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

**CIVIL COURT COMMITTEE**
**CONSUMER AFFAIRS COMMITTEE**

**Comments on proposed amendment of 22 N.Y.C.R.R. §§ 208.14-a and 210.14-a to adopt the use of forms for default applications in consumer debt cases**

**THE PROPOSED RULE AMENDMENT IS OPPOSED**

These comments are with regard to the New York State Office of Court Administration (OCA) proposed amendment of 22 N.Y.C.R.R. §§ 208.14-a and 210.14-a relating to adoption of statewide affidavit forms for use in consumer credit actions seeking award of a default judgment.

As OCA is well aware, default judgments in consumer credit actions—often of questionable merit—are widespread in New York. Since consumer debt filings exploded in the mid-2000s, illegal and improperly entered consumer debt judgments have harmed hundreds of thousands of New Yorkers who have been subject to bank liens and wage garnishment and have faced barriers to housing, employment, affordable credit, and critical consumer services and products.

We recognize that OCA is attempting to address the serious problem of "requirements of proof in consumer credit matters where banks and credit card companies assign their interest in credit card debt to third parties," particularly "proof of ownership of the debt." We also agree that there is substantial value in having uniform forms for courts to use.

However, we believe the proposed forms do not effectively address the problem because the forms would still permit debt-collectors to use "robo-signed" affidavits. Indeed, the proposed forms would facilitate the entry of default judgments based on hearsay and without establishment of the plaintiff's prima facie case, including a clear chain of title for the debt at issue. We urge OCA not to adopt this proposed rule. Instead, OCA should adopt a rule requiring - in every case - the submission of an affidavit from the original creditor attesting to the basic facts of the alleged debt based on personal knowledge of the original creditor's records and billing practices. In addition, we set forth other comments and recommendations below.

## FEATURES OF THE PROPOSED STATEWIDE FORMS

Key provisions of the proposed statewide forms include the following:

1. The proposed rule amendments affect New York Rules of Court, Part 208, Uniform Civil Rules for the New York City Civil Court and Part 210, Uniform Civil Rules for the City Courts Outside the City of New York. They do not amend Part 212, Uniform Civil

Rules for the District Courts. In Nassau and Suffolk counties, consumer debt cases are filed in the District Court.

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

**REASONS FOR OPPOSITION**

## I. The Proposed Affidavit Forms Will Condone "Robo-Signing" and Fail to Comply With Evidentiary and Other Requirements

### A. <u>The Form Affidavits Fail to Establish Chain of Title</u>

One of the most problematic aspects of the proposed form debt buyer affidavits is that they do not accomplish one of their main goals: establishing a chain of title for the alleged debt. A complete and accurate chain of title is essential to due process; as in the mortgage context, the chain of title requirement prevents the court from entering judgments in cases in which the plaintiff does not actually own the debt. As one court noted:

> [O]n a regular basis this court encounters defendants being sued on the same debt by more than one creditor alleging they are the assignee of the original credit card obligation. Often these consumers have already entered into stipulations to pay off the outstanding balance due the credit card issuer and find themselves filing an order to show cause to vacate a default judgment from an unknown debt purchaser for the same obligation.[1]

The affidavits fail to establish a chain of title because they do not require the original creditor to testify about the sale of the particular debt at issue. The original creditor affidavit requires only a statement that the original creditor "sold a pool of charged-off accounts" to a debt buyer. It does not require the original creditor to confirm that the particular debt at issue was, in fact, part of the sale.

Similarly, intervening owners (classified as "debt sellers" by the directive) state that they "sold a pool of charged-off accounts" to a debt buyer and that they "had previously bought the Accounts" from a different entity. The proposed debt seller's affidavit does not confirm that the specific account at issue was part of the sale. Moreover, this affidavit is highly likely to be inaccurate because debt sellers usually buy accounts from multiple sources, including original creditors and other debt sellers, and then break the accounts up into different packages for resale.

[1] *Chase Bank USA, N.A. v. Cardello*, 896 N.Y.S.2d 856 (N.Y. Civ. Ct. Richmond County 2010).

It is thus extremely unlikely that a debt buyer would obtain a "pool of charged-off accounts" from one entity and then sell that same "pool" to another entity, as stated in the proposed affidavit.

The only way to establish a complete chain of title is for the original creditor to affirm that it sold *the particular account* to Debt Buyer A. Debt Buyer A must then affirm that it sold *the particular account* to Debt Buyer B, and so on until the chain reaches the plaintiff. OCA should, at a minimum, revise the proposed affidavits so that they provide a complete chain of title for the specific debt at issue.

### B. The Form Affidavits Allow Debt Buyers to Obtain Judgments Entirely on Hearsay

Another troubling aspect of the proposed form affidavits is that they allow debt buyers to testify to facts that are not within their knowledge. In the proposed form affidavits, it is the debt buyer that affirms that there was a credit agreement between the defendant and the original creditor, that the defendant breached the agreement, and that a certain amount is due and owing. The debt buyer makes these statements based on access to the debt buyer's own books and records. However, as the FTC has confirmed, **the debt buyer has no information in its possession to support these assertions**.[2] And, even if the debt buyer did have access to this information from the original creditor, which it does not, its testimony would be entirely based on hearsay.[3]

It is the original creditor, and only the original creditor, that has the relevant information about the debt and is in the proper position to attest to the basic facts about the alleged debt.

### C. The Form Affidavits Allow Testimony from Unknown "Authorized Agents"

The original creditor and debt buyer affidavits would improperly allow an affiant to testify based on an assertion that he or she is a mere "authorized agent" of the plaintiff with "personal knowledge and access to plaintiff's books and records . . . of the account of the defendant." This statement does not restrict the universe of potential affiants to employees of the plaintiff. Instead, it would allow the affidavit to be completed by a third-party debt collector who has no formal

---

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

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

*Id.*

[3] We are also concerned about the representations in the affidavits that records received from others "were incorporated into the debt buyer's records and kept in the regular course of business." We fear third-party debt buyers may attempt to use these affidavits as an end run around longstanding evidentiary requirements related to the use and admissibility of business records. As is clear, "the mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient to qualify the documents as business records." *People v. Cratsley*, 86 N.Y.2d 81, 90 (1995) (citation and quotation marks omitted).

affiliation with the plaintiff and no knowledge of its business practices, but merely receives electronic records long after they were created for the purposes of debt collection. Such an individual would not have personal knowledge of the account sufficient to comply with New York evidentiary law.[4] To comply with evidentiary law, the courts should not allow testimony by "authorized agents." Instead, OCA should require that the affiant be an employee of the original creditor, and that the affiant clearly set forth the basis for her knowledge.

### D. The Proposed Forms Do Not Meet the Stringent Requirements To Ensure Compliance With CPLR 3215 And Evidence Law

CPLR 3215 governs the entry of default judgments and contains fundamental requirements meant to avoid rubber-stamping of a judgment simply because a defendant has failed to appear. Our concern is that the proposed rule would elevate process over substance and that the important elements of CPLR 3215 would be superseded by the use of the proposed forms. We emphasize below three subsections, which we believe would be particularly undermined if the rule goes into effect as proposed.

*CPLR 3215(a)*

CPLR 3215(a) permits a clerk, as opposed to a judge, to enter a default judgment when the amount in dispute is a "sum certain." Although defaulted consumer debt, like other recoveries under a contract theory, is not a sum certain, the courts have been treating it as such. The low cost and ease of making default applications to a clerk, rather than a judge, is part of what has driven the debt buying business model in New York. Debt buyers have taken advantage of this loophole in the judicial process, effectively transforming the court into an arm of the debt collection industry. The Committees respectfully disagree that the amount in dispute in a consumer debt case is a "sum certain." In its memorandum in support of the proposed amendments, OCA characterizes the sums in these cases as "liquidated damages." That characterization is at odds with New York law.

The Court of Appeals has stated: "The term 'sum certain' . . . contemplates a situation in which, once liability has been established, there can be no dispute as to the amount due, as in actions on money judgments and negotiable instruments. The clerk then functions in a purely ministerial capacity."[5] When damages cannot be determined without resort to extrinsic proof, the amount sought does not qualify as a sum certain.[6]

Numerous court decisions in this state have made clear that the sum due on a credit card debt almost always requires resort to extrinsic proof, particularly as to the allowable interest rate.[7]

---

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

[5] *Reynolds Security Inc. v. Underwriters Bank & Trust Company*, 44 N.Y.2d 568, 572 (1978) (citation omitted).

[6] *Id*.; *Gaylord Bros. v. RND Company*, 523 N.Y.S.2d 4, 5 (App. Div. 4th Dep't. 1987) (citing *Reynolds Security Inc. v. Underwriters Bank & Trust Company*, 44 N.Y.2d 568. 572 (1978)).

[7] Professor David Siegel, in commentary to CPLR 3215(a), notes that default may be entered by for a sum certain "on contract claims whose damages are clear-cut by the terms of the contract itself, such as an action to recover the agreed price of items which are shown to have been delivered." However, even this view requires that damages be "clear-cut"

Banks typically assess interest rates well in excess of New York's civil and criminal usury limits (16% and 25%). Late fees and penalties often comprise a significant portion of these debts as well. However, the plaintiff in a collection action may not collect this higher interest rate unless it can establish its entitlement to impose interest rates higher than the state usury cap.[8] Courts have denied judgment to creditors in these cases, in part, because they failed to prove the applicable interest rate.[9] In addition, late fees and interest charges vary over time, depending on the terms of the original contract and periodic amendments, which the consumer may or may not have ratified.

Of particular note is *Citibank (SD) N.A. v. Hansen*, a decision on inquest after the defendant defaulted at trial.[10] The court acknowledged that "[b]y virtue of . . . th[e] default [at trial], defendant's liability is deemed established. But it leaves the Court to determine plaintiff's damages, upon the documentary evidence in the record."[11] The court allowed interest only at the statutory rate of 9%, denying plaintiff the full amount of interest it sought.[12] Although the default occurred at trial and not on application to a clerk, the court in *Hansen* recognized that the amount of the debt is not certain.[13] It depends, at least in part, on the applicable interest rate.

Aside from the need to prove the interest rate, a consumer debt is not a sum certain because consumers being sued for debts often contest the amount due. For example, a consumer might refuse to pay a cell phone or medical bill because of a dispute with the provider over the amount charged. Disputes also arise in the credit card context. Extrinsic proof such as billing statements is in fact necessary to prove the amount of damages, even when the consumer defaults.

Although the Committees disagree with OCA's policy of treating default applications in consumer debt cases as a sum certain, we also recognize that OCA may well maintain this policy to manage the huge volume of these applications. Clerks are not trained as lawyers, however, and they should not be asked to determine whether an applicant for a default judgment has met the legal requirements for proof. The standardized forms are an attempt to compensate for the lack of judicial oversight in these matters. To do that, they must contain the same requirements that a court would require in passing on a default application. As discussed above, the proposed affidavit forms, which contain conclusory statements alleging a sum due, without any explanation or description as to how that sum was calculated, including late fees and interest, and without the documentation supporting those calculations, do not satisfy the statutory requirement for "the requisite proof" of a sum certain.

---

by the contract terms. That is rarely the case in consumer debt matters. At minimum, it requires that the debt collector submit the contract governing the account and establish that it actually is the governing contract.

[8] *Citibank (South Dakota), N.A v. Zaharis*, 2011 WL 6738840 (N.Y. Sup. Ct. Queens County 2011); *Citibank (S.D.), N.A. v. Martin*, 807 N.Y.S.2d 284, 289 (N.Y. Civ. Ct. N.Y. County 2005); *American Express Travel Related Services Co. v. Assih*, 893 N.Y.S.2d 438, 443 (N.Y Civ. Ct. Richmond County 2009); *Citibank (SD) N.A. v. Hansen*, 902 N.Y.S.2d 299, 305 (N.Y. Dist. Ct. Nassau County 2010); *Citibank (South Dakota), N.A. v. Mahmoud*, 866 N.Y.S.2d 90, 90 (N.Y. Civ. Ct. Richmond County 2008).

[9] Cases cited *supra* note 8.

[10] 902 N.Y.S.2d at 299.

[11] *Id.* at 301.

[12] *Id.* at 305.

[13] *Id.*

*CPLR 3215(e)*

Although a defendant's default concedes liability, "[a] plaintiff seeking a default judgment under subdivision (e) of CPLR 3215 must present *prima facie* proof of a cause of action."[14] Debt collectors typically allege two causes of action in consumer debt cases: breach of contract and account stated.

To establish a *prima facie* case of breach of a credit card contract, a plaintiff must establish: (1) the existence of a contract and any revisions; (2) that the card was issued to the defendant at his or her address; (3) that the defendant used the card to purchase goods and services; and (4) that the defendant breached that agreement by failing to pay what was owed.[15] In contexts other than consumer debt cases, courts have denied default judgments where the party seeking the judgment "failed to include the underlying contract and assignment, and the assignor's affidavit did not provide the particulars of the contract assigned . . . ."[16]

To establish a *prima facie* case of account stated, a plaintiff must prove three elements: (1) the account was presented, (2) by mutual agreement it was accepted as correct, and (3) the debtor promised to pay the amount stated.[17] In a consumer debt case, a creditor may succeed on a claim for account stated when it is supported by an affidavit by someone with personal knowledge of the manner in which the account statements were created, maintained, and mailed to the consumer.[18] However, where the affidavit "is not based on personal knowledge of the generation and mailing to defendant of the credit card statements sufficient to satisfy the business records exception to the hearsay rule . . . . plaintiff has not made out a prima facie showing of an account stated."[19]

With respect to both causes of action, the basic elements of the claim must be tendered by affidavit of the original creditor.[20] If the plaintiff is a debt buyer, it must additionally tender proof of an assignment of a particular account.[21] Employees and agents of the assignee cannot provide such proof through their own affidavits because they lack personal knowledge of the assignor's business and record-keeping practices.[22]

---

[14] *Silberstein v. Presbyt. Hosp. in City of New York*, 463 N.Y.S.2d 254, 256 (App. Div. 2d Dept. 1983).
[15] *See Martin*, 807 N.Y.S.2d at 289; *CACH LLC v. Fatima*, 936 N.Y.S.2d 58, 58 (N.Y. Dist. Ct. Nassau County 2011); *Zaharis*, 2011 WL 6738840; *Palisades Collection, LLC v. Gonzalez*, 809 N.Y.S.2d 482, 482 (N.Y. Civ. Ct. N.Y. County 2005). While these cases involved decisions on motions for summary judgment, they are nevertheless instructive because they recite the elements for the causes of action in consumer debt cases. Although the level of proof may be lower for a default application than for a summary judgment motion, the elements of the debt collector's *prima facie* case are the same. There are few reported cases involving default in the consumer debt context and that is understandable given that default applications are not reviewed by judges. However, at least one court denied a debt buyer's summary judgment motion where the defendant had answered, but was in default for not having opposed the summary judgment motion. *Gonzalez*, 809 N.Y.S.2d at 482.
[16] *Giordano v. Berisha*, 845 N.Y.S.2d 327, 328 (App. Div. 1st Dept. 2007).
[17] *See, e.g., Bank of New York-Delaware v. Santarelli*, 491 N.Y.S.2d 980, 981 (Co. Ct., Greene County 1985).
[18] *See Citibank (South Dakota) N.A. v. Jones*, 708 N.Y.S.2d 517, 518 (App. Div. 3rd Dept. 2000).
[19] *CACH, LLC v. Davidson*, 873 N.Y.S.2d 232 (N.Y. Civ. Ct. N.Y. County 2008).
[20] *Martin*, 807 N.Y.S.2d at 289.
[21] *Id.* at 291; *see also Giordano v. Berisha*, 845 N.Y.S.2d at 328.
[22] *See Rushmore Recoveries X, LLC v. Skolnick*, 841 N.Y.S.2d 823, 823 (Dist. Ct. Nassau County 2007); *Palisades Collection, LLC v. Kedik*, 890 N.Y.S.2d 230, 230-31 (App. Div. 4th Dept. 2009).

*CPLR 3215(f)*

"The granting of a default judgment does not become a 'mandatory ministerial duty' upon a defendant's default."[23] A party seeking default must submit proof of its claim, as follows:

> On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 or subdivision (a) of rule 316 of this chapter, and *proof of the facts constituting the claim, the default and the amount due by affidavit made by the party . . . .*[24]

Under New York law, affidavits must satisfy the evidentiary requirement of foundation; to be admissible they "must demonstrate personal knowledge of essential facts."[25] To establish personal knowledge, the affiant must make a showing of how she came to know the facts stated. An affidavit lacks probative value if it "fail[s] to assert facts from which personal knowledge . . . may be inferred."[26] An affidavit that lacks an evidentiary basis for its assertions lacks foundation.[27]

In consumer debt cases, courts have rejected affidavits in which the affiant simply claimed that he or she was "authorized" by the card issuer or assignee to make the assertions in the affidavit.[28] In *CACH, LLC v. Cummings*, the court said:

> It is simply not good enough to be "authorized to make an affidavit." This Court does not know [the affiant's] relationship to Chase or how she knows the facts to which she is swearing . . . . She does not state for whom she works, in what capacity and how she knows that . . . the amount she claims defendant owed Chase - is an accurate number.[29]

Additionally, in the consumer debt context, courts have noted that an assignee of the debt lacks personal knowledge of the card issuer's business and record-keeping practice and cannot provide the foundation for the originator's business records.[30] Debt collectors do not typically submit the originator's records with default applications, although their affidavits often recite that there has been a review of the records. This recitation gives no assurance of authenticity, however, because the assignee does not have personal knowledge of the originator's business and record-keeping practices.

---

[23] *Gagen v. Kipany Productions, Ltd.*, 735 N.Y.S.2d 225, 228 (App. Div. 3rd Dept. 2001).
[24] CPLR 3215(f) (emphasis added).
[25] *Martin*, 807 N.Y.S.2d at 289.
[26] *Dickerson v. Health Mgt. Corp. of Am.*, 800 N.Y.S.2d 391, 394 (App. Div. 1st Dept 2005) (citation omitted).
[27] *Grullon v. City of New York*, 747 N.Y.S.2d 426, 428 (App. Div. 1st Dept 2002).
[28] *Davidson*, 873 N.Y.S.2d at 232; *CACV of Colorado, LLC v. Santiago*, Index No. 22708/07 (N.Y. Civ. Ct., N.Y. County 2009) (Samuels, J.), *available at* http://www.newyorklawjournal.com/CaseDecisionNY.jsp?id=117262.
[29] 12/9/2008 N.Y.L.J. 29, col., Index No. 22747/07 (N.Y. Civ. Ct., N.Y. County 2007), *available at* http://www.newyorklawjournal.com/CaseDecisionNY.jsp?id=106188.
[30] *Skolnick*, 841 N.Y.S.2d at 823 (denying summary judgment to debt collector for failure to tender admissible evidence of claims, despite defendant's default by failing to oppose the motion).

Although *Davidson, Santiago, Cummings,* and *Skolnick* were decisions on motions for summary judgment, this basic evidentiary requirement is not relaxed simply because the movant is seeking a default judgment.[31] "A plaintiff seeking a default judgment under CPLR 3215 (subdivision e) must present prima facie proof of a cause of action."[32] The applicant must submit either a verified complaint or an affidavit asserting the essential elements of the cause of action, "so the court has nonhearsay confirmation of the factual basis constituting a prima facie case."[33] Hearsay and broad statements of fact have "failed to provide the motion court with evidence sufficient to satisfy the court as to the prima facie validity of defendant's liability for the stated claims" needed for a default judgment.[34] Failure to support a motion for default judgment with an affidavit of facts constituting the claim is grounds for denying the motion.[35]

The legislative history of CPLR 3215(f) supports this view. In 1964, subsection (e) of CPLR 3215 contained the proof requirements for a default application. It was amended, in pertinent part, as follows: "On any application for judgment by default, the applicant shall file [proof of service], and proof by affidavit made by the party of the facts constituting the claim . . . ." McKinney's 1964 Session Laws of New York. The Legal Staff Summary explains that this amendment was made to ensure some firsthand support for the claim:

> This bill also amended the same subdivision to provide that any affidavit required hereunder shall be made by the party. An affidavit, including the facts constituting the claim and the amount due, is best made by the party because of his more intimate and direct knowledge of such facts. For the sake of convenience, this bill would permit an affidavit solely as to the default to be made by the party or his attorney.[36]

As the First Department stated succinctly:

> CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action. . . . The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts.[37]

---

[31] At least one court denied a debt buyer's summary judgment motion where the defendant had answered, but was in default for not having opposed the summary judgment motion. *Gonzalez*, 809 N.Y.S.2d at 482. Although the plaintiff had tendered affidavits, account statements, and a contract, the court found all of the purported evidence to be inadmissible. *Id.* This case illustrates that when debt buyer evidence is subject to judicial review, it usually does not pass muster.

[32] *Silberstein*, 463 N.Y.S.2d at 256.

[33] *State v. Williams*, 843 N.Y.S.2d 722 (App. Div. 3rd Dept. 2007) (holding overturned).

[34] *Martinez v. Reiner*, 961 N.Y.S.2d 116, 117 (App. Div. 1st Dept. 2013) (citations omitted).

[35] *Matone v. Sycamore Realty Corp.*, 818 N.Y.S.2d 463, 464 (App. Div. 2d Dept. 2006).

[36] Legal Staff of the Judicial Conference of the State of New York, "Summary of Significant 1964 Changes in New York Civil Procedure Law", *reprinted in* 1964 N.Y. Sess. Laws 1909, 1911 (McKinney).

[37] *Joosten v. Gale*, 514 N.Y.S.2d 729, 732 (App. Div. 1st Dept. 1987) (citations omitted); *Feffer v. Malpeso*, 619 N.Y.S.2d 46, 47 (App. Div. 1st Dept 1994) (same); *accord, Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 70 (2003) (upholding default judgment where record established "that plaintiff had personal knowledge of her claim against defendants").

## RECOMMENDATIONS

In light of the significant problem of "robo-signing" in consumer debt collection actions and the harm default judgments inflict on New Yorkers, the Committees make the following recommendations:

- Because consumer debt collection actions do not involve "claim[s] . . . for a sum certain," entry of default action should occur following judicial inquest – either by hearing or on the papers submitted by the plaintiff.[38]

- OCA should support passage of legislation like the Consumer Credit Fairness Act (A.2678/S.2454), which among other provisions sets out the specific evidentiary support required for a debt buyer to obtain a default judgment,[39] including an affidavit from the original creditor establishing the existence of the debt and the defendant's default and affidavits proving all assignments of the debt. The bill also requires the plaintiff or plaintiff's attorney to attest that based on reasonable inquiry, the statute of limitations has not expired.

- OCA should not adopt the proposed amendment and should issue a revised proposed amendment that conforms to the legal requirements discussed above.[40]

- Applications for default judgments in consumer debt collection actions should include an affirmation by the plaintiff's attorney that that the attorney has reviewed the documentary evidence in support of the application and that they comply with the legal requirements set out by court rule similar to the requirements for foreclosures.[41]

December 2013

---

[38] *See* N.Y. Uniform Civil Rules for the Supreme Court and the County Court 202.46 (2013)(b) ("In any action where it is necessary to take an inquest before the court, the party seeking damages may submit the proof required by oral testimony of witnesses in open court or by written statements of the witnesses in narrative or question-and-answer form, signed and sworn to.").

[39] The New York City Bar Association supports enactment of the bill with some modifications. *See* New York City Bar Association, *Report on the Consumer Credit Fairness Act – A.2678/S.2454* (Reissued Feb. 2013), *available at* http://www.nycbar.org/pdf/report/uploads/20071915-CommentonConsumerCreditFairnessActReissued.pdf.

[40] The Civil Court Committee has previously shared with Deputy Chief Administrative Judge for New York City Courts Justice Fern A. Fisher proposed form affidavits that meet evidentiary requirements. The Committees welcome the opportunity to submit proposed affidavit forms, should they be helpful to OCA. *See also* Appendix A (discussing how other states have addressed the problem of debt collectors seeking default judgment by requiring proof that complies with evidentiary law).

[41] A. 5582A, 2013-2014 Reg. Sess. (N.Y. 2013); S. 4530A, 2013-2014 Sess. (N.Y. 2013). The law now requires foreclosure attorneys, when filing a case, to certify that they have reviewed pertinent documents (including the mortgage, security agreement and note or bond underlying the mortgage, and all instruments of assignment), that there is a reasonable basis for the commencement of the foreclosure action, and that the plaintiff is currently the creditor entitled to enforce rights pursuant to the information contained in the above documents. The attorney must also attach a copy of the mortgage, security agreement and note or bond underlying the mortgage, and all instruments of assignment.

## APPENDIX A – THE EXPERIENCE OF OTHER STATES

Concern with the integrity of the court process and violations of consumers' due process and procedural rights have spurred reforms in other jurisdictions through the legislative process or administrative rulemaking to address the problem of meritless debt collection cases.

Most recently, California enacted the Fair Debt Buyer Practices Act, which specifically states what evidence debt buyers must have on hand when collecting debts, when filing debt collection suits, and when applying for a default judgment.[42] To successfully obtain a default judgment in California, a debt buyer must have business records and a copy of the contract authenticated by a sworn declaration that establishes specific details about the alleged debt.[43]

North Carolina passed legislation in 2009 preventing debt buyers from obtaining default judgments in the absence of properly authenticated business records that establish the amount and nature of the debt.[44] The law also requires debt buyers to attach to the complaint a copy of the contract, as well as an assignment or other writing establishing that the plaintiff is the owner of the debt. In the case of multiple assignments, proof of each assignment must be provided to establish an unbroken chain of ownership. Each assignment must contain the original account number of the debt purchased, and must clearly show the debtor's name associated with the account.[45]

In Connecticut, the Small Claims Bench/Bar Committee has promulgated a checklist for processing judgments in small claims courts. As required by the checklist, debt buyers must provide an admissible affidavit showing unbroken assignment of the particular account.[46] Importantly, the affidavit cannot be a "generic" affidavit of debt by the original creditor.[47]

The Maryland Court of Appeals approved similar changes to Maryland's Rules of Civil Procedure, requiring debt buyers seeking default judgment by affidavit to attach evidence of the existence of the debt, an itemization of the debt, the terms and conditions of the contract, and proof of plaintiff's ownership.[48] As proof of plaintiff's ownership, the debt buyer must provide in its affidavit a chronological listing of the names of all prior owners of the debt and the date of each transfer, and attach "a certified or other properly authenticated copy of the bill of sale or other document that transferred ownership of the debt to each successive owner."[49] The rule is clear that the bill of sale or other document must contain a "specific reference to the debt sued upon."[50]

---

[42] S.B. 233 (Ca. 2013).
[43] Cal. Civ. Code § 1788.60 (2013).
[44] N.C. Gen. Stat. §§ 58-70-155(a)-(b) (2013) ("Prerequisites to entering a default or summary judgment against a debtor under this Part.").
[45] N.C. Gen. Stat. §§ 58-70-150(1)-(2) ("Complaint of a debt buyer plaintiff must be accompanied by certain materials.").
[46] Ct. Gen. Stat. § 52-118 (2013).
[47] Ct. Practice Book Sec. 24-24 (2013), *available at* http://www.jud.ct.gov/Publications/PracticeBook/PB.pdf.
[48] Md. Rule of Procedure 3-306(d)(1)-(4) (2013).
[49] Md. Rule of Procedure 3-306(d)(3).
[50] *Id.*

The concern with robo-signing of affidavits has caused stepped-up oversight of original creditor debt collection and debt sales, as well as intensified scrutiny and enforcement actions of the third-party debt collection industry[51] and debt buyers.[52] Collection firms have recently paid out a number of multi-million dollar settlements regarding allegations of "robo-signed" affidavits.[53] In 2012, the West Virginia Attorney General sued debt buyer Encore Capital Group alleging the use of false affidavits.[54] The Federal Trade Commission obtained a $2.5 million civil penalty against another debt buyer, Asset Acceptance, LLC; the FTC's complaint alleged, among other violations, that the debt buyer misrepresented that consumers owed a debt when it could not substantiate those claims and that it failed to disclose time-barred debt.[55] A federal judge recently found that in New York City, a single debt buyer "obtained tens of thousands of default judgments in consumer debt actions, based on thousands of affidavits attesting to the merits of the action that were generated en masse by sophisticated computer programs and signed by a law firm employee who did not read the vast majority of them and claimed to, but apparently did not, have personal knowledge of the facts to which he was attesting."[56]

---

[51] *See* Federal Trade Commission, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* i (July 2010), *available at* www.ftc.gov/os/2010/07/debtcollectionreport.pdf. The FTC reported "[t]he system for resolving disputes about consumer debts is broken." *Id.* Among its findings, the FTC noted that: "Very few consumers defend or otherwise participate in debt collection litigation, resulting in courts entering default judgment against them . . . . Complaints often do not contain sufficient information to allow consumers in their answer to admit or deny the allegations and assert affirmative defenses." *Id.* at iii.

[52] *See* Federal Trade Commission, *Collecting Consumer Debts: The Challenges of Change* iv (Feb. 2009), *available at* http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf. The FTC has declared that "[t]he most significant change in the debt collection business in the past decade . . . has been the advent and growth of debt buying (*i.e.*, the purchasing, collecting, and reselling of debts in default)." *Id.* A 2013 study of the debt buying industry revealed that debt buyers paid an average of 4 cents per dollar of debt face value, rarely received dispute history, and received few underlying documents about the debt. Federal Trade Commission, *The Structure and Practices of the Debt Buying Industry* ii-iii (Jan. 2013), *available at* http://www.ftc.gov/os/2013/01/debtbuyingreport.pdf.

[53] Horwitz, *Bank of America*, *supra* note 23. *See also Midland Funding, LLC v. Brent*, No. 3:08 CV 1434 4 (N.D. OH Aug. 12, 2011) (finding that the defendants engaged in "the practice of 'robo-signing' affidavits in debt collection actions" in violation of the federal Fair Debt Collections Practices Act).

[54] Complaint, State of West Virigina v. Midland Funding LLC, No. 12C-4-33 (Circuit Court of Kanawha County, West Virginia 2012), *available at* http://ftpcontent.worldnow.com/wowk/Midland.pdf. The Complaint alleged as follows:

> 58. Midland often filed false, mass-produced affidavits with its motions for default judgment and summary judgment.
>
> 59. Midland's employees signed these affidavits attesting to the validity of the alleged debt without reading the affidavit they were signing, without reviewing the accounts' records, and/or without having any knowledge of the validity of the alleged debts.
>
> 60. Midland and MCM filed false, mass-produced, computer-generated affidavits that were "robo-signed"," or signed without the affiant reading the contents of the document, and/or signed by MCM employees who had no personal knowledge of the validity of the debt or other facts to which they were attesting.

*Id.* at 9.

[55] Press Release, Federal Trade Commission, Under FTC Settlement, Debt Buyer Agrees to Pay $2.5 Million for Alleged Consumer Deception: Firm Also Will Notify Consumers with "Time-Barred" Debt That It Will Not Sue to Collect (Jan. 30, 2012), *available at* http://www.ftc.gov/opa/2012/01/asset.shtm.

[56] *Sykes v. Mel S. Harris and Associates*, 285 F.R.D. 279, 279 (S.D.N.Y. 2012).