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Vermont House Commerce and
Economic Development Committee
Vermont Statehouse
Montpelier, Vermont

April 5, 2017

Dear Committee Members:

Thank you for your invitation to testify by phone at the hearing on H. 482, entitled Fair Credit Card Debt Collection, on April 6. I am submitting these written comments in advance for your convenience. I believe this bill contains some excellent ideas, but I have concerns about other aspects of the proposal.

I support the idea of an advance mailing prior to initiating litigation. I expect it would lead to some cases getting resolved prior to suit. If nothing else, it would let the potential defendants know what credit card was at issue even if a different company now owns the debt. This is often an area of confusion for debtors. In addition, sending the potential defendant the "Declaration of Inability to Pay," may save time and money for everyone if the creditor determines early on that the debt is not worth pursuing based upon the consumer's financial status. However, there is often a misconception (exacerbated by use of the term "judgment proof") that people are immune from a judgment if they do not have the ability to pay. This is incorrect: the plaintiff who can prove its case is still entitled to a judgment. The issue is whether they can currently take any court enforcement action to collect on that judgment. If a debtor is currently receiving government benefits but next year is not, the debt can be collected next year. Thus, to avoid confusion, I would suggest any notice explain this.

I like the idea of a prepaid envelope for mailing the Declaration of Inability to pay back to the Plaintiff, but it does not make sense to have the defendant also mailing the form to the court because this is at a pre-suit stage and a case may never get filed. In that event, we would have forms floating around that did not have a case file.

I wholeheartedly support deleting the reference to the federal minimum wage. Our Vermont minimum wage is higher, and represents the considered judgment of the legislature of Vermont as to the benchmark of what is the minimum income needed to survive. That is the figure we should be using.

I am puzzled by section 4051(b), which refers twice to subsection (a)(1). I suspect the second reference was intended to say that if the prospective defendant disputes the debt, the creditor must cease action until it sends the documents described in subsection (a)(1)(G).

I have several concerns about section 4052(3), which would set a trial in every case even when the defendant did not answer, and require the court to send notice to the defendant. Under normal practice in civil cases, no hearings are held if a defendant does not file an answer, with the exception of certain special cases such as rent escrow hearings or preliminary injunction hearings. There are two issues here: whether a trial should occur if no defendant answers, and how notice of such a hearing would get to the defendant.

As to the first issue, we do not typically have trials if no answer has been filed. Instead, default motions are filed. There is no reason to take up court trial time, or require witnesses to come to court, if no one is contesting the claims. Plaintiff should not have to bring witnesses (from out of state especially) if defendant never appears—that is what default motions are for. I do not

believe it is appropriate to single out this one category of cases and require the plaintiffs to come to trial when there is no defendant involved in the case.[1]

I do strongly support the idea of trying to get defendants more actively involved, as these cases are ones in which many defendants never respond at all. On a gut level I believe that getting a notice of a court hearing at the same time you get your summons and complaint may get more people to participate. Thus, in the Civil Division I would support a proposal to set an initial status conference in each of these case as soon as they are filed, to encourage people to come in to discuss the case with the judge and the plaintiff. I expect that if we can get them in the door and explain their options, many more cases can get addressed in some way other than a default judgment. I do not believe adding status conferences in all *Small Claims* cases is a workable proposal, however, because we have limited hearing time and judge time for these cases, which are handled by lawyers or Assistant Judges. Instead, I believe that requiring clearer default motion filings in all cases – to assure that all of the required elements are met – would be a better approach.

The other issue is how a notice for either a trial or a preliminary status conference, whichever you settle on, would be served. In other cases in which a hearing is set before any answer is filed, such as rent escrow hearings and preliminary injunction hearings, the court issues the hearing notice and it is the Plaintiff's responsibility to have it served upon the defendant by sheriff. Section 4052(3) says the court shall mail the defendant a hearing notice even if no answer is filed. WE DO NOT HAVE A VALID ADDRESS FOR A DEFENDANT IF HE/SHE HAS

[1] Moreover, even in cases in which a defendant does respond, the idea of setting a trial in every case in the Civil Division as soon as it is filed is unfair to both sides. Neither will likely be ready for trial right at the start of case. They may need discovery, we want them to talk, and the best way to address that with pro se parties is a status conference. Setting a trial right away as the first step in the case would deprive the parties of their rights to discovery. Small Claims court cases do not have discovery, but regular Civil Division cases do. In addition, parties in the Civil Division have the right to file motions to dismiss or for summary judgment, and setting an immediate trial in every case would skip those steps as well.

NOT ANSWERED. Any notice of a court hearing in a case where we do not have an answer from the defendant needs to be done by sheriff's service to assure they get it. I would suggest that the statute say that the court shall issue a hearing notice for a status conference as soon as a case is filed, and plaintiff shall serve that notice on defendant by sheriff. Ideally it would go with the summons and complaint and the statute would require that it be the *top page* of the service packet so they don't miss it. However, I understand that often the plaintiffs in these cases try to serve defendants first and file the complaint later, so that if the sheriff cannot locate the defendant they have not paid the court filing fee in vain. Thus, although I prefer having a notice served *with* the summons and complaint, the alternative would be to have the hearing notice served (at plaintiff 's expense) after the case is filed, as sheriff's service costs less than a court filing fee.

One other suggestion. In Small Claims cases, the rules require that the plaintiff include a blank answer form for the Defendant's use in the packet of papers served with the summons and complaint. I believe that requiring two blank answer forms (one to send the Plaintiff and one to send the court) with the cases filed in the Civil Division might also increase the number of responses, as it would make it easier for defendants to understand what they were expected to file. Stealing an idea from the earlier part of the bill, I think it would be an excellent idea to also require prepaid, preaddressed, envelopes for the Defendant to mail the answer to the court and to the Plaintiff.

The idea (in section 4052(7)) of staying the running of post-judgment interest while a defendant remains exempt from collection makes sense, as arguably it is unfair to penalize someone for not paying if they truly cannot afford to do so. I also support the proposal to require disclosures about how long it will take to pay off the debt at various payment levels, as

unsophisticated debtors do at times agree to such low payments that they will never pay off any principal.

A few other comments. In section 4052 sections 5, 6(A) and 6(B), which address the burden of proof and calculations of interest impacts, I would suggest adding "or in a default motion" after "trial." We need the same proof either way.

Section 4052(7)(A) directs the court to determine whether the defendant's income is exempt from collection. I would suggest saying: "*If possible*, the court shall determine …" We cannot make such determinations if the defendant fails to appear.

Section 4053, addressing Post-Judgment Collection, uses the term "wage assignment." Perhaps the term "wage garnishment" would be clearer to non-lawyers.

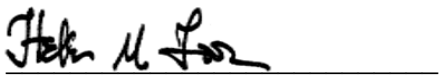
Section 4055(1) would require Plaintiff to make ongoing attempts to collect on a judgment before renewing it for another eight years. Is it necessarily beneficial to either side to require ongoing attempts to collect if a creditor wants to renew a judgment in the future? What if the defendant is collection-proof now so Plaintiff *cannot* take any action? Why should they lose the right to do so in future if the Defendant comes into a better financial situation? What if the creditor wishes to be kind to a defendant who is going through cancer treatment or a divorce, and would prefer to delay collection?

Lastly, section 4055(2) would bar a creditor from renewing a judgment if the creditor could not prove it "has the present intent and ability to file a judgment lien against the defendant." My understanding is the only lien this refers to is one filed in the land records. If a defendant owns no land, the plaintiff cannot meet this requirement. Why should the fact that a defendant owns no land bar the plaintiff from trying to collect through other means?

I take no position on the penalty section of the bill, which I believe is a policy judgment for you to decide.

One other matter. Often when new laws go into effect that require changes to our practice, they throw the judiciary into a rush to change procedures, create new forms, change computer coding, and train staff about the changes in a very short period of time. Ideally, the effective date of the law could be delayed several months – until October 1, for example, rather than July 1. Thank you for the opportunity to comment. Please let me know if I can be of any further assistance.

Sincerely,



Helen M. Toor
Superior Court Judge