UDAAP FOR THE DEBT COLLECTION INDUSTRY

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PURPOSE

The purpose of this White Paper is to explore how the collection industry, particularly buyers of charged off consumer debt, engage in rampant abuse, deception and unfair practices that contribute to marital instability, loss of jobs, invasion of individual privacy, and the high number of personal bankruptcies.

This White Paper will outline a series of recommendations that, if adopted, would halt the most egregious behaviors and thus allow consumers better opportunities to make a meaningful contribution to the national economy through improved employment opportunities and more stable families.

> ***"The elimination of a consumer claim against a struggling family can make a difference between a lifetime of debt and the accumulation of real wealth in the form of a home and savings".*** [1]

OVERVIEW

Times are tough for many consumers.

The collapsed housing bubble, high unemployment and the high cost of health care have left consumers with not enough money to go around. More debt collectors than ever are trying to collect these debts. One gets a mental image of the carcass of a gazelle on the plains of Africa, with vultures fussing and scrambling to get their bite of that carcass before it is completely consumed by the other vultures.

In these modern times, it is not so much that consumers cannot pay any of their debts but that they cannot pay all of their debts. Thus, debt collectors are pitted against each other; each wanting to collect their debt ahead of the others. With the mentality of a vulture, the competitive debt collector looks constantly for ways to increase his share of what funds the consumer has available. Consequently, there is a disincentive for a debt collector to work within the budgetary limits of the consumer because he knows he is only ceding territory to his competitors.

The result is an environment where basic rules of conduct are ignored, where corners are cut, illegal late-night phone calls, arrest threats and other abuse, where more aggressive behavior results in a "larger bite of the carcass".

The penalties for behaviors that cross the line have been light. Most debt collectors view such penalties as a "cost of doing business"[2].

Because of the high profit margins, debt buying industry has been described as 'one of the sexiest, one of the most financially lucrative businesses you can get into.'[3]

EVOLUTION OF THE DEBT BUYING INDUSTRY

The history of the debt buying and selling business is traced to the 1980s and the savings and loan crisis. Then, the government liquidator of failed savings and loan institutions auctioned off to the private sector for collection over $450 billion in failed savings and loan assets. Seeing a new market niche, debt buyers

thereafter began to purchase other kinds of debt as well, primarily credit cards that were charged off. Regulations require banks to charge off credit card type debts 180 days after delinquency.

The emergence of the debt buying industry coincided with an explosion over the last three decades in the availability and use of consumer credit. Between 1990 and 2005, for example, the amount of outstanding credit card debt grew from $237 billion to $1 trillion in 2008.[4] During this time living expenses rose while real wages declined. Many low-income and working poor families came to rely on credit cards to pay for essential expenses when their salaries failed to cover their basic needs.[5] Worse, many borrowers were entrapped by subprime credit cards – credit cards with low credit limits but exorbitant interest rates and fees, often marketed to lower-income individuals who had limited access to mainstream financial services.

The housing bubble collapsed. Subsequently, banks charged off $476 billion of uncollectible credit card debt[6]. This extraordinary volume of available bad debt created a fertile market for the debt buying industry.[7]

While the industry is dominated by a handful of public companies, there are as many as 500 privately owned debt buyers in the United States. These companies collect debts for others, purchase and collect their own portfolios, and resell packaged debt portfolios to other debt buyers.[8] They raise money to finance their purchases by issuing stock and using credit lines from banks, which are often also major credit card issuers. Some debt buyers have been purchased in whole or in part by high profile Wall Street banks, mutual funds, insurance companies, hedge funds or other financial services companies that provide financial backing for the debt buyers' activities.[9]

Additionally, there are about 4,100 debt collection agencies which do not purchase debt for their own account but do collect debt on behalf of debt buyers.[10] All told, the industry comprises about 450,000 employees making one billion contacts with consumers each year.[11]

CREDIT CARD DEBT BUYER – AN EVOLVING BUSINESS MODEL FROM TELEPHONE TO COURTROOM

Before 2000, only a relatively modest number of consumers were taken to court to force payment of debt. Most banks, collection agencies and debt buyers relied on the time-proven practice of contacting consumers by telephone or mail in an attempt to negotiate a satisfactory resolution.

While debt buyers deployed tens of thousands of computerized predictive automatic dialers, more and more consumers opted to use cell phones and the ease of call-screening through caller ID and voice mail.

The response of debt buyers to this failure to maintain technological superiority was to adopt an aggressive business plan that encompasses a strategy of massive collection litigation activity – sort of a "sue 'em all and let God sort it out" approach to collecting consumer debt. Before 2000, a collector would often work with a consumer to make a discounted lump sum payment or some sort of payment plan. Today, the debt buyer goes for a quick and easy default judgment and proceeds directly to garnish wages and seize assets.

Once a debt buyer sues, it is virtually assured of a win. Roughly 94% of collection cases filed against borrowers result in default judgments in favor of the debt buyer. 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.[12]

In some states, debt buyers have even figured out ways around laws that prevent them from putting debtors in jail.[13]

Over the past decade debt buyers have turned increasingly to filing lawsuits to collect debts. This business strategy is called "robo-suing".

Data from the four publically traded debt buyers reveal an increased focus on legal collections each year since 2002. At Encore Capital Group, for example, legal collections accounted for 47.29% of gross collections in 2012, up from 20% in 2003.[14] A number of debt buyer companies report that currently between one-third and one-half of their total collections are from litigation activities and that they plan to continue to grow the percentage of their collections derived from litigation.[15] The Chief Financial Officer of one prominent debt buyer, Asta Funding, put it simply: *"We're looking to sue"*.[16]

Some major debt buyers have decided to leverage their new found litigation skills to other debt buyers. Asset Acceptance Capital Corp. announced in September 2012 they were closing a traditional call center in order to beef up legal collections operations and would provide a "fee for service" legal collections activity to others.[17] As further evidence of the company's commitment to debt collection litigation, Asset Acceptance was awarded a patent for "a system for legal document authoring for a legal action and electronic court filing of such legal documents".[18]

Asset Acceptance announced in March 2013 that it was being acquired by Encore Capital Group; resulting in an even larger organization focused on litigation as a primary collection strategy.[19] Industry Leaders expressed the view that such consolidations were a harbinger of what is to come for debt buying companies.[20]

Some debt buyers have moved to a "litigation only" business model and make only cursory effort to contact consumers before filing a lawsuit.[21]

THE COURTHOUSE IN CRISIS

Civil courts across the country have been overwhelmed by surges in debt collection filings. The volume of these abusive actions filed by debt buyers is interfering with the integrity of the judicial system.

The Federal Trade Commission observed that "the majority of cases on many state court dockets on a given day are often debt collection matters" and that the glut of debt collection cases has "posed considerable challenges to the smooth and efficient operation of courts". Further, the FTC notes "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."[22]

Recent testimony before the House Judiciary Subcommittee on Constitution and Civil Justice estimates that 72% of all civil cases on state and local court dockets are debt collection cases.[23] Studies in Virginia have indicated that 70% to 80% of all filings are debt collection cases.[24]

Ira Leibsker, a Chicago collection attorney, told an FTC workshop *"that there are literally probably tens of millions of lawsuits being filed, and more will be filed as time goes on."*[25]

In 2013, at least 10 million lawsuits will be filed by debt buyers to collect credit card debt – some think that the number of lawsuits will be closer to 20 million.[26]

LACK OF PROOF -- ROBO-SIGNING IN THE DEBT BUYER INDUSTRY

In every jurisdiction, the law requires that debt buyers provide proof of their claims in order to win a case. If a debt buyer cannot do so, and the case is contested, the case must be dismissed.[27] The staggering number of judgments – mostly by default – obtained by debt buyers masks the fact that debt buyers rarely have admissible evidence of the debt and that many cases are meritless.

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 debtor's records, when in fact they have only looked at account information on a computer screen.[28] Robo-signing in the credit card debt buyer industry is not new – it has always existed – just no one paid attention to it.

According to Ira Rheingold, president of the National Association of Consumer Advocates, *"Everyone is hysterical about the (mortgage) robo-signing. What's overlooked is that … the scale in collection cases far exceeds what we're focused on now."*[29] *"What was true with the mortgage foreclosures is true here,"* says Thomas Donnelly, a law professor at Chicago's Loyola University and part-time Cook County judge.[30]

Debt buyers do not purchase documentation of debts, such as credit applications bearing signatures, contracts that applied to each account, account statements, or customer service records that would confirm or clarify the identity of the consumer. While some debt buyers have a contractual right to obtain a portion of this information in a limited number of cases, this is far from the norm.[31] Credit card accounts are typically sold by the originating bank with no documentation other than a spreadsheet with a name, address, and phone number.

In the vast majority of cases filed, debt buyers cannot provide documentation of the underlying debt.[32] Debt buyers have always relied on affidavits to satisfy legal requirements.[33] According to ACA International, a debt buyer industry group, there *"is a challenge to obtain original documentation"* of purchased debt, including the *"contract underlying the debt at issue"* … documentation *"establishing proof [that] the consumer debt at issue existed"* is often lacking. Lawyers for ACA International go on to say the documentation *"is often unattainable for a variety of reasons, the most important of which is that the original creditor no longer has the information or did not have it when selling an account…."*[34]

Astonishingly, debt buyers argue that informal proof of debt, such as affidavits by a debt buyer's own employees, should be sufficient to prove standing to sue.[35]

There is a rapidly growing body of anecdotal examples of robo-signing that illustrates the depth and breadth of the problem. Examples that best draw the picture are:

- **According to a study out of New York, "researchers found that over the course of a year, one debt buyer's affiant identified himself as the custodian of records in 47,503 affidavits, thereby claiming to have personal knowledge of the facts of each and every case".[36]**
- **An employee of a debt buyer said that she signed an affidavit on average every 13 seconds.[37]**
- **A bank officer responsible for preparing credit card accounts for sale reported that in one pool of 23,000 accounts there were 5,000 accounts with incorrect balances or addresses and even cases where the consumer had won a judgment against the bank but was still part of the package being sold. The officer flagged the defects for her manager who shrugged them off and urged her to complete the deal. Instead, the officer contacted senior legal counsel at the bank. Within days, she was fired.[38]**
- **In an Ohio case *(Vasselle v. Midland Funding)* an employee of the debt buyer testified that he signs 200 to 400 affidavits a day, few of which are reviewed for accuracy.[39] U. S. District Judge David A. Katz ruled that the debt buyer's employees determined the validity of a debt "based entirely" on a printout and thus that each robo-signed affidavit was a violation of the FDCPA[40].**
- **In perhaps the most outrageous case of robo-signing, a dead woman's name was used to sign 16,000 affidavits.[41]**

- **In deposition, two debt buyer employees who routinely signed 100 to 400 affidavits each day said they had no idea where the affidavits came from. "We had a big printer and they would just print out all the time".[42]**
- **In a civil court hearing, the judge asked the debt buyer's lawyer, "What proof did you have that this is the true gentleman that you were trying to pursue?" The lawyer responded, "Just his Social, his date of birth, and his address and the account." "That's all you have?" the judge asked. "So if you have somebody's Social Security number, date of birth, and address, you could sue them without any other information?"[43]**
- **An employee of a debt buyer stated in a deposition that if a debtor's file said the moon was made out of green cheese he would formally vouch for it.[44]**

According to Peter Holland, who runs a University of Maryland law school clinic, "This is a $100 billion-a-year industry. It's created a crisis in our small-claims courts. There's tens of thousands of cases filed without proof just in Maryland. Nationwide, it's in the tens of millions."[45]

Robo-signing by debt buyers has attracted significant attention from state attorneys general.[46] One former Attorney General, in a letter to members of the National Association of Attorneys General, said:

> ***"We will see a scandal emerge in the credit card debt collection arena that may dwarf the mortgage fraud crisis. The same practice of mass litigation, robo-signing and false affidavits that have given rise to regulatory crackdowns, federal legislation and class action lawsuits are going on today in the purchase and collection of credit card debt."***

DEBT BUYER LAWSUITS ARE OFTEN MERITLESS

A recently completed study of debt buyer litigation collection practices in New York City concluded that many cases brought by debt buyers were, in fact, meritless.[47] An analysis of the study sample shows that 35% of cases brought by debt buyers were clearly meritless due to mistaken identity or identity theft, the debt had been previously paid, the debt had been discharged in bankruptcy, or the statute of limitations on the debt had expired. The study sample also showed that the filing of meritless cases disproportionately affects people of color.

An earlier study, also in New York City, concluded that 99% of the cases reviewed where default judgments were entered, the materials underlying those applications constituted inadmissible hearsay and did not meet the standard set forth in law for the entry of a default judgment. Nevertheless, these applications were approved, the default judgments were entered; and consumers suffered the consequences.[48]

EVEN JUDGES FAIL TO RECOGNIZE THE DAMAGE CAUSED BY ROBO-SIGNING

In 2001, a U.S. District Court in Ohio granted final approval of a nationwide class settlement of three class-action lawsuits *(Vassalle v. Midland Funding)* that alleged Midland Funding, a subsidiary of Encore Capital Group, used robo-signed affidavits to collect debt from 1.44 million individuals.[49]

Consumer advocates normally applaud news like this multi-million dollar settlement against a debt buyer who cheated consumers. One problem with the settlement was that in only provided $10 per consumer as restitution for damages. Further, the settlement barred consumers from ever suing Midland for damages.

Finally, the settlement barred Midland from any similar false affidavits for a period of only one year. Thereafter, Midland would be free to do as they wished.

This settlement was strongly opposed by the Federal Trade Commission, 38 state attorneys general, the American Association of Retired Persons and the National Consumer Law Center.[50] According to New York Attorney General Eric Schneiderman, "Under any interpretation, the ten-dollar-per-class member settlement is not fair, reasonable, or adequate to address the harm incurred".

Attorneys General from California, Ohio and Massachusetts also said the agreement unfairly forced class members to release any claims against Midland, yet allowed Midland to pursue claims against the class members. "The settlement strips class members of their right to defend against existing lawsuits and to seek to vacate judgments obtained through Midland's use of false and misleading affidavits", said the Attorneys General.

District Judge David Katz, after having concluded that Midland's affidavits were based on nothing more than a computer screen, approved the settlement over the objections of the opposed parties. The lead plaintiffs in the case each received $8000 and the forgiveness of any debt owed to Midland, the lawyers for the class received $1.5 million in legal fees, and each of the 1.44 million other class members could apply for a maximum award of $17.87 – approximately the value of four gallons of gasoline.

The US Court of Appeals for the Sixth Circuit reversed and vacated the settlement.[51] The Circuit Court order said "the settlement was unfair" and the relief provided to the class members was "perfunctory at best". The court went on to say, "This disparity in relief is so great that we conclude the district court abused its discretion in finding that the settlement was fair, reasonable, and adequate."

The Appeals Court also said that the one-year injunction was of "little value" as it did not prohibit Midland from creating false affidavits and only required the company to change its policies. The appeals court also noted that Midland is free to resume its "predatory practices" after the injunction was over.

THE COMBINATION OF ROBO-SUING AND ROBO-SIGNING IS A COMMON BUSINESS STRATEGY

Debt buyers approach collection lawsuits in ways that undercut consumer's rights and stack the deck in favor of the debt buyer in litigation at every stage of the process.

Debt buyers use advanced technology to identify those consumers who are most vulnerable in a litigation arena.[52] Debt buying companies have ways of exploiting their databases to increase debt recovery and improve the return on their debt investments.

- **One confessed strategy is selection based on sex since women are more likely than men to repay debts without legal action.[53] Moreover, women generally accrue less savings and more expenses than men and are consequently more worried about losing assets.[54]**
- **Another strategy is to target elderly individuals based on the assumption that these debtors are easily confused about whether the debt existed, that they fear a collector garnishing their social security income, and that they are hesitant to engage in legal skirmishes.[55] As one callous collector remarked, "When you're dealing with older people, especially older people who have a deceased spouse, their memory doesn't work too well with what they had in the past. They get something in the mail and call about it…. They hear someone saying their Social Security benefits are being looked into, their home is being looked into … [and] when you've got all this thrown at you and there's someone talking sly on the phone, you're forced to pay".[56]**
- **Debt buying companies also target individuals based on their income and financial history.[57] Debt buyers use a debtor's income to predict whether the debtor is likely to create a legal skirmish. When collecting a debt, the debt buyer hopes for the quickest and easiest recovery. Thus, they wish to limit**

the possibility of the debtor hiring a lawyer. Studies show that less-sophisticated individuals are more likely to be intimidated by legal proceedings and less likely to hire attorneys, while wealthier individuals are more adept at using the legal system.[58]

"It is the factory approach to practicing law," **said Richard Rubin, a New Mexico lawyer who represents consumers against debt buyers.**[59] **Rubin continued*****, "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 do not have a lawful basis".***

Rather than a true adversary system, the debt buyer litigation model is characterized by a sophisticated business represented by a skilled lawyer suing an unsophisticated, unrepresented consumer in which no formal rules of evidence are applied and rank hearsay is rampant. [60]

As millions of Americans have fallen behind on paying their bills, debt buyers have been clogging courtrooms with lawsuits seeking repayment. To observe the reach and power of the modern credit card debt buyer industry, one need only pay a visit to a local small claims court. Every day hundreds of these low level state courts mass produce tens of thousands of judgments against credit card debtors. Silently, one state after another has found itself overwhelmed:

- **In Virginia, low level courts processed claims against consumers at the astonishing rate of one collection lawsuit for every 20 residents.**[61]
- **In New York City, between 2000 and 2007, the rate of lawsuits tripled to 618,000. Seven large collection firms alone accounted for 180,000 lawsuits in 2007. Similarly 26 debt buyers filed 457,000 lawsuits in a 31-month period ended in July 2008.**[62]
- **In Massachusetts, three of every five civil actions were debt collection – 575,000 between 2000 and 2005.**[63]
- **In the San Francisco Bay Area, the number of lawsuits filed to collect debts rose to 96,000 in 2009 from 54,000 in 2007.**[64]
- **Cohen & Slamowitz, a Woodbury, NY, firm that has specialized in debt collection for nearly two decades has been filing roughly 80,000 lawsuits a year. With just 14 lawyers on staff, that works out to more than 5,700 cases per lawyer.**[65]
- **A New York City court imposed a $10,000 sanction on attorneys for bringing a debt collection case without sufficient proof and considered, but ultimately decided against, holding them in contempt.**[66]

There are no nationwide figures available, but a survey of 20 judges across the nation by *The Wall Street Journal* yielded anecdotes of court calendars choked with debt collection lawsuits. One judge said, *"There exists a real danger that the courts will be perceived as mere extensions of collection agencies".* [67]

Debt buyers use small-claims courts as a means to get a competitive edge for two main reasons. First, the minimal procedural requirements of small-claims courts offer a swift sword of justice against debtors and give leeway to cost-efficiently file cases that would not survive in general civil court and that the volume of lawsuits leads small-claims judges to be less likely than civil court judges to closely inspect each suit's merits. Second, debt buyer collection attorneys file thousands of lawsuits each year and are intimately familiar with small-claims courts where they have an upper hand over first-time users of the legal system.

Courts across the nation are overwhelmed. The infrastructure is simply inadequate to deal with massively growing volumes of debt collection litigation – especially when so many questions exist about the veracity of the supporting evidentiary materials.[68]

THE IMPACT OF THE NEW PARADIGM

Given industry history and trend and assuming there is no change in the regulatory climate, over the next 36 months we will see very large numbers of consumers subjected to debt collection activity by debt buyers. Because consumers hold multiple debts with different banks and rarely are a consumer's debts all sold to one debt buyer.

The 26 largest debt buyers currently hold in their portfolios an estimated 104 million consumer accounts[69]. The Federal Reserve Bank estimates that about 35 million Americans are being pursued by a debt collection agency.[70] Since most consumers have multiple accounts in default at the same time, these numbers correlate well and represent an average of 3.5 accounts per consumer in default.

The potential for litigation for any one consumer at a given time exceeds 100%. The number of accounts the consumer has in default when spread across multiple debt buyers who are litigation oriented can easily result in multiple lawsuits simultaneously.

The likely volume of actual debt collection litigation in 2013 will be well in excess of 10 million cases.

In almost every case, the consumer will find himself or herself subject to a lawsuit premised on nothing more than a string of binary code in someone's computer or a spreadsheet with a name and a few numbers.

As courts have found, certain litigation techniques, like filing a lawsuit with no arguable merit constitutes an abusive collection practice.

ZOMBIE DEBT – THE REAL 'WALKING DEAD'

In 2004 the Federal Trade Commission assessed a fine of $1.5 million against the NCO Group, the nation's largest consumer debt buying firm. NCO, now a part of the JPMorgan Chase family, was discovered to be intentionally changing the delinquency dates on accounts to bypass the statute of limitations so that it could collect the debt in court.[71]

It is this type of action that gives rise to the term "Zombie" to describe a debt that, instead of disappearing, rises from the dead and brought is back alive through trickery or deception.

While collectors are not supposed to file lawsuits to collect out of statute debt, it happens all the time.[72] But lawsuits are filed anyway, and industry groups and some consultants argue that collectors routinely harass debtors for unpaid balances that have exceeded the statute of limitations. In some cases, collectors have unlawfully added fees and interest.

***"It's so cheap, if you can work it smart, you don't need to collect that much,"* said John Pratt, a consultant to the debt-buying industry and an author of "Debt Purchasing: An Investor's Guide to Buying Debt". Because collectors cannot sue on old debt, he said, they are more likely to resort to abusive tactics. *"Time-barred debt is where the worst abuse has occurred towards the debtor,"* he said.[73]**

In January 2012 the FTC assessed a fine of $2.5 million against Asset Acceptance Capital Corp. for coercing consumers into paying debts they did not owe. FTC officials also said that Asset Acceptance trained employees to go after "past-statute" debts, encouraging them to persuade debtors to make at least a "partial payment," even though many of them had no idea that doing so would revive their legal obligation to pay.[74] The Department of Justice alleged that Asset Acceptance violated the federal Fair Debt Collection Practices

Act, made deceptive statements to consumers, gave false reports to credit-reporting agencies and committed other violations.[75]

Another debt buyer, CAMCO, was shut down by the FTC for abusive tactics including threatening debtors with illegitimate lawsuits, failing to provide adequate information, lying about the legitimacy of the debt, and even seeking out innocent people with the same name as the supposed debtor and attempting to collect the debt from them.[76] **For example, the collector typed in the name 'Victor' into the computer and 'Victoria' popped up, so the company changed the name on the debt and pursued Victoria instead.**[77]

DEBT BUYER LAWSUITS BREAK DOWN FAMILY UNITS AND PUSH FAMILIES INTO BANKRUPTCY

Senator Elizabeth Warren, one of the nation's most respected experts on the causes of bankruptcy shared her views on how the credit card debt buyer industry has pressured families and become a major driving force for bankruptcy in the country[78]**. Some of her comments are especially on target in any conversation about debt buyer robo-signing:**

> ***Sen. Warren: (Banks) bundle up all the (credit card loans) that haven't been paid and they sell them. They sell them the same way you and I would sell our old furniture. We said, 'Retire that stuff.' We bundle it up and we sell it on the market.***
>
> ***Interviewer: Who do they sell it to?***
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> ***Sen. Warren: They sell it to people who make a lot of money from buying it and working it a second time.***
>
> ***Interviewer: This is a booming industry?***
>
> ***Sen. Warren: This is a huge industry. This is a huge industry.***
>
> ***Interviewer: What's their rap, this second level?***
>
> ***Sen. Warren: The second level tends to be the "pay it or your life becomes living hell."***
>
> ***Interviewer: A living hell?***
>
> ***Sen. Warren: A living hell.***
>
> ***Interviewer: In what way?***
>
> ***Sen. Warren: Let me see how many ways I can do. Sometimes your life will become a living hell because I will call you, and I will call you, and I will call you, and I will call you, and I will call you. I will call you and I will call you vile names. I will call you and I will Harangue you. I will call you and I will make fun of you. I'll look on your application, and I'll call your mom, I'll call your dad, I'll call your neighbor.***
>
> ***Sen. Warren: We studied the families who filed for bankruptcy. One of the man reasons they identified for what they hoped to accomplish by filing for bankruptcy is to stop the calls. "Stop frightening me. Stop frightening my children. Stop threatening us."***
>
> ***Interviewer: Is this an industry that is out of control?***
>
> ***Sen. Warren: This is an industry that makes its money by being out of control. This is an industry that is profiting out of terrifying people. "Look, if I can't scare you into paying this. I don't make the money."***
>
> ***Interviewer: In some cases, breaking the law along the way?***
>
> ***Sen. Warren: "Eh. Catch me. Prove it."***

Interviewer: How do you think the consumer debt industry has to be reformed?

Sen. Warren: We not only need better laws to control the activities of debt collectors, we need serious enforcement. The families themselves, who are on the ropes when they receive these calls, are not going to be the people who are going to enforce the law. We need serious state attorneys general who have real power to step in and say, "Hey, this stops!"

THE CFPB IS A DAGGER POINTED AT THE HEART OF THE DEBT BUYING INDUSTRY

Every creditor has the right to ask every borrower to pay their bills. No creditor has the right to abusive behavior.

In William Shakespeare's play The Merchant of Venice, Shylock (the moneylender) demanded from Antonio (the borrower) a pound of flesh – a penalty that would surely kill Antonio. One has the feeling that if Shakespeare were alive today, his play would be titled something like The Debt Buyer of San Diego.

There is no other way to describe the debt buyer industry except to say it is off the rails.

There are debt buyers of honest intent and who wish to conduct an honorable and compliant business. Those debt buyers find themselves disadvantaged by the unscrupulous debt buyers in the industry and by widespread belief among the public and the media that the entire industry is nothing but a bunch of crooks.

The CFPB has the power and mandate to put the industry back on the rails and establish rules of conduct that allow honest commerce without deceptive and abusive behaviors. This mandate fits well with the expressed public statements of the agency:

Goals	***Our goal is to help honest debt collectors do their job responsibly and see that the rest are either rehabilitated or run out of business once and for all.***
Vision	***A consumer financial marketplace … in which no one can build a business model around unfair, deceptive or abusive practices.***
Priorities	***Protecting honest businesses from competitors who use unscrupulous practices to gain an unfair advantage by using enforcement authority to address violations of Federal consumer financial laws.***

There can be no doubt that the CFPB will establish definitions of Unfair, Deceptive, Abusive Acts and Practices (UDAAP) that will leave a lasting mark on the industry. The only questions to be answered is "what" and "how" – in other words, what UDAAPs will be adopted and how those UDAAPS will be implemented.

STRATEGIES TO ACHIEVE OUTCOME ORIENTED GOALS

Following are recommended strategies to achieve certain outcomes. Basically, debt buyers (and collection agencies and law firms that represent debt buyers) would not be permitted to:

1. **Collect time barred-debt,**
2. **Attempt to make contact with a consumer more than two times each 24 hours.**
3. **Add post-charge off interest or fees to the debt.**
4. **Begin collection activity until the debt buyer has in his possession "sufficient documentation".**

5. **Initiate litigation without first giving a required notice to the consumer.**
6. **Initiate litigation without attaching to the complaint "evidence of the debt".**

The first approach to accomplish the desired outcomes is to issue UDAAP rules that would be applicable directly to debt buyers and any collection agency or law firm representing a debt buyer. Details of these requirements are essentially items 1 through 6 enumerated above but are outlined in more detail in Appendix A and Appendix B.

The second approach is to issue UDAAP rules that would be applicable to banks who sell delinquent consumer debt. The bank would be required to include in their loan sale agreement provisions that require the debt buyer to the same enumerated requirements. Those requirements are outlined in more detail in Appendix C.

There are several further recommendations that should be addressed more generally as part of any UDAAP rule.

1. **The UDAAP rule should provide for penalties – both personal and corporate – for violation of the UDAAP rule. There should be a burden of compliance on the individual who commits a violation and the corporate executives of the company that receives the economic benefit from the services provided by the individual who committed the violation.**
2. **The UDAAP rule should provide for both protections and incentives for whistleblowers. Retaliation against a whistleblower should be prohibited and, following the example of the IRS, the whistleblower should receive 10% of any fine assessed.**
3. **The UDAAP debt collection rules and whistleblower provisions should be required to be posted at all debt collection sites in locations where they are readily available to employees.**
4. **The UDAAP debt collection rules should be incorporated into the employee training program for each debt buyer.**

SUMMARY

Debt buyers (and the law firms and debt collectors who work for debt buyers) approach their collection activities in ways that undercut consumers' rights at every stage of the process. Debt buyers fail to notify consumers of lawsuits filed against them.[79] Debt buyers file lawsuits based on insufficient evidence of indebtedness.[80] They obtain default judgments at a high frequency against consumers who do not appear to defend the lawsuits.[81] They attempt to recover on debts even after the statute of limitation has run.[82] And they illegally levy exempt funds from consumers' personal bank accounts.[83]

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.

It is time for a change. Our country can do better.

APPENDIX A

UDAAP REQUIREMENTS FOR DEBT BUYERS AND COLLECTION AGENCIES

A debt buyer (or collection agency representing a debt buyer) will be deemed to have committed an Unfair, Deceptive, Abusive Act or Practice (UDAAP) when:

1. **The debt buyer or collection agency attempts collection, by litigation or otherwise, of debts that are time-barred.**
2. **The debt buyer or collection agency attempts contact with any consumer more than two times in any 24-hour period.**
3. **The debt buyer or collection agency adds post-charge off interest or fees to the debt.**
4. **The debt buyer or collection agency attempts any collection activity from outside the United States.**
5. **The debt buyer or collection agency, if the consumer notifies the debt buyer or their collection agency or law firm, verbally or in writing that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, fails to cease collection of the debt, until verification of the debt has been obtained and provided as described below to the consumer or the consumer's attorney by Registered Mail Return Receipt Requested.**
    a. **Copy of the original note, loan agreement, payment history or affidavit of indebtedness.**
    b. **Documentation that the debt buyer is the sole owner of the specific debt and that the chain of title is documented to the original creditor. Chain of title documentation must clearly reflect an association between the name of the consumer and the original account number issued by the original creditor.**
    c. **The name, address and telephone number of the debt buyer or the current owner of the debt, if different.**
    d. **The name, address and telephone number of the original creditor.**
    e. **The name of the original creditor as would have been known to the debtor.**
    f. **The debtor's original account number.**
    g. **The date the account was opened, the date of first default, the date of charge off, the amount of the debt at charge off and the date the account was closed.**
    h. **An itemized accounting of all amounts claimed to be owed.**
6. **The debt buyer or collection agency attempts collection before they have in their possession bona fide evidence of the indebtedness. Such evidence shall consist of:**
    a. **Copy of the original note, loan agreement, payment history or affidavit of indebtedness.**
    b. **Documentation that the debt buyer is the sole owner of the specific debt and that the chain of title is documented to the original creditor. Each assignment and bill of sale or other writing evidencing transfer of ownership must contain the original account number of the debt purchased and must clearly show the debtor's name associated with that account number. Under no circumstances will any document prepared by anyone other than the original creditor or their successor in interest be deemed sufficient documentation. For this purpose, a successor in interest is a state or federally chartered financial institution whose primary business is the extension of credit. No instrument or document prepared by the debt buyer, loan broker or any other person will be sufficient.**

Debt buyers shall have vicarious liability for all actions taken on their behalf by collection agencies or law firms hired by the debt buyer.

APPENDIX B

UDAAP REQUIREMENTS FOR LAW FIRMS REPRESENTING DEBT BUYERS

A law firm representing a debt buyer will be deemed to have committed an Unfair, Deceptive, Abusive Act or Practice (UDAAP) when:

1. **The law firm attempts collection, by litigation or otherwise, of debts that are time-barred.**
2. **The law firm attempts to make contact with any consumer more than two times in any 24-hour period.**
3. **The law firm adds post-charge off interest or fees to the debt.**
4. **The law firm attempts collection before they have in their possession bona fide evidence of the indebtedness. Such evidence shall consist of:**
    a. **Copy of the original note, loan agreement, payment history or affidavit of indebtedness.**
    b. **Documentation that the debt buyer is the sole owner of the specific debt and that the chain of title is unbroken back to the original creditor.**
    c. **Under no circumstances will any document prepared by anyone other than the original creditor or their successor in interest be deemed sufficient documentation. For this purpose, a successor in interest is a state or federally chartered financial institution whose primary business is the extension of credit. No instrument or document prepared by the debt buyer, loan broker or any other person will be sufficient.**
5. **The law firm initiates a lawsuit against a consumer without first giving the debtor written notice of intent to file legal action at least 30 days in advance of filing. The written notice shall include:**
    a. **The name, address and telephone number of the debt buyer.**
    b. **The name of the original creditor as would have been known to the debtor.**
    c. **The debtor's original account number.**
    d. **A copy of the contract or other document evidencing the consumer debt**
    e. **An itemized accounting of all amounts claimed to be owed.**
    f. **Notice shall be sent Registered Mail Return Receipt Requested.**
6. **The law firm files a lawsuit without all of the following materials attached to the complaint or claim:**
    a. **A copy of the contract or other writing evidencing the original debt, which must contain a signature of the defendant. If no such signed writing evidencing the original debt ever existed, then copies of documents generated when the credit card was actually used must be attached.**
    b. **A copy of the bill of sale and Loan Purchase Agreement or Forward Flow Agreement establishing that the plaintiff is the sole owner of the debt and setting forth the warranties and representations made by the seller to the purchaser of the consumer debt.**
        i. **If the debt has been assigned more than once, then each assignment and bill of sale or other writing evidencing transfer of ownership must be attached to establish an unbroken chain of ownership.**
        ii. **Each assignment and bill of sale or other writing evidencing transfer of ownership must contain the original account number of the debt purchased and must clearly show the debtor's name associated with that account number.**

c. **Authenticated business records detailing at least the following:**

   i. **The original account number.**

   ii. **The original creditor.**

   iii. **The amount of the original debt.**

   iv. **An itemization of charges and fees claimed to be owed.**

   v. **The original charge off balance, or, if the balance has not been charged off, an explanation of how the balance was calculated**

   vi. **An itemization of post-charge off additions, where applicable.**

   vii. **The date of the last payment.**

   viii. **The amount of interest claimed and the basis for the interest charged.**

7. **The law firm fails to disclose clearly and conspicuously on the face of the complaint that the plaintiff is a debt buyer.**

8. **The law firm fails to disclose clearly and conspicuously on the face of the complaint that the debt is not time-barred.**

9. **The law firm fails to include in the complaint a short statement, written in simple language, describing the nature of the underlying debt and the consumer transaction from which it is derived.**

APPENDIX C

UDAAP REQUIREMENTS FOR BANK LOAN SALE AGREEMENTS
(Applicable only to sales of charged-off credit cards)

A bank will be deemed to have committed an Unfair, Deceptive, Abusive Act or Practice (UDAAP) when:

1. **The bank sells loans to any debt buyer who has demonstrated a substantive pattern of unfair, deceptive or abusive treatment of consumers or violation of state or federal debt collection statutes as evidenced by class action lawsuits, actions by State Attorneys General or the Federal Trade Commission.**
2. **The bank's Loan Sale Agreement does not contain the following four requirements:**
   a. **A requirement that debt buyer agrees to not resell the loans purchased from the bank.**
   b. **A requirement that the debt buyer agrees to cease all collection activity once the debt is time-barred.**
   c. **A requirement that the debt buyer agrees to not attempt to contact the debtor more than two times in any 24 hour period.**
   d. **A requirement that the debt buyer agrees to not litigate with the debtor regarding debt purchased from the bank nor to threaten such litigation.**
3. **The bank fails to implement a plan to audit the performance of the debt buyers to whom it sells loans. At minimum such an audit plan will include:**
   a. **The requirement that the debt buyer provide to the bank monthly an affidavit of compliance signed by an Executive Officer of the debt buyer.**
   b. **The requirement that bank personnel will quarterly conduct an on-site visit of the debt buyer.**
   c. **The requirement that the debt buyer provides to the bank annually an independent audit of its compliance and complaint management program.**

Endnotes:

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[13] ***Welcome to Debtor's Prison, 2011 Edition*, THE WALL STREET JOURNAL, Jessica Silver-Greenberg, March 17, 2011: More than a third of all U.S. states allow borrowers who can't or won't pay to be jailed. Nationwide figures aren't known because many courts don't keep track of warrants by alleged offense. In interviews, 20 judges across the nation said the number of borrowers threatened with arrest in their courtrooms has surged since the financial crisis. *Debtor Arrest Criticized*, THE WALL STREET JOURNAL, Jessica-Silver Greenberg, November 22, 2011: Illinois Attorney General Lisa Madigan, in an interview, vowed to push state-court judges to quash arrest-warrant requests by lawyers representing the fast-growing debt-collection industry.**

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