

>> Tom Pahl: Good afternoon, everyone, and welcome back to those of you who were with us this morning. Our first panel of this afternoon will deal with the issue of "Evidence of Indebtedness in Debt-Collection Litigation." The moderator of our panel will be Julie Bush, who's an attorney in our division of financial practices here at the Federal Trade Commission. I'm gonna turn it over to Julie.

>> Julie Bush: Thank you, and welcome back, everyone. I hope you had a good lunch. We're so glad that our -- you're here to join us for our afternoon panel. I'd like to start by introducing our distinguished panelists. First, we have Leslie Bender, who is a Maryland attorney in private practice specializing in healthcare collection matters. Next is Eric Berman, a collection attorney whose economist firm operates in New York, New Jersey, North Carolina, Pennsylvania, and South Carolina, and who's president of the Commercial Lawyers Conference of New York. Next is Brian Bromberg, a New York state attorney with his own private consumer-protection law practice. And we have Judge Hiram Carpenter, who is the judge of the 24th judicial district of Pennsylvania and helped originate the Blair County credit-card court, which we'll get a chance to discuss later in the panel. Next is Lynn Drysdale, a Florida consumer-protection attorney with Jacksonville area legal aid who is co-chairman of the national association of consumer advocates. And we have Judge Fern Fisher of the New York state Supreme Court who is the deputy chief administrative judge for New York city courts and has issued city debt collection policy directives. James Flanagan doesn't ap--

>> Eric Berman: He was originally going to take the training this morning, so he may have gotten held up.

>> Julie Bush: I see. Okay. He is -- I hope he'll be able to join us, and he is a judge on the first district court in Suffolk County, New York. Next to me is Connell Loftus, who's the managing partner of Mann Bracken, LLP, a collection and debt-buying firm with offices throughout the country. Next is Angela Martin, a consumer-protection law attorney in private practice in North Carolina, with extension experience representing military personnel. Welcome, Judge Flanagan.

>> James Flanagan: Hello. I'm sorry.

>> Julie Bush: No problem.

>> James Flanagan: Train was late.

>> Julie Bush: Uh-huh. Next, we have Alexander Mitchell-Munevar, who is a staff attorney with Greater Boston Legal Services, who practices consumer housing and elder law, among other subjects, for low-income clients and helped draft pending Massachusetts state debt collection legislation. Next is Jerry Myers, a North Carolina debt-collection and creditor-rights attorney with the Smith Debnam firm, who was named a super-lawyer by his peers.

>> Jerry Myers: [Laughs]

>> Julie Bush: Next we have Judge Lorraine Nordlund, who's a judge on the General District Court for Fairfax County, Virginia, and helped develop that county's best practices guide and checklist for debt-buyer cases and also helped train other Virginia judges about dead collection litigation issues. Next is Adam Olshan, a New England consumer collection attorney who participated on both the Massachusetts small claims court working group and the Connecticut bench bar small claims committee. Next is Dale Pittman, a pioneering Virginia consumer protection lawyer who operates a private firm. And finally, we're joined by Chi Chi Wu, a National Consumer Law Center consumer-protection attorney whose expertise encompasses medical debt collection, among other matters. So, thank you all for being here today. Our panel will focus on evidence of indebtedness, and I'm going to try and break our discussion into several units. First, I'd like to talk about complaints and pleading, talking about what evidence is contained or communicated in complaints, what is required in various jurisdictions, and what ought to be required, if anything. Next, I would like to discuss how does or should the evidence of indebtedness that's provided by collectors differ, depending on whether they're seeking a default judgment or whether the case is contested. Then I'd like to discuss the issues whether the evidence required by courts does or should differ for different types of collectors, such as creditors, third-party collectors, and debt buyers. And after that, I'd like to raise the issue of how courtroom legal clinics that are staffed by pro bono or legal services attorneys intersect with

evidentiary issues, if at all, and whether such programs influence the amount or type of evidence of indebtedness provided at the outset of the case. And once we get through all that, we'd like to talk about what we should do going forward. What private or public actors should do to address the issues that we've brought out during the panel. So, to start it out, I'm wondering, if someone would like to discuss what evidence is contained or communicated in the complaints in their jurisdiction, and what -- and/or what evidence they bring, add to the complaint to inform the consumer about the debt. Yes. Mr. Berman?

>> Eric Berman: Sure. I'd like to refer to the United States Supreme Court. *Bell Atlantic v. Twombly*, which set out the standard which says, "Complaints must contain enough factual allegations to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true, even if doubtful. In fact, specific facts are not necessary. The statement need only give the defendant fair notice of what the claim is and the grounds upon which it rests." In regard to what we do, we will name the plaintiff, provide the address, the defendant, and provide the address. If it's a debt buyer, we include that in ours. We include the cause of action. We include the amount that's due in owing with the date of default, which is usually the date from which we request interest, depending on the state and the jurisdiction, and I believe that that standard, what I just described, does fit what the Supreme Court requires.

>> Julia Bush: Mm-hmm. Okay. Would anyone else like to add to that? Ms. Bender?

>> Leslie Bender: In the state of Maryland, where I practice, most collection matters are heard in the state district court, which has jurisdiction up to \$30,000, and in that instance, the court requires that you attach some type of summary that states with particularity what services were rendered or what products were sold or whatever. So, some type of at least summary bill. My own practice is somewhat unique because I only represent healthcare providers, so we have to balance what we attach, consistent with Maryland law, with privacy considerations, because under the Health Insurance Portability and Accountability Act of 1996, we are only permitted to disclose the minimum necessary. So, oftentimes we will need to redact sections of summary bills that we attach to complaints. There is virtually no pretrial discovery to speak of in our district

courts, so the other information would never be provided unless it is specifically requested by the patient.

>> Julie Bush: Okay. Thank you. Yes, Mr. Mitchell-Munevar?

>> Alexander Mitchell-Munevar: Well, two things. With respect to the --

>> Julie Bush: Oh, and let me remind everyone, when you're talking, to try to talk close to a microphone.

>> Alexander Mitchell-Munevar: I want to raise one point as to just give context to the conversation, that part of what I've reviewed in Massachusetts and the information that I've received indicates that the question of evidence and whether it's supported or not oftentimes doesn't even -- isn't even really an issue that gets resolved or disputed upon for many of the reasons that also got brought up in some of the earlier proceedings where there isn't anyone on the other side who is disputing the efficiency of the evidence, but at the same time, within the proceedings themselves, oftentimes many of these case, many of the debtors, are -- either because of core practice and the plaintiff's attorney, are pushing to resolve the matter. So, the question of whether or not the underlying evidence actually is sufficient to warrant the claim is something that I often see doesn't really -- very rarely does it ever get brought forth as a matter to be resolved. In terms of the complaints that I've seen -- and again, I'm not trying to generalize, but just based in my practice, the complaints are scant in that they may name the original debtor, provide the address of the original debtor, provide the amount that's being sought. Attached to that is simply a one-page notarized affidavit from someone who may not necessarily reside in the state but claiming to be the keeper of records who certifies the debt. And then there isn't anything else thereafter. Most of the cases in Massachusetts are brought under small claims, which as indicated in the newly reformed small claims rules, simply it just has to be concise in technical language, but if the complaint itself fails to allege all the elements of a prime official case, that will not cause the complaint itself to be inappropriate.

>> Julia Bush: Thank you. Yes, Mr. Olshan?

>> Adam Olshan: I've got good news, Alexander. Massachusetts is the first state in, I think, the country to undergo a 14-month-long benchmark conversation that was collaborative, and at that discussion, there were members of the national consumer law center. There were members of the creditor bar. There was one legislator. There were judges, there were clerks, and the end result was a knowledge-based recommendation to the chief judge that resulted in itemized information being required in Massachusetts small claims complaints. The information that's now being filed as of October 1 includes, in the case of debt buyers, the name of the original creditor, the last four digits of the original account number. The plaintiff is also required to indicate the amount sought in all interests thereafter. So, I understand that most plaintiffs are now pleading the charge-off amount and any alleged damage that follows charge-off. So, the end result is transparency, and I think that -- we'll talk more about this through the program, but I think that this Massachusetts model and the way that the Massachusetts court went about this is a model that we can look to follow around the country.

>> Julia Bush: Yes, Judge Nordlund?

>> Lorraine Nordlund: Well, actually, Massachusetts may not be the first. In Fairfax County, our bench recognized that there were problems with respect to the complaint itself. I know we'll get in to sufficiency of the evidence later in the program, but as far as the complaint itself, we had a similar type of event, if you will, where we brought in all of the stakeholders. We had people who represent creditors. We had people who represent debtors. We had national representatives. And what we did was we had an open discussion. We invited participation, invited them to present any evidence or documentation that they had in support of their relative positions, and then we went further than that and also contacted the OCC and looked at the National Banking Act, looked up all the cases in support of the various positions, and what we came up with was a best-practices list. And the part dealing with the complaint itself indicated that in the future, we would require that in the complaint, they identify the original creditor as well as the fact that the party suing at this time was doing so on the basis of an assignment. So, identifying both parties, because what we had found was a lot of litigants were coming to court saying, "I have no idea who's suing me and for what." So, we required that they identify, required that they go through and identify

principle interest, attorneys' fees -- separate that out. We also have the affidavit, but that gets in to the sufficiency of the evidence, so I'll reserve for later. Thank you.

>> Julia Bush: Okay. Yes, Ms. Wu?

>> Chi Chi Wu: Actually, I think one of the models that I personally would like -- would support -- And I should say I wasn't involved with the Massachusetts process. That was one of my colleagues, our debt-collection expert. But the standard that I personally like is the one from Arkansas which requires for credit-card debts that not only do you have the information but you have the actual documents, including evidence that the consumer was the one who signed the account application, a copy of the account agreement, and a copy of billing statements so that you're not only talking about a summary of evidence but the actual documents to prove the debt. Now, that may not be required under *Bell Atlantic v. Twombly*, but that's the standard for due process under the Constitution, and certainly, states can require a higher standard. With respect -- my specialty is medical debt. With respect to medical debt, I would have concerns -- I mean, I do recognize that HIPAA does limit the amount of information that can be in the complaint. On the other hand, one of the problems with medical debt is that, you know, going back before the actual collection lawsuit, what the patients often get is that summary bill, and they don't know whether they actually should owe all the debt that's on the bill because it's very summary, you know. Procedure, \$25,000, and it doesn't set forth the itemization, and hospitals under other healthcare providers are notorious for double billing and overbilling, using wrong codes and whatnot.

>> Hiram Carpenter: Miss Wu, actually, in Pennsylvania, as far as I would be concerned as a judge of a general jurisdiction trial court, I'm pretty much on board with you. These are contracts, and contracts are founded on writings. And so right from the get-go, if you look at the Pennsylvania rules of civil procedure, there would be a requirement of attaching something that verifies the contract. And the fact is, that's a wonderful defense of the types of pleadings your firm is filing. You can't come to Pennsylvania. I don't want to hear an argument that there's a Pennsylvania Supreme Court case saying that what I would consider to be an inadequate pleading is okay. And if you pull the Supreme Court on me, I've got problems. But I'm on board with you that the contractual nature of these, more should be pled. Now, you can raise a legitimate

question, I think, whether you have to put it in the complaint or whether it can be discovered. And in our system, and I think I'm going to get a chance to talk about it a little bit later, our credit-card court has really removed the problem. We don't have that problem anymore of the inadequacy of the complaint because we don't have any default judgments, which ought to interest everybody, in terms of participation, which is a problem here. We don't have default judgments. So -- and that's why our court, taking an aggressive stance. But in terms of the pleading, I think your view is the better one.

>> Chi Chi Wu: Thank you. I appreciate that. By the way, the Arkansas court case was based on the Federal Truth in Lending Act, and there is an argument at the Federal Truth in Lending Act that level of proof is required.

>> Female Speaker: I wonder whether -- in a moment, Mr. Bromberg, whether Judge Flanagan or Judge Fisher would like to comment on the kinds of evidence that they tend to see in the complaints before them and how that affects the participants in the dispute.

>> Fern Fisher: I think the complaints in New York are as Mr. Berman would like them to be, very scantily. Oh, sorry. I apologize. I said the complaints in New York are, as Mr. Berman would argue that they should be, they're pretty scant, and it is very difficult for litigants to discern what they're being sued for. So, they often do say the original creditor, but since they've been sold so many different times, it's very difficult for the litigant to figure out who the current plaintiff is. The account numbers are not planted, nor are they really required under New York law. There is some movement at our state legislature to try to fix all of this, but as you know, in our media, our state legislature is dealing with some very other serious issues right now. So I don't think that legislation is going anywhere right now. But I think that litigants are confused when they receive a complaint, that the account numbers would be extremely helpful, and I'm not even sure the last four digits are enough. You probably need the full account number, and since they're all still accounts, what difference does it make, I think? And also a chain of how the accounts been sold from agency to agency would be extremely helpful.

>> Hiram Carpenter: Having the plaintiff prove they're the plaintiff, at a minimum, doesn't seem too much.

>> James Flanagan: In my court, very often, well, most of the cases that come in, if they're not pled in the manner Mr. Berman and other attorneys that practice in the area -- he does provide the information -- they do very often, when I get pro se litigants -- and that's most of the time -- I will ask them this very simple question when they step up to the bench. I'll say, "Do you know why you're being sued?" And if I see XYZ Corporation who brought the debt from ABE, who bought it from STP, who bought it originally from a well-known national credit card or bank, I understand the person's confusion. Very often, though, I'll get cases where they'll be sued by a well-known national bank directly, and I'll ask them, "Why are you being sued?" And they'll say no. And then I'll see proof that they signed off on the credit card, et cetera. So, it's a balancing act sometimes. But the biggest thing I do is, I tell the attorney for the lending institution or the purchaser of the debt, "Counselor, whatever you intend to offer at the time of trial into evidence -- not saying it's getting in -- whatever document you want to give, you will give to them now, or you'll give it to them within the next 30, 45 days. The attorneys in my court have gotten now to the point -- this is my 60th sitting in the same court -- that they will walk in with it ahead of time. They'll say, "Judge, on the record, we're giving it to them right now." If it's \$6,000 or less, we go mandatory arbitration so they don't come back to see me unless they file for trial de novo. If it's over \$6,000, I set a trial date. I cannot remember the last time I tried a consumer-debt case, because the people either settle or they default. I don't know the last time -- Mr. Berman will bear me out on this. I can't remember the last time I tried a case with a credit card or a loan. I may have one coming in Monday. We'll see. But -- Not from you, but it's a defendant who has been very, very diligent. And she -- I keep asking her if there's an attorney in her background or in her immediate family, and she denies it. But I-I-I -- it doesn't pass the sniff test. But I tell them right up front, "You have to give the discovery. I don't know whether it's going to get in or not, but give them everything." And I want to see if they signed anything. All the bills, all the receipts -- I mean, I've seen them give stacks 3 or 4 inches thick. And I require it right away and say, "Sir, ma'am, here it is now. This is what they're claiming. See you at trial."

>> Adam Olshan: If I may, I was on that Massachusetts --

>> Julie Bush: If you would please speak closer to the mike. We've been told that the people on the web -- viewing the webcast can't hear.

>> Adam Olshan: Thanks. I have never before been told to speak louder, so I'm happy that you asked. Thank you. Happy to. Thank you. I served in the Massachusetts Bench Bar Committee, as well as the Connecticut Bench-Bar Committee. That Connecticut committee met 30 times. I was at 29 of those meetings over a year's time. There was a lot discussed. This morning, Joanne Faulkner was here. She chaired one of those subcommittees. Judge Abrams was also here, who was on that committee, also. After all those meetings, it was determined that we weren't interested in taking down more trees to go along with the complaints, that, in the 21st century, contracts are not always in writing. As a matter of fact, more often than not, they're not. The contract offer and acceptance occurs when the consumer receives the plastic and uses it at a store. That's the contract. So, what was agreed to in Connecticut was that the small-claims complaint -- and, again, for purposes of transparency -- should include a lot of information but not necessarily more paper. The information includes the date of last payment, the last payment amount, the charge-off date, charge-off amount. If you have the open date, plead the open date, the original creditor name, the original creditor account number. And I'll say more. I think that we have consensus here on the round tables around charge-off. Michael Kinkley, who is a consumer attorney in San Francisco, agreed at that round table that the charge-off was a reasonable place to begin with the checklist -- an itemized post-charge-off. This morning, too, it seemed that the group had some consensus around charge-off. So, I would suggest that we begin there, and perhaps we can reach some consensus right now, but what should be in that checklist? I've got Connecticut's right here. This isn't a default checklist. This is the Connecticut Small-Claims Judgment checklist. So, it was agreed that any judgment that enters in the Connecticut small-claims system must have this information as a minimum. And I think that, with a lot of information, there's transparency. I believe that the consumers will better understand what they are being sued for. And in 60 days in Massachusetts, I see that there's more phone calls from people who are getting sued, and that's what this is all about to us. We want to communicate and hopefully resolve the matter so the matter can be dismissed for a judgment entering.

>> Julie Bush: Miss Martin, did you want to add something?

>> Angela Martin: Just one thing -- I haven't had the opportunity to review either the Arkansas or the Connecticut, and we did change our pleadings in North Carolina, but I will say that if you only come forward with a bare-bones complaint -- I have clients who have sued by two different entities on the same debt. And if you use the Arkansas model, then, with the original documents that would lend to a greater credibility as to the person actually having it as opposed to just bare-bones pleading.

>> Julie Bush: Mm-hmm. And Mr. Mitchell?

>> Alexander Mitchell-Munevar: Just to follow up on what was said before, that the Bench Bar Committee that resulted in the changes in the small-claims court, which most of the debt-collection actions are brought within, again, that -- just to give context, that came out of a four-part series that the "Boston Globe" had done called "The Debtor's Health," which highlighted a number of problems going on and inequities in the process. But that wasn't the only reform that came out of that series, although, albeit, good reforms. There are other reforms that are also on the way that follow along with what Miss Woods pointed out, that there is current legislation pending in Massachusetts filed by NCLC that's seeking to require that the contract be attached and be mandated to be part of the complaint. In addition to that, we filed other -- to make a more comprehensive reform, I've worked on legislation to increase exemption protection and also to reform the supplementary process in certain specific cases. So we are moving. I don't see the benchmark as the changes in small claims as the end-all/be all, that there's clearly a progressive movement that's been going on to reform both the court system as well as the requirements in order to bring these actions forward.

>> Chi Chi Wu: I would just like to say, in response to the statement that contracts are in writing, the Federal Reserve Board would be very interested to know that credit-card contracts aren't in writing. I mean, they're obviously in writing. We all get them, and they're required by Regulation Z. And if they're required by Regulation Z, why not attach a copy to the complaints?

>> Hiram Carpenter: Although I'll agree with -- I'm with you on that one, too, but I'll agree with him that a credit card is a continuous contract so that each time it's swiped, you may be agreeing to new terms and conditions, you may be varying the contract based on the changing terms on your statement. All of that is true. But still, there's some written documentation of it, even so, just for argument's sake.

>> Julie Bush: Okay, I'd like to hear from Mr. Myers.

>> Jerry Myers: Thank you. On the issue of the credit-card agreement, certainly, there is a written set of terms and conditions that each consumer receives, and we all understand that. I think an important part of all this is understanding how the contract actually works. As was said earlier, the issuance of the card is an offer to enter into a contract, and the use of the credit card is, in fact, the formation of the contract. And that can take place without there ever having been a signature on anything. It's frustrating sometimes to represent creditors and to be repeatedly asked for a signed agreement or a signed sales slip when no such thing ever existed. It's very easy to go onto the Internet and to apply for a credit card, to be approved, to be given a credit-card account number, to go to another website and make a charge, and there's never been a piece of paper that was signed by anyone. So, it is almost as though there's this notion that electronic records are inherently unreliable and should not be depended on. And if that's the case, then we've set this country back tremendously in the advance of commerce.

>> Julie Bush: Miss Bender and Mr. Bromberg, followed by Judge Nordlund.

>> Leslie Bender: I just wanted to step back for a minute and point out, you know, as some of the earlier panelists today stated, legal remedies and going to court to collect a debt is really not the most cost-effective, because even once you obtain a judgment, you still haven't resolved the consumer receivable. So, I think that it bears mentioning that it is not in any of our best interests, any responsible collection attorney's interest, to have so little information that it results in consumer confusion over why you are going to court. The second observation I would make is that there is nary a soul we bring a lawsuit against that we haven't already provided a collection notice to, pursuant to the Fair Debt Collection Practices Act and that we haven't offered at least

one, possibly two opportunities for debt validation. It's the way that we operate. Moreover, our clients, who -- I would respectfully disagree with Miss Wu -- do not regularly and systematically overcharge and overbill and double-bill the hospital patients. Our clients provide several bills pursuant to other federal regulations that control how they bill and receive payment for healthcare services and have had -- on two or three, five, six, sometimes nine times -- provided statements to patients and other information. So, by the time we get to court, there has been a debt-validation opportunity. The underlying healthcare creditor has repeatedly sent and offered statements of account. If there's health plan involved, they've also sent an explanation of benefits. So, I think that it would be important for this panel to understand that we are probably on the same page. Responsible collection attorneys want there to be sufficient information attached to a complaint so that a consumer is fully informed regarding what his or her responsibilities are alleged to be.

>> Julie Bush: Thank you. Mr. Bromberg?

>> Brian Bromberg: Well, I disagree with that on virtually every point. It is in the debt buyer's interest to get a default judgment. It is in the debt buyer's interest to freeze up the bank accounts. It's in the debt buyer's interest to take that default judgment and start garnishing wages as soon as possible. The goal is to give as little information as possible to get that default judgment and make sure no one fights, okay? These requirements -- Mr. Berman's absolutely right. You basically have to give name, rank, and serial number. That's all you need to do to make out your claim in the New York courts. And you attach as little as you possibly can 'cause you want those people defaulting. You want them going under. You want to get that garnishment. If you can still freeze up the bank account, you want to freeze up that bank account. You want to use those 4-, 5-, 6-year-old addresses for where the person lives -- those addresses that came from the original creditor that are now completely out of date, 'cause you want that default judgment, okay? Now, as for what should be the rules, as for what should be in there, instead of name, rank, serial number -- and by the way, just doing name, rank, serial number, that's all the attorneys have, okay? As everyone knows from a few recent cases, that's all they've got. They don't do any meaningful attorney review. The case comes in. Out goes the initial letter -- you know, the national G-notice letter. If someone responds to the initial G-notice letter with a dispute, they get back a single -- a single -- one paragraph. It says, "Gosh, we checked with the creditor, and the

creditor says you really owe that money.” And under the Fourth Circuit decision of Chaudhry, that's all they need to do. And then they go ahead and they send out that name, rank, and serial complaint that Mr. Berman's so proud of. And the next thing you know, they got their default judgment based on a 3-, 4-, 5-year-old address, sometimes 6. Now, what should be in there, okay? First of all, got to remember most of the stuff is going on default, okay? No one's going to be coming in and asking for discovery. Most people don't know to ask for discovery, and there are a lot of affirmative defenses that have to be pleaded, okay? In New York, you lose your right to attack standing if you don't plead it as an affirmative defense. You lose your right to attack statute of limitations, if you don't plead it as an affirmative defense. You might get to use these things later in some hypothetical FDCPA case, as a Kimber violation -- great. You still get the judgment against you, 'cause you haven't raised them as an affirmative defense. So, things have to be front-loaded. You have to make the debt collectors and make the debt buyers attach the necessary information up front, 'cause no one's ever getting a copy of it at a later date. First of all, you have to make sure they have the right address. That's another matter. You have to have a copy of proof that the consumer signed the agreements. You have to have copies of the cardholder agreements, amendments, chains of assignment, proof of assignment. You want to have the name of the original creditor. You want to have copies of the bills, if that's possible. That gets a little weird, because you might end up giving away some privacy rights. So, copies of bills attached, it can go both ways on. Then you got to have some kind of breakdown. For God sake, who knows what's in these things? Who knows how you calculate the interest? You got some principle from three, four, five years ago -- back before it got handed back to a debt buyer. No one knows how you got from the principal amount that was allegedly due three, four, five, six years ago to the present amount. No one knows how the interest was calculated. No one knows how the overlimit fees came in, the late charges. No one can figure this out, okay? Now, the perfect place to start is with Judge Lebedeff's decision, which is a groundbreaking decision. That's Civil Court, New York County, 2005. This is where everyone should start. These are the minimum requirements on what you need to prove up any debt. Okay? This is where it all starts. No hearsay, no double hearsay, no nonsense affidavits. Everything you need to prove up a debt is in here. But just my basic point, though, is that the initial complaint should have a lot of this stuff, 'cause no one's going to see it again.

>> Julie Bush: Just to clarify, are you saying that the initial complaint is required to have the things on your list?

>> Brian Bromberg: No, no, no. New York -- it's notice, pleading. It's name, rank, serial number.

>> Julie Bush: You're just recommending that it include all of these things, right?

>> Brian Bromberg: Judge Fisher's working very hard to try and get some more requirements in there, okay? The legislature's working very hard. There's got to be more in there. Name, rank, and serial number doesn't do it. And the attorneys, by the way, are just operating with name, rank, serial number, which is why they're violating --

>> Julie Bush: I know Mr. Berman wants to respond but Judge Nordlund and Judge Fisher were waiting to speak.

>> Lorraine Nordlund: First of all, I must say that in Virginia, I'm proud to say that the judges, the creditors' attorneys, the debtors' attorneys -- we all seem to be on the same page and on the same side of making certain that justice is done, and there doesn't seem to be this adversary type of stance between us all. We're all seeking the same result, which is justice for all litigants. And so I'm very proud of the attorneys who appear in our courts, because when we went ahead and put our best practices checklist together, everyone worked together to make certain that the best policy was put forth. I'd also like to point out that there is a distinction between the level of evidence that's required for default judgment versus the level of evidence that's required to be put forth at trial. And I can give you a small example. If you are going to be presenting a copy of bills evidencing that payment has been made or copies of bills evidencing that a purchase has been made or if you actually have the signature card -- any one of those three things will establish that the contract, the underlying contract, has been ratified. So, for default judgment, we require the underlying contract to establish why it is that they're entitled to those interest rates, why they're entitled to attorneys' fees, why they're entitled to compound interest. We also require that they establish ratification of that contract in the form of a signature card or proof of a purchase or proof of a payment. And we don't look behind those documents. We accept them on their face for

a default judgment. We aren't looking to create arguments for the debtor. We simply want the prima facie case established, and I would refer you to a case out of New York -- *MVNA v. Nelson* at 15 miscellaneous 3rd, 1148, where it establishes very clearly that an unsigned contract may still be enforceable if objective evidence establishes that the parties intended to be bound. And so we rely upon that. We believe that it's a good recitation of the facts necessary for default judgment. The distinction that could be drawn between a default judgment and a trial is that if those documents, if that evidence is presented at trial, they could be subject to hearsay objections, they could be subject to a whole series of objections, such as they're not proper records of the business, that sort of thing. But those are things that are to be presented at trial. And so when we first began this discussion, it was suggested to us that we, as judges, were going beyond the role of gatekeeper and that we were becoming adversaries for the debtors. And we responded, "No. Absolutely not. We are gatekeepers." We are making certain that a prima facie case is established. We are not going to be making that argument as to the admissibility of these documents. We're not going to be making arguments, looking behind the documents. And we're also not going to be putting forth affirmative defenses for these debtors. We simply want a prima facie case established so that we know this is a valid debt.

>> Julie Bush: Yes. Judge Fisher?

>> Fern Fisher: I agree with that there is different standards for default judgments, as opposed to cases that are going to trial. However, I wanted to just backtrack just a bit, and although I do believe that complaints in New York should have more information, we have to wait for the out-of-state legislature to do something about it. The court's hands are tied right now, with respect to what we can require in a complaint. However, we have done as much as we can, we think, in New York, to address some issues. But with respect to more paper, I have to talk about the practical realities of what some courts in this country are facing, in terms of paper. We don't have electronic filing in New York. And if I require a whole lot more paper, there won't be any room for anybody in the courthouse. Right now, our files are throughout the hallways, in boxes, in stacks, because there are over 300,000 consumer credit cases in just the city of New York alone. So, until we get electronic filing, which would make it more practical, I'm not advocating

additional paper. With respect to the default standard, we can talk about what New York's done later on.

>> Julie Bush: Okay. I'd like to hear from Mr. Berman and Ms. Drysdale, and then I'd like to move the discussion to the focus on default versus contested judgments.

>> Eric Berman: There are a couple of realities that I think have been misstated. Number one, the banks don't get the individual charge slips. The vendor or the retailer keeps those charge slips. The information is provided electronically to the bank, just as we file lawsuits electronically in many courts across the country, including federal courts. The credit-card holder sends statements of account on a monthly basis to cardholders. I have all the cites, but I'm not gonna bother with that. That'll be in the submission, okay? And those statements require a whole bunch of information, much of which has already been stated. The account holder has 60 days, under the Fair Credit Billing Act, to dispute any entry that's on any of those statements. Some courts have held that there's a presumption that if the account holder does not dispute those, that, in fact, presumption -- not reality, the presumption -- let me finish. I didn't interrupt Mr. Bromberg. There's a presumption that the information on the account is correct. That presumption can be challenged in court. We have the Fair Credit Reporting Act, which allows a consumer to check one's credit report and see. If an account is charged off, pursuant to federal legislation -- and, again, we have the treasury regs, we have the CFR, et cetera, regarding what's required in a charge-off -- the charge-off which appears on the credit report is the amount that the bank charged off. That's another place that a consumer can check to see if the amount is accurate. As far as signed documents that was touched by Mr. Myers and Mr. Olshan -- today's world, there aren't any, pure and simple. You got to get off this thing about signed documents, because they simply don't exist. And there's all sorts of federal statutes, as well as a variety of state statutes, which indicate that they want these transactions to be done and maintained electronically so there are not going to be signed statements. Look at GLBA. Look at HIPAA. Look at UEFTA and 27 others. Again, I have them all here. In regard to what we provide in New York city, you have this bare-bones things. Well, if a defendant goes to a court in New York City and they speak to a clerk, the clerk is authorized to provide them with an answer that they can fill out. If they choose not to use it, that's fine. All these affirmative defenses that Mr. Bromberg just talked about -- "I

do not owe this debt," "I did not incur this debt," "I am the victim of identity theft," "I have paid all or part of the alleged debt," "I dispute the amount," "I did not have a business relationship with plaintiff," "the New York Department of Consumer Affairs shows no record of plaintiff having a license to collect a debt." I'll skip a few. Statutes of limitations, laches, "the debt's been discharged in bankruptcy." Frankly, I know a lot of lawyers who don't know what laches is. "The collateral property was sold," et cetera, et cetera, et cetera. Violation of the duty of good faith, okay? This document is readily available in every civil court in the city of New York, and I believe that it's appropriate for the court to work with the pro se defendants, at least to a reasonable level, so that they're not screwed, to put it in the vernacular.

>> Fern Fisher: Thank you, Mr. Berman.

>> Eric Berman: You're welcome, Judge. And the issue is, how far are we going to go on the other side? Where are the scales of justice going to be balanced? At this point in time -- I should say, a few years ago, everybody felt at that creditors were way up here and the consumers were way down here. Now, it's gone the other way so that consumer protection is way up here and any creditor trying to collect the debt is way at the bottom of the barrel or some other terms which I will not use. This information is available. There are specific requirements under the law and under court rules regarding documents, regarding evidence, which the consumer bar often is willing to disregard because they can't win on the rules. So, why not change the rules? And I'll stop there.

>> Julie Bush: Thank you. Ms. Drysdale?

>> Lynn Drysdale: Just very briefly, in Florida -- Can you hear me at all?

>> Julie Bush: A little bit.

>> Lynn Drysdale: In Florida, you're required to attach -- I lost my voice. I apologize. So I'll be very brief. You're required to attach a copy of the document sued upon or a material part thereof. And I think what I'm hearing is we're trying to set up sort of a dual-tiered justice system, where in

certain instances you don't have to have any documentation relating to the amounts that are owed, relating to the interest rate. But one of the things that we are seeing in Florida -- and keep in mind, most of the people that are being sued in small-claims court or for a lot of debt-collection cases are being sued for amounts that do not warrant hiring of an attorney, nor do they have the resources to hire an attorney. And what we have been seeing in Florida is sort of a perversion of the service of process, where nothing at all is attached to the summons in the complaint -- maybe a 2002 generic credit-card agreement when the account was opened in 1995 or 2008. But in addition to that, or to the exclusion of documentary evidence and information about when the debt was incurred, how much -- when the date of default is, who the original creditor was. We have the attorney serving on the consumers with initial process a stipulation to try to avoid having the courts realize that they do not have the documentation necessary to prove the debt in the amounts that are due and owing.

>> Julie Bush: Thank you. Ms. Wu?

>> Chi Chi Wu: I just want to respond to a couple of Mr. Berman's points. First of all, signed-document points. It is not true that there are no signed documents in a credit-card transaction. I don't know about you, but when I opened my credit-card account, I signed an account application. A lot of credit-card accounts are opened with a signed account applications, and that is a critical document. That is a really critical document, especially when you're talking about lawsuits against spouses, when you don't know if the spouse is a joint account holder or an authorized user. And it says that on the account agreement.

>> Eric Berman: What if it's opened over the Internet? Where is the signature?

>> Chi Chi Wu: The case of -- The Arkansas cases actually have a good standard, with respect to telephone and Internet account openings, where, basically, it says, yeah, you don't need a signed account application, although they often exist and should be included, but, you know, you could have telephone logs if it's a telephone transaction. You can have computer logs if it's a computer transaction. But the fundamental point -- and we have actually advocated to the Federal Reserve Board that accounts should be opened in writing. And by the way, an account holder under the

age of 21 will now have to be in writing under the Credit Card Act. But there should be some quantum of proof, especially when you're talking about suing a spouse and you don't know whether that spouse was an authorized user or a joint account holder who's actually liable on the debt.

>> Male Speaker: Is there a signature anyway, with the spouse?

>> Chi Chi Wu: Well, we're talking about what's required in the complaint, and so what I'm saying is, with the complaint, you should have evidence that that person was the person who actually opened the account, is liable on the account, and then you should have the account agreement. And you should have a periodic statement. The last periodic statement -- this is a document federal law requires be sent to the account holder, so why not include a copy of it with the complaint? On the Fair Credit Billing Act, I have heard that it is an absolute abomination. The Truth in Lending Act and the Fair Credit Billing Act are consumer-protection statutes, and the fact that someone does not raise a claim under the Fair Credit Billing Act does not mean they have given up all rights to contest the validity of the debt. This is an argument that the credit-card issuers are pushing out there, and it is absolutely wrong, okay? Just because a consumer did not send a dispute within 60 days of the last -- of the periodic statement does not mean that they give up their rights to claim the debt's been paid. The debt was unauthorized use. It was identity theft. "Somebody else used my credit card." The interest rate was the wrong interest rate. So, they don't give up their rights to make other claims under Truth in Lending or under common law just because they didn't raise a Fair Credit Billing Act dispute.

>> Julie Bush: Miss Martin wanted to speak, and then Mr. Loftus and Mr. Olshan.

>> Angela Martin: Unless I misheard Mr. Berman, his attack was that somehow the debt-defense attorneys are afraid of the rules because, by the rules, we would lose or something like that. You said it was the rules that would prevent us from winning. It's actually the rules that allow me to win and have allowed me to be 100% successful as to a debt collector or a debt buyer. The rules of evidence are what do stand in court, and that's what has helped me. As to the original creditor, when you say about the scales of justice, I do not take cases against original creditors. They do

have all the documents they need. If a client comes in with an original-creditor case, I attempt to enter into negotiation or something like that. But if you have third-, fourth-, fifth-tiered debt buyers, those are the cases that can be won and should be won because the original creditor, to my knowledge, has gotten the full value of the charge-off on their account. They were not damaged by the client. The client may owe somebody, but I would argue that it's not the original creditor, because they have been paid in full as to the business loss.

>> Eric Berman: I don't understand how they've been paid in full. Under the federal regs, they have to write it off. Under the charge-off regulations -- if you're saying that they sold it for a price, and that price is sufficient, again, the price that they sell it for is not the amount that's due and owing. Otherwise, there would be no debt collection buy. And I happen to agree with Miss Wu that a statement of account is not a bad thing. We usually provide them in almost all of our cases, okay? But you have to, again, look at the reality that the law does require certain things. And we have really studied this, okay? I have 20 cases which support what I said about the presumption. I have another 20 cases which go into the issue of the use of the account completes the contract. Okay? And I will be submitting this, and I'll be very interested in seeing the responses, because that will help me down the road. But ethical lawyers -- and I consider myself one, I consider the members of NARCA to be ethical -- we try to provide the information and the evidence and support the evidence that is required. Are we going to win every case? Absolutely not. Judge Flanagan just did a number on me, for sake of discussion. You may not know it. I do. But in any case, we try to work within the realm of the law as the requirements of the law go to document production, the authentication of electronic business records -- which in a lot of the parts of the country are not recognized as valid documents. There are real issues going into the authentication of business records, which I guess will come up later. And I'm sorry. I'm getting off on the topic. I'll stop.

>> Julie Bush: Okay. Mr. Loftus was waiting to speak for a while.

>> Connell Loftus: Yes. I would just like to say, we have an adversarial system. I think this panel, back and forth, demonstrates that we have an adversarial system with the consumer bar and the creditors bar going back and forth at each other. So we have to put things into two buckets. I

mean, there are those cases that are non-contested, where someone's been served lawfully and they haven't bothered to appear. And there may be lots of reasons. There have been transportation reasons raised earlier. But they haven't bothered to appear, for whatever reason. And that's one bucket. And how do we satisfy an initial level, an initial complaint, to put everyone on notice -- okay? -- that a complaint has been filed against them. I think, where it's possible, where you say, if the debt's been assigned, that you clearly outline the assignment trail so that the consumer can see it. That's a good thing, if you can do it. But then the second issue is, what evidence does the creditor's attorney have to present if it's contested? And, obviously, there's more evidence to that. And the evidence that's presented will be subject to attack. So, if Miss Wu wants to attack the statements and whether it's a joint-account allegation, it can be attacked. The rules that Ms. Martin uses so effectively are there for her to attack that evidence. But I think we have to understand that there are two buckets. Typically, we practice all over the country. There's a low level to get a case going. It's usually a complaint which lays out allegations that support the complaint. Sometimes, state forms are hard to read. They're hard for me, as a lawyer, to read when I look at some of these state forms that have been developed by the legislators throughout the country. But something that puts the debtor on notice that they've been sued, why they've been sued. And that should be enough to get the case going. That should be enough to get the case going. If there's a problem with service, as was addressed earlier, that can be addressed at a later date. And, obviously, the evidence may balloon from the initial court pleading, as it would in a personal-injury case, which is a five-paragraph pleading in most cases that I've seen. And the evidence balloons to 25 boxes of evidence brought in by both sides. So, I think that that's -- that's one of the things that we have to live with. We have an adversarial system. The other comment that was made by Mr. Bromberg -- and I respect Mr. Bromberg -- but as collections lawyers, we don't want to take default judgments. Default judgments don't satisfy our client. I don't know of any client that I have dealt with in the 15 years that I've practiced law that said, "Hey, good job, Connell. You took 10,000 default judgments." What I want to do, as a creditor's lawyer, is I want to get that consumer there so he or she can communicate with me. If they owe the money, I want to hear what they can do to resolve the debt. If they can't resolve the debt, I want to hear what they're planning to do. Are they going to do a bankruptcy, or are they going to take some other step? But we want to have communication. I'm all for conciliation courts, where creditors' lawyers sit down with debtors, and if there are legal-aid people there, fine. That's fine.

Let's resolve the cases where people come in. My experience practicing law in Virginia, I would go on a 40-case docket. Five people would show up. Four of the five didn't have a defense. They came in because they were good people. They came in because they wanted to try to pay their bill. And I wanted to work with them to pay a bill. I don't want to get a judgment where I have to go search for assets and then spend a heck of a lot of my client's money trying to find the assets and ultimately executing freezing a bank account. I understand, in New York, it's a little easier to freeze bank accounts than it is in most places around the country. But it's not particularly easy to do. So, it's -- getting default judgments is nice. That's not what we're in the business of doing. The last thing I wanted to mention, and I think it's very real, because there were comments from various members of both sides of this issue and the judiciary that we should put account records into the public domain. State after state are requiring us to protect consumers' privacy. We have to be careful what evidence we put in the public domain. Entire account numbers -- I tend to agree with the judge who said that they're stale accounts, but most states don't break that out when they rewrite their rules and their legislation. So, there is a real concern and a real balancing act between privacy -- privacy and proof. And once the case gets contested, that can be dealt with by the court. The consumer's privacy can be protected by the court. But just filing that document, with a ton of personal information, whether it be medical records or whether it be credit-card information or some other bank-account information, is a problem.

>> Julie Bush: There are quite a number -- thank you -- quite a number of people who have things to say, but I think this might be a good moment for Judge Carpenter to talk about the credit-card-court model.

>> Hiram Carpenter: It really is. You've segued into me better than I could have. We've had all these problems and heard all these arguments. Now, I am from a county -- you would describe it as fly-over country. Small county, small court. But even the couple of judges on our court could not agree on a general jurisdiction trial court with unlimited jurisdiction, which is what we are in Pennsylvania. We could not agree on these procedures, even among ourselves, trying to follow the same rules, for many of the reasons you've suggested and a bunch more. Finally, we got so tired of it and so tired of sloppiness that existed, frankly, on all sides, albeit for different reasons, that we went with something completely new, novel, whatever you want to call it. But effective

December '08, following in our county, the filing of the complaint and service, we stay all proceedings in favor of requiring both sides to appear at a conciliation conference. So, preliminary objections are gone. Now it doesn't matter what's in the complaint anymore. That we have the complaint will get all the parties in the room. So, you don't have to file P.O.s that something wasn't attached or get into somebody's privacy. When we schedule this credit-card court, we've stayed everything. We then require the plaintiff to come with some evidence relating to proof of damages, proof that they are the plaintiff, because they usually haven't pled it in all the various assignments, and some kind of a breakdown. Now, if plaintiff doesn't come, remembering we're fly-over country, there probably aren't 10 attorneys in Pennsylvania that are filing suits on behalf of all of the credit-card companies taken together. and we don't need any of them ever. They won't return a phone call, basically, for the most part. We require them to come. If they don't come, we dismiss their case with prejudice. If a debtor doesn't come after they've been sued, we grant the default judgment, right then and there, right after the complaint and service, no more proceedings. Well, after you do that for a couple of months -- and we've been at this now for 10 months -- we start to get what we've been talking about all day that we need. We start to get some participation, and when we get participation, we go right down the avenue of our last speaker, Connell or Co-nnell. We negotiate -- When we get both sides there, what we're looking to do is one of three things. Most of the time, we're settling the case. That's what happens when you get everybody in the room. And you get a consent judgment with the number that the debtor can pay, with all of the fancy charges sorted out. And we get something working that gives the creditors that come a judgment when they leave and gives the debtor a schedule of payment. We pushed the envelope way forward to where we think it should be from everybody's point of view. Now, if you can't settle the case, then one of two things is going to happen. You may want some of this nifty discovery that we've been talking about that was in a complaint that I think's inadequate. But, again, we've removed the issue, because it doesn't matter what's in the complaint now. We're going to solve it by discovery and keep it private. We have a form discovery order -- and I brought all of this stuff, if anybody wants it -- in which we require proof of any assignment of the debt, the last statement before the default, the terms and conditions as of the date of the default, and the most recent statement, at a minimum. That's the form. You get that within 60 days. If the creditor doesn't produce it within 60 days, we may let them have the charges, depending on what it is they failed to produce, but we penalize them their finance charges and

their fees. They can get their base debt, but perhaps not the rest, depending upon what the nature of the discovery default is. Then, the other thing is, you get a trial date, right away. We cut through everything. Coming out of that initial conciliation conference, you have a trial date. And I appreciated the observation of one of my colleagues who does a lot more of this than I do, I'm sure -- I'm too busy with capital homicides -- that you had tried one case. Well, we've brought all of ours into our court, about 100 a month in our county. We've tried one in 10 months, giving them all a trial date and giving them all discovery. And we've put advertisements on the wall on what the statute of limitations is. We have pro bono attorneys from our bar who have volunteered to come, not as advocates but to help negotiate the agreements. We put our discovery order right on the wall, where people can look at it -- "This is what I can get." It's all disclosed, so we teach them. Law clerks basically run it. You don't need a judge, although one of the five of us usually sits there and does a little orientation at the beginning as to what we're trying to accomplish. But if you think about it, all of our cases after that meeting are either default judgments, albeit not in the typical sense, they're dismissals with prejudice of creditors, they're agreements, or they're trial dates. Now, when we first did this, which side does everybody think balked? Didn't want to do this? The credit-card companies, right. The attorneys for the credit-card companies did not want this system. At least, their association wanted to challenge it. But now I can honestly report to you, after 10 months, that, I think for some of the reasons you suggested, Connell -- I think they're becoming fans, because they're coming out with money -- not paper judgments against people they can't find, but consent agreements. So, there it is, for what it's worth.

>> Julie Bush: Thank you very much, Judge Carpenter. I'd like to follow this by asking people about default judgments, as opposed to contested judgments, about what evidence tends to come into the court for these judgments, and whether any different standard ought to be applied. And I'd like to start with Mr. Pittman.

>> Dale Pittman: Well, is this a segue from the prior topic into this, but to the extent that a record is created out of this, I don't think that the record should be left to reflect on paper that there's one happy world out there where we're all on the same page that no one is building business model to seek defaults. I just finished suing a debt buyer in Virginia, a Virginia debt buyer, with an in-house collector. And here's their business model. They buy a debt from another debt buyer,

knowing that they don't have media. The debt buyer from whom they buy it does not have media. So, they send out a 1692g notice that does not say, "In order to obtain verification, you have to make a written request." It says, "If you want to obtain verification, let us know." And if someone calls during the 30-day validation period, they say, "Well, we'll see what we can get." As soon as the 30-day validation period runs, they're not going to give anything because you didn't make a request in writing, and they simply avoid ponying up proof. If anyone comes to court, they're going to dismiss, because they can't -- they can't get the proof because it doesn't exist either with them or the people from whom they've purchased it. And so I think I submitted that complaint before. If not, I'd like to submit it for the record. But that is a model designed solely to lull somebody into suffering a default judgment. And this is a company that does this all over the state of Virginia. They've been around a while.

>> Julie Bush: Okay. Thank you. Mr. Olshan?

>> Adam Olshan: Thanks, Julie. It seemed that there was consensus on the San Francisco panel. It seemed there was consensus this morning with regard to what should be in an initial pleading. There isn't going to be consensus on this panel, and that's okay, because I think that the location this conversation should occur at is the state level in those collaborative bench/bar discussions. There are 12 states that have launched these sort of conversations, and I applaud those 12 states. I think that the FTC should encourage state judiciaries to kick off that very mechanism, to ensure that all the local stakeholders are right there at the table to have this conversation to decide what, at the local level, should be included in the initial complaint. I certainly have my opinion, which I've shared already on the record. I think that this decision should be made state by state. I was part of the Connecticut decision and the Massachusetts decision, and I think that 40 other states -- well, there's 10 others that have also begun the conversation. There's 38 that need to start the conversation. Transparency is the goal. Communication is the goal. We've talked about this. As Brian talked about the mill towards defaults, I think that there was a recent newspaper article about, we live by defaults. All we want to do is communicate. And that's what I've discussed at the local bench/bar conversations I've been part of. Judge Fisher mentioned for New York that there's boxes of paper out in the hallways. That same topic was brought up at the bench/bar conversations that I've been part of, that the age of paper has passed. We need to find ways for

there to be transparency through information in the pleading. And I would encourage the FTC to strongly recommend that every state begin a local bench/bar conversation where collaboration can occur.

>> Julie Bush: Thank you. Mr. Mitchell-Munevar.

>> Alexander Mitchell-Munevar: I would say just a couple things, both with respects to Massachusetts and in light of sort of how some of these proceedings are run and some of the challenges of the lack of participation on the part of debtors. I would support Mr. Bromberg's position that the standard in terms of what should be supplied along with the complaint, I think for all parties, it would make sense to me that should be set higher, for a couple of reasons. I mean, I hear the arguments as it resolves around being able to attack the sufficiency of the evidence. But given the fact that debtor participation is so low, that opportunity may not necessarily present itself. Also, unfortunately, in Massachusetts and most of the -- a lot of these actions are being brought in small claims. And even under the current rules, no discovery shall be allowed except upon good cause that's shown. And so either the debtor would have to affirmatively move for discovery and have that be at the discretion of the clerk magistrate to be approved, or have to affirmatively move this case over to the civil docket. Now, that's not necessarily an issue on the debt collector's side. I think it just raises part of the problems within Massachusetts that we have, given our current framework, in that there isn't an opportunity in which to have some of this back-and-forth discovery, and so that's why I would support an up-front submission of more documentation. But also, the reason why I think it would serve the debt collectors is because if, more than likely, these judgments are going to resolve in a default, not only do we want to set a standard that should be sufficient in order to maintain a default, but it seems like, at that point, once a default is issues and notice is given of judgment, that's where debtors seem to appear. And in order to not have these default later to be removed and later overturned, then you want to be able to at least set the standard and the benchmark that will support the underlying judgment.

>> Julie Bush: Yes, I'd like to ask you, Judge Fisher, to speak about the default systems in the state of New York that you've implemented.

>> Fern Fisher: Certainly. And let me say before I move on that I think all of the discussions today are in a particular context. Yes, this is an adversarial system, but it's an adversarial system that has changed dramatically in the last five years so that there are more self-represented litigants, or I call them unrepresented litigants, coming into the courts ever before. And I think the Chief Judge's Conferences have pretty much conceded the most pressing issue the state courts are facing are unrepresented litigants. So, if you're talking about transparency and rules and all those kinds of things that have to be discussed within the context of court system, particularly in this area -- the consumer-debt area -- where litigants don't have lawyers. So, they don't know what they're looking at when they get it in the mail, and that's what we have to address, and that's probably why we have so many defaults. In the state of New York, I'd say 98% to 99% of consumer debtors are not represented by counsel, so the counsel that are involved in this litigation -- there are a few that come into court, but most of them are policy making, who are fighting with Mr. Berman and people like that. So, they're not actually representing people in court, because of the cutbacks. With respect to default judgments -- and this is only the city of New York, not the state of New York, because I'm only in charge of the city of New York, which includes the Civil Court of the City of New York. We were slow to realize that the industry had changed, and there was no longer original creditors, but debt-collection agencies, third-party purchasers, now seeking defaults. So, when our numbers leapt -- and, I mean, they really did all of a sudden increased -- we at first didn't realize there were third-party purchasers, and so our rules stayed the same for a while, until we got on top of the issue. And so, as a result of concerns that judges were raising that came to the administration's attention that it was very clear that the third-party purchasers who were coming into court really did not have personal knowledge of all the books and records. They had personal knowledge of their own books and records but not all the books and records of the prior debt-collection agencies or even the original creditor. We began to look at our clerk's office operation. In New York city and New York state, there's a 70% default rate. Defaults are only processed through the clerk's office. They are not reviewed by a judge. In some states, I know they are reviewed by a judge, but not in New York state. And although we would like to maybe one day do that, given the fact that we have 300,000 cases and only 51 judges, that would be a little difficult for to us do hearings on every single default judgment. So, it's processed through the clerk's office. So, the directive I'm about to talk about is

a directive that we issued to the clerk's offices with respect to processing default judgments. When there is a third-party purchaser, that is a default -- the directive is DRP 182, effective date May 13, 2009. It is available on our website, nycourts.gov. And if you keep clicking around, you'll see directives of New York City. And you can just print it out, you can e-mail me, and I'll send it out to you. And this is a procedure that was only to apply to accounts that were purchased after September 1, 2009. And if you ask us why we picked 2009 -- September 1, 2009, it was somewhat of an arbitrary picking of the date, but we wanted to give the debt-collection agencies notice that they had to now file this procedure so that, for any account that they purchase, they have to follow this procedure. What it requires is affidavits establishing the business record -- a foundation for a business record for every single account and to establish a chain of custody, so that there has to be an affidavit from the original creditor establishing that the books and records are accurate -- you know, the typical business record foundation requirements -- and that the next purchaser has to have the affidavit. And then the final -- the final debt-collection agency that is in court actually suing has to establish a chain of custody for all of the sales and include all the affidavits from all the other debt-collection agencies. So, that has just gone into effect in September, and we do not give a default judgment to any plaintiff seeking a default that hasn't followed this procedure now. The other thing I think that Julie wanted me to talk about was the statute of limitations, which is also something that we're requiring on a default judgment application, that in the affidavit, or affirmation if it's an attorney applying for a default judgment, they have to indicate whether or not the statute of limitations has run or not. And we did that based on -- although, in New York state, it's an affirmative defense, our interpretation of federal law through our counsel's office is that we believe that they have to comply to the statute of limitations.

>> Julie Bush: Thank you. So, that gets that requirements for default judgments in general, and then it gets that requirements in particular for purchased debts. The first directive that you spoke about wanting applying to purchased debts, correct?

>> Fern Fisher: Purchased debts. Obviously, the original creditor has personal knowledge of the books and records -- their books and records -- so they will -- they've always put in an affidavit on that. These are for the third-party purchases.

>> Julie Bush: And I think Judge Nordlund wanted to follow up on that.

>> Lorraine Nordlund: Yes, I would like to say, I'm not suggesting that this was an easy process. Trust me, we had to beat some heads about this. But in essence, the overarching concern was the same, that we wanted to have -- all parties wanted justice to be done and for it to go forward with competent evidence. The disagreement was what constituted competent evidence. And one of the things that led to that was an apparent misunderstanding, that the charge-off -- for example, when a debt creditor buys this from a credit-card company and they're buying that charge-off amount -- that it almost created, in some of their minds, a new cause of action, separate from the original cause of action. And the one thing that we kept going back to and eventually we were able to get our point across, and that is that an assignee has no greater rights than the original assignor. And we kept having to beat this into their heads. Think about the doctor's office that sues, and they're asking for interest and attorneys' fees. They don't get those "extras" of the higher interest rate or the compounded interest rate or the attorneys' fees unless they can prove that they have a contractual right to those. They may be able to get the original claim by bringing in those bills of services rendered, but they aren't going to get all those extras unless they can prove a contractual right to that. That was the thing that we had to keep pressing, because the other point that we were making was, understand, that charge-off amount isn't just principal. It's a compounded principal. It includes the overdraft fees. It includes the finance charges. And that many times, the final bill, it has no relation whatsoever to the actual principal. And so what we indicated to them was, "In order for you to be able to get your compounded-interest sum that you've purchased, you're going to have to establish how it got there," the fact that they were entitled to that amount, and all of the things that were included in that. And this came about because of the National Banking Act and Marquette, which indicated that all of the rights or all of the laws that came from the home state would be imported to our state. So, as a result, there was no more usury provision in Virginia that could prevent these higher interest rates. There was still -- There was nothing -- If a home state allowed compounded interest without proof of that contract or without establishing the contract, we were going to have to go ahead and accept that. So, I'm just saying that this was something we had to do, and also, it's also the reason why the Virginia Supreme Court asked our court to come down and speak at the mandatory conference, because there was

this amazing split in the urban versus rural areas of Virginia, where, many times, people were coming in with these very basic pleadings and getting default judgments, whereas in Fairfax, there was the Fairfax rule. And so they wanted to encourage some consistency among the different parts of the state.

>> Julie Bush: I'd just -- I'd like to ask our North Carolina panelists if they can say a little bit about how things are treated differently for purchased debt in North Carolina now.

>> Jerry Myers: I'll be glad to talk. Yeah, we do have a new law in North Carolina that became effective October 1, and I would not offer it as a model statute for other states. It's very sweeping in its breadth. It was apparently debated very little, according to the observations I was able to make. Its underlying policies were actually very good, and the underlying policies, I think, were, to use Adam's words, make things more transparent, to make it clear who was the owner of the debt, to make it clear what the balance is, and to provide the kinds of evidence that give people some assurance that what is being sought is actually proper. But as is often the case, the devil is in the details, and if you read this act -- and I won't go through the whole thing, because there are parts of it that really aren't relevant for purposes of talking about litigation today -- but if you just go through the litigation parts, there are pieces that are hard to reconcile. For instance, one of the requirements is that you must have, for your default judgment, the original creditor's account number. Well, there's another North Carolina statute that says you can't put that in the public record. How is a debt purchaser to get a default judgment in North Carolina now? Because you can't comply with both of those statutes. You're going to violate one or the other. You need the original creditor's name. Certainly, that's available. The amount of the original debt -- the smart aleck in me wants to say that the original amount on any credit-card account is zero, because that's the way it begins. And so I don't know what the original amount of the debt is. That's something that we're hoping someone can explain to us. An itemization of charges and fees claimed to be owed and the charge-off amount -- well, which is it? Are we going to agree that the charge-off amount is a reliable number? Are we talking about itemization of things after charge-off or things before charge-off? It's hard to tell from looking at the statute exactly what is being sought. The amount of interest claimed and the basis for the interest charged. Well, if you're seeking statutory -- I mean, excuse me -- contractual interest, then, certainly, you need to attach

the contract so that one can understand how the charges are calculated. But it's an interesting statute. It appears to have been rushed through the legislature, and it's -- I won't say indecipherable, but it's hard to understand.

>> Julie Bush: Ms. Martin, would you like to comment?

>> Angela Martin: Just briefly. Actually, the better proponent for this would be Carlene McNulty, who was on an earlier one. [Cellphone playing song] [Laughter]

>> Female Speaker: That's a great song.

>> Male Speaker: Don't want to turn it off. I'm sorry.

>> Female Speaker: Nice ringtone.

>> Male Speaker: Yeah, it is good.

>> Angela Martin: I love the North Carolina statute. I think every state should rush to it even faster than North Carolina allegedly has. The great part about this statute, for my part as a consumer advocate, is -- I think it protects the original creditors to a great deal and any assignee that actually has the documents. The problem is that they don't have the documents, and that's what the problem is for them. To my knowledge, since October 1st, not one debt-collection suit has been filed in North Carolina. When Mike Bonner, who is the general counsel for LVNV, called me when he found about its passage, I assured him that there were 49 other states that he could still do business in and he would probably be fine.

>> Adam Olshan: Is that debt avoidance or consumer protection?

>> Angela Martin: I think it's justice. I think it's justice, and this is why. For some reason in North Carolina in debt defense -- and I presume it's that way around the country -- there's a different evidentiary model for all other types of cases than debt defense. It's as if -- If the perfect

number were seven, then the debt-collection model would be 6.9. It almost looks believable, so much that a regular attorney might not even realize how wrong it is to try and accept that affidavit at face value. How wrong it is to accept anything with David Rosenberg's -- one of his nine signatures on it in any state in this court -- or in this country. And, also, the chains of titles we have seen, it goes from -- the one affidavit says directly to the debt purchaser, and then in that very same case, they come forward, and the chain of titles shows actually there were intervening ones, so which is it? Do you have it both ways or not? And I just think the evidentiary model for debt collection should be the same as for anybody else. You have to have competent evidence. You have to have -- When you say about debt avoidance, that really irks me in a certain respect because I think the original creditor could have sued on it even earlier and had better records, the records that I would say need to be done. They stand in much better shoes to prove up the records competently in a court for the record and in a court. They're the ones -- So, debt avoidance -- no. Why does a debt collector hang on to the debt exactly to the 3-year mark in North Carolina and then to the 10-year mark in another state and the 5-year mark in the other states. Where is the avoidance? Or is that the laches that Eric was talking about?

>> Adam Olshan: Angela, I think it's tough to use anecdotes like that because I know many clients that will sue quickly at charge-off or, in many cases, before charge-off.

>> Angela Martin: I'm in favor of that.

>> Adam Olshan: And that does happen. I don't think that it's fair to paint with such a broad brush with that sort of anecdotal evidence. As you mentioned, though, there's no lawsuits since October 1st.

>> Angela Martin: Jerry, is it true? Do you know of one?

>> Jerry Myers: I'm not aware of any lawsuits.

>> Female Speaker: Carlene, debt-collection lawsuit since October 1st in North Carolina? Right, no debt buyer.

>> Julie Bush: I'd like to hear very quickly from Miss Bender, but we're in our final five minutes of the panel and then Devin Murphy is going to come and hopefully help you -- help you give us advice about what actions should be taken in light of what we've uncovered here today. But Miss Bender.

>> Leslie Bender: I just wanted to follow on what Ms. Martin said, and I think that as an industry -- I'm a member of ACA International. I'm one of 800 attorneys who are members of ACA International. I also have served on ACA's Ethics and Professional Responsibility Committee which receives and vets and resolves complaints from consumers and businesses against its members. And this issue of data or media retention is a very big issue and has been a big issue for our association. And we are currently supporting legislation on Capitol Hill right now that would require original creditors and any subsequent creditors to retain all of those exact things that you're talking about. So either debt collectors or debt buyers could subsequently receive and continue that chain of information. And it would be great if the consumer advocates were interested also in supporting this type of legislation because I think that it's very important to point out two things. First, all debt collectors aren't debt buyers. In my own space, there are very few debt buyers. I do not service for any debt buyers because there just really aren't very many in healthcare. Number two, we want, as an industry -- debt collectors and debt buyers -- we want the media. We would love to get the media. We would love for there to be an industry standard, but we often find ourselves in a spot where what we get is only what the creditors, just as Your Honor pointed out, we have no more rights than the prior creditor had or prior assignee. But we similarly -- if our creditors or the sellers are not retaining the media, then it disadvantages us, and we end up being the bad guys at the end of the day. So I would like to mention that this legislation is something we are supporting as an industry and that perhaps that is something that people from all sides of this table in this room can gather around and be supportive of.

>> Adam Olshan: And, Julie, they don't have the docs because they rely on the charge-off balance. The doctor bill of \$1,800 is very different than that bank charge-off of \$1,800 because that bank is so heavily regulated, where the doctor's office is not so much. That bank is regulated. The treasury's here. They'll stand up and they'll tell you that they're OCC, and the FDIC will

heavily regulate so that these banks rely heavily on that charge-off balance, which then is either attempted to be collected or it's sold.

>> Julie Bush: Okay. Miss Drysdale had a quick point.

>> Lynn Drysdale: Yes. The only thing I wanted to mention because something Mr. Loftus said struck a real raw nerve with me, and I notice that clinics was one of the last topics in our section. I think consumer knowledge is a really important part of the process, and Judges Fisher and Carpenter mentioned that with the conciliation and their prospect. But I know Mr. Loftus said that they would love to have the legal aid attorneys there. Well, in Jacksonville where I practice, we wanted to set up a pro bono program where legal attorneys came and spoke to the defendants at the small-claims hearings, and we met with the judges, and then the president of the creditor's bar wrote a four-page scathing letter about how we were going to be doing solicitations, we were going to be impeding the efficiency of the court, and came out very strongly against us being able to speak as pro bono attorneys and nonprofit attorneys to the defendants. So I guess my question there is, why not? And what are they afraid of? Because they're also trying to streamline and almost get rid of the small-claims pretrial process through the Florida Bar Small Claims Rules Committee.

>> Connell Loftus: I can't speak to what happened in Jacksonville. I can only speak from my own experience. In the jurisdiction where Judge Nordlund sits, right across the river in Fairfax County, the legal-services folks have been there for years, for the entire time that I've practiced. And my dealings with them have been helpful. They've been helpful. They've informed us of defenses, and they've told us when their folks are in a position to work out a deal. So I can only speak from my own experience, and I didn't mean to step on you in Florida.

>> Female Speaker: I'm being told we have to stop. I'm very sorry. The time is up. But Miss Murphy is going to follow on the panel.

>> Female Speaker: Can everyone hear me? Okay, well, I regret to inform everyone -- in case anyone has been tuning out for the past hour and 45 minutes -- we have not really reached

consensus on many of the issues. State the obvious. However, what we have seen is that there are a number of different states and different organizations trying a number of different methods and models and best practices. And I think that we will be able to learn a lot from those, as well as any additional information that I know a lot of you have mentioned and indicated your intents to submit. So we have heard a number of different standards and models. And these vary from, I think what's been called -- what could be considered "notice pleading." Twombly was referenced. I think it was also called "name, rank, and serial number." So we've seen everything, going from a more sort of bare-bones, pleading style to a request or concerns expressed by others, that we really need to have more evidence and more information produced in the complaints -- an itemization of information, such as account numbers. Original creditors would be helpful. In fact, we also heard, that even beyond information, some expressed the concern that we need documentation attached, as well as just the information. We certainly heard a lot of what I'll call challenges or concerns or issues expressed. And I think, one, is that, in fact, in general, these issues aren't often expressed because we have this issue of a lot of default judgments. So sometimes this isn't even discussed because the adversarial system is not what it is in cases where there are not default judgments. We heard some concerns expressed about written contracts and whether these should be required, and in fact how the advance of technology might affect this, whether there are still written contracts in, for example, telephone or Internet transactions. We heard some concerns expressed about -- Should there be, either because of current requirements or additional requirements, whether these can be balanced with a number of other legitimate concerns, such as personal privacy or HIPAA concerns in the medical context. There was a discussion of whether there should be different standards for default judgments versus judgments where a defendant does show up. We discussed the importance of using the day of charge-off. And although there was no consensus there, specifically, I think that most could agree that this could be used as a starting point and that it is an important issue, to determine to use this date of charge-off. And finally, there was a discussion of the various goals and incentives of all the parties involved. I know there's dispute over whether an informed consumer is really a goal that all parties have. But I like what Judge Nordlund brought up -- that, you know, despite differing perhaps goals or opinions, at least in Virginia, the attorneys and members of the bar and all the various stakeholders were able to work together and to come up with at least a model that can be used and tried. If anyone disagrees with anything I said, please speak up now, but be aware that

you're holding everyone else from their break, so use it wisely. Does anyone have any disagreements with what I've said? Okay, then, in that case, we're gonna be taking a break and returning at a time Julie will announce.

>> Female Speaker: I think it's 3:45.

>> Female Speaker: Yes, for garnishment, thank you.

>> Female Speaker: Garnishment panel. [Indistinct conversations]