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December 4, 2013

By e-mail

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

Dear Mr. McConnell:

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

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

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

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

Robo-Signing in Consumer Credit Litigation

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

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

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

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

[2] *Id.* at ii-iv.

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

debt buyers routinely submit false, robo-signed affidavits to the courts to secure default judgments. In a representative example, a debt buyer "obtained tens of thousands of default judgments in consumer debt actions [in NYC civil court], based on thousands of affidavits attesting to the merits of the action that were generated en masse by sophisticated computer programs and signed by a law firm employee who did not read the vast majority of them and claimed to, but apparently did not, have personal knowledge of the facts to which he was attesting."[4]

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

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

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

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

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

[7] *See* Jeff Horwitz & Maria Aspan, *OCC Pressures Banks to Clean Up Card Debt Sales*, Am. Banker, July 2, 2013, 1:24pm ET, *available at* http://www.americanbanker.com/issues/178_127/occ-pressures-banks-to-clean-up-card-debt-sales-1060353-1.html; Maria Aspan, *Wells Fargo Halts Card Debt Sales as Scrutiny Mounts*, July 28, 2013 10:00 p.m. ET, *available at* http://www.americanbanker.com/issues/178_144/wells-fargo-halts-card-debt-sales-as-scrutiny-mounts-1060922-1.html; 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.

[8] Prepared Remarks by Richard Cordray, Director of the Consumer Financial Protection Bureau, Cash America Enforcement Press Call, Nov. 20, 2013.

The Proposed Form Affidavits Would Only Exacerbate the Problem

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

The proposed form affidavits have multiple problems, including:

- **The proposed affidavits fail to establish proper ownership of the debt.** A complete and accurate chain of title is essential to due process and prevents the court from entering judgments in cases in which the plaintiff does not actually own the debt.[9] Existing caselaw has established that a debt buyer cannot obtain a judgment without establishing the chain of title for the specific debt at issue in the lawsuit.[10] The proposed affidavits fail to establish a chain of title because they allow original creditors and debt sellers to state only that they sold "a pool of charged-off accounts" without confirming whether the particular debt at issue was part of the sale.

- **The proposed affidavits would allow debt buyers to obtain judgments based entirely on hearsay.** Under CPLR 3215(f), in order to obtain a default judgment, a plaintiff must provide proof of the key facts in the form of an affidavit. The affidavit must be based on personal knowledge.[11] This requirement ensures that no judgment is entered, even on default, without at least "some firsthand confirmation of the facts."[12] Evidence from someone without this firsthand knowledge is insufficient to meet this minimal standard.

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

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

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

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

[12] *Feffer v. Malpaso*, 619 N.Y.S.2d 46 (1st Dep't 2004); *see also Zelnik v. Bidermann Industries U.S.A.*, 662 N.Y.S.2d 19, 19 (1st Dep't 1997) ("No judgment, even in a small claims action, can rest entirely on hearsay evidence.").

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

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

- **The proposed rule would create an unacceptable double standard.** The proposed rule would properly require original creditors seeking a default judgment to submit an affidavit on personal knowledge containing the essential facts in support of the cause of action, as required by New York law. Inexplicably, however, the proposed rule would lower evidentiary requirements for debt buyers. A debt buyer seeking a judgment on an assigned debt would not have to submit an affidavit from someone with personal knowledge, but instead would be allowed to obtain a judgment based entirely on hearsay. Debt buyers would be the only type of business excused from having to comply with the basic tenets of law applicable to all other litigants. Such a double standard is deeply problematic.

- **The proposed affidavits allow testimony from mere "authorized agents."** The proposed affidavits allow for testimony by mere "authorized agents" – which could include employees of third-party debt servicers who do not work for the original creditor and/or the plaintiff and have no knowledge of their business practices, but simply receive electronic records for debt collection purposes long after they were created. Such an individual would not have the personal knowledge of the account required to comply with New York evidentiary law.[13]

- **The proposed affidavits allow for entry of judgment on an account stated claim without recitation of key elements of the claim.** The form affidavits wrongly allow for entry of a judgment on an account stated claim without recitation of the facts necessary to support an account stated cause of action. Specifically, to support an account stated cause of action, the affidavit must provide proof that statements were mailed to the defendant on a particular date and then retained without objection for an unreasonable period of time.[14]

Recommendations

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

[13] *See supra* n.11.

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

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

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

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

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

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

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

Thank you for the opportunity to comment.

Sincerely,

New Economy Project

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