

As the leading organization representing the interests of older people, especially the protection of their financial security, AARP appreciates the opportunity to submit written comments to the Consumer Debt Collection Roundtable. Older people are experiencing a disproportionate increase in unaffordable debt and are disproportionately vulnerable to debt collection abuses.

Abuses in the debt collection industry abound, despite efforts by legislatures, state Attorneys General, and the Federal Trade Commission (hereinafter “FTC”) to protect consumers. Common abuses include seeking to collect time-barred debt and debt buyer’s refusal to purchase the evidence necessary to verify the validity of the debt. The collection of stale claims also increases the likelihood that errors in collection will occur because alleged debtors may lose important evidence over time. Defective service of process has been reported in court systems across the country. Once a judgment is entered, collectors aggressively seek to collect, including garnishing funds that are exempt under federal law and filing liens against homes.

AARP urges more effective protection from the debt collection abuses common in the current financial environment. The Roundtables have sought to collect evidence regarding the nature and extent of problems relating to judicial collections, looking at service of process, judicial practices and procedures, alternative dispute resolution experiments, and more. While conclusive studies may or may not be available, it is clear that debt collection continues to be an overwhelming problem for both people and the courts.. We urge systemic improvements to better protect people from abusive collections by addressing the underlying wide-spread industry practices that encourage abusive collections. Protections that should be enforced include:

- Requiring debt collectors and debt buyers to have adequate documentation and evidence necessary to verify a debt prior to initiation of collection activities, including the original agreement or contract, if written;
- Requiring collectors to provide in the initial written contact with the alleged debtor an accurate, itemized accounting of principal, fees, and interest sought;
- Requiring collectors to establish at the time of collection the chain of title evidencing the original creditor and all assignments of the debt;

- Ensuring disputed debt and debt that is beyond the applicable statute of limitations is not sold to subsequent debt buyers;
- Requiring collectors affirmatively to disclose collection efforts that are past the statute of limitations and that making partial payment will revive the debt.
- Ensuring truthfulness to affidavits claiming to be based on personal knowledge of the alleged debtor's account or business practices of a prior creditor.
- Requiring banks to evaluate funds electronically deposited into accounts prior to freezing pursuant to a garnishment order to ensure they are not categorically exempt from garnishment; and,
- Ensuring the prompt release of funds shown to be exempt from garnishment and prohibiting subsequent garnishment of funds known to be exempt.

I. Older People Are Disproportionately Impacted By Debt Collection Abuses and A Growing Unaffordable Debt Burden

Older people are very vulnerable to debt collection abuses. Many older people own their homes, are overly trusting of debt collectors, and believe they will have to go to jail if they are summonsed to court. Donna S. Harkness, *When Over-The-Limit is Over The Top: Addressing The Adverse Impact of Unconscionable Consumer-Credit Practices on the Elderly*, 16 Elder L.J. 1, 3-4 (2008); Matthew W. Ludwig, *Abuse, Harassment, and Deception: How the FDCPA is Failing America's Elderly Debtors*, 1 Elder L.J. 135, 135-37, 151-56 (2008). As distressing as abusive debt collection practices are for everyone, they are particularly problematic for seniors. A frail elderly person is more easily upset by an abusive telephone call; indeed, the stress from harassing tactics can actually threaten the health of such people. Older consumers living alone are more often targets of abusive tactics because they may be socially isolated; in addition, because they are at home during daytime hours, they are more accessible to collectors. Charles Duhigg, "*Bilking the Elderly with a Corporate Assist*," N.Y. Times, A1 (May 20, 2007).

Older people are also particularly vulnerable to debt collection abuses because debt burdens and bankruptcy rates are growing faster for older

people than any other age group. Although older households long have been considered among the most frugal and resistant to consumer debt, changing economic conditions – particularly declining pension and investment income and rising costs for basic expenses such as housing, prescription drugs, health care, and utilities – have made credit card debt a more serious financial issue for older people.

A. Deregulation and Growth in the Financial Sectors Followed Passage of the FDCPA

Congress enacted the Fair Debt Collections Practices Act (hereinafter “FDCPA”) in 1977 to combat the “widespread and serious national problem” of debt collection abuse. Consumer Credit Protection Act, S. Rep. No. 95-382, at 2 (1977). The FDCPA was designed to “prohibit in general terms any harassing, unfair, or deceptive collection practice,” as well as to place restrictions on the manner in which debt collectors could contact debtors. *Id.* at 4. A third abusive practice the Act sought to curb in 1977 was “forum abuse,” in which “collectors would file suit against consumers in courts which are so distant or inconvenient that consumers are unable to appear. As a result, the debt collector obtains a default judgment and the consumer is denied his day in court.” *Id.* at 5.

In 1977, when the FDCPA was passed, there was no interstate banking, and credit card companies had to obey the laws of the borrower’s home state. Federal Trade Commission, *Statement of Basis and Purpose for the Credit Practices Rule*, 49 Fed. Reg. 7740, 7747 (Mar. 1, 1984). Credit card deregulation, and the concomitant spiraling credit card debt began in 1978 with a Supreme Court decision allowing banks to locate in states with lax or no usury caps and to take the lax states’ interest limits across state lines. *Marquette Nat’l. Bank of Minneapolis v First of Omaha Service Corp.*, 439 U.S. 299 (1978). At the beginning of 1977, consumers carried revolving debt worth approximately \$32 billion; by 2007 it had increased more than 27 times to \$880 billion. Federal Reserve Board, *Statistical Release - Consumer Credit Historical Data (Revolving)*, available at www.federalreserve.gov/releases/g19/hist/cc_hist_mt.txt (accessed Nov. 18, 2009).

According to the Employee Benefits Research Institute, the age group with the largest percentage point increase in credit card debt was those with family heads age 55–64, increasing from 37% in 1992 to 50% in 2007.

Notes, *Debt of the Elderly and Near Elderly, 1992–2007*, Vol. 30, No. 10. p.9 (Oct. 2009), available at http://www.ebri.org/pdf/notespdf/EBRI_Notes_10-Oct09.DebtEldly.pdf (accessed Nov. 18, 2009). A growing share of older families had incurred debt through 2007, particularly those ages 55–64 -- the ages right before or at the start of retirement. *Id.* at 6. The percentage of families headed by a person age 55 or older who have some level of debt was 63.0 percent in 2007, almost 3 percentage points higher than 2004, 7 percentage points higher than in 2001, and up nearly 10 percentage points from 1992. The average total debt level also increased from 1992–2007: from \$32,191 (2007 dollars) in 1992 to \$70,370 in 2007 -- a real average increase of 118%. The median debt level (half above, half below) of those with debt increased from \$15,923 to \$43,000, or 170%. *Id.*

Not only do older people carry more credit card debt than before, but more are carrying what may be considered *unaffordable* debt. An increasing number of older people -- from 7.3% in 2004 to 9.9% in 2007 -- have debt payments that exceed 40% of their income, and this increase is especially acute for older age groups. Employee Benefit Research Institute Notes, *Debt of the Elderly and Near Elderly, 1992–2007*, Vol. 30, No. 10. p.9 (Oct. 2009), available at http://www.ebri.org/pdf/notespdf/EBRI_Notes_10-Oct09.DebtEldly.pdf (accessed Nov. 18, 2009).

Among those families headed by a person ages 55–64, the proportion with excessive debt above the 40% threshold increased from 7.9% in 2004 to 12.5% in 2007, and for those ages 65–74, it rose from 7.9% to 11.2% during this period. *Id.* It is clear that unmanageable debt is forcing some older people to delay retirement, and it is nudging those already out of the workforce back in. Tamara Draut & Heather McGhee, Demos, *Retiring in the Red: The Growth of Debt Among Older Americans* (February 2004), available at http://www.demos.org/pubs/Retiring_2ed.pdf (accessed Nov. 18, 2009).

Credit card debt is also causing a record number of older people to seek bankruptcy-court protection, and bankruptcies among older people are increasing faster than any other age group. Deborah Thorne, Ohio University, Elizabeth Warren, Harvard Law School, and Teresa A. Sullivan, University of Michigan, *Generations of Struggle*, published by AARP's Public Policy Institute, (June 2008), http://www.aarp.org/research/credit-debt/debt/2008_11_debt.html (accessed Nov. 18, 2009). The rate of personal bankruptcy filings among those aged 45 to 54 jumped by more than

48% from 1991 to 2007. *Id.* For people aged 55 to 64, the rate rose by 150%, and for those aged 75 to 84, by 433%. *Id.* Such bankruptcies often have as a cause high medical costs. *Id.*

A significant amount of debt load is increasingly exacerbated by punitive tactics of the credit card industry which keep consumers on a treadmill of spiraling debt, fees, and charges for as long as possible. Center For Responsible Lending, *The Plastic Safety Net: The Reality Behind Debt In America: Findings From A National Household Survey Of Credit Card Debt Among Low- And Middle-Income Households* 20-21 (2005), available at <http://www.responsiblelending.org/credit-cards/research-analysis/DEMOS-101205.pdf> (accessed Nov. 18, 2009). “A debtor could pay nearly 100% of what she owed every year for the rest of her life, and thanks to the traps built in to her credit card, she would keep paying until she died—and still not pay off her card.” Statement of Professor Elizabeth Warren, Senate Comm. On Banking, Housing & Urban Affairs, *Examining The Billing, Marketing, And Disclosure Practices Of The Credit Card Industry And Their Impact On Consumers* 3 (Jan. 25, 2007), http://www.banking.senate.gov/_files/warren.pdf (accessed Jan 4, 2010).

The litany of abusive credit card fees and charges seen today did not exist in 1977. But in 1996, a Supreme Court ruling permitted credit card companies to avoid laws of the borrower’s home state governing a wide variety of fees. *Smiley v Citibank (SD), N.A.*, 517 U.S. 735 (1996). Credit card lenders no longer impose high penalties in order to curb undesirable behavior by consumers. Industry tactics now intentionally trap consumers into incurring added fees, practices which have been described as “widespread financial exploitation of the urban poor by overbearing credit card companies.” *Discover Bank v Owens*, 822 N.E.2d 869, 875 (Ohio Mun. Ct. Clev. 2004); see Government Accountability Office, *Credit Cards: Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers*, GAO-06-929, at 20-21 (September 2006), available at www.gao.gov/new.items/d06929.pdf (accessed Nov. 18, 2009).

The debt collection industry has also evolved substantially in the decades since the FDCPA was passed. “The most significant change in the debt collection business in the past decade, however, has been the advent and growth of debt buying (i.e., the purchasing, collecting, and reselling of debts in default).” Federal Trade Commission, *Collecting Consumer Debts: The Challenges of Change, A Workshop Report*, iv, (Feb. 2009), available at

<http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf> (accessed Nov. 18, 2009) (hereinafter “*Challenges of Change*”). Formerly considered a liability, stale debt is now a commodity that is sold at auction to the highest bidder. *SEC v Merchant Capital, LLC*, 483 F.3d 747, 750-51 (11th Cir. 2007); Suein Hwang, *Small Claims: Once-Ignored Consumer Debts Are Focus of Booming Industry*, Wall St. J., A4 (Oct. 25, 2004). Greater efficiencies in the collection of debts, fed by technological and communications advances, have spawned the debt buying industry, anticipated to have annual revenues worth \$11.6 billion by 2011. *Challenges of Change* at 13. Purchasing consumer debt at rock-bottom prices with little of the information about the debt, collectors are no longer hampered by traditional transaction costs. *Id.* at 17 n.121.

B. Collection Industry Focus Is On Debts Previously Considered To Be Uncollectible

The evolution of the debt buying industry is driving an increasing volume of debt collections. Courts across the country face significant challenges in administering the burgeoning dockets of collections in a just and fair manner. “Judges have expressed concern that the burden of handling the number of debt collection lawsuits on their dockets is making it difficult for them to handle other cases in an expeditious manner.” *Challenges of Change* at 56, Report of the Civil Court of the City of New York, January 1, 1997 – December 31, 2006, *A Decade of Change and Challenge in “The People’s Court” 1997 – 2006* at 11-12 (hereinafter “*NYC Civil Court Report*”). The New York City Department of Consumer Affairs has expressed concern that complaints and testimony received by the Department “reflect that debt collection efforts are initiated and proceed through the court process despite insufficient proof demonstrating that a debt is actually due and owing.” (Comment of New York City Department of Consumer Affairs Submitted to FTC, at 2 [Nov. 9, 2007], available at [http://www.ftc.gov/os/comments/debtcollection workshop/529233-00055.pdf](http://www.ftc.gov/os/comments/debtcollection%20workshop/529233-00055.pdf) [accessed Nov. 18, 2009]).

Debt collectors aggressively pursue judicial collection of debts previously considered to be uncollectible, especially if an alleged debtor has an attachable asset, such as a home. Courts must guard against relaxation of legal standards due to the sheer volume of cases choking the court system for relaxation will only increase the number of unverifiable claims. “The judiciary continues to provide an important role in safeguarding consumer

rights and in overseeing the fairness of the debt collection process.” *MBNA America Bank, N.A. v Nelson*, 15 Misc. 3d 1148[A], *1, 841 N.Y.S.2d 826 (Table N.Y. Civ Ct. 2007). Considering the courts’ role as gatekeeper, both debtors and the integrity of the legal system risk significant harm if vigilance and high standards are not maintained. The *ad hoc* development of alternative procedures, including “rocket dockets” may exacerbate the problems they are intended to solve. *See* Fred Schulte and James Drew, *Their Day in Court*, Baltimore Sun (Dec. 22, 2008) available at <http://www.baltimoresun.com/news/nation-world/bal-te.hospitaldebt22dec22,0,2601054.story> (accessed Jan. 18, 2010).

Because debt is increasingly more difficult to collect as it ages, most stale debt is purchased for minimal cost, between 4 and 6 cents on the dollar and eventually for less than a penny on the dollar. *Id.* As one debt buyer explains

“[t]he age of a defaulted consumer receivables portfolio (the time since an account has been charged-off) is an important factor in determining the price at which we will purchase a receivables portfolio. Generally, there is an inverse relationship between the age of a portfolio and the price at which we will purchase the portfolio. This relationship is due to the fact that older receivables typically are more difficult to collect.”

Portfolio Recovery Associates LLC, *2008 Annual Report to SEC Form 10-K*, 8 (Feb. 27, 2009), available at <http://www.sec.gov/Archives/edgar/data/1185348/000095013309000517/w72980e10vk.htm> (accessed Nov. 18, 2009) (hereinafter “*Portfolio 10-K*”). A New York court aptly observed that debt is sold at such a cheap price for “the simple fact that the proof required to obtain a judgment in the creditor’s favor is lacking, *usually as a result of poor record keeping on the part of the creditor.*” *MBNA* at *2 (emphasis added).

It should be anticipated that the total number of collections will continue to increase, particularly as unemployment and debt load rises and debt portfolios becomes more stale and difficult to collect by means other than judicial proceedings. According to one debt buyer, “[a]s our portfolio matures, a larger number of accounts will be directed to our outsourced collections department for judicial collection; consequently, we anticipate

that legal collections will grow commensurately and comprise a larger percentage of our total cash collections.” *Portfolio 10-K at 8.*

As such debt portfolios age beyond the statute of limitations, one can expect collectors to nevertheless seek to collect through non-judicial means. *Id.* This likelihood exposes debtors to abuses arising from collector incentives to get the debtor to make partial payments that likely reaffirm the debt and further extend the statute of limitations. Requiring an affirmative disclosure about the statute of limitations and the effect of a partial payment would alleviate this problem. Concerns about the capacity of debtors to understand such disclosures should not outweigh the harm caused by withholding such information. Affirmative disclosure may well be inadequate to prevent abuses in this regard, however. More restrictions on the collection of debt beyond the statutes of limitation is likely necessary, and the penalties for doing so must be sufficient to outweigh the significant financial incentives debt buyers have to do so.

C. Debt Buyers Seek Collection-Friendly States

Judicial collection is a key tool used by the collection industry. *Portfolio 10-K at 11.* Portfolio’s in-house and contingency-fee attorneys review for legal action “[a]ccounts for which the consumer has the likely ability, but not the willingness, to resolve their obligations. . . Depending on the balance of the defaulted consumer receivable and the applicable state collection laws, we determine whether to commence legal action to judicially collect on the receivable.” *Id.* Further, Portfolio uses judicial collection for “[a]ccounts for which the consumer is not cooperative and for which we can establish a garnishable job or attachable asset Additionally, we review accounts using a proprietary scoring model and select those accounts reflecting a high propensity to pay in a legal environment.” *Id.* at 15.

As mentioned above, older people are susceptible to abuses in the judicial collection environment because many older people have attachable assets – their homes – and may not understand the civil court system. Many think a court summons means they will go to jail. Limited capacity and mobility options may also be factors that make older people more vulnerable to judicial collection abuses. Collectors are frequently reported to dismiss claims without prejudice to refile if an alleged debtor appears to contest a debt and to simply refile at a later date. Chances are high that the collector

will eventually be able to obtain a default judgment if the person misses the subsequent court date.

Logically, the requirements for fair debt collection are critical to debt buyers' ability to collect stale debts. When considering purchase price for debt, they look beyond the attributes of the debts and debtors to determine the distribution in states with collection-friendly laws and procedures. For example, Portfolio "review[s] the geographic distribution of accounts within a portfolio because [they] have found that certain states have more debtor-friendly laws than others and, therefore, are less desirable from a collectibility perspective." *Id.* at 8. Moreover, changes in the collection law may prompt debt buyers to "pursue selective expansion into different geographic regions if analysis indicates it is favorable to do so." Asset Acceptance Capital Corp., *2008 Annual Report to SEC Form 10-K*, 10 (Mar. 5, 2009), available at <http://www.sec.gov/Archives/edgar/data/1264707/000119312509046364/d10k.htm> (accessed Nov. 18, 2009) (hereinafter "*Asset Acceptance 10-K*"). Debt buyers readily acknowledge that "[a] decrease in the willingness of courts to grant such judgments, a change in the requirements for filing such cases or obtaining such judgments, or a decrease in our ability to collect on such judgments could have a material and adverse effect on our results of operations." *Id.* at 17-18.

II. Collection Of Stale Debt Is Fraught With Problems

Despite legal protection from abusive debt collections, consumer complaints to state Attorneys General and the Federal Trade Commission about debt collection practices have exceeded those for any other specific industry for over 10 years. News Release, *Top 10 List of Consumer Complaints for 2008*, (Aug. 31, 2009), <http://www.naag.org/top-10-list-of-consumer-complaints-for-2008-aug.-31-2009.php> (accessed Nov. 18, 2009); Federal Trade Commission, *Annual Report 2009: Fair Debt Collection Practices Act* 4, available at <http://www.ftc.gov/os/2009/02/P094804fdcpareport.pdf> (accessed Nov. 18, 2009). Complaints about third-party debt collectors and in-house collectors in 2008 totaled 104,661 complaints and accounted for 25.2% of all complaints the FTC received. *Id.* at 5. State Attorneys General¹ and the FTC² have launched targeted enforcement actions to combat widespread abuses by relatively large debt collectors.

¹ See Press Release, *Attorney General Cuomo Launches Inquiry Into Debt Collectors Across New York State, Cuomo Shuts Down NY Collection Agencies That Threatened and*

A. Inadequate Information Begets Abusive Collection Practices

Debt collectors are able to manipulate the power of the courts to perpetrate abusive practices because lack of information makes both consumers and the courts vulnerable to manipulation. In most debt buyer transactions, they are not provided with – *and do not have access to* – documentation which would constitute admissible evidence to prove the debtor in fact opened the account, used the credit card, or agreed to the terms and interest rates imposed and added to the purported principal amount. Typically, only basic electronic information regarding the alleged account is provided or available to the debt buyer. *Foreman v PRA III, LLC*, 05 C 3372, 2007 U.S. Dist. LEXIS 15640, 2007 WL 704478, *9 (N.D. Ill., March 5, 2007). According to Portfolio,

“[i]n a typical sale transaction, a debt owner distributes a computer data file containing ten to fifteen basic data fields on each receivables account in the portfolio offered for sale. Such fields typically include the consumer’s name, address, outstanding balance, date of charge-off, date of last payment and the date the account was opened.”

Intimidated Consumers Into Paying Debts They Didn't Owe, Sends Subpoenas to Nearly 20 Debt Collectors Statewide (May 27, 2009), http://www.oag.state.ny.us/media_center/2009/may/may27a_09.html (accessed Nov. 18, 2009); Press Release, *Attorney General Cuomo Sues To Throw Out Over 100,000 Faulty Judgments Entered Against New York Consumers In Next Stage Of Debt Collection Investigation, 37 Law Firms and Collectors Named in Lawsuit for Failing to Properly Notify New Yorkers Being Sued for Owing Debt, Cuomo Seeks to Vacate Over 100,000 Faulty Judgments Statewide and Provide Restitution to Victims*, (July 22, 2009), <http://www.nydebthelp.com/> (accessed Nov. 18, 2009); Press Release, *Illinois Attorney General Madigan Files Suit Against Deceptive Debt Collection Agency Illinoisans Allegedly Harassed For Payment On Uncollectible Debt*, (May 18, 2006), http://www.illinoisattorneygeneral.gov/pressroom/2006_05/20060518.html (accessed Nov. 18, 2009); News Release, *Historic Lawsuit Settlement for New Mexico...AG's Pursuit Means Good News for Consumers* (August 28, 2008), available at <http://www.nmag.gov/Articles/newsArticle.aspx?ArticleID=484> (accessed Nov. 18, 2009).

² For a list of cases, *see* Federal Trade Commission, *Annual Report 2009: Fair Debt Collection Practices Act 4*, available at <http://www.ftc.gov/os/2009/02/P094804fdcpareport.pdf> (accessed Nov. 18, 2009)).

Portfolio 10-K at 19.

Critical information necessary to validate debts that is typically *omitted* from the sales process includes:

- consumer complaints about billing errors
- payments not credited
- settlement agreements not honored
- identity theft
- mistaken listing of an account user as an account holder responsible for the whole account balance
- the consumer's representation by an attorney
- the contract, or
- payment history.

*Comment of Nat'l. Consumer Law Cntr. Submitted to FTC, 12-13, (June 6, 2007), available at http://www.ftc.gov/os/comments/debtcollection_workshop/529233-00018.pdf (accessed Nov. 18, 2009) (hereinafter "*NCLC Comments*").* In light of the unavailability of such information in the industry *generally*, it is not surprising that debt collectors regularly cannot produce evidence of a contract or its terms sufficient to meet the legal standards for entitlement to judgment.³

³ Many courts have criticized the lack of such evidence. *See, e.g., LVNV Funding, LLC v Moehrlin*, No. 2006-10917-CODL (Order Denying Plaintiff Final Judgment and Closing the Court's File, 7th Judicial Cir. Ct., Volusia Co., FL, Aug. 2006) (finding "Not only did the Plaintiff fail to attach a bill, statement or contract to the complaint, the Plaintiff has not attached ANYTHING to its affidavit or the complaint that has the Defendant's name or signature on it"); *Nelson v First Nat'l. Bank Omaha*, A04-579, 2004 WL 2711032 (Minn. Ct. App. Nov 30, 2004) (no signed credit card application provided); *Citibank (SD), N.A., v Martin*, 11 Misc. 3d 219, 807 N.Y.S.2d 284 (N.Y. Civ. Ct. 2005) (enumerating documents necessary for summary judgment in credit card case, including account agreement, billing statements, and proof of assignment); *DeVivo v. Sparago*, 287 A.D.2d 535, 536 (2d Dep't 2001) (affirming denial of motion for default judgment); *Asset Acceptance Corp. v Proctor*, 804 N.E.2d 975 (Ohio Ct. App. 2004) (debt buyer failed to provide documentation of the charges, debits, and credits to permit court to calculate the balance claimed to be due); *Worldwide Asset Purchasing v Stern*, Civ Div No. AR04-4429 (Pa. Ct. Common Pleas Dec. 29, 2004), reprinted in 153 Pittsburgh Legal J. 111 (2005); *Atlantic Credit and Fin., Inc., v Giuliana*, 829 A.2d 340 (Pa. Super. 2003); *First Selection Corp. v Grimes*, 2003 WL 151940 (Tex. App. Jan. 23, 2003) (no written agreement submitted)).

Collection based on such scant information should be prohibited. Collectors should not be permitted to pursue collections without complete and accurate account information, and they should be required to affirm they have examined such information to determine if the debt has been disputed prior to commencing collection. Given that the debt buyers, in particular, are seeking to profit from debt that an original or subsequent creditor sold as uncollectible, it is not unreasonable to require them to verify they have sufficient proof before seeking to collect.

Lacking such proof, debt buyers nevertheless pursue purported debtors by simply offering up an affidavit from an employee in their loss recovery department and/or suing on an account-stated theory. *See, e.g., Citibank (SD) N.A., v Whiteley*, 149 S.W.3d 599 (Mo. Ct. App. 2004); *Asset Acceptance Corp. v Proctor*, 804 N.E.2d 975 (Ohio Ct. App. 2004). Debt buyers fully understand that some courts reject such shortcuts. “When we collect accounts judicially, courts in certain jurisdictions require that a copy of the account statements or applications be attached to the pleadings in order to obtain a judgment against the account debtors. If we are unable to produce account documents, these courts will deny our claims.” *Portfolio 10-K* at 19.

Debt buyers do not deny that lack of information provided to the assignee about the debt they have purchased is a significant problem inherent to the industry as a whole. For example, Portfolio concedes that “[t]he lack of such records fail to serve the interests of consumers in obtaining documentation of disputed accounts or the legitimate interests of credit grantors and debt collectors in collecting debts that are genuinely owed.” *Portfolio Comment* at 2. Portfolio also concedes that lack of information masks valid defenses: “[i]f the credit originator fails to comply with applicable statutes, rules and regulations, it could create claims and rights for consumers that could reduce or eliminate their obligations to repay the account and have a possible material adverse effect on us.” *Portfolio 10-K* at 18.

To hedge against such risk, debt buyers such as Portfolio “contractually require[s] credit originators to indemnify us against any losses caused by their failure to comply with applicable statutes, rules and regulations relating to the receivables before they are sold to us.” *Id.* at 18. Thus, Portfolio bears no financial or legal risk for defenses that may be asserted against the assignor. Portfolio nevertheless excuses its own role in

and responsibility for ignoring such defenses, attributing an “unwillingness to pay” to debtors’ lack of recognition of the debt. Portfolio suggests that “for many reasons (including mergers and acquisitions in the banking and credit card industries) a much more common occurrence is that consumers simply do not recognize or remember obligations, particularly when a consumer has many accounts and the names of various creditors may have changed for some reason.” *Portfolio Comment* at 2.

Of course, such reasoning begs the question, because alleged debtors are entitled to obtain verification, including adequate information about the original debt and chain of assignment. The FDCPA imposes two specific verification requirements on debt collectors: obtaining verification from the creditor and mailing that verification to the debtor (15 U.S.C. § 1692g(b)). These requirements are designed to prevent debt collectors from “dunning the wrong person or attempting to collect debts which the consumer has already paid.” *Chaudhry v Gallerizzo*, 174 F.3d 394, 406 (4th Cir. 1999). Requiring collectors to more readily be able to and to actually verify debts prior to commencing collection, especially in the judicial setting, would completely eliminate lack of recognition as a reason for “unwillingness to pay a debt.”

B. Skepticism Is Warranted In Collection Of Stale Debt

Considering the age of the debt being collected, it is reasonable to require collectors to provide more information to the alleged debtor at the outset of collections. “It is unsurprising when a consumer/debtor contacted by a collection agency about a seven-year-old debt would question whether it was a valid obligation.” *Midland Funding LLC v Brent*, 3:08-cv-1434, 2009 WL 2437243, *8 (N.D. Ohio 2009)). It is reasonable to conclude that some percentage of people who are “unwilling to pay” have a defense or dispute about the validity of the debt being collected. One New York court aptly warned that

“The entire [debt buying] industry is a game of odds, and in the end as long as enough awards are confirmed to make up for the initial sale and costs of operation the purchase is deemed a successful business venture. However, during this process mistakes are made, mistakes that may seriously impact consumers and their credit.”

MBNA at *1. Common defenses include: disputes with the original creditor; wrong person/id theft; prior satisfaction; inadequate documentation to establish the debt is owed; and collection of inaccurate or impermissible interest, fees, and penalties. *NCLC Comments* at 27-28.

When a debtor disputes the validity of a debt, the debt collector must provide the debtor with meaningful information to inform him of the source of his debt. Otherwise, a debtor has no way of knowing what the outstanding debt is from and if it is in fact still owed. “The verification requirement demands more than that the debt collector merely repeat its assertion that a debt is due.” *Norton v Wilshire Credit Corp.*, Civ No. 95-3223, 1997 U.S. Dist. LEXIS 23360, *22 (D.N.J. Jul. 14, 1997); *Semper v JBC Legal Group*, No. C04-2240L, 2005 WL 2172377, *14 (W.D. Wash. Sept. 6, 2005) (finding “[s]imply repeating second-or third-hand information in the debt collector’s file ... is insufficient under the statute.”). Debtors with disputes face significant frustration as a result of the inadequate information provided to the debt buyer.

Even if the debt buyer agrees to cease collection, it may nevertheless sell the debt to another debt buyer, who will in turn have inadequate information about the dispute. Debt buyers are also known to sell debt which is ostensibly the result of identity theft,⁴ settled, discharged in bankruptcy, or which has been paid in full. *NCLC Comments* at 27-28. It is not uncommon for debt to be sold three or four times. *Portfolio 10-K* at 8. With each incarnation, a debtor must re-engage in the same frustrating and often futile process to dispute the debt. Such debt has been dubbed “zombie debt” for apt reasons; it is hard to defend against and it seemingly never dies.⁵ Although collectors may vehemently deny reselling disputed debts, it

⁴ Almost nine million people, or four percent of the United States population, were victims of identity fraud in 2006. Council of Better Business Bureaus and Javelin Strategy & Research, 2006 Identity Fraud Survey Report, (January 31, 2006), available in part at <http://www.bbb.org/alerts/article.asp?ID=651> (accessed Nov. 18, 2009). A recent study found that New York State has the highest rate of identity fraud among the fifty states. News Release: *ID Analytics Research Shows Highest Rates of U.S. Identity Fraud in New York and the Western States*, ID Analytics, (February 14, 2007), available at http://www.idanalytics.com/news_and_events/20070214a.html (accessed Nov. 18, 2009).

⁵ There are numerous accounts of such collections. *See, e.g.*, Eileen Ambrose, “*Debt That Won’t Die*,” *Baltimore Sun* (May 6, 2007), available at <http://www.baltimoresun.com>

is clear that portfolios of debt sold are often resold numerous times, and that “zombie debt” is a significant concern for debtors. Requiring complete accounts and prohibiting collection without an affirmative verification that no dispute exists would greatly reduce such problems.

C. Sufficient And Reliable Evidence Of Alleged Debt Must be Required

Consumers and courts are justifiably frustrated by the lack of compliance with court requirements by credit card debt collectors. One New York court lamented, “With great frequency, courts are presented with summary judgment motions by credit card issuers seeking a balance due from credit card holders which motions fail to meet essential standards of proof and form in one or more particulars.” *Citibank (SD), N.A., v Martin*, 2005 NY Slip Op 25536, 11 Misc. 3d 219, 807 N.Y.S.2d 284 (Civ Ct., New York Co. Dec. 16, 2005); *see Portfolio Recovery Associates, LLC v Ginn*, No. 2008-941 QC, 2009 WL 2170564, *1 (N.Y.Sup.App.Term 2009) (finding collector failed to provide proof necessary to establish its *prima facie* entitlement to summary judgment); *MRC Receivables Corp. v Zion*, No. 60926-2-I, 2009 WL 3418132, *3 (Wash. App. Div 1 2009) (finding even if collector established delinquent account beyond question, it provided “no direct or even indirect proof of any written assignment” and “failed to meet its burden of establishing that it was entitled to judgment as a matter of law”); *Resurgence Financial, LLC v Taylor*, 05-07-01492-cv, 2009 WL 2712387, *4 (Tex.App.Dallas 2009) (affirming dismissal where evidence reflected a variety of conflicting rates and requirements and was insufficient to support the default judgment requested).

Collector conduct designed to manipulate the judicial process, including asserting facts known to be untrue, which “appears to be designed to conclusively establish each element of [the] case and to use the power of

/business/investing/balbz.ambrose06may06,0,5473187.column (accessed Nov. 18, 2009); Michael Rezendes, Beth Healy, Francie Latour, Heather Allen, and Walter V. Robinson (ed.), *Debtor's Hell, IV Part Series*, Boston Globe (July 30, 2006), available at <http://www.boston.com/news/specials/debt/> (accessed Nov. 18, 2009); Liz Pulliam Weston, *The Basics: 'Zombie Debt' is Hard to Kill*, MSN Money (c. May 18, 2006), available at <http://articles.moneycentral.msn.com/SavingandDebt/ManageDebt/ZombieDebtIsHardToKill.aspx> (accessed Nov. 18, 2009); Caroline Mayer, *New Breed Of Collectors Has Debtors Seeing Red*, Washington Post (May 28, 2005)).

the judicial process against a *pro se* defendant to collect a time-barred debt . . . is abusive, unfair and unconscionable.” *McCullough v Johnson, Rodenberg & Lauinger*, 610 F. Supp. 2d 1247, 1256 (D. Mont. 2009). Where, as with most debt collection cases, the vast majority of cases involve unrepresented debtors – who are unlikely to be able to raise complex defenses – and end in default, such conduct is especially abhorrent. Notably, *McCullough* found its “conclusion in this regard is strengthened when one considers that [collector’s] behavior is measured by the objective “least sophisticated debtor” standard.” *Id.*

D. Statutes Of Limitations Must Be Strictly Enforced

The United States Supreme Court repeatedly has pointed out that “[s]tatutes of limitations are not simply technicalities. On the contrary, they have been long respected as fundamental to a well-ordered judicial system.” *Bd. of Regents v Tomanio*, 446 U.S. 478, 487 (1980). Indeed, “it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.” *United States v Kubrick*, 444 U.S. 111, 117 (1979) (quoting *R.R. Telegraphers v Ry. Express Agency*, 321 U.S. 342, 349 (1944)).

When a collector pursues a stale claim, “the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.” *Kubrick*, 444 U.S. at 117; *Kimber v Federal Fin. Corp.*, 668 F. Supp. 1480, 1487 (M.D.Ala. 1987). This is especially critical in cases involving primarily *pro se* debtors. *Kimber* explained that

“[T]he unfairness of [filing suit on a time-barred debt] is particularly clear in the consumer context where courts have imposed a heightened standard of care — that sufficient to protect the least sophisticated consumer. Because few unsophisticated consumers would be aware that a statute of limitations could be used to defend against lawsuits based on stale debts, such consumers would unwittingly acquiesce to such lawsuits.”

Id.

III. Conclusion

The abuses predominating in the debt collection industry must be resolved on a systemic level. Concerns about accurate data regarding the extent and nature of all the debt collection problems, including service of process, court procedures, representation for debtors, and other features of the judicial collections environment should not prevent taking action to stop debt collection abuses.

Many of the present day collection abuses is inherent the business model of the collection and debt buying industry itself. Collectors have a strong profit incentive to take shortcuts when seeking to collect debt that has been deemed uncollectible by other creditors. Eliminating these incentives can alleviate a substantial portion of the debt collection abuses. Doing so will also alleviate pressures on courts to implement alternative procedures or relax standards – which risk depriving people of their day in court – in order to cope with the crush of collection cases.

Thank you for the opportunity to submit these comments.