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By U.S. Mail and by email to OCArule208-14-a@nycourts.gov

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25 Beaver Street, 11th Floor
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RE: Proposed Amendments to 22 N.Y.C.C.R. §§ 208.14a and 210.14a, relating to adoption of statewide forms for use in consumer credit actions seeking award of a default judgment

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

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

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

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

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

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

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

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

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

¹ *Shining a Light on the Consumer Debt Industry: Hearing Before The Senate Banking, Housing, and Urban Affairs Subcommittee on Financial Institutions and Consumer Protection*, 113th Cong., 3-4 (2013) (Testimony of Corey Stone, Assistant Director, Office of Deposits, Cash, Collections, and Reporting Markets, Consumer Financial Protection Bureau), available at http://www.banking.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=d69d5a6b-aa86-4f4e-8b73-88814703f473&Witness_ID=00a7a97f-5645-4de4-9abe-b292b9a976c5).

² *Id.* at 5 (citations omitted).

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

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

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

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

MFY’S OBJECTIONS TO THE PROPOSED FORMS

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

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

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

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

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

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

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

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.¹¹ Importantly, the affidavit cannot be a "generic" affidavit of debt by the original creditor.¹²

The Maryland Court of Appeals approved similar changes to Maryland's Rules of Civil Procedure.¹³ 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."¹⁴ The rule is clear that the bill of sale or other document must contain a "specific reference to the debt sued upon."¹⁵

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

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

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

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

¹⁰ *Id.*

¹¹ Ct. Gen. Stat. § 52-118 (2013).

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

¹³ Md. Rule of Procedure 3-306(d)(1)-(4) (2013).

¹⁴ Md. Rule of Procedure 3-306(d)(3).

¹⁵ *Id.*

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

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

Id.

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

C. The proposed affidavits would allow testimony from unknown “authorized agents.”

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

RECOMMENDATIONS

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

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

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

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

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

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

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

Thank you for the opportunity to comment.

Sincerely,

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