

**Testimony of the Legal Services Center of Harvard Law School,¹
Massachusetts Law Reform Institute,² and
National Consumer Law Center, on behalf of its low-income clients³**

**Written Testimony for the
Standing Advisory Committee on the
Rules of Civil and Appellate Procedure
Responding to Proposed Amendments to the
Mass. Rules of Civil Procedure
Regarding Credit Card Debts**

February 28, 2017

Thank you for the opportunity to provide comments on the proposed amendments to the Massachusetts Rules of Civil Procedure regarding credit card debts. We applaud the Standing Advisory Committee's ("Committee") efforts to protect consumer defendants who are sued in credit card collection lawsuits and suggest ways to strengthen the proposed protections below.

1. Overview of Debt Collection in Massachusetts

Debt collection affects millions of Massachusetts residents. In 2014, the Urban Institute reported that nearly *1 in 4* Massachusetts residents with credit reports had a debt in collection due to non-payment of a bill and that the average amount of the debt was \$4,602.⁴

¹ The Legal Services Center of Harvard Law School ("LSC") is a clinical program of Harvard Law School and has been located in the Jamaica Plain section of Boston since 1979. The staff and students of LSC represent low and middle-income Massachusetts residents through LSC's Consumer Protection Clinic, Veterans Legal Clinic, Housing Clinic, Safety Net Project, Federal Tax clinic, Estate Planning Clinic and Family Law Clinic. LSC's Consumer Protection Clinic provides direct representation to hundreds of clients each year in debt collection cases in state courts and LSC therefore has a strong interest in debt collection issues.

² Massachusetts Law Reform Institute ("MLRI") is a nonprofit statewide legal services advocacy and support center. Since 1968, MLRI has represented low-income individuals and groups on legal issues of statewide importance in the areas of employment, housing, health care, income supports, family law, immigration and disability rights. Our organization has a significant interest in protecting the state's consumers against the abusive debt collection practices described in this testimony.

³ The National Consumer Law Center ("NCLC") is a national research and advocacy organization focusing on the legal needs of consumers, especially low income and elderly consumers. For over 48 years NCLC has been the consumer law resource center to which legal services and private lawyers, state and federal consumer protection officials, public policy makers, consumer and business reporters, and consumer and low-income community organizations across the nation have turned for legal answers, policy analysis, and technical and legal support. Fair debt collection has been a major focus of the work of NCLC, which publishes *Fair Debt Collection* (8th ed. 2014), a comprehensive treatise to assist attorneys and debt collectors to comply with the law, and *Collection Actions* (3rd ed. 2014), detailing defenses to consumer debts.

⁴ Caroline Ratcliffe, et al. Urban Institute, [Delinquent Debt in America](#), at 9 (July 30, 2014).

Between 2004 and 2013, 1.9 million lawsuits were filed in small claims and district courts across the Commonwealth.⁵ Of these 1.9 million lawsuits, *at least 1.2 million were filed by professional debt collectors*.⁶ These numbers are consistent with the Boston Globe’s previous report that professional debt collectors filed an estimated 575,000 lawsuits in these same courts between 2000 and 2005.⁷ Moreover, these numbers indicate that reforms enacted since the Boston Globe’s groundbreaking reporting on debt collection in 2006 have not stemmed the tide of debt collection litigation in Massachusetts courts.

2. General Issues Applying to Both Proposed Rules

2.1 Covering Original Creditors, Assignees, and Purchasers Expands Consumer Protection

We support the proposals to cover actions brought by creditors, assignees, or purchasers of the debt.⁸ Broad coverage reflects the diverse range of parties that may be suing to collect consumer debts.

Credit card companies collect charged-off accounts internally in addition to placing debt for collection with third-party debt collectors and selling portfolios of debt to debt buyers. A recent study of credit card issuers by the CFPB found that, “[w]hile on average only 10% of charged-off debt was pursued through internal recovery, at least one issuer chose to retain and internally collect over 80% of its charged-off debt.”⁹ Data collected by ProPublica demonstrates that some credit card companies are frequent litigants in consumer debt cases.¹⁰ Comparable data for Massachusetts could be obtained through the Mass Trial Court database.¹¹

2.2 Limiting Coverage to Credit Card Debts is Harmful to Consumers

We disagree with the proposals to limit coverage to credit card debts.¹² In contrast, the existing Joint Standing Order 2-15: Verification of Defendant’s Address for Claims Incurred in Trade or Commerce or Pursuing Assigned Debt is an example of a provision already in place in Massachusetts District Courts that applies broadly to actions to collect consumer debt. For the reasons discussed

⁵ Jessica Mendoza, et al., “[Collection claims abuses move up to higher courts](#),” Boston Globe (Mar. 28, 2015).

⁶ *Id.*

⁷ M. Resendez, F. Latour, “[No Mercy for Consumers](#),” Boston Globe (July 30, 2006).

⁸ Proposed Mass. R. Civ. P. 8.1(a), 55.1(a).

⁹ Consumer Fin. Protection Bureau, The Consumer Credit Card Market (Dec. 2015), available at: http://files.consumerfinance.gov/f/201512_cfpb_report-the-consumer-credit-card-market.pdf.

¹⁰ Paul Kiel, “At Capital One, Easy Credit and Abundant Law Suits,” *ProPublica* (Dec. 28, 2015).

¹¹ Massachusetts Trial Court Electronic Case Access is available at <http://www.masscourts.org/>.

¹² Proposed Mass. R. Civ. P. 8.1(a), 55.1(a).

below, the Committee should revise this section to apply broadly to all consumer debts, not just credit card debts.

Publicly available data from the CFPB’s Consumer Complaint database confirms that Massachusetts residents file debt collection complaints about a wide range of products. Data in Table 1 demonstrates that approximately two-thirds of complaints are related to the collection of debts other than credit card debts. Reforms that only target credit card debts would, therefore, fail to respond to concerns raised by the majority of Massachusetts residents filing complaints at the CFPB.

Table 1: Consumer Debt Collection Complaints Filed by Massachusetts Residents with the Consumer Financial Protection Bureau¹³

Type of Debt ¹⁴	Number of Complaints	Percentage of Complaints
Credit Card	550	31 %
Other (phone, health club, etc.)	478	27 %
I don’t know	338	19 %
Medical	152	9 %
Mortgage	97	5 %
Federal student loans	52	3 %
Non-federal student loans	46	3 %
Payday loans	36	2 %
Auto	26	1 %

Excluding other types of debts will produce disparate results for debts that originate from the same type of consumer activity. For example, a medical debt would not be subject to these protections if a consumer is sued by a medical provider or debt buyer on an unpaid bill. However, a medical debt charged to a credit card would benefit from these protections if the consumer is sued by the credit card company or a debt buyer to collect an amount that includes the medical debt.

¹³ This data was compiled by downloading publicly-available data from the CFPB Consumer Complaint Database. The data set was limited to complaints which listed the state as “MA” and the product as “Debt Collection.” There were 1775 records meeting this criteria on February 12, 2017. The database is available at: <https://www.consumerfinance.gov/data-research/consumer-complaints/>.

¹⁴ This field is labeled “sub-product” in the CFPB Complaint Database.

Limiting coverage to credit card debts is also problematic because consumer protections would not be applied to all collection activities by debt buyers, who are collecting on a variety of types of accounts in addition to credit card debts. For example, a study of nine debt buyers conducted by the Federal Trade Commission found that credit card debts comprised fewer than half of the accounts in the portfolio. Table 2 summarizes some of the other types of debt identified.

Table 2: Characteristics of Portfolios Submitted by Nine Debt Buyers¹⁵

Type of Debt Accounts Within Charge-off Portfolios (a)	% of All Charge-Off Accounts
Credit Card	45 %
Medical	28 %
Telecom	15 %
Utilities	2 %
Student Loans	1 %
Auto Loans	1 %
Consumer Loans	1 %

Similarly, a recent study of debts available for sale online conducted by the Consumer Financial Protection Bureau found that less than one third of the accounts available for purchase were credit card debts, nearly half were payday loan debts, and the remainder included medical debts, auto deficiencies, telecom, utility, retail, and other types of debts.¹⁶

Debt buyers are some of the most active litigants in Massachusetts courts. Data presented in Table 3 below shows the frequency of filings by nine debt buyers in 2015. While Massachusetts courts do not record the type of debt at issue in a collection action, studies like the ones conducted by the FTC and the CFPB suggest that a significant percentage of cases filed by debt buyers might not be for credit card debts.

¹⁵ Fed. Trade Comm’n, The Structure and Practices of the Debt Buying Industry, at T-4 (Jan. 2013) available at <http://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buyingindustry/debtbuyingreport.pdf> (percentages do not add up to 100 because only some of the results have been reproduced here).

¹⁶ Consumer Fin. Protection Bureau, Market Snapshot: Online Debt Sales (Jan. 2017), available at: http://files.consumerfinance.gov/f/documents/201701_cfpb_Online-Debt-Sales-Report.pdf

Table 3: Number of Cases Filed in Massachusetts District Courts and Boston Municipal Courts in 2015 (Including Civil, Small Claims, and Supplementary Process) by Nine Debt Buyers¹⁷

Debt Buyer	Number of Cases Filed in 2015
Midland Funding	32,009
Portfolio Recovery Associates, LLC	9,410
Cavalry SPV	6,911
LVNV Funding	5,224
Waterfront Capital	3,934
CACH	2,993
Unifund CCR, LLC	1,391
Jefferson Capital Systems, LLC	1,335
Atlantic Credit & Finance	1,137
Total for 9 Debt Buyers	64,344
All Civil, Small Claims, and Supplementary Process Cases Filed in 2015	149,022

3. Proposed Rule 8.1 - Special Requirements for Credit Card Debts

The newly proposed Mass. R. Civ. P. 8.1 addresses a number of required filings for credit card debts. We discuss the proposed rule in more detail below.

3.1 Section (b) – Data about Problems Caused by Poorly Documented Debt

In an effort to address problems with “poorly documented debts,” the Committee proposes requiring an Affidavit Regarding Debt to be filed with the complaint for any claim against an individual arising from a credit card debt. We agree that insufficient documentation is a critical problem in collection actions. This section presents data about the problems caused by poorly documented debt.

¹⁷ Data collected by the National Consumer Law Center in January and February 2016 using the Massachusetts Trial Court Electronic Case Access at <http://www.masscourts.org/>. More detailed methodology and additional data available upon request.

The CFPB's survey of consumer experiences with debt collection found that "[m]ore than half of consumers (53 percent) who were contacted about a debt in collection in the past year indicated that the debt was not theirs, was owed by a family member, or was for the wrong amount."¹⁸ This result is consistent with the most common complaints about debt collection reported to the CFPB:

[I]n 2015, again the most common issue selected by consumers submitting a debt collection complaint is continued attempts to collect a debt that the consumer states is not owed (40%). Many consumers, for example, report that they already paid the debt in collection. In many of these complaints, the attempt to collect the debt is not itself the problem; rather, consumers assert that the calculation of the amount of underlying debt is inaccurate or unjust.¹⁹

Similarly, 41% of complaints about debt collection filed with the CFPB by Massachusetts residents list continued attempts to collect a debt not owed as the issue of the complaint.²⁰

Collecting from the wrong person, for the wrong amount, or where the collector has no legal right to collect is especially problematic in light of the high rate of default judgments obtained in collection lawsuits. In the CFPB's survey of consumer experiences with debt collection, only 26% of consumers who had been sued on a debt reported that they attended the court hearing.²¹ This survey results suggest that as many as 74% of consumer collection cases nationwide result in default judgments for the plaintiff. Previous research has confirmed that an overwhelming majority of collection lawsuits result in default judgments,²² often without presenting any evidence and despite the fact that consumers may have legitimate defenses.

¹⁸ Consumer Fin. Protection Bureau, *Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt 5* (Jan. 2017), available at: http://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf.

¹⁹ Consumer Fin. Protection Bureau, *Fair Debt Collection Practices Act: CFPB Annual Report 2016 17* (Mar. 2016), available at: http://files.consumerfinance.gov/f/201603_cfpb-fair-debt-collection-practices-act.pdf.

²⁰ This data was compiled by downloading publicly-available data from the CFPB Consumer Complaint Database. The data set was limited to complaints which listed the state as "MA" and the product as "Debt Collection." There were 1775 records meeting this criteria on February 12, 2017, of these 729 listed "cont'd attempts to collect not owed" as the "issue." The database is available at: <https://www.consumerfinance.gov/data-research/consumer-complaints/>.

²¹ Consumer Fin. Protection Bureau, *Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt 5* (Jan. 2017), available at: http://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf.

²² *See, e.g.*, Mary Spector, "Debts, Defaults, and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts," 6 Va. L. & Bus. Rev. 257, 288 (2011) (77% default rate in Dallas County); Claudia Wilner and Nasoan Sheftel-Gomes, Neighborhood Economic Development Advocacy Project, *Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Low Income New Yorkers* (2010) (81% default rates in New York City); Federal Trade Commission, *Repairing a Broken System 7* (July 2010) ("panelists from throughout the country estimated that sixty percent to ninety-five percent of consumer debt collection lawsuits result in defaults, with most panelists indicating that the rate in their jurisdictions was close to ninety percent") and 7 n.18 (collecting studies on default rates).

Many debt buyers lack critical account-level documentation about a debt at the time that they file a lawsuit. In 2013, an FTC report highlighted that debt buyers purchase accounts in bulk, typically obtaining only an electronic spreadsheet with minimal information about the debts.²³ The FTC found that most of the time debt buyers do not receive the credit application, the account agreement, monthly statements, payment records, or any customer service records that would reflect customer disputes.²⁴ In mid-2015, the CFPB found that credit card issuers provide the following information at sale:

account statements, the account number, the account holder’s identifying information (such as their Social Security number), written applications, affidavits, cease and desist indicators, attorney representation indicators, and outstanding principal, interest, and fees at charge-off At least some issuers followed the OCC’s bulletin through a policy requiring the most recent 12 statements to be provided to the buyer at time of sale. Some issuers only required that the last transaction statement be provided as well as a “charge-off statement” detailing the final payment made, the remaining balance, and the date of charge-off.²⁵

Thus, even recently sold debt is transferred without key documents like the terms and conditions or documentation establishing the chain of title. Older credit card debt that is still in circulation or other types of debt purchased by debt buyers likely continues to be sold without account statements, written applications, or other key documentation.

3.2 Section (b) – Affidavit Regarding Debt

We are concerned that the proposed affidavit format will encourage practices like robo-signing by parties who are merely parroting data from a spreadsheet and have no personal knowledge of the facts to which they are attesting.²⁶ Robo-signing and other abusive practices related to use of affidavits by collection law firms have been the target of CFPB enforcement actions.²⁷ The affidavit proposed here would be susceptible to similar abusive practices.

Another concern is that an affidavit submitted with the complaint may also discourage consumers from coming to court to defend against a debt. Defendants may believe that the plaintiff has already

²³ Fed. Trade Comm’n, *The Structure and Practices of the Debt Buying Industry*, at 20, 29 (Jan. 2013).

²⁴ *Id.* at T-9.

²⁵ Consumer Fin. Protection Bureau, *The Consumer Credit Card Market 261* (Dec. 2015), available at: http://files.consumerfinance.gov/f/201512_cfpb_report-the-consumer-credit-card-market.pdf.

²⁶ *See, e.g., Citibank (S. Dakota), N.A. v. Giorvine*, 2014 Mass. App. Div. 73 (Dist. Ct. 2014) (individual not employed by Citibank submitted affidavit despite lacking personal knowledge of the alleged Card Agreement she attached to the affidavit); *Citibank (S. Dakota) N.A. v. Van Buskirk*, 2010 Mass. App. Div. 198 (Dist. Ct. 2010) (“It is difficult even to infer how [non-bank affiant] has knowledge of how the records were maintained, or when entries were made.”).

²⁷ *See, e.g., Consent Order, In the Matter of Pressler & Pressler, LLP, Sheldon H. Pressler, and Gerald J. Felt* ¶ 39 (Apr. 25, 2016); *Consumer Fin. Protection Bureau v. Frederick J. Hanna & Assoc., Stipulated Final Judgment and Order*, 14-cv-02211-AT, at ¶¶ 10-11 (D.Ga. 2015).

met its burden of proof by submitting the affidavit. To avoid creating this false impression, the Affidavit Regarding Debt (if adopted) should include a prominent statement in bold clarifying that:

As the Defendant, you have the right to challenge this information in court. For more information about your rights, including information about how to find a lawyer or represent yourself when you have been sued on a debt see: [insert link to relevant website].

As currently drafted, the proposed rule states that the affidavit must be prepared by “a person who has reviewed the relevant business records.” However, as noted above, debt buyers may lack original, account-level documentation, and may rely on secondhand information transmitted by spreadsheet or documents created from spreadsheet data in anticipation of litigation. If an affidavit approach is adopted, the rule should clarify that the information in the affidavit must be supported by original, account-level documentation.

Instead of requiring an affidavit from the creditor, another approach to ensuring that the plaintiff has critical account-level documentation is to require the plaintiff to file certain documentation in court with the complaint. Both California²⁸ and North Carolina²⁹ require debt buyers to attach a copy of the contract³⁰ to the complaint. Additionally, North Carolina requires debt buyer to file a copy of the assignment or other writing establishing that plaintiff is the owner of the debt.³¹ Research conducted by the North Carolina Justice Center shows a significant decrease in filings in Wake County, North Carolina by two debt buyers after passage of these provisions in 2009 as reflected in Table 4.

Table 4: Annual Filings by Three Debt Buyers in Wake County, North Carolina from 2008-2013³²

	2008	2009	2010	2011	2012	2013
Debt Buyer 1	137	729	32	38	124	26
Debt Buyer 3	195	54	13	11	28	32

²⁸ Cal. Civ. Code §1788.58

²⁹ N.C. Gen. Stat. § 58-70-150.

³⁰ Both statutes also define alternative documents that meet the statutory requirement. Cal. Civ. Code §§1788.58, 1788.52; N.C. Gen. Stat. § 58-70-150.

³¹ N.C. Gen. Stat. §§ 58-70-150.

³² North Carolina Justice Center, Comments on the Advance Notice of Proposed Rulemaking Debt Collection (Regulation F): 12 CFR Part 1006, Docket No. CFPB-2-13-0033, RIN 3170-AA41 (Feb. 28, 2014) (copy of comments on file with author). The debt buyers were not identified by name in the comments. Note that we believe that one of the three debt buyers went out of business. As such, we are excluding the data from Debt Buyer 2.

For credit card debts, the Committee should explicitly require plaintiffs to attach both a signed³³ account application and the applicable terms and conditions at default. These documents would still need to be properly authenticated to the court if the lawsuit proceeds but requiring filing up-front would at least prevent filing by plaintiffs who cannot provide basic documentation to substantiate key elements of their claims. Limiting the items filed with the complaint to documents like the contract or proof of assignment of the debt minimizes the potential for disclosure of sensitive information that may be included in documents like account statements or medical bills.

3.3 Section (c) – Enhanced Notice to Consumers

We support the committee’s efforts to enhance notice to consumers about debt collection actions. However, we are concerned that the proposed affidavit regarding address verification will not increase notice to consumers.

First, a requirement that the plaintiff verify the consumer’s address within the 12 months prior to filing the action will not ensure notice to consumers. Relocation rates for low-income consumers, who are particularly likely to be sued on a debt,³⁴ are very high, exceeding 50 percent in a two-year period.³⁵ Individuals who are struggling financially may temporarily stay with friends or family members while seeking more permanent housing. Housing instability may mean multiple addresses over a short period of time, during which individuals may not update their address with places like the Registry of Motor Vehicles. Additionally, when individuals are not formally listed on the lease, they may be unable to receive mail at that address, complicating their ability to have mail forwarded from an old address. Given the likelihood for increased mobility for certain low-income consumers who may be facing collection lawsuits, we recommend that the plaintiff be required to use one of the methods identified to verify the consumer’s address no more than one week prior to filing the complaint.

However, we are concerned that even ensuring recent verification of an address will not be sufficient to ensure that consumers receive notice by first class mail. In 2006, Boston Globe reporters sent

³³ The signature can be either a written signature of the defendant or evidence of the debtor’s agreement by electronic means in compliance with Section 101(c) of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001(c).

³⁴ Consumer Fin. Protection Bureau, Consumer Experiences with Debt Collection: Findings from the CFPB’s Survey of Consumer Views on Debt 27 (Jan. 2017), available at: http://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf (“consumers with incomes less than \$40,000 were more likely to say they were sued than consumers with higher incomes”).

³⁵ Rebecca Cohen and Keith Wardrip, Center for Housing Policy, Should I Stay or Should I Go?: Exploring the Effects of Housing Instability and Mobility on Children 3 (Feb. 2011), <http://www.nhc.org/media/files/HsgInstablityandMobility.pdf> (Fifty-five percent of poor families and forty-five percent of near poor families moved in the twenty-four months prior to the study as compared to thirty-one percent of non-poor families.).

out 100 misaddressed letters to test the small claims courts' service by first class mail.³⁶ They found that only 52 were returned.³⁷ These results raise questions about the effectiveness of service by first class mail that will not be addressed by the proposed verification of the defendant's address. We suggest that a better approach to service would be to require service either in hand or by certified mail to improve actual notice to consumers.³⁸

3.4 Section (d) – Lawsuits Filed Beyond the Statute of Limitations

We applaud the Committee for addressing lawsuits filed beyond the statute of limitations. Instead of a separate certificate, however, the Committee should require claims relevant to the statute of limitations to be made in the complaint, together with citations to the terms and conditions of the contract³⁹ where relevant. The relevant information to include in the complaint is:

- the cause of action;
- the length of the statute of limitations for that cause of action, together with a statutory citation;
- the alleged date of default;⁴⁰
- whether the contract includes a choice of law provision and, if so, which state's law is alleged to control;
- whether the plaintiff alleges that a written acknowledgment⁴¹ or partial payment⁴² extended the statute of limitations; and
- a statement that the debt is being filed within the applicable limitations period.

The pleading would need to be signed by the attorney for the plaintiff in accordance with Mass. R. Civ. P. 11(a), affirming that “to the best of his knowledge, information, and belief there is a good ground to support it.” With the relevant information separately pled, it would be easy for the judge to review the relevant information to determine whether the limitations period has expired.

Even with these heightened pleading requirements, production of the credit card application and terms and conditions remains critical if the court is to prevent plaintiffs from obtaining default judgments on time-barred debt. In the cases in which The Legal Services Center of Harvard Law

³⁶ Beth Healy, “Dignity Faces a Steamroller,” Boston Globe (July 31, 2006), available at: <https://www.bostonglobe.com/metro/2006/07/31/dignity-faces-steamroller/SoK0TBVHzOziLEpNqNrVYN/story.html>.

³⁷ *Id.*

³⁸ See Minn. Stat. §§ 491A.01(3a)(b).

³⁹ As discussed above, the rules should be amended to require plaintiffs to attach the contract.

⁴⁰ The affidavit regarding debt refers to the “date of default” while this section refers to the “date the cause of action or claim accrued.” We understand these different terms to be referring to the same concept.

⁴¹ G.L. c. 260, § 13.

⁴² G.L. c. 260, § 14.

School (“LSC”) has been able to obtain the credit card contract from Plaintiffs, LSC has found that the credit card contracts contain choice of law provisions that invoke Delaware law. The Statute of Limitations in Delaware on contracts, such as a credit card, is 3 years, as opposed to the 6 year Massachusetts limitation period. As Massachusetts courts have long employed a functional test for application of choice of law,⁴³ these credit card contracts are frequently subject to that 3 year Delaware statute of limitations. Many of these cases are filed after the expiration of the Delaware statute of limitations and dismissal, rather than default judgment, should be the result. Production of the credit card agreement is therefore critical in all credit card collection cases.

3.5 Section (e) – Waiver

We object to the broad waiver provision included in these proposed rules. Allowing “any provision” to be waived for undefined “good cause” creates a huge loophole in the heart of this proposed rule that is contrary to the goal of addressing problems of “poorly documented debts.”

4. Proposed Rule 55.1 - Special Requirements for Defaults and Default Judgments for Credit Card Debts

As we discuss above in section 3.1, the vast majority of credit card collection cases are resolved by default judgment in favor of plaintiffs and against pro-se defendants. Under our present rules of civil procedure, as applied, very little oversight is given these cases, many of which may involve a defendant who does not owe the debt upon which the default judgment has been entered and which may have been brought by a plaintiff who cannot prove its ownership or the amount owed.

Therefore, we are very encouraged by the intent of the Proposed Rules, particularly Proposed Rule 55.1(c) in its attempt to mandate that Plaintiffs produce the best evidence that supports their claims prior to default being entered. This is a strong attribute of the proposed rule changes and a major step forward for our judicial system. However, the language of Proposed Rule 55.1(c) contains too many loopholes to be effective. We believe the Rule can be changed to better avoid wrongful defaults.

4.1 Default Judgment Reforms in Other States

California, Maryland, Minnesota, New York, and North Carolina have all adopted similar reforms requiring additional documentation to be filed prior to a default.⁴⁴ The Committee may wish to research their experiences after adoption of these reforms.

⁴³ See, e.g., *NETT Co., v. Gourdeau Constr. Co. Inc.*, 419 Mass 658 (1995).

⁴⁴ Cal. Civ. Code §1788.60; Md. R. Civ. Pro. 3-306; Minn. Stat. § 548.101; N.Y. Court Rules 22 NYCRR §§ 202.27-a; N.C. Gen. Stat. § 58-70-155.

4.2 Section (c)(1) - Original Contract or Other Documentation.

We are encouraged that the Committee seeks to require plaintiffs in credit card cases to produce writings to establish the debt prior to obtaining a default judgment. It has been far too easy in the Commonwealth for credit card plaintiffs, especially debt buyers and other assignees, to obtain default judgments without providing the contract or proving any of its terms.

We applaud the Committee for its requirement that plaintiffs produce an original or copy of the contract. As discussed above, the relevant documents are a signed account application⁴⁵ and the applicable terms and conditions. If these documents have already been produced as attachments to the complaint,⁴⁶ they would need to be properly authenticated before a default judgment enters. Otherwise, it is critical that these documents be produced and authenticated at this stage. Producing these documents is critical evidence to establish that a defendant formed a contract and what the terms of that contract are.

However, we believe the Committee has erred in giving plaintiffs a way around this requirement by allowing them to produce undefined “other documentation generated by the original creditor showing the terms of the account relationship between the debtor and the original creditor.” This clause is simply too amorphous, will swallow the remaining language of the subsection, and should be stricken from the Proposed Rule.

It is easy to foresee that, unless plaintiffs are required to produce at least a copy of the original contract for examination by the Court prior to default being entered, they will simply supply “other documentation” consisting of a single periodic statement or an “affidavit” created by the original creditor long after it sold off the debt, neither of which will comply with the spirit of the rule change - to allow the defendant and the court to determine if the plaintiff can properly establish its right to a default judgment.

We find this loophole particularly problematic in regards to debt buyers. The LSC experience from several years defending hundreds of defendants in lawsuits brought by debt buyers such as Midland Funding, CACH, CACV and Waterfront Capital in Massachusetts courts is that debt buyers have scanty documentation supporting their claims. The documents they do have to support their claim are not admissible in evidence, often not legible and frequently partial at best.

The debt buyers’ business model simply does not require or even allow them to obtain or produce thorough documentation of their claims. They most frequently produce a portion of the assignment documents, e.g., a one page Purchase and Sale Agreement which references but does not include attachments, and a portion of a computer generated spreadsheet that allegedly identifies the debtor

⁴⁵ Or proof that the application was e-signed.

⁴⁶ See section 3.2.

and the terms of the debt. These plaintiffs rarely have the original (or even a copy) of the credit card agreement and never have any document created by the original creditor showing the terms of the original agreement.

Original creditor plaintiffs should already have a copy of that contract in their records that they can easily append to the complaint or request for default. Debt buyers must alter their collection practices and must produce the original contract in order to allow the Court and defendants to determine if the action has been properly commenced.

4.3 Section (c)(2) - Documentation of Plaintiff's Entitlement to Amount Sought

We agree with the Committee's proposal that plaintiffs should be required to produce documentation to establish their entitlement to the amount sought. However, the proposed rule seems to suggest that a single periodic billing statement would be sufficient to establish indebtedness. A single periodic statement is not sufficient because it would not show how the amount claimed was determined, nor how much of the amount represents principal, interest, charges or fees is included. Moreover, requiring only a single periodic billing statement makes it easy for plaintiffs to manufacture a billing statement for litigation purposes, using data from their database to populate a form intended to look like a periodic billing statement.

In order to establish the plaintiff's entitlement to collect the amount sought, it must produce the payment and charge history for the account dating back to when the account last had a zero balance. This is best established by producing copies of all the periodic statements on the account.⁴⁷

Additionally, the plaintiff must produce the terms and conditions for the account (this is part of the contract and should have already been produced as discussed in section 4.3) because this establishes authority to charge interest at the contract rate, charge late fees, etc. Finally, the plaintiff must also submit documentation of any post-charge off account activity to the extent that payments were made or they claim that additional interest or fees accrued between charge-off and the lawsuit. In order to provide the Court with the information that it needs to determine the entitlement to the amount sought, the Committee needs to require this additional documentation.

4.4 Section (c)(3) - Assignments

Requiring Plaintiffs in debt collection cases to produce proof that they are the current owners of the debt at issue is a major step forward. This basic proposition of standing has long been overlooked in debt collection cases and we applaud the Committee for addressing this issue in the Proposed Rule. Far too many default judgments have been awarded to debt buyer Plaintiffs who did not and could not prove that they owned the debt upon which they brought suit.

⁴⁷ The Committee should make clear that these should be copies of the documents actually sent to consumers and not documents manufactured for litigation purposes.

However, the Proposed Rule suffers from a lack of definition. These debts are assigned or sold between sophisticated business entities. Their “assignments” include multiple documents:

In the typical debt buyer case, the actual assignment of ownership will be accomplished by the creation of three separate documents. First is a signed “forward flow” agreement, that is a lengthy document that will set out the terms of sale of debt in general between the creditor and debt buyer. When a particular portfolio of debt (typically thousands of accounts) [is] sold between those parties, the parties execute a bill of sale or other short assignment document. That document will reference the portfolio and the forward flow agreement for the terms of the sale. That short assignment document will be accompanied by a “sale data file” or “final data file” which is an electronic spreadsheet that lists the specific consumer accounts being transferred, which will typically be numbered in the thousands.⁴⁸

We ask that the Committee require Plaintiffs in credit card cases seeking default judgments to produce all of these documents for each assignment in the chain of assignments, where applicable, in order to establish standing. Given the voluminous nature of all of these documents if they are correctly and fully produced, we recommend that the court adopt a procedure to allow for submission in electronic format (e.g., a USB memory stick, CD-ROM, or through an online platform) of the documents themselves while including a list that details the names, dates, and relevance of all documents included in the paper file.

Other states with heightened requirements from those seeking default judgments have referenced the bill of sale, but not specifically required its attachment.⁴⁹ As discussed in section 3.2, North Carolina law requires a copy of the assignment(s) to be filed together with the complaint, but the statute does not specify which documents are needed to establish assignment.⁵⁰

⁴⁸ Nat’l Consumer Law Center, Collection Actions § 4.3.4.2.1 (3d ed. 2014), updated at www.nclc.org/library.

⁴⁹ Md. R. Civ. Pro. 3-306(d)(3) (*Proof of Plaintiff’s Ownership*). The affidavit shall contain a statement that the plaintiff owns the consumer debt. It shall include or be accompanied by: (A) a chronological listing of the names of all prior owners of the debt and the date of each transfer of ownership of the debt, beginning with the name of the original creditor; and (B) a certified or other properly authenticated copy of the bill of sale or other document that transferred ownership of the debt to each successive owner, including the plaintiff.”); Minn. Stat. § 548.101(5) (“admissible evidence establishing a valid and complete chain of assignment of the debt from the original creditor to the party requesting judgment, including documentation or a bill of sale evidencing the assignment with evidence that the particular debt at issue was included in the assignment referenced in the documentation or bill of sale”); N.Y. Court Rules 22 NYCRR §§ 202.27-a; N.Y. Courts, Rules – Consumer Credit Reform, Affidavit of Facts and Sale of Account by Original Creditor and Affidavit of Purchase and Sale of Account by Debt Seller (Jan. 6, 2015), available at: <https://www.nycourts.gov/rules/ccr/affidavits.shtml> (“A true and correct copy of the bill of sale or written assignment of the Account is attached as an exhibit to this affidavit.”)

⁵⁰ N.C. Gen. Stat. § 58-70-150(2) (“A copy of the assignment or other writing establishing that the plaintiff is the owner of the debt. If the debt has been assigned more than once, then each assignment or other writing evidencing transfer of ownership must be attached to establish an unbroken chain of ownership. Each assignment or other writing evidencing transfer of ownership must contain the original account number of the debt purchased and must clearly show the debtor’s name associated with that account number.”).