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LANDSCAPE

A Sum Uncertain: Preserving Due Process and Preventing Default Judgments In Consumer Debt Buyer Lawsuits In New York

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**A SUM UNCERTAIN: PRESERVING DUE
PROCESS AND PREVENTING DEFAULT
JUDGMENTS IN CONSUMER DEBT BUYER
LAWSUITS IN NEW YORK**

*Conor P. Duffy**

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INTRODUCTION

Since the mid-2000s, the Civil Court of the City of New York (“Civil Court”) has been overwhelmed by debt collection lawsuits. Between 2006 and 2008, debt collectors filed approximately 300,000 lawsuits per year, and although these numbers have decreased since this peak period,¹ debt collection lawsuits continue to clog Civil Court dockets.² These judgments are especially troublesome because they disproportionately impact New York City’s low- and moderate-income communities and communities of color.³ Moreover, because a judgment remains on a defendant’s credit report for at least five years in New York, it can prevent a person from obtaining employment or

1. Presumably, the drop in debt collection filings in New York City can be attributed to increased enforcement actions, reform measures, and advocacy. *See infra* Part II.A.

2. *See* CLAUDIA WILNER & NASOAN SHEFTEL-GOMES, THE LEGAL AID SOC’Y, NEIGHBORHOOD ECONOMIC DEVELOPMENT ADVOCACY PROJECT, MFY LEGAL SERVICES & URBAN JUSTICE CENTER, DEBT DECEPTION: HOW DEBT BUYERS ABUSE THE LEGAL SYSTEM TO PREY ON LOWER-INCOME NEW YORKERS 6 (2010), available at http://www.nedap.org/pressroom/documents/DEBT_DECEPTION_FINAL_WEB.pdf; New York City Civil Court Filing Statistics 2006–2011 (on file with author). In 2011, 134,423 consumer cases were filed in Civil Court. Of these lawsuits, 107,618 went unanswered, 70,371 resulted in default judgments, and attorneys represented consumer defendants in 3,342 cases. *See id.*

3. *See* WILNER & SHEFTEL-GOMES, *supra* note 2, at 10. Wilner and Sheftel-Gomes’s DEBT DECEPTION study was based on a random but representative selection of debt buyer filings in New York City between January 2006 and July 2008 and “a 451-case data set” that was comprised of people who called a legal hotline “because they had been sued by a creditor or debt buyer.” *Id.* at 8. The study found that “91% of people sued by debt buyers and 95% of people with default judgments entered against them live in low- and moderate-income communities.” *Id.* at 10. In addition, “51% of people sued by debt buyers and 56% of people with default judgments entered against them lived in communities in which the population is more than 50% black or Latino.” *Id.*

a promotion, housing, and access to other credit.⁴ Debt buyers, entities that purchase defaulted debts, file many of these lawsuits.⁵ Although debt buyers claim that they reduce the losses that creditors incur in extending credit to consumers,⁶ they also pursue litigation for profit.⁷ Debt buyers purchase bad debt for pennies on the dollar and pursue collection, in part, through litigation.⁸ Frequently, however, debt buyers do not purchase enough documentation or information to support a consumer collection lawsuit.⁹ To make matters worse, consumer defendants often lack notice of these lawsuits and many are unable to afford an attorney.¹⁰

If a defendant does not respond to the summons and complaint, or fails to appear in court at any point in the litigation, the debt buyer can apply for a default judgment.¹¹ Moreover, if the debt buyer's claim is for a sum certain or a sum which by computation can be made certain, a court clerk—not a judge—will review the application for the default judgment.¹² Under New York's Civil Practice Law and Rules (CPLR), if the debt buyer's claim is for a sum certain, the clerk may enter judgment so long as the debt buyer attaches an affidavit to the application stating that, among other things, it purchased the defendant's debt in a "pool of debts."¹³ This practice, however, does not comply with New York case law, which requires plaintiffs at the default judgment stage to prove the facts constituting the claim, and that there is "no reasonable question about the amount of the judgment" sought.¹⁴ This Note examines this conflict, the various

4. See *infra* notes 127–28 and accompanying text.

5. See WILNER & SHEFTEL-GOMES, *supra* note 2.

6. FED. TRADE COMM'N, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY 11 (2013), available at <http://www.ftc.gov/os/2013/01/debtbuyingreport.pdf>.

7. Peter A. Holland, *Defending Junk-Debt-Buyer Lawsuits*, 46 CLEARINGHOUSE REV. POVERTY L. & POL'Y 12, 19 (2012). Indeed, it has been noted that one debt-buyer plaintiff filed on average 133 debt collection actions per day in Civil Court between 2006 and 2008. See *Sykes v. Mel Harris*, 757 F. Supp. 2d 413, 419 (S.D.N.Y. 2010).

8. See *infra* Part I.A.2.

9. See *infra* Part I.A.2.

10. See *infra* note 181.

11. See *infra* Part I.C.2.

12. See *id.*

13. See *infra* Part II.A–B.

14. See *Collins Fin. Servs. v. Vigilante*, 915 N.Y.S.2d 912, 918 (Civ. Ct. 2011) (quoting *PDQ Aluminum Prods. Corp. v. Smith*, 864 N.Y.S.2d 681, 683 (App. Term 2008) (internal quotation marks omitted)). Consumer advocates have noted that there is a specific conflict between the Civil Court's Directive, DRP-182, and the legal standard to make out a *prima facie* debt collection case. See, e.g., JIM BAKER,

approaches to preventing inappropriate default judgments in debt buyer lawsuits, and provides solutions to the problem of inappropriate debt buyer default judgments.

This Note proceeds in three parts. Part I provides background information on consumer credit, debt collection, and consumer debt lawsuits. Part II examines the conflict in New York over the evidentiary standard that plaintiffs in consumer debt cases must satisfy to obtain a default judgment, proposed legislation on this issue, and how other jurisdictions have responded to the problems of debt buyer lawsuits. Finally, Part III advocates for the passage of the Consumer Credit Fairness Act in New York or the adoption of a court rule that ensures due process and prevents improper default judgments.

I. BACKGROUND ON CONSUMER CREDIT, DEBT COLLECTION, AND DEBT COLLECTION LAWSUITS

This Part provides background information on consumer credit, debt collection, and consumer debt lawsuits in New York. Section A briefly examines consumer debt and the debt collection industry, and details the stages of debt collection. Section B outlines the regulation of debt collection at the federal, state, and municipal levels. Section C examines common problems found in debt collection lawsuits, the explosion of debt buyer lawsuits in New York City, default judgments in New York, and the relevant procedural rules necessary for understanding the conflict described in Part II.

MATTHEW SCHEDLER & ANAMARIA SEGURA, UPDATES IN DEBT COLLECTION DEFENSE AND THE EVER-CHANGING CONSUMER RIGHTS LANDSCAPE 32–33 (2011), *available at* <http://www.leapny.org/images/FE/chain235siteType8/site204/client/Updates%20in%20Debt%20Collection%20Defense%20and%20the%20Ever-changing%20Consumer%20Rights%20Landscape.pdf> (arguing that a “notable omission” in the Civil Court’s DRP-182 sample affidavits “is that the [plaintiff] does not have to specify the particular account number in any of the affidavits from the original creditor, [and rather can] simply attest to the sale of a ‘pool of charged off accounts,’” and that the affidavits would not require proof sufficient to survive a Summary Judgment motion because they do not require debt buyers to produce information on the defendant’s specific account); WILNER & SHEFTEL-GOMES, *supra* note 2, at 27 n.102–03 (arguing that the then-recent Directive, DRP-182, does not require debt buyers to provide the court with sufficient proof for a sum certain); *see also infra* Part II.A–B.

A. Consumer Credit and Debt Collection

1. Consumer Credit

In the wake of the most severe economic crisis since the Great Depression, unemployment persists and many households continue to struggle with debt.¹⁵ As of June 2012, Americans had more than \$849 billion outstanding in revolving credit¹⁶—mostly from credit cards.¹⁷ Indeed, credit card debt has increased rapidly over the past two decades.¹⁸ Between 1990 and 2005, the amount of outstanding credit card debt in the United States jumped by 238%, from \$237 billion to \$802 billion,¹⁹ and between 2000 and 2006 credit card borrowing rose by approximately 30%.²⁰ Moreover, in the years preceding the

15. According to the Federal Reserve, as of September 30, 2012, 8.9% of consumer debt is in some stage of delinquency, about \$1.01 trillion of consumer debt is delinquent, and \$740 billion of consumer debt is seriously delinquent (at least 90 days late). This number includes mortgages, student loans, credit cards, and other types of consumer debt. *See* FED. RESERVE BANK OF N.Y., QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT Q3, at 1 (2012), *available at* http://www.newyorkfed.org/research/national_economy/householdcredit/DistrictReport_Q32012.pdf.

16. Revolving credit is a “consumer-credit arrangement that allows the borrower to buy goods or secure loans on a continuing basis as long as the outstanding balance does not exceed a specified limit.” BLACK’S LAW DICTIONARY 424 (9th ed. 2009).

17. BD. OF GOVERNORS OF THE FED. RESERVE SYS., CONSUMER CREDIT G.19 STATISTICAL RELEASE (2013) [hereinafter G.19 RELEASE], *available at* <http://www.federalreserve.gov/releases/g19/current/g19.pdf>.

18. *See* RICK JURGENS & ROBERT J. HOBBS, NAT’L CONSUMER LAW CTR., THE DEBT MACHINE: HOW THE COLLECTION INDUSTRY HOUNDS CONSUMERS AND OVERWHELMS COURTS 5 (2010), *available at* <http://www.nclc.org/images/pdf/pr-reports/debt-machine.pdf> (noting that between the years of 1996 and 2009 the total loans outstanding to consumers had doubled and that total credit card and other revolving debt approached \$1 trillion at its peak during this period); *see also* ELIZABETH RENUART ET AL., THE COST OF CREDIT: REGULATION, PREEMPTION, AND INDUSTRY ABUSES 27–28 (4th ed. 2009) (“In the 1990s and 2000s, credit card debt grew substantially among all American families The debt burden is greatest on families with annual incomes under \$10,000. For families in this category carrying on-going debt, the debt loan increased four times from 1989 to 2004, with an average debt load of 31% of total gross income.”); WILNER & SHEFTEL-GOMES, *supra* note 2, at 3 (reporting that between 1990 and 2005, “the amount of outstanding credit card debt in the United States grew from \$237 billion to more than \$802 billion—an increase of 238%” (citing U.S. GOV’T ACCOUNTABILITY OFFICE, CREDIT CARDS: INCREASED COMPLEXITY IN RATES AND FEES HEIGHTENS NEED FOR MORE EFFECTIVE DISCLOSURES TO CONSUMERS 57 (2006))).

19. *See* WILNER & SHEFTEL-GOMES, *supra* note 2, at 3.

20. *See* James Surowiecki, *House of Cards*, NEW YORKER, Mar. 16, 2009, at 45 (“And these cards did not go unused: between 2000 and 2006, even as Americans’ real income was essentially stagnant and their savings rate negligible, credit-card borrowing rose by about thirty per cent. Our willingness to spend beyond our means

financial crisis of 2008, credit card fees increased, making it more difficult for many to pay down their balances.²¹ Since the financial crisis of 2008, however, consumer credit card debt has diminished.²²

Nonetheless, credit cards continue to be profitable for lenders.²³ One reason for this profitability is that a credit card lender's best customers are not those "who dutifully pay off their balance every month," but rather the revolvers who "charge a lot and pay only a little every month, carrying a sizeable balance and racking up interest and late fees."²⁴ Not surprisingly, the terms of the most common credit card agreements are favorable to lenders.²⁵ Indeed, these

served the credit-card companies well: their profits jumped forty-five per cent between 2003 and 2008.").

21. JOSE A. GARCIA, DEMOS, BORROWING TO MAKE ENDS MEET: THE RAPID GROWTH OF CREDIT CARD DEBT IN AMERICA 6-7 (2007), available at <http://www.demos.org/publication/borrowing-make-ends-meet-rapid-growth-credit-card-debt-america>. Between 1989 and 2004, sixty-day late payment fees increased by 67 percent, and in 2005 households paid \$7.9 billion in credit card fees. *Id.*

22. As of July 2012, consumers owed \$850.7 billion in credit card debt, an amount that was 17% lower than the \$1.03 trillion owed by consumers in 2008. See *Consumer Borrowing Falls as Less Is Put on Credit Cards*, N.Y. TIMES, Sep. 10, 2012, at B8; see also BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT TO THE CONGRESS ON THE PROFITABILITY OF CREDIT CARD OPERATIONS OF DEPOSITORY INSTITUTIONS (2012) [hereinafter REPORT TO CONGRESS ON PROFITABILITY OF CREDIT CARD OPERATIONS], available at <http://www.federalreserve.gov/publications/other-reports/files/ccprofit2012.pdf> (finding that outstanding credit card balances are "notably lower" than their high point in 2008).

23. See REPORT TO CONGRESS ON PROFITABILITY OF CREDIT CARD OPERATIONS, *supra* note 22 ("Although profitability for the large credit card banks has risen and fallen over the years, credit card earnings have been almost always higher than returns on all commercial bank activities. Earnings patterns for 2011 were consistent with historical experience: For all commercial banks, the average return on all assets, before taxes and extraordinary items was 1.18 percent in 2011 compared to 5.37 percent for the large credit card banks.").

24. Surowiecki, *supra* note 20 ("Credit-card companies don't necessarily want revolvers to pay off their debts; if they did, there'd be no interest or fees to collect. They want their loans to be, in the words of a banking regulator, "a perpetual earning asset."); see Gretchen Morgenson, *Given a Shovel, Americans Dig Deeper Into Debt*, N.Y. TIMES, July 20, 2008, at A1 ("[B]ehind the big increase in consumer debt is a major shift in the way lenders approach their business. In earlier years, actually being repaid by borrowers was crucial to lenders. Now, because so much consumer debt is packaged into securities and sold to investors, repayment of the loans takes on less importance to those lenders than the fees and charges generated when loans are made."). According to the Federal Reserve, typically half of consumers surveyed reported that they pay their credit card balance in full each month before being charged interest. See REPORT TO CONGRESS ON PROFITABILITY OF CREDIT CARD OPERATIONS, *supra* note 22.

25. See generally Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373 (2004).

agreements often include hidden fees and charges obfuscated by terms that “were designed in large part to add unexpected—and unreadable—terms that favor the card companies.”²⁶

Credit card profits, however, have come at a great cost to many borrowers. In particular, credit card debt continues to trouble low- and moderate-income borrowers. According to a 2012 report, 40% of low- and moderate-income households studied used credit cards to pay for basic necessities,²⁷ such as housing, groceries, and health insurance.²⁸ The same report found that unemployment and medical bills are among the greatest sources of credit card debt for low- and

Consumer contracts are characterized by an asymmetry between the two parties: the seller of a good or the provider of a service on the one hand and the consumer on the other. One party is usually a highly sophisticated corporation, the other—an individual, prone to the behavioral flaws that make us human. Absent legal intervention, the sophisticated seller will often exploit the consumer’s behavioral biases. The contract itself, commonly designed by the seller, will be shaped around consumers’ systematic deviations from perfect rationality. Such biased contracting is not the consequence of imperfect competition. On the contrary, competitive forces compel sellers to take advantage of consumers’ weaknesses.

Id. at 1373.

26. Elizabeth Warren, *Unsafe at Any Rate*, 5 DEMOCRACY 8, 11–12 (2007), available at <http://www.democracyjournal.org/5/6528.php?page=all> (“Part of the problem is that disclosure has become a way to obfuscate rather than to inform. According to the *Wall Street Journal*, in the early 1980s, the typical credit card contract was a page long; by the early 2000s, that contract had grown to more than 30 pages of incomprehensible text.”); see also THE PEW CHARITABLE TRUSTS, SAFE CREDIT CARD STANDARDS: POLICY RECOMMENDATIONS FOR PROTECTING CREDIT CARDHOLDERS AND PROMOTING A FUNCTIONAL MARKETPLACE 2 (2009), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Credit_Cards/Final8247_pct_CreditCard_v3.pdf (“[T]he vast majority of credit cards come with contracts which give issuers nearly unlimited power to raise interest rates, impose significant penalties and fees, process payments in ways which maximize interest charges and otherwise control the terms of credit, regardless of what was stated in previous disclosures. These practices can produce serious consequences, including rapid increases in household debt, unforeseen by most consumers.”). *But see infra* notes 54–66 and accompanying text (describing the CARD Act of 2009 that prohibits some, but not all, of the predatory practices described above).

27. See AMY TRAUB & CATHERINE RUETSCHLIN, DEMOS, THE PLASTIC SAFETY NET: FINDINGS FROM THE 2012 NATIONAL SURVEY ON CREDIT CARD DEBT OF LOW- AND MIDDLE-INCOME HOUSEHOLDS 9–10 (2012), available at <http://www.demos.org/publication/plastic-safety-net> (“While the greatest single source of credit card debt was nonessential purchases, nearly half of all households cite necessities such as home or car repairs, expenses related to job loss, business expenses, or household appliances, as the greatest contributors to their credit card balances.”).

28. *Id.* According to the think tank Demos, in 2012, 40% of the low- and moderate-income families studied reported using credit cards to pay for basic living expenses such as rent, groceries, and insurance. *Id.* at 1.

moderate-income families.²⁹ Households in this group are more likely than their wealthier counterparts to carry credit card balances³⁰ and more likely to carry balances with high interest rates.³¹ And low-income borrowers are twice as likely as middle-income borrowers, and five times as likely as upper-income borrowers, to pay an interest rate over 20%.³²

Several factors contributed to the credit card boom of the past two decades. First, due to technological advancements and readily available credit reports on consumers, lenders could more quickly determine a borrower's creditworthiness.³³ It was therefore easier for lenders to price risk and solicit new customers,³⁴ including so-called "subprime"³⁵ customers.³⁶ Second, deregulation helped national

29. *Id.* at 1. Before the financial crisis, a similar survey found that low- and moderate-income homeowners frequently refinanced an existing mortgage or obtained a second mortgage to pay off credit card debt. See TAMARA DRAUT ET AL., DEMOS & THE CTR. FOR RESPONSIBLE LENDING, THE PLASTIC SAFETY NET: THE REALITY BEHIND DEBT IN AMERICA 15 (2005), available at <http://www.demos.org/publication/plastic-safety-net-reality-behind-debt-america>.

30. For instance, 65% of low- and moderate-income families carried credit card balances, compared to 46% of households with incomes over \$100,000. See GARCIA, *supra* note 21, at 6.

31. See RENUART ET AL., *supra* note 18, at 734 ("While in the past credit card practices may have affected primarily middle-class consumers, low-income consumers have become a lucrative target for credit card lenders, because those consumers typically carry and pay big balances at high interest rates. One survey found that the average credit card debt of low- and middle-income households is \$8,650.").

32. *Id.* at 735. There is also evidence to suggest that high interest rates and fees for credit card balances disparately impact minorities and women, as well as low-income consumers. See *id.* at 735 (noting that "African-American and Latino credit card holders who carry a balance are more likely than whites to be paying an interest rate over 20%," that "[n]early 15% of African-American revolvers and 13% of Latino revolvers pay these rates, versus 7% of whites," and that "[s]ingle women revolvers are almost twice as likely as single male revolvers to pay an interest rate over 20%").

33. See BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT TO THE CONGRESS ON THE PRACTICES OF THE CONSUMER CREDIT INDUSTRY IN SOLICITING AND EXTENDING CREDIT AND THEIR EFFECTS ON CONSUMER DEBT AND INSOLVENCY 5-12 (2006), available at <http://www.federalreserve.gov/boarddocs/rptcongress/bankruptcy/bankruptcybillstudy200606.pdf>.

34. *Id.* In 2005 alone, credit card lenders sent six billion direct mail solicitations to potential customers. While direct mail solicitations decreased during the financial crisis, in 2011 nearly 5 billion direct mail solicitations were sent to consumers. See REPORT TO CONGRESS ON PROFITABILITY OF CREDIT CARD OPERATIONS, *supra* note 22, at 7-8 & nn.15-16.

35. Subprime borrowers have been defined as borrowers with a weakened credit history that includes late payments, defaults, bankruptcies, and other problems. See *Background Definitions*, FDIC, <http://www.fdic.gov/about/comein/background.html> (last updated July 13, 2007).

banks and other depository institutions develop new profit streams based on higher “market-determined” interest rates and fees.³⁷ This, in turn, provided lenders with greater incentives to lend.³⁸ Third, consumers began to use credit cards to make routine payments.³⁹ And fourth, financial institutions began to securitize credit card receivables to tap into capital markets to fund additional credit card lending.⁴⁰

To develop new profits, lenders began to offer subprime credit cards. These products were aimed at borrowers with lower credit ratings and include higher interest rates.⁴¹ In addition, deregulation allowed issuers to sell products with penalty interest rates and promotional interest rates.⁴² A penalty interest rate is an increase in a

36. See BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 33, at 5–6.

37. See *id.* at 6. Of these reasons, deregulation was especially influential in the growth of the consumer credit industry. Deregulation and the federal preemption of state usury laws allowed national banks and other depository institutions to avoid state caps on interest and fees. In 1978, in *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*, the Supreme Court held that a national bank was subject to federal regulation and the laws of the state in which it was chartered, and not the usury laws of any other state. 439 U.S. 299 (1978). As a result, “national banks and other depositories established their headquarters in states that eliminated or raised their usury limits, giving them free rein to charge whatever interest rate they wanted.” Carolyn Carter et al., *The Credit Card Market and Regulation: In Need of Repair*, 10 N.C. BANKING INST. 23, 33 (2006). In addition, in 1996, in *Smiley v. Citibank (South Dakota), N.A.*, the Supreme Court upheld the Office of the Comptroller of the Currency’s definition of interest, which included late payment and other fees. 517 U.S. 735 (1996). Because of *Smiley*, “national banks and other depositories can charge fees in any amount to their customers as long as their home-state laws permit the fees and so long as the fees are ‘interest’ under the OCC definition.” Carter et al., *supra* at 35. Thus, following the *Smiley* decision in 1996, penalty fee revenue increased from \$1.7 billion in 1996 to \$18 billion in 2007. See CAROLYN L. CARTER & ANDREW G. PIZOR, NAT’L CONSUMER LAW CTR., CONSUMER CREDIT REGULATION 376 (2012).

38. See BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 33, at 6 (“Beginning in the late 1970s, court decisions and legislation by some states relaxed the restrictions on credit card interest rates, allowing national banks based in those states to charge market-determined rates throughout the country. The reduction in legal impediments, together with improvements in data processing and telecommunications, allowed for the development of risk-based pricing nationally and contributed to the growth of revolving credit.”).

39. *Id.* at 6–7.

40. *Id.* at 10–12.

41. See Jessica Silver-Greenberg & Tara Siegel Bernard, *Lenders Again Dealing Credit to Risky Clients*, N.Y. TIMES, Apr. 10, 2012, <http://www.nytimes.com/2012/04/11/business/lenders-returning-to-the-lucrative-subprime-market.html>.

42. In addition, issuers also relied on universal default, which was a form of credit re-pricing where lenders “impose[d] penalty rates on consumers, not for late payment or any behavior with respect to the customer’s account with that particular lender,

credit card's Annual Percentage Rate (APR) "triggered by the occurrence of a specific event, such as the consumer's making a late payment or exceeding the credit limit."⁴³ For example, before reform legislation, if a customer missed a payment, the issuer, pursuant to the credit agreement, could charge a late fee—sometimes as high as \$40—and raise the interest rate to as high as 30%.⁴⁴ Likewise, under a promotional interest rate product, a card's APR increases following a specified period of time that is disclosed at the account opening.⁴⁵ Due in part to these practices and others, by 2008 some credit card borrowers found themselves trapped in debt.⁴⁶

The credit card industry maintains that deregulation benefits consumers by allowing lenders to extend credit to more borrowers at lower cost.⁴⁷ Industry advocates argue that restraints on interest rates

but for late payments to any of the consumer's other creditors" or in circumstances where the consumer's credit score falls under a particular score. *See* RENUART ET AL., *supra* note 18, at 737; *see also infra* notes 54–66 and accompanying text (discussing the CARD Act reforms that banned this practice).

43. *See* RENUART ET AL., *supra* note 18, at 736.

44. *See* Kathleen Day, *Credit Cards' Hidden Costs*, WASH. POST, Oct. 12, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/11/AR2006101101850.html>.

45. *See* RENUART ET AL., *supra* note 18, at 738. Thus, after the time period for the "teaser" or "introductory" rate elapses, the interest rate increases. *Id.*

46. *See* Discover Bank v. Owens, 822 N.E.2d 869, 873 (Cleveland Mun. Ct. 2004) (holding that credit card issuer was unjustly enriched by its repeated charging of over-the-limit fees and other finance charges where borrower had paid \$3,492 for a \$1,900 debt, but issuer still alleged payment due of \$5,564.28); *see also* Morgensen, *supra* note 24, at A1 ("[T]he lucrative lending practices of America's merchants of debt have led millions of Americans—young and old, native and immigrant, affluent and poor—to the brink. More and more, Americans can identify with miners of old: in debt to the company store with little chance of paying up.").

47. *See* JONATHAN ORSZAG & SUSAN MANNING, AN ECONOMIC ASSESSMENT OF REGULATING CREDIT CARD FEES AND INTEREST RATES 9 (2007), *available at* http://skaddenpractices.skadden.com/cfs/cfs_pdf/An%20Economic%20Assessment%20of%20Regulating%20Credit%20Card%20Fees%20and%20Interest%20Rates.pdf ("Since then, however, innovation and deregulation have allowed for more efficient risk-based pricing and management of individual cardholder risk. Changes in technology, such as credit scoring, automatic access to consumer reports, and response modeling and other risk analysis techniques, have enabled credit card issuers to better track and assess changes in an individual's risk profile. As issuers became better able to assess borrower risk, they could then offer a broader variety of credit products to borrowers with more diverse rates and fees."). *But see* Adam J. Levitin, *A Critique of the American Bankers Association Study on Credit Card Regulation* (Georgetown Univ. Law Ctr., Georgetown Law & Econ. Research Paper No. 1029191, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1029191.

and fees will lead to moral hazard⁴⁸ that risk-based pricing would prevent.⁴⁹ Additionally, the American Bankers Association argues that risk-based pricing avoids a “one-size-fits-all-model,” which would increase rates for everyone and ultimately limit the amount of available credit.⁵⁰

Nevertheless, deregulation has led to an increase in predatory lending and excessive fees.⁵¹ For example, the National Consumer Law Center argues that high interest rates and fees “disproportionately burden financially vulnerable and historically disadvantaged populations,”⁵² and that penalty rates and fees deceive consumers because “[c]onsumers never shop [for credit] based on penalty rates or late fees because they never expect to incur them.”⁵³

Congress acted, however, to prohibit some of the practices that made credit cards profitable for lenders and risky for consumers. In 2009, Congress passed the Credit Card Accountability, Responsibility, and Disclosure (CARD) Act of 2009 to “establish fair and transparent practices relating to extension of credit under an open end consumer credit plan, and for other purposes”⁵⁴ and to provide for the informed use of credit.⁵⁵ The CARD Act limits forms of credit re-pricing such as universal default⁵⁶ and surprise interest rate increases,⁵⁷ restricts retroactive penalty rate increases resulting from late payments unless the payment is more than 60 days late,⁵⁸ prevents interest rate increases within the first year,⁵⁹ and requires

48. The phrase “moral hazard” denotes “a condition in which the knowledge that a third party will bear the costs of some harm creates a risk that the actor may fail to take due precautions against occurrence of the harm.” RICHARD SCOTT CARNELL ET AL., *THE LAW OF BANKING AND FINANCIAL INSTITUTIONS* 84 (4th ed. 2009).

49. See Levitin, *supra* note 47, at 10. “Risk-based pricing occurs when lenders offer different consumers different interest rates or other loan terms, based on the estimated risk that the consumers will fail to pay back their loans.” *What Is Risk-Based Pricing?*, CONSUMER FIN. PROTECTION BUREAU (Sept. 4, 2012), <http://www.consumerfinance.gov/askcfpb/767/what-risk-based-pricing.html>.

50. See AM. BANKERS ASS’N, *NEW CREDIT CARD LAW: WHAT IT MEANS FOR CONSUMERS* (2009), available at <http://www.aba.com/aba/documents/CreditCards/CreditCardLawFactSheet060209.pdf>.

51. See RENUART ET AL., *supra* note 18, at 736.

52. *Id.*

53. *Id.*

54. Pub. L. No. 111-24, 123 Stat. 1734 (2009).

55. 15 U.S.C. § 1601 (2012).

56. Pub. L. No. 111-24, § 101(b), 123 Stat. 1734, 1736 (2009).

57. *Id.*

58. *Id.* § 171 (to be codified at 15 U.S.C. § 1666i-1).

59. *Id.* § 172, 123 Stat. at 1738 (to be codified at 15 U.S.C. § 1666i-2).

promotional interest rates to last at least six months.⁶⁰ The CARD Act also prohibits over-the-limit fees, unless the cardholder authorizes the issuer to complete over-the-limit transactions.⁶¹ Additionally, it prohibits fees for accepting payment,⁶² double-cycle billing,⁶³ and fee harvesting subprime credit cards.⁶⁴ According to a 2012 study, the CARD Act has helped households pay down debt faster and avoid fees.⁶⁵ The Act does not cap interest rates that card issuers may charge, however, and it does not apply retroactively to debt that was incurred prior to the reform.⁶⁶

2. *Debt Collection: Industry and Players*

Concomitant with the growth of consumer debt over the past two decades has been the rise of the debt collection industry.⁶⁷ Between 1970 and 2009, the third-party debt collection industry profited from a “sixfold increase in inflation-adjusted revenue.”⁶⁸ Industry analysts estimated that the debt collection revenues would be as large as \$17 billion for 2013.⁶⁹ Moreover, amidst a nationwide slump in hiring for many sectors, the Bureau of Labor Statistics has reported that

60. *Id.*

61. *Id.* § 102, 123 Stat. at 1738 (to be codified at 15 U.S.C. § 1637(k)).

62. *Id.* (to be codified at 15 U.S.C. § 1637(l)).

63. *Id.* (to be codified at 15 U.S.C. § 1637(j)).

64. *Id.* § 105, 123 Stat. at 1738 (to be codified at 15 U.S.C. § 1637(n)).

65. See TRAUB & RUETSCHLIN, *supra* note 27, at 2 (finding that, as a result of the CARD Act, “one third of households are responding to new information included on credit card statements by paying their balances down faster,” that far fewer households are paying late, and that “those who did make late payments were significantly less likely to see their interest rate increase as a result”).

66. See FRED WILLIAMS, FIGHT BACK AGAINST UNFAIR DEBT COLLECTION PRACTICES: KNOW YOUR RIGHTS AND PROTECT YOURSELF FROM THREATS, LIES AND INTIMIDATION 74 (2011).

67. See FED. TRADE COMM’N, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE, A WORKSHOP REPORT 13 (2009), available at <http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf> (outlining the debt collection industry and its growth); see also WILLIAMS, *supra* note 66, at 27 (“[The] army of professional collection workers is expected to swell, now that the consumer debt bubble has burst: The Bureau of Labor Statistics predicts that about 100,000 new collection jobs will be created in the decade that ends in 2016, a ‘much faster’ growth rate than average for all occupations.”); Judith Fox, *Do We Have A Debt Collection Crisis? Some Cautionary Tales of Debt Collection in Indiana*, 24 LOY. CONSUMER L. REV. 355, 357 (2012) (“The debt industry is one of the few booming industries left in America.”).

68. See FED. TRADE COMM’N, *supra* note 67, at 13.

69. See *U.S. Debt Collections Industry Worth \$12.2 Billion*, PRWEB (Apr. 10, 2012), <http://www.prweb.com/pdfdownload/9383739.pdf>.

employment in the debt collection industry is projected to increase by 14% between 2010 and 2020.⁷⁰

The debt collection industry consists of third-party collection agencies, debt buyers, and debt collection law firms.⁷¹ Third-party collection agencies are contractors that creditors—both original creditors and debt buyers—hire to collect delinquent accounts.⁷² Collection agencies work on a contingency fee system whereby they receive from the creditor a fraction of the amount that they are able to collect.⁷³ Fees range between ten to fifty cents of each dollar collected and the size of the fee depends on the age of the accounts.⁷⁴ For instance, older accounts, perhaps those accounts that creditors already have sent to other collection agencies but remain uncollected, offer larger fees.⁷⁵ Many collection agencies are large, publicly traded companies that use sophisticated autodialing techniques to contact as many consumers as possible.⁷⁶ These agencies provide their debt

70. See *Occupational Outlook Handbook, Bill and Account Collectors*, U.S. BUREAU OF LABOR STAT., <http://www.bls.gov/ooh/office-and-administrative-support/bill-and-account-collectors.htm> (last visited Apr. 19, 2013).

71. Unfortunately, some debt collectors rely on abusive and deceptive tactics to pressure consumers into paying delinquent debts and, sometimes, debts that the consumer may not even owe. Indeed, according to a 2012 report, the Federal Trade Commission (FTC) received more complaints about the debt collection industry than any other industry. See CONSUMER FIN. PROTECTION BUREAU, ANNUAL REPORT 2012: FAIR DEBT COLLECTION PRACTICES ACT 6 (2012), available at http://files.consumerfinance.gov/f/201203_cfpb_FDCPA_annual_report.pdf (“The FTC continues to receive more complaints about the debt collection industry than any other specific industry.”); see also WILLIAMS, *supra* note 66, at 5 (“The rate of complaints is exploding, having more than tripled since 2003. The number-one complaint is that collectors are demanding money that people do not even owe, even grabbing it directly from their bank accounts.”). But see Michael Klozotsky, *The Facts Behind the Fantasies About Debt Collection Complaints*, FORBES (Jun. 22, 2012), <http://www.forbes.com/sites/insidearm/2012/06/22/the-facts-behind-the-fantasies-about-debt-collection-complaints/print/> (questioning the veracity of the FTC complaint figures because the FTC “acknowledges that it neither verifies . . . complaints for legitimate violations of federal law . . . nor scrubs them [the complaint statistics] for duplication”).

72. See WILLIAMS, *supra* note 66, at 27.

73. *Id.*

74. *Id.*

75. *Id.*

76. See *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 638–39 (7th Cir. 2012) (“The situation is this: Customer incurs a debt and does not pay. Creditor hires Bill Collector to dun Customer for the money. Bill Collector puts a machine on the job and repeatedly calls Cell Number, at which Customer had agreed to receive phone calls by giving his number to Creditor The machine, called a predictive dialer, works autonomously until a human voice comes on the line. If that happens, an employee in Bill Collector’s call center will join the call.”).

collector employees with salary incentives and commissions for successful collection efforts.⁷⁷

If collection agencies are unable to collect, many creditors will sell a consumer's debt to a debt buyer. Debt buyers purchase defaulted consumer debt—mostly credit cards, but also other consumer debts such as medical debt, auto loans, telecommunications debt, and retail debt—well below its face value, typically for pennies on the dollar.⁷⁸ Like contingency fee collection agencies, some debt buyers are publicly traded companies.⁷⁹ Unlike contingency fee collection agencies, however, debt buyers keep all the money they recover from consumers.⁸⁰

The practice of debt buying began following the savings and loan crisis of the late 1980s and early 1990s when the federal government established the Resolution Trust Corporation to auction off the nearly \$500 billion in unpaid loans that creditors owned.⁸¹ Debt buying grew significantly during the 1990s and early 2000s, increasing from \$660 million in 1993 to \$57 billion in 2004.⁸² In the past decade,

77. See John Hechinger, *Taxpayers' Fund \$454,000 Pay for Collector Chasing Student Loans*, BLOOMBERG (May 15, 2012), <http://www.bloomberg.com/news/2012-05-15/taxpayers-fund-454-000-pay-for-collector-chasing-student-loans.html>; see also WILLIAMS, *supra* note 66, at 89 (describing the bonus incentives at one debt collection agency).

78. See FED. TRADE COMM'N, *supra* note 6 (FTC study finding that the largest debt buyers paid an average of 4 cents per dollar of debt face value and that debt buying serves a function for consumer credit because by “reducing the losses that creditors incur in providing credit, debt collection allows creditors to provide more credit at lower prices—that is, at lower interest rates”); see also *Debt Buyers' Ass'n v. Snow*, 481 F. Supp. 2d 1, 4 (D.D.C. 2006) (noting that “an originating lender may sell a charged-off consumer loan to a Debt Buyer, usually as part of a portfolio of delinquent consumer loans, for a fraction of the total amount owed to the originating lender”); Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 J. BUS. & TECH. L. 259, 260 (2011) (“The goal of the debt buyer is to purchase—for pennies on the dollar—debts that have already been deemed uncollectable by the original creditor, and then collect all, most or some of the debt and thereby make a handsome profit.”). *But see* FED. TRADE COMM'N, *supra* note 6, at 23 (noting “that although the price paid by debt buyers for debts is low relative to their face value, it does not necessarily follow that the profit from collecting on those debts will be high” because debt buyers do not always recover the full value of the debts they collect and they incur substantial costs throughout the collection process).

79. See Jessica Silver-Greenberg, *Boom in Debt Buying Fuels Another Boom—In Lawsuits*, WALL ST. J., Nov. 28, 2010, <http://online.wsj.com/article/SB10001424052702304510704575562212919179410.html>.

80. See Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After the FDCPA*, 79 S. CAL. L. REV. 711, 725–26 (2006).

81. See FED. TRADE COMM'N, *supra* note 6, at 12.

82. See ROBERT J. HOBBS ET. AL., FAIR DEBT COLLECTION 7 (6th ed. 2008).

the number and type of debt buyers expanded rapidly, especially during the period from 2004–2006.⁸³

According to a recent FTC report, two factors have led to growth in debt buying during the past decade or more. First, consumers took on more debt—especially credit card debt—during the past decade.⁸⁴ Second, major credit card issuers incorporated the sale of debt to others into their accounts receivable management strategies.⁸⁵ Indeed, the largest source of debt for the debt buying market is so-called “charged-off” debt.⁸⁶ This is debt that banks charge off after a certain period of time—180 days for credit cards—to comply with federal banking regulation capital requirements.⁸⁷ In return for selling this charged-off debt, banks may consider money they receive as assets for capital requirements.⁸⁸

Debt buyers purchase debt in portfolios of bundled debts from original creditors, other debt buyers, and debt brokers.⁸⁹ It is typical for portfolios to share common attributes; for instance, a debt seller may prepare a portfolio that consists of accounts from consumers with credit scores within a given range, or last known addresses in a particular state.⁹⁰ In deciding how to bid for a portfolio at auction, debt buyers consider, among other things, the states in which the

83. See FED. TRADE COMM’N, *supra* note 6, at 14 (“The number and type of debt buyers expanded rapidly in the 2000s, especially during the period from 2004–06, as a result of, among other things, increases in the amount of debt available for purchase and the ready availability of capital to finance debt-buying enterprises and debt purchases.”).

84. See FED. TRADE COMM’N, *supra* note 6, at 12–13.

85. *Id.* at 13.

86. *Id.*

87. *Id.* at n.58 (“Federal regulations prohibit banks and other depository institutions from counting toward their capital requirements debts that are in bankruptcy or delinquent more than a specified number of days. Banks and other depository institutions must charge off installment loan debts by the end of the month in which the debts become 120 days past due, credit card loan debts by the end of the month in which they become 180 days past due, and debts in [sic] bankruptcy within 60 days of the bank’s receipt of notification that consumers have filed for bankruptcy.” (citing Uniform Retail Credit Classification and Account Management Policy, 65 Fed. Reg. 36903-01 (June 12, 2000))). “Charge-off” status means the lender treats the amount as uncollectible for financial reporting and tax purposes.” WILLIAMS, *supra* note 66, at 106–07.

88. See FED. TRADE COMM’N, *supra* note 6, at 13.

89. *Id.* at 17–19.

90. *Id.* at 17. It is also important to note that “debts that have been settled, challenged by consumers, or in active litigation are typically not included in portfolios” and if one of these “ineligible” accounts is sold, the buyer can return the account for a refund. *Id.* at 17–18.

debtors reside⁹¹ and the type,⁹² age,⁹³ and previous collection history of the debt.⁹⁴ When a seller accepts a buyer's bid for a portfolio, the two agree to a purchase and sale agreement and the seller provides the buyer with a data file containing basic information on the various debts.⁹⁵ Frequently, however, sellers disclaim all warranties and representations regarding the accuracy of the information and documents contained within the portfolio by stating that debts are sold "as is and with all faults."⁹⁶ Most agreements also state that documents may not be available for all accounts.⁹⁷

A portfolio typically consists of an electronic spreadsheet that contains a person's name, date of birth, phone number, social security number, last known address, an amount allegedly owed, the date the account was created, the date of the last payment, and the date the original creditor charged-off the account.⁹⁸ Portfolios often lack essential collection information, such as "the credit application, account agreement, monthly statements, payment records, and customer service records that would reflect customer disputes."⁹⁹ Indeed, according to a recent FTC report on the practices of the largest debt buyers, of accounts studied, only 11% listed the principal amount, 37% listed finance charges and fees, 30% listed the interest charged on the account.¹⁰⁰ In addition, debt buyers rarely receive documentation about purchased accounts in portfolios. For example, according to the FTC study, debt buyers received account statements

91. *Id.* at 21.

92. *Id.* at 24 ("[D]ebt buyers paid substantially more for mortgage debt and significantly less for debts such as medical and utility debt.").

93. Newer debts are more expensive than older ones. *Id.* at 23–24 ("The FTC's analysis suggests that debt buyers paid on average 3.1 cents per dollar of debt for debts that were 3 to 6 years old and 2.2 cents per dollar of debt for debts that were 6 to 15 years old compared to 7.9 cents per dollar for debts less than 3 years old.").

94. *Id.* at 24 (finding that debt buyers on average "paid less for debts for which sellers previously hired third-party collectors to try to recover and for debts for which there was no information, or incomplete information, about third-party collection attempts").

95. *Id.* at 24–28 (detailing contractual agreements to purchase debt).

96. *Id.* at 25.

97. *Id.* at iii.

98. See WILNER & SHEFTEL-GOMES, *supra* note 2, at 5; FED. TRADE COMM'N, *supra* note 6, at 34–35.

99. See ROBERT J. HOBBS & CHI CHI WU, NAT'L CONSUMER LAW CTR., MODEL FAMILY FINANCIAL PROTECTION ACT 4 (2012), available at http://www.nclc.org/images/pdf/debt_collection/model_family_financial_protection_act.pdf (hereinafter Model Family Financial Protection Act).

100. See FED. TRADE COMM'N, *supra* note 6, at 35.

for 6% of accounts, “terms and conditions” statements for 6% of accounts, and application documents for 1% of accounts.¹⁰¹ Moreover, most of the time debt buyers do not obtain account documents from sellers after purchase,¹⁰² perhaps because purchase and sale agreements limit their ability to do so free of charge.¹⁰³

Debt buyers use various methods to collect on debts, such as sending letters to consumers, filing lawsuits, reporting debts to credit bureaus, and refinancing debt into new credit agreements.¹⁰⁴ These methods lead to significant profits, but come at great cost to communities—especially low- and moderate-income communities and communities of color.¹⁰⁵ Nonetheless, many have noted that debt buyers collect and profit from debts with little information or documentation to support collection efforts, engage in abusive debt collection tactics, and overwhelm courts with lawsuits.¹⁰⁶

101. *Id.*

102. *Id.* at 40 (finding that while debt buyers may request documents free of charge for a specified period after purchase and purchase documents after that purchase, they rarely do so).

103. *Id.* at 26 (“Debt buyers often were given a defined amount of time (typically between six months and three years) to request a defined maximum number of documents at no charge. Some contracts also limited the frequency with which debt buyers could submit requests to obtain document copies. After the period for debt buyers to receive information at no cost ended, or after debt buyers had obtained the maximum number of free copies, whichever came first, the debt sale contracts specified a price (usually between five and ten dollars and sometimes higher per document) and quantity of documents that debt buyers had the option of purchasing.”).

104. *See* WILNER & SHEFTEL-GOMES, *supra* note 2, at 5; *see also* HOBBS ET. AL., *supra* note 82, at 7 (“The debt buyers may bring thousands of collection suits on the claims they buy reducing them to judgment, flip the consumer to a new credit account, or simply put the debt on the consumer’s credit report, ruining their credit rating.”).

105. *See, e.g.*, WILNER & SHEFTEL-GOMES, *supra* note 2, at 10; Patrick Lunsford, *Encore Capital Reports Surge in Profit and Revenue; Close to \$500 Million in 2011*, INSIDEARM (Feb. 10, 2012), <http://www.insidearm.com/daily/debt-buying-topics/debt-buying/encore-capital-reports-surge-in-profit-and-revenue-close-to-500-million-in-2011/>; Silver-Greenberg, *supra* note 79 (reporting that a large debt buyer, Encore Capital Group, Inc., posted \$33 million in profit in 2009, a jump of 139% from 2008).

106. *See, e.g.*, ROBERT J. HOBBS & RICK JURGENS, NAT’L CONSUMER LAW CTR., *THE DEBT MACHINE: HOW THE COLLECTION INDUSTRY HOUNDS CONSUMERS AND OVERWHELMS THE COURTS*, (2010), *available at* http://www.nclc.org/images/pdf/debt_collection/debt-machine.pdf; RACHEL TERP & LAUREN BOWNE, *PAST DUE: WHY DEBT COLLECTION PRACTICES AND THE DEBT BUYING INDUSTRY NEED REFORM NOW* (2011), *available at* http://defendyourdollars.org/pdf/Past_Due_Report_2011.pdf; Holland, *supra* note 78.

In addition to debt collection agencies and debt buyers, another key group in the debt collection industry is debt collection law firms. Debt collection law firms collect on delinquent debts on behalf of debt buyers or original creditors.¹⁰⁷ Collection lawyers rely on a variety of methods to collect consumer debt. For instance, some collection firms operate on a contingency fee basis.¹⁰⁸ These firms, aided by computer software that helps prepare their cases, file a high volume of suits against consumers.¹⁰⁹ Other collection law firms consist of a small number of lawyers and an abundance of collectors or paralegals.¹¹⁰ A firm of this type operates as a contingent fee collection agency at first and then, if unsuccessful, as a litigation firm that pursues collection through the courts.¹¹¹ Finally, some collection firms purchase the debt they are attempting to collect.¹¹²

3. Debt Collection: Process

The collection process starts with lenders. Every consumer credit obligation begins with an agreement requiring the borrower to repay the lender¹¹³—normally a contract that is either closed or open ended.¹¹⁴ Once a debt is created—for example, when a borrower makes a purchase on a credit card or obtains a mortgage—the borrower is obligated, under the terms of his or her agreement with the lender, to repay the borrowed amount according to the terms of that agreement, typically in monthly payments. If a borrower misses a monthly payment and defaults, the lender initiates a collection

107. See Andrew Martin, *Automated Debt-Collection Lawsuits Engulf Courts*, N.Y. TIMES, July 12, 2010, <http://www.nytimes.com/2010/07/13/business/13collection.html>.

108. See HOBBS ET AL., *supra* note 82, at 7.

109. See Martin, *supra* note 107 (describing the business model of Cohen & Slamowitz, a New York law firm with 14 lawyers on staff that has been filing “roughly 80,000 lawsuits a year”).

110. See HOBBS ET AL., *supra* note 82, at 7.

111. *Id.*

112. *Id.*

113. See FED. TRADE COMM’N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION 5 (2010), available at <http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf>.

114. See Nefertara Clark, *Finance and Other Charges: Is Disclosure for the Sake of Disclosure Sufficient? Discussing the Nature of Finance and Other Charges Under the Truth-in-Lending Act*, 33 S.U. L. REV. 313, 317–18 (2006) (distinguishing between an open end credit agreement, which “is a credit agreement whereby the consumer is allowed to purchase items on an ongoing basis, provided the outstanding balance does not surpass the preset spending limit,” and a closed-end credit agreement, which is “generally payable in pre-determined installments”).

effort. The debt collection process typically begins with a creditor's in-house collections department that attempts to collect the consumer's past due amount.¹¹⁵

Unsuccessful creditors may then hire debt collection agencies to make further attempts to collect the debt.¹¹⁶ These efforts typically include dunning letters and phone calls.¹¹⁷ If a credit card debt remains in default for an extended period of time—180 days—the issuer will charge off the debt.¹¹⁸ At this point the issuer may either sell the debt to a debt buyer,¹¹⁹ or initiate its own lawsuit against the borrower.¹²⁰ If the debt is sold as part of a portfolio to a debt buyer, collection agencies and debt buyers may make further efforts to collect the debt.¹²¹ Debt buyers also routinely file lawsuits initiated by debt collection law firms.¹²²

If a creditor—either the issuer or a debt buyer—prevails in court or the defendant fails to appear, the creditor obtains a judgment against the defendant. These judgments harm people in several ways. First, they allow creditors and debt buyers to garnish non-exempt wages and property and to freeze bank accounts,¹²³ and thus jeopardize that person's ability pay for basic necessities such as rent, food, and healthcare.¹²⁴ Second, the judgment amount often exceeds the

115. See HOBBS ET AL., *supra* note 82, at 4.

116. *Id.* at 5; see also *Primer on Debt Collectors*, COLUMBUS DISPATCH, Oct. 7, 2012, <http://www.dispatch.com/content/stories/local/2012/10/07/dc-primer-art-gtujjba4-1.html>.

117. See WILLIAMS, *supra* note 66, at 26.

118. See BLACK'S LAW DICTIONARY 266 (9th ed. 2009) (“To treat (an account receivable) as a loss or expense because payment is unlikely; to treat as a bad debt.”); see also FED. FIN. INST. EXAMINATIONS COUNCIL, 65 FR 36903-01, UNIFORM RETAIL CREDIT CLASSIFICATION AND ACCOUNT MANAGEMENT POLICY 2 (2000) (describing “charge-off policy for open-end credit at 180 days delinquency and closed-end credit at 120 days delinquency”).

119. See Silver-Greenberg, *supra* note 79.

120. See, e.g., *HSBC Bank Nev., N.A. v. Higgins*, 899 N.Y.S.2d 60 (N.Y. Civ. Ct. 2009).

121. See HOBBS ET AL., *supra* note 82, at 7–8; see also WILLIAMS, *supra* note 66, at 84–86.

122. See *infra* Part I.C.

123. See Mary Spector, *Debts, Defaults and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. L. & BUS. REV. 257, 259–60 (2011); see also N.Y. C.P.L.R. 5205 (McKinney 2013) (New York's Exempt Income Protection Act); Fox, *supra* note 67, at 363; see e.g., *Chase Bank USA, N.A. v. Greene*, 901 N.Y.S.2d 898 (N.Y. Civ. Ct. 2009) (discussing and applying New York's Exempt Income Protection Act).

124. See APPLESEED, DUE PROCESS AND CONSUMER DEBT: ELIMINATING BARRIERS TO JUSTICE IN CONSUMER CREDIT CASES 2 (2010), *available at*

original amount of the debt due to interest, fees, and legal costs and thus places the defendant deeper in debt.¹²⁵ Moreover, the person may not even owe the debt due to identity theft, mistaken identity, or clerical error.¹²⁶ Third, because a judgment is one of the most damaging pieces of information found on one's credit report,¹²⁷ it can adversely affect a person's ability to gain employment, receive a promotion, obtain credit, or find housing.¹²⁸

B. Debt Collection Regulation

In New York City, the collection of consumer debt is regulated on the federal level by the Fair Debt Collection Practices Act (FDCPA),¹²⁹ on the state level by Article 29-H of the General Business Law,¹³⁰ and on the city level by the Administrative Code of the City of New York.¹³¹

1. Federal Regulation: The Fair Debt Collection Practices Act

Congress enacted the FDCPA in 1977 to protect consumers from the “widespread and serious national problem” of debt collection

<http://appleseednetwork.org/wp-content/uploads/2012/05/Due-Process-and-Consumer-Debt.pdf>.

125. *Id.* In New York, a judgment holder is also entitled to 9% annual statutory interest of the judgment amount. *See* N.Y. C.P.L.R. 5004 (specifying that judgments may collect 9% interest); *see also* N.Y. C.P.L.R. 211(b) (“A money judgment is presumed to be paid and satisfied after the expiration of twenty years from the time when the party recovering it was first entitled to enforce it.”).

126. APPLESEED, *supra* note 124, at 2.

127. Under the Fair Credit Reporting Act (FCRA) civil judgments may remain on a consumer's credit report for no more than seven years. In New York, however, if a judgment is paid within five years, it may only appear on the consumer's report for five years. *Compare* 15 U.S.C. § 1681c (2012), *with* N.Y. Gen. Bus. Law § 380-j(f)(ii) (McKinney 2013) (prohibiting “judgments which, from date of entry, antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period; or judgments which, from date of entry, having been satisfied within a five year period from such entry date, shall be removed from the report five years after such entry date”).

128. *See* MFY LEGAL SERVS., QUESTIONS AND ANSWERS ON CREDIT REPORTS (2011), *available at* <http://www.mfy.org/wp-content/uploads/Questions-Answers-on-Credit-Reports.pdf>.

129. Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified as amended at 15 U.S.C. §§ 1692–1692p (2012)). In addition to the FDCPA, debt collectors and debt buyers are also subject to enforcement under the Section 5 of the Federal Trade Enforcement Act, which prohibits unfair or deceptive acts or practices affecting commerce. *See* 15 U.S.C. § 45; *see also* FED. TRADE COMM'N, *supra* note 6, at 4 (explaining FTC Act).

130. N.Y. GEN. BUS. LAW §§ 600–603 (McKinney 2013).

131. N.Y.C. ADMIN. CODE § 20-488 (2012).

abuses by third-party debt collectors.¹³² Congress found that the FDCPA was necessary because of the lack of meaningful regulation at the state level.¹³³ The FDCPA's purpose is to protect consumers from "unfair, harassing, and deceptive debt collection practices without imposing unnecessary restrictions on ethical debt collectors."¹³⁴

The FDCPA covers debt collectors collecting debts from consumers.¹³⁵ The Act defines the term "debt collector" as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed due or asserted to be owed or due another."¹³⁶ The FDCPA does not cover the collection efforts of creditors collecting their own debts.¹³⁷ The Act defines "creditors" as "any person who offers or extends credit creating a debt or to whom a debt is owed" but not "any person who to the extent that he receives

132. S. REP. NO. 95-382, at *2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 ("The committee has found that debt collection abuse by third party debt collectors is a widespread and serious national problem. Collection abuse takes many forms, including obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process."); *see also* Richard D. Gage, *A Remedy Foreclosed? Mortgage Foreclosure and the Fair Debt Collection Practices Act*, 81 *FORDHAM L. REV.* 283, 286 (2012) (examining the purpose, effect, and coverage of the FDCPA).

133. *Id.*

134. *Id.* at *1.

135. *Id.* For the purposes of the FDCPA, "consumer" means "any natural person obligated or allegedly obligated to pay any debt." 15 U.S.C. § 1692a(3). Likewise, the term "debt" means "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." *Id.* § 1692a(5); *see also* *Munk v. Fed. Land Bank of Wichita*, 791 F.2d 130, 132 (10th Cir. 1986) (FDCPA did not apply to loan for agricultural purposes because the loan was not for personal, family, or household purposes); *cf.* *Graham v. Manley Deas Kochalski L.L.C.*, No. 08-CV-120, 2009 WL 891743, at *10 (S.D. Ohio Mar. 31, 2009) (refinancing mortgage loan was a 'consumer debt' for the purposes of the FDCPA even though a small percentage of the loan was used for investment purposes); *Randolph v. Crown Asset Mgmt., L.L.C.*, 254 F.R.D. 513, 518 (N.D. Ill. 2008) (\$60.00 business-related expense did not establish that a credit card was not used primarily for personal, family, or household purposes where the total amount of the debt claimed was \$12,602.69).

136. 15 U.S.C. § 1692a(6) (2012).

137. *Id.* § 1692a(6)(A).

an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.”¹³⁸ Therefore, the Act covers debt collection agencies, as well as debt buyers¹³⁹ and debt collection law firms.¹⁴⁰

The FDCPA prohibits a variety of abusive behavior. For example, a debt collector may not harass any person in connection with the collection of debt.¹⁴¹ Debt collectors may not threaten violence, use obscenity, or make repeated annoying phone calls in connection with the collection of a debt.¹⁴² Debt collectors are also prohibited from engaging in unfair practices,¹⁴³ or making false or misleading representations to individuals when attempting to collect a debt.¹⁴⁴ Moreover, during the initial communication with the consumer, debt collectors must inform the consumer that they are attempting to collect a debt and that any information the consumer proffers may be used to collect the debt.¹⁴⁵ The FDCPA additionally prohibits debt collectors from attempting to collect an amount greater than what is owed on a debt.¹⁴⁶ Debt collectors are also prohibited from speaking to third parties about a debt.¹⁴⁷

In addition to proscribing harassing and abusive behavior, the FDCPA requires debt collectors to validate debts and to verify disputed debts.¹⁴⁸ Under 15 U.S.C. § 1692g(a), debt collectors must send a validation notice that provides basic information about the debt to consumers within five days of initial contact, unless the notice requirements are contained in the first communication.¹⁴⁹ Moreover,

138. *Id.* § 1692a(4).

139. Although debt buyers have claimed that the FDCPA does not cover their collection activities because they collect debts they own, courts have consistently rejected this argument. *See Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1486 (M.D. Ala. 1987); *see also McKinney v. Cadleway Props., Inc.*, 548 F.3d 496, 501 (7th Cir. 2008) (holding that purchaser of defaulted debt is a debt collector for purposes of the FDCPA); *Fed. Trade Comm’n v. Check Investors, Inc.*, 502 F.3d 159, 171 (3d Cir. 2007) (holding that purchaser of bad debts was debt collector under the FDCPA).

140. 15 U.S.C. § 1692a(6); *see Crossley v. Lieberman*, 868 F.2d 566, 569 (3d Cir. 1989) (holding that attorney who regularly engaged in debt collection on behalf of clients was a debt collector); HOBBS ET AL., *supra* note 82, at 7.

141. 15 U.S.C. § 1692d.

142. *Id.*; *see also Heintz v. Jenkins*, 514 U.S. 291, 292 (1995).

143. 15 U.S.C. § 1692f.

144. *Id.* § 1692e.

145. *Id.* § 1692e(11).

146. *Id.* § 1692e(2)(A).

147. *Id.* § 1692c(b).

148. *Id.* § 1692g.

149. *Id.* § 1692g(a).

if a consumer disputes a debt within thirty days of receiving the validation notice, debt collectors must suspend collection efforts until they obtain verification of the debt.¹⁵⁰ Collectors must also cease contact with a consumer if the consumer notifies the collector “in writing that the consumer refuses to pay the debt or that the consumer wishes the debt collector to cease communication.”¹⁵¹

2. *New York State and New York City Debt Collection Regulation*

In New York State, debt collectors and creditors are regulated pursuant to Article 29-H of the General Business Law.¹⁵² Called the New York State Debt Collection Procedures Law (NYS DCPL), the regulation is similar to the FDCPA in that it also prohibits a wide array of unfair and abusive debt collection practices.¹⁵³ While the FDCPA merely applies to third-party debt collectors, the NYS DCPL applies to creditors and debt collectors.¹⁵⁴ The NYS DCPL does not, however, provide consumers with a private right of action; rather, the New York State Attorney General or the “District Attorney of any county” enforces the statute’s provisions.¹⁵⁵

New York City arguably has the most robust debt collection laws. In New York City, the New York City Department of Consumer Affairs (DCA) regulates debt collection pursuant to the New York City Administrative Code (“NYC Administrative Code” or “Code”).¹⁵⁶ The purpose of the city’s debt collection law is to forbid abusive tactics that “would shock the conscience of ordinary people.”¹⁵⁷ Under the Code, if a consumer requests “written documentation identifying the creditor who originated the debt and itemizing the principal balance of the debt that remains or is alleged to remain due and all other charges that are due or alleged to be due” from a debt collection agency at any point, the debt collection agency must stop any collection efforts until it responds to the consumer’s request.¹⁵⁸ Moreover, debt collectors—including debt collection law

150. *Id.* § 1692g(b).

151. *Id.* § 1692c(c).

152. N.Y. GEN. BUS. LAW §§ 600–603 (McKinney 2013).

153. *Compare id.*, with 15 U.S.C. § 1692d.

154. N.Y. GEN. BUS. LAW §§ 600–603.

155. *Id.* § 602; *see also* Citibank (S.D.) N.A. v. Sablic, 865 N.Y.S.2d 649 (App. Div. 2d Dep’t 2008) (dismissing claim for harassment because the New York Debt Collections Procedure Law does not create a private right of action).

156. N.Y.C. ADMIN. CODE §§ 20-488 to -493 (2012).

157. *Id.* § 20-488.

158. *Id.* § 20-493.2.

firms—must be licensed by the DCA.¹⁵⁹ In addition, a statute of limitations proscribes collectors from trying to collect debts, unless the collector discloses to the consumer information regarding his or her legal rights under the statute of limitations.¹⁶⁰

Debt collectors in New York City must also provide more information to satisfy a verification request than the FDCPA requires. To comply with City rules, debt collectors must respond to verification requests by providing “a copy of the debt document issued by the originating creditor or an original written confirmation evidencing the transaction resulting in the indebtedness to the originating creditor.”¹⁶¹ Additionally, “[c]omputer documents or electronic evidence created or generated after default on the indebtedness shall not qualify as such confirmation.”¹⁶² Moreover, pursuant to the verification requirements of the City’s Administrative Code, debt collectors must provide an itemization of the principal debt in addition to other charges alleged due.¹⁶³ To meet this requirement, debt collectors must furnish consumers with

a copy of the final statement of account issued by the originating creditor and a document itemizing: (1) the total amount remaining due on the total principal balance of the indebtedness to the originating creditor and (2) each additional charge or fee claimed or alleged to be due that separately (i) lists the total for each charge or fee and the date that each charge or fee was incurred; and (ii) identifies and describes the basis of the consumer’s obligation to pay it.¹⁶⁴

DCA rules also impose specific disclosure, debt settlement, record retention, and callback requirements on debt collectors.¹⁶⁵

159. *Id.* § 20-490. *But see* Berman v. City of New York, No. 09–CV–3017 (ENV)(CLP), 2012 WL 4514407, at *11–16 (E.D.N.Y. Sept. 29, 2012) (striking down portions of the New York City Administrative code requiring debt collection lawyers to be licensed by the DCA for being in contravention of New York Judiciary law regulation attorneys and for violating the dormant Commerce Clause of the United States Constitution).

160. N.Y.C. ADMIN. CODE § 20-493.2.

161. R.C.N.Y. § 2-190 (2013), available at http://72.0.151.116/nyc/rcny/Title6_2-190.asp; see also N.Y.C. ADMIN. CODE § 20-493.2(a).

162. R.C.N.Y. § 2-190.

163. N.Y.C. ADMIN. CODE § 20-493.2(a).

164. R.C.N.Y. § 2-190(b).

165. *Id.* §§ 2-191 to -194.

C. Debt Collection Lawsuits

1. *General Overview and the Role of Debt Collection Lawsuits in the Debt Buyer's Business Model*

In recent years, debt collectors have flooded state courts with debt collection lawsuits.¹⁶⁶ According to a 2009 FTC report, “[t]he majority of cases on state court dockets on a given day often are debt collection matters.”¹⁶⁷ This explosion is, among other things, a result of the emergence of the debt buying industry. As noted, the debt buying industry has grown significantly over the past two decades.¹⁶⁸ Between 2000 and 2005, debt buyer purchases of consumer debt—mostly credit card debt—more than tripled, rising from approximately \$40 billion to \$128 billion.¹⁶⁹ Although debt buyers claim that they pursue non-judicial collection techniques prior to filing a lawsuit, others note that debt buyers use state courts as a tool for collection.¹⁷⁰

Consumers also often fail to respond to suits because they lack sufficient notice. There are several reasons why consumers lack notice in debt collection lawsuits. First, the debt buyer may not have

166. See Goldberg, *supra* note 80, at 742; see also Fox, *supra* note 67, at 362; Holland, *supra* note 78; Spector, *supra* note 123, at 269.

167. See WILNER & SHEFTEL-GOMES, *supra* note 2, at 6 (quoting FEDERAL TRADE COMMISSION, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE 55 (2009)); see also U.S. GOVERNMENT ACCOUNTABILITY OFFICE (GAO), CREDIT CARDS: FAIR DEBT COLLECTION PRACTICES ACT COULD BETTER REFLECT THE EVOLVING DEBT COLLECTION MARKETPLACE AND USE OF TECHNOLOGY 41 (2009), available at <http://www.gao.gov/new.items/d09748.pdf> (“In Chicago’s Cook County Circuit Court, more than 119,000 civil debt collection lawsuits were pending as of June 2008, according to a review by the Chicago Tribune. State officials in Ohio told us that municipal court judges there handle as many as 1,000 debt collection cases per week. A review by the Boston Globe found that at least 60 percent of small claims cases filed in Massachusetts in 2005 were filed by debt collectors.”).

168. See JONATHAN SHELDON ET AL., NAT’L CONSUMER LAW CTR., COLLECTION ACTIONS: DEFENDING CONSUMERS AND THEIR ASSETS 4 (1st ed. 2008).

169. *Id.*

170. See *Centurion Capital Corp. v. Guarino*, No. 1117/05, 2012 WL 1543286, at *3 (N.Y. Civ. Ct. Apr. 30, 2012) (noting that debt buyer plaintiff “adopted as a business plan to use the New York State court system as an arm of its collection activities”); see also ANIKA SINGH, THE URBAN JUSTICE CTR., DEBT WEIGHT: THE CONSUMER CREDIT CRISIS IN NEW YORK CITY AND ITS IMPACT ON THE WORKING POOR 9 (2007), available at http://www.urbanjustice.org/pdf/publications/CDP_Debt_Weight.pdf, Goldberg, *supra* note 80, at 742; Holland, *supra* note 7. Debt buyers use debt collection lawyers to pursue collection actions against consumers. Indeed, the relationship between debt buyers and debt collection law firms is close; “some debt buyers are actually owned by the principals of debt collection law firms.” See WILNER & SHEFTEL-GOMES, *supra* note 2, at 4.

accurate contact information for the consumer.¹⁷¹ Second, lack of notice is often the fault of process servers who fail to serve consumers properly.¹⁷² For example, process servers have been accused of engaging in so-called “sewer service” and of filing false affidavits with the court.¹⁷³ Third, even when consumer defendants receive a summons and complaint, they may not recognize the plaintiff and they may be puzzled by the allegations in the complaint.¹⁷⁴ The FTC has found that debt buyer complaints filed in court “often do not contain sufficient information about the debt(s) to allow consumers in their answers to admit or deny the allegations and to assert affirmative defenses.”¹⁷⁵

Frequently these lawsuits “rely on erroneous documents, incomplete records and generic testimony from witnesses.”¹⁷⁶ Many debt collection complaints do not contain enough information to satisfy notice-pleading¹⁷⁷ requirements for civil litigation.¹⁷⁸ Complaints are also frequently “filed against the wrong consumer, seek the wrong amount, or both, or are otherwise based on erroneous information”¹⁷⁹ and it is not uncommon for debt buyers to sue consumers over debts that have passed the statute of limitations.¹⁸⁰

171. See FED. TRADE COMM’N, *supra* note 113, at 8 (discussing two reasons why service of process fails: (1) because service fails “to reach the consumer if it is delivered to an old or otherwise incorrect address or it is delivered to the wrong person, such as someone with a similar name” and (2) because “[s]ome process servers may simply not serve the consumer but falsely assert that they have done so”).

172. *Id.*

173. *Id.*

174. *Id.* at 16 (reporting that several judges who participated in a study of debt collection lawsuits commented that the most common question consumers in debt collection lawsuits have is, “Where is this from?” and that many consumers are puzzled by the timing and amount of the debts alleged in a complaint and who the plaintiff is).

175. See FED. TRADE COMM’N, *supra* note 6, at 1.

176. See Jessica Silver-Greenberg, *Problems Riddle Moves to Collect Credit Card Debt*, N.Y. TIMES DEALBOOK, Aug. 12, 2012, <http://www.dealbook.nytimes.com/2012/08/12/problems-riddle-moves-to-collect-credit-card-debt/>.

177. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”).

178. See FED. TRADE COMM’N, *supra* note 113, at 14–17.

179. See *id.* at 15.

180. Although the FDCPA has been consistently interpreted to prohibit collectors from suing on debts that have passed the statute of limitations, some debt collectors sue or threaten to sue on time-barred debts. Some collectors also “revive” time-barred debt by persuading consumers to make payments on debts that have passed

Moreover, consumers do not have a lawyer in the overwhelming majority of cases.¹⁸¹ Therefore, in most collection cases, plaintiffs are able to obtain default judgments¹⁸² or convince consumers into entering one-sided and often abusive settlement agreements¹⁸³ without having to prove the merits of their claims.

To remedy the widespread problems endemic in these suits, a 2010 FTC report recommended that debt collection complaints contain:

- (1) the name of the original creditor and the last four digits of the original account number;
- (2) the date of default or charge off and the amount due at that time;
- (3) the name of the current owner of the debt;
- (4) the total amount currently due on the debt; and
- (5) a breakdown of the total amount currently due by principal, interest, and fees.¹⁸⁴

In addition, the report encouraged states to require plaintiffs in debt collection lawsuits to attach contracts or other documentation on the debt to the complaint.¹⁸⁵ Nonetheless, because of the many evidentiary and due process issues associated with collection lawsuits, the FTC concluded that the “system for resolving disputes about consumer debts is broken.”¹⁸⁶

the statute of limitations. As soon as the consumer makes such a payment, the statute of limitations begins to run anew. *See id.* at 28.

181. *See* Holland, *supra* note 78, at 266–67 (“Debtors who do receive notice usually appear without legal representation because they either (1) cannot afford an attorney, or (2) cannot find an attorney who will take their case. . . . As a result, consumer debtors, who lack any knowledge of their legal rights, must resort to appearing pro se and stumble through complex procedural and substantive legal issues that even some trained attorneys do not fully understand.”)

182. *See id.* at 265 (finding that in most cases debt buyers are able to obtain a default judgment because the consumer has failed to appear at trial). In New York City, the rate of default has diminished significantly, presumably because of stepped up enforcement actions, reform measures adopted by courts, and advocacy. *Compare* New York City Civil Court Filing Statistics 2011 (on file with author) (indicating that default judgments were entered in just over 50% of total consumer filings), *with* New York City Civil Court Filing Statistics 2009 (on file with author) (reporting that default judgments were entered in 66% of total consumer filings), *and* SINGH, *supra* note 170, at 18 (a 2007 report finding default judgments in 80% of cases studied). *See also infra* Part II.A. (describing measures adopted by the Civil Court of the City of New York).

183. *See* APPLESEED, *supra* note 124, at 28 (noting that consumers without attorneys are “at a significant disadvantage and can be pressured into one-sided settlements, settling for amounts similar to or greater than those demanded in the complaints, which may include unknown interest and fees.”).

184. *See* FED. TRADE COMM’N, *supra* note 113, at 17.

185. *Id.* at 18–19.

186. *See id.* at i.

2. Debt Collection Lawsuits in New York City

In New York City, nearly all consumer debt cases are litigated in the city's Civil Court. The Civil Court was established in 1962¹⁸⁷ and has monetary jurisdiction over claims up to \$25,000.¹⁸⁸ By volume, the Civil Court is the largest civil jurisdiction court in the United States and its filings comprise 25% of the New York State Unified Court System's total filings.¹⁸⁹ Every consumer debt lawsuit in Civil Court begins with the purchase of an index number and the filing of a summons and complaint.¹⁹⁰ After filing the summons and complaint with the clerk, the plaintiff serves the summons and complaint on the defendant pursuant to the service rules of New York's CPLR.¹⁹¹

Debt collection law firms retained by debt buyer or original creditor plaintiffs rely on process server agencies to serve defendants.¹⁹² Although there has been,¹⁹³ and continues to a lesser extent to be, service abuse in consumer debt cases in New York City, key reforms have been adopted by the Civil Court.¹⁹⁴ For example, the Civil Court's Section 208.6(h) notice created a new notice form that the court is required to send to each defendant, informing the defendant that they have been sued and that if a judgment is entered in the plaintiff's favor, the plaintiff may be able to seize the

187. See N.Y. CITY CIV. CT. ACT § 102 (McKinney 2013). Today the Civil Court has courts in New York, Bronx, Kings, Queens, and Richmond counties. See DAVID D. SIEGEL, *NEW YORK PRACTICE* 22 (5th ed. 2011).

188. CITY CIV. CT. ACT § 201 ("The court shall have jurisdiction as set forth in this article and as elsewhere provided by law. The phrase '\$25,000,' whenever it appears herein, shall be taken to mean '\$25,000 exclusive of interest and costs.'").

189. See *Civil Court History*, NYCOURTS.GOV, <http://www.courts.state.ny.us/courts/nyc/civil/civilhistory.shtml> (last visited Apr. 8, 2013).

190. CITY CIV. CT. ACT § 400.

191. N.Y. C.P.L.R. 308 (McKinney 2013); see also CITY CIV. CT. ACT § 402.

192. See APPLESEED, *supra* note 124, at 11–14; WILNER & SHEFTEL-GOMES, *supra* note 2, at 6.

193. See *Velocity Invs., LLC v. McCaffrey*, 921 N.Y.S.2d 799, 801–02 (Nassau Cnty. Dist. Ct. 2011) (discussing *Pfau v. Forster & Garbus*, No. 2009-8236 (N.Y. Sup. Ct. filed July 9, 2009), a special proceeding commenced by the Chief Administrative Judge of the New York State Unified Court System). The *Pfau* action alleged that process servers were engaging in sewer service and filing false affidavits of service, and found that "[w]hen the defendants who had not been properly served did not appear, default judgments were entered." *Id.* at 801. A single process server had "signed affidavits of service swearing he had been in two different locations on the same date at the same time on at least 10 different occasions." *Id.* at 802; see also APPLESEED, *supra* note 124, at 12–13.

194. See APPLESEED, *supra* note 124, at 11–14 (detailing the problem of lack of notice, the response of consumer advocates, and the reform measures adopted by court officials).

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defendant's property, garnish the defendant's wages, or both.¹⁹⁵ If this notice is returned as undeliverable or the plaintiff fails to produce an affidavit of service showing that 208.6(h) service was made, a default judgment may not be entered by the clerk on behalf of the plaintiff.¹⁹⁶ This notice is required in addition to the normal service requirements found in the state's procedural rules.¹⁹⁷ Between May 2008 and September 2009, 28,422 of these notices were returned to the court as undeliverable.¹⁹⁸ Moreover, New York City requires process servers licensed by the DCA¹⁹⁹ to carry an electronic device with global position system to establish the time, date, and place when service was attempted or carried out,²⁰⁰ to pass an examination,²⁰¹ and to maintain records of service.²⁰²

There is a great disparity in legal representation in consumer debt lawsuits. While 100% of debt collector plaintiffs are represented by counsel, only 4% of defendants have legal representation.²⁰³ As a result, many defendants fail to take advantage of all available defenses and enter into settlement agreements with plaintiff's counsel.²⁰⁴ Typically, the plaintiff's attorney will ask the defendant to discuss the case in the hallway before they go before the judge.²⁰⁵ According to one report, plaintiffs' counsel uses these discussions to

195. N.Y. CITY CIV. CT. UNIFORM R. § 208.6(h) (2008), available at <http://www.nycourts.gov/rules/trialcourts/208.shtml#06>.

196. *Id.*

197. Under the New York CPLR there are three ways to serve a litigant. *See* N.Y. C.P.L.R. 308 (McKinney 2013). First, litigants may be served by personal delivery, which entails hand delivering a copy summons and complaint to the defendant. *Id.* Litigants may also be served by substituted service, a process in which a copy of the summons and complaint is left with a person other than the defendant "of suitable age and discretion" at the defendant's residence. *Id.* Third, litigants may be served by "conspicuous place delivery", or "nail and mail", which requires the server to affix a copy of the summons and complaint to the door of the defendant's residence. *Id.* After service has been made, the plaintiff must file an affidavit of service, attesting that the person who carried out the service is over eighteen years old and not a party to the action, and describing the type of service and if applicable a description of the person served. *Id.* §§ 306, 2103. The defendant then has twenty days to answer if the service was personal service, and thirty days to answer if the service was substituted or "nail and mail." *Id.* § 402.

198. *See* APPLESEED, *supra* note 124, at 15.

199. N.Y.C. ADMIN. CODE § 20-403 (2012).

200. *Id.* § 20-410.

201. *Id.* § 20-406.

202. *Id.* § 20-406.3.

203. *See* APPLESEED, *supra* note 124, at 32.

204. *Id.* at 22-23, 28-29.

205. *Cf. id.* at 28.

pressure unrepresented defendants into one-sided and sometimes unaffordable settlement agreements.²⁰⁶ It has also been alleged that plaintiffs' counsel strategically use repeated adjournments to further develop their cases, hoping that unrepresented defendants will not be able to make subsequent court dates because of work or other reasons, which could result in default judgments for the plaintiffs.²⁰⁷

Debt collector plaintiffs have several causes of action against consumer defendants. Some collectors pursue breach of contract actions against consumer defendants. Under this cause of action, debt buyers allege that the consumer entered into a credit agreement, subsequently breached that agreement, and caused the creditor to incur damages as a result of the breach.²⁰⁸ To satisfy a breach of contract action, collectors must produce a contract and evidence of individual charges that make up an unpaid balance.²⁰⁹

Debt collectors also pursue "account stated" causes of action against consumer defendants.²¹⁰ In this cause of action, the plaintiff argues that an account statement was sent to the defendant, it was accepted as correct, and the defendant agreed to pay the amount stated on the account.²¹¹ Thus, for an account stated cause of action, a plaintiff must produce "(1) prior transactions that establish a debtor-creditor relationship between the parties, (2) an express or implied agreement between the parties as to the amount due, and (3) an

206. *Id.* at 28–29 (noting that 13% of a sample defaulted on settlement agreements).

207. *Id.* at 27, 30.

208. *See* SHELDON ET AL., *supra* note 168, at 49.

209. *Cf.* Citibank (S.D.), N.A. v. Martin, 807 N.Y.S.2d 284, 289 (Civ. Ct. 2005).

210. *See, e.g.* Velocity Invs., LLC v. McCaffrey, 921 N.Y.S.2d 799, 805 (Dist. Ct. Nassau Cnty. 2011); *Martin*, 807 N.Y.S.2d at 291 (discussing prima facie case in account stated causes of action).

211. *See, e.g.*, Camacho Mauro Mulholland LLP v. Ocean Risk Retention Grp., Inc., No. 09 Civ. 9114(SAS), 2010 WL 2159200, at *2 (S.D.N.Y. May 26, 2010) ("To establish a claim for account stated, a plaintiff must plead that: "(1) an account was presented; (2) it was accepted as correct; and (3)[the] debtor promised to pay the amount stated. The account stated is based upon prior transactions between [the parties] with respect to the correctness of the account items and balance due. Recovery on a claim for account stated is permitted on the theory that the parties have, by their conduct, evidenced an agreement upon the balance of an indebtedness." (internal quotation marks and citations omitted)); *Velocity Invs.*, 921 N.Y.S.2d at 805 (holding that to establish an account stated plaintiff was required to show that statements were sent to the defendant and that the defendant failed to pay); *see also* IMG Fragrance Brands, LLC v. Houbigant, Inc., 679 F. Supp. 2d 395, 411 (S.D.N.Y. 2009).

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express or implied promise from the debtor to pay the amount due.”²¹² Although debt buyers often argue

that the defendant never objected when the credit card bills were filed, or when the lawsuit was filed, or when the plaintiff sent a demand of payment to the defendant . . . [t]his argument fails because “the mere rendition of an account, by one party to another, does not alone establish an account stated.”²¹³

Moreover, for an account stated claim, the plaintiff must also establish an independent basis for liability, because “[t]he account stated can only determine the amount of the debt’ and cannot ‘create liability where none existed.’”²¹⁴ In addition to these requirements, debt buyer plaintiffs must produce affidavits from an official of the credit card issuer that demonstrate that (1) the consumer agreed to pay “any interest on the account,” (2) that the account was received by the consumer, and (3) that the consumer failed to protest and to pay the amount due.²¹⁵

In the majority of consumer credit actions in Civil Court, plaintiffs are able to obtain default judgments against unrepresented defendants. From a plaintiff’s perspective, default judgments are a “desired commodity” primarily “because they provide parties with the spoils of successful litigation without the hassle of actually litigating controversies.”²¹⁶ Under CPLR section 3215, if a defendant fails to appear or defaults in some other manner,²¹⁷ the plaintiff may apply for a default judgment.²¹⁸ A defendant’s default, however, does

212. See Holland, *supra* note 170, at 16–17 (citing 1 AM. JUR. 2D *Accounts and Accounting* § 26 (2013)).

213. See *id.* (quoting 1 AM. JUR. 2D *Accounts and Accounting* § 29 (2013)).

214. See *Martin*, 807 N.Y.S.2d at 291–92.

215. See *id.*

216. John R. Higgitt, *A Nullity or Not?—The Status of a Default Judgment Entered Absent Compliance with CPLR 3215(f)*, 73 ALB. L. REV. 807 (2010).

217. While failure to appear is the most common reason for default, it is not the only one. For instance, “[a] defendant who has duly appeared can be guilty of a default at a later stage of the action, such as by failing to show up at trial at the scheduled time.” See SIEGEL, *supra* note 187, at 493.

218. N.Y. C.P.L.R. 3215 (McKinney 2013). Courts, however, have “generally displayed great leniency in vacating defaults, indicating a strong judicial disposition to see cases determined on the merits.” JACK B. WEINSTEIN ET AL., *NEW YORK CIVIL PRACTICE: CPLR 5015.05* (citation omitted); see also N.Y. C.P.L.R. 5015 (McKinney 2013) (providing grounds for relief from judgment or order). There is, however, a split between appellate departments in New York over whether the plaintiff’s failure to produce requisite proof of the cause of action at the default judgment stage renders the default judgment a nullity. Compare *Freccia v. Carullo*, 462 N.Y.S.2d 38 (App. Div. 2d Dep’t 1983), with *Natradeze v. Rubin*, 822 N.Y.S.2d 541 (App. Div. 1st

not mean that the court must automatically enter judgment on behalf of the plaintiff for the amount sought in the complaint.²¹⁹ Indeed, “[a] defendant who defaults concedes only liability.”²²⁰ Additionally, “New York holds that default in a money action does not concede the amount of the plaintiff’s damages.”²²¹

Therefore, a plaintiff is still required to “support its motion for default judgment with ‘enough facts to enable the court or the clerk to determine that a viable cause of action exists.’”²²² To do so, the plaintiff must satisfy three requirements. First, the plaintiff must submit proof of service of the summons and complaint.²²³ Second, the plaintiff must submit proof of the facts constituting the claim.²²⁴ And third, the plaintiff must submit proof of the defendant’s default.²²⁵ The proof of claim requirement is normally made through an affidavit from the plaintiff “buttressed, if need be, by additional affidavits of other having first-hand knowledge” of the facts constituting the claim.²²⁶

Depending on the type of claim, the plaintiff may apply to either the court or the clerk for the default judgment.²²⁷ A plaintiff may apply to the clerk for a default judgment if his or her claim is for “a sum certain or for a sum which can by computation be made certain.”²²⁸ If the claim is for a sum certain, the clerk, upon plaintiff’s

Dep’t 2006), *and* *Gagan v. Kipany Prods. Ltd.*, 735 N.Y.S.2d 225 (App. Div. 3d Dep’t 2001). *See also* Higgitt, *supra* note 216.

219. *See* *Collins Fin. Servs. v. Vigilante*, 915 N.Y.S.2d 912, 917 (Civ. Ct. 2011) (quoting *Gagen v. Kipany Prods.*, 735 N.Y.S.2d 225 (App. Div. 3d Dep’t 2001)); *see also* Eric Y. Wu, Note, *Vigilante Justice: Ensuring that Consumer Credit Plaintiffs Are Not Above the Law in Collins Financial Services v. Vigilante*, 60 AM. U. L. REV. 1561 (2011) (discussing *Collins* and the standard for default judgments in consumer credit lawsuits).

220. *See* SIEGEL, *supra* note 187, at 494.

221. *Id.* (citing *McClelland v. Climax Hosiery Mills*, 169 N.E. 605 (N.Y. 1930)). If, however, the defaulting defendant fails to appear at any damages trial or hearing, “the plaintiff may put in affidavits to prove damages.” *Id.*

222. *See* *Vigilante*, 915 N.Y.S.2d at 917 (quoting *Woodson v. Mendon Leasing Corp.*, 790 N.E.2d 1156, 1162 (N.Y. 2003)).

223. N.Y. C.P.L.R. 3215(f).

224. *Id.*

225. *Id.*

226. *See* SIEGEL, *supra* note 187, at 497. *See also* *Vigilante*, 915 N.Y.S.2d at 916 (holding that a “complaint verified by an attorney for the plaintiff is not sufficient to enter a default judgment unless the attorney submits an additional affirmation in that regard specifically acknowledging he or she has personal knowledge of the facts”).

227. N.Y. C.P.L.R. 3215(a); *see also* SIEGEL, *supra* note 187, at 494.

228. N.Y. C.P.L.R. 3215(a). A sum certain is “[a]ny amount that fixed, settled, or exact.” BLACK’S LAW DICTIONARY (9th ed. 2009).

submission of requisite proof, “shall enter judgment for the amount demanded in the complaint . . . plus costs and interest.”²²⁹ Application to the clerk, if applicable, “is the preferable procedure because it gives the plaintiff a final judgment on papers alone, a ministerial procedure with nothing to try.”²³⁰ By contrast, application to the court necessarily involves judicial review of the plaintiff’s papers and “may even require a testimonial hearing.”²³¹

When the claim is for a sum certain, the clerk may only enter the default judgment if there is “no reasonable question about the amount of the judgment.”²³² Indeed, “[a]nything that prevents mere arithmetic from reducing a claim to a sum certain requires that the application be made to the court” rather than to the clerk.²³³ In *Reynolds Securities, Inc. v. Underwriters Bank & Trust Co.*, the New York Court of Appeals held that the sum certain requirement was intended to ensure that the clerk would “function in a purely ministerial capacity.”²³⁴ In consumer credit lawsuits, a default judgment for a sum certain may only be granted if it is based on a “detailed affidavit of merit, made upon first hand knowledge,” including “a properly documented assignment of proof of the validity of the underlying claim.”²³⁵ The CPLR does not specify what information is required in an affidavit of facts supporting a default

229. N.Y. C.P.L.R. 3215.

230. See SIEGEL, *supra* note 187, at 494.

231. *Id.*

232. *Id.* (citing WEINSTEIN ET AL., *supra* note 218, at 3215.04 (Clerk May Enter Default Judgment in Qualifying Cases)).

233. See SIEGEL, *supra* note 187, at 494 (citing the New York Court of Appeals in *Reynolds Securities, Inc. v. Underwriters Bank & Trust Co.*, 378 N.E.2d 106 (N.Y. 1978), to hold that “only the most liquidated and undisputed claims can be taken care of by the clerk”); see also Higgitt, *supra* note 216, at 809–10 (“Only a narrow class of claims may be submitted to the clerk. In this regard, the statute contemplates ‘a situation in which . . . there can be no dispute as to the amount due, as in actions on money judgments and negotiable instruments.’ Thus, causes of action seeking unliquidated damages—such as torts—or equitable relief do not fall within that reserved class. If the complaint (or summons with notice) asserts any claim other than one for a ‘sum certain,’ the plaintiff’s application for a default judgment must be made to the court.”).

234. 44 N.Y.2d 568, 572 (1978); see also WEINSTEIN ET AL., *supra* note 218, at 32–275 (Clerk May Enter Default Judgment in Qualifying Cases) (noting that the sum certain requirement “is intended to ensure that the computation of damages by the clerk will be ministerial and involve no exercise of discretion”).

235. *LVNV Funding, LLC v. Delgado*, No. 29263/08, 2009 WL 2370987, at *3 (N.Y. Sup. Ct. Aug. 3, 2009); *Collins Fin. Servs. v. Vigilante*, 915 N.Y.S.2d 912, 920 (Civ. Ct. 2011) (listing information necessary for sum certain, including a complete history of the consumer credit account, which is required “in every affidavit of facts so as to constitute proof” for default judgment).

judgment for a sum certain, or what supporting documentation should be required in support of such motion. Courts have noted, however, that the current practice, in which debt collector plaintiffs rely on affidavits that do not specify, among other things, how the sum alleged was calculated, is not sufficiently specific enough to explain the complexity of consumer credit agreements and show that amount claimed is for a sum certain.²³⁶

In those cases that do not end in default judgment, debt buyer plaintiffs have difficulty establishing the merits of their claims. Debt buyers routinely pursue actions despite having limited evidence to support their claims in the hopes of obtaining a default judgment.²³⁷ Indeed, the legality of debt buyer default judgments and collection lawsuits is being litigated across the country.²³⁸ Debt buyer plaintiffs commonly resort to discovery requests, such as interrogatories, document requests, and Notices to Admit to garner evidentiary support for the claims asserted in their complaints.²³⁹ Frequently, unrepresented defendants fail to respond to these requests or “make unknowing admissions.”²⁴⁰ For instance, Judge Philip S. Straniere of Richmond County has observed,

[a] third-party debt buyer who only receives a computer printout of the debtor’s account could utilize the Notice to Admit to force a debtor to produce documentation to establish the plaintiff’s case, when the plaintiff lacks any evidence in admissible form to prove its claim either because it does not exist or because the debt buyer has made a “business decision” not to spend sufficient monies to obtain complete records from the initial creditor.²⁴¹

Debt buyers attempt to make out a *prima facie* case by arguing that the few documents and records they have obtained from original creditors should be entered into evidence under the business records

236. See *Vigilante*, 915 N.Y.S.2d at 918–19; see also *infra* Parts II.B–C.

237. See *SHELDON ET AL.*, *supra* note 168, at 6.

238. See *Sykes v. Mel Harris & Assocs., LLC*, 285 F.R.D. 279 (S.D.N.Y. 2012) (decision certifying a class of plaintiffs pursuing a Civil RICO action alleging that debt buyer, debt collection law firm, and process server defendants engaged persistent robo-signing and conspired to fraudulently obtain thousands of default judgments in New York City); see also *Gray v. Suttell & Assocs.*, No. CV-09-251-EFS, 2012 WL 1067962 (E.D. Wash. Mar. 28, 2012); *Brent v. Midland Funding, LLC*, No. 3:11-CV-1332, 2011 WL 3862363 (N.D. Ohio Sept. 1, 2011).

239. See *APPLESEED*, *supra* note 124, at 28.

240. *Id.*

241. *Midland Funding LLC v. Loreto*, No. 008963/11, 2012 WL 638807, at *6 (N.Y. Civ. Ct. Feb. 23, 2012).

exception to the hearsay rule.²⁴² This exception permits out-of-court documents to be admitted if they have been created and retained in the normal course of business and if a witness with personal knowledge of the practices and procedures pursuant to which the document was made testifies to their validity.²⁴³ Debt buyer plaintiffs try to avail themselves of the business records exception by having their own employees testify to the validity of the original creditor's documents.²⁴⁴ These employees, however, must demonstrate personal knowledge of essential facts.²⁴⁵ Thus, debt buyer-affiants may not testify to the validity of the original creditor's records because they do not have personal knowledge of how these records were created or managed.²⁴⁶

Debt buyers also strain to prove that they have standing to sue consumer defendants. To have standing to sue, debt buyers must show that they have been assigned the right to collect a consumer's debt by the original creditor.²⁴⁷ Indeed, a debt buyer or assignee "must tender proof of assignment of a particular account or, if there were an oral assignment, evidence of consideration paid and delivery of the assignment."²⁴⁸ Likewise, in scenarios where a debt has been sold and resold to numerous debt buyers, debt buyer plaintiffs must demonstrate that the defendant's particular account was sold and

242. See FED. R. EVID. 803(6); see also N.Y. C.P.L.R. 4518(a) (McKinney 2013).

243. N.Y. C.P.L.R. 4518(a); see also *Chase Bank USA, N.A. v. Gergis*, No. CV-83761-10/KI, 2011 WL 2409647, at *3 (N.Y. Civ. Ct. June 15, 2011) (holding that "[i]t is well settled law that in order for a witness to lay the foundation for the admission of a document as a business record pursuant to CPLR 4518[a], the witness must demonstrate personal knowledge of the business practices and procedures pursuant to which the document was made" (citation omitted)).

244. See *Rushmore Recoveries X, LLC v. Skolnick*, No. 21161/05, 2007 WL 150643 (N.Y. Sup. Ct. May 24, 2007) (holding that debt buyer could not satisfy business records exception to the hearsay rule because plaintiff's custodian of records could not have personal knowledge of account agreement between defendant and original creditor).

245. See *Citibank v. Martin*, 807 N.Y.S.2d 284, 289 (Civ. Ct. 2005); see also *Palisades Collection, L.L.C. v. Gonzalez*, No. 58564CV2004, 2005 WL 3372971, at *1 (N.Y. Civ. Ct. Dec. 12, 2005).

246. See *Rushmore Recoveries X*, 2007 WL at *2 (holding that "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." (citation omitted)).

247. See, e.g., *Palisades Collection, LLC v. Kedik*, 890 N.Y.S.2d 230, 231 (App. Div. 4th Dep't 2009); *Centurion Capital Corp. v. Guarino*, No. 1117/05, 2012 WL 1543286 (N.Y. Civ. Ct. Apr. 30, 2012).

248. *Martin*, 807 N.Y.S.2d at 291.

resold.²⁴⁹ Both instances are difficult for debt buyers because they purchase debts in large portfolios devoid of pertinent information about the specific accounts.²⁵⁰ For instance, although debt buyers are frequently able to produce bills of sale between the original creditor or assignor and the debt buyer, these documents typically do not identify individual accounts.²⁵¹ Rather, these documents “make reference only generally to thousands of accounts being purchased at the same time.”²⁵²

Thus, as the foregoing demonstrates, the outbreak of consumer debt collection lawsuits in New York City has raised numerous due process and evidentiary issues. According to one Kings County judge, “roughly 90% of the credit card lawsuits are flawed,” in part, because the plaintiff cannot prove the person owes the debt.²⁵³ And in most cases, plaintiffs are able to obtain a default judgment without having to prove that they own the debt or that the defendant owes the amount requested.

II. CONFLICT: PREVENTING INAPPROPRIATE DEFAULT JUDGMENTS IN DEBT BUYER LAWSUITS

This Part compares the approaches courts and legislatures from different jurisdictions have adopted or proposed to address the problems of the types of consumer credit lawsuits described in Part I. Specifically, this section examines the case law addressing what constitutes a “sum certain” under New York law and compares the case law’s standard to the standard set by the 2009 Civil Court Directive on default judgments in consumer debt buyer lawsuits. This Part also considers the approaches recommended and proposed by advocates to ensure due process in consumer debt buyer lawsuits.

Section A begins by examining the 2009 Directive on default judgments in consumer debt buyer lawsuits. Section B compares the Directive to the pertinent case law on default judgments in consumer credit actions. Section C looks at the proposed Consumer Credit Fairness Act in New York. Section D examines the steps that other

249. See *Midland Funding LLC v. Wallace*, No. 1788-08, 2012 WL 29074, at *4 (Mt. Vernon City Ct. Jan. 5, 2012) (holding that a “full chain of assignment in addition to documentary proof of the contract and debt is required” for prima facie consumer credit action); see also *Midland Funding LLC v. Loreto*, No. 008963/11, 2012 WL 638807, at *10 (N.Y. Civ. Ct. Feb. 23, 2012).

250. See *supra* Part I.A.2.

251. See *SHELDON ET AL.*, *supra* note 168, at 47.

252. *Id.*

253. See *Silver-Greenberg*, *supra* note 176.

jurisdictions have taken to prevent inappropriate default judgments in consumer debt lawsuits.

A. The 2009 New York City Civil Court Directive

The Civil Court of the City of New York has adopted several key measures in response to the increased number of consumer credit actions in the past decade. Indeed, the Civil Court has issued important advisory notices and directives broadly aimed at ensuring due process for consumer credit defendants. For example, the Civil Court has advised that in cases where the defendant is not represented by counsel, the judges of the Civil Court should ascertain the validity of the debt by determining, among other things, whether the plaintiff is licensed by the DCA (in cases where the plaintiff is not an original creditor), whether the debt is time-barred, whether the defendant's income is exempt, whether the defendant acknowledges the debt, and, if a lack of service is raised in the answer, whether the defendant understands and wants to proceed with a traverse hearing to determine if service was proper.²⁵⁴ Additionally, pursuant to a 2009 Directive, debt collector plaintiffs must supplement their requests for default judgments with an affidavit stating that the debt is not time-barred under the relevant statute of limitations.²⁵⁵

The Civil Court has also adopted a directive that specifically addresses default judgments in cases brought by debt buyers. Noting that the Civil Court's procedures were based on debt collection actions brought by original creditors, in May of 2009, the Civil Court issued a directive, DRP-182, on "Default Judgments on Purchased Debt" ("Directive").²⁵⁶ The Directive addresses clerk-entered default

254. Advisory Notice, Consumer Debt Cases: C.P.L.R. § 3015(e); Validation; Allocations of Stipulations, AN-9 (N.Y. Civ. Ct. June 21, 2008), *available at* <http://www.nycourts.gov/courts/nyc/SSI/directives/AN/consumerdebt.pdf>; *see also* Advisory Notice, Consumer Debt Cases: Statute of Limitations, AN-11 (N.Y. Civ. Ct. Feb. 23, 2010), *available at* <http://www.nycourts.gov/courts/nyc/SSI/directives/AN/AN11.pdf>.

255. Memorandum from Jack Baer, Chief Clerk, Civil Court of N.Y.C., Default Judgments and Time Barred Debt in Consumer Credit Actions (June 1, 2010), *available at* <http://www.nycourts.gov/COURTS/nyc/SSI/directives/CCM/CCM186A.pdf>. Although New York's statute of limitations for consumer credit transactions is six years, New York CPLR § 202 ("the borrowing statute") "requires that the cause of action be timely under both New York and the jurisdiction where the cause of action accrued." *Id.* (citing Portfolio Recovery Assocs., LLC v. King, 927 N.E.2d 1059 (N.Y. 2010)).

256. Directives and Procedures, Default Judgments on Purchased Debt, DRP-182 (N.Y. Civ. Ct. May 13, 2009) [hereinafter DRP-182], *available at*

judgments and instructs that when a debt buyer plaintiff moves for a default judgment pursuant to CPLR § 3215, the plaintiff must submit, in addition to the statutory requirements for a default judgment: (1) an affidavit of Sale of Account by the original creditor, (2) in cases where the debt has been sold many times, an Affidavit of Sale of Account from each debt seller, and (3) an Affidavit of a Witness of the Plaintiff, “which includes a chain of title of the accounts, completed by the plaintiff/plaintiff’s witness.”²⁵⁷

The Directive, however, does not require debt buyers to prove that they have standing to bring a collection action because it does not require debt buyers to submit affidavits from original creditors that specify the basic facts about the defendant’s account, including the account number, the terms governing the account, and an itemization of the amount claimed due, including interest, fees, and other charges. According to a sample affidavit attached to the Directive, the original creditor need only verify that it sold a “pool of charged-off accounts” to a debt buyer.²⁵⁸ Similarly, the debt seller’s affidavit requires the debt seller to verify that the “pool of charged-off accounts” was sold to another debt buyer.²⁵⁹ Although the sample affidavits attached to the Directive states that the original creditor confirms that, as part of the sale of the pool of accounts, “electronic records and other records were transferred on individual [a]ccounts to the debt buyer,” the affidavits do not require original creditors to confirm that electronic and other records of the defendant’s specific account were included as part of the sale.²⁶⁰ Pursuant to the Directive, a debt buyer plaintiff is able to comply with the Directive without having to produce any proof of its own standing to collect the debt.²⁶¹ Thus, the Directive conflicts with case law requiring debt buyers to prove standing.

<http://www.nycourts.gov/courts/nyc/SSI/directives/DRP/drp182.pdf>; *see also* Memorandum from Jack Baer, *supra* note 255.

257. DRP-182, *supra* note 256.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Cf.* Citibank v. Martin, 807 N.Y.S.2d 284, 291 (Civ. Ct. 2005) (holding that because “courts are reluctant to credit a naked conclusory affidavit on a matter exclusively within a moving party’s knowledge, an assignee must tender proof of assignment of a particular account or, if there were an oral assignment, evidence of consideration paid and delivery of the assignment” (citation omitted)); *see also* Midland Funding LLC v. Wallace, No. 1788-08, 2012 WL 29074, at *4 (Mt. Vernon City Ct. Jan. 5, 2012) (holding that under New York law, “a full chain of assignment in addition to documentary proof of the contract and debt is required in order to prove a prima facie case in a consumer debt action where the plaintiff is an assignee of the original creditor,” and that absent a full chain of assignment a plaintiff is

B. What Is a Sum Certain? The Directive's Conflict with New York Case Law for Verification of a Debt

The Civil Court's Directive on default judgments for purchased debt also conflicts with current case law on the evidentiary standard for a default judgment because it does not require debt buyers to show that they have a *prima facie* case for a sum certain. As noted, a defendant's default does not "create a mandatory ministerial duty by the clerk to enter a default judgment against [the] defendant."²⁶² The plaintiff must still produce "enough facts to enable the court to determine that a viable cause of action exists."²⁶³ Thus, although defaulting defendants are deemed to have admitted liability, the plaintiff seeking the entry of a default judgment must still show that he or she has a case for a sum certain or for a sum that by computation can be made certain.²⁶⁴ The Directive, however, does not require debt buyers to satisfy these requirements because its sample affidavits do not require plaintiffs to show that they have standing to collect on the defendant's specific account or that the amount allegedly owed by the defendant is a sum certain.

Pursuant to New York case law, in order for a default judgment to be entered against the defendant, the plaintiff must submit a detailed affidavit of merit from a person with firsthand knowledge of the facts²⁶⁵ that establishes proof of assignment and proof of the underlying debt.²⁶⁶ Therefore, for a breach of contract case, the

"unable to show its standing to sue the defendant and a lack of standing renders a litigation a nullity, subject to dismissal without prejudice").

262. PRS Assets v. Rodriguez, No. 17301/05, 2006 WL 1707947, at *1 (Dist. Ct. Nassau Cnty. June 21, 2006).

263. Woodson v. Mendon Leasing Corp., 790 N.E.2d 1156, 1162 (N.Y. 2003).

264. Section 3215(f) of the C.P.L.R. requires plaintiffs to submit "proof of the facts constituting the claim, the default and the amount due by affidavit made by the party." N.Y. C.P.L.R. 3215(f) (McKinney 2013). If the plaintiff meets this burden, then the clerk may then enter a judgment for the plaintiff. *Id.*; see also Joosten v. Gale, 514 N.Y.S.2d 729, 732 (App. Div. 1st Dep't 1987) ("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."); Velocity Inv., LLC v. McCaffrey, 921 N.Y.S.2d 799, 805-06 (Dist. Ct. Nassau Cnty. 2011) (holding that a default judgment was not proper where the plaintiff could not show that it had a prima facie case based on non-hearsay evidence).

265. See Joosten, 514 N.Y.S.2d at 732 (holding that a complaint verified by an attorney is insufficient for default judgment when the attorney lacks personal knowledge of the facts constituting the claim).

266. LVNV Funding, LLC v. Delgado, No. 29263/08, 2009 WL 2370987, at *3 (Dist. Ct. Nassau Cnty. Aug. 3, 2009); see also Palisades Collection, LLC v. Kedik, 890 N.Y.S.2d 230 (App. Div. 4th Dep't 2009); Proposed Brief of Amici Curiae Camba

plaintiff must provide the court or the clerk with enough facts to establish that the lender issued the defendant a credit card and that the defendant used the card and defaulted in payment.²⁶⁷ If an assignee's application for default judgment does not include proof of the original contract, the assignment of the contract to the plaintiff, and the particulars of the contract, the application should be denied.²⁶⁸ Likewise, for an account stated cause of action, the plaintiff must prove that there was an agreement between the parties, that statements were mailed to the defendant, and that the defendant refused to pay or object to those statements.²⁶⁹ If the plaintiff does not establish that there was such an agreement or that such statements were sent to the defendant, then the court or the clerk should not enter a default judgment for the plaintiff.²⁷⁰ In addition, as part of the *prima facie* finding, debt buyer plaintiffs must establish that they have purchased or have been assigned the defendant's specific debt²⁷¹ and that notice of the assignment was sent to the consumer.²⁷²

Courts have noted, however, that debt buyers rarely satisfy these requirements.²⁷³ According to a 2010 study of approximately 700

Legal Services, Inc. et al. as Amici Curiae Supporting Objectors-Appellants and Arguing for Reversal, *Vassalle v. Midland Funding, LLC*, No. 11-3814, 2012 WL 256644, at *27–28 (6th Cir. Jan. 19, 2012).

267. *Velocity Inv.*, 921 N.Y.S.2d at 805.

268. *See* *Giordano v. Berisha*, 845 N.Y.S.2d 327 (App. Div. 1st Dep't 2007) (affirming trial court's denial of appellant's application for default judgment because the appellant did not establish proof of the underlying contract, the assignment, or the "particulars of the contract assigned" to the appellant).

269. *Velocity Inv.*, 921 N.Y.S.2d at 805; *see also* *Citibank v. Martin*, 807 N.Y.S.2d 284, 289 (Civ. Ct. 2005) (holding that the plaintiff's affidavit must establish proof of the original agreement between the lender and the card holder, as well as any revision to that agreement, proof that the agreement was mailed to the defendant, and "copies of credit card statements which serve to evidence a buyer's subsequent use of the credit card and acceptance of the original or revised terms of credit").

270. *Velocity Inv.*, 921 N.Y.S.2d at 805 (holding that judgment should not have been entered where plaintiff failed to produce statements or establish that statements were business records).

271. *See* *Martin*, 807 N.Y.S.2d at 291 (holding that "an assignee must tender proof of assignment of a particular account").

272. *Velocity Inv.*, 921 N.Y.S.2d at 805.

273. *See* *Am. Express Bank, FSB v. Dalbis*, No. 300082/10, 2011 WL 873512, at *12 (N.Y. Civ. Ct. Mar. 14, 2011) (noting that third-party debt collection lawsuits typically do not contain a "nano of a modicum of a scintilla of a prima facie case so as to be entitled to a judgment whether it be by default or otherwise" (internal quotations omitted)); *LR Credit 21 LLC v. Paryshkura*, 914 N.Y.S.2d 614, 616 (Dist. Ct. Nassau Cnty. 2010) ("The judges of this Court, and the lawyers practicing before

consumer credit actions in New York City Civil Court, complaints often lack a clear break-down of how the amount claimed was calculated based on the principal, interest, and fees incurred.²⁷⁴ The FTC has also recently concluded that debt buyers frequently do not possess documentation on the terms and conditions of an account, the account statements, or information about the amounts consumers owe on the original account,²⁷⁵ and the purchase and sale agreements between debt buyers and original creditors frequently disclaim the accuracy of the information in the documents that debt buyers receive.²⁷⁶

In *Collins Financial v. Vigilante*, Judge Straniere specifically addressed the issue of what proof is sufficient to support the entry of a default judgment for a sum certain in consumer credit actions.²⁷⁷ In *Vigilante*, Judge Straniere noted that the current practice, which permits the entry of default judgments based on an affidavit of facts from someone with personal knowledge of the facts, but which does not require plaintiffs to explain how the sum was calculated or to produce supporting documentation of the debt, is “not tolerable in regard to credit card and other consumer credit debt cases where items such as the interest rate, late payment charge, and over-the-limit fees may change several times over the course of the consumer credit agreement.”²⁷⁸ Thus, because consumer credit agreements contain many variables, Judge Straniere reasoned that it is not possible for a clerk to determine if the amount alleged is a sum certain by looking at the “four corners of the instrument.”²⁷⁹ Judge Straniere held that the documentation submitted in *Vigilante* and the documentation submitted for default judgments in “almost all” consumer credit cases “fails to provide the necessary ‘requisite proof’ to support entry of default pursuant to CPLR § 3215,” in part because “[m]erely pleading an amount due and owing without reference to how that number was calculated is a failure of proof that the alleged damages qualify as a ‘sum certain.’”²⁸⁰

According to the *Vigilante* decision,

them, know all too well that debt buyers rarely have readily available proof to establish an assigned debt claim.”).

274. See APPLESEED, *supra* note 124, at 23–24.

275. See FED. TRADE COMM’N, *supra* note 6, at 35.

276. *Id.* at iii.

277. See *Collins Fin. Servs. v. Vigilante*, 915 N.Y.S.2d 912, 918 (Civ. Ct. 2011).

278. *Id.*

279. *Id.* at 915.

280. *Id.* at 914.

[D]ue process requires at a minimum, that in order to utilize . . . [interest] rates in calculating the amount owed, the agreement between the card issuer and card holder containing that rate must be presented as an exhibit or recited in sufficient detail in the “affidavit of facts” so that either the clerk or the court may determine if the amount claimed owed is properly calculated.²⁸¹

Therefore, pursuant to *Vigilante*, in order for the clerk to approve an entry of a default judgment for a sum certain, the affidavit of facts submitted in support of that judgment must include: (1) the date the consumer credit agreement was entered into by the defendant, (2) the name of the original creditor, (3) the complete history of the assignment of the account, (4) the date of the defendant’s last payment, (5) the amount of the defendant’s last payment, (6) the last date of purchase or cash advance, (7) the original credit card number and, if applicable, a history of account numbers, (8) the outstanding balance at the last payment date, (9) a calculation of the balance on the date of the last payment broken down by interest, fees, and charges, (10) a statement of how the interest rate was calculated, including documentation to support any changes in interest rate, (11) a statement that the address of the defendant from the summons and complaint is correct and, if it is not correct, a statement that a good faith effort was made to locate the current address for the defendant, and (12) copies of extrinsic documents referred to in the consumer credit agreement.²⁸²

In comparison to the 2009 Civil Court Directive, the twelve requirements from *Vigilante* impose a far more stringent evidentiary requirement on debt buyer plaintiffs seeking default judgments.²⁸³ The Directive’s sample affidavits do not specifically require plaintiffs to submit this information in their applications for default judgments.²⁸⁴ Thus, according to the *Vigilante* decision, the Directive does not provide the court or clerks with the requisite information to determine if the debt buyer has a *prima facie* case for a sum certain.

281. *Id.*

282. *Id.* at 915–16.

283. *See* Wu, *supra* note 219, at 1571–72 (examining the *Vigilante* decision and calling for other courts to impose similarly strict evidentiary requirements for default judgments in consumer debt cases).

284. *See supra* Part II.A.

C. New York's Proposed Consumer Credit Fairness Act

In New York there have been legislative efforts to provide consumers with greater protection in debt collection lawsuits. Specifically, legislators have proposed the Consumer Credit Fairness Act (CCFA), which if passed, would amend the CPLR to place additional requirements on plaintiffs in debt collection lawsuits.²⁸⁵ The justification of the bill is to fill the gaps in the CPLR that abusive debt collection lawsuits exploit.²⁸⁶ The CCFA would reduce the statute of limitations on consumer credit actions from six to three years and impose heightened pleading standards in consumer credit lawsuits by requiring a plaintiff to include in its complaint substantial information on the defendant's debt.²⁸⁷ In particular, debt collector plaintiffs would be required to produce in their complaints: (1) the name of the original creditor, (2) the last four digits of the defendant's account number, (3) the date of the last payment, (4) the date that the final statement was mailed to the defendant in cases claiming an account stated, and (5) an itemization of the amount sought, broken down by principal, interest, finance charge(s), all fees incurred by the original creditor, collection costs, and attorney's fees.²⁸⁸ If the original creditor sold the account, the date of the sale and a complete chain of assignment must also be included in the complaint.²⁸⁹

The bill would also prevent inappropriate default judgments. The CCFA imposes specific requirements on plaintiffs who seek default judgments.²⁹⁰ In particular, the CCFA would require plaintiffs to attach to their complaints an itemization of the amount sought broken down by principal, interest, fees, and other charges.²⁹¹ Moreover, unlike the current Directive, the CCFA would require debt buyer plaintiffs to produce documentation from the original creditor about each specific debt. For example, under the proposed law, debt buyers would be required to submit an affidavit from the original creditor stating the "facts constituting the debt, the default in payment, the sale or assignment of the debt, and the amount due at

285. See Consumer Credit Fairness Act, S. 2454, 2013 Leg., Reg. Sess. (N.Y. 2013), available at <http://open.nysenate.gov/legislation/bill/S2454-2013>.

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

the time of the sale or assignment.”²⁹² The CCFA would also require subsequent debt buyers to produce affidavits for subsequent assignments from the seller or assignor, and an affidavit of a witness of the plaintiff, which includes a chain of title of the debt.²⁹³

D. Debt Collection Reform in Other States

The problem of inappropriate default judgments in debt collection lawsuits has troubled other jurisdictions as well. As a result, several states have reformed procedural rules and statutes governing debt collection lawsuits. Generally, these regulations, court rules, and statutes have sought to level the playing field by raising a plaintiff’s burden of production in consumer debt actions.

1. Legislative Efforts²⁹⁴

In 2009, North Carolina amended its procedural rules to require debt buyer plaintiffs to attach to their complaints a copy of the original contract or agreement evidencing the debt and a copy of the assignment establishing that the plaintiff owns the debt, which contains the defendant’s account number and name.²⁹⁵ The same

292. *Id.*

293. *Id.*

294. In addition to the following legislative efforts, in 2012, the National Consumer Law Center published the Model Family Financial Protection Act to encourage state legislatures to take up debt collection reform. See ROBERT J. HOBBS & CHI CHI WU, NAT’L CONSUMER LAW CTR., MODEL FAMILY FINANCIAL PROTECTION ACT 2 (2012), available at http://www.nclc.org/images/pdf/debt_collection/model_family_financial_protection_act.pdf. Pursuant to the Model Act, prior to the entry of a default judgment or summary judgment, the debt collector or debt buyer plaintiff must provide the court with detailed evidence substantiating the claim. *Id.* at 23–24. The Model Act states that “[t]he only evidence sufficient to establish the amount and nature of the debt shall be properly authenticated business records” that satisfy the appropriate business record exception under the particular state’s rules of evidence. *Id.* at 24. This evidence must also include the same documentation needed to collect on the debt, or initiate a lawsuit, such as a copy of the original contract evidencing the debt and an itemization of all charges, interest, and fees. *Id.* In addition, the Model Act provides consumers with the right to a default judgment with costs for lost wages and transportation if the plaintiff fails to appear or is unprepared to proceed without good cause for a continuance (Title I of the model act comprehensively addresses common abuses in the credit and collections industries, for example the Act would create special protections for consumer form contracts or contracts of adhesion. Likewise Title II addresses property exempt from collection.).

295. N.C. GEN. STAT. ANN. § 58-70-150 (West 2013); see also Consumer Economic Protection Act of 2009, S. 974, 2009 Leg., Reg. Sess. (N.C. 2009). Pennsylvania also requires a plaintiff to attach “a cardholder agreement and statement of account, as well as evidence of assignment” to their complaint. *Atl. Credit & Fin., Inc. v. Giuliani*, 829 A.2d 340, 345 (Pa. Super. Ct. 2003).

North Carolina law makes it an unfair practice for a debt buyer to initiate a lawsuit to collect on a debt that it knows or reasonably should know is barred by the applicable statute of limitations.²⁹⁶ It is also an unfair practice for a debt buyer to bring suit, initiate an arbitration proceeding, or attempt to collect on debts without valid documentation that the debt buyer is the owner of the specific debt and reasonable verification of the amount the debt allegedly owed by the debtor.²⁹⁷ The law also sets a civil penalty as high as \$4,000 for engaging in unfair practices.²⁹⁸ As a result of this legislation, debt buyer filings in North Carolina have decreased significantly.²⁹⁹

Elsewhere, the Minnesota legislature has passed a bill that requires debt buyers to submit, in addition to their application for default judgment, a copy of the written contract between the debtor and the original creditor or other admissible evidence establishing the terms of the agreement, admissible evidence establishing that the defendant owns the debt, “the last four numbers of the debtor’s Social Security number, if known,” admissible evidence that the amount claimed due is accurate, “including the balance owed at the time the debt was charged off or first assigned to another party by the original creditor and, if included in the request, application, or motion for judgment, a breakdown of any fees, interest, and charges added to that amount,” evidence establishing a complete chain of assignment and that the defendant’s specific debt was assigned to the plaintiff, proof that the defendant was properly served with the summons and complaint, and proof that the defendant was provided notice of the default.³⁰⁰

296. N.C. GEN. STAT. ANN. § 58-70-115.

297. *Id.*

298. *Id.* § 58-70-130.

299. See Terry Carter, *Payback: Lawyers on Both Sides of Collection are Feeling Debt’s Sting*, ABA J. (Dec. 1, 2010), http://www.abajournal.com/magazine/article/payback_lawyers_on_both_sides_of_collection_are_feeling_debts_sting/; Paul Tharp, *New Debtor-Protection Legislation Puts the Big Chill on Debt Buyers*, N.C. LAW. WKLY., <http://nclawyersweekly.com/reprints/begnoche051710/> (last visited Mar. 31, 2013); see also CARLENE McNULTY & AL RIPLEY, N.C. JUSTICE CTR., NC DEBT BUYER LEGISLATION (2012), available at <http://www.stateinnovation.org/Events/Event-Listing/Policy-Directors-Webinar-Series-2011-12/Zombie-Debt/McNulty-and-Ripley---NC-Debt-Buyer-Legislation-Feb.aspx> (noting that “very few cases” have been filed since the bill became law because it is difficult for debt buyers to comply with the law).

300. H.R. 80, 2013 Leg., 88th Sess. (Minn. 2013), available at <http://wdoc.house.leg.state.mn.us/leg/LS88/HF0080.3.pdf>; see also Jennifer Bjorhus, *Minnesota Looks to Toughen Laws for Pugnacious Bill Collectors*, STAR TRIB., Jan. 15, 2013, <http://www.startribune.com/politics/statelocal/186812441.html>. Similarly, the California state senate has passed the proposed Fair Debt Buyer Practices Act, which would require debt buyers to produce more documentation regarding a

Likewise, the Connecticut General Assembly is considering a proposed bill that would impose substantial requirements on debt buyers.³⁰¹ For example, the Connecticut bill would set a three-year statute of limitations for debt buyer collection actions and if the consumer makes a payment after the charge off date, that payment does not extend, or restart the running of, the three-year statute of limitations.³⁰²

In addition, the Connecticut bill sets important prerequisites for debt buyer lawsuits, such as prohibiting debt buyers from filing suits that they know or reasonably should know are time barred, and from pursuing actions unless they have proof that they own the defendant's specific debt and documented verification of the amount allegedly owed, including and itemization of all fees and charges.³⁰³ The bill also would require debt buyers to send written notice of their intent to file suit thirty days in advance, and this notice must include information to verify the debt.³⁰⁴ If an action is filed, debt buyers must mail or deliver a copy of the contract or other documents evidencing the debt, a copy of the assignment, and an itemization of the amount of damages sought by the defendant at least ten days prior to date the defendant's answer is due.³⁰⁵ Moreover, if the consumer appears for trial and the debt buyer either fails to appear or is not ready for trial, and the court does not find good cause for a continuance, the court shall enter judgment for the defendant, dismiss the debt buyer's claim with prejudice, and in its discretion award the defendant costs, attorney's fees, and any lost wages or other related expenses.³⁰⁶ Prior to the entry of a default judgment, the debt buyer must also affirm that it has complied with the new litigation prerequisites and requirements, and produce admissible business records establishing the debt.³⁰⁷ And if a judgment is awarded to the debt buyer, "the bill limits the interest rate of a judgment to the

consumer's account to collect on that account or pursue collection through litigation. See S. 890, 2011 Leg., Reg. Sess. (Cal. 2011), available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120SB890.

301. H.B. 6173, 2013 Leg. (Conn. 2013).

302. *Id.* at 16.

303. *See id.*

304. *Id.*

305. *Id.* at 17.

306. *Id.* at 17–18.

307. *Id.* at 18.

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weekly average one-year constant maturity yield of United States Treasury securities.³⁰⁸

2. Reforms Adopted by Courts

In September of 2011, the Court of Appeals of Maryland amended the Maryland Rules of Procedure to place additional requirements on plaintiffs seeking default judgments in consumer debt cases.³⁰⁹ The amendments seek to achieve the goals of

(1) provid[ing] courts with sufficient information about each case to actually determine whether judgment is warranted, and, if so, what the proper amount of the award should be and (2) to give consumer defendants sufficient information to (a) fully understand the claim being filed against them and (b) file any appropriate defense to the lawsuit.³¹⁰

Pursuant to these goals, Maryland added an entirely new section to its default judgment statute for consumer debt claims, which requires plaintiffs to submit an affidavit providing proof of the debt based on the signed original contract, “a bill or record reflecting purchases, payments, or other actual use of a credit card or account by the defendant,” documents on the terms of the contract, proof of the plaintiff’s ownership of the debt demonstrating an unbroken chain from the original creditor to the plaintiff, a certified copy of the bill of sale of the debt, identification on the account such as the name of the original creditor and the last four digits of the account number, and account charge off information including the date of charge-off, the balance at charge-off, an itemization of any fees or charges claimed in addition to the charge-off balance, and the date of the last payment on, or transaction giving rise to, the debt.³¹¹ Moreover, Maryland also amended its procedural rules to require consumer debt plaintiffs to prove liability and damages, regardless of the defendant’s failure to appear.³¹²

In addition, in August of 2012, the Chief Judge of the Court of Common Pleas in Delaware issued the directive “Consumer Debt

308. *Id.* at 18–19.

309. MD. RULE 3-306; *see also* STATE COLLECTION AGENCY LICENSING BD. & OFFICE OF THE ATTORNEY GEN. OF MD., REPORT TO SENATE JUDICIAL PROCEEDINGS COMMITTEE (2011) [hereinafter MD. REPORT], *available at* [http://dlslibrary.state.md.us/publications/Exec/DLLR/HB358Ch332\(8\)_2011.pdf](http://dlslibrary.state.md.us/publications/Exec/DLLR/HB358Ch332(8)_2011.pdf).

310. *See* MD. REPORT, *supra* note 309, at 2.

311. MD. RULE 3-306(d).

312. MD. RULE 3-509.

Collection Actions”, which adopts similar measures.³¹³ The Delaware directive requires plaintiff debt collectors to attach an “Affidavit of Ownership and Amount Due” to their complaints, which states the basic facts about the chain of ownership and the amount due.³¹⁴ The caption of the complaint must also “include a sufficient description of the original creditor to reasonably enable the defendant to identify the account,” “the last four digits of the original account number,” and “a breakdown of the Principal Amount Due and interest, fees and other charges.”³¹⁵ At the default judgment stage, the plaintiff must submit an additional affidavit and documents evidencing the legal obligation that gives rise to the debt.³¹⁶ The affidavit must list the complete chain of assignment, as well as the date of the defendant’s last payment on the account, the principal amount due, and the rate of interest the plaintiff is claiming due.³¹⁷

In addition, courts in Massachusetts have adopted a checklist approach to ensuring due process in consumer debt cases. In Massachusetts, pursuant to a small claims court rule, if a defendant fails to appear, the court must scrutinize the certainty of the court’s jurisdiction over the claim, the essential facts supporting the claim, and whether the facts establish a sum certain.³¹⁸ Similarly, the Connecticut Small Claims Bench/Bar Committee has proposed a checklist for small claims court magistrates to determine whether the claim is valid and reasonable.³¹⁹ The checklist also recommends that magistrates sanction plaintiffs who frequently fail to comply with “small claims court rules and procedures designed to protect defendants from improper judgments.”³²⁰

313. See Administrative Directive of the Chief Judge of the Court of Common Pleas for the State of Delaware, No. 2012-2 (Aug. 22, 2012).

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. MASS. UNIFORM SMALL CLAIMS R. 7(d), available at <http://www.mass.gov/courts/courtsandjudges/courts/districtcourt/uniform-small-claims-rules.pdf>; see also Memorandum from the Appleseed Network to Trial Court Judges (2005), available at <http://www.appleseednetwork.org/wp-content/uploads/2012/10/Appleseed-Judicial-Memo-Electronic.pdf>.

319. FED. TRADE COMM’N, *supra* note 113, at E-9.

320. *Id.*

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III. SOLUTIONS: REQUIRING PROOF AND DEFENDING DUE PROCESS

This Part proposes several solutions to prevent the entry of improper default judgments in consumer debt buyer lawsuits in New York. The goal of these solutions is to preserve due process for consumer defendants, including defaulting defendants, and to ensure that courts are not used as arms of the debt collection industry. Section A argues that the sum certain requirement for clerk-entered default judgments requires debt buyers to include more specific information in their supporting affidavits than is currently required. Section B proposes that the first step to reform is the passage of the Consumer Credit Fairness Act in New York. In the alternative, section C recommends that the Civil Court of New York City should revise its Directive on Default Judgments on Purchased Debt. Finally, section D argues that New York should consider amending its debt collection procedures law to make it an unfair practice for a debt buyer to attempt to collect a debt or initiate a collection lawsuit when it lacks valid documentation that it owns the consumer's debt and lacks information on the amount that the consumer allegedly owes.

A. What Constitutes a Sum Certain?

Calculating a sum certain in consumer credit actions is not a simple task. The CPLR requires a plaintiff seeking a default judgment for a sum certain to establish “the facts constituting the claim, the default and the amount due.”³²¹ The amount due, however, is typically the result of complicated, and often dynamic, contract terms and thus is based on several variables, including the principal borrowed for purchases, an interest rate that often changes several times, and numerous over-the-limit and other fees and charges.³²² Despite this complexity, pursuant to the insufficiently vague Civil Court Directive, DRP-182, debt buyer plaintiffs are able to obtain coveted default judgments from clerks without having to show how the sum certain was calculated.³²³ However, “[n]either the debtor, the court clerk nor a judge can verify the validity the amount claimed due based solely on unsubstantiated numbers in a complaint or affidavit of facts.”³²⁴

321. *See supra* note 228 and accompanying text.

322. *See supra* Part I.A.1.

323. *See supra* Part II.A.

324. *Collins Fin. Servs. v. Vigilante*, 915 N.Y.S.2d 912, 920 (Civ. Ct. 2011).

Without information in the affidavit listing the basic facts of the account history, especially an itemization of charges, fees, and interest, a clerk is not in a position to determine whether the claim is valid and for a sum certain.³²⁵ According to the Court of Appeals, the sum certain requirement “contemplates a situation in which, once liability has been established, there can be no dispute as to the amount due,” thus permitting the clerk to then function in a “purely ministerial capacity.”³²⁶ If plaintiffs wish to take advantage of this function, they should be required to furnish the court and the clerk with specific information regarding their own standing and as to how the defendant’s debt was incurred. Therefore, New York should amend the CPLR to require a plaintiff seeking a default judgment for a sum certain to provide the court with detailed proof of the debt. Following Judge Stranieri’s *Vigilante* decision, plaintiffs seeking a default judgment for a sum certain should be required to produce substantially more information than currently required in their supporting affidavits.³²⁷

The requirements in the proposed CCFA are sufficient to ensure due process throughout the litigation. Thus, debt buyer plaintiffs should be required to state in their complaints (1) the name of the original creditor, (2) the last four digits of the account number, (3) the date and amount of the last payment, (4) for account stated claims, the date the final account statement was mailed to the defendant, (5) an itemization of the amount sought itemized by principal, finance charges, fees charged by the original creditor, collection costs, attorney’s fees, interest, and any other fees or charges, and (6) the date the debt was sold to the debt buyer plaintiff and the names of any previous owners and the dates of those sales.³²⁸ Furthermore, at the default judgment stage, pursuant to the CCFA requirements, debt buyers should be required to provide (1) an affidavit from the original creditor explaining the basic facts giving rise to the debt, the default, the sale of the debt, as well as the amount due at the time of the sale, (2) an affidavit of sale by any subsequent debt seller, and (3) “an affidavit of a witness of the plaintiff, which includes a chain of title of

325. *See supra* Part II.B (discussing the *Vigilante* decision’s requirement for a sum certain).

326. *Reynolds Sec., Inc. v. Underwriters Bank & Trust Co.*, 378 N.E.2d 106, 109 (N.Y. 1978).

327. *See supra* Part II.B.

328. *See supra* Part II.C. These requirements are similar to those proposed by the FTC in response to the many evidentiary and due process problems endemic in debt collection lawsuits; *see also* FED. TRADE COMM’N, *supra* note 113, at 17.

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the debt, completed by the plaintiff or plaintiff's witness."³²⁹ Together, these requirements will sufficiently preserve due process and make certain that the standard for a default judgment for a sum certain as expressed in the case law is satisfied prior to the entry of judgments.

B. New York Should Enact the Consumer Credit Fairness Act³³⁰

The first step to solving the problem of improper default judgments is for New York to enact the proposed Consumer Credit Fairness Act. The CCFA would require debt buyers and debt collector plaintiffs to include more information about the defendant's debt in their court papers.³³¹ By requiring debt buyers to include information on the consumer's original contract and an itemization of the alleged debt broken down by purchases, interest, fees and other charges, the CCFA would better help courts to dismiss unsubstantiated claims and allow legitimate cases to proceed.³³² Moreover, at the default judgment stage, the CCFA would ensure that courts only enter judgments for legitimate claims that are for a sum certain.³³³ Therefore, the CCFA will likely reduce the number of debt buyer lawsuits because debt buyers typically do not purchase all the information necessary to prove their cases at trial.

C. The Civil Court Should Revise Its Directive on Default Judgments for Purchased Debt to Comply with New York Case Law

In the alternative of passage of the CCFA, the Civil Court should revise its Directive on default judgments in consumer debt buyer lawsuits to bring it into accord with the evidentiary standard for default judgments expressed in the case law. Judge Stranieri is

329. *See supra* notes 290–92 and accompanying text.

330. As of this writing, the CCFA is still being considered by the legislature. The Senate version of the bill was referred to the Judiciary Committee on January 17, 2013. *See* S. 2454, 2013 Leg., Reg. Sess. (N.Y. 2013), *available at* <http://open.nysenate.gov/legislation/bill/S2454-2013>. The Assembly, however, passed the CCFA on April 22, 2013. *See* Assemb. 2678, 2013 Leg., Reg. Sess. (N.Y. 2013), *available at* <http://m.nysenate.gov/legislation/bill/A2678-2013>.

331. *See supra* Part II.C.

332. *See id.*; *see also* Memorandum from MFY Legal Services to N.Y.S. Legislature (Feb. 11, 2013), *available at* <http://www.mfy.org/wp-content/uploads/MFY-CCFA-Memo-of-Support-2013-Final.pdf> (arguing that the CCFA would “prevent debt buyers from continuing to exploit gaps in our state’s Civil Practice Law and Rules, while allowing legitimate cases to proceed”).

333. *See supra* Part II.C.

correct to note that the substantial problems created by debt collection lawsuits require the courts to take steps to ensure that the due process rights of unrepresented debtors and even defaulting defendants are protected.³³⁴ The Civil Court has already adopted several important measures.³³⁵ Pursuant to the current Directive, however, debt buyer and original creditor affidavits in support of default judgments are permitted to consist of merely conclusory statements alleging that the plaintiff owns the debt and that the defendant owes a sum due.³³⁶ In most cases, a debt buyer is able to obtain a default judgment without having to prove that it owns the defendant's specific debt or that the defendant owes the specific amount demanded.³³⁷

The Directive does not satisfy the evidentiary standard that the case law establishes because it does not require plaintiffs to prove that they have standing to pursue a collection action against the defendant. Moreover, the Directive is also silent on what proof is required for a sum certain.³³⁸ Thus, debt buyers are able to obtain default judgments without having to produce essential facts, such as the terms and conditions governing the account, account statements from the original creditor, and information as to how the sum was calculated, broken down by principal, fees, and interest.³³⁹ An affidavit that merely states that the defendant's debt was purchased in a pool of debts, without more, is ill-equipped to furnish courts with documentation and information to calculate the amount of damages to the high level of specificity requisite for a sum certain. Therefore, the Civil Court should amend the existing Directive to require debt buyers to prove that the claim is for a sum certain pursuant to the requirements laid out in the CCFA.

Courts throughout the state should also consider adopting a default judgment checklist, similar to those proposed and instituted by other jurisdictions.³⁴⁰ A checklist would provide judges with important guidelines and allow plaintiffs to clearly establish that the underlying facts supporting their claims. Just as important, a default checklist would ensure fairness for defendants who fail to appear because they

334. See *Centurion Capital Corp. v. Guarino*, No. 1117/05, 2012 WL 1543286, at *4 (N.Y. Civ. Ct. Apr. 30, 2012).

335. See *supra* Part II.A.

336. See *id.*

337. See *supra* Part II.A–B.

338. See *id.*

339. *Id.*

340. See *supra* notes 327–29 and accompanying text.

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are unaware of the lawsuit or are unfamiliar with the litigation process.

D. New York Should Consider Amending The Debt Collection Procedures Law

New York should also consider adopting some of the measures codified in North Carolina's recent law addressing the flood of debt buyer lawsuits.³⁴¹ In particular, the legislature should examine the possibility of making it an unfair practice under New York's debt collection procedures law³⁴² for a debt buyer to attempt to collect on or initiate a collection action in situations where it lacks documentation that it is the owner of the defendant's specific debt or verification of the amount of the debt allegedly owed by the debtor. In North Carolina, for example, these reforms have caused the number of debt buyer lawsuits to decrease significantly.³⁴³ These requirements do not discourage legitimate collection actions; rather, they encourage debt buyers to obtain sufficient documentation and information to provide consumers with notice.

CONCLUSION

The ease with which debt buyers have been able to obtain default judgments is alarming, especially when one considers that debt buyers typically lack the requisite proof to support their claims. Courts therefore should adopt measures to make certain that debt buyers comply with well-established procedural and evidentiary standards. The requirement that a plaintiff's claim must be for a sum certain should be strictly enforced because it protects defendants with unequal access to representation and lack of notice. Moreover, these procedural protections are even more important in the consumer credit context, where complex and notoriously one-sided financial products create debts that are puzzling combinations of charges, interest rates, and fees.

The best solution is for New York to enact a law, such as the CCFA, that requires debt buyers to produce more documentation and information on the debts they are attempting to collect. Indeed, the CCFA would fill gaps in the current CPLR that debt collectors continue to exploit to the disadvantage of many low- and moderate-

341. *See supra* notes 295–99 and accompanying text.

342. *See supra* notes 152–65 and accompanying text.

343. *See supra* notes 295–99 and accompanying text.

income New Yorkers. In the alternative, the Civil Court of the City of New York and other courts throughout the state should adopt directives that require plaintiffs in consumer credit actions to fully support their claims at the default judgment stage.

Although it is true that “like other contracts, credit contracts are of little value if the parties cannot enforce them,”³⁴⁴ it is also true that when debt collector plaintiffs “use the court system to enforce [credit obligations], the rules of evidence and legal precedents existing will then govern the transaction.”³⁴⁵ In large measure, debt buyers are not satisfying these requirements; instead, these entities routinely exploit the adversarial process and deny due process to many, especially those who live in low- and moderate-income communities and communities of color. With this disparity in mind, this Note urges legislatures and courts to preserve due process by requiring collectors to satisfy basic procedural and evidentiary standards.

344. See FED. TRADE COMM’N, *supra* note 6, at 11 (quoting BENJAMIN E. HERMALIN ET AL., 1 HANDBOOK OF LAW AND ECONOMICS 99 (A. Mitchell Polinsky & Steven Shavell eds., 2007)).

345. *Am. Express Bank, FSB v. Dalbis*, 927 N.Y.S.2d 814 (Civ. Ct. 2011).