


4-15-2018

Recent Developments Concerning the Purchase of Consumer Debt; Defining Potential Problems and Proposals for Suggested Solutions

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Recommended Citation

Gerald A. Williams, *Recent Developments Concerning the Purchase of Consumer Debt; Defining Potential Problems and Proposals for Suggested Solutions*, 11 J. Bus. Entrepreneurship & L. 255 (2018)
Available at: <https://digitalcommons.pepperdine.edu/jbel/vol11/iss2/1>

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RECENT DEVELOPMENTS CONCERNING THE PURCHASE OF CONSUMER DEBT; DEFINING POTENTIAL PROBLEMS AND PROPOSALS FOR SUGGESTED SOLUTIONS

HON. GERALD A. WILLIAMS*

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Consumers arguably have fewer rights after May 15, 2017. On that date, the United States Supreme Court decided, somewhat remarkably, that a purchaser of consumer debt could lawfully file a claim in bankruptcy court for debts that are time barred by the statute of limitations.¹ Justice Sonia Sotomayor issued a stinging dissent.² Justices Ruth Bader Ginsburg and Elena Kagan joined her.³ This dissent is actually longer than the majority’s opinion and it is fair to say that these justices do not hold the debt buying industry in high esteem. They claimed the following:

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¹ Midland Funding, LLC v. Johnson, 137 S. Ct. 1407, 1416 (2017).

² *Id.*

³ *Id.*

Professional debt collectors have built a business out of buying stale debt, filing claims in bankruptcy proceedings to collect it, and hoping that no one notices that the debt is too old to be enforced by the courts. . . . [S]tatutes of limitations have not deterred debt buyers. . . . In most States the statute of limitations is an affirmative defense, meaning that a consumer must appear in court and raise it in order to dismiss the suit (citation omitted). . . . [C]onsumers . . . fail to defend themselves in court—in fact, according to the FTC, over 90% fail to appear at all (citation omitted). The result is that debt buyers have won “billions of dollars in default judgments” simply by filing suit and betting that consumers will lack the resources to respond.⁴

This comment provides background information that will allow readers to determine whether this criticism is fair.

The purchase of consumer debt is an over \$2 billion per year industry.⁵ Most of this consumer debt is originally from unpaid credit card obligations. In the first major study of this industry, which was completed in 2013, the Federal Trade Commission examined nearly 90 million consumer accounts purchased during a three-year period.⁶ This consumer debt had a face value totaling \$143 billion.⁷ It was purchased for \$6.5 billion.⁸

Encore Capital Group, a parent company for several debt-buying corporations, had an estimated gross collection of over \$5 billion from 2009 to 2015 with a net income that exceeded \$384 million.⁹ During that same time frame, it purchased approximately 60 million consumer accounts with a face value of \$128 billion for \$4 billion.¹⁰

Although some consumer rights advocates and even a few judges had some doubts, there were only limited objective reasons to question the documents that were submitted as proof of the original debt and as proof that the assignment of

⁴ *Id.* at 1416–17; *See also* Annette Jarvis & Thomas Hwang, *The Mixed Message of Midland Funding*, ORANGE COUNTY LAWYER, Sept. 2017, at 28.

⁵ *Survey Finds Over One-in-Four Consumers Contacted By Debt Collectors Feel Threatened*, CONSUMER FINANCIAL PROTECTION BUREAU (Jan. 12, 2017), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-survey-finds-over-one-four-consumers-contacted-debt-collectors-feel-threatened/>.

⁶ FED. TRADE COMM’N, *THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY* 8 (2013) (hereinafter FTC report); *see also* T. Carter, *The Debt Buyers: Lax court review and a ravenous industry and burying defendants in defaults*, 101 ABA JOUR. 54 (Nov. 2015).

⁷ FTC report, *supra* note 6.

⁸ *Id.*

⁹ *Encore Capital Group, Inc., Midland Funding, LLC, Midland Credit Management, Inc., and Asset Acceptance Capital Corp.*, Admin. Proceeding, File No. 2015-CFPB-0022, Consent Order, 5 (Sept. 9, 2015) available at http://files.consumerfinance.gov/f/201509_cfpb_consent-order-encore-capital-group.pdf.

¹⁰ *Id.* at 6–7.

that debt to the debt buyer was valid. Actions by the U.S. Consumer Financial Protection Bureau (CFPB) may have added a new set of reasons to question some of these business records. This article will explain the mechanisms used to purchase consumer debt and the impact of past and possible future actions by the CFPB. It will also look at how one state, Arizona, has approached these issues in the context of changes to statutes and to court rules. Finally, there will be a discussion of evidentiary issues unique to debt buyer cases and some suggested options from courts in Maricopa County, Arizona.

I. THE BASICS OF A DEBT BUYING CASE

When consumers stop paying toward their credit card balance, federal regulations require that the account be charged-off, generally within 180 days of the account being past due.¹¹ Although the original creditor has written off the debt as being uncollectable, it remains a valid debt that can eventually be sold.¹² However, what is sold is not a collection of paper documents.

Instead, it is similar to a spreadsheet with hundreds of line items containing the debtor's name, address, account number, Social Security number, the date the debtor opened the account, the date of the debtor's last payment, the date the original creditor charged-off the debt, and the balance due.¹³ This debt information can be, and frequently is, sold and then resold.¹⁴ This electronic record is often referred to as data file.¹⁵ Some collection attorneys either redact account information not belonging to the defendant or cut and paste only the defendant's information from this data file and attach it as a data strip to their initial discovery disclosures.¹⁶

Debt collectors must have certain minimum information during the collection process. Under 15 U.S.C. section 809(a), collectors of assigned debt must provide a validation notice containing (1) the amount of the debt; (2) the name of the current owner of the debt; and (3) statements explaining, in addition to other things, the right of consumers under the Fair Debt Collection Practices Act to dispute debts and to request the name and address of the original creditor, if different from the creditor that owns the debt.¹⁷ However, often records are not

¹¹ FTC report, *supra* note 6 at 21.

¹² *Id.* at 154.

¹³ *See generally* New Century Fin. Servs. v. Oughla, 98 A.3d 583, 591 (N.J. Super. Ct. App. Div. 2014) (contained a detailed discussion of the debt buying process; summary judgments were affirmed in part and were reversed in part).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ FTC Report, *supra* note 6, at 30–31.

available because they are not required to be maintained after a certain period of time.¹⁸

II. ARIZONA LAW AS A CASE STUDY: PRO CREDITOR STATUTES VS. PRO CONSUMER COURT RULES

On May 9, 2012, Governor Jan Brewer signed House Bill 2664.¹⁹ It had some bipartisan support; but it was controversial.²⁰ The legislation enacted section 44-7801 of Arizona Revised Statutes, *et seq.*, which identifies specific items of evidence that would be required to prove credit card indebtedness.²¹

The statute recognizes that an original contract or credit card application will likely be unavailable in part because consumers over the last fifteen years have applied for credit cards primarily either over the phone or online.²² Merely using the card appropriately creates a binding contract.²³ By statute, a “cardholder is personally liable for all charges and interest incurred” on the account by either the cardholder or by any “authorized user.”²⁴ An authorized user is anyone else “who has actual, implied or apparent authority to use” the credit card.²⁵

The calculation of the amount due is also statutory.²⁶ A valid charge is defined to include purchases, cash advances, annual membership fees, delinquent payment fees, insufficient fund fees, and over the limit fees.²⁷ Subject to other state laws, the interest rate due on the account can be established either by the terms and conditions of the contract or by a billing statement that contains the interest rate.²⁸ However, some concerns about the sufficiency of documentation remained.

¹⁸ Creditors are only required to maintain records for two years “after the date the disclosures are required to be made or action is required to be taken.” Truth in Lending Act (Regulation Z), 12 C.F.R. § 226.25 (2017). Original creditors are only required to maintain copies of credit card applications for 25 months. Equal Credit Opportunity Act (Regulation B), 12 C.F.R. § 202.12(b)(1) (2017).

¹⁹ HB 2664, State of Arizona House of Representatives, available at <https://www.azleg.gov/legtext/50/leg/2r/bills/hb2664p.pdf>.

²⁰ Democrats in the Arizona House of Representatives issued a press release stating, “The new law empowers out-of-state debt collectors to force Arizona citizens to defend themselves against debts that were already paid, dismissed or forgiven.” Press Release, *Governor Signs Bill Benefiting Out-Of-State Debt Collectors*, Arizona House Democrats (May 10, 2012), available at <http://www.azhousedemocrats.com/2012/05/update-governor-signs-bill-benefiting.html>.

²¹ A.R.S. § 44-7801 (2017).

²² *Id.*

²³ A.R.S. § 44-7802 (2017).

²⁴ A.R.S. § 44-7803 (2017).

²⁵ A.R.S. § 44-7801(1) (2017).

²⁶ A.R.S. § 44-7805 (2017).

²⁷ A.R.S. § 44-7801(3) (2017).

²⁸ A.R.S. § 44-7805 (2017). The prejudgment interest rate is presumed to be 10% per annum unless a contract establishes a different rate. A.R.S. § 44-1201(A) (2017).

As House Bill 2664 was moving through the legislative process, a committee appointed by the Chief Justice of the Arizona Supreme Court was drafting a separate set of procedural rules for justice courts.²⁹ Due to the volume of debt buyer cases filed in justice courts, rules to address concerns raised by these cases were drafted and were subsequently adopted.³⁰

First, the name of the plaintiff generated confusion. Many defendants claimed that they ignored the summons and complaint because they knew that they had never entered into a contract with the debt buyer. In response, and even though this was already the practice of many Arizona collection attorneys, in lawsuits seeking to recover on an assigned debt, the name of the original creditor is now required to be stated in the complaint.³¹

Second, there was some frustration that the underlying documents in debt buyer cases were often not available during the early stages of litigation. Consequently, another special rule of civil procedure for justice courts was adopted and provides that in contested cases based on the collection of a consumer debt, the plaintiff must, as part of his or her initial disclosure statement, affirmatively disclose (when available): (1) the agreement between the creditor and the consumer; (2) any available billing statements to the consumer; (3) if the debt has been assigned, evidence that the plaintiff is the owner of the debt, and (4) information concerning the date of the last payment made by the consumer.³² While this additional information at the time of the pretrial conference can be helpful, it is sometimes hard to interpret the documents in these cases in part because there is no standardized format.

III. ORDERS BY THE CFPB DURING THE OBAMA ADMINISTRATION

The Dodd-Frank Wall Street Reform and Consumer Protection Act set up the CFPB as a nearly completely independent agency, within the Federal Reserve System, and established it as the federal government's main regulator of consumer

²⁹ *In re Establishment of the Committee on Civil Rules of Procedure for Limited Jurisdiction Courts*, Ariz. Supreme Ct. Admin. Order No. 2011-13 (Jan. 19, 2011). The committee was chaired by Paul Julien, Judicial Education Officer. Other members of the committee included attorneys William Klain and David Rosenbaum (civil procedure subject matter experts), David Hameroff and Stanley Hammerman (collection attorneys), and George McKay, Veronika Fabian, and Anthony Young (legal aid attorneys). *Id.* The Justices of the Peace on the committee were Jill Davis, Timothy Dickerson, Maria Felix, and Gerald Williams. Superior Court Judge Hugh Hegyi also served on this committee. *Id.*

³⁰ *Id.*

³¹ Arizona Justice Court Rules of Civil Procedure (JCRCP) Rule 110(b)(2) (2017). In cases prior to the adoption of this rule, the complaints often merely alleged the existence of a contract between the defendant and the "Plaintiff or Plaintiff's assignor." Complaint at ¶ 2; *Midland Funding LLC v. Rodgers*, North Valley Justice Court, No. CC2009-203288 (Ariz. 2009) (case resulted in default judgment for plaintiff in 2009; after renewal of judgment, garnishment action was filed in 2017).

³² JCRCP Rule 121(a)(3)(B) (2017).

financial products and services.³³ On September 9, 2015, the CFPB filed a 63-page consent order against debt buyers Encore Capital Group, Inc., Midland Funding, LLC, Midland Credit Management, Inc., and Asset Acceptance Capital Corp.³⁴ The CFPB filed a substantially similar consent order against Portfolio Recovery Associates, LLC the same day.³⁵

In the consent orders, the CFPB alleged that the named debt buyers' past practices violated federal law³⁶ and orders those debt buyers not to attempt to collect debts unless they have a reasonable basis for doing so.³⁷ The consent order did not prohibit the debt buyers from collecting from consumers who have acknowledged their debt. As part of a consent order, one set of debt buyers agreed to deposit up to \$42 million for the purpose of paying claims to eligible consumers.³⁸ If less than \$34 million is paid, then any surplus funds must be given to the United States Treasury.³⁹ The CFPB made the following allegations:

- The purchase agreements between the original creditors and the debt buyers acknowledge that the balances may not be accurate and that the statute of limitations may have run on some of the accounts.⁴⁰
- In many cases, the original creditors refuse to provide the debt buyers with supporting documentation (e.g. billing statements to individual consumers).⁴¹
- The debt buyers rely on consumers to inform them when they are attempting to collect a debt based on inaccurate or erroneous information.⁴²
- Prior to litigation, the debt buyers told consumers that their dispute was untimely and that they had the burden of proving that they did not owe the debt. However, they did not forward this correspondence to their attorneys. As a result, law firms representing the debt buyers had no knowledge of which accounts were disputed.⁴³

³³ 12 U.S.C. §§ 5491, 5512 (2017). *See generally* R. Scott Adams & Bruce M. Jacobs, *Developments in the Regulation of Debt Buying*, 72 BUS. LAW. 495 (2017); Todd Zywicki, *The Consumer Financial Protection Bureau, Savior or Menace?*, 81 GEO. WASH. L. REV. 856 (2013); Eric Pearson, *A Brief Essay on the Constitutionality of the Consumer Financial Protection Bureau*, 47 CREIGHTON L. REV. 99 (2013).

³⁴ Encore Consent Order, *supra* note 9.

³⁵ *In re Portfolio Recovery Associates, LLC.*, Admin. Proceeding, File No. 2015-CFPB-0023, Consent Order (Sept. 9, 2015) available at http://files.consumerfinance.gov/f/201509_cfpb_consent-order-portfolio-recovery-associates-llc.pdf.

³⁶ Encore Consent Order, *supra* note 9, at 19–31. *See also* Adams & Jacobs *supra* note 33.

³⁷ Encore Consent Order, *supra* note 9 at 31–41.

³⁸ *Id.* at 46.

³⁹ *Id.*

⁴⁰ *Id.* at 7–8.

⁴¹ *Id.* at 9–10.

⁴² *Id.* at 10.

⁴³ *Id.* at 14.

- The affidavits supporting the lawsuits frequently contain “false or misleading statements regarding the seller’s review of unattached records.” In addition, “in numerous instances from at least 2009 to 2011, Encore submitted affidavits in which affiants misrepresented that they had personal knowledge of facts contained in affidavits, including that the Consumer owed a Debt.”⁴⁴

In court proceedings, attorneys representing the debt buyers named in the consent orders strongly disputed the allegations from the CFPB.⁴⁵ Their counsel correctly pointed out that in paragraph three of both consent orders, their clients merely consented to the issuance of the CFPB order and that they did so “without admitting or denying any of the findings of fact or conclusions of law.”⁴⁶ In short, they consented only that the CFPB had jurisdiction to issue the order and to the financial sanctions imposed by it.⁴⁷ Collection counsel also maintained that the terms of the consent order only applied to future cases.⁴⁸ But even prior to the CFPB orders being finalized, at least some debt buyers started adding language to their pleadings stating that they had attempted to work with the consumer prior to litigation.⁴⁹

⁴⁴ *Id.* at 16–17.

⁴⁵ An initial response by some justices of the peace was to set pending default judgment requests in these cases for a hearing. In the North Valley Justice Court, which is located in Maricopa County, over 20 such hearings were set for October 13, 2015. An attorney representing Portfolio Recovery Associates, LLC appeared, as did several attorneys representing individual cases from Midland Funding, LLC. The information in this paragraph is largely from those hearings. *See also* Press Release, *Encore Enters Settlement Agreement with Consumer Financial Protection Bureau*, ENCORE CAPITAL GROUP (Sept. 9, 2015), <https://www.encorecapital.com/?press-release=encore-enters-settlement-agreement-with-consumer-financial-protection-bureau>.

⁴⁶ Encore Consent Order, *supra* note 9, at 2.

⁴⁷ *See id.*

⁴⁸ *Id.*

⁴⁹ *Id.* Some of the attorneys representing Midland Funding, LLC started opening their complaints with the following language:

1. Plaintiff, Midland Funding, LLC, owns portfolios of consumer receivables, which it attempts to collect. When working with individual consumers, Plaintiff, Midland Funding, LLC, and its affiliates (collectively “Midland”) generally attempt to contact consumers like Defendant through several means, all in an effort to establish contact and to resolve the underlying obligation. In doing so, Midland attempts to assess each consumer’s willingness to pay, though phone calls, letters, or other means. Midland attempts to exclude consumers from its collection efforts where Midland believes those consumers are facing extenuating circumstances or hardships that would prevent them from making any payments.
2. When Midland contacts consumers, it strives to treat consumers with respect, compassion, and integrity. Midland works with consumers in an effort to find mutually-beneficial solutions, often offering discounts, hardship plans, and payment options. Midland’s efforts are aimed at working with consumers to repay their obligations and to attain financial recovery. Midland strives to

IV. EVIDENTIARY ISSUES

The announcement of the consent orders caused some concern within Arizona's justice courts, where consumer debt collection cases by debt buyers are typically filed in that state.⁵⁰ From January 1, 2014 until September 14, 2015,⁵¹ the following cases, which involve parties named in the consent orders, were filed in Justice Courts in Maricopa County⁵²: Midland Funding filed 27,813 cases, Asset Acceptance filed 495 cases, and Portfolio Recovery filed 12,816 cases. As significant as those numbers are, they do not include the additional thousands of cases that are always becoming active again through garnishment actions or through requests to renew judgments.⁵³

A. *Default Judgments*

While the law has not changed,⁵⁴ the CFPB consent orders may have the practical effect of requests for different or additional documentation to

engage in dialogue that is honorable and constructive, and to play a positive role in consumers' lives.

3. Despite Midland's efforts to reach consumers and resolve the consumer's obligations, only a percentage of consumers choose to engage with Midland. Those who do are often offered discounts or payment plans that are intended to suit their needs. Midland would prefer to work with consumers to establish voluntary payment arrangements resulting in the resolution of any underlying obligations. However, the majority of Midland's consumers ignore calls or letters, and some simply refuse to repay their obligations despite an apparent ability to do so. When this happens, Midland must decide then whether to pursue collection through legal channels, including litigation like the present case against Defendants. Although the account is now in litigation, Plaintiff remains willing to explore a mutually-beneficial solution through voluntary payment arrangements, if possible.

Midland Funding LLC v. De La Cueva, North Valley Justice Court, No. CC2014-195210 (Ariz. 2012) (summary judgment granted for the plaintiff).

⁵⁰ Brian Stauffer, *Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor*, HUMAN RIGHTS WATCH (Jan. 20, 2016), <https://www.hrw.org/report/2016/01/20/rubber-stamp-justice/us-courts-debt-buying-corporations-and-poor>.

⁵¹ This is the date many Arizona judges became aware of the consent orders.

⁵² There are 26 justice courts in Maricopa County, Arizona. The judicial officer for each justice court is an elected justice of the peace. Ariz. Rev. Stat. Ann. § 22-111 (2017). The cities of Phoenix, Glendale, Tempe, Scottsdale, Mesa, Gilbert, and Chandler are included within Maricopa County. See Court Locations, Maricopa County Justice Courts, <http://justicecourts.maricopa.gov/Locations/index.aspx>.

⁵³ *Id.*

⁵⁴ *Introduction to the Justice Court Rules of Civil Procedure*, https://webcms.pima.gov/UserFiles/Servers/Server_6/File/Government/JC-GreenValley/R120006.pdf (last visited Mar. 8, 2018). The actual default standards are fairly straightforward. "A party who has been properly served with a complaint, a third-party complaint, a counterclaim, or a cross-claim and who fails to file a written answer or response within the time allowed may be defaulted as provided in Rule 140." JCRCP

substantiate a complaint, even in a default setting. In fact, some judges may be reluctant to sign a default judgment in debt buyer cases unless the plaintiff, through pleadings or at a hearing, can establish how the case before the court is different than the ones referenced in the consent orders.

B. Motions for Summary Judgment and Trial

The law in this area has not changed either.⁵⁵ However, the allegations in the consent orders could create some proof problems when it comes to the potential admission of documentary evidence under the business records exception to the hearsay rule.⁵⁶

The plaintiff's witnesses in debt buyer cases are frequently in the position, whether submitting an affidavit in connection with a pleading or providing trial testimony, of being a type of records-custodian-by-proxy.⁵⁷ During trials, it is usually undisputed that these witnesses neither prepared the documents they are testifying about nor have any first-hand knowledge of the day-to-day business practices of the corporation that did.⁵⁸ For example, a witness may testify that he or she is employed by the debt buyer and has never worked for Citibank Visa, but that she is familiar with the records of Citibank Visa because she sees them so frequently and can tell that they were purchased electronically.

Rule 114(d). Under Rule 140(e), "A party may request the entry of a default judgment without a hearing if the party's claim is for a specific amount, or if the claim is for an amount that can be determined by a mathematical calculation. The party requesting the entry of a default judgment without a hearing must attach to the request for entry of a default judgment without a hearing a supporting affidavit concerning the claimed amount, along with attachments that prove the amount of the claim." JCRCP Rule 114(e). The standard from the superior court default judgment rule is, "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided." Ariz. R. Civ. P. 8(d); see also Conor P. Duffy, *A Sum Uncertain: Preserving Due Process and Preventing Default Judgments In Consumer Debt Buyer Lawsuits In New York*, 40 FORDHAM URB. L.J. 1147 (2013).

⁵⁵ *Introduction to the Justice Court Rules of Civil Procedure*, supra note 54. "The judge may grant a summary judgment motion if the record before the court shows that there is no genuine issue as to a material fact, and that the moving party is entitled to judgment as a matter of law." JCRCP Rule 129(d). A party seeking summary judgment must support its motion with specific facts that are admissible as evidence. See Ariz. R. Civ. P. 56(e); *GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 795 P.2d 827, 834 (Ct. App.1990). A party opposing summary judgment must contest the accuracy of the moving party's evidence with specific, admissible facts. See Ariz. R. Civ. P. 56(e); see also *Florez v. Sargeant*, 917 P.2d 250, 255 (1996). A plaintiff cannot shift the burden of proof to the defendant by filing a motion for summary judgment. *Wells Fargo Bank, N.A. v. Allen*, 231 P.3d 195, 199-201 (Ct. App. 2012) (credit card collection case).

⁵⁶ Fed. R. Evid. 410.

⁵⁷ Larry Primeaux, *Laying the Foundation for a Business Record*, THE BETTER CHANCERY PRACTICE BLOG (Mar. 3, 2011), <https://betterchancery.com/2011/03/03/laying-the-foundation-for-a-business-record/>.

⁵⁸ *Id.*

Many, if not most, judges allow this type of testimony and admit the records, in part because the business records exception does not require the records custodian to have actually created the records.⁵⁹ In addition, under the “adoptive business records doctrine,” business records from one company can be admitted if purchased and regularly relied on by another company.⁶⁰ Judges concerned about the reliability of these records will typically admit them and hold that any concerns go toward the weight and not toward admissibility.

In the consent orders, the CFPB claimed that debt buyer’s employees, based on their past dealings with account sellers, knew “that a specific portfolio of the seller’s accounts might contain unreliable data, but continued to represent that Consumers owed the claimed amount on the accounts in question without obtaining and reviewing additional information that would provide a reasonable basis for such claims.”⁶¹ The CFPB also alleged that the debt buyers prepared or presented misleading collection affidavits because in numerous instances the “affiants had not reviewed account-level documentation from the original Creditor corroborating the Consumer’s Debt; . . . Debt seller affiants had not reviewed hard copy records corroborating the Consumer’s Debt; . . . [and] [debt buyer] affiants did not have personal knowledge of the individual Consumer defendant’s indebtedness.”⁶² Given these allegations from the federal government, collection attorneys could face additional hurdles when seeking the admission of similar documents into evidence in some cases.⁶³

⁵⁹ *Rayner v. Stauffer Chem. Co.*, 120 P.2d 1240, 1246 (Ct. App. 1978) (Expert witness, who did not actually conduct the experiments, can testify that chemical company’s records were made in the ordinary course of business).

⁶⁰ *Air Land Forwarders, Inc. v. United States*, 172 F.3d 1338, 1344 (Fed. Cir. 1999). *See also Saks Int’l, Inc. v. M/V “Exp. Champion”*, 817 F.2d 1011, 1013 (2d Cir. 1987) (following the adoptive business records doctrine); *United States v. Ullrich*, 580 F.2d 765, 771-72 (5th Cir. 1978); *Acarta, LLC v. Partridge*, No. 1 CA-CV 14-0467, Not reported in P.3d, 2015 WL 5438105 (Ct. App. 2015) (unpublished opinion concerning a card from Chase Bank); *Midland Funding, LLC v. Howell*, No. 1 CA-CV13-0015, Not reported in P.3d, 2013 WL 6008724 (Ct. App. 2013) (unpublished opinion concerning a Home Depot card from Citibank); *see also Vassalle v. Midland Funding LLC*, No. 3:11 CV 96, 2012 U.S. Dist. LEXIS 151101, (N.D. Ohio July 5, 2012) (Federal Special Master concluded that Midland’s affidavits meet the requirements of Fed. R. Evid. 803(6)).

⁶¹ *Encore Consent Order*, *supra* note 9 at 20.

⁶² *Id.* at 22.

⁶³ Even prior to the CFPB Consent Orders, the use of conclusory affidavits in support of motions for summary judgment in debt buyer cases had been rejected. *Seth v. Midland Funding, LLC*, 997 N.E.2d 1139 (Ind. Ct. App. 2013).

C. Maricopa County's Approach to a National Issue

The consent orders triggered requests for some type of additional evidence that was over and above what had been provided in the past.⁶⁴ As plaintiffs submit substantially similar documentation in support of their cases, judges may want some type of assurance that the conduct alleged in the consent orders did not occur in the particular case before their courts.

While judges attempt to work with other judges for purposes of standardization and consistency,⁶⁵ there is at least a chance that some judges will require different levels of documentation than other judges in order for a plaintiff in a debt-buyer case to substantiate his or her claims. Some judges may request a declaration, similar to what is requested in a verified pleading.⁶⁶ Others may request some type of additional affidavit.⁶⁷ In addition to possible inconsistency, there are some obvious judicial ethics issues.

Judges are usually prevented from considering information that is outside of the record and usually cannot do their own independent investigations concerning questions of fact.⁶⁸ In these cases, judges arguably can take judicial notice of the consent orders *sua sponte*;⁶⁹ but even so, judicial officers will need to be constantly striking a balance between ensuring that there is a factual and legal

⁶⁴ Amy E. Martinez, *CFPB Reveals Specific Consent Orders with Legal Debt Firm, Partners, and Debt Purchaser*, GERACI LAW FIRM (Aug. 30, 2017), <https://geracilawfirm.com/cfpb-reveals-specific-consent-orders-with-legal-debt-firm-partners-and-debt-purchaser>.

⁶⁵ Justices of the Peace in Maricopa County have a well-established Best Practices Committee for this very purpose. Other jurisdictions do as well. Peter Vieth, *Collections Best Practices Adopted*, VIRGINIA LAWYERS WEEKLY, Nov. 26, 2012.

⁶⁶ ARIZ. R. CIV. P. 11(b); JCRCP Rule 109(c).

⁶⁷ Justice Courts in Maricopa County, Arizona developed an affidavit for this purpose. See Appendix A to this article. Indiana has one as well. IND. R. OF TRIAL PROC. 9.2. The model affidavit includes language that requires identification of the original owner and subsequent purchasers, the amount of the unpaid balance, the date the account was opened, the date and the amount of the last payment, the type of consumer (e.g. name of the store or company issuing the card), the amount of any late fees, and a calculation of the interest rate. APPENDIX A, AFFIDAVIT OF DEBT.

⁶⁸ See *Code of Conduct For United States Judges*, UNITED STATES COURTS (March 20, 2014), <http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges>.

⁶⁹ ARIZ. R. EVID. 201(b) and 201(c)(1). See generally *Interstate Nat. Gas Co. v. S. Cal. Gas Co.*, 209 F.2d 380, 385 (9th Cir. 1953) (Courts may take judicial notice of records and reports of administrative bodies). Some may argue that it is improper for judges to take judicial notice of the consent orders because they are binding only on the parties and do not provide a private right of action. *Housdan v. JP Morgan Chase Bank, N.A.*, No. 3:13-CV-543-CWR-FKB, 2014 U.S. Dist. LEXIS 134532 (S.D. Miss. Sept. 24, 2014) (citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975) (holding a consent order is a consent decree that cannot be enforced in a collateral proceeding)).

basis for judgments in these cases⁷⁰ and crossing a line of neutrality to the point when the judge is an advocate for the debtor.⁷¹

V. POSSIBLE FUTURE OF THE CFPB DURING THE TRUMP ADMINISTRATION

Almost immediately, the Trump Administration recommended a “significant restructuring in the authority and execution of regulatory responsibilities by the CFPB.”⁷² However, the CFPB’s actions against debt-buyers were apparently not a significant source of concern. The attacks instead focused on the structure of the CFPB and on perceived abuses in its approach to enforcement.⁷³ The Trump Administration claimed that the CFPB would allege that a company had violated the law at the same time it announced what the law was by way of an enforcement action.⁷⁴

But reports of the CFPB’s near abolition⁷⁵ may be premature. The CFPB has filed twenty nine significant enforcement actions in 2017, including against JP Morgan Chase⁷⁶ and American Express.⁷⁷ The CFPB directed American Express

⁷⁰ Judges are required to perform all duties fairly and impartially. ARIZ. CODE OF JUDICIAL CONDUCT, Rule 2.2 (2017).

⁷¹ “It is not a violation of this rule for a judge to make reasonable accommodations to ensure self-represented litigants the opportunity to have their matters fairly heard.” ARIZ. CODE OF JUDICIAL CONDUCT, Rule 2.2., Comment 4 (2017).

⁷² U.S. Dept. Treasury, *A Financial System That Creates Economic Opportunities: Banks and Credit Unions*, U.S. DEPT. OF THE TREASURY (June 2017), <https://www.treasury.gov/press-center/press-releases/Documents/A%20Financial%20System.pdf>; see also Alan Rappeport & Matthew Goldstein, *Trump Administration Says Financial Watchdog Agency Should Be Defanged*, N.Y. TIMES (Jun. 12, 2017), <https://www.nytimes.com/2017/06/12/business/banking-regulations-consumer-financial-protection.html>; Office of Management and Budget, Major Savings and Reforms, Budget of the U.S. Government, Fiscal Year 2018, 158 (2018) (heading titled, “Restructure the Consumer Financial Protection Bureau”).

⁷³ U.S. Dept. Treasury, *supra* note 72, at 79–92.

⁷⁴ *Id.* at 82.

⁷⁵ Sheelah Kolhatkar, *What is the fate of the Consumer Financial Protection Bureau?*, THE NEW YORKER (Sept. 7, 2017), <https://www.newyorker.com/business/currency/what-is-the-fate-of-the-consumer-financial-protection-bureau>.

⁷⁶ *In re JP Morgan Chase Bank, N.A.*, Admin. Proceeding, File No. 2017-CFPB-0015, Consent Order (Aug. 2, 2017), available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201708_cfpb_JPMorgan-Chase_consent-order.pdf (alleging Chase Bank failed to have adequate processes for accurately reporting checking account information).

⁷⁷ *In re American Express Centurion Bank and American Express Bank, FSB*, Admin. Proceeding, File No. 2017-CFPB-0016, Consent Order (Aug. 23, 2017), available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201708_cfpb_american-express_content-order.pdf (alleging American Express did not provide certain offers to consumers with Spanish language preferences that were available to those without Spanish language preferences).

to provide \$96 million in remediation⁷⁸ and fined Chase \$4.6 million.⁷⁹ But in spite of these actions, as long as Republicans favoring limited government are in power at the federal level, any extremely powerful regulatory agency with arguably minimal oversight by elected officials is going to remain unpopular.⁸⁰ The House of Representatives, by a party line vote of 232 to 186, passed the Financial CHOICE Act.⁸¹ It would essentially strip away the CFPB's enforcement and regulatory authority, allow the President to fire the CFPB director, and mandate that funding for the CFPB would need to go through Congress.⁸² When CFPB Director Richard Corday resigned to run for Governor of Ohio, President Trump appointed White House Budget Director Mick Mulvaney, who was accused of being openly hostile to the CFPB's mission.⁸³

VI. SOME FINAL THOUGHTS

Debt buying cases have the potential to generate frustration. The vast majority are resolved by a judge signing a default judgment. In those cases, it is

⁷⁸ Press Release, *CFPB and American Express Reach Resolution to Address Discriminatory Card Terms in Puerto Rico and U.S. Territories*, CONSUMER FINANCIAL PROTECTION BUREAU (Aug. 23, 2017), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-american-express-reach-resolution-address-discriminatory-card-terms-puerto-rico-and-us-territories/>.

⁷⁹ Press Release, *CFPB Takes Action Against JP Morgan Chase for Failures Related to Checking Account Screening Information*, CONSUMER FINANCIAL PROTECTION BUREAU (Aug. 2, 2017), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-jpmorgan-chase-failures-related-checking-account-screening-information/>. See also *The Honorable Patrick J. Toomey, United States Senate*, Comp. Gen. B-329129, 2017 WL 6016701 (Dec. 5, 2017) (CFPB bulletin concerning indirect auto lenders is a nonbinding general statement of policy).

⁸⁰ See Kate Berry, *Justice Department turns against CFPB in constitutionality case*, AMERICAN BANKER (Mar. 6, 2017), <https://www.americanbanker.com/news/justice-department-turns-against-cfpb-in-constitutional-court-case>; Alden Abbott & Todd Zywicki, *How Congress Should Protect Consumers' Finances*, THE HERITAGE FOUNDATION (Feb. 28, 2017), <http://www.heritage.org/markets-and-finance/report/how-congress-should-protect-consumers-finances>.

⁸¹ Final Vote Results for Roll Call 299, Financial CHOICE Act of 2017, H.R. 10, Jun. 8, 2017, available at <http://clerk.house.gov/evs/2017/roll299.xml>.

⁸² Financial CHOICE Act of 2017, H.R. 10, 115th Cong. (2017) (legislation has 40 co-sponsors from 26 states). See also Geoff Bennett, *House Passes Bill Aimed At Reversing Dodd-Frank Financial Regulations*, NATIONAL PUBLIC RADIO (June 8, 2017), <http://www.npr.org/2017/06/08/5320363>

74/ *house-passes-bill-aimed-at-reversing-dodd-frank-financial-regulations*; Press Release, *5 Reasons to Support the Financial CHOICE Act*, SPEAKER PAUL RYAN (June 5, 2017) (describing the CFPB as being "unchecked, unconstitutional, and unaccountable") <https://www.speaker.gov/general/5-reasons-support-financial-choice-act>.

⁸³ Sylvan Lane, *Dem Attorneys General Blast Trump for Mulvaney Appointment to Consumer Bureau*, THE HILL (Dec. 12, 2017), <http://thehill.com/policy/finance/364543-dem-attorneys-general-blast-trump-for-mulvaney-appointment-to-consumer-bureau>; *contra* Colin Hanna, *With CFPB, GOP Can Finally Make Good on Abolishing Federal Agencies*, THE HILL (Dec. 11, 2017), <http://thehill.com/opinion/white-house/364245-shutter-the-cfpb-conservatives-can-finally-make-good-on-calls-to-abolish>.

difficult to objectively know whether the plaintiff has filed suit against the correct defendant, whether the debt is valid, or whether the interest and penalties were calculated correctly. Even so, being named in a lawsuit is not a spectators' sport and if you ignore your rights, there is a good chance you will lose them.

For policymakers and for judges, the trick is to find the proper balance between the rights of consumers and the rights of businesses to collect a legally valid debt. Any efforts toward what some would call consumer reform cannot unfairly penalize creditors. As far back as 1927, Judge Learned Hand realized the necessity of relying on business records in courtrooms:

The routine of modern affairs, mercantile, financial and industrial, is conducted with so extreme a division of labor that the transactions cannot be proved at first hand without the concurrence of persons, each of whom can contribute no more than a slight part, and that part not dependent on his memory of the event. Records, and records alone, are their adequate repository, and are in practice accepted as accurate upon the faith of the routine itself, and of the self-consistency of their contents. Unless they can be used in court without the task of calling those who at all stages had a part in the transactions recorded, nobody need ever pay a debt, if only his creditor does a large enough business.⁸⁴

⁸⁴ Mass. Bonding & Ins. Co. v. Norwich Pharmacal Co., 18 F.2d 934, 937 (2d Cir. 1927).

VII. APPENDIX



Maricopa County Justice Courts, Arizona

North Valley Justice Court 14264 W. Tierra Buena Ln., Surprise, AZ 85374 602-372-2000

CASE NUMBER: _____

() -
Plaintiff(s) Name / Address / Phone

() -
Defendant(s) Name / Address / Phone

() -
Attorney for Plaintiff(s) Name / Address / Phone

() -
Attorney for Defendant(s) Name / Address / Phone

AFFIDAVIT IN SUPPORT COMPLAINT
(Purchase of Consumer Debt)

I _____ am the Plaintiff's attorney or a designated full-time employee of Plaintiff.
(Name of Affiant)

I am fully authorized by the Plaintiff in this case to make the following representations: (1) I am familiar with the record keeping practices of the Plaintiff; (2) The information contained within this affidavit is based on my review of documents or records that were made contemporaneously, or nearly so, with the underlying event; (3) by, or from information transmitted by, a person with first-hand knowledge acquired in the course of a regularly conducted business activity; (4) that these records were prepared completely in the course of that activity; and (5) as a regular practice for that activity.

- The Plaintiff has obtained this debt from _____ and the original owner of this debt was _____.
- The Defendant has an unpaid balance of \$ _____ on account _____.
(Use last 4 digits of number or an ID number)
- That amount is due and is owed to the Plaintiff.
- The type of account is _____.
(If credit card, list the name of the company or store that issued the card.)
- The account balance includes late fees in the amount of \$ _____ as of _____.
(Month, Day, Year)
- The account balance includes interest at a rate of _____ % beginning on _____.
(Month, Day, Year)
- The original account was opened on _____.
(Month, Day, Year)
- The last payment was received from the debtor on _____ in the amount of \$ _____.
(Month, Day, Year)
- The Defendant is not on active duty in the U.S. military and is not otherwise protected by the Service Members Civil Relief Act.
OR
 The Plaintiff is unable to determine whether or not the Defendant is on active duty in the U.S. military and whether the Defendant is otherwise protected by the Service Members Civil Relief Act.

Affiant
(Person making affidavit)

SUBSCRIBED and SWORN to me this _____ day of _____, 20____.

My Commission expires: _____

Notary Public

I CERTIFY that a copy of this document has been or will be mailed on _____ to:

Plaintiff at the above address Plaintiff's attorney Defendant at the above address Defendant's attorney

Date: _____ By _____
Signature

