JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on September 14–15, 2017

Title
Civil Practice and Procedure: Request for Entry of Default

Rules, Forms, Standards, or Statutes Affected
Amend Cal Rules of Court, rule 3.1800; adopt form CIV-105; revise form CIV-100

Recommended by
Civil and Small Claims Advisory Committee
Hon. Raymond M. Cadei, Chair

Agenda Item Type
Action Required

Effective Date
January 1, 2018

Date of Report
August 24, 2017

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Executive Summary

The Civil and Small Claims Advisory Committee recommends adopting a new mandatory form for requesting entry of default and default judgment in cases subject to the Fair Debt Buying Practices Act, which imposes a number of requirements that debt buyers who purchase charged-off consumer debt must meet in order to pursue collection efforts and seek a default judgment against the debtor. The committee also recommends revising the current form for requesting entry of default and default judgment in all other civil cases, and amending the rule regarding default judgment to include references to the new form. The new form will assist litigants and courts by listing the extensive statutory requirements for a default judgment under the act. Both forms also include a revised declaration of nonmilitary service.

Recommendation

The Civil and Small Claims Advisory Committee recommends that the Judicial Council, effective January 1, 2018:

1. Amend California Rules of Court, rule 3.1800, which currently provides that form CIV-100 must be submitted in support of a default judgment on declarations, to authorize and require the use of new form CIV-105 in actions subject to the Fair Debt Buying Practices Act;

2. Adopt *Request for Entry of Default (Fair Debt Buying Practices Act)* (form CIV-105) to provide a form for requesting a default judgment in cases subject to the Fair Debt Buying Practices Act; and

3. Revise *Request for Entry of Default (Application to Enter Default)* (form CIV-100) to provide notice that the form is not for use in actions subject to the Fair Debt Buying Practices Act, and to clarify the declaration of nonmilitary service by revising the language of the declaration and including the state law definition of military service.

The text of the amended rule and the new and revised forms are attached at pages 12-17.

Previous Council Action

The Judicial Council adopted rule 3.1800 of the California Rules of Court in July 2000. In 2005, the rule was amended to authorize, in unlawful detainer cases, the use of a specific optional form in addition to mandatory form CIV-100. In 2007, the rule was reorganized and renumbered.

The Judicial Council adopted the precursor to form CIV-100 on July 1, 1971. In 2005, the form was revised to state that the memorandum of costs (item 7) must be completed if a money judgment is requested, and to reflect federal legislation renaming the law on which the declaration of nonmilitary service (item 8) is based. The form was renumbered in 2007.

Rationale for Recommendation

Background

The Fair Debt Buying Practices Act, Civil Code section 1788.50 et seq., which took effect January 1, 2014, imposes a number of requirements on debt buyers pursuing collection efforts including that no default judgment may be entered against a debtor defendant unless the debt buyer plaintiff submits certain documents, authenticated through a sworn declaration, to establish specified facts. (Civ. Code, § 1788.60(a), (b).) If the debt buyer has not complied with the act's requirements, the court cannot enter a default judgment for the debt buyer. (§ 1788.60(c).) Last year, the Attorney General expressed concern about a large number of default judgments being entered across the state for plaintiffs who had not complied with the act. To address this, the Attorney General suggested revising *Request for Entry of Default (Application to Enter Default)* (form CIV-100) to add an item to alert the court and parties seeking a default that compliance with the act may be required.

A proposal with a revised version of form CIV-100 that included an item regarding the act circulated for public comment in 2016. The majority of comments received on that proposal expressed the strong sentiment that the revisions to form CIV-100 did not do enough to ensure that all statutory requirements under the act would be met before a default judgment was entered. The committee substantially revised the proposal based on the comments received in 2016, and recirculated the revised proposal in spring 2017.

New form for default judgment under the Fair Debt Buying Practices Act

The committee is now recommending a new mandatory form specifically for requesting a default judgment in cases subject to the Fair Debt Buying Practices Act. The proposed new *Request for Entry of Default (Fair Debt Buying Practices Act)* (form CIV-105) is modeled on form CIV-100, but, in addition to containing all of the general civil default judgment requirements, it also includes new items 3, 4, and 5, which specify the statutory requirements for a default judgment under Civil Code section 1788.60. Item 3 requires the party seeking a default judgment to state that the action is not barred by the statute of limitations (Civ. Code, § 1788.56). Item 4 lists the required allegations of the complaint, all of which must in fact have been alleged for a debt buyer plaintiff to obtain a default judgment (§§ 1788.58, 1788.60). Item 5 lists the documentation requirements for a default judgment, all of which documents must be submitted with the request for default judgment (§ 1788.60).

Revised form CIV-100

To reflect the proposed adoption of new form CIV-105, form CIV-100 would be revised to provide notice that it is not for use in actions subject to the Fair Debt Buying Practices Act.

In addition, the declaration of nonmilitary service on form CIV-100 would also be revised. (See form CIV-100 at item 8.) The current version of this declaration contains the confusing phrase "entitled to the benefits of," referring to the federal law that provides protection for military servicemembers who are sued in a civil action. The Attorney General suggested revising this language to (1) remove the "entitled to the benefits" phrase, which does not appear in the statute and has created confusion about whether such entitlement is an element a servicemember has to prove; and (2) include the state law definition of military service. The revised language in CIV-100 addresses these concerns. In addition, the revision to this item reflects a recent renumbering of the federal law. This updated declaration language has also been incorporated into proposed form CIV-105. (See form CIV-105 at item 9.)

Amended rule 3.1800

Rule 3.1800 currently provides that a party seeking a default judgment on declarations must use mandatory form CIV-100. The proposed amendment of rule 3.1800 authorizes an exception for actions subject to the act, in which case the party must use mandatory form CIV-105.

Comments, Alternatives Considered, and Policy Implications

External comments

The new proposal circulated for public comment between February 27 and April 28 as part of the regular spring 2017 invitation-to-comment cycle. Nine individuals or organizations submitted comments. Two agreed with the proposal, and seven agreed if the proposal is amended. Commenters included three superior courts, one judicial officer, the Attorney General's office, a state bar committee, a county bar association, two public interest organizations, and one law firm (which submitted a joint comment with one of the public interest organizations). A chart with the full text of the comments received and the committee's responses is attached at pages 16–66.

Based on these comments, the committee has further modified the proposal that was circulated. The main comments and the committee's responses are discussed below.

Comments on adding declarations to form CIV-105

The invitation to comment specifically asked whether the statement at item 3 on proposed new form CIV-105—"This action is not barred by the applicable statute of limitations (Civ. Code, § 1788.56)"—should be in the form of a declaration under penalty of perjury. Five commenters answered affirmatively: the Attorney General, two superior courts (Riverside County and San Diego County), the judicial officer, and the joint public interest organization/law firm. Two commenters said no: the bar association and the State Bar committee. Of those in favor of making item 3 on form CIV-105 a declaration under penalty of perjury, three commenters suggested that items 4 and 5 detailing the statutory requirements for a default judgment under the act also be made under penalty of perjury. Two commenters made the further request that a declaration be added to form CIV-100 to require the plaintiff to state under penalty of perjury that the action does not arise under the act (and thus that the plaintiff is using the correct form for requesting entry of default/default judgment).

The commenters who favor adding declarations to the forms contend that this will facilitate compliance with the act and provide a basis for both public and private enforcement in the event of noncompliance. Conversely, the two commenters who oppose making item 3 a declaration point out that the act does not require declaring under penalty of perjury that the statute of limitations has not expired, and there is no authority in the act as currently written for imposing such a requirement on the plaintiff.

The committee considered the comments but ultimately decided not to modify the forms to place further items under penalty of perjury. The committee is concerned about adding any sworn declarations that are not mandated by statute. The act explicitly requires a sworn declaration in only two instances, both of which pertain to authentication of documents. Civil Code section 1788.60 provides that no default judgment may be entered against a debtor (1) "unless business records, authenticated through a sworn declaration, are submitted by the debt buyer to the court to establish" specified facts; and (2) "unless a copy of the contract or other document [evidencing the debtor's agreement to the debt], authenticated through a sworn declaration, has

been submitted by the debt buyer to the court." (See § 1788.60(a), (b); items 2 and 5 on form CIV-105.)

Similarly, Code of Civil Procedure sections 585 and 585.5, which govern general civil defaults, specify the facts that must be supported by a declaration under penalty of perjury. Code of Civil Procedure section 585(d) provides that the court has discretion to permit affidavits in lieu of personal testimony as to all or any part of the evidence or proof required or permitted in cases referred to under subdivisions (b) and (c).[1] Code of Civil Procedure section 585.5 requires that every application to enter default under section 585(a) include an affidavit stating facts showing that the action is not subject to certain specified statutes. (See item 7 on form CIV-105 and item 5 on form CIV-100.)

Other declarations on forms CIV-100 and CIV-105 are also statutorily mandated. The declaration regarding a legal document assistant or unlawful detainer assistant is required by Business and Professions Code section 6400 et seq. (see item 4 on form CIV-100; item 6 on form CIV-105). The declaration of mailing is required by Code of Civil Procedure section 587 (see item 6 on form CIV-100; item 8 on form CIV-105). The declaration of nonmilitary status is required by Military and Veterans Code section 402 (see item 8 on form CIV-100; item 9 on form CIV-105).

Given that the Legislature has specified requirements for declarations in these other instances, in the absence of statutory language requiring a declaration with respect to the statute of limitations and the other items suggested by commentators, the committee presumed that the omission was intentional. The committee is, therefore, disinclined to recommend augmenting the statutory scheme by adding such a requirement by way of a Judicial Council form. If the proponents are so inclined, they may pursue their concerns through the legislative process.

Comments on whether a clerk may enter a default judgment under the act

As circulated for public comment, proposed new form CIV-105 retained the boxes found on current form CIV-100 that allow the filing party to request either a court default judgment or a clerk's default judgment. The committee received a number of comments regarding not only these check boxes, but also the overall topic of whether a clerk may enter a default judgment under the act. As discussed below, this issue was also raised in comments on the 2016 proposal and considered by the committee in developing the proposal that circulated for comment in 2017.

2016 comments and development of 2017 proposal. In 2016, 10 of the 15 commenters opined that the act requires a judicial officer to review the application and determine whether to enter a default judgment, and precludes a clerk from doing so. The commenters urged the committee to

[1] Code of Civil Procedure section 585(b) sets forth the procedure for obtaining a default judgment in actions other than those arising upon contract or judgment for the recovery of money or damages only (which are addressed in subdivision (a)). Code of Civil Procedure section 585(c) sets forth the default judgment procedure for all actions where the service of the summons was by publication.

decide the issue and modify the proposal to make clear on the form that only judicial officers may enter default judgments under the act.

In drafting proposed new form CIV-105 that was circulated this year, the committee considered this issue and the concerns expressed in the 2016 comments. The committee noted that the act does not expressly exempt defaults from being handled by clerks and specifically states that the general statutory framework for defaults applies, except as provided in the act. (See Civ. Code, § 1788.60(d).) Under the general statutory framework for defaults, depending on the case and the supporting evidence, civil default judgments may be entered by either the clerk or the court. (Code Civ. Proc., § 585.) Clerks are authorized expressly to enter judgments in actions arising on contracts or judgments for recovery of money only. (Code Civ. Proc., § 585(a).) The committee also found it significant that different courts across the state handle requests for default judgments under the act differently: some require a judicial officer's review; others allow clerks to enter default judgments. Ultimately, the committee concluded that deciding this issue and incorporating that decision into the new form was beyond its purview. The 2017 invitation to comment acknowledged that the act is silent on this point and stated that proposed new form CIV-105 does not attempt to resolve this question.

2017 comments. In response to this new proposal, the committee received comments on the clerk's judgment/court judgment question from commenters on both sides of the issue. The Attorney General and both public interest organizations contend that only a judge is able to evaluate the evidence, determine whether the declaration properly authenticates business records, and determine whether the claim is barred by the statute of limitations. In their view, such review far exceeds the ministerial tasks a clerk may perform. In their comment, Public Counsel/Alston & Bird LLP point out that allowing the courts to handle these cases differently leads to inconsistent results.[2]

On the other side of the issue, the judicial officer, who handles a large volume of these cases in one of the collections hubs in the Superior Court of Los Angeles County, contends that form CIV-105 should explicitly permit clerks' review of default applications. His court processes an average of 800 defaults per month, the vast majority of which are subject to the act. As to these cases, the commenter stated, "[T]he court ordinarily does not need to assess the evidence, but rather can take judicial notice that records obtained from such a lender [a federally-regulated banking institution] and authenticated either by the lender itself or by the purchaser are business records that establish a prima facie case supporting a default judgment. [Citations.]" In this commenter's view, the review of the evidence is within the scope of evaluations court clerks already perform. He acknowledges that in cases that are more complicated, court review may be

[2] The commenters cite the example of two very similar cases—one in San Diego County and one in Alameda County—filed by the same debt buyer plaintiff, containing similar documentation and declarations but reaching opposite results (default judgment entered by the clerk in San Diego; rejected by a judge in Alameda). (See summary of exhibits provided by the commenters at the end of the comment chart.)

required. The commenter indicates that he "has seen no evidence to support the belief that [fraudulent debts leading to consumer hardship are] common."

The Superior Court of Riverside County comments that the clerk's judgment/court judgment "is an issue that needs to be resolved," and illustrates the difference using the statute of limitations as an example: a clerk can verify that the plaintiff asserts the statute has not expired; only a judicial officer can make the determination that, in fact, it has not expired.

Committee review and discussion. As part of considering these comments, the committee discussed at length the requirements of the act for default judgments and the legislative history of the act.[3] As before, the committee noted that the act does not expressly preclude clerks from entering default judgments and expressly states that the general statutory framework for defaults and default judgments, i.e., Code of Civil Procedure section 585, applies, except as provided in the act. (§ 1788.60.)

The legislative history of the act indicates that the development of the final statutory language took years of work and negotiations among interest groups.[4] The act was originally introduced as Senate Bill 890 (SB 890) in 2011, but that bill died in committee in late 2012.[5] The following year, provisions substantially similar to the final version of SB 890 were reintroduced in an amended version of Senate Bill 233 (SB 233).[6] After further amendments, SB 233 ultimately was signed into law as the Fair Debt Buying Practices Act.

Consumer groups and debt collectors groups were actively involved in negotiations over this proposed legislation. The initial Senate Banking Committee analysis of SB 233 states:

> The provisions of this bill are substantially similar to provisions of SB 890 (Leno), a bill that was extensively debated during the 2011-12 Legislative Session, and which was ultimately amended to reflect a compromise between the author, sponsor [the Attorney General's office], debt buyer, and debt collector industries. SB 890 ultimately failed passage in the Assembly Banking & Finance Committee, due to opposition from the California Bankers Association. SB 233 builds on the compromise reached last year with the debt buyer and debt collector industries.[7]

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[3] To date, no appellate court has addressed the issue of a clerk's authority to enter a default judgment under the act.

[4] The legislative history of SB 890 is located at http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=sb_890&sess=1112&house=B&author=leno

The legislative history of SB 233 is located at http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=sb_233&sess=1314&house=B&author=leno

[5] April 15, 2013 Senate Banking Committee Analysis, page 5.

[6] *Ibid.*

[7] *Ibid.*

As might be expected, the proposed language of the act evolved during the legislative process. Relevant to the topic of the issue raised by commenters, the language in section 1788.60 regarding evidentiary and documentation requirements for a default judgment changed substantially. In the May 27, 2011 version of SB 890, section 1788.60(a) would have required the debt buyer plaintiff to provide, prior to entry of judgment, "admissible evidence satisfactory to the court to establish the amount and nature of the debt and the identity of the debtor …." Section 1788.60(b) provided that the only evidence sufficient to establish the amount and nature of the debt "shall be properly authenticated business records that the court determines are sufficient to satisfy the requirements of Sections 1271 and 1272 of the Evidence Code." Subdivision (d) of section 1788.60 required the debt buyer to plead and prove that the applicable statute of limitations had not expired, and required the court to determine "on the record that the applicable statute of limitations ha[d] not expired."

One year later, in the June 17, 2012 version of SB 890, section 1788.60(a) and (b) provided that "no default or other judgment may be entered against a debtor unless authenticated business records have been admitted into evidence" to establish the facts regarding the debt and unless a copy of the contract is "admitted into evidence." The section no longer contained a provision requiring the debt buyer to plead and prove that the statute of limitations had not expired.

Following further amendments, in the June 27, 2012 version of SB 890, subdivision (a) no longer required that the business records had to have been admitted into evidence. Instead it provided for "business records, authenticated through a sworn declaration" to be "submitted by the debt buyer to the court to establish the facts …." Similarly, the requirement in subdivision (b) that a copy of the contract be admitted into evidence was revised to require that an authenticated copy be "submitted."

The April 1, 2013, version of SB 233 incorporated the same proposed language for section 1788.60 as the June 27, 2012, version of SB 890, except that it now included as subdivision (d) the provision that "[e]xcept as provided in this title, this section is not intended to modify or otherwise amend the procedures established in Section 585 of the Code of Civil Procedure." Section 1788.60 was not further amended before becoming law.

This legislative history indicates that language which would have more explicitly required the kind of evidentiary showing and evaluation that commenters suggest is required under the act was considered by the Legislature, but was eliminated from the bill that was ultimately proposed and enacted.

Committee conclusion. The committee concluded that the language of section 1788.60 could be interpreted as the commenters urge, that is, to require a judicial officer to make evidentiary findings in a default judgment prove-up hearing. However, given the language of the act and the legislative history, the committee was not convinced that this is the only reasonable interpretation of the statutory language. In the committee's view, the text of section 1788.60 also

could be interpreted as requiring the submission of appropriate documents and declarations such that a clerk with a checklist could enter a default judgment in an appropriate case.

The committee agrees with the Superior Court of Riverside County that clarification of this issue would be helpful, but, given the considerable legislative effort required to adopt the current act, any such clarification should come from the Legislature or in the form of case law interpreting the act. The committee feels strongly that resolving this issue, which was not directly addressed in the legislative process, and which has far-reaching implications for litigants and the superior courts, is not an appropriate undertaking for the committee. In light of this conclusion, the committee made other revisions to the form to ensure that the form is neutral on this issue.

Other comments regarding proposed new form CIV-105

Item 1(d) parenthetical. The bar association suggested adding a reference to Code of Civil Procedure section 585(d) to the parenthetical, to conform to CIV-100. The judicial officer objected to the parenthetical on the ground that it implies a court judgment. The committee concluded that the reference to the court entering judgment on an affidavit is not necessary on form CIV-105. Consistent with removing references to court judgments and clerks' judgments, this language has been deleted from the item 1d parenthetical.

Item 3 dates. A court suggested adding space for the date of accrual and the date of filing of the original complaint to facilitate consideration of the statute of limitations requirement. The committee declined to make this revision on the basis that this information is already provided: the date the complaint was filed is required in item 1 and the date the cause of action accrued will be stated in the complaint and contained in the attached documentation.

The language of items 4 and 5. Two commenters suggested that the committee conform the language in items 4 and 5 to the statutory language. The committee agreed and these items were revised.

Item 4: copy of the contract. One commenter suggested that item 4 include a statement that a copy of the contract (or other document evidencing the debt) is attached to the complaint, which is required by the act. The committee agreed and this statement was added as item 4b.

Trace the chain of title. The judicial officer suggested that, consistent with the practice in his court, form CIV-105 require the plaintiff to trace the full chain of title of the debt with documents authenticated through a declaration. The committee declined to modify the form in this way because the form already requires this information (the names and addresses of all persons or entities that purchased the debt after charge-off) and documentation (business records, authenticated through a sworn declaration, to establish these facts).

Documenting a revolving credit account. The judicial officer suggested revising item 5a to identify, for revolving credit accounts, the particular documents the plaintiff can submit as

evidence of the debt, rather than citing to Civil Code section 1788.52(b), the code section that describes those documents. The committee agreed with calling attention to the alternative documentation that is appropriate for a debt based on a revolving credit account. Accordingly, the committee revised item 5a to refer to revolving credit accounts, but retained the reference to section 1788.52(b) because that section is not limited to revolving credit accounts.

Authentication of business records. The judicial officer suggested an alternative approach to authenticating business records. He cited several cases for the proposition that courts can take judicial notice that a bank's records are business records. He suggested that CIV-105 be revised to indicate that the documents submitted in support of a default judgment must be shown to be admissible *either* by establishing that they are records of a bank *or* through a sworn declaration from someone with personal knowledge as to how the records were prepared that satisfies the requirements of Evidence Code section 1271. However, by its terms the act requires authentication through a sworn declaration. The committee concluded that the form should follow the provisions of the act and so declined to modify this section.

Other comments regarding form CIV-100 and proposed new form CIV-105

Separate forms. The Superior Court of San Diego County requested separate forms for entry of default and for default judgment to reduce confusion and make clear the requirements for each. This suggestion is beyond the scope of the proposal and will be retained for future consideration by the committee, as time and resources permit.

Internal comments

When the committee was reviewing the proposal after the public comment period, it realized that rule 3.1800 currently requires the use of CIV-100 and would need to be amended to allow for the use of proposed new CIV-105 in appropriate cases. Because the need for this amendment was raised within the committee after the public comment period, it did not circulate for public comment with the rest of the proposal. However, amending the rule to include the new mandatory form constitutes a technical amendment and need not be circulated. See California Rules of Court, rule 10.22(d)(2).

Alternatives considered

The committee originally considered not making any changes to form CIV-100, but decided that some form revision was needed to reflect the different default requirements for cases brought under the act.

Following the comments received on the 2016 proposal, the committee considered further revising form CIV-100 to include a new section summarizing the statutory requirements for a default judgment under the act. The committee decided not to pursue this option because the new section would require adding a third page to the form and would only apply to one particular case type, whereas the rest of the form is generally applicable to all civil cases. Moreover, the

committee felt that setting forth all of the requirements contained in the act would be more helpful than including a summarized version of those requirements.

The committee also considered creating an attachment to form CIV-100 in the form of a checklist that would contain all of the statutory requirements for a default judgment. This option had the benefit of setting forth all of the statutory requirements, but attachments are easily overlooked. The committee concluded that a new form for use only in actions subject to the act would best accomplish the goals of bringing these cases and their particular requirements to the attention of courts and litigants and facilitating compliance with the act.

Implementation Requirements, Costs, and Operational Impacts

The committee anticipates that this proposal will result in some costs incurred by the courts to train staff to recognize and understand the new form, and to distinguish it from form CIV-100. Courts may also need to update case management systems. In addition, efforts should be made to publicize the new form to attorneys and the public. Once training is complete and the form is in use, the committee expects that litigants will better understand the requirements for default judgment and courts will have an easier time processing and issuing decisions on applications for default judgment under the act.

Attachments and Links

1. Cal. Rules of Court, rule 3.1800, at page 12
2. Form CIV-100, at pages 13–14
3. Form CIV-105, at pages 15–17
4. Chart of comments, at pages 18–69
5. Senate bill 233 (Stats. 2013, ch. 64), http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB233

Rule 3.1800 of the California Rules of Court would be amended, effective January 1, 2018, to read:

Title 3. Civil Rules

Division 18. Judgments

Rule 3.1800. Default judgments

(a) Documents to be submitted

A party seeking a default judgment on declarations must use mandatory *Request for Entry of Default (Application to Enter Default)* (form CIV-100), unless the action is subject to the Fair Debt Buying Practices Act, Civil Code section 1788.50 et seq., in which case the party must use mandatory *Request for Entry of Default (Fair Debt Buying Practices Act)* (form CIV-105). In an unlawful detainer case, a party may, in addition, use optional *Declaration for Default Judgment by Court* (form UD-116) when seeking a court judgment based on declarations. The following must be included in the documents filed with the clerk:

(1)–(9) * * *

(b) * * *

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	*FOR COURT USE ONLY* **DRAFT** **Not Approved by the Judicial Council** **07.10.17**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
Plaintiff/Petitioner: Defendant/Respondent:	
REQUEST FOR (Application) ☐ **Entry of Default** ☐ **Clerk's Judgment** ☐ **Court Judgment**	CASE NUMBER:

Not for use in actions under the Fair Debt Buying Practices Act (Civ. Code, § 1788.50 et seq.) *(see CIV-105)*

1. TO THE CLERK: On the complaint or cross-complaint filed
   a. on *(date):*
   b. by *(name):*
   c. ☐ Enter default of defendant *(names):*

   d. ☐ I request a court judgment under Code of Civil Procedure sections 585(b), 585(c), 989, etc., against defendant *(names):*

   (Testimony required. Apply to the clerk for a hearing date, unless the court will enter a judgment on an affidavit under Code Civ. Proc., § 585(d).)
   e. ☐ Enter clerk's judgment
      (1) ☐ for restitution of the premises only and issue a writ of execution on the judgment. Code of Civil Procedure section 1174(c) does not apply. (Code Civ. Proc., § 1169.)
         ☐ Include in the judgment all tenants, subtenants, named claimants, and other occupants of the premises. The *Prejudgment Claim of Right to Possession* was served in compliance with Code of Civil Procedure section 415.46.
      (2) ☐ under Code of Civil Procedure section 585(a). *(Complete the declaration under Code Civ. Proc., § 585.5 on the reverse (item 5).)*
      (3) ☐ for default previously entered on *(date):*

2. **Judgment to be entered.**

	Amount	Credits acknowledged	Balance
a. Demand of complaint	$	$	$
b. Statement of damages*			
(1) Special	$	$	$
(2) General	$	$	$
c. Interest	$	$	$
d. Costs *(see reverse)*	$	$	$
e. Attorney fees	$	$	$
f. **TOTALS**	$	$	$

   g. **Daily damages** were demanded in complaint at the rate of: $ per day beginning *(date):*

   (Personal injury or wrongful death actions; Code Civ. Proc., § 425.11.)*

3. ☐ *(Check if filed in an unlawful detainer case.)* **Legal document assistant or unlawful detainer assistant** information is on the reverse *(complete item 4).*

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF PLAINTIFF OR ATTORNEY FOR PLAINTIFF)

FOR COURT USE ONLY

(1) ☐ Default entered as requested on *(date):*
(2) ☐ Default NOT entered as requested *(state reason):*

Clerk, by _____, Deputy

Form Adopted for Mandatory Use
Judicial Council of California
CIV-100 [Rev. January 1, 2018]

REQUEST FOR ENTRY OF DEFAULT
(Application to Enter Default)

Code of Civil Procedure, §§ 585–587, 1169
www.courts.ca.gov

Plaintiff/Petitioner: Defendant/Respondent:	CASE NUMBER:

4. **Legal document assistant or unlawful detainer assistant (Bus. & Prof. Code, § 6400 et seq.).** A legal document assistant or unlawful detainer assistant ☐ did ☐ did **not** for compensation give advice or assistance with this form. If declarant has received **any** help or advice for pay from a legal document assistant or unlawful detainer assistant, state:
   a. Assistant's name:
   b. Street address, city, and zip code:
   c. Telephone no.:
   d. County of registration:
   e. Registration no.:
   f. Expires on *(date):*

5. ☐ **Declaration under Code Civ. Proc., § 585.5** *(for entry of default under Code Civ. Proc., § 585(a)).* This action
   a. ☐ is ☐ is not on a contract or installment sale for goods or services subject to Civ. Code, § 1801 et seq. (Unruh Act).
   b. ☐ is ☐ is not on a conditional sales contract subject to Civ. Code, § 2981 et seq. (Rees-Levering Motor Vehicle Sales and Finance Act).
   c. ☐ is ☐ is not on an obligation for goods, services, loans, or extensions of credit subject to Code Civ. Proc., § 395(b).

6. **Declaration of mailing (Code Civ. Proc., § 587).** A copy of this *Request for Entry of Default* was
   a. ☐ **not mailed** to the following defendants, whose addresses are unknown to plaintiff or plaintiff's attorney *(names):*
   b. ☐ **mailed** first-class, postage prepaid, in a sealed envelope addressed to each defendant's attorney of record or, if none, to each defendant's last known address as follows:
      (1) Mailed on *(date):*
      (2) To *(specify names and addresses shown on the envelopes):*

I declare under penalty of perjury under the laws of the State of California that the foregoing items 4, 5, and 6 are true and correct.

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF DECLARANT)

7. **Memorandum of costs** *(required if money judgment requested).* Costs and disbursements are as follows (Code Civ. Proc., § 1033.5):
   a. Clerk's filing fees . . . . . $
   b. Process server's fees . . . . . $
   c. Other *(specify):* $
   d. $
   e. **TOTAL** . . . . . $ _____
   f. ☐ Costs and disbursements are waived.
   g. I am the attorney, agent, or party who claims these costs. To the best of my knowledge and belief this memorandum of costs is correct and these costs were necessarily incurred in this case.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF DECLARANT)

8. **Declaration of nonmilitary status** *(required for a judgment).* No defendant named in item 1c of the application is in the military service as that term is defined by either the Servicemembers Civil Relief Act, 50 U.S.C. App. § 3911(2), or California Military and Veterans Code section 400(b).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF DECLARANT)

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.:	FOR COURT USE ONLY
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	**DRAFT** **Not Approved by** **the Judicial Council** **07.03.17**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
Plaintiff/Petitioner: Defendant/Respondent:	
REQUEST FOR (Application) ☐ **Entry of Default** ☐ **Judgment**	CASE NUMBER:

For use only in actions under the Fair Debt Buying Practices Act (Civ. Code, § 1788.50 et seq.)

1. On the complaint or cross-complaint filed
   a. on *(date):*
   b. by *(name):*
   c. ☐ Enter default of defendant *(names):*
   d. ☐ I request a judgment under Civil Code section 1788.60 and Code of Civil Procedure section 585 against defendant *(names):*

   _____

   (Testimony may be required. Check with the clerk regarding whether a hearing date is needed.)
   e. ☐ Default was previously entered on *(date):*

2. **Judgment to be entered.**

		Amount	Credits acknowledged	Balance
a.	Demand of complaint*	$	$	$
b.	Interest	$	$	$
c.	Costs *(see page 3)*	$	$	$
d.	Attorney fees	$	$	$
e.	**TOTALS**	$	$	$

   (Must be established by business records, authenticated through a sworn declaration, submitted with this application. (Civ. Code, §§ 1788.58(a)(4), 1788.60(a).))*

3. This action is not barred by the applicable statute of limitations (Civ. Code, § 1788.56).
4. **Requirements for the complaint**.
   a. The complaint alleges ALL of the following (Civ. Code, §§ 1788.58, 1788.60):
      (1) That the plaintiff is a debt buyer;
      (2) A short, plain statement regarding the nature of the underlying debt and the consumer transaction from which it is derived;
      (3) That the plaintiff is EITHER the sole owner of the debt OR has the authority to assert the rights of all owners of the debt;
      (4) The debt balance at charge-off and an explanation of the amount and nature of, and reason for, all post-charge-off interest and fees, if any, imposed by the charge-off creditor or any subsequent purchasers of the debt;
      (5) The date of the default OR the date of the last payment;
      (6) The name and address of the charge-off creditor at the time of charge-off in sufficient form so as to reasonably identify the charge-off creditor, and the charge-off creditor's account number associated with the debt;

Plaintiff/Petitioner: Defendant/Respondent:	CASE NUMBER:

4. a. (7) The name and last known address of the debtor as they appeared in the charge-off creditor's records prior to the sale of the debt;

   (8) The names and addresses of all persons or entities that purchased the debt after charge-off, including the plaintiff debt buyer, in sufficient form so as to reasonably identify each such purchaser; and

   (9) That the plaintiff has complied with Civil Code section 1788.52.

   b. A copy of the contract or other document described in Civil Code section 1788.52(b) is attached to the complaint.

5. **Documentation requirements for default judgment**. ALL of the following documents are submitted with this request for default judgment (Civ. Code, § 1788.60(a)–(c)):

   a. A copy of the contract or other document evidencing the debtor's agreement to the debt, authenticated through a sworn declaration. See Civil Code section 1788.52(b) regarding documentation, including for revolving credit accounts.

   b. Business records, authenticated through a sworn declaration, to establish:

      (1) That the plaintiff is EITHER the sole owner of the debt OR has the authority to assert the rights of all owners of the debt;

      (2) The debt balance at charge-off, and an explanation of the amount and nature of, and reason for, all post-charge-off interest and fees, if any, imposed by the charge-off creditor or any subsequent purchasers of the debt;

      (3) The date of the default OR the date of the last payment;

      (4) The name and address of the charge-off creditor at the time of charge-off in sufficient form so as to reasonably identify the charge-off creditor, and the charge-off creditor's account number associated with the debt;

      (5) The name and last known address of the debtor as they appeared in the charge-off creditor's records prior to the sale of the debt; and

      (6) The names and addresses of all persons or entities that purchased the debt after charge-off, including the plaintiff debt buyer, in sufficient form so as to reasonably identify each such purchaser.

Date:

(TYPE OR PRINT NAME)

▶ (SIGNATURE OF PLAINTIFF OR ATTORNEY FOR PLAINTIFF)

FOR COURT USE ONLY

(1) ☐ Default entered as requested on *(date):*

(2) ☐ Default NOT entered as requested *(state reason):*

Clerk, by _____, Deputy

6. **Legal document assistant or unlawful detainer assistant (Bus. & Prof. Code, § 6400 et seq.).** A legal document assistant or unlawful detainer assistant ☐ did ☐ did **not** for compensation give advice or assistance with this form. If declarant has received **any** help or advice for pay from a legal document assistant or unlawful detainer assistant, state:

   a. Assistant's name:

   b. Street address, city, and zip code:

   c. Telephone no.:

   d. County of registration:

   e. Registration no.:

   f. Expires on *(date):*

7. ☐ **Declaration under Code Civ. Proc., § 585.5** *(for entry of default under Code Civ. Proc., § 585(a)).* This action

   a. ☐ is ☐ is not on a contract or installment sale for goods or services subject to Civ. Code, § 1801 et seq. (Unruh Act).

   b. ☐ is ☐ is not on a conditional sales contract subject to Civ. Code, § 2981 et seq. (Rees-Levering Motor Vehicle Sales and Finance Act).

   c. ☐ is ☐ is not on an obligation for goods, services, loans, or extensions of credit subject to Code Civ. Proc., § 395(b).

Plaintiff/Petitioner: Defendant/Respondent:	CASE NUMBER:

8. **Declaration of mailing (Code Civ. Proc., § 587).** A copy of this *Request for Entry of Default* was

   a. ☐ **not mailed** to the following defendants, whose addresses are unknown to plaintiff or plaintiff's attorney *(names):*

   b. ☐ **mailed** first-class, postage prepaid, in a sealed envelope addressed to each defendant's attorney of record or, if none, to each defendant's last known address as follows:

      (1) Mailed on *(date):*

      (2) To *(specify names and addresses shown on the envelopes):*

I declare under penalty of perjury under the laws of the State of California that the foregoing items 6, 7, and 8 are true and correct.

Date:

(TYPE OR PRINT NAME)

▶ (SIGNATURE OF DECLARANT)

9. **Declaration of nonmilitary status** *(required for a judgment).* No defendant named in item 1c of the application is in the military service as that term is defined by either the Servicemembers Civil Relief Act, 50 U.S.C. App. § 3911(2), or California Military and Veterans Code section 400(b).

10. **Memorandum of costs** *(required if money judgment requested).* Costs and disbursements are as follows (Code Civ. Proc., § 1033.5):

    a. Clerk's filing fees ..... $

    b. Process server's fees ..... $

    c. Other *(specify):* $

    d. $

    e. **TOTAL** ..... $

    f. ☐ Costs and disbursements are waived.

    g. I am the attorney, agent, or party who claims these costs. To the best of my knowledge and belief this memorandum of costs is correct and these costs were necessarily incurred in this case.

I declare under penalty of perjury under the laws of the State of California that the foregoing items 9 and 10 are true and correct.

Date:

(TYPE OR PRINT NAME)

▶ (SIGNATURE OF DECLARANT)

SPR17-07
Civil Practice and Procedure: Request for Entry of Default (proposed form CIV-105, proposed revisions to form CIV-100)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
1.	Alston & Bird LLP and Public Counsel by Ward Benshoof and Andrea Warren for Alston & Bird LLP; by Anne Richardson, Directing Attorney, and Stephanie Carroll, Senior Staff Attorney, Consumer Law Project, for Public Counsel	AM	Public Counsel and Alston & Bird have been working together for several years on consumer debt collection issues, including the new substantive and procedural requirements for entry of default judgments on consumer debt mandated by California's Fair Debt Buying Practices Act, Civil Code Sections 1788.50-1788.64 (the "Act"). We had the opportunity last year to comment on the proposal which the Committee made then to revise CIV-100, and appreciate the opportunity now to comment on your Committee's further proposal which arises from those efforts: to Revise Form CIV-100, and adopt Form CIV-105 ("Proposal"). At the outset we would like to commend the Committee for proposing a separate form for debt buyer cases that explicitly lays out the Act's requirements. However, while we understand that some may consider that a clerk can adequately ensure that the requirements are met, we strongly believe that, in view of settled California law on limitations of clerk functions to "ministerial tasks," the Act's new evidentiary requirements necessarily require judicial scrutiny of default judgment requests from debt buyers, and accordingly propose amendments such that the new form would	The committee notes the commenters' general support for the proposal if modified, and appreciates the detailed comments. See below for responses to specific comments. The committee understands and appreciates the commenters' position on this issue. However, as discussed in more detail in the report to the council, based on the ambiguous statutory language and the legislative history of the Act, the committee concluded that resolving the issue of whether clerks may enter default judgments under the Act is better left to the Legislature or to the courts.

	Commenter	Position	Comment	Committee Response
			address the issue directly. Our position is supported by recent developments in case law. Further, our research demonstrates that this approach will both 1) create consistency that is currently lacking at the moment and 2) reduce the burden on our over-burdened court system. 1. Recent Case Law As the Judicial Council's Proposal recognizes, the Act now requires that requests for default judgments on consumer debts be supported by "business records, authenticated through a sworn declaration" to establish details of the debt and the alleged default. (Civil Code §§ 1788.58(a)(2)-(a)(8), 1788.60.) Evidence Code Section 1271 specifies four separate foundational requirements that must be established by a party attempting to offer writings into evidence as "business records." Recent case law shows what a complex task it can be to (a) determine whether a witness has addressed each required element for each record sought to be admitted; and (b) whether that witness in fact has the personal knowledge to do so. The task is not only complex, but California law declares that the evaluation of such	The committee appreciates the commenters' discussion of recent cases addressing the authentication of business records as part of an application for default judgment under the Act. However, to the extent these are cited to support the council's adopting a rule precluding the entry of default judgments in these cases by clerks, note the response above.

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			evidence is not the sort of "ministerial task" that clerks may perform. (See, e.g., Kim v. Westmoore Partners, Inc. (2011) 201 Cal.App.4th 267, 287.) Rather, determining whether an application for default judgment under the Act is supported by competent evidence is a quintessential judicial responsibility. At first glance, it might appear that a clerk could determine whether a request for a default judgment on a debt collection includes the requisite authenticated business records. Yet there is no case that considers evidentiary authentication as something a clerk may determine. As the California Supreme Court has explained: "Authentication is to be determined by the trial court as a preliminary fact (§ 403, subd. (a)(3)) and is statutorily defined as the 'introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is.' (§ 1400)." (People v. Goldsmith (2014) 59 Cal.4th 258, 266.) Four recent decisions have explored authentication of business records in debt buyer cases: one from the Sixth District Court of Appeal, and three from Appellate Divisions in the Riverside, Ventura, and Orange County Superior Courts. Each of	

	Commenter	Position	Comment	Committee Response
			these cases demonstrates why judicial scrutiny is so important: to assure that the requirements of proper business record authentication in the collection litigation are followed. Debt buyers often acquire whatever records of the original creditor that exist when the debt is purchased and routinely utilize declarations of their employees – who are without personal knowledge of the original creditor's record keeping procedures – to meet the authentication requirements of the Act. As the cases hold, such declarations do not satisfy the new authentication requirements of the Act and Evidence Code Section 1271. Perhaps the most thorough review is found in the Sixth District's opinion in National Collegiate Student Loan Trusts v. Macias, (Cal.Ct.App., May 12, 2016, No. H040905) 2016 WL2864858 (not certified for publication) (Macias).) The debt buyer in that case purchased unpaid student loans from Bank of America and JPMorgan Chase. Id., at *1. At trial, the only witness offered by the debt buyer to authenticate the banks' records regarding the allegedly unpaid student loans was its own employee. No witness from either bank appeared. Id. The trial judge allowed the	

	Commenter	Position	Comment	Committee Response
			debt buyer's employee to authenticate the banks records and entered judgment for the debt buyer. The Court of Appeals reversed, finding that the debt buyer's witness – even if the custodian of the debt buyer's records purchased from the banks – still could not meet any of the four separate foundational requirements mandated for authentication of the banks' "business records." (Id., at *4-*7.) In reaching this result, the Macias court expressly endorsed the similar reasoning of the Appellate Division of the Ventura County Superior Court reported in Sierra Managed Asset Plan, LLC v. Hale (2015) 240 Cal.App.4th Supp. 1 (Sierra). (Id., at *6.) As in Macias, the trial court in Sierra had entered judgment for the debt buyer. However, the appellate court again reversed, concluding that since the only witness offered by the debt buyer to authenticate the bank's records was its own employee, that witness could not lay a proper foundation under Evidence Code 1271. (Sierra, supra, 240 Cal.App.4th Supp. at 9.) The Sierra court's reasoning was straightforward: the debt buyer employee had no knowledge about the account or the charges in question "other than what he	

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	Commenter	Position	Comment	Committee Response
			knows as a result of acquiring the documents from Citibank" and that did not make him a "qualified witness to lay the business records foundation required by Evidence Code 1271. . . ." (Id., at 8-9.) In September 2016, the Appellate Division of the Orange County Superior Court relied upon the reasoning of Sierra to reach the same result: reversing judgment in favor of a debt buyer entered by a trial judge who allowed the debt buyer's employee to authenticate the credit card debt records purchased from Credit One Bank. (Midland Funding LLC v. Romero (2016) 5 Cal.App.5th Supp.1.) The only case to the contrary – decided on a very distinctive set of facts – is a decision of the Appellate Division of the Riverside County Superior Court, which affirmed a trial court judgment where the debt buyer representative's testimony purported to authenticate the original creditor bank's business records. (Unifund CCR, LLC v. Dear (2015) 243 Cal.App.4th Supp 1 (Unifund).) As recognized by the opinion in Macias, the Unifund decision is limited to its own facts and was a case where the consumer had testified to all the particulars	

	Commenter	Position	Comment	Committee Response
			of his credit card debt and default, and thus could not claim prejudice from any evidentiary error in the debt buyer's improper authentication. (Macias, supra, see 2016 WL2864858, *7, fn 3.) Beyond that, the Unifund court, itself demonstrated how its decision – rendered after a full trial – could not be applied to a default judgment request. The Court acknowledged one of the problems at the heart of this type of litigation by stating "mistakes are often made on bank statements" and explained that "such matters may be developed on cross-examination and should not affect the admissibility of the statement itself." (Unifund, supra, 243 Cal.App.4th Supp. at 7-8 (quoting People v. Dorsey (1974) 43 Cal.App.3d, 953, 961).) Of course, on a debt buyer's application for a default judgment no cross examination is possible so those mistakes cannot be tested or ameliorated. That is why judicial scrutiny of the evidence offered to support a debt buyer's default application is so critical. 2. California Counties Are Applying the Law Inconsistently We have looked at examples of the	The committee reviewed these materials with

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			implementation of the Act from consumer collection case files in the Superior Courts of San Diego, Alameda and Los Angeles counties. These counties follow two separate procedures: Los Angeles and Alameda counties require default requests under the Act to go before a judicial officer. San Diego County continues to allow default requests to be processed by clerks. To aid the Judicial Council in understanding the practical consequences of allowing the evidence required by the Act to be evaluated by clerks, we attach as examples requests filed by Midland Funding LLC in two different Superior Courts on the same day, seeking default judgment on debts subject to the Act. [Committee Note: the exhibits are summarized at the end of this chart.] The requests were supported by essentially the same declaration: one reviewed by a judge was rejected, whereas the one reviewed by the clerk's office was granted. (Compare Midland Funding LLC v. Christian Namoca, San Diego Superior Court Case No. 37-2016-0000744-CL-CL-CTL, (Exhibit 1), with Midland Funding LLC v. Karnail Singh, Alameda Superior Court Case No. HG16808705, (Exhibit 2).)	great interest, and thanks the commenters for providing them. [Note: the 85 pages of exhibits are summarized at the end of this chart.] As noted in the report, however, requiring judicial officers' review of all requests for default judgments in debt buyer collections cases is a matter best left to the Legislature or the courts in interpreting the Act.

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			In both requests, declarations of Midland employees were the only evidence proffered to authenticate the business records required under the Act. Neither Midland employee claimed to have any personal knowledge of the practices of the original creditors but both declared, "The records are trustworthy and relied upon because the original creditor was required to keep careful records of the account at issue in this case as required by law and/or suffer business loss." Midland's request in Alameda County went before Judge Wynne Carvill who rejected it, finding the declaration failed to properly authenticate the business records as required. (See, "Request Re: Default and Default Court Judgment (CCP 585) Rejected," (Exhibit 3).) After receiving this rejection, Midland dismissed its Alameda action. (See, "Request for Dismissal," (Exhibit 4.) However, Midland's request for default in San Diego, on the same flawed evidence, was accepted by the clerk's office. See "Judgment by Default" (Exhibit 5).) As we understand it, one of the important roles of the Judicial Council is to assure consistency amongst California's courts in	The committee notes that council forms and rules must comply with statute, and it has

	Commenter	Position	Comment	Committee Response
			their application of the law. The above examples demonstrate that such consistency cannot be assured unless the Judicial Council joins counties such as Alameda and Los Angeles in recognizing that the business record evidence required by the Act to substantiate the underlying consumer debt and default be evaluated by a judicial officer. Differential handling of the actions could result in forum shopping by debt collectors and unfair results toward consumers who happen to live in different counties. 3. Evidence Suggests that California Counties Adopting a Judicial Scrutiny Approach Have Seen Default Filings Decrease Finally, we are aware that the Judicial Council has been appropriately concerned as to whether requiring judicial oversight of consumer collection case default judgment requests would impose an untoward burden on our court system. While it is too early to reach firm conclusions,[fn 1] our research indicates that total filings in counties that subject default applications to judicial scrutiny have substantially declined. Comparing debt buyer collection cases in	concluded, as discussed in the report, that statute does not preclude clerks from handling defaults in consumer collection cases. The committee appreciates the commenters' efforts in gathering this information. However, the committee did not look to the potential burden on the courts in reaching its conclusion that the Act does not mandate that defaults in consumer collections cases be handled only by judicial officers.

	Commenter	Position	Comment	Committee Response
			2013 and 2016, both Los Angeles and Alameda counties, where default requests under the Act are subject to judicial scrutiny, saw declines in new filings of between 30% and 40%.[fn 2] FN 1. Debts subject to the Act (sold or re-sold since January 1, 2014) have only recently been entering the collection case litigation stream in numbers (approximately the past year and a half according to our case file review). FN 2. Los Angeles County reported to us in 2014 that, for the 11 months from April 2013 through February 2014, there were a total of 65,170 collection cases filed in Los Angeles County – roughly 6,000 new filings per month. The court has recently reported to us that 2016 collection case filings were down over 40%. (Communication from Ms. Sylvia White-Irby, LASC Administrative Records, to Alston & Bird, 3/27/17. Total collection case filings in 2016 were reported at 42,429.) Alameda County reported to us in 2014 that there were 5,814 collection case filings in calendar year 2013. For calendar year 2016, Alameda County reports 3,926 new filings – a decline of over 30%. (Communication from Mr. Adam	

	Commenter	Position	Comment	Committee Response
			Byer, ASC Office of Planning, Research and Outreach, to Alston & Bird, 4/5/2017.) Both communications are attached hereto collectively as Exhibit 8. One sees a similar declining trend when examining the filings of individual high volume debt buyers. For this exercise, we looked at debt collection filings by Midland Funding LLC, which describes itself as "one of the nation's largest buyers of unpaid debt"[fn 3] as a useful barometer. A search of Alameda County's online database shows that, in 2013, Midland Funding filed a total 1,112 collection actions in Alameda County Superior Court. (Exhibit 6.) By 2016, Midland's filings in Alameda were reduced to just 200 new cases for that entire year – over an 80% reduction. (Exhibit 7.)[fn 4] FN 3. https://www.midlandfunding.com/faqs/. FN 4. Factors other than active judicial involvement may also have been at work to reduce filings in Alameda and Los Angeles counties over the period examined. However, we do know that in 2013 consumer debt default applications were	

	Commenter	Position	Comment	Committee Response
			being processed by clerks in both counties and in 2016 they were not. It is thus reasonable to conclude that at least some of the reduction may very well be due to that difference. This experience in Alameda County can be contrasted with San Diego County, which continues to allow clerk entry of default judgments for debt subject to the Act. We searched the San Diego County online database for new cases filed by Midland in 2014 and 2016, and found that Midland's new filings actually increased between those two years by approximately 14%.[fn.5] FN 5. We counted 1,355 new collection case filings by Midland in San Diego County Superior Court in 2014, and 1,545 new filings in 2016. San Diego's online search function allows search by party name, but does not total the results. The totals we arrived at were based upon hand counting of the results of 95 data pages and should therefore be regarded as approximately accurate. As instructive as we believe these comparisons are, in the final analysis we do	

	Commenter	Position	Comment	Committee Response
			not recommend that CIV-105 require default requests under the Act to be submitted to a judicial officer simply because that process may lead to a significant reduction of burdens on our court system. We do so because we believe such judicial review is required by law as essential to proper implementation of the Act. 4. Specific Recommendations on CIV-100 and CIV-105 Forms Consistent with the analysis above, we ask that CIV-105 be revised to require that a judicial officer be the ultimate arbiter as to whether a debt buyer's default judgment application meets the new evidentiary requirements of the Act. This will mean removing the option of "Clerk's Judgment" from the heading box and changing paragraph 1 to state "to the Court" as opposed to "to the Clerk." In addition to this substantial change, we support the recommendations made by the Attorney General in its comment letter of April 14, 2017, to add penalty of perjury statements to both CIV-100 and CIV-105. We concur with the Attorney General that such statements will both facilitate	The committee agrees with removing distinctions between court judgments and clerk's judgments on the form, and has combined the checkboxes in the caption to one simply titled, "Judgment." The text "TO THE CLERK" in item 1 and the reference to the court entering judgment on an affidavit in the parenthetical to item1d have been removed. The committee notes the commenters' support for these recommendations of the Attorney General. Upon further consideration of the comments and policy concerns, the committee declines to add declarations under penalty of perjury because they are not statutorily

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			compliance with the Act as well as provide the basis for both public and private enforcement in the event of non-compliance.[fn. 6] FN 6. In addition, we note a typo in paragraph 5 of CIV-105: that paragraph should reference Civ. Code 1788.60 (and not 788.60). We commend the Committee for the progress made this far, but strongly urge that the Judicial Council recognize explicitly that clerk-entered default judgments for consumer debt subject to the Act are no longer permitted. We thank you for considering our comments. We would be happy to discuss any aspect of our views on this subject at your convenience.	required. The committee thanks the commenters for identifying this typo. The error has been corrected.
2.	Attorney General of the State of California by Tina Charoenpong, Deputy Attorney General, Consumer Law Section	AM	On behalf of the Attorney General of the State of California, I write to comment on the proposal made by the Civil and Small Claims Advisory Committee of the Judicial Council of California to revise the form used to request entry of a default judgment in a civil case (Form CIV-100) and to adopt a new form to be used to request entry of a default judgment in a civil case that is subject to the Fair Debt Buying Practices	The committee notes the commenter's support for the proposal if modified, and appreciates the detailed comments. See below for responses to specific comments.

	Commenter	Position	Comment	Committee Response
			Act, Civil Code sections 1788.50 et seq. (Form CIV-105). As stated in my May 26, 2016 comment to the Committee's previously circulated proposal to revise Form CIV-100, the Attorney General strongly supports the proposal to revise the declaration of non-military status and its efforts to incorporate the requirements of California's Military and Veterans Code (Mil. & Vet. Code, § 400 et seq.). The Military and Veterans Code sets forth important consumer protections for members of the military against abusive default judgment practices, and revisions to Form CIV-100 will help ensure that our servicemembers receive the benefit of those protections. The Attorney General also supports the Committee's efforts to facilitate compliance with the statutory requirements for default judgments in cases subject to the Fair Debt Buying Practices Act. The Attorney General believes, however, that the Committee should revise its proposal to more effectively achieve this stated purpose. The Attorney General believes that the Act requires a judicial officer to review default applications and to determine whether to	

	Commenter	Position	Comment	Committee Response
			enter default judgments in consumer debt collection actions subject to the Act. Therefore, the Attorney General encourages the Committee to provide for referral of default applications to judicial officers in actions subject to the Act. The Attorney General also urges the Committee to add certain declarations to Form CIV-100 and proposed Form CIV-105, as discussed below, to effectuate the Committee's purpose of facilitating compliance with the Act. Declaration of Non-Military Status The Attorney General strongly supports the Committee's proposal to revise the declaration of non-military status in Form CIV-100. Both California's Military and Veterans Code and the federal Servicemembers Civil Relief Act (SCRA) provide certain protections for active-duty servicemembers who face default judgments and require plaintiffs seeking entry of default to file sworn declarations regarding the military status of each defendant. The Committee's proposal to revise the language of the declaration will help ensure that declarations conform to state and federal law and will clarify plaintiffs' obligations under the law.	The committee notes the commenter's support for the proposed revisions to the declaration of nonmilitary status.

SPR17-07
Civil Practice and Procedure: Request for Entry of Default (proposed form CIV-105, proposed revisions to form CIV-100)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			Fair Debt Buying Practices Act The Attorney General supports the Committee's efforts to facilitate compliance with the statutory requirements for a default judgment in cases subject to the Fair Debt Buying Practices Act. The Attorney General encourages the Committee to provide for the referral of default applications to judicial officers, rather than to clerks, in cases subject to the Act. To effectuate the Committee's purpose of facilitating compliance with the Act's statutory requirements for default judgments, the Attorney General also urges the Committee to (1) require all plaintiffs seeking default judgment in any civil case to state, under penalty of perjury, whether the action is a consumer debt collection action subject to the Act; and (2) require all plaintiffs seeking default judgment in cases subject to the Act to state, under penalty of perjury, that they have complied with each of the Act's applicable requirements. Review by Judicial Officers Because of the factual findings that must be made under the Act before a default judgment may be entered, it continues to be the Attorney General's position that judicial	The committee understands and appreciates the commenter's position on this issue. However, as discussed in more detail in the report to the council, based on the ambiguous statutory language and the legislative history of the Act, the committee concluded that resolving the issue of whether clerks may enter default judgments under the Act is better left to the Legislature or to the courts The lack of statutory authority for requiring that certain statements be made under penalty of perjury prevents the committee from recommending these changes. See the response above, and the report to the council for a more detailed discussion.

 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

	Commenter	Position	Comment	Committee Response
			officers must review default applications and enter default judgments in actions subject to the Act. The Attorney General therefore asks the Committee to modify its proposal to provide for referral of such default applications only to judicial officers. The level of review necessary to ensure that default applications comply with the Act—and to effectuate the Act's purpose of protecting debtors from debt-buyer abuse—is well beyond the ministerial functions that clerks may perform. Specifically, the Act prohibits the entry of default judgment unless a debt buyer plaintiff has, among other things: (1) alleged specified facts in the complaint, including the nature of the underlying debt and the consumer transactions from which it derived; (2) attached to the complaint a copy of the contract or other document demonstrating that the debt was incurred by the debtor; (3) submitted to the court a copy of the contract, authenticated through a sworn declaration, that evidences the debtor's agreement to the debt; and (4) submitted to the court certain business records, authenticated through a sworn declaration, that are sufficient to establish specified facts, including the debt balance at charge off and that the debt buyer is the sole owner	

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	Commenter	Position	Comment	Committee Response
			of the debt or has authority to assert the rights of all owners. (Civ. Code, §§ 1788.60, 1788.58, 1788.52.) The Act also prohibits plaintiffs from bringing an action on a time-barred claim (Civ. Code, § 1788.56); no default judgment may be entered if the applicable statute of limitations on a claim has expired. Should the Committee decide not to modify its proposal to provide for referral only to judicial officers in cases subject to the Act, the Attorney General requests that, at a minimum, it remain neutral for the present time and not sanction review by clerks of default applications subject to the Act. Form CIV-100 Declaration The Attorney General strongly urges the Committee to add to Form CIV-100 an item that requires plaintiffs to state, under penalty of perjury, that the action is not subject to the Act. The item should advise that this declaration is required and that plaintiffs who cannot so declare must file their default application using Form CIV-105. The Attorney General recommends adding this item as a new Item 7, below existing Item 6. This addition would add only minimal content to Form CIV-100 and	The committee agrees with removing distinctions between court judgments and clerk's judgments on the form. Accordingly, the committee has modified the checkboxes in the caption and portions of the text in item 1. Upon consideration of the comments and policy concerns, the committee declines to add declarations under penalty of perjury because they are not statutorily required.

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			would serve a critical function in facilitating compliance with the Act. The declaration would provide guidance to litigants and their counsel who may otherwise inadvertently use the wrong form to request a default judgment. Without this declaration, debtors protected by the Act may not be identified to the court and therefore would not receive the protections to which they are entitled. Unfortunately, default judgments are often entered without any involvement by the defendant or the defendant's counsel; as such, there likely would be no one to identify the error to the court if a plaintiff incorrectly uses Form CIV-100 to request a default judgment in an action subject to the Act. Requiring plaintiffs who use Form CIV-100 to state under penalty of perjury that the action is not subject to the Act would provide an incentive for plaintiffs to ensure that they submit the proper form to the court, thereby facilitating compliance with the Act. Additionally, this declaration would provide the Attorney General and other prosecutors with an enforcement tool in case a plaintiff intentionally files the wrong form, and thus would greatly facilitate prosecutors' ability to enforce compliance with the Act.	

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			Form CIV-105 Declarations For similar reasons, the Attorney General urges the Committee to require the statement regarding the statute of limitations in Item 3 of CIV-105 to be made under penalty of perjury, and to likewise revise Items 4 and 5 of CIV-105 to be statements that plaintiffs must make under penalty of perjury. The Attorney General further encourages the Committee to conform the language of Items 4 and 5 to the language used in the Act in order to reduce confusion, and to state all the requirements of the Act. The Attorney General believes that there is value to requiring plaintiffs to state, under penalty of perjury, that the action is not barred by the applicable statute of limitations. The Act prohibits debt buyers from bringing an action that is time-barred, and requiring plaintiffs seeking default judgment to certify that they have met this requirement would aid compliance with the Act and help achieve the Act's purpose of eliminating abuses common in the debt-buying industry. Requiring the statement in Item 3 to be made under penalty of perjury would also assist the efforts of the Attorney General and other prosecutors to enforce the	As with the suggestion that a declaration be added to form CIV-100, above, the committee declines to add such requirements to items 3, 4, and 5 on form CIV-105 because the Act does not require that the statements be made under penalty of perjury and there is no authority in the Act as currently written to impose such requirement.

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	Commenter	Position	Comment	Committee Response
			Act. Items 4 and 5 state that the court shall not enter a default judgment unless certain requirements of the Act are met. The Attorney General supports the Committee's inclusion of the Act's requirements to assist both courts and litigants in complying with the Act. The Attorney General believes that the Committee could better address its stated purpose of facilitating compliance with the Act if it modified these items to require plaintiffs to state, under penalty of perjury, that they have met these requirements. Specifically, the Attorney General urges the Committee to modify Item 4 to state, "Declaration regarding complaint (required for a judgment). The complaint contains ALL of the following allegations (Civ. Code, §§ 1788.58, 1788.60) . . . ." Likewise, the Attorney General urges the Committee to modify Item 5 to state, "Declaration regarding documentation (required for a judgment). ALL of the following documents are submitted with this request for default judgment (Civ. Code, § 788.60(a)-(c)) . . . ." Requiring plaintiffs to certify that they have met the Act's requirements would facilitate compliance with the Act, provide an	

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	Commenter	Position	Comment	Committee Response
			incentive for plaintiffs to ensure that they submit the proper information and documentation to the court, and facilitate enforcement of the Act. The Attorney General also encourages the Committee to use the Act's language in drafting the required declarations to reduce confusion. For example, Form CIV-105 states that the complaint must allege, and that authenticated business records must be submitted to establish, "the name and last known address of the debtor at the time of the sale of the debt." The Act, however, requires "the name and last known address of the debtor prior to the sale of the debt." (Civ. Code, §§ 1788.58, subd. (a)(7), 1788.60, subd. (a) [emphasis added].) The Attorney General believes that Form CIV-105 should conform to the language in the Act—specifically, to the language used in section 1788.58, subdivisions (a)(1)-(9), of the Civil Code. Finally, the Attorney General encourages the Committee to require plaintiffs seeking default judgment to state under penalty of perjury that a copy of the contract or other document described in Civil Code section 1788.52, subdivision (b), was attached to	The committee agrees with tracking the statutory language more closely, and has made the suggested revisions to the form. The committee agrees that this statutory requirement should be included on form CIV-105, although not as a statement under penalty of perjury. The committee has added it as item 4b.

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	Commenter	Position	Comment	Committee Response
			the complaint, as required by Civil Code section 1788.58, subdivision (b). The proposed Form CIV-105 omits this requirement. No default judgment may be entered if the plaintiff did not comply with this requirement or the Act's other requirements. (Civ. Code, § 1788.60, subd. (c).) The Attorney General thanks the Committee for its efforts to protect servicemembers and other consumers against abuses of legal process, and appreciates this opportunity to comment and share his thoughts with the Committee. Thank you for considering these views.	
3.	East Bay Community Law Center, Consumer Justice Clinic by Sharon Djemal, Director, Ted Mermin, Pro Bono Counsel, and Robin Wetherill, Student Advocate	AM	The East Bay Community Law Center (EBCLC) appreciates the opportunity to comment on the Civil and Small Claims Advisory Council's proposal to implement a new form, CIV-105, and revise an existing form, CIV-100. We fully support the Council's efforts to bring judicial practice into compliance with the Fair Debt Buying Practices Act (FDBPA) of 2013. While, overall, implementation of CIV-105 would further that goal, EBCLC urges the Council to revise the proposed form to reflect the requirement that all applications	The committee notes the commenter's general support of the proposal if modified and appreciates the detailed comments. Responses to specific comments are below.

	Commenter	Position	Comment	Committee Response
			for default judgment that are subject to the FDBPA must be reviewed by a judge. Our comments will focus on three reasons for making this change. First, assessment of an application for default judgment under the FDBPA is not a ministerial duty, and as such may not be performed by a clerk. Second, explicitly requiring review by a judge would better serve the purposes of the FDBPA because it would better protect vulnerable defendants. Finally, though we recognize that the Council has thus far stated an intent not to take a position on the question whether a clerk may enter a default judgment under the FDBPA, the inclusion of the "clerk" option on the CIV-105 form is not neutral but rather could be read as condoning clerks' performance of the task. As we noted in our comments regarding the Council's previous proposal to revise CIV-100, EBCLC, as a co-sponsor of the FDBPA, is intimately familiar with the purposes of the Act. One principal reason that we conceived and supported the FDBPA is that we serve many clients who do not learn of default judgments entered	

	Commenter	Position	Comment	Committee Response
			against them until years after the fact. Our work with low-income residents of the East Bay convinces us that our clients and other vulnerable people across California will be best protected if the form contains an explicit statement that judicial review is required for the entry of a default judgment in a case subject to the FDBPA. I. **Review of CIV-105 is not a ministerial duty which may be performed by a clerk.** Only judges may approve applications for the entry of a default judgment under the FDBPA because that approval is not a ministerial duty, but rather requires the exercise of discretion. Since the FDBPA requires that all applications made using Form CIV-105 will require judicial review, the Council should eliminate the option on the form to request a "Clerk's Judgment." Clerks' duties must be limited to the ministerial; any task requiring subjective judgment must be performed by the court. The California Supreme Court has held that clerks may enter default judgments only where such a duty would be purely ministerial and would not require the consideration of evidence. *Lynch v. Bencini* (1941) 17 Cal.2d 521, 525-26. The requirements for the entry of a default	The committee understands and appreciates the commenter's position on this issue. However, as discussed in more detail in the report to the council, based on the ambiguous statutory language and the legislative history, the committee concluded that deciding whether clerks may enter default judgments under the Act is a determination better made by the Legislature or the courts. In order to make the form neutral on this point, the committee has removed references to court judgments and clerk's judgments on form CIV-105.

	Commenter	Position	Comment	Committee Response
			judgment under the FDBPA are far more than ministerial. Accordingly, as the Alameda County Superior Court held in *Portfolio Recovery Associates v. Esmeralda Castellanos*, entry of default judgment under the FDBPA is a duty reserved for judges, not for clerks. (Super. Ct. Alameda County, May 24, 2016, No. RG15-796408 [p. 2].) That is, the court held that plaintiff Portfolio's motion for default judgment could not be made under California Code of Civil Procedure § 585(a), concerning default judgments entered by the clerk, but rather must be considered under § 585(b) or (c), which relate to judgments entered by the court (*Ibid*.). The court reached this conclusion because "Portfolio's motion concern[ed] the application of the phrase 'authenticated through a sworn declaration' and [California Code of Civil Procedure §] 585(a) does not permit the clerk to consider declarations or any other evidence." (*Ibid.*, quoting the FDBPA, Cal. Civ. Code § 1788.60(a), (b)). Evaluating an application for entry of default judgment in a case subject to the FDBPA requires the exercise of judicial discretion. Under the Fair Debt Buying Practices Act, in an action initiated by a debt buyer, default judgment may not be	

	Commenter	Position	Comment	Committee Response
			entered against a debtor unless the debt buyer submits evidence supported by "business records, authenticated through a sworn declaration" to "establish" required facts. Assessments of a submitted Form CIV-105 will therefore always require the consideration of evidence. Determining whether the documents submitted are sufficient to "establish" the necessary facts requires the court to make a subjective judgment. Therefore, entry of default judgment under the FDBPA will always fall outside the ministerial duties which may be performed by a clerk. II. **The purpose of the FDBPA will be best served by the elimination of the option to choose a clerk's judgment.** The purpose of the FDBPA is to protect unsophisticated consumers with limited access to legal advice or representation from the entry, without adequate documentation, of default judgments in collection suits brought by debt buyers. The bill analysis for S.B. 233, which enacted the FDBPA, cited a joint report by EBCLC and Consumers Union for its finding that "debt buyers frequently buy portfolios of individual consumer debts with inadequate information, and frequently sue without any	The committee recommends that, if so inclined, the commenter pursue amendment of the statutory scheme to clarify whether clerks may enter default judgments. Upon clarification, the committee could address conforming form CIV-105 to the Act.

	Commenter	Position	Comment	Committee Response
			proof that they own the debts or that the consumer owes them money." (Cal. Asm. Floor. Bill Rep., analysis of Sen. Bill No. 233 (2013-2014 Reg. Sess.) June 26, 2013, p. 4.) The same Report notes that proponents of the FDBPA "contend, quite reasonably, that . . . the consumer should not have a default judgment entered against him simply because he is unsophisticated or could not afford legal representation. This bill seeks to end that basic unfairness in collection cases where the debt buyer does not substantiate or support his claim with adequate information." (*Ibid*.) The unsophisticated parties whom the FDBPA is intended to protect are in a particularly poor position to identify and correct errors made in the review of debt buyers' applications for default judgments. By the very nature of default judgments, the consumer is unlikely to be involved in this stage of the process. Many of EBCLC's clients – as a result of debt buyers' dubious record-keeping, improper identification of defendants, and numerous other departures from reasonable business practices that compelled the passage of the FDBPA – are unaware of lawsuits against them at the time that default judgments are entered. Even assuming that consumers know they are	

	Commenter	Position	Comment	Committee Response
			being sued, few have the kind of specialized knowledge needed to determine that a particular case was reviewed by the clerk but should have been reviewed by a judge, or that the clerk incorrectly assessed the validity and adequacy of documentary evidence. The purpose of the FDBPA is best served by unambiguously indicating that CIV-105 must always be reviewed by a judge, not by a clerk. The entry of default judgment in cases subject to the FDBPA necessarily concerns the rights of parties who are unable to participate or object. Those parties are often unsophisticated, low-income, or otherwise vulnerable. A failure to require adequate documentation for the entry of default judgment could result in the erroneous seizure of consumers' income or assets and could have life-changing consequences including eviction, the repossession of a vehicle, or the inability to meet basic needs. The seriousness of entering a default judgment, in the context of the debt buying industry's history of collecting debts without adequate proof, mandates judicial—not clerical—review of CIV-105 applications. III. **Allowing debt buyers to choose**	

	Commenter	Position	Comment	Committee Response
			between a Clerk's Judgment and a Court Judgment is not neutral; rather, it lends support to an erroneous interpretation of the law. We believe, as noted, that the FDBPA leaves no room for entry of default by a clerk. But even if the Council wishes to remain neutral on the issue, certain changes to CIV-105 are necessary. In its "Invitation to Comment," the Committee states that "the Act does not specify whether a default judgment should be entered by the clerk or the court, and the proposed form does not attempt to resolve this question." Contrary to this intention, however, the inclusion of a check box allowing debt buyers to choose a "Clerk's Judgment" rather than a "Court Judgment" gives weight to the position that debt buyers have the option of clerical review. If Form CIV-105 suggests that clerical review is available, debt buyers may rely on the form as persuasive authority to argue that the entry of Clerk's Judgments in FDBPA cases has been given the imprimatur of the Judicial Council. Where the language of a statute is ambiguous, courts may look to extrinsic sources for clarification, including "contemporaneous administrative construction." (*People v.*	The committee agrees with the commenter and has removed the checkboxes for Court Judgment and Clerk's Judgment. Form CIV-105 now has a single checkbox for Judgment.

	Commenter	Position	Comment	Committee Response
			Woodhead (1987) 43 Cal.3d 1002, 1008.) Like the Committee in its Invitation, at least one superior court has determined that the FDBPA is ambiguous as to the question whether clerical review is permitted. *See Portfolio v. Castellanos*, *supra*, pp. 4-9 (discussing the Act's legislative history, and therefore impliedly determining that the statute's language is ambiguous). Given the ambiguity of the statutory language, it is reasonable to expect that courts presented with the question whether clerical review is acceptable may consider Form CIV-105 as an administrative or quasi-administrative interpretation of the Act. Rather than allowing courts to resolve any ambiguity in the statute, therefore, the Committee risks putting its thumb on the scale in favor of the availability of a clerk's judgment. – i.e., part of the problem that the FDBPA was enacted to resolve. The neutrality of the Council could be easily preserved by the elimination of the option to choose either a Clerk's or Court Judgment. Both the checkbox indicating a preference for a clerk's judgment and the box indicating preference or need for a court judgment could simply be removed. By eliminating both boxes, the Council would allow courts to determine how Form	

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			CIV-105 should properly be processed free from unintended influence by the Council. In conclusion, EBCLC wishes to reiterate our appreciation for the Civil and Small Claims Advisory Committee's efforts to implement the FDBPA. We are grateful for the committee's work, for its investment of time and effort in this issue of immediate importance to our low-income clients, and for its invitation to comment on the proposed forms. We are confident that the Committee's efforts will substantially improve the lives of thousands of Californians every year.	
4.	Hon. Thomas D. Long, Judge, Los Angeles Superior Court	AM	These are my comments on the invitation to comment described above. Please let me know if there is anywhere else I need to submit them. **These comments are only my own personal point of view** since I have not had time to vet them with the court as a whole. For background, I am one of	The committee notes the commenter's agreement with the proposal if modified, and appreciates the input and insight into how these cases are handled in Los Angeles County.

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			four judicial officers assigned to the two limited civil departments (in Chatsworth and Norwalk) that handle all limited civil collections cases in Los Angeles County. As we discussed, we have a docket of tens of thousands of cases. We process currently a monthly average of 800 or more defaults in Norwalk alone. The vast majority of the defaults are subject to the Fair Debt Buying Practices Act ("FDBPA") and most FDBPA defaults involve debts that originated through credit cards issued by federally-regulated depository institutions (banks). I have been in the Norwalk assignment since I took the bench on January 22, 2016. I am currently the judicial officer with the longest tenure in this assignment in Los Angeles County. **Responses to Request for Specific Comments:** **Does the proposal appropriately address the stated purpose?** Yes. Both the revisions to form CIV-100 and the proposed CIV-105 will make the processing of defaults under the FDBPA more consistent. The form will also serve as an effective means to communicate the requirements of the statute to attorneys and parties.	The committee thanks the commenter for responding to specific questions presented in the invitation to comment, and appreciates this feedback..

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			Should the statement regarding the statute of limitations in item 3 be required to be made under penalty of perjury? Yes. The Act requires documentation of the last payment or transaction and an accounting as to the balance due. One of the major purposes of the FDBPA is to eliminate stale claims. Thus plaintiff's attorney and/or plaintiff should be analyzing whether or not the claim is barred by the statute of limitations and should be able to so state under penalty of perjury. In collections cases the analysis usually is simply whether or not the last transaction shown on the account records occurred within 4 years of the filing of the complaint. In this sense, the statement is really more factual than legal in most cases. If the situation is more complicated—e.g. defendant waived the statute of limitations or there is tolling—a declaration will need to address the issue and court review may be required.	Based on the lack of statutory authority for requiring that this statement be made under penalty of perjury, the committee has not made this revision to the form.
			Would the proposal provide cost savings? Likely yes. The proposed form CIV-105 would make it easier to transfer review of these default judgment applications to clerks. Currently Norwalk	The committee appreciates this input.

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			Dept. B is using 7 full days of research attorney help and likely 2 days of judicial officer help and an unknown amount of clerical help to process about 200 defaults weekly, all as court judgments. I estimate research attorney time could be reduced to 2 days per week and judicial officer time to 1 day per week if most of the default applications led to clerk's judgments. This would likely be partially offset by additional clerical time that would be required. **What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?** Staff would have to answer this. We would also want to publicize the new form with attorneys and parties. **Would three and a half months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?** Staff would have to answer this. I would encourage the Council to make the form	The committee agrees that communication about the new form will be important. The committee notes the suggestion, but the

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			CIV-100 available as optional without delay. The form would help process defaults even if they remain subject to court review. Judicial officers, research attorneys and private attorneys practicing in the area would need only minimal training to use the form. **How well would this proposal work in courts of different sizes?** I can only opine that it would work well in Los Angeles. **Additional Comments on proposed form CIV-105:** 1. It is our practice in LASC to require that the FDBPA plaintiff trace the full chain of title by providing copies of assignments and/or bills of sale showing the transfer of the debt from the original creditor to the plaintiff. These documents are authenticated in the declaration submitted with the application. Without this additional information, it is not possible to fulfill the purpose of the FDBPA that the plaintiff prove its ownership of the debt. Proposed form CIV-105 should be revised to take this into account. 2. The vast majority of these debts are on	Judicial Council's process for forms proposals, which allows for external and internal review, is only subject to modification in urgent circumstances. The committee declines to recommend an earlier effective date. No response required. The committee appreciates the suggestion but has decided not to add this requirement to the form because the documentation showing all transfers of the debt must be included with the application. The committee agrees with the commenter's

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			revolving credit card accounts. For such accounts the FDBPA provides that "the most recent monthly statement recording a purchase transaction, last payment, or balance transfer shall be deemed sufficient" to satisfy the requirement of CCP 1788.52(b). I would consider revising 5(a) of proposed form CIV-105 to read: "A copy of the contract , or for revolving credit accounts a copy of the last monthly statement containing a purchase transaction, last payment, or balance transfer, shall be authenticated by a sworn declaration." 3. A debt buyer's authentication of the original lender's records does not (at least in my view) establish the applicability of the business records exception to the Hearsay Rule in section 1271 of the Evidence Code. Debt buyer employees do not know how the original lender prepared and maintained the records. BUT where the original lender is a federally-regulated depository institution (a bank) the court can take judicial notice that its account records are business records and are sufficiently reliable to overcome the Hearsay Rule. See *People v. Dorsey* (1974) 43 Cal. App. 3d 953, 960-61; *People v. Lugashi* (1988) 205 Cal. App. 3d 632; and *Sun N' Sand, Inc. v. United California Bank*	suggestion to call attention to revolving credit accounts, but concluded that it is necessary to retain the citation to Code of Civil Procedure section 1788.52(b). The committee has revised item 5(a) to include a reference to revolving credit accounts in item 5(a). The committee appreciates the commenter's discussion of this evidentiary issue.

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			(1978) 21 Cal. App. 3d 671, 679. As explained in *Lugashi*, "bank statements prepared in the regular course of banking business and in accordance with banking regulations are in a different category than the ordinary business and financial records of a private enterprise." 205 Cal. App. 3d at 642. Since banks are required by law to maintain orderly and accurate account records, it is presumed they are accurate in part because of the maxim of jurisprudence that "[t]he law has been obeyed." Civ. Code § 3548. Proposed form CIV-105 should be revised to indicate that the records must be shown as admissible either by establishing that they are records of a bank OR with testimony from someone with personal knowledge (see Evidence Code section 702) as to how the records were prepared who provides a sworn declaration satisfying the requirements of section 1271 of the Evidence Code.	By its terms, the Act requires authentication through a sworn declaration. Prescribing alternative evidentiary standards is beyond the committee's purview.
			4. The parenthetical comment in 1(d) of proposed form CIV-105 implies that any judgment will necessarily be a court judgment. It should read "whether the court *or clerk*" will enter the judgment to be consistent with other aspects of the form and with the Invitation to Comment.	The committee agrees with this comment and has revised the parenthetical comment in item 1(d) to delete the reference to the court entering judgment.

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			Via second email: I would like to add to my comments below as follows: **(Again, these comments are merely my own personal views.)** (5) The new form CIV-105 should be adopted as drafted (except with the changes I suggest above) and should explicitly permit clerk's review of default applications. Over 90% of the applications subject to section 1788.60 submitted to LASC are based on credit card debt originated by a federally-regulated bank. In such cases, the court ordinarily does not need to assess the evidence, but rather can take judicial notice that records obtained from such a lender and authenticated either by the lender itself or by the purchaser are business records that establish a prima facie case supporting a default judgment. See *Unifund CCR, LLC v. Dear* (2015) 243 Cal. App. 4th Supp. 1, 7 and *Portfolio Recovery Associates LLC v. Wong* (LASC App. Div. unpublished, October 27, 2015), slip. Op. at 5 citing *Jazayeri v. Mao* (2009) 174 Cal. App. 4th 301, 322. Once the bank records and final credit card statement are authenticated, they can be accepted for the	The committee thanks the commenter for providing additional input. The committee understands and appreciates the commenter's position on this issue. However, for the reasons provided in the report, clarification of the authority of clerks to enter default judgments under the Act is a matter better left to the Legislature or the courts.

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			truth of their contents as bank records. The rationale for this conclusion is discussed in *People v. Dorsey* (1974) 43 Cal. App. 3d 953, 960-61; *People v. Lugashi* (1988) 205 Cal. App. 3d 632; and *Sun N' Sand, Inc. v. United California Bank* (1978) 21 Cal. App. 3d 671, 679. As explained in *Lugashi*, "bank statements prepared in the regular course of banking business and in accordance with banking regulations are in a different category than the ordinary business and financial records of a private enterprise." 205 Cal. App. 3d at 642. Those commenting on the form in 2016 provided anecdotes of fraudulent debts leading to consumer hardship. This commenter has seen no evidence to support the belief that such fraud is common. The evidence needed to prove fraud is typically not in the hands of the plaintiff at all and so will not be before the court on a default since the defendant is not appearing. The review of a declaration under section 1788.60 is like the review of other documents which the clerk must review in order to determine whether or not to enter a default judgment. Among other things, the clerk must verify that the proof of service documents proper service on the defendant.	

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			The clerk must determine the reasonableness and recoverability of costs identified in the memorandum of costs declaration. The clerk must determine whether there is proper foundation for the plaintiff's declaration of the defendant's "nonmilitary status." The clerk also has discretion to "require copies of the bills or invoices, and a declaration negating the existence of any written agreement with the defendant." Rutter Group, Civil Procedure Before Trial, Chapter 5, Section 5:167. In the author's experience with LASC both clerks and judicial officers often require copies of invoices and clarification of whether there is or is not a written contract to support a default application. Each of these items supporting a default application requires the clerk to assess evidence in deciding whether or not to enter a default judgment. But not all assessments of evidence are a judicial function. The review of default applications for bank credit card debt is a clerical function that almost never involves evaluating evidence beyond the type of evaluations court clerks already do. The court has no practical ability to assess the accuracy of any of the information provided to it in a default application. If the application provides information that	

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			appears to be complete and consistent, there is no basis to withhold entry of judgment. The evidence of fraud would usually need to be provided by the defendant and the defendant is not present on a default application.	
5.	Orange County Bar Association by Michael L. Baroni, President	AM	As to the proposed new form CIV-105, the following modifications are suggested. At item 1d, within the parenthesis where the possible use of an affidavit is addressed, the reference to Code of Civil Procedure section 585(d) should be included, as it is currently at the similar item on form CIV-100. This would provide the authority for, and guide the content of, the contemplated affidavit. At item 4, the allegations of the complaint required pursuant to section 1788.58 have, in some instances, been paraphrased. While the need to conserve space on these forms is understood, this paraphrasing should not be to the degree that it appears as an interpretation of rather precise statutory	The committee notes the commenter's general support for the proposal if modified, and appreciates the input. The committee has revised this parenthetical instruction to delete reference to the court entering judgment on an affidavit to avoid distinctions between court judgments and clerk's judgments on the form. Reference to Code of Civil Procedure section 585(d), which applies to court judgments under subdivisions (b) and (c) of section 585, is not necessary because the Act sets forth with specificity the evidentiary requirements for a default judgment. The committee agrees with the comment and has revised the language in item 4 to more closely track the language of the statute.

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	Commenter	Position	Comment	Committee Response
			language, resulting in confusion as to the necessary content of allegations or the implication that statutorily required content has been relaxed. Accordingly, consider the following, expanded language. At item 4b, "A short, plain statement of the nature of the underlying debt and the consumer transaction(s) from which it derived." At item 4d, "A statement of the debt balance at charge-off and an explanation of the amount, nature, and reason for any and all post-charge-off interest and fees, which explanation shall identify separately the charge-off balance, the total of post-charge-off interest, and the total of post-charge-off fees." At item 4f, "The name and address in a form sufficient to reasonably identify the charge-off creditor at the time of the charge-off and the charge-off creditor's account number associated with the debt." At item 4h,"The names and addresses in a form sufficient to reasonably identify all persons or entities that purchased the debt after charge-off, including the plaintiff debt buyer; and." At item 5, the citation within the parenthesis should be corrected to read, "Civ. Code	The committee thanks the commenter and has corrected this typographical error.

	Commenter	Position	Comment	Committee Response
			§1788.60(a)-(c)." At item 5b, points (1)-(6) to be established by declaration should mirror the language of the relevant allegations set forth at item 4. As to the revised form CIV-100 and proposed new form CIV-105, the following modification is suggested. At item 8 and item 9, respectively, and concerning the "Declaration of nonmilitary status," while it is understood that all references are to California law unless otherwise noted, in that both a federal and a state law are referenced here, it might be facilitative to include "California" before the reference to Military and Veterans Code section 400(b). **Request for Specific Comments:** Does the proposal appropriately address the stated purpose? Yes, however, it is believed it would do so more effectively were the suggestions set forth above incorporated into the final form/s. Should the statement regarding the statute	The committee agrees and has conformed the language of item 5 to that of item 4, both of which have been revised to more closely track the statutory language. The committee agrees and has made the suggested change. The committee appreciates the commenter's responses to the questions presented in the invitation to comment. No response required.

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			of limitations in item 3 be required to be made under penalty of perjury? No, absent an amendment to the statute underlying form CIV-105. Currently, there appears to be no authority for imposing such a requirement on the plaintiff and to attempt to do so by way of a mandatory form would likely prove problematic.	The committee agrees with the commenter and has not made this change to the form.
6.	State Bar of California, Standing Committee on the Delivery of Legal Services by Sharon Djemal, Chair	A	**Specific Comments** <u>Does the proposal appropriately address the stated purpose?</u> Yes. <u>Should the statement regarding the statute of limitations in item 3 be required to be made under penalty of perjury?</u> No, the law does not require that the statement regarding the statute of limitations in item 3 be made under penalty of perjury. **Additional Comments** In response to proposal SPR16-07 (Civil Practice and Procedure: Request for Entry of Default) that was circulated for public comment last year, SCDLS requested that the Judicial Council list all the statutory	The committee notes the commenter's agreement with the proposal and appreciates the comments and responses to specific questions raised in the invitation to comment. The committee agrees with the commenter and has not modified item 3. The committee appreciates the commenter's input and support of the proposal.

 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

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	Commenter	Position	Comment	Committee Response
			requirements of the Fair Debt Buying Practices Act (FDBPA) in the body of CIV-100 in hopes that it would decrease the large amount of default judgments being entered without the Plaintiff having satisfied these requirements. SCDLS strongly supports the Judicial Council's decision to create a separate form to be used only in cases brought pursuant to the FDBPA, which clearly sets forth all these statutory requirements. *Please also note that there is a typo in Section 5, which cites to Civil Code section 788.60 instead of 1788.60.*	The committee thanks the commenter for pointing out this typographical error; it has been corrected.
7.	Superior Court of Los Angeles County	A		The committee notes the commenter's agreement with the proposal, with thanks for submitting the comment.
8.	Superior Court of Riverside County by Susan D. Ryan, Chief Deputy of Legal Services	AM	CIV-105: Whether a default judgment is entered by a clerk or a judicial officer is an issue that needs to be resolved. The clerk can only verify whether the plaintiff is asserting that the statute of limitations has not expired; only a judicial officer may make the determination that it has, in fact, not expired. It is recommended that the statute of limitations statement be under penalty of	The committee notes the commenter's general support for the proposal if modified, and agrees that clarity on this point would be helpful. Upon further consideration of the comments and policy concerns, the committee declines

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	Commenter	Position	Comment	Committee Response
			perjury. It is also recommended that line 3 on CIV-105 be rewritten to state the date of accrual of the cause of action and the date of the filing of the original complaint so that it can be determined whether the limitations period has expired.	to add declarations under penalty of perjury because they are not statutorily required. The committee declines to make the suggested revisions because the date of the filing of the complaint is required in item 1, and the accrual date is alleged in the complaint and contained in documentation attached to the application for default judgment.
9.	Superior Court of San Diego County by Mike Roddy, Executive Officer	AM	Q: Does the proposal appropriately address the stated purpose? Yes. Q: Should the statement regarding the statute of limitations in item 3 be required to be made under penalty of perjury? Yes. The form should also require that the party confirm that the requirements listed in items 4 & 5 of the CIV-105 are also made under penalty of perjury. Modify the language listed in item 4 to read, "The complaint contains ALL of the following allegations…" Similarly, modify item 5 to read, "ALL of the following documents are submitted with this request for default judgment…" Q: Would the proposal provide cost	The committee notes the commenter's support for the proposal if modified and appreciates the responses to the specific questions asked in the invitation to comment. Upon further consideration of the comments and policy concerns, the committee declines to add declarations under penalty of perjury because they are not statutorily required. The committee agrees with the suggested modifications to the language of the form and has made the changes.

	Commenter	Position	Comment	Committee Response
			savings? If so, please quantify. No. Q: What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? Updating training materials, case management system, judgment checklists, and notifying staff. Q: Would three and a half months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes. **General comments from our court:** Our court requests that separate forms be created for the request for entry of default and application for judgment. This will avoid confusion by the users of the form as to what items must be completed when requesting a default be entered versus the items that must be completed in the case of requesting entry of judgment.	No response is required. The committee appreciates this information. No response is required. The committee notes the request and will retain the suggestion for consideration in the future, as time and resources permit.

SPR17-07
Civil Practice and Procedure: Request for Entry of Default (proposed form CIV-105, proposed revisions to form CIV-100)

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Summary of exhibits to comment submitted by Public Counsel/Alston & Bird LLP

Exhibits 1-5: To illustrate their point that superior courts are applying the Fair Debt Buying Practices Act inconsistently, the commenters attached two requests for default judgment filed by the same debt buyer plaintiff, Midland Funding LLC (Midland), on the same day in two different superior courts. (*Midland Funding LLC v. Christian Namoca*, San Diego Superior Court case no. 37-2016-0000744-CL-CL-CTL (Exhibit 1); *Midland Funding LLC v. Karnail Singh*, Alameda Superior Court case no. HG16808705 (Exhibit 2).)

The requests were supported by nearly identical declarations in support of the judgment. Only the declarants and the factual details regarding the debts and the debtors were different. Both declarants were officers for the plaintiff and employed with Midland Credit Management Inc., servicer of the credit accounts. Both declarants stated that plaintiff became the successor in interest to the accounts, acquired and incorporated the former owner's account records into its own business records, relied upon the accuracy of those records, and that the records were trustworthy because the original creditor was required to keep careful account records. (Exhibits 1 and 2, paragraphs 4 and 5.)

The Superior Court of Alameda County requires a judge to review default judgment applications under the Act. The judge rejected the request in the *Singh* case for several reasons, including that the declarant was not a custodian of records as to the records of the original creditor and therefore could not authenticate that creditor's business records. (Exhibit 3.) A week later, the plaintiff filed a request for dismissal of the case. (Exhibit 4.)

The Superior Court of San Diego County allows the clerk to review requests for default judgment under Code of Civil Procedure section 585(a) (an action arising upon a contract for the recovery of money). The clerk entered judgment in the *Namoca* case for the plaintiff. (Exhibit 5.)

Exhibits 6-8: In support of their contention that default filings have declined in counties that require judicial review, the commenters attached documents from the Superior Court of Alameda County and the Superior Court of Los Angeles County. Two Alameda County DomainWeb printouts show that Midland filed 1,112 actions in 2013 (Exhibit 6), and 200 actions in 2016 (Exhibit 7).

A letter from the Superior Court of Los Angeles County regarding collections cases states that 58,264 cases were filed in 2014; 38,522 cases were filed in 2015; and 42,429 cases were filed in 2016. (Exhibit 8.) The commenters refer to the number of collections cases filed in 2013, but the letter does not contain data for 2013.

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A letter from the Superior Court of Alameda County regarding collections cases contains data regarding the number of cases filed and the number of requests for default judgment filed from June 2014 through March 2017. (Exhibit 8.) The commenters refer to the number of collections cases filed in 2013, but the letter does not contain data for 2013.