who must seek to vacate default judgments on alleged debts, many people sued are not in fact “debtors” because the alleged debt arose from identity theft or mistaken identity, or was already paid or discharged in bankruptcy. It would therefore be more appropriate and more accurate to refer to the person sued simply as “Defendant.”
 3. **Require the Affidavit of Non-Expiration of Statute of Limitations to be submitted by the plaintiff’s attorney and clarify the language.** While we strongly support this proposed reform, we believe that it should require an affirmation submitted by the

plaintiff's attorney, as it requires legal analysis to determine the applicable statute of limitations and whether that statute of limitations has expired. In addition, we believe that a cause of action can accrue in only one state (though the laws of multiple states may apply). For the sake of clarity and accuracy, we recommend that the second paragraph be amended to read as follows:

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

4. **Clarify the defenses on the Answer form.** There seems to be an inadvertent omission from the written answer form (Exhibit C to OCA's proposed reforms), as it does not include "I do not owe this debt" as a defense, although this is listed as a possible defense on the Order to Show Cause Information Sheet on Defenses. We also recommend modifying the language for defenses number eight and nine, which refer to licensing, so that they may apply to any other municipality that currently requires debt collectors to be licensed (such as Buffalo) or that may adopt such a requirement in the future.
5. **Clarify the language on the form Affidavit in Support of Order to Show Cause.** We recommend the following changes to this form:
 - a. *Paragraph two, "Service."* When seeking to vacate a judgment for lack of personal jurisdiction, a defendant must do more than make a conclusory statement that she was not served: the defendant must specifically refute the process server's assertions set forth in the Affidavit of Service. Unfortunately, due to budget cuts, many litigants do not have immediate access to the affidavit of service as the files are in archives and take months to retrieve. To address these issues, we recommend adding the following language to this section:

" __ c) I have read the Affidavit of Service, and I disagree with it because: _____
__ d) I requested the Affidavit of Service from the court, but it was not available."
 - b. *Paragraph three, "Excusable Default."* We recommend eliminating any "excuses" that may not suffice under New York law as "reasonable excuses" for failing to appear, such as "I don't owe the money" or "I receive exempt income." Also, so that the form does not discourage defendants from supplementing any checked-off excuse with additional explanation, we recommend changing "Other Explanation" to "Additional or other explanation."

c. *Order to Show Cause Information Sheet on Defenses.* As with the Answer form, we recommend modifying the language for defenses number nine and ten, which refers to licensing, so that it may apply to any municipality that currently requires debt collectors to be licensed or may adopt such a requirement in the future.

6. **Make the proposed reforms applicable to Supreme Court as well.** We are concerned that if the proposed reforms do not also apply in Supreme Court, creditors and debt buyers will simply “forum shop” and file lawsuits only in that forum, thereby denying those defendants the fundamental protections afforded defendants sued in other New York courts.

New Economy Project also believes that the courts should establish a specialized part dedicated to handling some or all aspects of consumer credit actions, including the review of default judgments. At the very least, New Economy Project believes that **thorough training of court clerks** will be critical to the successful and effective implementation of the proposed reforms. This is essential to ensure that all default judgment applications in debt collection lawsuits meet the new requirements and that clerks make the user-friendly forms available to *pro se* defendants as appropriate.

Finally, in addition to strengthening the proposed reforms, New Economy Project recommends that OCA implement **a rule requiring attorney affirmations in debt collection lawsuits**, similar to the attorney affirmations that OCA previously required in mortgage foreclosure actions. Like mortgage foreclosure actions, debt collection lawsuits – especially those filed by debt buyers – have been fraught with such problems as robo-signed affidavits and affidavits that falsely attest to the affiant’s personal review of the relevant documents and records. The foreclosure rule helped curb robo-signing and other fraudulent practices in the foreclosure context, and should be implemented in the debt collection context as well.

Thank you for the opportunity to comment.

Sincerely,

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May 29, 2014

BY EMAIL

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Comments of Legal Services NYC In Support of The
Proposed Reforms Relating To Consumer Credit Collection Cases

Dear Mr. McConnell:

In response to the request for comments by the Office of Court Administration on proposed rules governing consumer credit collection actions published on April 30, 2014, please accept the following comments from Legal Services NYC ("LSNYC").

Legal Services NYC fights poverty and seeks justice for low-income New Yorkers. For more than 40 years, we have challenged systemic injustice and helped clients meet basic needs for housing, access to high-quality education, health care, family stability, and income and economic security. LSNYC is the largest civil legal services provider in the country, with deep roots in all of the communities we serve. Our neighborhood-based offices and outreach sites across all five boroughs help more than 60,000 New Yorkers annually.

Legal Services lawyers provide full representation to defendants in consumer cases in the New York civil courts and legal advice on consumer matters to New Yorkers who we do not represent in court. We also work with the court-sponsored CLARO program in which volunteer lawyers provide limited help to *pro se* litigants in consumer credit collection cases.

We support the proposed reforms because they contain significant, concrete changes that will strengthen the due process rights of civil litigants and will combat widespread problems in consumer collection suits: insufficient proof of the amount of the alleged debt, an inability to prove ownership of the debt (standing), sewer service, and the exploitation of *pro-se* litigants' lack of sophistication and familiarity with court processes and requirements.

The Proposed Rule Changes Will Help The Courts Ensure That Default Judgments
Are Granted Only When Plaintiffs Can Substantiate Their Claims

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Legal Services NYC supports the proposed amendments to the Court rules requiring more detailed and claim-specific documentation and affidavits from creditors in support of their default judgment applications.

Plaintiffs in consumer credit cases, both original creditors and debt buyers, routinely bring cases when they lack documentation to substantiate their claims. Litigants in these cases, unfortunately, often reach our offices after a default judgment has been granted. We typically find the evidence submitted in support of the default judgment application to be insufficient to determine the validity of the claims. Indeed, we often secure vacatur of such judgments and then demand from plaintiff's counsel the documentation substantiating the claims. These plaintiffs sometimes are unable to provide any evidence whatsoever in support of claims on which they previously procured judgments on default.

The consequences resulting from entry of default judgments on low-income clients cannot be overstated, as is demonstrated from just a sampling of representative client experiences:

- *Mr. R. is a father of two who realized he had been sued only after he received a garnishment notice. The plaintiff, a credit card company, had obtained a default judgment against him almost seven years earlier. LSNYC obtained the court file, and Mr. R. confirmed that he did not acknowledge the alleged credit card debt, and neither he nor his wife were served or recognized the description of the person allegedly served with the complaint. The documents submitted in support of the default judgment application revealed that the default affidavit was prepared before the date of alleged service, was prepared by the lawyers' office even though the complaint was unverified, and sought an amount inconsistent with the amount sought in the complaint. Mr. R. was successful in challenging the judgment and dismissing the case, but lost 10% of his income due to garnishment for months before finding representation.*
- *Mr. Y is a low-wage earner with three children. He contacted LSNYC after discovering his bank account was frozen. Upon investigation, it became clear that the default was for a credit card debt that Mr. Y never had, and the plaintiff sued the wrong party altogether. LSNYC was successful in vacating the default judgment against Mr. Y and releasing the bank account. Yet, without setting forth real proof, plaintiff caused tremendous harm by obtaining a default judgment against the wrong person. Minimal due diligence would have easily revealed that our client, Mr. Y., was not the same Mr. Y. that plaintiff intended to sue.*
- *Mr. B. is a low-wage earner who was fortunate to be selected in a low-income housing lottery at the same time that he was facing a prohibitive rent increase at his home. Mr. B. was nearing retirement age and was certain that moving into low-income housing would offer him the stability he needed as he faced living on a fixed income. Unfortunately, Mr. B. did not get the low-income housing spot because his credit report, which otherwise reflected an excellent credit history, indicated he defaulted in a debt collection action. Mr. B., as far as he knew, never had any debt. He sought help from LSNYC, and discovered that the alleged debtor was a different person with a similar name. Nonetheless, the debt collector had already obtained a default judgment against Mr. B with inadequate proof. LSNYC is now taking steps to vacate the default judgment, but Mr. B lost the opportunity to obtain the low income housing on which his retirement plan depended because of the blemish on his credit report that resulted from an improperly-issued default judgment.*
- *Mr. V. is a young man who lived with his father. In 2013 his sister added him to her bank account to assist her after she was injured on the job. She thought nothing of adding her brother*

to her account because she trusted him and he had no debt issues. But when Mr. V.'s name was added, her account was then frozen because of a 2011 default judgment against him that he did not know about. The money in Mr. V.'s sister's account was child support that she had intended to use for her son's tuition, and she requested that the freeze be lifted. The creditor opposed her request and she was unable to pay her son's tuition on time. Mr. V. then sought legal assistance and a review of the file showed that the plaintiff claimed to have served his co-tenant. But Mr. V. lived with an elderly man and the affidavit of service described his co-tenant as a young woman. With LSNYC's help, the default judgment was vacated and the family's assets released.

Requiring more evidence in support of default judgment applications will also help prevent multiple plaintiffs suing on the same debt, which is a problem that we have observed. In 2007, one of our clients settled a case in state court only to be sued again on the exact same debt by another debt buyer. In United States of America v. Steven Goldberg, Ind. #09 CR 80030 (S.D. Florida 2009), a debt buyer pled guilty to selling over 85,000 credit card and auto loan debts to other debt buyers even though he did not own the accounts.

The Expansion Of New York City's Notice Rule Should Help Reduce Default Rates Against People Who Were Not Properly Served

New York City's civil court rule, 22 NYCRR § 208.6(h), has made some headway in reducing the default rate in New York City civil courts. In the example of Mr. R described above, the default was obtained before those rules were implemented. Had he received notice of the lawsuit he might have been able to successfully defend it at the time it was brought. The process server in that case had been fined by the DCA for fabricating affidavits and the case was dropped because he would not appear for the traverse hearing.

Statistics about the New York City civil court docket confirm that this is not an isolated problem. In less than two years, the 26 most active debt buyers filed almost a half a million collection suits in New York City.¹ In 81% of these cases, the debt buyer won without having to present evidence of ownership or the amount owed.² These high default rates are directly tied to the problem of defective process service, because many of the defendants who fail to defend these collection actions were not properly served and were unaware of the pendency of a collection action against them.

We therefore support the OCA's proposed rule, which will extend the reach of 22 NYCRR § 208.6(h) to courts outside New York City. It will provide an additional failsafe to prevent entry of default judgments against parties who do not know they have been sued.

The Proposed Pro-Se Court Forms Will Help Litigants Assert Their Rights

While Legal Services NYC provides full representation to some litigants, as the OCA memorandum notes, 98% of defendants in consumer credit collection cases are not represented. The forms used in New York City Courts provide a valuable service to those people who cannot obtain legal help. We therefore support the expanded use of those forms to other parts of the state and to Supreme Court, and also suggest that they be translated into Spanish so that they are more accessible to a broader group of people.

¹ The Legal Aid Society et al., *Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers* at p. 1 (May 2010).

² *Id.* at 8.

In conclusion, Legal Services NYC fully supports all three of the proposals for reform in consumer collection cases. Each proposal contains specific and important changes that will address common problems in consumer collection cases. The changes will help ensure that default judgments are granted only when plaintiffs: have standing to sue, have evidence to prove their claims and have served defendants properly. The proposals also help *pro-se* litigants in their efforts to defend themselves in consumer collection actions. These proposed reforms safeguard a fair legal process by requiring the plaintiff to adequately substantiate their claims **before** obtaining a default judgment, and prevent the unnecessary strain on judicial resources that results from improperly obtained default judgments.

Respectfully Submitted,

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May 30, 2014

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RE: Proposed Reforms Relating to Consumer Credit Collection Cases

Dear Mr. McConnell:

The Legal Aid Society (Legal Aid) is grateful for the opportunity to provide comments on the April 30, 2014 proposed reforms by the Office of Court Administration (OCA) relating to consumer credit collection cases. Legal Aid strongly supports the proposed court rules, subject to the suggestions below, and believe that they provide much needed and long overdue consumer protections for New Yorker's. We commend the court system for proposing to require Creditors and Debt buyers to provide basic proof when seeking default judgments and to expand statewide court procedures that have proven to be successful in New York City.

Legal Aid is the oldest and largest legal services provider for low-income families and individuals in the United States. Annually, the Society handles some 300,000 cases and legal matters for low-income New Yorkers with civil, criminal and juvenile rights problems, including more than 43,000 individual civil matters as well as law reform cases

which benefit some 2 million low income families and individuals. Through a network of sixteen neighborhood and courthouse-based offices in all five boroughs and 23 city-wide and special projects, the Society's Civil Practice provides direct legal assistance to low income individuals.

Our support for the proposed reforms is based upon our extensive work with individual clients, communities, and organizations that assist low-income consumers. Legal Aid's consumer law practice regularly represents and assists low-income consumers who are the victims of unscrupulous creditors and debt buyers who commence lawsuits and seek default judgments with minimal information and documentation. The proposed rules will substantially reduce the epidemic of improperly obtained default judgments and growth of "sewer service," while easing the challenges faced by unrepresented litigants in navigating the court system in consumer debt lawsuits.

We support the proposal to require Plaintiff's seeking a default judgment in a consumer credit case to provide affidavits by original creditors, assignees, and debt buyer-plaintiffs, and proof of the written agreement and assignments. Debt collection lawsuits in New York account for eight out of ten default judgments that are entered.¹ In 90 percent of debt buyer lawsuits, an employee of the debt buyer with no connection to the original creditors, fraudulently claims facts that only the original creditor could possibly know.² The failure of creditors and debt buyers to maintain and produce information and documentation when seeking a default judgment has been a problem illustrated in many studies.³ In our

¹ New Economy Project, *The Debt Collection Racket in New York; How the Industry Violates Due Process and Perpetuates Economic Inequality* (June 2013).

² See NEP Report at 3.

³ The Urban Justice Center, Community Development Project, *Debt Weight: The Consumer Credit Crisis in New York City and its Impact on the Working Poor*; National Consumer Law Center, *The Debt Machine: how the Collection Industry Hounds Consumers and Overwhelms Courts* (July 2010). Legal Aid Society et al., *Debt Deception: How debt buyers abuse the legal system to prey on lower-income New Yorkers* (May, 2010).

experience the vast majority of cases debt buyers routinely obtain default judgment without proper proof that they own the account that is being sued upon.

Legal Aid believes the proposed statewide expansion of 22 § NYCRR 208.6(h) would be beneficial in reducing the epidemic of sewer service in consumer credit actions. The requirement of an additional notice of lawsuit mailed by the court, would make sure that the responsibility of ensuring that Defendants are provided notice of the lawsuit is not left only in the hands of the process server. The intentional failure to provide notice of a lawsuit has drastic and severe consequences to consumers.

Legal Aid is routinely approached by low-income consumers who discover that a default judgment has been entered against them when their wages are garnished or bank accounts are frozen. We support the statewide expansion of the use of pro se forms currently used by New York City Civil Courts. There is a crucial need for assistance to pro se litigants in consumer credit cases, as only two percent of New Yorkers sued have legal representation.⁴ Our client's experience in using nearly identical forms has been that they greatly assist pro se litigants in raising common defenses and navigating the court system.

Though these rules, if enacted, would significantly reduce some of the abusive consumer credit litigation practices and provide a more level playing field for pro se litigants who lack legal resources, we have several suggestions that would improve the proposed rules.

Legal Aid believes that the court systems proposed reforms should also be applicable to the New York State Supreme Courts. Currently the proposal only refers to the rules of the New York City Civil Court, City Courts outside New York City, and District

⁴ New Economy Project, *The Debt Collection Racket in New York: How the Industry Violates Due Process and Perpetuates Economic Inequality* (June 2013).

Courts. In consumer credit cases, the amount sought by Plaintiffs regularly exceed the \$15,000 monetary jurisdictional cap for District Courts⁵, and the \$25,000 cap set for New York City Civil Courts⁶ and New York State County Courts⁷. Therefore, the proposed reforms should also apply to consumer credit cases in the Supreme Courts.

Legal Aid recommends that the proposed reforms should not be limited to consumer credit cases, but should also be applicable to medical debt, breach of lease cases, and other consumer debt lawsuits. Consumers facing medical debt and breach of lease collection lawsuits in New York face the same abusive debt collection practices that are present in consumer credit cases. Listed below are several suggested changes to the affidavits, notice and forms.

Exhibit A: Proposed Affidavits for Default Judgment

Affidavit of Facts by Original Creditor

Paragraph one of the affidavit should replace the general reference to “Plaintiff’s records” with the specific identity of the record being referenced. Creditors often attach multiple records to their pleadings, including agreements, amendments, account statements, and correspondence. The affiant’s attestation of personal knowledge should not be limited to the Original Creditor’s procedures, but should also apply to affiant’s claim that the specific records “were made in the regular course of business”, “were made at or near the time of the events recorded”, and “was the regular course of such business to make....”.⁸

When a creditor seeks judgment on an account stated cause of action, it should be required to provide a true and correct copy of the final account statement it alleges was sent

⁵ Uniform District Court Act § 201.

⁶ New York State Constitution Art. 6, § 15(b); New York City Civil Court Act § 202.

⁷⁷ New York State Constitution Art. 6, 11(a).

⁸ CPLR § 4518(a).

to the Defendant. An account stated cause of action requires an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due.⁹ The agreement may be implied where a Defendant retains bills without objecting to them within a reasonable period of time, or makes partial payments on the accounts.¹⁰ Therefore, the creditor should be required to present the final account statement to establish its prima facie entitlement to the judgment in the amount it alleges.

Paragraph three of the affidavit should be amended to require additional facts regarding the account statements that the creditor sent to Defendant, including the method and date of delivery, and the amount claimed on the statement. These facts are essential because the delivery and retention of the account statements without objection are the key elements on an account stated claim.

Paragraph three of the affidavit should be modified from its current language “Debtor retained the account statement without objection” to state that “the mailing was not returned and there is no record of an objection.” The creditors would not possess personal knowledge that the account statements were retained by the Defendant and such a claim would constitute impermissible hearsay.

Affidavit of Facts and Sale by Original Creditor (Debt Buyer Actions)

The original creditor should be required to state which State it resides in for purposes of CPLR § 202. When a non-resident sues on a cause of action accruing outside New York, CPLR § 202 requires the cause of action to be timely under the limitations period of both New York and the jurisdiction where the cause of action accrued. Under

⁹ *Interman Indus. Products, Ltd. v. R.S.M. Electron Power, Inc.*, 371 N.Y.S.2d 675 (NY 1975).

¹⁰ *Ruskin, Moscou, Evans & Faltischeck, P.C. v. FGII Realty Credit Corp.*, 644 N.Y.S.2d 206 (NY 1996); *Engel v. Cook*, 605 N.Y.S.2d 839.

CPLR § 202, a Plaintiff is a resident of the state where the cause of action accrues.¹¹ Debt buyers as assignees are not entitled to stand in a better position than that of its assignor and they routinely initiate collection lawsuits on accounts that have passed the statute of limitations period.¹²

Similar to the Affidavit of Facts by Original Creditor, paragraph one of the affidavit should replace the general reference to “Original Creditor’s records” with the identity of the specific records. The affiant’s attestation of personal knowledge is limited to its claims pertaining to court procedures. Plaintiffs should be required to attest with personal knowledge which specific records were made in the regular course of business at or near the time of recorded event, and was the regular course of Plaintiff’s business to make.¹³

Our three recommendations stated earlier for account stated causes of action, in the Affidavit of Facts by Original Creditor, should also be applied to the Affidavit of Facts and Sale of Accounts by Original Creditor.

Affiant should be required to attach a copy of the assignment contract it assigned, which is referred to in paragraph four. The assignment contract or supplemental proof of assignment must identify Defendant’s account. Though the assignment contract is currently required to be attached to the Affidavit of the Debt Buyer Plaintiff, it should rather be attached to the affidavit of the assignor who attests to sale of the account.

Affidavit of Purchase and Sale of Account by Debt Seller (Debt Buyer Actions)

Paragraph one of the affidavit should replace the general reference to “Debt Seller’s records” with the identity and date of the specific records. It is important to know whether the debt seller is referring to the records of purchase, records of sale, or other records.

¹¹ *Portfolio Recovery Associates, LLC v. King*, 901 N.Y.S.2d 575 (NY 2010).

¹² *Id.*

¹³ CPLR § 4518(a).

Furthermore, the affiant's attestation of personal knowledge should not be limited to just the debt seller's procedures, but should also be required in their claims of how and when the records were made.

As stated earlier in regards to the Affidavit of Sale by Original Creditor, affiants should be required to attached a copy of the assignment contract and all exhibits that are referenced. The assignment contract or supplementary exhibits must identity Defendant's account. It should be attached to the affidavit of the assignor, rather than the Plaintiff-Debt Buyer.

Affidavit of Facts and Purchase of Account by Debt Buyer Plaintiff (Debt Buyer Actions)

Paragraph one of the affidavit should replace the general reference to "Debt Seller's records" with the identity of the specific records. The debt seller should be required to state the identity and date of the specific record. As stated earlier, the attestation of the affiant's personal knowledge should not be limited to the debt seller's procedures, but also to its claims that the specific records were made in the regular course of business, at or near the time of the events recorded, and was the regular course of Plaintiff's business to make.¹⁴

The written assignments required in paragraph three should specifically mention the account being assigned and include all attachments and exhibits. As stated earlier, each written assignments should be attached to the affidavit of the assignor who attests to its assignment.

Affidavit of Non-Expiration of Statute of Limitations (All Actions)

The Plaintiff should be required to specify which limitations period is applicable in light of CPLR § 202. The language in paragraph two of the affidavit should be simplified to state the following:

¹⁴ *Id.*

“The cause(s) of action accrued on _____ (date of default). The applicable statute of limitations for the cause(s) of action asserted herein is/are _____ (years) because the cause of action accrued in New York / _____ (other jurisdiction where cause of action accrued, if applicable).”

Exhibit B. Proposed Rule Relating to Additional Notice of Consumer Credit Action

The Rule should clearly specify that if the additional notice is returned as undeliverable to the court, no default judgment should be processed in accordance with CPLR § 3215(a). The current language of the Rule simply states that “No default judgment based on defendant’s failure to answer shall be entered unless there has been compliance with this subdivision...”

Exhibit C: Written Answer Consumer Credit Transaction

The reference to the Civil Court in the caption to the Written Answer and Affidavit in Support of Order to Show Cause should be corrected, as the forms would be used in other courts statewide.

The Written Answer should include the defense of “I do not owe this debt.” This defense differs from other listed on the Answer, such as identity theft, mistaken identity, disputing the amount, or claiming to have paid the debt.

Defenses eight and nine in the Written Answer relating to debt collection licenses incorrectly claim to be only applicable to New York City. They should clarify that the City of Buffalo also requires debt collection licenses.¹⁵

Exhibit C: Order to Show Cause

Paragraph two of the Affidavit in Support of Order to Show Cause (“OSC”) should include an option to state that the Defendant has not had an opportunity to review the affidavit of service and include space for them to dispute the claims in the affidavit of

¹⁵ Buffalo, N.Y., Code § 140-1

service or in the alternative request provision of an affidavit of service in Plaintiff's opposition. Legal Aid's experience has been that the New York City Court Administration is extremely backlogged in filing affidavits of service that have been submitted by Plaintiff. Defendants are unable to determine the specific facts of the alleged service, and unable to refute the specific claims of service. When Defendants seek to vacate a default judgment for lack of personal jurisdiction, only a specific and detailed denial of service can rebut the process server's affidavit of service and render it non-conclusive.¹⁶ Paragraph two of the affidavit permits Defendants to merely denial service, which the court has repeatedly held is insufficient to rebut the inference of validity granted to the affidavit of service.¹⁷

Paragraph three of the Affidavit in Support of OSC should exclude the excuse of "I don't owe the money" and "I receive exempt income...". Our experience in submitting numerous OSC is that it is highly unlikely the courts would consider such claims to be a reasonable excuse for failure to respond to summons or to appear in court. In fact, such a claim may be detrimental to the consumer, who may choose not to raise other more meritorious excuses for their failure to appear.

Paragraph six of the affidavit currently states, "I ask permission to serve these papers in person." This language should be changed to clarify that the Defendant seeks permission to be the person to serve the papers and not that the papers be served in person.

The Legal Aid Society recognizes that the proposed reforms are an extremely important step in furthering consumer protections and combating the growth in abusive debt collection litigation practices. We believe that our suggestions would further improve the

¹⁶ *De Zego v. Donal F. Bruhn, M.D. P.C.*, 501 N.Y.S.2d 801(1986).

¹⁷ *Bank of New York v. Samuels*, 968 N.Y.S.2d 93 (2d Dept' 2013); *Rockland Bakery Inc. v. M.M. Baking Co., Inc.*, 923 N.Y.S.2d 572 (2d Dep't 2011); *Electric Ins. Co. v. Grajower*, 681 N.Y.S.2d 667 (3d Dep't 1998); *In re de Sanchez*, 870 N.Y.S.2d 24 (1st Dep't 2008).

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court systems proposals, which we strongly support. The Society applauds the court systems proposed reforms and support their speedy implementation. Thank you for the opportunity to comment.

Respectfully submitted,



Tashi T. Lhewa, Esq.
The Legal Aid Society
Queens Neighborhood Office
120-46 Queens Blvd.
Kew Gardens, NY 11415



NEW YORKERS FOR RESPONSIBLE LENDING

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

May 30, 2014

By e-mail

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

RE: Proposed reforms relating to consumer credit collection cases

Dear Mr. McConnell:

Thank you for the opportunity to comment on the proposed reforms relating to consumer credit collection cases. The undersigned members of the New Yorkers for Responsible Lending (NYRL) coalition applaud the Office of Court Administration (OCA) for issuing strong proposed court rules to address the debt collection industry's longstanding abuse of the courts, which has caused serious harm to countless New Yorkers. We also make several recommendations that we believe will strengthen the proposed reforms. We request that OCA deems this comment letter as constituting 42 separate letters for the purpose of counting the total comments received on this proposal.

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 more than 160 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.

NYRL strongly supports the proposed reforms because they would help prevent debt collectors from routinely violating the due process rights of hundreds of thousands of New Yorkers each year. The proposal makes explicit *what is already required of all plaintiffs by law* and echoes those that OCA has already implemented in the mortgage foreclosure context to curb robo-

signing. By enacting the proposed changes, OCA would set a national standard for due process protections in debt collection lawsuits.

The proposed reforms are critically needed. 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, especially debt buyers, routinely engage in unfair and deceptive tactics to collect on debts about which they have little or no documentation or other basic information. One of their worst tactics involves 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.

In its Memorandum describing the proposed rules, OCA states that the reforms would "prevent unwarranted default judgments and ensure a fair legal process." We are confident that the proposed changes would further these goals. We strongly support those aspects of the proposed rules that would:

- **Prevent debt buyers from obtaining default judgments using "robo-signed" affidavits based on hearsay.** New York law requires all plaintiffs to submit an affidavit of facts based on *personal*, or firsthand, knowledge when applying for a default judgment. Debt buyers routinely flout this requirement by submitting robo-signed affidavits in which they claim, based on a review of their books and records, 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. However, debt buyers obtain little to no documentation about the debts they purchase, and their records virtually never contain any basis to support such assertions. Nor do debt buyers have the requisite firsthand knowledge of these alleged facts; rather, it is the original creditor, and only the original creditor, that has firsthand knowledge of the facts and is in the proper position to testify about them. The proposed reforms would prevent debt buyers from continuing to evade this fundamental evidentiary requirement, by requiring them to submit an affidavit of facts from the original creditor when applying for a default judgment.
- **Help to address the problem of "sewer service" and level the playing field for unrepresented New Yorkers.** The proposed expansion to courts outside New York City of the "additional notice" requirement under 22 NYCRR § 208.6(h) would help to ensure that more New Yorkers receive notice that they have been sued. The proposed adoption by all courts of certain user-friendly forms – namely, an answer form with a simple checklist of possible defenses and a form affidavit that explains, in layman terms, what a defendant needs to tell the court when seeking to vacate a default judgment ("Affidavit in

Support of Order to Show Cause”) – would help the 98% of defendants across the state who are unrepresented in debt collection lawsuits. We also support the requirement of an affidavit attesting that the statute of limitations has not expired.

NYRL also makes the following recommendations to strengthen the proposed reforms:

1. **Strengthen the provisions relating to chain of title.** The proposed form affidavits would require only that the *Debt Buyer Plaintiff* attach “[t]rue and correct copies of all written assignments of the Account” to its Affidavit of Facts and Purchase of Account. While we strongly endorse the concept of requiring debt buyers to establish ownership of the debt as a condition of obtaining a default judgment, we see two fundamental problems with the rule as drafted:
 - a. Currently, when debt buyers include in their application for a default judgment a copy of a bill of sale or assignment, *it does not refer to the specific account on which the debt buyer is seeking a default judgment*. Without reference to the specific account being sued on, any bill of sale or assignment indicates only that *some* portfolio of debts was bought and sold on a particular date, and has no probative value with respect to the account at issue. For this reason, we recommend that the rule be amended to require documentation that *the specific account being sued on* was part of the sale or assignment.
 - b. The proposed rule would require the Debt Buyer Plaintiff to attach all the prior bills of sale to its own affidavit. However, the Debt Buyer Plaintiff has personal knowledge only of any sale or assignment to which it was a party, and not to any prior sale or assignment to which its predecessor(s), *i.e.*, Debt Seller(s), would have been a party. The Debt Seller, and not the Debt Buyer Plaintiff, is the proper entity to attest to the authenticity of any written assignment related to a prior sale. To comply with evidentiary law, each Debt Seller should be required to attach to its affidavit a copy of the bill of sale or assignment, together with proof that the account at issue was part of that sale or assignment.
2. **Refer to the person sued as “Defendant,” not “Debtor.”** We recommend referring to the person sued as “Defendant,” not “Debtor,” throughout the form affidavits. In our collective experience advising and representing thousands of New Yorkers who must seek to vacate default judgments on alleged debts, many people sued are not in fact “debtors” because the alleged debt arose from identity theft or mistaken identity, or was already paid or discharged in bankruptcy. It would therefore be more appropriate and more accurate to refer to the person sued simply as “Defendant.”

3. **Make the proposed reforms applicable to Supreme Court as well.** We are concerned that if the proposed reforms do not also apply in Supreme Court, creditors and debt buyers will simply “forum shop” and file lawsuits only in that forum, thereby denying those defendants the fundamental protections afforded defendants sued in other New York courts.

NYRL also believes that the courts should establish a specialized part dedicated to handling some or all aspects of consumer credit actions, including the review of default judgments. At the very least, NYRL believes that **thorough training of court clerks** will be critical to the successful and effective implementation of the proposed reforms. This is essential to ensure that all default judgment applications in debt collection lawsuits meet the new requirements and that clerks make the user-friendly forms available to *pro se* defendants as appropriate.

Finally, in addition to strengthening the proposed reforms, NYRL recommends that OCA implement **a rule requiring attorney affirmations in debt collection lawsuits**, similar to the attorney affirmations that OCA previously required in mortgage foreclosure actions. Like mortgage foreclosure actions, debt collection lawsuits – especially those filed by debt buyers – have been fraught with such problems as robo-signed affidavits and affidavits that falsely attest to the affiant’s personal review of the relevant documents and records. The foreclosure rule helped curb robo-signing and other fraudulent practices in the foreclosure context, and should be implemented in the debt collection context as well.

Thank you for the opportunity to comment.

Sincerely,

Albany County Rural Housing Alliance, Inc.
ANHD
Bedford-Stuyvesant Community Legal Services
Brooklyn Cooperative Federal Credit Union
Buffalo Urban League
BWICA Educational Fund
CAMBA Legal Services
Central New York Citizens in Action, Inc.
Central New York Fair Housing Council
Consumer Justice for the Elderly: Litigation Clinic of St. John’s University School of Law
Cypress Hills Local Development Corporation
District Council 37 Municipal Employees Legal Services
Empire Justice Center
Fifth Avenue Committee
Grow Brooklyn
Housing Help Inc.

Housing Resources of Columbia County
JASA/Legal Services for the Elderly in Queens
The Legal Aid Society
Legal Services NYC
Legal Services NYC – Bronx
Long Island Housing Services, Inc.
Manhattan Legal Services
MFY Legal Services, Inc.
Nassau/Suffolk Law Services
Neighborhood Housing Services of New York City
Neighbors Helping Neighbors
New Economy Project
New York Legal Assistance Group (NYLAG)
New York Public Interest Research Group (NYPIRG)
New York StateWide Senior Action Council
Pratt Area Community Council
Queens Legal Services
South Brooklyn Legal Services
Staten Island Legal Services
SUNY Buffalo Law School’s Consumer Financial Advocacy Clinic
Syracuse University College of Law’s Securities Arbitration and Consumer Clinic
Teamsters Local 237
University Neighborhood Housing Program
Urban Justice Center’s Community Development Project
Westchester Residential Opportunities Inc.
Western New York Law Center



YISROEL SCHULMAN, ESQ.
President & Attorney-in-Charge

May 30, 2014

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

Submitted by email

Re: Comments on Proposed Reforms Relating to Consumer Credit Collection Cases

Dear Mr. McConnell:

The New York Legal Assistance Group (NYLAG) greatly appreciates the opportunity to comment on the proposed Office of Court Administration (OCA) reforms relating to consumer credit collection cases, announced by Chief Judge Lippman on April 30, 2014 ("Reforms"). We applaud Judge Lippman's efforts to remedy widespread abuse of New York consumers by creditors, debt buyers, and debt collectors, and offer our resounding support for these outstanding, and sorely needed, reforms. We submit these comments to explain the basis for our support, and to respectfully offer certain additional insights for OCA's consideration based on our extensive experience representing consumers in New York courts. We hope that OCA finds these comments helpful as you implement these critical Reforms.

NYLAG is a not-for-profit law office that provides free civil legal services to low-income New Yorkers who cannot afford private attorneys. NYLAG provides legal assistance to New York City's poor and near poor in the area of consumer debt, as well as government benefits, family law, immigration, disability rights, housing law, and special education, among others. In 2013, NYLAG served more than 76,000 individuals. NYLAG's Consumer Protection Project (CPP) represents and advises consumer debtors in debt collection lawsuits, and assists them in challenging abusive debt collection practices, combating identity theft, and repairing credit. NYLAG has broad experience with consumer law through its Consumer Protection Project and is the largest provider of free consumer law legal services in New York State, serving over 4,000 clients on consumer law matters in the past year alone. In partnership with the Unified Court System, CPP also supervises the Volunteer Lawyer for a Day - Consumer Credit Project in Bronx County and Queens County Civil Courts, through which NYLAG and volunteer attorneys assist and represent hundreds of pro se consumer debtors at court appearances. NYLAG's

Special Litigation Unit represents classes of individuals subject to unfair and deceptive debt collection practices.

Through this considerable experience representing New York City consumers, we have witnessed first-hand the devastating abuses that prompted OCA to announce the Reforms. Debt buyers, as well as original creditors, routinely bring cases *en masse* against consumers without adequate investigation or documentary support. Because of widespread sewer service—which remains a real problem despite OCA’s and others’ commendable efforts—many consumers are never properly notified of these suits. Plaintiffs then seek default judgments on the basis of robo-signed affidavits that are not based on personal knowledge and fall far short of established legal standards. These default judgments can ruin the lives of New Yorkers, causing them to lose access to their savings and their wages, destroying their credit, and impairing their ability to meet their basic needs and obtain employment and housing.

We applaud these Reforms, which emphasize for debt collection plaintiffs what has *always* been the law in New York: a default judgment cannot be obtained without establishing, through admissible evidence, all elements of a party’s claim as well as that party’s standing to assert it. We also commend OCA’s decision to expand outside New York City the additional notice requirement of 22 NYCRR § 208.6(h), which has helped diminish—though not eradicate—the effects of sewer service. Finally, we share OCA’s view that the “Do It Yourself” (DIY) forms available in the NYC Civil Court have improved the ability of *pro se* consumers to assert their rights through the legal process, and agree that use of those forms should be expanded throughout the State.

The first part of this letter sets forth the reasons we support these Reforms, drawn from our experience assisting consumer litigants for many years. The second part respectfully provides some limited suggestions, based on that same experience, for making the proposed affidavits and DIY forms more robust and thus improving their ability to achieve the aims Judge Lippman set forth in his April 30 address.

The Reforms Offer Critical Improvements To Protect Consumers From Abuse and Should Be Implemented.

Debt buyers and other creditors currently break the law. In short, the law states that to obtain a default judgment in New York, a plaintiff must submit (a) proof of service, in the form of an affidavit of service; and (b) “proof of the facts constituting the claim, the default and the amount due by affidavit made by the party.” C.P.L.R. § 3215(f). Under New York Law, all creditors, like plaintiffs in any court action, must submit proof through admissible evidence supporting all elements of their legal claims. The affidavits of merit submitted in support of default judgments, like any affidavit, must be made on the basis of personal knowledge of the facts. Moreover, debt buyers, or alleged assignees, bear the burden of proving that they have a

legal right to sue and must submit admissible evidence demonstrating that they are the rightful owners of the account on which they sue. *See, e.g., Citibank v. Martin*, 807 N.Y.S.2d 284 (N.Y. Civ. Ct. 2005).

In practice, debt buyers (and even original creditors) rarely fulfill these requirements. Instead, creditors file robo-signed affidavits in support of default judgments alleging personal knowledge of the facts and circumstances surrounding the action, when in fact the affiant has little or no knowledge of any of the facts and often does not even have access to the original account documents, and submit no proof at all of their standing to sue. Overburdened clerks routinely grant default judgments to debt buyers on the basis of these affidavits. However, if a debt buyer is subsequently challenged by a consumer to provide proof of facts to which it has sworn in its affidavit, and substantiate its chain of title, the debt buyer can rarely, if ever, do so.

The proposed reforms will help to eliminate, or at least reduce, granting of default judgments to creditors whose claims are based on unsubstantiated chains of assignment and unavailable, incomplete, or unreliable account information.

Unsubstantiated Chain of Title

Instead of submitting full documentation of chain of title to the account on which they sue, debt buyers often fail to submit a shred of evidence, or submit only a purported “Bill of Sale” that does not include any information about the individual defendant’s account and thus cannot establish standing. Nor do debt buyers attach any of the relevant terms and conditions governing the sale, which are of course critical, not only because they are part of the complete contract, but also because they frequently contain disclaimers regarding the accuracy of the account information that is provided by creditors to debt buyers. *See, e.g., Dalié Jiménez, Dirty Debts Sold Dirt Cheap*, HARVARD J. ON LEGIS. (forthcoming) (manuscript at 19, available at <http://ssrn.com/abstract=2250784>). It is well documented that many written assignment agreements (i.e., the “purchase and sale agreement”) disclaim the accuracy of the information transmitted from the original creditor to the debt buyer, *id.* at 25-26, yet, debt buyers consistently submit affidavits and sworn testimony that this account data is accurate and that they possess the requisite proof of their legal claims. The actual assignment agreement—not a generic, robo-signed bill of sale—is the best evidence of the assignment, particularly when its contents are in dispute, and debt buyers should be required to provide it. *See Schozer v. William Penn Life Ins. Co. of New York*, 84 N.Y.2d 639, 643-44 (Ct. App. 1994).

Debt buyers’ refusal to provide the actual assignment agreement and the courts’ failure to hold debt buyers to their standard of proof continues to have devastating effects on consumer litigants. *See Fritz v. Resurgent Capital Services, LP*, No. 11-CV-3300 FB VVP, 2013 WL 3821479 *1 (E.D.N.Y. June 24, 2013) (denying debt buyer Resurgent’s motion to dismiss case alleging that it routinely obtained default judgments on the basis of representation that it purchased and was the legal owner of hundreds of credit consumer accounts, when in fact, as Resurgent later conceded, it never purchased nor was the owner of those accounts).

Lack of Documentation of Debts

Creditors—debt buyers and often original creditors—rarely have true and correct copies of original account agreements and account statements. The result is that cases are brought against wrong individuals, or for amounts that are incorrect or have already been paid off. When the amounts sought are erroneously high, the injury to the consumer compounds over time, as the interest sought on top of the amount allegedly owed is often calculated at a rate well in excess of the criminal usury rate of 25%, and is not authorized by the original contract. Creditors frequently submit conflicting documentation where the interest rates and fees enumerated by the purported contract do not reflect the exorbitant interest rates and fees actually charged on the account statements.

Debt Buyers' Unlawful Practices Injure Vulnerable Consumers

The following NYLAG clients are just a few examples out of thousands of consumers injured by the practices described above:

Lucia, one of NYLAG's clients in the Bronx, 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 overturned after three court appearances in which the debt buyer never appeared, she lost her chance to work for the NYPD.

Similarly, NYLAG's client 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. Martina had been entirely unaware of this judgment, and even the existence of the lawsuit that resulted in the judgment, because she was never served in the action. Although Martina, with NYLAG's help, went to court immediately and has had the judgment vacated, she must now return to the development's waiting list.

Sebastien, an immigrant New Yorker who has worked for dozens of years as a truck driver, recently sought to withdraw money from his bank account to pay an insurance bill, but learned his account had been frozen by a creditor he had never heard of, based on a judgment in an action for which he was never served. He eventually learned that he had been sued for a debt he had already paid in full. Sebastien filed two pro se motions

which were both denied before filing a third motion represented by NYLAG. The debt buyer contacted NYLAG and offered to drop Sebastien's case in exchange for a mutual release. NYLAG advised Sebastien that he likely had a counterclaim based on sewer service, but Sebastien nonetheless signed the stipulation because he could not afford to take any chances in court—he was falling behind on his bills, and needed immediate access to his bank account and could not take the chance of the court denying his motion again.

NYLAG assisted Robert through the Queens County Civil Court Volunteer Lawyer for a Day Program who was being sued by a debt buyer for a debt that he already settled previously with a debt collector. The settlement payments were taken over the phone and directly debited from his bank account approximately a year before the filing of the current civil court case. The settlement included three large payments to the debt collector, which the parties agreed was in full settlement of the account. A year later, despite his settlement, he was sued by a debt buyer for the full balance of the debt and not accounting for any of the payments made. Robert sought to obtain reliable assignment documentation to determine when his account was allegedly sold by the original creditor to the debt buyer, but was unsuccessful. He was bewildered that it was legally possible that a settled debt, that was sold to a debt buyer, did not reflect any settlement payments he already made and that he had to take days off of work to resolve something that should not be allowed to happen.

Limited Revisions To The Reforms May Improve Their Ability To Protect Consumers

We reiterate our view that these reforms are critical to holding consumer debt plaintiffs to existing New York legal standards designed to protect consumers and all litigants. Based on our day-to-day “on the ground” experience assisting consumers in New York courts, and having observed the ways in which debt collection plaintiffs most frequently violate those standards, we offer the following suggestions for limited revisions to the proposed affidavits and forms, which we believe would help those affidavits and forms more fully achieve their intended purpose:

General

- (1) **Require Affidavits in Supreme Court.** We respectfully suggest that OCA require the use of the proposed form affidavits not just in the New York City Civil Court, City Courts outside New York City, and District Courts, but also in **Supreme Court** throughout the State. Specifically, OCA could require the form affidavits to be used in all consumer credit cases filed in Supreme Court (regardless of the amount in controversy), or, in the alternative, to cases where the amount in controversy is \$25,000 or less. If creditors can escape the new rules by filing in Supreme Court, it will encourage

them to forum shop. This will deprive consumers of the new protections and subject them to other hardships.

- (2) **Require attorney affirmations in debt collection lawsuits, similar to the attorney affirmations that OCA now requires in mortgage foreclosure actions.** Like mortgage foreclosure actions, debt collection lawsuits—especially those filed by debt buyers—have been fraught with such problems as robo-signed affidavits and affidavits that falsely attest to the affiant’s personal review of the relevant documents and records. The foreclosure rule helped curb robo-signing and other fraudulent practices in the foreclosure context, and should be implemented in the debt collection context as well.

Default Judgment Affidavits

- (3) **Clarify What Constitutes A Written Assignment:** We suggest clarifying the language of the affidavit to make clear what constitutes a complete “written assignment.” We applaud the much-needed proposal to explicitly require debt buyers to attach “[t]rue and correct copies of all written assignments of the Account” to their affidavits in support of default judgments. It is our experience, however, that when debt buyers are required to substantiate their chain of title at other points in proceedings—for example, in response to discovery requests and at summary judgment—the documents they pass off as such copies are woefully insufficient. Most debt buyers provide only a purported “bill of sale” that does not reference the debtor’s individual account, does not contain relevant terms and conditions (such as disclaimers of accuracy of records), and may not even be fully executed. These bills of sale virtually always refer to schedules, exhibits, or master agreements—sometimes called “Forward Flow Agreements”—that contain terms integral to the contract but which are not attached. Specifically, we suggest that the relevant sentence in the Affidavit of Facts and Purchase of Account by Debt Buyer Plaintiff (Debt Buyer Actions) include these italicized additions: “True and correct, *fully executed* copies of all written assignments of the Account, *including specific reference to the Account and all applicable terms and conditions of the assignment*, are attached to this affidavit.”
- (4) **Require Further Attestation of Personal Review.** We are concerned that the availability of the form affidavits—despite their more robust contents—may not effectively deter robo-signing. The ambiguity of the proposed affidavits (“I...have personal knowledge and access to Debt Buyer’s/Original Creditor’s books and records... relating to the account...”) may inadvertently contribute to this problem. To ensure that affiants have the personal knowledge that the law requires, we suggest requiring affiants to attest that they have **personally reviewed** records related to the account and to **specify which records** they reviewed.

(5) **Require Creditor Affidavits to Specify the Account Record or Records Relied on When Attesting to the Amount Currently Due.** The original creditor affidavit in debt buyer actions should specify which “electronic and other records” were transferred. Similarly, the original creditor affidavit for original creditor and debt buyer actions should distinguish between contractual interest and statutory interest.

(6) **Require Provision of Sufficient Information to Make Out Account Stated Claim.** We suggest that rather than attest that the “Debtor retained the account statement without objection,” which is likely beyond the personal knowledge of the affiant, that the language be changed to, “the statement was not returned as undeliverable and the Plaintiff/Original Creditor had no record that the account was disputed.” In addition, the proposed Affidavits of Fact by Original Creditors in both Original Creditor Actions and Debt Buyers contain a paragraph that must be included where the plaintiff seeks judgment on an account stated claim. To make out such a claim, the original creditor should be required to identify the **amount sought on the account stated statement, the date it was sent**, and attach the account statement giving rise to the account stated claim. *See, e.g., Bank of New York-Delaware v. Santarelli*, 491 N.Y.S.2d 980, 981 (Civ. Ct. Greene Co. 1985).

Additional Notice Requirement

(7) The additional notice of consumer credit actions can be effective in combatting defaults; however, we believe that the effectiveness of this notice can be strengthened to improve appearance rates. Our experience working with thousands of consumers indicates that most people feel so intimidated by litigation that they think that if they do not have an attorney they will lose. As a result, if they are unrepresented, they think there is no reason to appear in in the action and file an answer, especially if they must take time off work to appear. Thus, we suggest adding language to the notice making it clear to consumers that they can consult an attorney but that this is not required and the defendant **must appear, even if not represented by an attorney**. We further suggest that the plaintiff be required to send the defendant an **additional copy** of the summons and complaint with the notice before the plaintiff can enter a default judgment. Lastly, we suggest that the court include a list of **legal service providers** with the additional notice that is sent out to consumers, as is done in other contexts, to assist consumers in obtaining information on their crucial legal rights.

Proposed Answer

(8) **Include “I Do Not Owe This Debt” Defense:** We suggest including the defense of “I do not owe this debt,” which was included in the prior forms and is in the OTSC proposed answer form.

- (9) **Make the standing and general denials more understandable:** These defenses are very difficult for many *pro se* defendants to understand. To make them more understandable, we suggest that, next to the standing defense, the form state in parentheses the explanation “I do not recognize this plaintiff.” Next to the general denial, we suggest that the form state in parentheses, “I do not recognize this debt.”

Proposed Order To Show Cause Form

- (10) **Create Separate Affidavits in Support of OTSC for Failure to Answer and Missing a Court Date.** We are concerned that the proposed form will create confusion for *pro se* litigants and court clerks, and urge OCA to help ensure that the forms elicit the facts that would be necessary for the court to make a determination on the motion. For example, the proposed form reads as if it cannot be used by a litigant who initially answers the lawsuit but subsequently misses a court date. Further, we are concerned that many of the excuses enumerated would likely not be determined reasonable by a judge for a person who did not answer a lawsuit in the first instance, at least not without providing further explanation. We believe these problems could be alleviated by having **one form designated for litigants who missed a court date**, including the possible “excuses” for default enumerated on the proposed form, as well as a **separate form for a consumer who never answered**, which elicits the facts in support of a motion to vacate based on lack of personal jurisdiction and/or based on reasonable excuse such as facts related to service or long-term barriers answering the lawsuit within the time allotted by statute. We believe this would create greater clarity for litigants and court clerks alike, thereby minimizing the likelihood that a *pro se* litigant will need to file the motion a second time, which in NYLAG’s experience is a pervasive problem that places an enormous strain on *pro se* litigants in addition to burdening the courts.

In conclusion, we are thrilled that the proposed reforms have been presented and that we have the opportunity to offer suggestions. While they already represent a great improvement to the system in place now, we feel our suggestions—based on the thousands of cases we litigate and handle each year—would strengthen the reforms and provide the necessary tools to effectively accomplish the goals intended. We hope you find them useful, and we will make ourselves fully available for discussions, clarifications or questions, should you wish to do so.

Respectfully submitted,



YISROEL SCHULMAN, ESQ.
President and Attorney-in-Charge
New York Legal Assistance Group

50th Anniversary: Mobilizing for Justice



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By email to rulecomments@nycourts.gov

May 30, 2014

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RE: Proposed reforms relating to consumer credit collection cases.

MFY Legal Services, Inc. (MFY) welcomes the Office of Court Administration's (OCA) proposed reforms relating to consumer credit collection cases, and appreciates the opportunity to comment on them. 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 over 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 8,500 New Yorkers each year. MFY's Consumer Rights Project assists low-income New Yorkers on a range of consumer problems, including debt collection lawsuits.

The proposed reforms are critically needed for our clients: 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. It is from this perspective that MFY applauds OCA for addressing the serious problems associated with default judgments in consumer cases. The purpose of the reforms is "to prevent unwarranted default judgments and ensure a fair legal process," and they will help even the playing field for defendants in debt collection litigation, the overwhelming number of whom appear *pro se*. The proposed amendments to the court rules serve to clarify what is already required under the CPLR and common law when seeking default judgments by both debt buyers and original creditors. The expansion state-wide of the additional notice requirement to consumers informing them that they have been sued will help address the continuing problem of "sewer

service” and will likely reduce default judgments. And making certain forms available to consumers across the state will provide *pro se* litigants with the basic tools they need to defend themselves in lawsuits. Although MFY fully supports the proposed reforms, we offer some suggestions for improving and clarifying certain points.

Overall Suggestion to Amend the Rules for Supreme Court

MFY notes that the proposal amends the rules regarding applications for default judgments for New York City Civil Court, the City Courts outside New York City, and the District Courts. We believe strongly that the rules for Supreme Courts should be amended as well. We are contacted regularly by consumers being sued in collection matters who are sued in Supreme Court who face the same hurdles as those sued in Civil Court. Strengthening the requirements solely in the courts of lesser jurisdiction will result in creditors seeking to file cases in Supreme Court, even with low amounts in controversy, simply to evade the requirements delineated by the rules. It will also mean two tiers of justice for consumers and will deny certain New Yorkers sued in Supreme Court the benefits of these important protections.

Suggestions for Affidavits

Implement standard affidavits in applications for default judgments is crucial to curbing the rampant abuse of the court system by creditors and debt buyers, especially because these applications are typically reviewed by clerks rather than judges. Overall, we suggest changing the references from “debtor” to “defendant” throughout the affidavits to more accurately describe the consumer (who may not actually owe a debt, and instead may be a victim of identity theft, for example) and to make the language consistent with the use of the word “plaintiff.” For each affidavit of facts, we also suggest requiring that, in addition to the underlying Agreement, any documents or statements demonstrating liability and the precise calculation of damages be attached as well. (Specifically, we refer to paragraph four of the Affidavit of Facts by Original Creditor, paragraph five of the Affidavit of Facts and Sale of Account by Original Creditor, and paragraph three of Affidavit of Purchase and Sale of Account by Debt Seller.)

Page 5 of 9: Affidavit of Facts by Original Creditor

In paragraph one, we suggest moving the reference to (“Account”)” to the following sentence, after the account number is provided, to make it absolutely clear which account is the subject of the action. In paragraph three, we suggest that the affiant be required to attest to sending the *final* account statement as well as the date the final account statement was sent. We also suggest that the plaintiff be required to attach a true and correct copy of the referenced account statements to the affidavit.

Page 6 of 9: Affidavit of Facts and Sale of Account by Original Creditor

In paragraph four we suggest that the affiant be required to attest that he or she actually reviewed the records referenced and that he or she has actual knowledge of how the records were created and of the procedures in place *at the time the records were created*.

Page 7 of 9: Affidavit of Purchase and Sale of Account by Debt Seller

Debts are sometimes sold and purchased numerous times, usually without any references to specific accounts, save for a spreadsheet that contains a list of consumers’ most basic identifying information. These spreadsheets are often conveyed in a form that can be edited and manipulated. Therefore, it is critical— both legally and practically—that the court ensure that plaintiffs actually own the debts being sued on. Accordingly, in paragraph three, we suggest that

the word “preserved” be added to the last sentence to read: the records had been “preserved or created and maintained.” Also, we strongly suggest that a copy of the assignment be attached to *this* affidavit, instead of attached to the Affidavit of Facts by Debt Buyer, as proposed. Furthermore, the language in this affidavit should be modified to include references to the actual account in question and should require that attachments and exhibits be attached.

Page 8 of 9: Affidavit of Facts and Purchase of Account by Debt Buyer Plaintiff

As explained above, the assignment referenced in paragraph three should be attached to the debt *seller's* affidavit.

Page 9 of 9: Affidavit of Non-Expiration of Statute of Limitations

We are contacted often by consumers who are sued on debts that are beyond the applicable statute of limitations for the state in which they accrued, which is unfair and a violation of the Fair Debt Collection Practices Act. Thus, we believe this proposal is very important. However, the language in this affidavit as written is confusing and implies that two different statutes of limitations may apply. Therefore, we propose that paragraph two be changed to say that “The cause of action for _____ [describe cause of action] in this case accrued on _____ [date of default] in the state of _____. The statute(s) of limitations for the cause(s) of action asserted in the complaint is _____ [years]. Based on my reasonable inquiry, I believe the applicable statute(s) of limitations for the cause(s) of action asserted herein have not expired.” Furthermore, because a determination as to the applicable statute of limitations is a legal conclusion that should not be determined by a layperson, we believe this form should be an affirmation from the plaintiff’s attorney.

Suggestion for Exhibit B: Proposed Rule Relating to Additional Notice of Consumer Credit Action

As stated above, this additional notice requirement is crucial to combating the prevalent problem of consumers not being served with a summons and complaint or receiving notice of the lawsuit, as is their due process right. However, the Rule should clearly specify that if the additional notice is returned as undeliverable to the court, no default judgment should be processed in accordance with CPLR § 3215(a). Although this point is referenced in the description of the proposal in the accompanying Memorandum, which says, “The court will not enter a default judgment in any case where the additional notice is returned to the court because of a wrong or unknown address,” this critical language is missing from the text of the proposed rule.

Suggestion for Exhibit C: Proposed *Pro Se* Forms

With tens of thousands of cases filed each year, representation of all defendants is impossible. Ninety-eight percent of consumers appear *pro se*, so the proposed forms are welcome additional assistance that will help them navigate the court system. Overall, because the forms apply to courts statewide, the captions of the forms and the language included should not be Civil Court or New York City specific. For example, the Answer form should not only refer to the “Civil Court” and the Order to Show Cause form should not only refer to the “Marshal or Sherriff of the City of New York.”

Written Answer Consumer Credit Transaction

Although having an answer form with a check-off list of defenses is a vast improvement, we suggest that “I do not owe this debt” be added to the list of defenses and that defenses eight

and nine pertaining to debt collection licensure be clarified to include the City of Buffalo as well. Because we often see consumers sued in the wrong county or locale and out-of-state consumers sued in New York, we also suggest that “Wrong venue” be added to the list of defenses.

Exhibit C: Order to Show Cause

As with the Answer form, uniform order to show cause forms will certainly help *pro se* litigants who lack access to representation and legal guidance. However, because of differences in court procedures and practices, a single Order to Show Cause form may not be applicable to every court; for example, courts that do not operate a *pro se* calendar may not be able to “restore a case” to said calendar.

In addition, the caption as written does not seem to contemplate dismissing a case for lack of personal jurisdiction, although the text of the Order does include an option for dismissing the action. The most common basis for vacating default judgments under CPLR Rule 5015 that we see is pursuant to 5015(a)(4), lack of personal jurisdiction because of improper service, and alternatively, pursuant to CPLR Rule 5015(a)(1), based on an excusable default and meritorious defense. Too often, courts overlook *pro se* litigants’ personal jurisdiction basis, even though the jurisdictional question should be addressed first. *See, e.g., Shaw v. Shaw*, 97 A.D.2d 403, 404 (App. Div. 2d Dep’t 1983) (“Absent proper service, a default judgment is a nullity, and, once it is shown that there was no service, the judgment must be unconditionally vacated”). This problem could be rectified in part if the forms made the distinction explicit and did not automatically contemplate vacating the judgment and allowing the case to proceed.

Finally, the Order to Show Cause should specify that it is permissible for service of the papers to be made by the *pro se* Defendant, and does not have to be done by a third party.

Exhibit C: Affidavit in Support of Order to Show Cause

New York City, and possibly elsewhere in the state, has seen a severe delay in obtaining court files from archives, as well as a backlog of filing and updating case files, including, importantly, affidavits of service. Without reviewing the affidavits of service, defendants cannot dispute them with the specificity required by the law; yet, defendants often require immediate relief from enforcement measures and cannot wait until the court file is procured before moving to vacate. Therefore, we suggest amending this Affidavit by deleting “(a) I was not served in the right way as required by the law with a summons and complaint in this action” and adding another subsection that would say: “I have/have not had an opportunity to review the affidavit of service.” The form should also include space to specifically dispute the content of the affidavit of service for cases in which it is available. When the affidavit is not available, the form should provide an opportunity to request that the plaintiff include the affidavit of service in its opposition, and that the consumer be allowed to supplement his or her papers upon reviewing the affidavit of service or be given the opportunity to attest on the return date as to how service was improper in narrative form.

Also, we recommend that, in paragraph three, pertaining to the defendant’s excuse for not appearing previously in court, the excuse “I was not notified of the court date” be added as an option. We also suggest that the section labeled “Other Explanation” be changed to “Additional or Other Explanation.” In addition, instead of requiring the consumer to fill in the defenses by hand, the form should instruct the consumer to fill out a proposed answer by marking off his or her applicable defenses and to simply attach it to the affidavit. Finally, in paragraph six, the sentence pertaining to seeking permission to serve the papers in person should be changed to clarify that the defendant seeks permission to be the person who serves the papers (not that the papers be served personally).

Thank you again for the opportunity to comment on these important and groundbreaking initiatives. If you have any questions about our suggestions, please feel free to reach out to us to discuss them further.

Sincerely,

/S/

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COMMENT ON PROPOSED RULEMAKING

May 28, 2014

By e-mail

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

rulecomments@nycourts.gov

RE: Proposed reforms relating to consumer credit collection cases

STATEMENT OF INTEREST: The Western New York Law Center provides free representation to consumers facing debt collection lawsuits through our walk-in clinics in Buffalo, and we appear at an attorney of the morning program in Buffalo City Court to represent consumers who do not have counsel. We also represent individual consumers in consumer credit matters in Erie County Supreme Court.

STATEMENT OF SUPPORT: We write to express our strong support for the proposed rulemaking which we believe will help to level an uneven playing field and ensure fair and equal access to justice for low and middle income New Yorkers by helping to curb abusive debt collection lawsuits that harm thousands of Western New Yorkers annually while allowing legitimate debt collection actions to proceed fairly.

Abusive debt collection lawsuits have become an epidemic in New York State. Hundreds of thousands of debt collection lawsuits are filed against low and moderate income New Yorkers every year; with 15,201 in one court in the City of Buffalo during 2010 alone. These lawsuits typically rest on bare-bones pleadings that provide very little information to the consumer defendant, and the majority that result in default judgments do so on the basis of scant and sometimes patently inauthentic evidence and robo-signed affidavits. Furthermore, most of these lawsuits are brought by third-party debt buyers—companies that buy portfolios of old, defaulted debts from original creditors for pennies on the dollar. As reporting from the Federal Trade Commission and American Banker magazine has shown, debt buyers usually receive very little documentation about the debts they purchase, and the information that they do receive is often scant and unreliable—to the extent that the institutions that sell debts themselves disclaim the availability or accuracy of information about the accounts that they sell as a matter of routine

business practice.

Predictably, companies that sue thousands of people on the basis of scant, nonexistent, inauthentic, or unreliable information frequently commit other errors such as: suing the wrong defendant; suing someone who is not liable, such as an authorized user; filing outside the statute of limitations; attempting to collect from a known victim of identity theft; or serving process at a defunct address. Yet unrepresented consumers find it difficult to defend themselves against such abuses for various reasons, including two that the proposed rules address: First, many consumers are not properly served with process and so do not receive actual notice that they have been sued. Second, consumers unfamiliar with court procedures are often confused by the language of the summons and simply do not understand what steps are required to avoid a default or what the potential consequences are of a default. The proposed rules address these barriers to effective consumer self-representation in several ways. The "additional notice" requirement would help to prevent "sewer service" by providing for a court record that mail addressed to the defendant at the service address was returned by the Postal Service, and when delivered would also provide a plain English explanation of the potential consequences of a default and the means of avoiding a default. And the "self-help forms" would facilitate consumers' assertion of valid defenses to debt collection actions that they often have but do not know how to assert.

The proposed rules would also go far to address the rampant deficiencies that plague many consumer credit lawsuits currently being filed in New York, which currently result in the entry of default judgments against consumers in thousands of cases that are filed without evidence and so can only be described as frivolous. In particular, the "affidavits of facts" would help to ensure that creditors or debt buyers that seek default judgments do so on the basis of actual documentary evidence that supports their claim. It should be noted that this proposal does not actually alter the law in any way. CPLR 3215(f) already requires that a plaintiff seeking a default judgment must submit "proof" of the essential facts in affidavit form, including an affidavit from the party. The proposed rules would do nothing more than clarify, for the benefit of the non-attorney clerks that consider default judgment applications, what the legal implications of that existing requirement are in consumer credit transaction cases.

Thus, as New York courts have long noted in decisions in contested cases, a viable claim to collect a debt requires that the party suing possess copies of the original contract and all amendments, in order to establish the terms governing the account and in particular the appropriateness of fees and interest that the plaintiff seeks to collect. The requirement that the proposed affidavits have such evidence attached and provided to the court merely codifies existing evidentiary requirements for the "proof" of such claims. If implemented consistently this proposal would provide an important assurance that the court approves judgments only when supported by evidence—but we stress again that CPLR 3215 already requires this and the rule seeks only to implement and clarify the implications of that existing law. Similarly, the proposed affidavits for debt buyer actions would help implement the existing "proof" requirement and thus provide greater assurance that plaintiffs are able to establish a full chain of title to the debts for which they request judgments.

PROPOSED IMPROVEMENTS: Although we do strongly support the proposed rulemaking, we also wish to suggest several modifications that we believe, based on our experience working

with unrepresented consumers facing debt collection actions and discussions with our consumer attorney colleagues, would make the reforms more useful to consumers and better protect the integrity of the judicial process.

First, the rules should clarify that receipt of the "additional notice" alone does not confer jurisdiction on the Court. Individuals who are "sewer served" but receive "actual notice" of the pendency of an action from the "additional notice," not having been served with process in accord with the CPLR, are not subject to the Court's jurisdiction and so are under no obligation or time limit to respond. A sentence to the effect that receipt of the additional notice does not confer jurisdiction on the Court in the absence of a proper service of process would assuage a concern that has been voiced by several New York consumer attorneys.

Second, the form answer promulgated by the courts should include a defense to the effect of "usury - the interest rate was in excess of New York's 16% cap and the lender was not entitled to any exemption from that cap." This is a defense as to which consumers frequently either prevail or at least defeat summary judgment, and is commonly enough applicable that it should be explicitly listed in the form.

Third, the "additional notice" and "affidavits of facts" requirements should be extended to consumer credit transaction cases in Supreme Court. Because of the geographical jurisdiction limits of Uniform City Court Act § 213, many small-dollar collection actions, particularly against suburban or rural consumers, are currently filed in Supreme Courts. These actions and the practices of the collectors filing them are no different from those filed in Civil, City, and District Courts, and those consumers are just as in need of the same protections. Furthermore, we fear that if the requirements for a default judgment in Supreme Court are less burdensome than those that apply in the lower courts, collectors will simply forum shop and shift cases to Supreme Court en masse.

Fourth, we do not think that the rules do enough to discourage robo-signing of affidavits, and we expect that if the rule is implemented in its present form, large creditors and debt buyers will attempt to adjust their internal systems so that they may continue using robo-signers to execute these affidavits. We suggest that the proposed rules' aim of preventing robo-signing would be furthered by requiring each affiant, in addition to specifying a job title in the first paragraph of the affidavit, to provide a description of his or her job responsibilities, and to attest to the number of affidavits the individual had executed during the previous week. We also join in the suggestion of New Yorkers for Responsible Lending (NYRL) (a coalition of which we are a member) that OCA require attorney affirmations in debt collection lawsuits along the lines of those required for similar reasons and to prevent similar abuses in the mortgage foreclosure context.

Fifth, the proposed rules concerning "affidavits of facts" should provide a remedy in cases where a default judgment is entered by a clerk notwithstanding the plaintiff's failure to comply with the rule. That this will happen and that a remedy is necessary is confirmed by present practice. As noted above, CPLR 3215(f) already requires "proof" of the essential facts, in the form of a party's affidavit or verification, to be submitted in order to obtain a default judgment, but default judgment applications in consumer credit cases frequently fail strictly to comply even with the

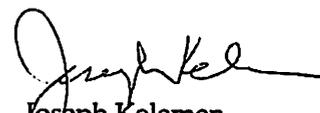
current rule, for example by relying solely on nonparty affidavits or attorney verifications, non-affidavit documents such as putative out-of-state affidavits not accompanied by a certificate of conformity or an affidavit by someone without personal knowledge. Under the recent Court of Appeals case *Manhattan Telecom. Corp. v. H&A Locksmith, Inc.*, 21 N.Y.3d 200 (2013), it appears that such defects cannot form the basis for a motion to vacate a default judgment under CPLR 5015(a)(4)—which it previously could under the law of three out of four Appellate Division Departments—and it is now not clear that any remedy is available to a consumer subjected to an evidence-free default judgment on the basis of defective "proof." The proposed rule on "additional affidavits" would certainly clarify that the "proof" required to obtain judgments in these cases must consist of affidavits (1) at least one of which is from the party; (2) all of which are made by someone with personal knowledge; and (3) that contain or have attached the essential information underlying the claim. But if current practice is any guide, we can expect many judgments to continue to be entered where defective affidavits are submitted that are not made by appropriate affiants or on personal knowledge, affix inappropriate or irrelevant attachments, or otherwise fail to conform with the rule. If no remedy is provided, the courts will continue to put their imprimatur on what amount to evidence-free and procedurally defective default judgments. The remedy should provide for vacatur of the improperly entered judgment and restoration of the status quo ante that existed immediately before submission of the default judgment application.

Sixth, the courts should require an additional notice to unrepresented consumers receiving summary judgment motions, along the lines of those required to be given to unrepresented litigants under the local rules of many federal district courts. Like those courts, New York courts could promulgate a form notice and require the plaintiff seeking summary judgment on a consumer credit transaction to serve it on the defendant with the motion papers. See, for example, WDNY Local Rule 56(b) and Rule 56 Notice to Pro Se Litigants. In our experience assisting unrepresented consumers faced with summary judgment motions, such consumers often do not understand from the Notice of Motion form alone either (a) what a motion requesting summary judgment means or what the consequences would be if one was granted; (b) that the court expects written opposition in advance in the event the defendant wishes to contest the motion; or (c) that the court expects the defendant to appear in court on the return date.

The Western New York Law Center strongly believes these rules should be finalized to greatly reduce the number of unfair and abusive debt collection lawsuits, which are particularly harmful to elderly, disabled, and low and moderate income New Yorkers.

Please contact Matthew Parham or Andrew Spong with any questions at (716) 855-0203.

Sincerely,


Joseph Kelemen
Executive Director

21 N.Y.3d 200, 991 N.E.2d 198, 969 N.Y.S.2d 424, 2013 N.Y. Slip Op. 03867

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****1** Manhattan Telecommunications Corporation, Appellant

v
H & A Locksmith, Inc., et al., Defendants, and Ariq Vanunu, Respondent.

Court of Appeals of New York

Argued May 2, 2013

Decided May 30, 2013

CITE TITLE AS: Manhattan Telecom. Corp. v H & A Locksmith, Inc.

SUMMARY

Appeal, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that Court, entered March 31, 2011. The Appellate Division reversed, on the law, an order of the Supreme Court, New York County (Ira Gammerman, J.H.O.), which had denied defendant Ariq Vanunu's motion to vacate the default judgment entered against him, and granted the motion. The following question was certified by the Appellate Division: "Was the order of this Court, which reversed the order of the Supreme Court, properly made?"

Manhattan Telecom. Corp. v H & A Locksmith, Inc., 82 AD3d 674, reversed.

HEADNOTE

Judgments

Default Judgment

Proof of Facts Constituting Claim—Non-Jurisdictional Defect

In an action alleging that plaintiff had provided telephone service to defendants, a number of corporations and an alleged principal officer, pursuant to a written agreement, and had not been paid, plaintiff's failure to supply "proof of the facts constituting the claim" (CPLR 3215 (f)) against the principal officer in his individual capacity did not constitute a jurisdictional defect that rendered the default judgment entered a nullity. The defect was not so fundamental that it deprived the court of power to enter the judgment. Although a failure to submit the proof required by CPLR 3215 (f) should lead a court to deny an application for a default judgment, a court that does not comply with that rule has merely committed an error and has not usurped a power it does not have. The error can be corrected by an application for relief from the judgment pursuant to CPLR 5015.

RESEARCH REFERENCES

Am Jur 2d, Judgments §§ 236-238, 242, 273.

Carmody-Wait 2d, Judgments §§ 63:169, 63:170, 63:174, 63:179, 63:190.

McKinney's, CPLR 3215 (f).

NY Jur 2d, Judgments §§ 119, 123-125, 144, 149.

Siegel, NY Prac §§ 293, 295.

***201 ANNOTATION REFERENCE**

See ALR Index under Default Judgments.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: default /2 judgment /s proof /6 fact /p null!

POINTS OF COUNSEL

Jonathan D. Bachrach, New York City, for appellant.

I. The complaint was not defective. (Natradeze v Rubin, 33 AD3d 535; DeLeon v Sonin & Genis, 303 AD2d 291; Giordano v Berisha, 45 AD3d 416; Wilson v Galicia Contr. & Restoration Corp., 10 NY3d 827.) II. New York State requires a showing of excusable neglect in order to vacate a default judgment. (Dimitriadis v Visiting Nurse Serv. of N.Y., 84 AD3d 1150; Felsen v Stop & Shop Supermarket Co., LLC, 83 AD3d 656; Westchester Med. Ctr. v Allstate Ins. Co., 80 AD3d 695; Farrah v Pinos, 78 AD3d 1115; Francis v Long Is. Coll. Hosp., 45 AD3d 529; Wilson v Galicia Contr. & Restoration Corp., 10 NY3d 827.) III. The Appellate Division, First Department, improperly vacated plaintiff's judgment against defendant on grounds that defendant had never raised in the trial court or in its briefs on appeal. (Feffer v Malpeso, 210 AD2d 60; Perez v Lenox Hill Hosp., 159 AD2d 251; Natradeze v Rubin, 33 AD3d 535; DeLeon v Sonin & Genis, 303 AD2d 291.)

Ofeck & Heinze, LLP, New York City (Mark F. Heinze of counsel), for respondent.

I. When there is noncompliance with CPLR 3215 (f), a default judgment is a nullity or, at a minimum, subject to vacatur in the court's traditional discretion. (Woodson v Mendon Leasing Corp., 100 NY2d 62; Misicki v Caradonna, 12 NY3d 511; Giordano v Berisha, 45 AD3d 416; Natradeze v Rubin, 33 AD3d 535; Zaidman v Zaidman, 90 AD3d 1035; Friedman v Connecticut Gen. Life Ins. Co., 9 NY3d 105; Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington, 97 NY2d 86; Ladd v Stevenson, 112 NY 325; Alvarez v Prospect Hosp., 68 NY2d 320; Zuckerman v City of New York, 49 NY2d 557.) II. Plaintiff's motion for a default judgment was premature, and Judicial Hearing Officer Gammerman lacked judicial authority to enter any order, and so the judgment was fatally defective. (Dobkin v Chapman, 21 NY2d 490; Matter of Bernstein Family Ltd. Partnership v Sovereign Partners, L.P., 66 AD3d 1; Dunn v Burns, 42 AD3d 884; *202 Quality Food Oils v Caruso Prods. Distrib. Corp., 127 Misc 2d 1097; Red Creek Natl. Bank v Blue Star Ranch, 58 AD2d 983; Firemen's Fund Ins. Co. v Dietz, 110 AD2d 1083; R. L. C. Invs. v Zabski, 109 AD2d 1053; Nash v Duroseau, 39 AD3d 719; Marazita v Nelbach, 91 AD2d 604; Morris v Smithline, 145 Misc 2d 772.) III. Plaintiff's proof of its cause of action was insufficient as a matter of law, and defendant Ariq Vanunu has a meritorious defense. (Savoy Record Co. v Cardinal Export Corp., 15 NY2d 1; Salzman Sign Co. v

Beck, 10 NY2d 63; Bartsch v Bartsch, 54 AD2d 940; Giordano v Berisha, 45 AD3d 416; Ritzer v 6 E. 43rd St. Corp., 47 AD3d 464; Feffer v Malpeso, 210 AD2d 60; IMG Intl. Mkta. Group, Inc. v SDS William St., LLC, 32 Misc 3d 1233[A], 2011 NY Slip Op 51561[U]; Rodkinson v Haecker, 248 NY 480; Speciner v Parr, 252 AD2d 554; Landa v Dratch, 45 AD3d 646.) IV. Defendant Ariq Vanunu excusably defaulted and has a meritorious defense. (Woodson v Mendon Leasing Corp., 100 NY2d 62.)

OPINION OF THE COURT

Smith, J.

CPLR 3215 (f) requires an applicant for a default judgment to file "proof of the facts constituting the claim." In Woodson v Mendon Leasing Corp. (100 NY2d 62, 71 [2003]), **2 we left open the question of whether non-compliance with this requirement is a jurisdictional defect that "renders a default judgment a 'nullity.'" We now hold that the defect is not jurisdictional.

Plaintiff sued a number of corporations and an individual, Ariq Vanunu, alleging that plaintiff had provided telephone service to defendants pursuant to a written agreement, and had not been paid. The complaint alleged that Vanunu was "a principal officer in all the corporate defendant entities"; it did not attach the agreement or allege that Vanunu had signed it in his individual capacity. All defendants defaulted, and a default judgment was entered on November 28, 2008.

On November 5, 2009, Vanunu moved to vacate the judgment, asserting that his default was excusable and that he had meritorious defenses to the action. Supreme Court denied the motion, finding that Vanunu's delay in defending himself was not excusable. The Appellate Division reversed without reaching the issue of excusable default, holding that because "plaintiff failed to provide . . . evidence that [Vanunu] was personally liable for the stated claims . . . the default judgment was a nullity" (*203 Manhattan Telecom. Corp. v H & A Locksmith, Inc., 82 AD3d 674, 674 [1st Dept 2011]). The Appellate Division granted leave to appeal, certifying the question of whether its order was properly made. We answer the question in the negative, and reverse.

We assume for present purposes that the Appellate Division was correct in holding that plaintiff's complaint, though verified, failed to supply "proof of the facts constituting the claim" against Vanunu, as CPLR 3215 (f) requires. Thus the default judgment was defective, but not every defect in a default judgment requires or permits a court to set it aside. CPLR 5015 (a) (1) authorizes the court that rendered a judgment to relieve a party from it "upon the ground of . . . excusable default"—a ground that Supreme Court found to be absent here. The question raised by this appeal is whether the defect is jurisdictional—i.e., whether it was so fundamental that it deprived the court of power to enter the judgment, rendering the judgment a nullity whether Vanunu's default was excusable or not. This question has divided the Appellate Division departments (see Natradeze v Rubin, 33 AD3d 535 [1st Dept 2006] [holding defect jurisdictional]; State of New York v Williams, 44 AD3d 1149, 1151-1152 [3d Dept 2007] [same]; Westcott v Niagara-Orient Agency, 122 AD2d 557, 558 [4th Dept 1986] [same]; but see Zaidman v Zaidman, 90 AD3d 1035, 1036-1037 [2d Dept 2011] [holding defect non-jurisdictional]; Araujo v Aviles, 33 AD3d 830 [2d Dept 2006] [same]; Freccia v Carullo, 93 AD2d 281, 286-289 [2d Dept 1983] [same]).

As we explained in Lacks v Lacks (41 NY2d 71, 74-75 [1976, Breitel, Ch. J.]), the word "jurisdiction" is often loosely used. But in applying the principle "that a judgment rendered without subject matter jurisdiction is void, and that the defect may be raised at any time and may not be waived" (id. at 75), it is necessary to understand the word in its strict, narrow sense. So understood, it refers to objections that are "fundamental to the power of adjudication **3 of a court" (id. at 74). "Lack of jurisdiction" should not be used to mean merely "that elements of a cause of action are absent" (id.), but that the matter before the court was not the kind of matter on which the court had power to rule.

The defect in the default judgment before us is not jurisdictional in this sense. A failure to submit the proof required by CPLR 3215 (f) should lead a court to deny an application for a default judgment, but a court that does not comply with this rule has merely committed an error—it has not usurped a power *204 it does not have. The error can be corrected by the means provided by law—i.e., by an application for relief from the judgment pursuant to CPLR 5015. It does not justify treating the judgment as a nullity. As the Appellate Division said in Freccia: "the court had subject matter jurisdiction over the case which included the concomitant power to enter a default judgment in favor of plaintiff" (93 AD2d at 288-289).

The result we reach today follows from our decision in Wilson v Galicia Contr. & Restoration Corp. (10 NY3d 827, 829 [2008]), where we refused to set aside a default judgment despite the defaulting party's contention "that CPLR 3215 (f) renders the judgment a nullity." We relied in Wilson on the party's failure to preserve its argument (id. at 829-830). But if the defect were truly jurisdictional—if the court that entered it was powerless to do so—a lack of preservation would not matter. Wilson thus implies that a defect of this kind is non-jurisdictional, as we now hold.

Accordingly, the order of the Appellate Division should be reversed, with costs, the case remitted to the Appellate Division for consideration of issues raised but not reached on the appeal to that court, and the certified question answered in the negative.

Chief Judge Lippman and Judges Graffeo, Read, Pigott and Rivera concur; Judge Abdus-Salaam taking no part.

Order reversed, with costs, case remitted to the Appellate Division, First Department, for consideration of issues raised but not determined on the appeal to that court, and certified question answered in the negative.

Copr. (c) 2014, Secretary of State, State of New York

NY, 2013.

MANHATTAN CORP. v H & A INC.

21 N.Y.3d 200, 991 N.E.2d 198, 969 N.Y.S.2d 424, 2013 N.Y. Slip Op. 03867

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[Via email to rulecomments@nycourts.gov](mailto:rulecomments@nycourts.gov)

May 30, 2014

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

Re: Proposed reforms concerning consumer credit collection cases

Dear Mr. McConnell:

District Council 37 Municipal Employees Legal Services ("DC 37 MELS") appreciates the opportunity to submit these comments on the reforms proposed by the Office of Court Administration relating to consumer credit collection cases.

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 handle 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.

We support the proposals because they would bring more fairness to the practices of debt collection in New York and in particular to the debt buyer segment of the collection industry. Our courts stand for the rule of law, and the proposals are completely consistent with the idea that our citizens, when they are sued in consumer debt matters, are entitled to the fundamental due process protections that our constitution and laws provide. The proposals make explicit the standards that are already required of all plaintiffs in litigated cases generally.

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.¹

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.² 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.³

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. Plaintiffs seek default judgments based on flimsy documentation, which may not establish that the defendant owes the amount claimed, or any amount at all, or that the plaintiff even owns the alleged debt.

Many judges in New York have refused to grant judgments in such situations. The proposals would bring best-practice uniformity by applying standards that are consistent with the laws of New York, including established rules of evidence and the rule against hearsay. Among other improvements, the proposals would: address the problem of ‘sewer service’ by requiring an additional notice to be sent to defendants; prevent debt buyers from obtaining default judgments based on hearsay affidavits from persons with no knowledge of the supposed facts to which they are swearing; and provide for Answer and Order to Show Cause Affidavit forms to make it easier for unrepresented defendants to effectively receive their day in court.

We make the following suggestions to further improve and strengthen the proposed reforms so that they best accomplish their purpose:

- Require each debt seller in the chain of title to submit a copy of the bill of sale or assignment which references the specific account on which the plaintiff is seeking a

¹ 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).

² 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).

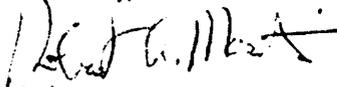
³ DC 37 MELS, *Where’s the Proof? When Debt Buyers are Asked to Substantiate Their Claims in Collection Lawsuits Against NYC Employees and Retirees, They Don’t* (December 2009), available at http://www.dc37.net/benefits/health/pdf/MELS_proof.pdf. The study also found that debt buyers in many instances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

default judgment. The rules as proposed would seemingly permit a plaintiff debt buyer to submit proof of assignments from previous debt buyers. The problem is, a plaintiff would have no personal knowledge of those assignments. It is also essential that any assignments (again, properly authenticated by the debt seller) include a reference to the particular account on which the defendant is being sued.

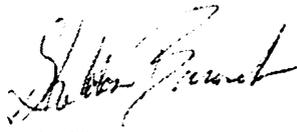
- Clarify the required Affidavit of Non-Expiration of Statute of Limitations. The proposed affidavit requires a statement that the cause of action accrued in New York and, where applicable, another state where the cause of action accrued, and then requires a statement of the statute of limitations for both states. Compliance with these requirements will be confusing. In reality, a cause of action will accrue in only one state. There will be only one applicable statute of limitations. We suggest that the affidavit be modified accordingly. In addition, since the affidavit necessitates a conclusion of law from the plaintiff's representative, we recommend that the affidavit must be executed by an attorney.
- We also recommend that OCA add to its proposals a requirement that a plaintiff demonstrate (in a case where a debt has been sold) that the defendant has received a notice of assignment. It is axiomatic that a debtor will have a duty to pay an assignee only if he or she has received notice of the assignment and whom to pay. Many New York courts have held that notice of the assignment is an essential element of the plaintiff's case in such matters. *See, e.g., Tri-City Roofers Inc. v. Northeastern Industrial Bank*, 61 N.Y.2d 779 (1984); *DNS Equity Group v. Lavalee*, 26 Misc.3d 1228(A), 2010 WL682466 (Dist .Ct .Nassau Co., 2010).
- Finally, we urge OCA to implement a rule mandating attorney affirmations in debt collection lawsuits, similar to the rule that OCA has required in mortgage foreclosure actions. The same problems that prompted OCA to implement the attorney affirmation rule in foreclosure matters have become standard practice in debt collection cases. A comparable rule applying to debt collection cases would have the same good effect in curbing such problems as robo-signed affidavits and false representations of facts by persons without the knowledge to make statements of fact.

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

Sincerely,



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Empire Justice Center

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May 30, 2014

Via Email and First Class Mail

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

Re: Proposed Court Rules Relating
to Consumer Credit Collection Cases

Dear Mr. McConnell:

We are writing in support of the Unified Court System proposed rules governing consumer credit collection cases and suggesting minor improvements to make them more effective. The Empire Justice Center has extensive experience in successfully representing low income consumers in upstate New York. In addition to assisting victims of predatory mortgage lending, we have successfully brought multiple suits against rent-to-own companies, exposing their rapacious pricing schemes; worked with the New York Attorney General to alert consumers about the dangers of debt settlement companies; and played an instrumental role in the enactment of the New York Exempt Income Protection Act. This state law protects thousands of low-income New Yorkers by exempting government benefits and their wages held in bank accounts from abusive debt-collection practices.

We also have considerable experience in defending low income consumers in litigation brought by major debt buyers such as Portfolio Recovery Associates, LLC (PRA), Cohen & Slamowitz LLP, Midland Funding, LLC in Rochester City Court and Monroe County Supreme Court. As you know, funding for consumer legal services in New York State has been extremely limited, leaving low income consumers woefully under-served. This is particularly true in Upstate New York. While that is beginning to change with the additional support of the Office of Court Administration (OCA) and the Chief Judge in providing unprecedented funding for civil legal services, the need for this type of legal assistance remains. Nevertheless, even with limited resources, our representation of dozens of poor consumers against debt buyers has been remarkably successful: No debt buyer has ever prevailed in *any* suit we have defended.

Based on our experience, the vast majority of consumers in Western New York have multiple meritorious defenses to debt collection actions filed against them. These defenses include expiration of the statute of limitations; previous payment of all or part of the debt; prior purchase of credit card payment insurance; suits for more than the amount of debt owed; and,

most frequently, the inability of a debt buyer to prove actual ownership of the alleged debt sought to be collected. Without a defense attorney, however, debt buyer-plaintiffs are virtually assured a default judgement. In fact, the successful business model used by PRA, Midland Funding and other large debt buyers is based on obtaining a default judgment against unrepresented consumers.

The Epidemic of Abusive Creditor Litigation

The epidemic of abusive litigation brought by creditors against New York consumers has resulted in tens of thousands of frivolous lawsuits, creating an enormous strain on our court system. These suits have a devastating long term economic effect on unrepresented New Yorkers, who have lost their case to debt buyers by default. Over the past decade, the number of debt collection lawsuits filed in New York courts has exploded, with upward of 200,000 cases filed in 2011 alone. Regrettably, only two percent of all New Yorkers sued have legal representation, and debt collection lawsuits account for eight out of ten default judgments entered. In that year, debt buyers obtained an estimated \$230 million in judgments against New Yorkers.

The proposed consumer debt collection court rules are analogous to the predatory lending state court rules. These mortgage foreclosure rules help protect the rights of consumers who are victims of the bad acts of predatory mortgage lenders, and guide mortgage consumers through the complex foreclosure crisis. Providing similar court rules in debt collection lawsuits will result in much needed relief for unrepresented consumers in these cases, just as the foreclosure court rules addressed the unfair practices of predatory mortgage lenders.

Once again, Chief Judge Lippman has identified and addressed a major access to justice issue. These proposed court rules will provide a necessary counterbalance to achieve fairness and justice for all summoned before the courts, while permitting debt collectors to proceed with legitimate cases. Specifically, the consumer credit court rules will help achieve fairness and justice by requiring debt collector plaintiffs to prove the statute of limitation has not expired; proffer evidence of ownership through the chain of assignment; and properly demonstrate the amount owed on the debt. Additionally, these rules propose the use of certain forms for pro-se consumers to vacate default judgments or file a pro-se answer in a debt collection case.

The Proposed Court Rules Come Closer to Eliminating the Disparity of Judicial Fairness

By applying uniform debt collection court rules to most New York courts, the proposed court rules limit the disparity of fairness between upstate and down-state residents. Court rules similar to those proposed have already provided protection to consumers in New York City, and have proven successful. In response to the Rochester City Court's recent promulgation of stricter default judgment rules, debt buyers have attempted to avoid these due process procedures by filing their actions in Monroe County Supreme Court.¹ As a result, a disparity of judicial fairness

¹ To avoid exploitation of New York's multilayered court system the proposed rules should cover all courts with civil jurisdiction, not just the Civil, City and District Courts.

based on the debt buyer's choice of forum remains. The proposed debt collection court rules will help, but not completely level the playing field for all New Yorkers regardless of where they live.

Achieving Fairness through Affirmation of Statute of Limitations

When bringing their cases, debt buyer-plaintiffs frequently rely on a pro-se defendant's lack of legal education to assert a statute of limitations defense. As a group, indigent defendants are more severely harmed by suits intentionally brought after the expiration of the statute of limitations because these defendants are less likely to afford and retain counsel to defend a debt collection lawsuit. The proposed court rule requiring a debt buyer to affirm that the statute of limitations has not expired is critical to achieving access to justice for all New Yorkers, and is especially significant to low income citizens of this state.

The Importance of Demonstrating the Chain of Assignment

Halecki v. Empire Portfolios, et al, 09 CV 6615 (W.D.N.Y.), provides an important window into common and abusive debt buyer litigation practices. In this matter, we represented Eugene Halecki, an elderly gentleman who used a Providian credit card with a \$1500 credit limit. In 2004, he owed Providian \$700. Around that time, he was hospitalized and was unable to make any more payments. Soon after, he defaulted on the debt, and owed \$2282.62, including \$1400 in fees and interest.

Four years later, Mr. Halecki's Providian debt was purchased by a debt buyer called "Empire Portfolios" for \$79.89, as part of a larger portfolio. Empire Portfolios then referred Halecki's debt to its debt collection law firm, Cohen & Slamowitz LLP, which later sued Mr. Halecki for \$2282.62 (plus interest) in Buffalo City Court. In the course of litigation, we learned that Empire Portfolios is actually a corporation with no employees and is equally owned by its two shareholders: Mitchell Slamowitz and David Cohen. The two partners of Cohen & Slamowitz LLP, Mitchell Slamowitz and David Cohen, are the same co-owners of Empire Portfolios, Inc. Cohen & Slamowitz pays Empire Portfolios a confidential amount in "management fees" from the firm's debt collection work, but there is no written contract between these two business entities.

Before or after filing suit, neither Empire Portfolios nor Cohen & Slamowitz ever bothered determining whether they could actually prove their debt collection case. Even without the recently proposed debt collection rules, state law requires a plaintiff who attempts to collect on an assigned debt to prove the chain of assignment. In Mr. Halecki's case, Empire Portfolios was required to prove the complete chain of assignment back to the original creditor, Providian, to lawfully collect their purported debt. In fact, neither Empire Portfolios nor Cohen & Slamowitz had any idea of what happened to Mr. Halecki's debt after it was sold by Providian in 2004. The chain of assignment was of no importance to them; all they knew is that on August 25, 2008, the debt was bought and sold several times, with Empire Portfolios as the final purchaser. Without these basic documents, Empire Portfolios never had standing to bring this suit. Unifund CCR Partners v. Youngman, 89 A.D.3d 1377, 1377-1378 (4th Dept. 2011).

Both Empire Portfolios and Cohen & Slamowitz had no idea about any prior collection efforts, or the whereabouts of the credit card contract between Providian and Mr. Halecki. In fact, the Halecki litigation revealed that *only* review or investigation conducted by Empire Portfolios or Cohen & Slamowitz prior to filing its debt collection suits is whether the purported debtor is dead or has filed bankruptcy.

We strongly believe that the proposed debt collection court rules requiring debt buyers to prove the chain of assignment will eliminate these types of cases, and put an end to this rampant abuse of the judiciary system. At the time of the Halecki suit, Cohen & Slamowitz employed approximately 14 lawyers who filed approximately 60,000 cases on behalf of Empire Portfolios and other clients in New York courts. In addition, Cohen & Slamowitz employed approximately 130 debt collectors and 100 other support staff. Last year, Cohen & Slamowitz filed 430 debt collection cases on behalf of debt buyers in Rochester City Court alone. In 423 of these cases, there was no attorney defending against them. Without these new court rules, however, Cohen & Slamowitz is virtually guaranteed a default judgment against another 423 unrepresented Rochester consumers.

The Proposed Affidavit of Facts and Purchase by Debt Buyer Plaintiff Will Eliminate Frivolous Suits

In Colorado Capital Investments, Inc. v. Burgess, Index No. 16094/04 (Rochester City Ct.), we again represented an elderly and disabled debtor, Solomon Burgess, against a large debt buyer. Colorado Capital was the sixth purported purchaser of Mr. Burgess' defaulted credit card debt, and in support of its motion for summary judgment, the debt buyer submitted an affidavit from one Jim Scoroposki, an "agent of the Recovery Division of Colorado Capital Management Corp." Affiant Scoroposki claimed to have "personally reviewed Plaintiff's business records," but he had no personal knowledge of the underlying facts. These details did not prevent Mr. Scoroposki from claiming that Mr. Burgess owed plaintiff \$2022.55 "plus interest at a rate of 9% from September 23, 2003". Affiant Scoroposki calculated that Mr. Burgess owed \$1010.53 when this sum was "charged off on or about May 30, 2001" by the credit card company, and "the account accrued contractual charge off interest at the rate of 23.99% through September 29, 2003". This resulted in "an amount due and owing of \$2022.55, the amount claimed herein."

In fact, Colorado Capital's credit card debt claim for \$2055.55, is mathematically impossible. Using the exact same variables as purportedly applied by Affiant Scoroposki, Mr. Burgess owes a maximum of \$1768.76. When confronted with this \$250 math error, neither Colorado Capital nor its counsel could explain the \$250 discrepancy or how the debt buyer actually determined "the amount claimed herein". Faced with this evidence, the debt buyer quickly dismissed the action with prejudice.

It is apparent that Colorado Capital had no idea of the underlying facts or an accurate amount of credit debt purportedly owed by Mr. Burgess. These types of debt buyer mistakes are all too common. But they require competent representation to uncover, which in turn is all too often unavailable. The proposed court rules directly address these issues by requiring an "Affidavit of Facts and Purchase of Account By Debt Buyer Plaintiff", paragraph 4, and will

provide both the court and consumer defendants with the evidence necessary to demonstrate the validity of any debt buyer's monetary claim.² We believe that this proposed rule will help consumers defend themselves against these types of frivolous suits, and ultimately lead to their elimination from the docket.

Pro-Se Forms will Assist in Eliminating Frivolous Creditor Suits

The Empire Justice Center supports the proposal for assisting pro se defendants by making simple legal forms available to defend a creditor lawsuit. For example, the proposed forms allow a defendant to file an answer by simply checking some boxes on a form. Pro-se debt collection programs will help facilitated access to justice for debtor defendants, assist the courts in handling frivolous creditor lawsuits, and help assure that creditors provide the requisite evidence to proof claims. In this respect, the Office of Court Administration should also consider adopting a rule similar to Alberta Legal Profession Act Rule 2.23 , applied by the Provincial courts in Alberta, Canada. This Rule gives individual judges discretion as to whether to allow non-lawyers to provide assistance to unrepresented parties in the courtroom.³

Conclusion

Requiring substantial proof of chain of assignment, the itemized amounts owed at the time the debt was purchased, and the amount owed post-purchase, (including an itemization of fees and

² The proposed rule should be amended to require that paragraph 3 of the affidavits with regard to cases involving "account stated causes of action" by both original creditors and debt buyers be amended to require the affiant to insert the dates of mailing and the address to which account statements were mailed, so that an alleged debtor can bring to the Court's attention that they were sent to an address where the alleged debtor did not reside at the time of the alleged mailing.

³ The Alberta Legal Profession Act Rule 2.23 provides:

Assistance before the Court:

- (1) The Court may permit a person to assist a party before the Court in any manner and on any terms and conditions the Court considers appropriate.
- (2) Without limiting subrule (1), assistance may take the form of (a) quiet suggestions, (b) note-taking, (c) support, or (d) addressing the particular needs of a party.
- (3) Despite subrule (1), no assistance may be permitted (a) that would contravene section 106(1) of the Legal Profession Act [i.e. practicing law without a license], (b) if the assistance would or might be disruptive, or (c) if the assistance would not meet the purpose and intention of these rules.

interest) are vitally important to protect consumers and help eliminate frivolous creditor-driven law suits. These rules will allow judges much needed time and resources to focus on valid lawsuits and protect consumers from unjust lawsuits. We appreciate OCA's attention to this matter, and look forward to working with the new court rules when promulgated.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Maggie Robb".

Maggie Robb, Esq.

Peter O'Brian Dellinger, Esq.

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May 30, 2014

BY EMAIL to rulecomments@nycourts.gov

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

Re: Comments in support of the adoption of reforms in consumer credit collection cases to prevent unwarranted default judgments and ensure a fair legal process (proposed reforms detailed in OCA Memorandum dated April 30, 2014)

Dear Mr. McConnell:

Lincoln Square Legal Services, Inc. (LSLS) and the Feerick Center for Social Justice, both at Fordham University School of Law, appreciate the opportunity to offer comments on the New York State Office of Court Administration's (OCA) proposed reforms for consumer credit collection cases, including adoption of statewide affidavit forms for default judgment applications, additional requirements of notice to defendants, and adoption of the *pro se* court forms used in New York City.

OCA's proposed reforms mark a significant improvement in the fair administration of justice in consumer credit cases in New York State by addressing the default judgment application process. The reforms will begin to correct the disparities between parties in consumer credit actions and address the struggle New York consumers encounter when dealing with debt collectors in the court system. By enforcing rules which uphold the proper standards of proof and procedure when default judgments are entered against consumer debtors, the OCA better serves a fair judicial process.

OCA's proposed reforms will help ensure that evidentiary requirements are met by both original creditors and debt buyers in proving ownership of debt and will help to prevent "robo-signed" affidavits as the basis for default judgments. By requiring additional notice, more defendants will know of lawsuits against them, mitigating the effects of improper service. Extending the proposed court forms statewide will facilitate access to justice for unrepresented New York State residents. We commend OCA and support the reforms and urge their immediate implementation.

Specifically, the proposed affidavit forms and additional proof requirements in consumer credit actions will help prevent the use of “robo-signed” affidavits, ensuring that default judgments are based on documentary proof establishing a *prima facie* case.

In addition, the proposed expansion statewide of New York City’s 22 N.Y.C.R.R. § 208.6(h) notice will help prevent entry of default judgments where the process server claims service at an incorrect or outdated address. While effective service of process in New York City has improved since local reforms in 2010, improper or illegal service of process remains the root of high default judgment numbers. Problems with service, and the resulting lack of notice to defendants, continue to contribute to the entry of default judgments, which can lead to the harmful effects of garnishment of wages or “frozen” bank accounts. This proposed reform extends to New York State residents an effective and fair measure that protects defendants’ procedural and due process rights.

Finally, the availability statewide of the New York City Answer and Order to Show Cause forms for consumer credit actions will benefit both the Civil Court and *pro se* litigants by significantly improving access to justice for tens of thousands of *pro se* defendants and facilitate the fair adjudication of such actions. With few defendants in such actions represented by counsel, and high rates of default causing a massive backlog of default judgments in New York City, the forms enable consumers to file more effective motions to vacate such judgments and more complete answers, helping them to avoid default and to advance their legal defenses.

In sum, LSLs and the Feerick Center at Fordham University School of Law applaud OCA for taking this important step in protecting the right to a fair administration of justice for New York consumers in credit collection actions. The proposed reforms reinforce the evidentiary requirements of plaintiffs for entry of default judgments and improve access to the courts for unrepresented defendants.

Respectfully submitted,



Marcella Silverman
Supervising Attorney, Lincoln Square Legal Services, Inc., Consumer Litigation Clinic
Clinical Associate Professor of Law, Fordham University School of Law



Dora Galacatos
Executive Director, Feerick Center for Social Justice, Fordham University School of Law



SYRACUSE UNIVERSITY

COLLEGE OF LAW

Office of Clinical Legal Education

May 30, 2014

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

Dear Mr. McConnell:

The Syracuse University College of Law, Securities Arbitration and Consumer Law Clinic (SACC) thanks you for the opportunity to comment on the proposed reforms relating to consumer credit collection cases. The SACC represents low income residents of central new York with consumer related problems including debt collection. We admire and strongly support the Office of Court Administration for proposing court rules to address the collection industry's misuse of the court system. These reforms are vital to curb the abusive debt collection practices which primarily harm low income communities in New York.

Debt collectors and debt buyers are engaging in deceptive and inherently unfair procedures, which involve little or no documentation of critical information, and include the use of fraudulent affidavits to obtain unwarranted default judgments. This represents an unfair legal process and a violation of basic consumer rights. The result is that individuals have their wages garnished, their bank accounts seized and their credit reports severely damaged, which prevents them from obtaining consumer credit, housing, employment, loan qualifications and mortgage modifications.

We respectfully wish to make recommendations in order to fortify the proposed reforms.

1. In reforming consumer credit collection cases, via amending procedural requirements, the New York State Unified Court system should consider expanding its reforms beyond consumer credit actions to include medical debt actions.

2. In addition to considering reforming New York Civil City Court, the Unified Court System should also consider expanding its reforms to the Supreme Court level. This will prevent creditors and debt buyers from engaging in “forum shopping” to circumvent the procedural safeguards ensured by the proposed rule changes.
3. When taking into account the requirement of submitting an **Affidavit of Fact by the Original Creditor** or an **Affidavit of Fact and Sale of Account by the Original Creditor** as proposed under court rules 208.14-a, 210.14-a, 212.14-a, it might also be prudent to require an attachment with the final statement of requested payment to the affidavit. This would ensure that the proper documentation of vital information and a timeline of the account in question remain intact.
4. We believe the requirement of submitting an **Affidavit of Fact and Sale of Account by the Original Creditor** as proposed under court rules 208.14-a, 210.14-a, 212.14-a, is an important provision.
 - a. We are also concerned about whether or not there should be a required element for notice of the assignment that must be sent to the debtor. This would require the entity selling the debt to plead that it has indeed provided notice to the debtor, thus further protecting consumers from possible fraudulent activity by debt collectors and debt buyers.
 - b. Furthermore, we believe that the Debt Seller (whether the original creditor or a subsequent owner of the debt) has personal knowledge of records at the time records were created with the entity itself. We propose that the Debt Seller, not the Debt Buyer Plaintiff be required to fill out this Affidavit. The Debt Seller, and not the Debt Buyer Plaintiff, is the proper entity to attest to the authenticity of any written assignment related to a prior sale. Therefore, the Debt Seller should be required to attach its own affidavit to the bill of sale or assignment in addition with evidence that the account in question was part of that sale or assignment.
5. When allowing for the requirement of submitting an **Affidavit of Fact and Sale by Debt Seller**, as proposed under court rules 208.14-a, 210.14-a, 212.14-a, we ask that the original records be preserved and forwarded to the entity buying the debt. This would create a chain of custody between debt sellers ensuring that the proper document remain available to the debtor and the debt buyer. In addition, we believe that the chain of title of the account includes more specific account information such as (but not limited to) an account number and the date it was transferred.
6. We also ask that the **Affidavit of Non-Expiration of Statute of Limitation** require the company or organization to testify where it resides. Because this is a mixed question of law and fact, it may be appropriate to have counsel sign this affidavit or have counsel determine the residence of an organization for purposes of assessing the statute of limitations.

7. It should also be considered to include an option under the defenses section of the **Written Answer for Consumer Credit Transaction** that asserts the defendant does not owe the debt in question.

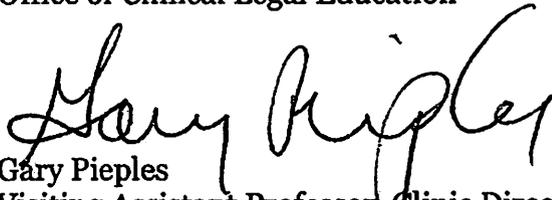
8. The possible inclusion of more universal language in the **Order to Show Cause** which in its current form refers to the Sheriff of New York City would allow for broader use of the form.

We sincerely thank you for the opportunity to comment.

Respectfully,



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Student Attorney, J.D. Candidate 2016
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QUEENS VOLUNTEER LAWYERS PROJECT, INC.

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May 30, 2014

Via Email to rulecomments@nycourts.gov

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

Re: Proposed Reforms Relating to Consumer Credit Collection Cases

Dear Mr. McConnell,

Please find enclosed comments of the Queens Volunteer Lawyers Project, Inc. regarding the proposed reforms requiring creditors to submit affidavits based on personal knowledge that meet substantive and evidentiary standards for entry of a default judgment under New York law; requiring that an additional notice of a consumer credit action be mailed to debtors in courts outside New York City; and providing unrepresented debtors with additional resources and assistance.

We would be happy to provide any other information or assistance you may find helpful.

Sincerely,

Mark Weliky, Esq.,
Executive Director, QVLP



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COMMENTS RE PROPOSED REFORMS RELATING TO CONSUMER CREDIT COLLECTION CASES

The Queens Volunteer Lawyers Project (QVLP), a not-for-profit provider of legal services to residents of Queens County, administers the Civil Legal Advice and Resource Office (CLARO) Queens program, a limited-scope walk-in clinic that provides free legal assistance to defendants in consumer credit collection cases. Since 2008, CLARO-Queens has assisted more than 4,000 defendants in consumer credit collection cases by assisting with preparation of pleadings, responding to discovery requests and providing advice.

QVLP views the proposed reforms as improving the ability of pro se litigants to receive a fair hearing in court. In particular, the proposed form affidavits to be submitted in support of the entry of default judgments represent an important step towards curbing the insidious practice of “robo-signing” in which affidavits are sworn in large batches by affiants lacking personal knowledge.

We would ask, however, in order to maintain consistency of treatment, that the word “debtor” in the proposed form affidavits be replaced by the term “Defendant.”

QVLP also believes the proposed standard answer form attached as Exhibit C is an improvement over the existing form, as it contains important defenses such as “Failure to mitigate damages (Plaintiff did not take reasonable steps to limit damages).” The plain-English translation of legal concepts such as mitigation and collateral increase the ability of unrepresented defendants to understand affirmative defenses that may be available to them.

Finally, QVLP supports the proposal to expand 22 NYCRR § 208.6(h) to courts outside of New York City.

These proposals, if adopted, would go a long way towards the goals set forth by New York State Court of Appeals Chief Judge Jonathan Lippman in his Law Day 2014 remarks. QVLP commends the Unified Court System for proposing these reforms and expanding those already in place in New York City to the rest of the state.



May 30, 2014

VIA E-MAIL

John W. McConnell, Esq.
Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004
e-mail: rulecomments@nycourts.gov

Re: **Proposed reforms relating to consumer credit collection cases.**

Dear Mr. McConnell:

Thank you for the opportunity to comment on the proposed reforms relating to consumer credit collection cases. CAMBA Legal Services, Inc. ("CAMBA") applauds the Office of Court Administration ("OCA") for issuing strong proposed court rules to address the debt collection industry's longstanding abuse of the courts, which has caused serious harm to countless New Yorkers. We also make several recommendations that we believe will strengthen the proposed reforms and help OCA set an important standard for due process protections in debt collection lawsuits.

CAMBA is a non-profit legal services provider that provides free legal counsel and representation to more than 3,000 poor and working poor New Yorkers each year in the areas of Consumer Law, Housing Law, Foreclosure Prevention, Domestic Violence, Public Benefits and Immigration Law.

CAMBA strongly supports the OCA's efforts to prevent unwarranted default judgments and ensure New Yorkers a fair legal process. CAMBA supports the proposed reforms because they will prevent debt collectors from routinely violating the due process rights of hundreds of thousands of New Yorkers each year. The proposals make explicit what the law already requires of all plaintiffs.

The proposed reforms are critically needed. For years, CAMBA has fought the harmful and abusive debt collection practices used against New York's lower income communities and communities of color. Debt collectors, especially debt buyers, routinely

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employ unfair and deceptive tactics to collect alleged debts using rudimentary information that falls far short of the legal and evidentiary standards demanded in New York's courts of law. Among the worst debt collection tactics is the practice of obtaining default judgments against people on the basis of fraudulent affidavits and using these judgments to garnish people's wages and restrain their bank accounts. Because the resulting judgments appear on people's credit reports the unfair debt collection practices also prevent New Yorkers from obtaining housing, employment, mortgage modifications, and fairly-priced consumer credit.

CAMBA is confident that the proposed changes will help curb the practice of robo-signing and help ensure that default judgments are based on non-hearsay allegations and the personal review of documents and other evidence required to substantiate alleged debts. We strongly support those aspects of the proposed rules that will:

- a) **Help address the problem of "sewer service" and level the playing field for unrepresented New Yorkers.**

The proposed expansion to courts outside New York City of the "additional notice" requirement under 22 NYCRR § 208.6(h) will help to ensure that more New Yorkers receive notice that they have been sued. The adoption of plain-English and user-friendly forms that tell the lay defendant what information the defendant must provide to vacate a default judgment will help the 98% of defendants across the state who are unrepresented in collection actions.

- b) **Prevent debt buyers from obtaining default judgment using "robo-signed" affidavits based on hearsay.**

New York law requires all plaintiffs to submit an affidavit of facts based on personal, i.e. firsthand, knowledge when applying for a default judgment. Because debt buying and debt collection is a volume based business model whose profitability is directly related to the number of default judgments obtained, debt collection plaintiffs often flout this requirement by submitting robo-signed affidavits where the alleged personal knowledge is based on the affiant's review of an alterable spreadsheet instead of essential account records, e.g. the underlying credit agreement. The proposed reforms will prevent debt buyers from continuing to evade this fundamental evidentiary requirement.

However, CAMBA believes that implementing the following recommendations would strengthen the proposed reforms. OCA ought to:

1. **Require each Debt Buyer Plaintiff to submit a copy of the purchase and sale or assignment agreement, together with proof that the account at issue was part of that sale or assignment.**

While we believe that requiring an Affidavit of Purchase and Sale is critically important, the rule ought to be strengthened by mandating that each Debt Seller attach to its Affidavit of Purchase and Sale of Account a true and correct copy of the purchase and

sale or assignment agreement together with documentation evidencing that the specific account at issue was included in the sale or assignment. The proposed form affidavits currently only require that the Debt Buyer Plaintiff attach true and correct copies of all "all written assignments of the Account" to its Affidavit of Facts and Purchase of Account. There are two key problems with the current approach.

First, the proposed rules do not require sufficient proof that the alleged debt is owed by the defendant. The sale or assignment of debt from an original creditor to a debt buyer or seller involves large numbers of accounts and a large purchase price. The agreement that memorializes the transaction, like all agreements executed by sophisticated financial entities, includes representations, warranties and covenants concerning the underlying account information and records. Thus, the representations and warranties contained in those agreements speak directly to the reliability and evidentiary value of the account records that will be presented to the court to obtain default judgments on those alleged debts. Without knowing the content of those agreements any affidavit executed by a Debt Buyer Plaintiff or Debt Seller is questionable.

Second, the Debt Buyer Plaintiff only has personal knowledge of sales or assignments to which it was a party and not to the sales or assignments that the Debt Sellers would have been parties to. The Debt Seller should therefore be required include, as an exhibit to its affidavit, a copy of the purchase agreement or assignment, together with proof that the account at issue was part of that sale or assignment.

- 2. Require plaintiffs in all actions to collect consumer credit debts to provide sufficient evidence concerning their records and documents and the unalterable nature of their records and documents.**

Require plaintiffs in actions to collect consumer credit debts to provide an affidavit, based on personal knowledge, stating that the affiant has personal knowledge of the generation or maintenance of documents and records concerning the alleged debt and whether the documents, as created or maintained, are alterable. Where applicable the same affidavit should also include a list of the transferred documents and a statement that the documents and records were transferred to a debt buyer in an unalterable format.

- 3. Make the proposed reforms applicable to Supreme Court.**

CAMBA is concerned that if the proposed reforms do not apply to Supreme Court, then creditors and debt buyers will simply "forum shop" and file lawsuits in the less restrictive but more costly Supreme Court forum despite the fact that the amount in controversy thresholds would permit the plaintiff to file in the less costly and more restrictive Civil Court forum and thus deny those defendants the fundamental protections the proposed reforms seeks to ensure and enhance.

4. Refer to the person sued as "Defendant," not "Debtor."

We recommend referring to the person sued as "Defendant" not "Debtor", throughout the form affidavits. In our experience many of clients are forced to be "Defendants" despite not, in fact, owing the alleged debt. In fact many of our clients would be more aptly labeled "victim" of identity theft or debt industry schemes. Thus, the proposed reforms should use the more accurate "Defendant" instead of the currently used "Debtor".

5. Implement a rule requiring attorney affirmations in debt collection lawsuits, similar to the attorney affirmations that OCA previously required in mortgage foreclosure actions.

Like mortgage foreclosure actions, debt collection lawsuits—especially those filed by debt buyers—have been fraught with such problems as robo-signed affidavits and affidavits that falsely attest to the affiant's personal review of the relevant documents and records. The foreclosure rule helped curb robo-signed and other fraudulent practices in the foreclosure context, and should be implemented in the debt collection context as well.

Finally, in addition to strengthening the proposed reforms, CAMBA urges OCA to implement a training program for court clerks. Well trained clerks will be critical to any meaningful implementation of the proposed reforms.

Thank you for this opportunity to comment.

Very truly yours,



Ricardo N. Avila
Staff Attorney

[REDACTED]

From: Miranda Buie <[REDACTED]>
Sent: Wednesday, April 30, 2014 3:16 PM
To: rulecomments
Subject: APRIL 30, 2014 Proposed reforms relating to consumer credit collection

I'm so grateful that someone is looking out for the debtors. I had a case that was pending. I spoke to the collection agent and he never notified the court that I was going to pay prior to case going into judgement. I paid prior and a few months later around August I got a notice of Judgement. I called them immediately and said what happened. The agent said oh we forgot to file papers and told me he would take care of it. Which I assumed he did. But years later in trying to clean up my credit the judgment of non payment was still there. I didn't understand. I called them four years later. They told me I didn't pay until September which was a lie. I paid before the judgment order date of July 30th. Now I have this judgment on my credit report for three more years. It's not fair. They make you think they are collecting for the original consumer when in fact like you said it was sold and they apply outrageous late fees and interest. Something that was 3000 for example is 10000. Theses agencies are merciless. Life happens and every body in collection is not trying to prevent paying. So Thank You Judge