PAST DUE: Why Debt Collection Practices and the Debt Buying Industry Need Reform Now

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East Bay Community Law Center was founded in 1988 by law students at UC Berkeley's Boalt Hall School of Law. EBCLC has since become the largest provider of free legal services in the East Bay and a nationally-recognized poverty law clinic, serving low-income clients in the areas of housing, welfare, HIV & health, immigration, homelessness, and Clean Slate (post-conviction remedies). In response to demand from a rising number of low-income consumers in need of legal assistance during the recent recession, EBCLC started a Consumer Law Clinic in 2010 in partnership with Alameda County courts and the Alameda County Bar Association's Volunteer Legal Services Corporation. EBCLC already has assisted almost 1,000 consumers being sued or otherwise subjected to collection attempts by debt collectors.

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PAST DUE: Why Debt Collection Practices and the Debt Buying Industry Need Reform Now

Sixty-one-year-old Emily first discovered that someone had stolen her identity when she received a letter from a debt collector she had never heard of, saying that it was about to garnish her wages. The debt collector had sued her two years earlier without giving her any notice – they sent the papers to an address where she had never lived and filed it under her maiden name, which she had not used for decades. The debt collector was able to get a court judgment that enabled it to take Emily's money right out of her paycheck without showing any proof that Emily owed them a cent.

Yvonne knew she owed a debt of $1000, so she paid it, a little each month, from her Social Security check. The debt collector accepted her final check and said it would close her account. Four years later, she was sued on the same account for over $5,000 by a different debt collector that could not produce any documentation proving it owned the debt or that she owed anything.

During these difficult economic times, legal services providers have experienced a dramatic influx of requests from clients like Emily who seek assistance in defending improper lawsuits brought by debt collectors. In addition, consumers like Yvonne continue to be hounded years after they settle their debt by unfamiliar collection agencies with little information about the debt. These experiences illustrate problems inherent in the current debt collection system. There is a massive industry buying and selling large portfolios of debt for pennies on the dollar, and a court system in which debt collectors are able to get court judgments without proof that they own the debt or even that the consumer owes any debt.

Policymakers at both federal and state levels must act to create better substantive and procedural safeguards for courts and consumers in debt collection litigation. The federal Fair Debt Collection Practices Act (FDCPA),[1] state fair debt collection laws, and court rules need to be amended to reform debt buying and debt collection industry practices. The new Consumer Financial Protection Bureau will also have the authority to write new rules under the FDCPA to rein in the worst abuses of the debt collection industry. This report describes problems with the debt collection and debt buying industries, provides real-life consumer stories exemplifying these problems,

[1] 15 U.S.C. §§ 1692-1692p (2006 & Supp. IV).

and makes policy recommendations to reform debt collection litigation and other debt collection practices.[2]

THE DEBT BUYING INDUSTRY HAS MIRED THE COURTS IN UNSUBSTANTIATED DEBT COLLECTION LAWSUITS

The Federal Trade Commission (FTC) declared in 2010 that "[t]he system for resolving disputes about consumer debts is broken" and urged states to pass legislation to provide "adequate protection for consumers."[3] Courts around the country are swamped with debt collection lawsuits. In California, collection lawsuits have increased by twenty percent statewide over the past five years.[4] Consumer debt collection lawsuits in three San Francisco Bay Area counties increased by nearly eighty percent between 2007 and 2009, from 53,700 to an estimated 96,000 cases.[5] This marked workload increase is coming during a fiscal crisis, when California courts are closing their doors early and court employees are taking mandated furlough days as a result of budget strain.[6] California is not alone in experiencing a tidal wave of debt collection suits. For example, in New York City, debt collectors filed approximately 300,000 lawsuits *per year* during 2006-2008.[7]

The growing debt buying industry is driving the swift growth in debt collection lawsuits. Since the 1987 savings and loan crisis, the sale of portfolios of individual debt has increased consistently year to year – the industry estimates that the face value of debts that changed hands between debt buyers and sellers increased from $6 billion in 1993 to $110 billion in 2005.[8] Between 2001 and 2006, debt buyer

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[2] The background information on the industry and policy recommendations in this report are also based in part upon EBCLC's experience representing individuals in debt collection lawsuits.

[3] FED. TRADE COMM'N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION (2010), *available at* http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf [hereinafter FTC REPORT].

[4] Bernice Yeung, *Some Lawyers Want to Keep Debt Collection Out of the Courts*, N.Y. TIMES, Apr. 23, 2010, at A21, *available at* http://www.nytimes.com/2010/04/23/us/23sfdebt.html. *See also* Jud. Council of Cal., *Trial Court Caseload Increases to Over 10 Million Filings*, DATA POINTS, Aug. 2010, at 1, *available at* http://www.courtinfo.ca.gov/reference/documents/datapoints10.pdf (indicating that the annual number of cases filed in California Courts reached a record high in 2009, with civil cases experiencing the highest rate of growth).

[5] *Id.*

[6] *Id;* L.A. SUPER. CT., ANN. REP. 6-7 (2010), *available at* http://www.lasuperiorcourt.org/courtnews/Uploads/14201053918492010AnnualReport.pdf (assessing the impact of budget cuts on the local economy and access to the justice system).

[7] NEIGHBORHOOD ECON. DEV. ADVOCACY PROJECT ET AL., DEBT DECEPTION: HOW DEBT BUYERS ABUSE THE SYSTEM TO PREY ON LOWER-INCOME NEW YORKERS 6 (2010), *available at* http://www.nedap.org/pressroom/documents/DEBT_DECEPTION_FINAL_WEB.pdf (hereinafter NEDAP ET AL.).

[8] NAT'L CONSUMER LAW CTR., THE DEBT MACHINE: HOW THE COLLECTION INDUSTRY HOUNDS CONSUMERS AND OVERWHELMS COURTS 18 (2010), *available at* http://www.nclc.org/images/pdf/pr-reports/debt-machine.pdf (hereinafter NCLC).

revenue increased more than 700%.[9] Debt buyers purchase these large bundled portfolios of consumer debt[10] from the original creditor or secondary debt buyers for pennies on the dollar: for example, between 2006 and 2008, Encore Capital Group paid $584 million, or 3 cents on the dollar, to acquire more than 11,000 portfolios of debt with a total face value of $17.1 billion;[11] Asset Acceptance Security Group paid $121.9 million, or 2.75 cents on the dollar, in its 2008-2009 fiscal year for debts with a total face value of almost $4.5 billion;[12] and Asta Funding, Inc. paid $8 million, or 3 cents on the dollar, during its 2009-2010 fiscal year for debt portfolios with a total face value of $269.1 million.[13] The buyers hope to make a profit by collecting at least a small percentage of those accounts. Once they exhaust their efforts to collect, they often resell the portfolio down the line.[14] In the wake of the foreclosure crisis, debt buyers may also look to purchase an increasing amount of post-mortgage debts – the debts that can remain if the consumer still owes money on a mortgage loan after the house is sold through foreclosure – and try to collect on them as well.[15]

The growth of the debt buying industry has led to myriad problems, including increased use of the court system to collect the debts in these purchased portfolios. Using automated software, some debt collection agencies have become debt-collection-lawsuit mills, filing thousands of cookie-cutter lawsuits against consumers each month.[16] Encore Capital Group, the largest publicly-traded debt buyer in the

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[9] NEDAP ET AL., *supra* note 7, at 3.

[10] The Government Accountability Office (GAO) reported in 2009 that most debt collection involves credit card debt. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, CREDIT CARDS: FAIR DEBT COLLECTION PRACTICES ACT COULD BETTER REFLECT EVOLVING DEBT COLLECTION MARKETPLACE AND USE OF TECHNOLOGY 13 (2009), *available at* http://www.gao.gov/new.items/d09748.pdf. However, there are other types of debt commonly charged off and sent to collections, including telecommunication, electric utility, healthcare (hospital), and government (e.g., taxes) debts. *Id.* at 12. The report also noted that debt collectors now pursue deficiencies from post-foreclosure mortgages and post-repossession auto loans. *Id.* at 14.

[11] NCLC, *supra* note 8, at 18.

[12] Asset Acceptance Security Group, Annual Report (Form 10-K), at 33 (Feb. 26, 2010).

[13] Asta Funding, Inc., Annual Report (Form 10-K), at 36 (Dec. 10, 2010).

[14] *See* NEDAP ET AL., *supra* note 7, at 3 (indicating that as many as half of the credit-card accounts purchased directly from original creditors are eventually resold); *see also Debt-Buying and Selling Needs to be Regulated*, CONSUMER REPORTS, Oct. 2010, *available at* http://www.consumerreports.org/cro/magazine-archive/2010/october/viewpoint/overview/index.htm (telling the story of one consumer whose debt was sold to debt buyers, which led to collection attempts from 13 different companies on the same debt).

[15] Jim Wasserman, *Debt Collectors Can Come Calling Years After a Mortgage Default*, WASH. POST, Mar. 27, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/03/26/AR2010032600027.html. Sylvia Alayon, Vice President for the Consumer Mortgage Audit Center, told the *Post* that buying post-mortgage debts is a "big business, and investors are coming out of the woodwork." *Id.* Although some states, such as California, have laws that prevent consumers from being sued on post-mortgage deficiencies after a foreclosure, *see* CAL. CODE. CIV. PROC. § 580(b), consumers may not be aware of those laws and may sign away their rights in last-minute "short sale" to sell the property quickly and avoid the foreclosure process. *See* Wasserman, *supra*.

[16] Andrew Martin, *Automated Debt-Collection Lawsuits Engulf Courts*, N.Y. TIMES, July 13, 2010, at B1, *available at* http://www.nytimes.com/2010/07/13/business/13collection.html; Yeung, *supra* note 4

country by asset size, filed 245,000 lawsuits in 2009;[17] half of its $487.8 million in gross collections came from legal actions – a 22.4% increase in revenue from the previous fiscal year.[18]

To keep up with the vast number of lawsuits they file, debt buyers employ "robo-signers" who sign affidavits attesting that they have personally reviewed and verified debtors' records, when in fact they have only looked at basic account information on a computer screen.[19] The *New York Times* has compared debt buyers' use of robo-signing in debt collection litigation to the "widespread corner-cutting [by banks] in the rush to process delinquent mortgages."[20] But robo-signing by debt buyers seems to present even bigger problems for consumers, as one consumer attorney reflected in the *Times* article: "…with debt buyers, the debt has been passed through so many hands, often over so many years, that a lot of times, these companies are pursuing the wrong person, or the charges have no lawful basis."[21]

Debt collection lawsuits often target people who do not know their rights or have attorneys to defend them.[22] Debt collectors often have no proof that the debt even existed, let alone that the person they are suing was responsible for it.[23] But under existing practices, it seems that they do not need proof. The vast majority of consumers – estimates range from eighty to ninety-five percent[24] – do not respond to collection lawsuits, many because they do not get notice.[25] In 2009, the FTC received more complaints from consumers about debt collectors than about any other industry.[26] Consumers complained to the FTC that they had faced collection for debts that were not owed, amounts over what was owed, debts that had been

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("[California-based Attorney Erica Brachfeld] acknowledged in court documents that she files between 500 and 2,500 cases a month.").

[17] Encore Capital Group, Annual Report (Form 10-K), at 46 (Jan. 29, 2010).

[18] *See id.* at 26 (percentage calculated by Encore; $398.6 million in revenue from debt collection in 2008 fiscal year).

[19] David Segal, *Debt Collectors Face a Hazard: Writer's Cramp*, N.Y. TIMES, Nov. 1, 2010, at A1, *available at* http://www.nytimes.com/2010/11/01/business/01debt.html.

[20] *Id.*

[21] *Id.* (quoting Richard Rubin, Atty. in Santa Fe, N.M.).

[22] NEDAP ET AL., *supra* note 7, at 1 (explaining that of the 457,322 lawsuits filed by twenty-six debt buyers, ninety-five percent of the cases ending in default judgments were filed against people residing in low or moderate income neighborhoods, and not a single person in the study was represented by counsel).

[23] Martin, *supra* note 16.

[24] According to the FTC's description of an informal survey by the California Creditors' Bar Association, eighty percent of consumers do not file answers to collections complaints; the FTC has estimated a ninety-five percent non-response rate. FTC REPORT, *supra* note 3, at 7 n. 18.

[25] *See id.* at 8-9 (noting that many consumer advocates and judges have stated that service of process is often inadequate or improper).

[26] FED. TRADE COMM'N, ANNUAL REPORT 2010: FAIR DEBT COLLECTION PRACTICES ACT 3 (2010), *available at* http://www.ftc.gov/os/2010/04/P104802fdcpa2010annrpt.pdf.

discharged in bankruptcy, and impermissible fees, interests or expenses.[27] However, obtaining a default judgment against a consumer frequently requires little more than the name, address and alleged balance of the consumer, so there is little to stop incorrect or unjustified filings.

Debt collectors approach collection lawsuits in ways that undercut consumers' rights in litigation at every stage of the process. Debt collectors fail to properly notify consumers of lawsuits filed against them.[28] Collectors file lawsuits based on insufficient evidence of indebtedness.[29] They obtain default judgments at a high frequency against consumers who do not appear to defend the lawsuits.[30] They attempt to recover on debts even after the statute of limitations has run.[31] And they illegally levy exempt funds from consumers' personal bank accounts.[32]

Presently, the cost of unsubstantiated debt litigation falls on courts, taxpayers and individuals. Taxpayers subsidize the time and resources that courts spend processing collections claims. Individuals pay judgments for debts they never owed or for the wrong amount, or lose time and money defending such cases.

Consumer Stories on Debt Collection Litigation

Consumer stories best capture the impact that debt collection lawsuits can have on people who are not provided adequate notice or information about the debts they allegedly owe. These stories starkly depict the need for reform:

- *Suzanne, a mother of two, first found out about a lawsuit when she learned a creditor had used the court to get personal account information from her bank. She then found out that the creditor had a lien against her home, and when she looked at court records, she found a false proof of service claiming that someone had given her court documents at her California home during a time when she was in Oregon with her oldest son, looking at colleges.* More stringent standards for pre-filing notices in consumer debt collection lawsuits, as well as supplemental service of such lawsuits, could have ensured that Suzanne at least had the opportunity to respond to the suit against her and to try to protect her home from the creditor's lien.

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[27] *See id.* at 6-7 (31.3% of complaints alleged attempted collection of debt or debt amount consumer did not owe; 10.9% of complaints alleged attempted collection of fees, expenses or interest consumer did not owe).
[28] FTC REPORT, *supra* note 3, at 8-9.
[29] *Id.* at 16.
[30] *Id.* at 7 n. 18.
[31] *Id.* at 29.
[32] *Id.* at 31.

- *Elda is a full time nursing assistant and single mother raising four children in San Leandro, California. She fell behind on credit card payments, and the debt went to collection. Elda attempted to negotiate a new payment plan with the debt collector, but she could not afford to settle on its terms. Then she received a court notice notifying her that the collection agency had won a case against her. It was a shock because Elda never knew that she had been sued, and she had never had a chance to defend herself in court. She found erroneous court documents indicating that someone had come to her house and served her with a copy of the lawsuit. However, Elda was not home at the time the server supposedly arrived. She had evidence to prove that she was at work.* Because of the debt collector's improper service of process, Elda was deprived of her opportunity to defend herself in court.

- *John*[33] *was sued by a creditor, lost the case, and had a quarter of his wages garnished – all without his knowledge. A company sued him in 2008 for a credit card debt that it claimed he owed. Although the company claimed that it served him at his workplace, John says he never received the summons or complaint and had no idea he was being sued. In October of 2008, without John even being aware of the lawsuit, the court entered a default judgment against him for the full amount of the claim. Furthermore, 25 percent of his wages were garnished – the maximum amount allowed in California. John, whose income was well below the poverty line, already struggled to meet his family's expenses prior to the high garnishment. After that 25-percent deduction, his struggle went from bad to worse.* Because of the debt collector's questionable service of process, John was deprived of his chance to defend himself in court and lost a substantial fraction of his modest wages. Tightening standards for debt collection litigation practices could help prevent this kind of unjust outcome.

- *Daniel was sued by a debt collector he had never heard of. Despite repeated requests, the collector failed to furnish a copy of Daniel's original contract or proof of assignment of the debt. Daniel had to take time away from caring for his ailing partner, and from his work, to spend hours fighting the lawsuit.* Because debt collectors file lawsuits expecting to obtain default judgments when consumers do not come (or do not know to come) to court,[34] many debt collectors do not possess the documentation necessary to show that they (or their clients) actually own the debt, or that the person

[33] To protect his privacy, John's name has been changed for this report.

[34] *See* Jessica Silver-Greenberg, *Boom in Debt Buying Fuels Another Boom – In Lawsuits*, WALL ST. J., Nov. 28, 2010, *available at* http://online.wsj.com/article/SB10001424052702304510704575562212919179410.html ("The majority of borrowers don't have a lawyer, some don't know they are even being sued, and others don't appear in court, say judges").

they are suing even owes it.[35] Requiring debt collectors to demonstrate proof of assignment—in a pre-filing notice to the consumer and when filing the complaint—would inform the consumer about the source and amount of the debt so that the consumer can make an informed decision as to how, or whether, to defend the lawsuit in court.

THE BOOMING DEBT BUYING INDUSTRY ALSO SUBJECTS CONSUMERS TO REPEATED DEBT COLLECTION ATTEMPTS OUTSIDE OF COURT

Although the law protects consumers from certain egregious debt collection practices through the Fair Debt Collection Practices Act and parallel state laws,[36] buying and selling debt is essentially unregulated. Very little historical information about the debts contained in debt portfolios is required to be passed down through the chain of title. As a result, consumers can face years of continued collection attempts by debt buyers outside of the court system for debt that is invalid, paid off, or disputed.

Original creditors do not transfer important identifying information to debt buyers at the time of sale, which leaves subsequent debt collectors without adequate information to respond to FDCPA "validation requests"[37] from consumers to verify and provide information about the debt, or to prove their cases in court. It is all too common for debt buyers to acquire spreadsheets containing inadequate or absent records of payments, disputes, or prior exchanges with the consumer -- and these spreadsheets are sold and resold repeatedly.[38] The *New York Times* reported in November 2010 that a JPMorgan Chase employee told the paper that despite finding 5,000 accounts with incorrect balances or addresses in a portfolio of 23,000 delinquent accounts being prepared for sale, Chase had sold the portfolio—with mistakes intact—to a debt buyer.[39] Plainly, it is easier for a creditor purchasing a portfolio of debts from an original creditor to ascertain how much is actually owed than it is for the consumer.

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[35] *See* FTC REPORT, *supra* note 3, at 15.

[36] California has a state fair debt collection law, the Rosenthal Fair Debt Collection Practices Act. CAL. CIV. CODE §§ 1788-1788.32 (Deering 2010). All but seven states have a law that deals with debt collector practices. NAT'L CONSUMER LAW CTR., Fair Debt Collection § 11.2.1 (6th ed. 2008).

[37] FDCPA, § 1692(g)(b) (requiring the collector to provide the consumer with certain information about the debt and to verify the debt upon the consumer's request).

[38] Segal, *supra* note 20 (JPMorgan Chase employee admitted that portfolios with errors were sold anyway: "We found that with about 5,000 accounts there were incorrect balances, incorrect addresses….There were even cases where a consumer had won a judgment against Chase, but it was still part of the package being sold.").

[39] *Id.*

These mistakes could live on and haunt account holders well beyond the legal limits currently in place. Statutes of limitations are meant to protect consumers against lack of memory, missing records and witnesses, and other difficulties inherent in attempting to defend a lawsuit. Each state has a statute of limitations limiting the period during which a collector can sue a consumer to collect a debt.[40] Yet debt buyers continue to contact consumers, sometimes for years after the statutes of limitations have run, to recover these "time-barred" debts.

The federal Fair Credit Reporting Act (FCRA) places a seven-year limit on reporting debt to a credit reporting agency.[41] The purpose of FCRA is to ensure the accuracy and fairness of credit reporting.[42] Because debt buying and selling continues long after the legal time limit on credit reporting has expired, [43] consumers can be forced to deal with inaccuracies and lack of records long after the seven years has elapsed. Further, the potential for unfairness and inaccuracy does not end once the risk of litigation or ruined credit is gone.

The law needs to be changed to require that debt buyers obtain, provide to the consumer, and retain a file of information documenting the amount owed before they can collect on a debt. These basic requirements would ensure increased information flows between creditors, debt buyers and collectors, and would ensure that this crucial information is available to consumers.

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[40] *See* FTC REPORT, *supra* note 3, at 22-24.

[41] Fair Credit Reporting Act, 15 U.S.C. §§ 1681c(a)(2-5), 1681c(b)(1-2) (limiting seven-year limit on reporting debt to a credit reporting agency, except for debts of $150,000 or greater, or employment of an individual at an annual salary equal or reasonably expected to equal $75,000 or more). Congress amended the law in 1996 to clarify that the seven-year period must start "no more than 180 days after the commencement of the delinquency immediately preceding the collection, charge to profit or loss, or similar action," because it wanted to ensure that "consumer reports contain timely as well as accurate information." S. REP. NO. 104-185, at 39-40 (1996), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_cong_reports&docid=f:sr185.104.pdf.

[42] *See* 15 U.S.C. § 1681(b) ("It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.").

[43] Portfolio Recovery Assocs., Inc., Annual Report (Form 10-K), at 8 (Feb. 16, 2010) ("[Portfolio (one of four publically traded debt buying companies)] purchases accounts previously worked by four or more agencies and these are typically 1,260 days [42 months] or more past due").

Consumer Stories on Debt Buyers' Collection Attempts

The following consumer stories illustrate why more information must be obtained, retained and provided to the consumer before a debt buyer attempts to collect on a debt:

- *Marie from Crescent City, California got a call from a bill collector in early 2010, claiming that she owed $500 for a purchase made on the Home Shopping Network eight years earlier. The debt collection company said that it had purchased the debt from the Network, and demanded that she immediately pay the full $500. When Marie disputed the debt, a collector with the firm accused her of lying. This wasn't the first attempt to collect the alleged debt: two years earlier, a different debt collection company called Marie with a similar claim. Marie considered both claims bogus. The collectors could not provide details about what she supposedly purchased or any information regarding payments that she had already made for the merchandize. When Marie had made purchases on the Home Shopping Network, she had authorized the Network to deduct money from her bank account in installments. The Network had never stated to her that the account had insufficient funds to pay any debts. After hearing from the second collector, Marie contacted the Network to find out more information about the original purchase. An operator said the records were no longer available. The alleged debt was not on Marie's credit report when she checked it last year.* Even though the debt collectors could provide no information or documentation about how they had calculated the amount Marie supposedly owed, that did not stop them from contacting her and trying to collect on a debt that likely did not exist.
- *Noah of Richmond, California was contacted by three different companies attempting to collect on the same debt, even though he had reached a settlement with one of the companies. He agreed to a settlement offered by the first firm, Frederick J. Hanna & Associates. A few months later, Associated Recovery Systems (another debt collection agency) claimed that it purchased the original debt from Chase, and Noah now owed it more than $4,000. Noah provided the company with proof of the settlement with the first firm. Associated refused to budge at first, but then it offered to settle. Noah rejected the offer, and he repeated his assertion that the debt was settled. Next, he was contacted by yet another debt collection firm, Zwicker & Associates, which claimed that he owed them the full amount.* If the original creditor had been required by law to exchange more information with debt buyers, this could have reduced confusion and could have prevented the

second two debt collectors from attempting to collect on a debt that had already been settled by the first collector.

- *Willie Mae, an 82-year-old Oakland, California woman was current on a payment plan that she negotiated with a debt collector. Even so, she received three to four threatening phone calls every week from companies attempting to collect on the same debt. Willie Mae had been sued by Portfolio Recovery Associates in 2008. The company apparently purchased her debt from Washington Mutual, to whom Willie Mae owed about $4,000 in credit card debt. Days before she was scheduled to face Portfolio in court, she received a call from a company representative who warned her that she would lose all her money if she lost the case. Willie did not realize at the time that her Social Security benefits and income from her pension were exempt from collection, so she agreed to pay $1000 more than she owed, even though money was already so tight that she had to get some meals from the food bank.* Even though Willie Mae's lawyer arranged a new settlement of the debt, and Willie Mae was making payments pursuant to that settlement, she was still subjected to persistent collection attempts – an unfair result that might have been prevented by increased information flow between creditors.

States are beginning to address the problem of debt collectors' attempts to collect debts without documentation to show that the debt is legally recoverable and within the relevant statute of limitations. For example, New York City requires debt collectors to notify consumers in writing if a debt has passed the statute of limitations.[44] Wisconsin and Mississippi laws go even further than New York City's law by extinguishing the debt once it has passed the statute of limitations.[45] New Mexico also recently implemented regulations requiring any person collecting on a debt to first make a "good faith" determination whether a debt is "time-barred" or otherwise unrecoverable by law, and to back up those determinations with supporting documents.[46] If a debt is time-barred or otherwise unrecoverable, the debt collector may not proceed with any debt collection attempts unless it notifies the consumer that (1) the debt is beyond the statute of limitations, or is otherwise legally unenforceable, (2) the consumer has no obligation to pay the debt, (3) the consumer is not obligated to do anything that would waive his or her legal rights, and (4) some

[44] 6 RULES OF CITY OF N.Y. § 2-191 (2010).

[45] *See* WIS. STAT. § 893.05 (2010) (when statute of limitations on cause of action has passed, "the right is extinguished as well as the remedy"); MISS. CODE ANN. § 15-1-3 (2010) ("completion of the period of limitation…shall defeat and extinguish the right as well as the remedy").

[46] N.M. CODE R. §§ 12.2.12.8 (Weil 2010) (effective Dec.15, 2010). If the legal status of a debt is in dispute, the burden falls on the debt collector to show that it made a reasonable, good faith determination that a debt is legally recoverable. Lack of supporting documentation creates a rebuttable presumption that the debt collector did not make a reasonable good faith determination before attempting to collect on the debt. § 12.2.12.9(H).

actions, such as a partial payment on the debt, could revive the debt and make it recoverable again.[47] The New Mexico regulations provide strong first steps toward preventing collection attempts on debt for which the consumer has no obligation to pay. An even better law would prohibit debt collectors from making *any* debt collection attempts, without exception, if the collector has determined that the consumer has no legal obligation to pay the debt.

POLICY RECOMMENDATIONS

Reform is needed to protect consumers from improper and unfair debt collection and debt buying practices, and to ensure that scarce court resources are devoted to handling only those cases that involve substantiated debt collection claims. The following policy recommendations provide a reasonable structure to protect consumers from being subjected to debt collection practices by someone without adequate information to substantiate the fact and amount of the debt, and to put a time limit on "zombie debt" – very old debt where the age of the debt makes it particularly difficult to dispute the collector's claims.

Require that more information be obtained before a debt collector makes any collection attempts.

Under the Fair Debt Collection Practices Act, debt collectors must provide a notice with basic "validation" information to the consumer within five days after their first communication, to show that they have a legitimate basis for collecting the debt they claim to be owed.[48] The notice must include five items: (1) the amount of the debt; (2) the name of the creditor; (3) a statement that the consumer must dispute the debt within 30 days or it will be presumed valid; (4) a statement that if the consumer disputes the debt within the 30-day period, the collector will provide verification of the debt; and (5) a statement that upon the consumer's request during the 30-day period, the collector will provide the name of the original creditor if different from the current creditor.[49] Retaining this information, as well as providing it to the debt buyer, becomes important once the original creditor sells the debt. It is also essential for ensuring accuracy once a collector notifies a consumer that a collection effort has begun. And if the matter must be settled in court, early and equal access by all parties to the same information is absolutely vital to ensuring a fair and just litigation process.

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[47] § 12.2.12.9(A).
[48] *See* 15 U.S.C. §§ 1692g(a)(1-5).
[49] *Id.*

The FDCPA and parallel state fair debt collection laws must be expanded so that the list of required "baseline" items also includes: (6) a statement explaining the consumer's rights under the FDPCA; (7) the name of the original creditor, whether or not the consumer requests it; and (8) an itemization of the total principal, interest, fees and other charges that were added to the debt:[50]

"Baseline" Information (currently required)

1. Amount of debt;
2. Name of creditor;
3. Statement re: assumption of debt validity in the absence of a dispute;
4. Statement re: if the debt is disputed the debt collector will "verify"; and
5. Statement re: upon written request the collector will provide name of original creditor if different from current creditor.

Recommended Additional "Baseline" Information

6. Statement notifying consumers of two significant rights they have under the FDCPA;[51]
7. Name of original creditor; and
8. Itemization of: total principal, interest, fees and other charges that have been added to the debt.

The FDCPA and parallel state fair debt collection laws should also be amended to require that debt collectors make a good faith effort to retain certain "baseline plus" information to the extent possible. A debt collector should be required to provide all "baseline plus" information it has to the consumer within five days after their first communication. Courts should also require that all available "baseline plus" information be attached to any complaint in a debt collection lawsuit:

Recommended "Baseline Plus" Information

9. Proof of indebtedness signed by the consumer;
10. Date that debt was incurred and date of last payment;
11. Chain of title if debt has been sold;[52]

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[50] These three additional items are recommended in FED. TRADE COMM'N, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE (2009) *available at* http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf.

[51] These two rights are: (1) the right to suspend debt collection attempts prior to debt verification, and (2) the right to require debt collects to cease contact upon written request. 15 U.S.C. §§ 1692c(c), 1692g(b).

12. Original debt;
13. Each payment credited to the debt;
14. Each fee and charge added to the debt;
15. Each payment credited against those fees and charges;
16. All other debits or charges to the account; and
17. Explanation of the nature of those fees, charges, debits, and all other credits to the debt, by source and amount.[53]

Require that more information be submitted when filing a complaint in court.

State law, federal law or rules, and court rules should be changed to require that a person seeking to collect a debt in court submit basic validation information as part of the complaint. Providing this information up front should increase the likelihood that the amount sued for is the amount owed, and should give the consumer the ability to choose an informed course of action—to defend the lawsuit or to try to negotiate a payment plan or settlement with the debt collector. California law already requires that a collector show how the debt was calculated, including the original amount and the nature and type of credits and additional charges. [54] State law, federal law or rules, and court rules should require this information and also require that debt collection complaints include all required "baseline" and all available "baseline plus" information about the debt that collectors must provide to consumers per our recommendations above:

- Amount of the debt;
- Name of the creditor;
- Name of the original creditor;
- Proof of indebtedness signed by the consumer;
- Original debt;
- Date debt was incurred and date of last payment;

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[52] Policy Recommendations 9-11 are included in comments submitted by the National Consumer Law Center and National Association of Consumer Advocates to the Federal Trade Commission. Letter from Nat'l Consumer Law Ctr. And Nat'l Ass'n of Consumer Advocates to Fed. Trade Comm'n (June 6, 2007), *available at* http://www.ftc.gov/os/comments/debtcollectionworkshop/529233-00018.pdf.

[53] Policy Recommendations 12-17 seek to include information that is required to accompany debt collection complaints in California small claims under CAL. CODE CIV. PROC. § 116.222 (Deering 2009).

[54] CAL. COMM. CODE § 9616, CAL. CODE CIV. PROC. § 116.222. Debt collectors are mostly excluded from small claims court in California, however. *See* CAL. CODE CIV. PROC. § 116.420.

- Itemization of the total principal, interest, fees and other charges added to the debt;
- An explanation of how the debt amount was calculated;
- Each payment credited to the debt, including credits against interest, fees and charges;
- All other debits or charges to the account; and
- Explanation of the nature of the fees, charges, debits, by source and amount.

Require that more information be passed along to the debt buyer when a debt is sold.

A serious problem with debt buying is that the original creditor (or current owner of the debt) does not pass along enough information to the debt buyer. This makes it difficult for collectors to provide the required validation information and prevent unfair or improper collection practices. State law and federal law or rules should require debt sellers to pass along to debt buyers all of the information that debt collectors are required to include in a complaint for a debt collection lawsuit, per the recommendations above. In addition, state law and federal law or rules should require that the following information be passed along with every sale of the debt and be made readily available to any affected consumer, without charge:

- Validation information listed in the previous section;
- All communications from the consumer that dispute the debt;
- Whether any settlement has been reached by this collector, any prior collector, or the original creditor concerning the debt;
- Whether the debt is beyond the statute of limitations;[55]
- Whether the consumer is or has been represented by an attorney and the attorney's contact information;
- Whether the consumer has informed the collector that a time or place is inconvenient to the consumer for communication;
- Whether the debt has been discharged or listed in bankruptcy;
- Any illness or disability claimed by the consumer or known to the collector;

[55] We also recommend a prohibition on the *sale* of debt if it is beyond the shorter of these two times: (1) the statute of limitations, or (2) the reporting period under FCRA.

- Any dispute that the consumer has raised with the creditor or any prior owner of the debt about the amount owed or about whether the consumer is the person who owes the debt;
- Any known or claimed violation of the FDCPA or relevant state fair debt collection laws to date; and
- Whether the consumer receives protected public benefits against which the collector cannot make a claim.

Increase oversight over service of process.

State law, federal law or rules, and court rules should require that supplemental service of the notice of complaint and summons be mailed by the clerk of the court to the consumer (paid for by the debt collector), and should prohibit default judgment if the notice is returned to the court as undeliverable. Consumers shouldn't be denied their right to due process and the right to defend themselves in court simply because they never knew they were being sued.

Prevent use of the court system to turn unsubstantiated claims into default judgments.

State law, federal law or rules, and court rules should:

- Establish minimum evidentiary standards that debt collectors must meet before they may obtain a default or summary judgment in their favor. Require dismissal where debt collectors fail to comply with these requirements.
- Require that courts enter judgment for the debtor, rather than a dismissal without prejudice, if (1) the consumer shows up to his or her court date, (2) the debt collector does not show up or is not prepared to proceed to trial, and (3) there is no good cause excuse to reschedule for a later date. The consumer shouldn't have to waste time and money coming back to court when the debt collector doesn't meet its own obligations to the court.
- Give courts discretion to order creditors to pay consumers' costs of preparing for trial, including lost wages and transportation expenses.

These changes are aimed at deterring debt collectors from bringing suits they are not prepared to argue in court, while compensating consumers for wasted time and money.

Protect consumers from debt collection, both in and out of court, for debts they have no legal obligation to pay.

A person attempting to collect on a debt should be required to prove that a debt obligation is legally enforceable before taking any further action. State law, federal law or rules, and court rules should:

- Require the debt collector to make a good faith determination as to whether or not the debt is time-barred, or otherwise unrecoverable as a matter of law, before making any attempts to collect on the debt.
- Create a rebuttable presumption that the debt collector has not made a good faith determination of a debt's legal status unless the debt collector produces adequate documentation supporting that determination.
- Prohibit filing suit against a consumer or otherwise attempting to collect a debt that the debt collector knows or has reason to know is time-barred or otherwise unrecoverable as a matter of law.
- Prohibit the revival of debts, and the restarting of the statute of limitations, unless the consumer is made aware that, for example, a partial payment on a stale debt may have this effect, and explicitly acknowledges the revival in writing.
- Require that the debt collector give the consumer a receipt for each payment on a debt, so that consumers are better able to prove what they have paid and to whom.

End "robo-signing" and collection attempts without back-up showing how the debt was calculated.

State law, federal law or rules, and court rules should require debt collectors to provide supporting documentation to the consumer, and to the court when suing to collect on a debt. The documentation should show that the debt collector is attempting to collect from the right person, for the right amount, on a debt that it can lawfully recover.

Require that statements connected to debt collection, whether or not a lawsuit is filed, be backed by evidence that must be reviewed before the statement is made, retained on file, and made available to the consumer promptly upon request and without charge.

State law and federal law or rules should strengthen prohibitions on false, deceptive or misleading representations under the FDCPA[56] and similar state laws by requiring debt collectors to review and retain evidence that supports the statements they make to consumers. This evidence must be reviewed before statements are made, and the consumer must be able to obtain the evidence upon request.

Establish a sell-by date for debt.

Once a debt is so old it cannot be brought to court or be reported on a credit report, sale of that debt should be forbidden or restricted:

- At the federal level, forbid sale and collection of debt once that debt is barred from being reported on a credit report pursuant to FCRA Section 605(a)(4), which is seven years plus 180 days.
- At the state level, prohibit sale and collection of debt after the shorter of these two times: (1) the time during which a debt collector can sue on the debt under the relevant statute of limitations, or (2) the seven-year FCRA limitation on reporting a debt on a credit report.[57]

[56] 15 U.S.C. § 1692e.

[57] States should be able to apply such a prohibition to national banks selling debts, in light of recent financial reform legislation. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be codified in scattered sections of the U.S. Code). Starting in July 2011, states will have a greater ability to regulate national banks, thanks to a clarification of certain national bank preemption standards. *See* Pub. L. No. 111-203, 124 Stat. at 2011 (preserving the power of states to enforce most state statutes against national banks) (effective date is July 21, 2011 pursuant to Section 1051 of the Act as implemented by the Dept. of Treasury, *see* Designated Transfer Date, 75 Fed. Reg. 181, 181 (Sept. 20, 2010)). Under the Dodd-Frank Act, states will be able to enforce state laws regulating the "manner, content, or terms and conditions of any financial transaction…or any account related thereto, with respect to a consumer" so long as those state laws do not have a "discriminatory effect" on national banks and do not "significantly interfere" with the exercise by the national bank of its powers. *See id.* at 2014 (Section 1044 of the Act).

Ensure that debt collectors who violate the law are appropriately penalized.

- Impose statutory damages and increase civil penalties for violations of debt collection laws from $1,000 under the FDCPA[58] and similar state laws to at least $5,000. In California, civil penalties should be raised from $100-$1,000 per violation to $500-$5,000 per violation.[59]
- Remove any prohibitions on consumers bringing class actions for violations of fair debt collection laws.[60]
- Prohibit awarding attorney's fees to debt collectors who fail to provide sufficient evidence to support the award based on actual hours worked. These fees are often awarded under a contractual attorney's fees provision.

Secure personal bank accounts against improper levying, wages against unlawful garnishment, and homes against illegal liens (creditor claims on the property).

- Require that the sheriff request information from consumers about their exempt funds to prevent improper levy of bank accounts, and require that the sheriff request information about consumers' total income to protect against wage garnishment beyond the maximum percentage allowed.[61]
- *Special issue in California*: Protect consumers' homes by making homestead exemptions automatic for both forced and non-forced property sales. Without this exemption, debt collectors who obtain a court judgment can obtain a lien on the consumer's property, which can

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[58] 15 U.S.C. § 1692k.

[59] CAL. CIV. CODE § 1788.30(b).

[60] For example, while the language of the California Rosenthal Act appears to bar class actions by mandating individual actions, courts have found that the California legislature intended the 1999 amendment to the Rosenthal Act to allow for class actions by incorporating portions of the federal FDCPA. *See*, *e.g.*, Palmer v. Stassinos, 233 F.R.D. 546, 548, U.S. Dist. LEXIS 2617 (N.D. Cal. 2006); Abels v. JBC Legal Group, LLC, 227 F.R.D. 541, 547-48, 2005 U.S. Dist. LEXIS 9180 (N.D. Cal. 2005); McDonald v. Bonded Collectors, L.L.C., 233 F.R.D. 576, 2005 U.S. Dist. LEXIS 17365 (S.D. Cal. 2005); WILLIAM RUBENSTEIN ET AL., 6 NEWBERG ON CLASS ACTIONS § 21:29 (4TH ED. 2010).

[61] The U.S. Department of the Treasury, Social Security Administration, Department of Veterans Affairs, Railroad Retirement Board and Office of Personnel Management recently issued a joint proposed rule to prevent the garnishment of federal benefit payments that are commingled with other funds in a consumer's bank account. Garnishment of Accounts Containing Federal Benefit Payments, 75 Fed. Reg. 20299 (Apr. 19, 2010). The proposed rule would require the debtor's bank to review the debtor's bank account activity within the last 60 days, and to allow the debtor access to "an amount equal to the lesser of the sum of such exempt payments or the balance of the account on the date of the account review," so that the debtor has access to funds exempt from garnishment while the bank complies with the court garnishment order. 75 Fed. Reg. at 20301.

be enforced through a foreclosure sale. Consumers should not have to worry about losing the family home or being unable to sell their property because a debt collector has obtained a lien as a result of an improperly served or documented debt collection lawsuit.

CONCLUSION

Consumers laden with credit card and other debts are already struggling. They do not need the added worries of collection attempts and collection lawsuits based on inadequate information, or judgments for debts they never owed or that are for the wrong amount. They should not be losing debt collection suits without receiving any notice that they are being sued, only to find that their wages and benefits have already been seized. The reforms set forth in this report will help to protect consumers against unfair debt collection practices, and ensure that scarce court resources are devoted to legitimate and substantiated debt collection claims.