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Consumer Financial Protection Bureau
1700 G Street, NW
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Submitted electronically to http://www.regulations.gov

Re: Advance Notice of Proposed Rulemaking Debt Collection (Regulation F): 12 CFR Part 1006, Docket No. CFPB-2-13-0033, RIN 3170-AA41

Dear Consumer Financial Protection Bureau:

New Economy Project appreciates the opportunity to comment on the proposed rulemaking on debt collection. We urge the CFPB to enact strong rules that will help curb the unfair, deceptive, and abusive debt collection practices that have harmed and continue to harm lower-income New Yorkers. *These rules should apply to original creditors' in-house collectors, debt collection agencies, debt collection attorneys, and debt buyers alike.*

New Economy Project works to promote community economic justice in New York City neighborhoods and to eliminate discriminatory economic practices that harm communities and perpetuate inequality and poverty. For years, we have operated a legal hotline serving low-income New Yorkers aggrieved by abusive debt collection practices. We have spoken to thousands of New Yorkers facing unfair and deceptive debt collection litigation practices, such as suing people on invalid debts and engaging in "sewer service." We have also documented many of these practices in two groundbreaking reports: *Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower Income New Yorkers* (May 2010) (co-authored by the Urban Justice Center, Legal Aid Society, and MFY Legal Services) and *The Debt Collection Racket in New York: How the Industry Violates Due Process and Perpetuates Economic Inequality* (June 2013). As the reports show, judgments stemming from abusive debt collection lawsuits, especially those brought by debt buyers, have caused New Yorkers profound harm and are disproportionally concentrated in lower-income communities and communities of color.

The consequences of these judgments can be devastating. Debt buyers enforce judgments by freezing people's bank accounts and garnishing their wages. Low- and moderate-income New Yorkers and their families then cannot pay for their basic needs, such as housing, utilities, food or medication. These judgments appear on people's credit reports, making it difficult, if not impossible, for them to find housing, obtain employment, take out a loan, or accumulate any savings. The consequences of a judgment are especially abusive when a person has had no prior notice that he or she was being sued.

Part I of this letter lists our top ten recommendations for addressing the unfair debt collection practices that have wreaked havoc in New York neighborhoods. In Part II, we endeavor to answer the specific questions posed in the ANPR that seem most relevant to the people who contact us.

PART I: RECOMMENDATIONS

1. **Require debt collectors to have basic information in hand before they contact someone about a debt.** Simply put, whether dunning by phone or filing lawsuits, debt collectors frequently pursue invalid debts. They may seek to collect from the wrong person, or the debt is past the statute of limitations or already paid, or the amount is padded by unlawful interest and fees. When asked to provide documentation in support of their claims, they aren't able to. The CFPB should enact rules to ensure that debt collectors review basic information about the debt prior to beginning collection. This recommendation is discussed in more detail below in our response to Questions Q1-12.

2. **Require debt collectors to provide a meaningful response, including copies of original documents, when someone disputes or requests verification of a debt.** The verification requirement under the FDCPA has been watered down to the point where it is no longer useful. The CFPB should enact rules requiring debt collectors to provide verification that is meaningful and responsive to the person's specific dispute. For example, if a person disputes a debt as having arisen from identity theft, the debt collector should provide such documents as a signed agreement or account application, and any other documents and information relating to the identity of the accountholder. If the person disputes the amount of the debt, the debt collector should provide information showing how the amount was calculated. The verification should include copies of original documents, not just a supposed confirmation of and renewed demand for the debt.

3. **Require that debt collectors have the ability to substantiate their claims before filing lawsuits.** Again and again, we see debt collectors filing lawsuits when they do not possess evidence about the key facts of the debt, and lack the ability to ever obtain such evidence, with devastating consequences for the people they sue. One of the most important things that the CFPB can do is ensure that debt collectors do not file lawsuits

unless they have the intent and ability to substantiate their claims in accordance with state laws and rules.

4. **Require original creditors to maintain complete and accurate records for each debt sold.** To help ensure that debt collectors that intend to file lawsuits have access to all the evidence that they would need to prove their claims in court, the CFPB should also use its authority to combat unfair, deceptive, or abusive acts and practices ("UDAAP authority") to require that original creditors maintain complete and accurate records for each debt sold. Any creditor that wishes to sell off its debts simply should not be permitted to do so unless it is ready and able to provide the evidence needed to substantiate the debts in court.

5. **Prohibit debt collectors from using false, robo-signed affidavits.** Debt collectors, and especially debt buyers, routinely submit to the courts false, robo-signed documents, fraudulently claiming that they possess personal knowledge about the facts of the debt. In one case, a federal judge found that a single affiant "sign[ed] hundreds of affidavits a week, purportedly based on personal knowledge, purporting to certify that the action has merit, without actually having reviewed any credit agreements, promissory notes, or underlying documents, and, indeed, without even reading what he was signing." The CFPB should clarify that these fraudulent statements violate the FDCPA and should use its UDAAP authority to declare these robo-signing practices unfair, deceptive, and abusive.

6. **Prohibit unfair, deceptive, and abusive debt collection practices by original creditors as well as third-party debt collectors.** Original creditors should not be permitted to engage in debt collection practices that are considered unfair, deceptive, or abusive under the FDCPA when engaged in by third-party debt collectors. The CFPB should use its UDAAP authority to declare such debt collection practices unfair, deceptive, and abusive when engaged in by original creditors attempting to collect debts.

7. **Prohibit debt collectors from engaging in unfair, deceptive, or abusive practices with respect to credit reporting.** We have heard from many New Yorkers who have been denied employment, housing, insurance, mortgage loan modifications, or fairly-priced credit because of debt collection accounts appearing on their credit reports. The CFPB should enact rules to protect people against unfair, deceptive, and abusive credit reporting practices by debt collectors. In particular, the CFPB should provide substantial protections for people facing medical debt collections, including requiring debt collectors to wait a minimum period of time before they may report unpaid medical bills to credit reporting agencies. The CFPB should also require that any debt collector that reports a debt to the credit bureaus also report any consumer disputes in a timely manner, and require debt collectors to take affirmative steps to remove any credit reporting on a debt that they no longer service or own.

8. **Limit the number of times that debt collectors, including original creditors, may contact someone about a debt, and require all debt collectors to comply with cease-contact requests.** All debt collectors, including original creditors' in-house collectors, should be subject to specific and strict limits on telephone communications, as discussed in more detail below.

9. **Improve remedies for private enforcement of the FDCPA.** The CFPB should clarify that statutory damages under the FDCPA are available *per violation*. Under the current interpretation of the FDCPA, a debt collector that commits a series of violations against a person pays the same amount of statutory damages – up to $1,000 – that it would pay if it committed a single violation against that person. Debt collectors that deliberately and routinely violate the law therefore have no real incentive to comply with the law, and consider the low amount of statutory damages simply a cost of doing business.

10. **Clarify that injunctive relief is available under the FDCPA.** Such relief is critical to deter future misconduct by the offending debt collector, and to encourage other debt collectors not to engage in the same kind of misconduct.

PART II: RESPONSES

Response to Questions Q1-Q11, concerning data regarding the information transferred by original creditors to debt buyers, and from primary debt buyers to subsequent debt buyers:

The CFPB has asked what data is available concerning the type and amount of information that is transferred from original creditors to debt buyers, and from primary debt buyers to subsequent debt buyers, at the time of sale. Obviously, the original creditors and debt buyers are the parties in possession of this information.

New Economy Project, and the other advocacy groups with whom we work, cannot provide data in response to this question. We can, however, confirm that in our experience—which includes providing pro se advice and assistance to thousands of people sued by debt collectors—most debt buyers lack documentation of the debts they collect. When asked to produce evidence of the debt, whether in or out of court, debt buyers simply cannot substantiate their claims.[1] The reason for this is clear. Through discovery in litigation against the debt buyer

[1] DC 37 (AFSCME) Municipal Employees Legal Services, *Where's the Proof? When Debt Buyers Are Asked to Substantiate Their Claims in Collection Lawsuits Against NYC Employees and Retirees, They Don't* (2009), *available at* http://www.dc37.net/benefits/health/pdf/MELS_proof.pdf; The Legal Aid Society, MFY Legal Services, Neighborhood Economic Development Advocacy Project, & Urban Justice Center, *Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers* (2010), *available at http://www.nedap.org/resources/documents/DEPT_POLICY_PAPER_FINAL_WEB_REV.pdf*.

industry, we have been able to review various agreements for the purchase and sale of debt. The agreements we have seen place significant limitations on the amount and kind of documentation that debt buyers may obtain, and some prohibit debt buyers from obtaining any information at all. Moreover, the agreements always seem to provide that subsequent debt buyers cannot go directly to original creditors for account documentation, but instead must seek information from intervening debt buyers, which are under no obligation to provide anything concrete in response to the debt buyers' requests. This account has been confirmed by the FTC, which reached similar conclusions after subpoenaing information from nine of the nation's largest debt buyers.[2] The OCC, which regulates debt buyers, has also called on banks to provide sufficient documentation to debt buyers.[3]

The FTC's study of the debt buyer industry was a massive endeavor that took four years to complete and, in the end, confirmed many of the fundamental problems that advocates had been raising for years. <u>The CFPB need not and should not engage in a similar study. The CFPB does not need to collect more data in order to issue a strong rule to protect people from the serious harms caused by the routine collection of unverifiable, and often inaccurate, debts.</u>

The CFPB should issue rules that (1) require original creditors to maintain complete records for each debt sold; (2) require original creditors to transfer basic documentation to debt buyers at the time of sale; (3) provide a mechanism by which any subsequent debt buyer can go directly to the original creditor to request additional documentation, if needed; (4) forbid debt collectors (including debt buyers) from collecting debts without having the basic documentation in hand; and (5) forbid debt collectors (including debt buyers) from filing lawsuits without having the basic documentation in hand and the ability to get additional information and witnesses from the original creditor, if needed.

The basic documentation that CFPB should require original creditors to transfer to debt buyers at the time of sale includes:

1. A copy of the signed contract or signed application, or other documents that provide evidence of the consumer's liability.
2. A copy of all or the last 12, whichever is fewer, account statements.
3. The date, source and amount of the most recent payment.
4. All account numbers ever used by the bank and its predecessor(s), if any, to identify the account. These should include the consumer's last account number

[2] Federal Trade Commission, *The Structure and Practices of the Debt Buying Industry* (2013), *available at* http://www.ftc.gov/os/2013/01/debtbuyingreport.pdf.

[3] Office of the Comptroller of the Currency, Statement of the Office of the Comptroller of the Currency Provided to the Subcommittee on Financial Institutions and Consumer Protection Senate Committee on Banking, Housing, and Urban Affairs, "Shining a Light on the Consumer Debt Industry," 7 (July 17, 2013), available at http://www.occ.gov/news-issuances/congressional-testimony/2013/pub-test-2013-116-oral.pdf.

prior to charge-off, the current account number, and any other account or reference numbers that the bank used to identify the account.

5. An itemized accounting of the amount claimed to be owed, whether the account is for closed-end or open-end credit, including the amount of the principal, interest, and other fees and charges. "Principal" should be construed strictly to include only the amounts charged for goods, services or cash advances, and not capitalized interest. The accounting should indicate the legal and contractual basis for each interest rate, fee and charge.
6. A document that provides the name of the issuing bank, the brand (or store) name, if any, the date and amount of the last payment, and the date of default, as well as the date of charge-off, and the amount owed at charge-off, if applicable.
7. Information regarding any outstanding or unresolved disputes and fraud claims, as well as any disputes and fraud claims from 6 months prior to default.
8. Information regarding collection efforts, including internal and third-party collection efforts, placement with law firms, and negotiations with debt-relief companies.
9. All information regarding whether the account requires any special handling, such as whether the consumer has advised that her attorney is handling the account, or that her income is exempt from debt collection, or that she intends to file for bankruptcy.
10. The consumer's name, address, telephone number, and Social Security number.

The CFPB should also require the original creditor to retain and make available to all subsequent debt buyers the following information upon request:

1. All account statements (as opposed to simply the last 12 months' worth);
2. Documents establishing the applicable interest rate over time;
3. All fraud claims and disputes not resolved in the consumer's favor; and
4. A fact witness if necessary in the jurisdiction.

The CFPB should also mandate that no debt buyer file suit unless it has in its possession a complete chain of title for the specific account at issue. CFPB rules should make clear that debt collectors and debt buyers that seek to collect debts or file lawsuits in the absence of this information have violated the FDCPA and UDAAP.

Response to Question Q12, concerning document repositories

We do not view document repositories as helpful. Document repositories can store documents, but cannot serve to verify the accuracy of any information contained in the documents. They raise significant concerns of accuracy, authenticity, privacy and identity theft. Because the customers of the document repositories are banks and debt collectors, there is little incentive for the repository to provide a product that works in the best interest of consumers. We

have only to look at the credit reporting industry to see the intractable harms, such as the reporting of inaccurate information, that result from a business model that does not directly serve consumers.

Furthermore, document repositories raise significant potential problems for the debt collection industry. Documents stored in a repository could not be used in state court litigation because they are hearsay and would not fall within the elements of the standard business records exception in effect in most states. Furthermore, for the reasons explained by the National Consumer Law Center, document repositories would be subject to the Fair Credit Reporting Act and the Fair Debt Collection Practices Act. People would have to have the right to obtain a copy of their file from the depository, to dispute incorrect information in the file, and to sue the repositories and the furnishers if incorrect information is not corrected. While at first blush a document repository sounds like a neat, technical solution to the problem of unverifiable debts, deeper scrutiny reveals that it is no solution at all, and could just compound the problem.

A much simpler approach is to require the original creditors to store all account records for at least seven years and to guarantee that all subsequent debt buyers will be able to access those documents upon request. The CFPB could provide that an original creditor may be excused from this requirement if it chooses not to sell its debts or report them to credit reporting agencies. The bottom line is that banks must be responsible for maintaining documentation on accounts that they are collecting or have outsourced to others to collect. We have made similar recommendations to the OCC, a copy of which is attached to this letter.

Response to Question Q17, concerning itemization of the total amount of the debt:

The CFPB has asked whether debt collectors should be required to itemize the debt on validation notices and, if so, how. For the reasons explained by the National Consumer Law Center (NCLC) and the National Association of Consumer Advocates (NACA), we strongly urge the CFPB to require debt collectors to itemize the debt—whether the account is for closed- or open-end credit—by principal, interest, and other fees and charges. By "principal," we mean the amounts charged for goods, services, or cash advances, and not capitalized interest.

This information is crucial for people but is currently—and unfairly—withheld from them. Under the FDCPA, the consumer has the right to dispute the entire debt "or any portion thereof." 15 U.S.C. § 1692g(a)(4). Without knowing what "portion" of the debt is principal and what is interest and fees, the consumer is unable to avail herself of this right. This information is particularly important because, in our experience, almost every person contacted by a debt collector disputes the outstanding balance. People have a right to know how much interest has been assessed against their account, and the particular rates that have been charged, so that they can dispute whether such interest has been lawfully charged. In our experience, in many cases, interest was not in fact lawfully charged (because the creditor never properly notified the person of the change in interest rate).

Furthermore, under existing law, both original creditors and debt buyers must distinguish between principal and interest when preparing Form 1099-C, in order to comply with Section 6050P of the Internal Revenue Code. The IRC provides that only the principal amount of a cancelled debt, and not accrued interest, is considered taxable income to the consumer.

Unfortunately, however, most creditors and debt buyers do not comply with the IRC. At the time of this writing, it is tax season, and our legal hotline has received multiple calls from low-income New Yorkers who have received copies of 1099-C forms in which the creditor or debt buyer has falsely reported the amount of the cancelled debt, listing the combined amount of principal and interest in the column marked for principal only. Most low-income people rely on VITA sites to prepare their income tax returns, and VITA volunteers are not trained to help people dispute an incorrect 1099-C. Furthermore, even if the consumer is able to state that the total amount of the cancelled debt has been reported incorrectly, she is unable to provide evidence of the correct amount, because that information—though available—is withheld by the creditor. The result of this false reporting is that low-income people are assessed taxes on thousands of dollars in income that they did not, in fact, have and cannot afford to pay. In some circumstances, this additional, phantom income could cause a low-income family to lose access to the Low Income Tax Credit and other important tax credits that families rely on to meet basic needs. Requiring creditors and debt collectors to itemize the debt by principal, interest and fees would go a long way towards resolving this problem.

For years, the FTC has recommended that validation notices include an itemization of the principal, the total of all interest, and the total of all other fees and charges added.[4] The CFPB should now issue rules to require just that.

Response to Questions Q31-Q52 and Q123-126, concerning verification of debts and consumer disputes under the FDCPA

We refer the CFPB to NCLC and NACA's detailed responses to these questions, which we endorse. Debt collectors universally do not respond appropriately to people's disputes or requests to verify the debt. The problem is particularly acute with debt buyers, which typically do not have access to the information necessary to respond to a verification request or dispute.

We are located in New York City, which under local law has much stricter verification requirements than under the FDCPA. Under New York City law, the debt collector must provide a copy of the contract, the final account statement issued by the original creditor, a breakdown of the amount owed by principal, interest and other charges and, for all other charges, the date and

[4] Federal Trade Commission, *Collecting Consumer Debts: The Challenges of Change* 30 (Feb. 2009), *available at* http://www.ftc.gov/sites/default/files/documents/public_events/life-debt/dcwr.pdf.

basis for the charge. New York State has proposed similar requirements but has not yet issued final rules.

In our experience, traditional third-party debt collectors rarely comply with our local law, and debt buyers never do. In New York City, when people dispute a debt and seek verification, debt buyers often abandon their collection efforts because they cannot provide the verification required by law. In the instances in which debt buyers attempt to provide verification, they never provide the complete documentation that the law requires, but usually send only an affidavit prepared by the debt buyer itself, perhaps accompanied by a document that purports to be the final statement of account. Often this document is not a true and correct copy of the final statement of account that the person would have received, but is rather a composite document created after the fact by the creditor or debt buyer. The wholesale inability of debt buyers to provide even the most basic documentation in support of a debt only underscores the need for CFPB to enact serious, industry-wide reform.

As an example of how stricter verification and dispute requirements can make a huge difference for consumers, consider the example of our client, Ms. P., a very low-income mother from Queens. Two years before she reached out to us, a debt buyer had contacted Ms. P and demanded that she pay $17,000 on a 10-year-old credit card account. Though Ms. P did not believe that she owed this amount, she felt she had no choice but to enter into a settlement agreement to make monthly payments, causing her and her family significant financial hardship. After Ms. P contacted us, we helped her to dispute the debt under the New York City rules (under which a debt collector must respond to any request for verification from the consumer, even if not sent within 30 days of the debt collector's initial notice, or else cease collection). In response to her dispute, the debt buyer conducted an investigation and informed Ms. P that she no longer owed the debt, and that it was closing the account and deleting its tradeline from her credit report. Under the slightest of scrutiny, Ms. P's alleged debt simply evaporated.

As stated above, the debt collector's most common response when faced with a request to verify the debt is to abandon collection efforts. Unfortunately, however, that does not cause the collection to end. Instead of retiring the unverifiable debt, the debt collector simply flips the debt to a different debt collector. Thus people are left having to make the same disputes repeatedly to different collectors over the years, never getting resolution of the dispute. This practice is unfair, deceptive, and abusive. To address it, the CFPB should issue a rule stating that unverifiable debts cannot be sold or passed on to a new collector.

In our view, the CFPB should take a two-pronged approach to verification and disputes. In the case of a general request for verification or unspecified consumer dispute, the debt collector should be required to provide basic information along the lines of that required by New York City or proposed to be required by New York State.[5] In the case of a specific dispute—a claim of identity theft or prior payment of the debt, for example—the debt collector should be

[5] New York State Department of Financial Services, Proposed 23 NYCRR __ Debt Collection, *available at* http://www.dfs.ny.gov/legal/regulations/proposed/debt-collection.pdf.

required to investigate and respond to the specific dispute with documentation. Unverifiable debts should not be collected. Note that if the CFPB requires that creditors provide and debt collectors have access to basic documentation of the debt, as we recommend above, most debts collected should be verifiable.

Response to Questions Q92-97 and Q112-113, concerning harassment and abuse under FDCPA § 806 and unfairness under FDCPA § 808

One of the complaints we hear most frequently is that debt collectors call people repeatedly, multiple times per day, several days per week. The result is that people—particularly seniors and people with disabilities—are afraid to answer their telephones and become anxious and isolated. There is no reason, other than harassment, for a debt collector to cause a person's phone to ring with such unreasonable frequency. We join NCLC and NACA in recommending that CFPB issue regulations strictly limiting the number of times that a debt collector can cause a person's telephone to ring, as follows:

- Limit the number of times per week that the debt collector is permitted to call the consumer—as in let the consumer's telephone ring. Subject to the additional restrictions set out below, we suggest this number should be no more than three.
- Limit the number of times per week that the debt collector is permitted to leave a voice mail for the consumer, so long as it is otherwise permissible. This number should be no more than one.
- Limit the number of times per week that the debt collector is permitted to call and have a phone conversation with the consumer, unless the conversation is instigated by the consumer. We suggest that this number be no more than one..

Original creditors, including major banks and payday lenders, are some of the worst violators when it comes to telephone harassment. They take full advantage of the fact that the FDCPA does not apply to them to barrage people with constant phone calls. Some of our elderly clients have complained to us that they are severely affected by these constant phone calls, to the point where they say they do not want to go on living. For example, Mr. and Mrs. G, an elderly couple in their 80s who live in Queens, were harassed by constant phone calls from a bank's collection department even though their only sources of income are Social Security and a pension, both of which are exempt from debt collection. The barrage of calls caused the couple, already in poor health, to suffer chest pains, insomnia, anxiety, and even thoughts of suicide; only when an advocate reached out to the bank on the couple's behalf did the calls finally cease. Mr. R, a disabled senior who lives in the Bronx and suffers from cancer, was so distraught by the relentless collection calls he received from his credit card company that he felt constantly pressured to use his Supplemental Security Income (SSI) for credit card payments instead of for the co-payments for his medications. CFPB should use its Dodd-Frank authority to require original creditors to follow the same rules as debt collectors.

Another complaint we hear with some frequency from people whose income is exempt from debt collection is that debt collectors have either threatened to take their exempt income or have actually taken it and refuse or unreasonably delay in giving it back. This behavior constitutes harassment and abuse and CFPB should enact rules prohibiting it under this section.

Response to Question Q100, concerning false and deceptive statements under the FDCPA

We urge the CFPB to clarify that a number of practices commonly undertaken by debt collection attorneys and debt buyers violate the FDCPA.

The CFPB should clarify § 807(3) (15 U.S.C. § 1692e(3)). Section 1692e(3) of the FDCPA prohibits impersonating a lawyer and including a lawyer's signature without meaningfully reviewing the case file to determine whether a consumer is actually liable for a debt. As comprehensively argued by NCLC and NACA, the CFPB should clarify that no collection letter can be signed by an attorney without a meaningful review by the attorney that supports the demands in the letter.

The CFPB should clarify § 807(10) (15 U.S.C. § 1692e(10)). Section 1692e(10) of the FDCPA is a catchall provision that broadly prohibits the use of any false representation or deceptive means to collect a debt. Despite the broad nature of this prohibition, however, courts have unreasonably narrowed its application in several circumstances relating to state court debt collection litigation. The CFPB should correct these erroneous interpretations of the FDPCA, as discussed further below:

> False statements to courts (and other third parties): One of the biggest harms to consumers occurs when debt collectors submit false and deceptive affidavits to state courts in order to obtain default judgments. As recognized by the district court in *Midland Funding, LLC v. Brent*, 664 F. Supp. 2d 961, 970 (N.D. Ohio 2009), such affidavits violate § 1692e of the FDCPA, which prohibits false or misleading representations. Unfortunately, however, the Seventh Circuit recently came to the opposite conclusion in *O'Rourke v. Palisades Collection XVI, IIC*, 635 F.3d 938 (7th Cir. 2011), holding (in contravention of the plain language of the statute) that the FDCPA does not extend to false communications made to state courts, even if consumers are adversely affected. The CFPB recently filed an excellent amicus brief in *Sykes v. Mel Harris & Assocs.*, No. 13-2742 (2d Cir. Nov. 13, 2013), refuting *O'Rourke*. The CFPB should take the opportunity to clarify that all false statements made to collect a debt are actionable under the FDCPA, whether directed at consumers or at third parties, and it should state specifically that false statements made in state court—even if never seen by the consumer—are actionable if they are made as part of an attempt to collect a debt.

> Filing lawsuits without conducting a meaningful attorney review: An important line of cases, including *Clomon v. Jackson*, 988 F.2d 1314 (2d Cir. 1993), *Avila v. Rubin*, 84

F.3d 222 (7th Cir. 1996), and *Nielsen v. Dickerson*, 307 F.3d 623 (7th Cir. 2002), has established that an attorney must conduct an independent review of the file before allowing a debt collection letter to issue under her signature, in order to avoid making the false representation that the attorney has reviewed the file and deemed it worthy of possible legal action. Unfortunately, it is far less clear whether such protections extend to attorneys who actually file lawsuits against consumers, and some courts have held that an attorney need not conduct such a review before filing suit.

All the factors that justify requiring that an attorney conduct a meaningful review of the case file prior to sending a debt collection letter apply with even greater force in the context of litigation. When an attorney files suit on behalf of a debt collector, the consumer assumes that the attorney has reviewed the file and determined in his independent professional judgment that the case has merit. The consumer then makes decisions, such as whether to dispute or pay the debt, based on this assumption. Many consumers decide to pay debts that they cannot recall and do not recognize simply because they assume that the attorney would not have sued them without evidence. Most consumers do not know that debt collection attorneys routinely bring cases on behalf of debt buyers without having reviewed the file, even when the debt buyer has no documents to support the claim and no ability or intent ever to obtain them. Such practices are unconscionable and violate the FDCPA. The CFPB should clarify by regulation that a debt collection attorney violates the FDCPA when she files a lawsuit without having conducted an independent review of the file to determine that the action has merit.

<u>Filing lawsuits without having the ability or intent to prove the debt</u>: In *Harvey v. Great Seneca Fin. Corp.*, 453 F.3d 324 (6th Cir. 2006), the Sixth Circuit held that filing a lawsuit without having the immediate means to prove the debt in hand does not violate the FDPCA. Several district courts, however, have distinguished *Harvey* and held that a debt collector violates the FDCPA by filing lawsuits without the intent or ability *ever* to prove the debt. *See, e.g., Mello v. Great Seneca Financial Corp.,* 526 F. Supp. 2d 1020 (C.D. Cal. 2007); *Kuria v. Palisades Acquisition XVI, LLC,* 752 F.Supp.2d 1293 (N.D. Ga. 2010). Unfortunately, in our experience, most lawsuits are filed by debt buyers without the intent or ability to ever prove the debt, as the purchase and sale agreements prevent debt buyers from being able to obtain proof of the debt in the vast majority of cases. Hundreds of thousands of people are ending up with default judgments against them as a result of these lawsuits that should never have been brought. The CFPB should clarify in its rules that the practice of filing lawsuits without having the intent or ability ever to prove the debt violates 15 U.S.C. § 1692e, and particularly § 1692e(10).

Response to Question Q127, concerning the effect of paying old debts on credit reports

In July 2013, the Bureau released a compliance bulletin explaining that representations

about the effect of debt payments on credit reports, credit scores, and creditworthiness have the potential to be deceptive under the FDCPA and the Dodd-Frank Act. We commend the CFPB for issuing this bulletin. However, we urge the Bureau to go further and make sure that people are fully aware of the very limited credit reporting consequences of paying debts in collection.

In our experience, people often decide to pay off old collection accounts out of the mistaken belief that making such payments will improve their credit score. Many people erroneously believe that paying the debt will cause it to disappear entirely from their credit report. Often, people make these decisions at high stakes moments – for example, when trying to rent an apartment, qualify for employment, or refinance a mortgage. We have received many complaints from people who paid debts they don't even recognize and may not owe, out of desperation to improve their credit score quickly, only to find out that the payment did them no good at all.

For this reason, we recommend that, unless the debt collector has specifically agreed in writing to delete the tradeline in exchange for payment, the CFPB require debt collectors to issue the following disclosure in every dunning letter, as well as during oral negotiations to pay a debt: "Paying this debt may not improve your credit report or score."

In the case of time-barred debts, or debts that the collector cannot report to the credit bureaus because it is not a subscriber, the disclosure should state: "Paying this debt will not improve your credit report or score."

In a related circumstance, people often do want to negotiate with debt collectors to delete a tradeline in exchange for payment. Such a strategy makes perfect sense, as it is far more beneficial to a person's credit score to eliminate a collection record entirely than to have it reported as paid. Unfortunately, many debt collectors refuse to negotiate these terms, falsely claiming that deleting the tradeline would violate the Fair Credit Reporting Act. As explained in more detail by NCLC and NACA, however, nothing in the FCRA requires a debt collector to report a debt or prevents a debt collector from deleting a tradeline. The CFPB should clarify that debt collectors are free to delete tradelines in exchange for payments. Such a clarification would provide an enormous benefit to people who need to clear their credit reports quickly in order to obtain jobs, housing, or affordable consumer credit.

Response to Questions Q133-142, concerning collection of time-barred debts

All too frequently, debt collectors aggressively collect on time-barred debt. While we cannot provide the CFPB with hard data in terms of the frequency with which debt collectors collect and sue on time-barred debt, we can report that we continue to receive complaints from people who are being collected on for debts that are well past the statute of limitations. For example, just in the last month, we heard from Mr. M, whose bank account containing his income tax refund was frozen by a debt buyer that had sued him on a debt from the 1990s, and from Mr. L, whose bank account was likewise frozen by a debt buyer that had sued him in 2006

over a Gateway computer purchased 17 years ago. Often, callers do not know that the statute of limitations has expired on those debts until they speak with us. And, often, they do not know what a statute of limitations is either. They certainly do not know that they can unwittingly revive a time-barred debt by making a partial payment of even a very small amount. This is an area in which debt collectors can easily take advantage of people, and the CFPB certainly should step in to protect them.

Our first choice would be for the CFPB simply to prohibit the collection of time-barred debt, for the reasons explained by NCLC and NACA. Assuming the CFPB is not willing to go so far, however, we have a number of additional recommendations.

First, the CFPB should issue a rule clearly stating that suing on a time-barred debt is unlawful because it violates the FDPCA and constitutes a UDAAP violation. In our experience, state court judges and administrative agency officials are sometimes confused on this point. While the trend of the federal case law is clear, state court rules usually classify the statute of limitations as an affirmative defense that must be raised by the defendant or else is waived. This classification, in turn, makes state court judges and state officials reluctant to go after the debt collection attorneys who routinely file time-barred suits. They reason that the attorneys have not acted improperly because state law permits suing on time-barred debts. A clearly worded rule would help to ensure that everyone understands that suing on time-barred debts is illegal and unacceptable under any circumstances.

Second, the CFPB should issue rules preventing debt collectors from suing on time-barred debts *even if the consumer has technically "revived" the debt by making a partial payment*. When people make payments on time-barred debts, they usually do so because of a sustained, often harassing, campaign on behalf of the debt collector. People are unaware of their rights and certainly do not understand that by agreeing to make a "good faith payment" on an old debt, they are also agreeing to have a lawsuit filed against them that could not otherwise be brought. Certainly, debt collectors do not disclose this fact to people during payment negotiations. Collection of time-barred debts becomes a high-stakes issue precisely because of the potential for a lawsuit to follow a payment. Collectors are more likely to work aggressively (and are more likely to violate the FDCPA) to get a payment if they know that a payment sets the stage for a lawsuit, which likely will become a valuable court judgment. And people are harmed significantly by having to face collection lawsuits on very old debts that should have been put to rest long ago. Finally, the CFPB should require clear disclosures on time-barred debt, so that people paying on time-barred debt are advised of the consequences of making payments. If the CFPB can prevent debt collectors from suing on time-barred debts, the disclosure is simple, and need only state: "The law limits how long you can be sued on a debt ("statute of limitations"). Because of the age of this debt, you CANNOT be sued on it."

Response to Questions Q145-149, concerning debt collection lawsuits

The most serious problems in state court litigation arise because of fundamental features

of the debt buyer marketplace: debt buyers purchase debts for pennies on the dollar and do not have access to basic documentation of the debts. They hire lawyers to file lawsuits on their behalf, but the attorneys do not review the file to assess whether the case has merit. Debt buyers routinely file lawsuits on debts for which they have no ability or intent ever to provide proof, relying on the person to default (including by using sewer service), and then obtaining judgments on the basis of false, robo-signed affidavits.

Similarly, debt collectors routinely make false statements in court filings. In our experience, debt buyers: swear that people were served with notice, when they were not; swear that they have personal knowledge that a person owes a debt, when in fact they have no idea; swear that a person owes a debt in a particular amount, when the amount includes unlawfully charged interest and fees. Debt buyers regularly sue the wrong person, or the right person for the wrong amount of money—each of these lawsuits generates multiple false statements.

For example, Ms. R, a disabled woman from Bronx, NY, was denied a subsidized apartment because of judgments from debt buyers on her credit report. Ms. R was never served, and she disputed owing the debts. Though Ms. R eventually succeeding in vacating the judgments, she never got the apartment. Similarly, Ms. W of Manhattan found out that she had been sued by a debt buyer when her bank account, containing her Social Security Disability benefits, was frozen. Like Ms. R, Ms. W was never served with notice of the lawsuit. The debt buyer claimed that Ms. W owed money on a Discover account, but Ms. W had never had a credit card in her life. Ironically, Ms. W recalled that she had twice applied for a Discover card only to be denied on the basis of her insufficient credit history.

In the rare case that somebody who is sued receives notice of the lawsuit and appears in court, the deceptive practices continue. Mr. G, a self-employed artist with a very low income, was sued by a debt buyer that claimed he owed nearly $30,000 on an old credit card. Mr. G disputed the debt and demanded proof. The debt buyer delayed and delayed, obtaining multiple adjournments, forcing Mr. G to attend numerous court dates which interfered with his ability to obtain work. When Mr. G asked the court to dismiss the case for lack of evidence, the debt buyer insisted that it wanted to have a trial and that it would be prepared to go forward with a witness and documentary proof. When the trial date finally arrived, however, the debt buyer's attorney appeared with no witness and no documents.

Each of these cases involved numerous false statements by debt buyers and their attorneys. Moreover, they are not unusual, but rather typical of the kinds of complaints we receive on a regular basis.

No debt collector should be permitted to haul people into court, and thereby waste people's time and the court's resources, unless it has access to all the documentation it would need to prove its claims, in accordance with applicable state laws and rules.[6] A debt buyer that

[6] A requirement that debt collectors have basic information in hand before beginning the collection process, as

files a lawsuit is implicitly representing that it has the ability to make a reasonable showing of proof. To the extent that a debt buyer is bound by standard purchase and sale agreement provisions that severely restrict its ability ever to obtain enough documents to substantiate its claim – and in our experience, this is virtually always the case – the debt buyer does not have this ability, and therefore violates state and federal consumer protection laws, including the FDCPA, when it uses the courts to attempt to collect a debt.

The CFPB can and must address these practices, and the solution is straightforward.

As stated in response to the questions concerning disputes and verification under the FDCPA, the CFPB must ensure that all debt collectors (including those filing lawsuits) have access to basic information before they begin the collection process. And, as stated in response to Q100, the CFPB should enact rules to make clear that the conduct described above—filing lawsuits with no ability or intent to prove the debt, and using false, robo-signed affidavits to obtain judgments—is unlawful and violates the FDCPA. These fundamental reforms would address the most serious problems infecting state court debt collection litigation, without interfering with court rules in the various states.

For the above reasons, we urge the CFPB to use its rule-writing authority under the FDCPA and the Dodd-Frank Act to promulgate strong debt collection rules that will prevent unfair, deceptive, and abusive practices by all debt collectors. Thank you for the opportunity to comment, and please contact Claudia Wilner or Susan Shin at 212-680-5100 if you have any questions.

Sincerely,

New Economy Project

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recommended above, would certainly help ameliorate this problem. Where a debt collector intends to engage in litigation, however, it will likely need more documents than those listed above. For example, the debt collector may need copies of all account statements, account agreements and any addenda establishing the applicable interest rate(s) over the life of the account, and possibly a fact witness, depending on the jurisdiction, in order to be able to prove its claims in court in accordance with applicable state laws and rules.