

May 27, 2011

Federal Trade Commission
Office of the Secretary
Room H-113 (Annex F)
600 Pennsylvania Avenue NW
Washington, DC 20580

Re: Workshop: Debt Collection 2.0: Protecting Consumers

To Whom It May Concern:

Consumers Union¹ and Consumer Federation of America² appreciate the opportunity to comment on how the Federal Trade Commission (FTC) can protect consumers in debt collection as newer technologies evolve. The FTC's April 28, 2011 public workshop, "Debt Collection 2.0: Protecting Consumers," engendered fruitful discussion between industry, government, and consumer advocates. We believe that this dialogue is crucial to ensure that newer technologies are used to promote a fairer and more efficient debt collection process that does not overburden consumers and the courts. It is also important to ensure that the use of newer technologies to contact consumers and attempt to collect from them does not result in abusing their privacy.

Newer technologies can increase both efficiency and accuracy in the debt collection process by improving information flow between original creditors, debt buyers and consumers and facilitating dialogue between debt collectors and consumers. However, reasonable safeguards must be put in place to ensure that the use of newer technologies prevent consumer abuses throughout the debt collection process. The FTC should look to the recent rise of the debt buying industry and concurrent growth of debt collection lawsuits overwhelming state court systems in particular when considering reform efforts, as this phenomenon has taken a heavy toll on low-income communities with little access to legal representation.

The FTC has an important role to play in shaping industry practices and strengthening consumer protections, both by enforcing existing laws and advising policymakers to enact reforms at the federal and state level. The FTC can:

- **Vigorously enforce existing law** under the Fair Debt Collection Practices Act (FDCPA) and the Federal Trade Commission Act (FTC Act). Step up enforcement actions and investigations of debt buying companies recently

¹ Consumers Union of United States, Inc., publisher of *Consumer Reports*[®], is a nonprofit membership organization chartered in 1936 to provide consumers with information, education, and counsel about goods, services, health and personal finance. Consumers Union's publications and services have a combined paid circulation of approximately 8.3 million. These publications regularly carry articles on Consumers Union's own product testing; on health, product safety, and marketplace economics; and on legislative, judicial, and regulatory actions that affect consumer welfare. Consumers Union's income is solely derived from the sale of *Consumer Reports*[®], its other publications and services, fees, noncommercial contributions and grants. Consumers Union's publications and services carry no outside advertising. Consumers Union does not accept donations from corporations or corporate foundations.

² Consumer Federation of America is an association of nearly 300 nonprofit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy and education.

brought under scrutiny in the media and by state Attorneys General for “robo-signing” and other dangerous practices. Such actions would yield valuable discovery on the common practices of the debt buying industry and inform discussion on how new technologies could facilitate industry compliance with fair debt collection laws.

- **Declare certain practices unfair or deceptive pursuant to Section 5 of the FTC Act**, such as selling debt without baseline information about the character and status of the debt, or attempting to collect on purchased debts without obtaining, retaining and providing supporting documentation to show that a collector is attempting to collect from the right person, for the right amount, on a debt that it can lawfully recover. This would incentivize the industry to explore ways that newer technologies can increase both the flow and accuracy of information concerning debts.
- **Advise the new Consumer Financial Protection Bureau (CFPB) to write rules under the FDCPA³** that would, among other things, place greater information disclosure requirements on debt sellers and debt buyers and prohibit collection attempts both in and out of court without supporting documentation to show that a debt buyer is the sole owner of a debt. This would incentivize the industry to combine the use of information technologies with meaningful human fact-checking at crucial points in the debt collection process, so that consumers aren’t improperly pursued on debts they have no legal obligation to pay, or that the collector has no legal right to recover.
- **Advise states to propose legislation and court rules that increase pleading requirements** in debt collection litigation, to reduce caseloads on state court dockets and prevent default judgments based on flimsy or inaccurate pleadings. This would incentivize the industry to combine technology with human fact-checking to ensure accuracy of court filings, and would decrease the bulk filing of cookie-cutter lawsuits in state courts.
- **Provide guidance about the use of social networks to locate and communicate with consumers for debt collection purposes.** This would help the industry to understand when the use of such networks is appropriate and how to avoid violating consumers’ privacy.

These actions would go a long way toward protecting consumers from unsubstantiated debt collection actions and privacy abuses while fostering the responsible use of newer technologies to improve the debt collection industry.

The Debt Collection System is “Broken”

The debt collection industry is in drastic need of reform. Last year, the FTC went so far as to declare that the “system for resolving disputes about consumer debts is broken.”⁴ Complaints about the debt collection industry continue to top the list of consumer complaints to the FTC,⁵ and courts around the country are swamped with debt collection lawsuits.

³ The CFPB receives authority to write rules under the FDCPA and other consumer financial protection laws starting on July 21, 2011. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1022, 124 Stat. 1376, 1980 (2010) (to be codified in scattered sections of the U.S. Code).

⁴ FED. TRADE COMM’N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION (2010), available at <http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf> [hereinafter FTC REPORT].

⁵ *See* FED. TRADE COMM’N, ANNUAL REPORT 2011: FAIR DEBT COLLECTION PRACTICES ACT 4 (2011), available at <http://www.ftc.gov/os/2011/03/110321fairdebtcollectreport.pdf>.

The problems within the debt collection industry have been exacerbated by the rapid growth of debt buying, because debt buyers typically purchase large portfolios of consumer debts for pennies on the dollar with little information about each debt, and employ software and database technologies to generate collection letters and lawsuit complaints en masse. The purchased portfolios often contain little more than the name and contact information of alleged debtors. Because the sellers of debt routinely fail to pass on important validation and historical information about the debt, there is a substantial likelihood of mistakes or confusion about the identity of the debtor and creditor and the actual amount owed. Purchased debts may be time-barred, settled, or otherwise not recoverable as a matter of law, and yet consumers are frequently pursued on such debts.⁶

Original creditors typically do not transfer important identifying information to debt buyers at the time of sale, which leaves subsequent debt collectors without adequate information to verify and provide information about the debt, or to prove up their cases in court. It is all too common for debt buyers to acquire spreadsheets containing inadequate or absent records of payments, disputes, or prior exchanges with the consumer -- and these spreadsheets are sold and resold repeatedly.⁷ The *New York Times* reported in November 2010 that a JPMorgan Chase employee told the paper that despite finding 5,000 accounts with incorrect balances or addresses in a portfolio of 23,000 delinquent accounts being prepared for sale, Chase had sold the portfolio—with mistakes intact—to a debt buyer.⁸ Plainly, it is easier for a creditor purchasing a portfolio of debts from an original creditor to ascertain how much is actually owed than it is for the consumer.

Meanwhile, the growth of the debt buying industry has led to increased use of the court system to collect the debts in these purchased portfolios. Using automated software, some debt collection agencies have become debt-collection-lawsuit mills, filing thousands of cookie-cutter lawsuits against consumers each month.⁹ Encore Capital Group, the largest publicly-traded debt buyer in the country by asset size, filed 245,000 lawsuits in 2009,¹⁰ half of its \$487.8 million in gross collections came from legal actions — a 22.4% increase in revenue from the previous fiscal year.¹¹

⁶ Consumers Union and the East Bay Community Law Center published a joint report in January 2011 which, among other things, highlights the experiences of clients at the Law Center who endured such abuses by debt buyers. See CONSUMERS UNION & EAST BAY CMTY. LAW CTR., PAST DUE: WHY DEBT COLLECTION PRACTICES AND THE DEBT BUYING INDUSTRY NEED REFORM NOW (2011), available at http://www.defendyourdollars.org/pdf/Past_Due_Report_2011.pdf.

⁷ David Segal, *Debt Collectors Face a Hazard: Writer's Cramp*, N.Y. TIMES, Nov. 1, 2010, at A1, available at <http://www.nytimes.com/2010/11/01/business/01debt.html> (JPMorgan Chase employee admitted that portfolios with errors were sold anyway: “We found that with about 5,000 accounts there were incorrect balances, incorrect addresses. . . . There were even cases where a consumer had won a judgment against Chase, but it was still part of the package being sold”).

⁸ *Id.*

⁹ Andrew Martin, *Automated Debt-Collection Lawsuits Engulf Courts*, N.Y. TIMES, July 13, 2010, at B1, available at <http://www.nytimes.com/2010/07/13/business/13collection.html>; Bernice Yeung, *Some Lawyers Want to Keep Debt Collection Out of the Courts*, N.Y. TIMES, Apr. 23, 2010, at A21, available at <http://www.nytimes.com/2010/04/23/us/23sfdebt.html> (“[California-based Attorney Erica Brachfeld] acknowledged in court documents that she files between 500 and 2,500 cases a month”).

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

¹¹ See *id.* at 26 (percentage calculated by Encore; \$398.6 million in revenue from debt collection in 2008 fiscal year).

To keep up with the vast number of lawsuits they file, debt buyers employ “robo-signers” who sign affidavits attesting that they have personally reviewed and verified debtors’ records, when in fact they have only looked at basic account information on a computer screen.¹² The *New York Times* has compared debt buyers’ use of robo-signing in debt collection litigation to the “widespread corner-cutting [by banks] in the rush to process delinquent mortgages.”¹³ But robo-signing by debt buyers seems to present even bigger problems for consumers, as one consumer attorney reflected in the *Times* article: “...with debt buyers, the debt has been passed through so many hands, often over so many years, that a lot of times, these companies are pursuing the wrong person, or the charges have no lawful basis.”¹⁴

By using the courts as a primary tool for debt collection, debt buyers place consumers in the burdensome position of having to defend themselves against companies they’ve often never heard of before, on debts they may not recognize, without the resources or information needed to effectively navigate the court system. Most consumers do not have legal representation or understand their rights under federal or state debt collection laws,¹⁵ while most plaintiffs do have attorneys and are familiar with the court system.

In addition, there is evidence that many debt collectors fail to properly notify consumers of lawsuits filed against them,¹⁶ and obtain default judgments at a high frequency against consumers who do not appear to defend the lawsuits.¹⁷

Many of the problems described above stem from inadequate and inaccurate information about debts – and yet information technologies exist that could increase the accuracy and efficiency of the debt collection process. Any policy solution that addresses problems with the debt collection industry must consider how human actors can employ such technologies. Yet the burden still rests with human actors to obtain adequate information about the debts, input that information, and check its accuracy at every stage in the debt collection process as well as at every sale of debt, to prevent mistakes and unjust outcomes.

The Use of Social Networking for Debt Collection Endangers Consumers’ Privacy

Privacy is an important aspect of the FDCPA. Congress found that “[a]busive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.”¹⁸ The statute protects consumers’ privacy by restricting the information that debt collectors can provide to third parties in attempting to locate debtors, limiting communication with third parties to specific purposes, prohibiting any actions that would result in harassing,

¹² Segal, *supra* note 7.

¹³ *Id.*

¹⁴ *Id.* (quoting Richard Rubin, Atty. in Santa Fe, N.M.).

¹⁵ NEIGHBORHOOD ECON. DEV. ADVOCACY PROJECT ET AL., DEBT DECEPTION: HOW DEBT BUYERS ABUSE THE SYSTEM TO PREY ON LOWER-INCOME NEW YORKERS 1 (2010), available at http://www.nedap.org/pressroom/documents/DEBT_DECEPTION_FINAL_WEB.pdf (explaining that of the 457,322 lawsuits filed by twenty-six debt buyers, ninety-five percent of the cases ending in default judgments were filed against people residing in low or moderate income neighborhoods, and not a single person in the study was represented by counsel).

¹⁶ FTC REPORT, *supra* note 4, at 8-9.

¹⁷ *Id.* at 7 n. 18.

¹⁸ 15 U.S.C. § 1692a (2006 & Supp. IV).

oppressing or abusing individuals, and prohibiting false or misleading representations in any attempt to collect a debt or obtain information about a consumer.¹⁹

As the FTC is aware, serious questions have arisen about the use of social networking to locate and communicate with consumers and whether such practices violate their privacy rights under the FDCPA.²⁰ At the Debt Collection 2.0 workshop, the discussion in Panel 5 illustrated that there are disparate views about whether it is appropriate to use social networking sites for debt collection purposes and under what circumstances. For instance, CFA commented that when a debt collector attempts to “friend” an alleged debtor on a social networking site, it may be a per se misrepresentation, since obviously the debt collector’s motive is not to be the person’s “friend” in the sense that consumers would expect. Some panelists shared that view; others did not. There were questions about whether it is effective to use social networking sites to locate alleged debtors considering the fact that there may be many people on the site with the same names and other characteristics and the potential for identifying the wrong person. There were also questions about whether contacting a consumer’s “friends” in an attempt to communicate with the consumer is appropriate, given the potential that this information might be shared with all of the person’s social contacts.

Policy Recommendations

Reform is needed to ensure that newer technologies increase the accuracy and not just the bulk of debt collection actions. In addition to fulfilling its existing duties under the FDCPA and FTC Act, the FTC should advise the CFPB and states to enact sensible reforms that will protect consumers from being subjected to unjust debt collection practices by collectors without adequate information and decrease the volume of unsubstantiated collection actions both in and out of court. The FTC should also provide guidance to the industry about using popular new technologies such as social networks, in order to prevent invasions of consumers’ privacy.

1. Require that more information be passed along to the debt buyer when a debt is sold. Declare it an unfair or deceptive practice to sell debt without certain baseline information, and advise the CFPB to write a rule prohibiting the sale of debt without transferring this information.

A serious problem with debt buying is that the original creditor (or current owner of the debt) does not pass along enough information to the debt buyer. This makes it difficult for collectors to provide the required validation information and prevent unfair or improper collection practices. Federal rules should require that the following information be passed along with every sale of the debt and be made readily available to any affected consumer, without charge:

- Validation information already required under the FDCPA;²¹

¹⁹ See §§ 1692b, 1692c, 1692d, 1692e.

²⁰ See Sarah Lundy, *Debt Collectors Must Tread Lightly on Social Media*, ORLANDO SENTINEL, Apr. 17, 2011, available at http://articles.orlandosentinel.com/2011-04-17/news/os-law-and-you-facebook-20110417_1_debt-collectors-mark-schiffman-jeff-happenstance (describing a Florida case in which the judge barred the debt collector from contacting the debtor or her friends via social networking sites).

²¹ (1) Amount of the debt; (2) name of the creditor; (3) statement re: assumption of validity of debt in absence of dispute; (4) statement re: if debt is disputed collector will verify; (5) statement re: upon written request, debt collector will provide name of original creditor if different from current creditor. 15 U.S.C. §§ 1692g(a)(1-5).

- The name of the original creditor, the original (redacted) account number, and evidence of unbroken chain of title;
- And itemization of the outstanding balance, including interest, fees and other charges;
- All communications from the consumer that dispute the debt;
- Whether any settlement has been reached by this collector, any prior collector, or the original creditor concerning the debt;
- Whether the debt is beyond the statute of limitations;²²
- Whether the consumer is or has been represented by an attorney and the attorney's contact information;
- Whether the consumer has informed the collector that a time or place is inconvenient to the consumer for communication;
- Whether the debt has been discharged or listed in bankruptcy;
- Any illness or disability claimed by the consumer or known to the collector;
- Any dispute that the consumer has raised with the creditor or any prior owner of the debt about the amount owed or about whether the consumer is the person who owes the debt;
- Any known or claimed violation of the FDCPA or relevant state fair debt collection laws to date; and
- Whether the consumer receives protected public benefits against which the collector cannot make a claim.

Requiring this information will incentivize both original creditors and debt buyers to employ newer technologies that facilitate the retention and transfer of this information with every sale of a debt. Newer technologies should also make it easier for debt sellers to review their portfolios and prevent the sale of debts that are not legally recoverable as a matter of law.

2. Prohibit debt collection attempts both in and out of court without first possessing evidence of sole ownership of the debt and basic information about the debt. Declare it an unfair or deceptive practice to engage in collection attempts without possessing this information, and advise the CFPB to write rules prohibiting collection attempts without possessing this information.

Consumers are often contacted or sued by multiple parties – typically debt buyers – trying to collect on the same debt, without proof that they are the sole owner of the debt and basic information about the debt. The following information should be retained before attempting to collect on a debt and should be made available to the consumer upon request, without charge:

- The amount of the debt allegedly owed by the consumer, including an itemized accounting of all post-charge-off fees and charges;
- The name of the original creditor at the time of charge-off;
- If the collector is a debt buyer, evidence showing that the debt buyer is the sole owner of the debt through unbroken chain of title;
- The name and address of the consumer as it appeared on the original creditor's records;

²² We also recommend a prohibition on the *sale* of debt if it is beyond the shorter of these two times: (1) the statute of limitations, or (2) the reporting period under FCRA.

- The original (redacted) account number associated with the debt; and
- A copy of the contract or other document evidencing the consumer's agreement to the debt or, if the claim is based on a debt for which no such signed writing evidencing the original agreement exists, then copies of documents generated when the account was active (e.g., account statements).

Requiring debt collectors to possess this information prior to collecting on a debt will incentivize the industry to employ newer technologies to facilitate retention and transfer of this information from creditor to debt collector and from debt collector to consumer.

3. Encourage states to adopt legislation or court rules that place enhanced requirements on debt collectors when filing complaints and when requesting entry of default judgment. The FTC should advise states to strengthen pleading and evidentiary requirements in debt collection litigation, to prevent unnecessary filings and default judgments based on inadequate or inaccurate information.

At the pleading stage, the following information should be required:

- All information and documentation listed above in Recommendation 2;
- A short and plain statement explaining the nature and source of the underlying debt (e.g., credit card);
- Date of last payment;
- Explanation of how the debt amount was calculated; and
- An allegation that the debt is not barred by the relevant statute of limitations.

Prior to requesting an entry of default judgment, debt collectors should be required to produce authenticated business records that are admissible under relevant laws of evidence, which establish the following:

- Proof of indebtedness;
- That the plaintiff is the sole owner of the debt;
- Original (redacted) account number;
- Name of original creditor;
- Account balance at time of charge-off;
- An itemization of post charge-off fees and charges claimed to be owed;
- Date of last payment; and
- Amount of interest claimed and the basis for the interest charged.

Courts should also be given discretion to deny entry of default judgment and/or dismiss a case when plaintiffs fail to meet these requirements.

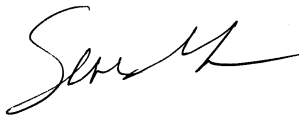
4. Provide guidance about the use of social networks to locate and communicate with consumers for debt collection purposes. This could be similar to the "Dot Com Disclosures"²³ that the FTC provided to help online advertisers avoid unfair or deceptive acts or practices. The guide could use hypothetical examples to recommend the "do's and don'ts" for using social networks in debt collection. Both industry and consumers would benefit from such guidance.

²³ See Fed. Trade Comm'n, Dot Com Disclosures: Information About Online Advertising, *available at* <http://business.ftc.gov/documents/bus41-dot-com-disclosures-information-about-online-advertising.pdf>.

Conclusion

At a time of weak economic recovery, consumers and courts with scarce resources are struggling as much as ever to keep pace with the rapid growth of debt buying and increased debt collection activities. Newer technologies have the potential to improve the debt collection process, but also to be used in abusive ways. The FTC should take advantage of its unique role as enforcer and adviser to investigate abuses in the industry, declare certain practices and omissions by debt collectors to be unfair or deceptive, advise the CFPB and states to adopt sensible reforms, and provide guidance to the industry on the use of new tools such as social networks. We applaud the FTC for its continuing efforts to address problems within the debt collection industry, and look forward to working with the FTC in the future on these important issues.

Sincerely,



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