

MASSACHUSETTS RULES OF CIVIL PROCEDURE

Rule 8.1. Special Requirements for Certain Consumer Debts

Reporter's Notes—2019

Rule 8.1 and Rule 55.1, effective in 2019, apply to collection actions against consumers involving debts arising out of revolving credit agreements. Rule 8.1 requires the plaintiff to (1) file with the complaint documentation regarding the debt, (2) verify the defendant's address prior to commencement of the action, and (3) certify that the statute of limitations has not expired. Rule 55.1 (1) prohibits entry of default against a defendant where the documentation required by Rule 8.1 has not been provided; (2) requires a determination that the plaintiff is entitled to judgment in the amount claimed prior to entry of a default judgment; and (3) requires reverification of the defendant's address under specified circumstances prior to entry of a default judgment.

Collection actions involving credit cards make up a significant portion of the civil actions commenced in the Massachusetts courts, with many of them filed in the District Court and Boston Municipal Court. Many of these cases proceed to judgment by default, sometimes raising questions whether the plaintiff has used a current address for service of process.

Requiring additional documentation with the complaint is a recognition that consumers in the past often lacked critical information needed when sued for credit card debts. When an assignee of the debt is named as plaintiff in the action and a complaint is served on the defendant, the defendant may have difficulty in ascertaining the identity of the original creditor. The documentation will help consumers to identify the original creditor in instances where an assignee is seeking to collect an assigned debt and the documentation will help to confirm the amount owed. The requirement of address verification mandates extra steps to help to ensure that an address used by a plaintiff to serve a defendant is as accurate as can reasonably be expected.

The addition of special requirements in litigation involving certain types of debts is not a new phenomenon in Massachusetts. Additional documentation and address verification requirements for certain types of debts have been applicable in small claims cases since 2009 (Rules 2(b), Uniform Small Claims Rules) and in civil actions on the regular civil docket in the District Court and Boston Municipal Court since 2015 (Boston Municipal Court and District Court Joint Standing Order No. 2-15).

Rule 8.1(a). The rule applies to a “debt incurred pursuant to a revolving credit agreement” (Rule 8.1(a)(1)). This would encompass, but is not limited to, a collection action arising out of credit card debt. The definition of debt is limited to consumer debt but excludes a revolving credit agreement involving real estate (Rule 8.1(a)(3)). Thus, Rule 8.1 is not applicable to a suit on a debt arising out of a home equity line of credit where the collateral is real estate.

Rule 8.1(b). The required items must be served on the defendant with the complaint. Accordingly, copies of all such items should be sent to the process server to be served together with the summons and complaint.

Rule 8.1(c). In connection with preparing an affidavit regarding debt, care should be taken not to include personal identifying data. Rule 5(h). Credit card numbers and other personal identifying information must be redacted consistent with Supreme Judicial Court Rule 1:24, Protection of Personal Identifying Information in Publicly Accessible Court Documents. See SJC Rule 1:24, §§ 3 and 4.

Rule 8.1(d). These documents are intended to provide a defendant with details about the nature of the claim, the amount allegedly owed, and the identity of the original creditor.

Rule 8.1(e). The address verification requirements provide various methods for the plaintiff to determine and confirm the defendant's address. The verification must have occurred within three months prior to plaintiff having commenced the action.

Rule 8.1(f). The plaintiff must certify, based on a reasonable inquiry, that the statute of limitations has not expired on the claim and must provide the statutory or caselaw basis for the period of limitations applicable to the debt. Even though the statute of limitations is a listed affirmative defense under Rule 8(c), this requirement places the burden on the plaintiff to determine, and certify, that the action is not stale. A regulation of the Massachusetts Attorney General provides that it is an unfair or deceptive act or practice for a debt collector to attempt to collect a consumer debt that "the creditor knows, or has reason to know based on a good faith determination, is a time-barred debt" unless the creditor makes certain disclosures, including that the debt may be unenforceable because it is time-barred. 940 CMR § 7.07(24).

Rule 55.1. Special Requirements for Defaults and Default Judgments for Certain Consumer Debts

Reporter's Notes--2019

Rule 8.1 and Rule 55.1, effective in 2019, apply to collection actions against consumers involving debts arising out of revolving credit agreements. Rule 8.1 requires the plaintiff to (1) file with the complaint documentation regarding the debt, (2) verify the defendant's address prior to commencement of the action, and (3) certify that the statute of limitations has not expired. Rule 55.1 (1) prohibits entry of default against a defendant where the documentation required by Rule 8.1 has not been provided; (2) requires a determination that the plaintiff is entitled to judgment in the amount claimed prior to entry of a default judgment; and (3) requires reverification of the defendant's address under specified circumstances prior to entry of a default judgment.

Collection actions involving credit cards make up a significant portion of the civil actions commenced in the Massachusetts courts, with many of them filed in the District Court and Boston Municipal Court. Many of these cases proceed to judgment by default, sometimes raising questions whether the plaintiff has used a current address for service of process.

Requiring additional documentation with the complaint is a recognition that consumers in the past often lacked critical information needed when sued for credit card debts. When an assignee of the debt is named as plaintiff in the action and a complaint is served on the defendant, the defendant may have difficulty in ascertaining the identity of the original creditor. The documentation will help consumers to identify the original creditor in instances where an assignee is seeking to collect an assigned debt and the documentation will help to confirm the amount owed. The requirement of address verification mandates extra steps to help to ensure that an address used by a plaintiff to serve a defendant is as accurate as can reasonably be expected.

The addition of special requirements in litigation involving certain types of debts is not a new phenomenon in Massachusetts. Additional documentation and address verification requirements for certain types of debts have been applicable in small claims cases since 2009 (Rules 2(b), Uniform Small Claims Rules) and in civil actions on the regular civil docket in the District Court and Boston Municipal Court since 2015 (Boston Municipal Court and District Court Joint Standing Order No. 2-15).

Rule 55.1(a). Rule 55.1 applies where the plaintiff seeks to default the defendant for failure to answer or otherwise defend or where the clerk sua sponte enters a default for failure to answer or otherwise defend. The rule is inapplicable to default for other reasons, such as failure of the defendant to attend a pretrial conference or as a discovery sanction.

In order to obtain a default and judgment by default in a collection action against a consumer involving a debt arising out of a revolving credit agreement, the plaintiff must comply with both Rule 55 and Rule 55.1. All of the provisions of Rule 55 are applicable to such an

action. Thus, a plaintiff must request entry of default under Rule 55(a), and a judgment after default may be entered by the clerk (if the action is one for a sum certain, Rule 55(b)(1)) or by the court (if the action is one other than for a sum certain, Rule 55(b)(2)). The requirement of a military affidavit pursuant to the federal Servicemembers Civil Relief Act (Rule 55(b)(4)) is applicable to collection actions covered by Rule 8.1.

Rule 55.1(b)(1). In addition to satisfying the requirements of Rule 55(a), counsel for the plaintiff or a self-represented party seeking a default must serve and file an affidavit setting forth various matters regarding the documentation required under Rule 8.1. Even where the plaintiff has not sought a default, the clerk may request that an affidavit be filed. This might occur, for example, in courts in which clerks have a practice of reviewing the docket for the purpose of entering a default sua sponte where the defendant has not answered or moved to dismiss within the time provided by Rule 12(a).

Rule 55.1(b)(2).

Even though a plaintiff has satisfied the provisions of Rule 55(a) for entry of default, Rule 55.1(b)(2) prevents the clerk from entering a default if the clerk determines that the plaintiff has not provided the information required by Rule 8.1 with the complaint or has not filed an affidavit under Rule 55.1(b)(1). In making this determination, the clerk is not required to review the various items that must be filed with the complaint under Rule 8.1, but may rely upon the Rule 55.1(b)(1) affidavit.

The clerk is required to notify the parties of the non-entry of default. The rule requires a judge (and not the clerk) to order dismissal of the complaint on or after the 30th day after the date the clerk sends notice of non-entry of default, but provides the plaintiff with an opportunity to avoid dismissal by showing cause why the complaint should not be dismissed. This period of time allows the plaintiff to remedy the defect by supplying the required missing information to the clerk or to persuade a judge that there is cause justifying non-compliance with the requirements of Rule 8.1, provided that cause for non-compliance is consistent with the purposes of the rule.

A party who disagrees with a clerk's determination whether to enter a default should bring the matter to a judge for resolution. The plaintiff must provide notice to the defendant of any attempt to show cause to avoid dismissal and provide the defendant with copies of any filings.

Rule 55.1(c).

Even though a plaintiff has satisfied the provisions of Rule 55(b)(1) for entry of default judgment by the clerk or Rule 55(b)(2) for entry of default judgment by the court, the clerk (if under Rule 55(b)(1)) or the court (if under Rule 55(b)(2)) must make a determination that the plaintiff is entitled to a judgment in the amount sought by the plaintiff. This will require a determination that the plaintiff has complied with Rule 8.1 and that the submitted documentation demonstrates the plaintiff is entitled to the damages sought. The clerk or court must also determine that the plaintiff has filed the affidavit required under Rule 55.1(b)(1). The rule

provides the option to the clerk or court to rely upon the plaintiff's Rule 55.1(b)(1) affidavit in the determination whether there has been compliance with Rule 8.1. Reliance on the Rule 55.1(b)(1) affidavit relieves the clerk or court from independently having to review the filings required by Rule 8.1(c)-(f).

Rule 55.1(d). This provision requires the plaintiff to serve the request for default judgment on the plaintiff in accordance with Rule 5(b) by delivery or by mail to the defendant's last known address. A plaintiff who uses the mail option must reverify the defendant's address as set forth in Rule 8.1.