Debt in the Courts: The Scourge of Abusive Debt Collection Litigation and Possible Policy Solutions

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Introduction

Imagine the following scenario. It is the end of the month and you are looking forward to getting your paycheck. As the sole provider for your family of four, your ten-dollar hourly wage is barely enough to meet your family's day-to-day living expenses like food, rent, and utilities. Most days, payday cannot come soon enough. But today, when you get your paycheck, something is wrong. The check is about two hundred dollars less than usual. This is not the first time this has happened—the past few checks have been a bit lower than they should be. You cannot figure out why—you did not work any less than normal. When you check with your employer, you learn that your employer received an order to garnish your wages from a company called Portfolio Acquisitions, Inc. You have never heard of this company, nor do you know why it is garnishing your wages.

Later that week, at the suggestion of your employer, you take time off work to visit your local legal aid office. There, you learn that Portfolio Acquisitions is a debt collector that bought your account for a loan you took out more than ten years ago from a separate company, 123 Credit. Portfolio Acquisitions apparently sued you and obtained a default judgment against you because you did not defend the case in court. The problem is that you never knew about the lawsuit. Besides, you are pretty certain that you paid off the loan years ago when another debt collector called you about the account. After your legal aid attorney does a bit more digging, you learn that Portfolio Acquisitions apparently served notice of the lawsuit at an apartment where you have not lived in for six years. Now you are out hundreds of dollars and your wages continue to be garnished, all for a judgment that appears to be wrongfully obtained and for a debt you think you no longer owe.

While the previous situation is fictional, it is representative of scenarios that tens of thousands of Americans (if not more) may face each year. In the 1990s and 2000s, Americans took on more and more debt, due in part to stagnant real wage growth (wage growth adjusted for inflation).[1] Now, a

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[1] *See, e.g.*, Drew DeSilver, *For Most Workers, Real Wages Have Barely Budged in Decades*, Pew Research Center (Oct. 9, 2014), http://www.pewresearch.org/fact-tank/2014/10/

significant proportion of this country—more than one-third of adults[2]—is struggling to pay off those debts. Explosive growth in consumer debt fueled a thriving debt-collection industry. One of the country's largest debt collectors, Encore Capital Group, "claims that one in every five US consumers either owe it money or have owed it money in the past."[3] The debt-collection industry is rife with abuses, generating concerns that collectors deliberately take advantage of consumers, particularly when they pursue those consumers in state courts.

Over the past decade, one of the most significant changes and concerns is the increased use of debt-collection litigation to collect debts. Just as abusive debt-collection practices shift with changing times, so too must policy and legal responses. However, as litigation emerged as a prominent tactic for debt collection, responses from federal and state actors have been far too infrequent or incomplete. A sufficiently thorough policy framework to address the growing exposure of individuals, households, and entire communities to illegal debt-collection practices is absent. Within the context of the deregulation of the U.S. financial marketplace that occurred from the late 1970s through 2000s,[4] this inadequate governmental response is unsurprising. Yet this lack of a robust policy response results in millions of dollars drained from households and communities, often wrongfully.

A sprawling subset of the debt-collection industry—debt buying—emerged in the wake of an explosion of consumer debt, generating a more recent and harmful trend in debt collection: debt-collection litigation. While creditors have always had the ability to take debtors to court to collect debts, the widespread use of courts to collect debts is new. Debt buyers use litigation to collect debts cheaply and efficiently, taking advantage of statistics suggesting that very few defendants in debt-collection lawsuits will appear in court. Debt-collection litigation harms consumers by allowing the collection of debts consumers may not legally owe and unfair and unaffordable settlement agreements. Further, the abusive litigation tactics disproportionately target elderly, impoverished, and minority defendants. In this article, I will present these problems in detail and offer a range of policy solutions aimed at curtailing the abuses associated with abusive debt-collection

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09/for-most-workers-real-wages-have-barely-budged-for-decades/ [https://perma.cc/2U3Q-7F9D] (finding that even though U.S. worker wages were increasing, the purchasing power of wages was stagnant due to inflation).

[2] *See* Caroline Ratcliffe et al., Urban Institute, Delinquent Debt in America 7 (2014), http://www.urban.org/research/publication/delinquent-debt-america/view/full_report [https://perma.cc/752Z-QFWA].

[3] Chris Albin-Lackey, Human Rights Watch, Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor 11 (2016), https://www.hrw.org/sites/default/files/report_pdf/us0116_web.pdf [https://perma.cc/XDT6-9HDX].

[4] *See, e.g.*, Barak Orbach, *A State of Inaction: Regulatory Preferences, Rent, and Income Inequality*, 16 Theoretical Inquiries L. 45, 66–67 (2015) (listing more than one dozen federal deregulatory actions). *See generally* Timothy A. Canova, *The Transformation of U.S. Banking and Finance: From Regulated Competition to Free-Market Receivership*, 60 Brook. L. Rev. 1295 (1995) (detailing the deregulation of the U.S. banking and financial marketplace starting in the late 1970s).

litigation practices, adequately protecting consumers from those abuses, and bringing integrity back to our state court systems.

Part I of this article offers an overview of the debt-collection industry and recent trends in the marketplace, focusing on the growth in consumer credit and debt in recent decades, as well as growth and changes in the debt-collection industry. This information provides a valuable backdrop to understanding many of the abusive illegal practices and associated harms U.S. households face when dealing with debt collectors.

In Part II, the article examines some of the most common debt-collection abuses, including: debt buyers' use of insufficient evidence in collecting debts; the collection of time-barred debts; abusive practices that occur within debt-collection litigation, including robo-signing and inadequate collection-attorney involvement; and a dependence on default judgments to collect debts.

Part III then explores some of the common harms that individuals experience due to the abuses highlighted in Part II, focusing particularly on the impact of these abuses on certain communities, such as African-American communities and low-income communities, and the harms that flow from debt collectors taking advantage of overwhelmed courts and *pro se* consumers.

In Part IV, this article proposes various state and federal policy solutions, drawing on examples of reform efforts adopted to date. Despite long-standing federal and state legislation governing debt collection, these laws are not adequate to address the full gamut of abuses and harms discussed in Parts II and III. Additionally, though many recent state and federal policy changes reflect a trend in the right direction, some of the reforms have significant loopholes or are inadequate to address the full scope of debt-collection abuses. Furthermore, only a small number of states have enacted debt-collection litigation reforms. At the federal level, debt collection laws have not been updated in almost forty years and to date, there are no federal regulations overseeing the industry. Specifically, this article suggests policy solutions that seek changes to debt-collection industry practices, reform debt-collection litigation, enhance support for consumers who find themselves defending debt-collection lawsuits, and ensure strong and effective enforcement of state and federal laws.

Part V provides a word of caution on creditor debt-collection practices. Historically, creditors engaging in debt collection have been left largely unregulated. Unfortunately, that policy decision has resulted in creditors engaging, unchecked, in many of the exact practices considered illegal if used by third-party debt collectors. This part argues that creditors should not be immune from most of the policy solutions offered in this article.

I. The Debt Collection Industry Has Experienced Significant Growth

The debt-collection industry has experienced significant growth and evolution over the past three to four decades. These changes are driven by growth in consumer credit availability (and thus debt levels), industry expansion and evolution, and changes in debt-collection methods. The growth in the debt-collection industry has propelled the emergence of the widespread use of litigation to collect debts, as collectors seek cheaper and more efficient methods to collect the ever-growing amount of debt they acquire. These changes are addressed in turn below.

A. U.S. Consumers Face Rising Amounts of Debt

Over the past few decades, U.S. households have experienced a perfect storm of negative financial events. The cost of living has increased, particularly due to increasing medical and education costs.[5] At the same time, real wages have stagnated or declined for the vast majority of households.[6] As a result, outstanding consumer debt loads have increased significantly, with current debt levels more than double the household debt levels of the 1990s.[7] Though outstanding debt levels peaked in 2008, they have been steadily growing over the past three years, driven by consistent increases in non-housing consumer debt.[8] Approximately eighty percent of U.S. adults with credit files have non-mortgage debt.[9]

Although delinquent consumer debt makes up a small portion of total outstanding debt, hundreds of billions of dollars of consumer debt is delinquent at any given time.[10] During the Great Recession, delinquency and

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[5] *See* Amy Traub & Catherine Ruetschlin, Demos, The Plastic Safety Net: Findings from the 2012 National Survey on Credit Card Debt of Low- and Middle-Income Households 9 (2012), http://www.demos.org/sites/default/files/publications/PlasticSafetyNet-Demos.pdf [https://perma.cc/PB8K-XAD4].

[6] *See* Josh Bivens et al., Econ. Policy Inst., Raising America's Pay: Why It's Our Central Economic Policy Challenge 4–5 (2014), http://www.epi.org/files/pdf/65287.pdf [https://perma.cc/V3YJ-A7D5].

[7] *Compare* Fed. Reserve Bank of N.Y., Quarterly Report on Household Debt and Credit: August 1 2016 1 (2016), https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2016Q2.pdf [https://perma.cc/J3FG-F6HJ] [hereinafter August 2016 Quarterly Report] (reporting total of $12.29 trillion in outstanding household debt in the second quarter of 2016) *with* Fed. Reserve Bank N.Y., Quarterly Report on Household Debt and Credit: August 2010 3 (2010), https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/DistrictReport_Q22010.pdf [https://perma.cc/PX69-XG45] (reporting $4.6 trillion in outstanding household debt in the first quarter of 1999).

[8] *See* August 2016 Quarterly Report, *supra* note 7, at 2.

[9] *See* Caroline Ratcliffe et al., Urban Institute, Debt in America 5 (2014), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/413190-Debt-in-America.pdf [https://perma.cc/B5U3-VMEX]. The author notes that this finding does not include debt "outside the financial mainstream" like payday, car title, and consumer finance loans.

[10] *See* August 2016 Quarterly Report, *supra* note 7, at 2.

charge-off rates for all consumer loans rose dramatically, peaking in 2010.[11] The Urban Institute reported that thirty-five percent of adults with credit files—seventy-seven million Americans in total—have credit files with debt in collections, for a median amount of $1,349.[12]

The overwhelming majority of people who are in debt and are being pursued by debt collectors are not in debt by choice. Instead, they are likely dealing with some sort of unforeseen circumstances—unexpected job loss, divorce or marital problems, or serious illness.[13] These reasons for debt are particularly relevant in light of the growth in subprime and predatory lending practices over the past few decades that trap people in a cycle of debt.[14]

B. A Debt-Buying Industry Emerged with the Rise in U.S. Consumer Debt

With the increase in consumer debt loads, the third-party debt-collection industry has grown tremendously over the past few decades. Industry revenue in 2010 was more than 6.5 times that of 1972, after controlling for inflation.[15] The industry's participants make more than one billion consumer-contacts annually for hospitals, government agencies, banks and credit card companies, student loan lenders, and telecom and utility providers, among others.[16] One particularly concerning trend has been the advent and tremendous growth of a subset of the industry: debt buying.[17]

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[11] Author's analysis of charge-off and delinquency data from the Federal Reserve. *See* Bd. of Governors of the Fed. Reserve System, *Charge-Off and Delinquency Rates on Loans and Leases at Commercial Banks: Charge-Off Rates, All Banks, S.A.*, FED. RESERVE (Aug. 18, 2016), http://www.federalreserve.gov/releases/chargeoff/chgallsa.htm [https://perma.cc/4AFX-RDNC]; Bd. of Governors of the Fed. Reserve System, *Charge-Off and Delinquency Rates on Loans and Leases at Commercial Banks: Delinquency Rates, All Banks, S.A.*, FED. RESERVE (Aug. 18, 2016), http://www.federalreserve.gov/releases/chargeoff/delallsa.htm [https://perma.cc/RSH2-5VC6].

[12] *See* RATCLIFFE, *supra* note 2, at 7. The number of consumers in collection is likely greater, since twenty-two million Americans do not have credit files yet nonetheless may be dealing with debt collection.

[13] *See* S. REP. NO. 95-382, at 3 (1977).

[14] *See, e.g.*, SARAH WOLFF, CENTER FOR RESPONSIBLE LENDING, THE CUMULATIVE COST OF PREDATORY PRACTICES: THE STATE OF LENDING IN AMERICA & ITS IMPACT ON U.S. HOUSEHOLDS (2015), http://www.responsiblelending.org/sites/default/files/uploads/13-cumulative-impact.pdf [https://perma.cc/S25J-DR4V] (discussing the cumulative impacts to U.S. households of predatory lending practices).

[15] *See* Robert M. Hunt, Vice President and Dir. Fed. Reserve of Phila., Presentation at a Federal Trade Commission—Consumer Financial Protection Bureau Roundtable: Understanding the Model: The Life Cycle of a Debt 10, 14 (June 6, 2013), https://www.ftc.gov/sites/default/files/documents/public_events/life-debt-data-integrity-debt-collection/understandingthemodel.pdf [https://perma.cc/ZAY7-BNJ7].

[16] *Id.* at 9–10.

[17] The FTC considers the advent and growth of debt buying to be the most significant change in the debt-collection industry. *See* FED. TRADE COMM'N, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE 13 (2009), https://www.ftc.gov/sites/default/files/documents/public_events/life-debt/dcwr.pdf [https://perma.cc/L9MP-ZGRJ] [hereinafter COLLECTING CONSUMER DEBTS].

Debt buyers purchase charged-off or other delinquent consumer debt portfolios for pennies on the dollar from credit card companies, banks, and other creditors who have ceased collecting on the defaulted debt.[18] As the new owners of these debts, debt buyers seek to collect the amount owed from defaulted borrowers themselves or hire collection agencies or law firms to do so.[19] Additionally, some debt buyers may sell the debts they purchased from original creditors (or debt buyers) to other debt buyers, resulting in the potential for a single debt to change ownership multiple times after default.[20]

The extensive sale and purchase of charged-off debt portfolios had its start in the aftermath of the savings and loan crisis in the late 1980s and early 1990s.[21] Since the 1990s, the debt-buying industry has grown substantially, spurred by increasing availability of consumer credit, particularly credit cards, in the 1990s and 2000s; higher delinquency and charge-off rates in the 2000s; and the routine incorporation of sales of charged-off debts into creditor accounting strategies.[22]

A recent report by the Federal Trade Commission (FTC) revealed the scope of the industry's activities. From 2006 to 2009, the nine largest debt buyers purchased more than five thousand portfolios of consumer debt—comprising almost ninety million accounts consisting of $143 billion owed—paying less than $6.5 billion for the debt (or about 4.5 cents per dollar).[23] Publicly traded debt buyers have experienced significant revenue growth since the early 2000s, despite the Great Recession. Analysis of company 10-K filings from 2002 to 2015 shows that Encore Capital Group and Portfolio Recovery Associates saw an annualized increase in revenue of more than twenty percent every year.[24]

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[18] *See* FED. TRADE COMM'N, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY 23 (Jan. 2013), https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf [https://perma.cc/R8N4-9XY7] [hereinafter DEBT BUYING INDUSTRY] (estimating that debt buyers paid an average of four cents for each dollar of debt purchased).

[19] *See* Dalié Jiménez, *Dirty Debts Sold Cheap*, 52 HARV. J. ON LEGIS. 41, 52–54 (2015).

[20] *Id.* at 52–53 (describing sale and resale of debts); *see also* DEBT BUYING INDUSTRY, *supra* note 18, at 1 ("Many debts are purchased and resold several times over the course of years before either the debtor pays the debt or the debt's owner determines that the debt can be neither collected nor sold.").

[21] DEBT BUYING INDUSTRY, *supra* note 18, at 12.

[22] *See id.* at 12–13.

[23] *Id.* at 8.

[24] Author's calculations are based on revenues reported in annual reports filed with the Security and Exchange Commission. *See* Encore Capital Grp., Annual Report (Form 10-K) (Feb. 24, 2016); Encore Capital Grp., Annual Report (Form 10-K) (Feb. 26, 2015); Encore Capital Grp., Annual Report (Form 10-K) (Feb. 25, 2014); Encore Capital Grp., Annual Report (Form 10-K) (Feb. 24, 2014); Encore Capital Grp., Annual Report (Form 10-K) (Feb. 13, 2013); Encore Capital Grp., Annual Report (Form 10-K) (Feb. 9, 2012); Encore Capital Grp., Annual Report (Form 10-K) (Feb. 14, 2011); Encore Capital Grp., Annual Report (Form 10-K) (Feb. 8, 2010); Encore Capital Grp., Annual Report (Form 10-K) (Feb. 11, 2009); Encore Capital Grp., Annual Report (Form 10-K) (Feb. 19, 2008); Encore Capital Grp., Annual Report (Form 10-K/A) (Apr. 30, 2007); Encore Capital Grp., Annual Report (Form 10-K) (Feb. 28, 2007); Encore Capital Grp., Annual Report (Form 10-K) (Mar. 15, 2006); Encore Capital Grp., Annual Report (Form 10-K) (Mar. 3, 2005); Encore Capital Grp., Annual Report (Form 10-K) (Mar. 2, 2004); Encore Capital Grp., Annual Report (Form 10-K) (Mar. 28, 2003); *see also*

Concerns about how defaulted debts are bought and sold have grown as the industry affects greater numbers of households. One of the biggest concerns is that as the debt is sold from the original creditor and among debt buyers, critical documentation about the borrower and the amount owed is rarely provided to the debt's new owner. An analysis by the FTC estimated that as few as six percent of debts sold were accompanied by such documentation.[25] Instead, debts are sold with limited documentation and what little information is shared is sold "as is," without any guarantees that the information about the borrower or amount owed is accurate.[26] As is described below in more detail, many of the harms consumers experience in debt-collection litigation occur due to the fact that limited information and documentation flows with the debt sales.

C. The Debt-Buying Industry Places an Increased Focus on Litigation as a Means to Collect

Driven in large part by the growth of debt buying, there has been a significant increase in litigation as a means to collect debts over the past fifteen years.[27] As one recent report put it, "The debt buying industry's business model is rooted in a very simple logic. If debt buyers can acquire debts cheaply enough, and develop efficient, low-cost methods of pursuing debt-

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PRA Grp., Inc., Annual Report (Form 10-K) (Feb. 26, 2016); PRA Grp., Inc., Annual Report (Form 10-K) (Mar. 3, 2015); PRA Grp., Inc., Annual Report (Form 10-K) (Feb. 24, 2014); PRA Grp., Inc., Annual Report (Form 10-K) (Feb. 28, 2013); PRA Grp., Inc., Annual Report (Form 10-K) (Feb. 28, 2012); PRA Grp., Inc., Annual Report (Form 10-K) (Feb. 25, 2011); PRA Grp., Inc., Annual Report (Form 10-K/A) (Dec. 17, 2010); PRA Grp., Inc., Annual Report (Form 10-K) (Feb. 16, 2010); PRA Grp., Inc., Annual Report (Form 10-K/A) (July 30, 2009); PRA Grp., Inc., Annual Report (Form 10-K) (Feb. 27, 2009); PRA Grp., Inc., Annual Report (Form 10-K/A) (Mar. 12, 2008); PRA Grp., Inc., Annual Report (Form 10-K) (Feb. 28, 2008); PRA Grp., Inc., Annual Report (Form 10-K) (Mar. 1, 2007); PRA Grp., Inc., Annual Report (Form 10-K) (Mar. 3, 2006); PRA Grp., Inc., Annual Report (Form 10-K) (Mar. 15, 2005); PRA Grp., Inc., Annual Report (Form 10-K/A) (Mar. 29, 2004); PRA Grp., Inc., Annual Report (Form 10-K) (Feb. 18, 2004); PRA Grp., Inc., Annual Report (Form 10-K/A) (Mar. 21, 2003); PRA Grp., Inc., Annual Report (Form 10-K) (Mar. 17, 2003).

[25] *See* DEBT BUYING INDUSTRY, *supra* note 18, at 35.

[26] *See id.* at 25, Technical Appendix C. *See generally* Jiménez, *supra* note 19 (analysis of more than eighty purchase and sale agreements between creditors and debt buyers revealing that the majority of agreements included language selling debts "as is").

[27] *See, e.g.*, Paul Kiel, *So Sue Them: What We've Learned About the Debt Collection Lawsuit Machine*, PROPUBLICA (May 5, 2016), https://www.propublica.org/article/so-sue-them-what-weve-learned-about-the-debt-collection-lawsuit-machine [https://perma.cc/XB8L-P6R4] [hereinafter Kiel, *So Sue Them*]; ALBIN-LACKEY, *supra* note 3, at 13–17; CLAUDIA WILNER & NASOAN SHEFTEL-GOMES, THE LEGAL AID SOC'Y, NEIGHBORHOOD ECON. DEV. ADVOCACY PROJECT, MFY LEGAL SERVS., & URBAN JUSTICE CTR. CMTY. DEV. PROJECT, DEBT DECEPTION: HOW DEBT BUYERS ABUSE THE LEGAL SYSTEM TO PREY ON LOWER-INCOME NEW YORKERS 6 (2010), http://www.neweconomynyc.org/wp-content/uploads/2014/08/DEBT_DECEPTION_FINAL_WEB-new-logo.pdf [https://perma.cc/2RBW-BMAK]; GOV'T ACCOUNTABILITY OFFICE, CREDIT CARDS: FAIR DEBT COLLECTION PRACTICES ACT COULD BETTER REFLECT EVOLVING DEBT COLLECTION MARKETPLACE AND USE OF TECHNOLOGY 41 (2009), http://www.gao.gov/new.items/d09748.pdf [https://perma.cc/9VHT-Q2LQ].

ors, they can realize substantial profits by collecting even a small percentage of the debts they purchase."[28]

A successful lawsuit gives the debt buyer additional and more powerful tools to collect on the judgment, including wage garnishment, bank account seizure, and property attachment.[29] Debt buyers file hundreds of thousands of cases annually against defaulted borrowers in state courts. For example, at the peak of the Great Recession in 2010, one debt buyer, Encore Capital Group (through its subsidiaries), filed more than 517,000 lawsuits in the United States against consumers.[30]

Analysis of state-level case filings provide further evidence of rising reliance on debt-collection litigation. In New Jersey, debt buyers obtained 500 court judgments against consumers in 1996; that number ballooned to 140,000 in 2008.[31] Financial statements from publicly-traded debt buyers similarly reveal the importance of the use of legal collections for the debts they purchase. The top three publicly-traded debt buyers together collected over one billion dollars annually in revenues from litigation in each of the past three years.[32]

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[28] *See* ALBIN-LACKEY, *supra* note 3, at 11.

[29] *See infra* notes 82–86 and accompanying text.

[30] Encore Capital Grp., Annual Report (Form 10-K) (Feb. 14, 2011) [hereinafter Encore Capital 2011]. 2011 was the last year that Encore reported the number of suits it filed on an annual basis.

[31] Kiel, *So Sue Them*, *supra* note 27. Other studies shed additional light on the litigiousness of debt buyers. A 2015 report by *ProPublica* found that in three major cities—Chicago, St. Louis, and Newark—debt buyers filed more lawsuits than any other type of plaintiff. Paul Kiel & Annie Waldman, *The Color of Debt: How Collection Suits Squeeze Black Neighborhoods*, PROPUBLICA (Oct. 8, 2015), https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods [https://perma.cc/BY3F-DZBP]. From 2009–13, twenty-two debt buyers filed more than 168,000 cases in Maryland. Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 LOY. CONSUMER L. REV. 179, 216 (2014) [hereinafter Holland, *Junk Justice*]. In New York, debt buyers, debt collectors, and creditors filed nearly 200,000 debt-collection lawsuits in 2011 against state residents, with debt buyers bringing more than half of these cases. SUSAN SHIN & CLAUDIA WILNER, NEW ECON. PROJECT, THE DEBT COLLECTION RACKET IN NEW YORK: HOW THE INDUSTRY VIOLATES DUE PROCESS AND PERPETUATES ECONOMIC INEQUALITY 1 (2013), http://www.neweconomynyc.org/wp-content/uploads/2014/08/DebtCollectionRacketUpdated.pdf [https://perma.cc/3A39-3XPA].

[32] Author's calculations are based on company revenues from litigation ("legal collections") as reported in annual reports filed with the Security and Exchange Commission by Encore Capital Group, Portfolio Recovery Associates, and SquareTwo Financial. *See* Encore Capital Grp., Annual Report (Form 10-K) 39 (Feb. 24, 2016) (disclosing revenue from "legal collections" for 2013, 2014, and 2015); PRA Grp., Annual Report (Form 10-K) 52 (Feb. 26, 2016); PRA Grp., Annual Report (Form 10-K) 53 (Mar. 3, 2015); PRA Grp., Annual Report (Form 10-K) 54 (Feb. 24, 2014); SquareTwo Fin. Corp., Annual Report (Form 10-K) 6 (Apr. 26, 2016) (disclosing revenues from "legal collections" for 2013, 2014, and 2015).

II. Abusive Practices Are Common in Debt-Collection Litigation

Although abusive debt-collection practices, such as harassing phone calls,[33] use of obscene language,[34] and illegal threats of criminal prosecution[35] are frequent and harmful, abusive practices within the context of debt-collection litigation expose consumers to more significant harms than extra-judicial debt collection. The simple threat or filing of a collection lawsuit can pressure individuals into making payments on debts, including ones they may not owe. For others, lawsuits will force them to spend money defending themselves against unwarranted lawsuits and protecting themselves from abusive practices, and that is if they are even aware of the lawsuits in the first place. As is described in more detail below, default judgments are the norm in debt-collection litigation.[36]

Default and other easy judgments extend the life of the debts purchased by debt buyers and accord them a sense of legitimacy that masks various defects in the underlying debt, evidence of the debt, and the debt buyers' legal cases. Armed with a judgment, a debt collector is able to garnish wages,[37] freeze bank accounts,[38] seize or place liens on assets (including personal property and real estate),[39] and in some states, have an individual arrested.[40] Default judgments can be difficult to overturn, even if improperly

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[33] *See, e.g.*, Complaint at 16, FTC v. BAM Fin., LLC et al., No. 15-cv-01672 (C.D. Cal. Oct. 19, 2015) (alleging repeated and harassing collection phone calls even after individuals request the calls to stop).

[34] *Id.*

[35] *See, e.g.*, Complaint at 10, FTC v. Brace, No. 15-cv-00875 (W.D.N.Y. Oct. 5, 2015) (alleging illegal threats of arrest and criminal prosecution for forgery, fraud, and other claimed criminal offenses).

[36] *See infra* notes 90–93 and accompanying text.

[37] *See, e.g.*, Colo. Rev. Stat. § 13-54-104(2)(a)(I) (2016) (allowing garnishment of wages up to the lesser of twenty-five percent of an individual's disposable weekly earnings or the amount by which the individual's weekly disposable earnings exceeds thirty times the state minimum wage); N.Y. C.P.L.R. § 5205(d)(2) (McKinney 2016) (allowing execution of ten percent of earnings for services provided earned within sixty days or after an income execution from execution). *But see* S.C. Code Ann. § 15-39-140 (2016) (prohibiting execution of a debtor's wages to satisfy a judgment). According to one report, all but four states allow wages to be garnished in some amount to satisfy judgments for typical consumer debts. *See* Carolyn Carter & Robert J. Hobbs, Nat'l Consumer Law Ctr., No Fresh Start: How States Let Debt Collectors Push Families into Poverty 12 (2013), http://www.nclc.org/images/pdf/pr-reports/report-no-fresh-start.pdf [https://perma.cc/Q8SR-BPHZ].

[38] *See, e.g.*, Mass. Gen. Laws Ann. ch. 235, § 34 (West 2016) (protecting from levy $2,500 in deposits in a bank account); Wilner & Sheftel-Gomes, *supra* note 27, at 7; *see also* Paul Kiel & Chris Arnold, *Unseen Toll: Wages of Millions Seized to Pay Past Debts*, ProPublica & Nat'l Pub. Radio (Sept. 15, 2014), https://www.propublica.org/article/unseen-toll-wages-of-millions-seized-to-pay-past-debts [https://perma.cc/BWW9-DTSE].

[39] *See* Holland, *Junk Justice*, *supra* note 31, at 196; *see also* Richard M. Haynes, *Broke But Not Bankrupt: Consumer Debt Collection in State Courts*, 60 Fla. L. Rev. 1, 11–12 (2008).

[40] *See, e.g.*, 735 Ill. Comp. Stat. 5/2-1402 (2016) (allowing judgment creditors to prosecute "supplementary proceedings" and have a judgment debtor examined in court for purposes of discovering property and assets, with arrest and imprisonment as punishments for failure to appear); Ohio Rev. Code Ann. § 2333.19 (West 2016) (failure to comply with debtor exami-

obtained or against the wrong person.[41] Once obtained, "court judgments from collection suits can be near-permanent"[42] as judgments last for years and can be renewed, sometimes indefinitely.[43] Additionally, judgments show up on credit reports, negatively affecting credit scores, which can make it harder for individuals to get affordable credit, jobs, and housing.[44]

By obtaining quick judgments and seeking payments on them, debt buyers that use abusive collection practices in debt-collection litigation extract money (often wrongfully) from households. Not only does this extract funds required for day-to-day subsistence, but also dollars legitimate collectors, creditors, and businesses could otherwise have received from these consumers. These abusive practices are detailed below and include: (a) suing with insufficient evidence of debt; (b) collecting time-barred debt; (c) cutting corners in the legal process; and (d) relying on default judgments to win cases.

A. Debt Buyers Collect and Sue with Insufficient Evidence of Debt

The agreements between debt sellers and debt buyers often dictate that accounts are sold "as is" with limited information and documentation for the accounts. As a result, unreliable records are used to collect or bring suits on debts that cannot be substantiated, are inaccurate in amount, or may not be owed by the consumer being pursued. In 2009, the FTC concluded that the information received by debt collectors is frequently "inadequate and results in attempts to collect from the wrong consumer or to collect the wrong

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nation may be punished as contempt); TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(c) (West 2016) (allowing court to enforce an order for a debtor to turn over nonexempt property by contempt proceedings). *See generally* Lea Shepard, *Creditors' Contempt*, 2011 B.Y.U. L. REV. 1509 (2011) (detailing the use of contempt proceedings and the threat of or actual imprisonment for contempt of court in post-judgment satisfaction debt-collection activities).

[41] *See, e.g.*, CONN. GEN. STAT. § 52-212(a) (2016) (allowing default judgment to be set aside if prejudiced party files motion within four months of the default judgment and can show reasonable cause, "or that a good cause of action or defense . . . existed at the time of the rendition of the judgment," and that the party was prevented from prosecuting or defending due to mistake, accident, or other reasonable cause); GA. CODE ANN. § 9-11-60 (2016) (limiting the grounds for seeking to set aside a default judgment to lack of jurisdiction; mistake, accident, or fraud; or "[a] nonamendable defect . . . [on] the face of the record or pleadings"); IA. COURT RULES 1.977 (2016) (allowing motion to set aside default judgment within sixty days after entry of the judgment for "mistake, inadvertence, surprise, excusable neglect or unavoidable casualty").

[42] Kiel, *supra* note 27.

[43] *See, e.g.*, CONN. GEN. STAT. § 52-598 (2016) (twenty-year statute of limitations to enforce a judgment, but ten-year statute of limitations to enforce a small claims judgment); N.M. STAT. ANN. §§ 37-1-2, 37-1-16 (2016) (fourteen-year statute of limitations on judgments, with limitations period restarting with written acknowledgement or partial payment); *see also* Haynes, *supra* note 37, at 14 ("As a result, plaintiffs in nearly every state may, in theory, pursue an unpaid judgment indefinitely.").

[44] *See* APPLESEED & JONES DAY, DUE PROCESS AND CONSUMER DEBT: ELIMINATING BARRIERS TO JUSTICE IN CONSUMER CREDIT CASES 2 (2010), http://www.appleseednetwork.org/wp-content/uploads/2012/05/Due-Process-and-Consumer-Debt.pdf [https://perma.cc/3C6W-PJN5] ("[W]hen the judgment shows up on credit reports, it becomes difficult for the debtor to find an apartment, get a better job, and obtain credit.").

amount."[45] According to the agency, "both sellers and buyers kn[o]w that some accounts included within a portfolio might have incomplete or inaccurate data, including data on important information such as the then-current balances on debts."[46]

Even if debt buyers receive account documents with the portfolio or at a later date, the sales contracts make clear that "account documents, when available, may be inaccurate and that the provision of account documents could not be relied upon to establish the outstanding balance of an account or that the account represented a valid and collectable debt."[47] In fact, a significant proportion of the purchase and sale agreements between debt sellers and buyers explicitly disclaim all warranties as to the completeness and accuracy of all of the information provided in the sale, including the amounts claimed to be owed and the documentation accompanying the accounts.[48]

Given these problems, it is not hard to imagine that debt buyers could attempt to collect from or sue the wrong person, for the wrong amount, or for illegitimate or already-paid debts. In fact, the largest category of debt-collection complaints to the Consumer Financial Protection Bureau (CFPB) is for the "continued attempts to collect debt not owed."[49] Stories of debt collectors and debt buyers pursuing the wrong people are not uncommon. In California, a state senator found himself on the receiving end of a wage garnishment from his earnings as a state lawmaker for the wrong person, despite having told the debt buyer they had the wrong person.[50] Similarly, a Kansas City woman won an eighty-three million dollar judgment against major debt buyer Portfolio Recovery Associates for its malicious pursuit of her for a credit card debt that she did not owe, despite being repeatedly told that it had the wrong person and that she never owned a credit card.[51]

Nevertheless, insufficient and inaccurate evidence of the debts often goes undetected by consumers and the courts alike. This lack of adequate information is especially troubling and jeopardizes the integrity of state court systems. In most states, the information required in a collection lawsuit is minimal, particularly in small-claims courts where procedures and eviden-

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[45] Collecting Consumer Debts, *supra* note 17, at 24.

[46] Debt Buying Industry, *supra* note 18, at C-7–8.

[47] *Id.* at C-13.

[48] *See* Jiménez, *supra* note 19, at 61–62.

[49] Consumer Fin. Prot. Bureau, Semi-Annual Report of the Consumer Financial Protection Bureau 24 (2016), http://s3.amazonaws.com/files.consumerfinance.gov/f/documents/Report.Spring_2016_SAR.06.28.16.Final.pdf [https://perma.cc/B8SF-LVQV] [hereinafter CFPB Semi-Annual Report].

[50] Brian Joseph, *Debt Collector Erroneously Garnishes OC Lawmaker's Wages*, Orange County Reg. (June 3, 2011) (detailing how State Senator Lou Correa received a notice at his legislative offices that his earnings were being garnished to pay the debt of an individual with an address and Social Security number different than his own).

[51] Dan Margolies, *Jury Awards KC Woman $83 Million in Debt Collection Case*, KCUR 89.3 (May 14, 2015), http://kcur.org/post/jury-awards-kc-woman-83-million-debt-collection-case#stream/0 [https://perma.cc/K8MK-WWHY]. The debt belonged to a Kansas City man with a similar name.

tiary standards are often relaxed.[52] Complaints rarely contain more than the basics: the allegation that the defendant owed a loan or service contract that he or she used and subsequently defaulted on, that the debt buyer purchased the account, and the amount allegedly owed. Significantly, these complaints do not provide critical information on the debt that would be helpful to consumers in deciding whether and how to respond to the complaint, such as the original creditor's name familiar to the consumer (or brand name); the date of default or last payment; or a breakdown of the principal, interest, and fees claimed to be due.[53]

Even more troubling, some debt collectors file lawsuits despite knowing that they do not have sufficient evidence to establish that they own the debt.[54] Without proof of ownership, the debt collector lacks the right to collect and standing to sue in court.[55] Instead, debt buyers only offer the chain of title of the debt in complaints filed in court if required to do so by state law or court rules, and even then, the proof of ownership is often lacking or false.[56] In recent years, state courts have at times rejected debt-buyer lawsuits when consumers challenge them, finding that the collectors lack the

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[52] *See, e.g.*, Bartlett v. Portfolio Recovery Assocs., LLC, 91 A.3d 1127, 1138 (Md. 2014).

[53] *See* Appleseed & Jones Day, *supra* note 44, at 20. *See generally* Jake Halpern, Bad Paper: Chasing Debt from Wall Street to the Underworld (Farrar, Straus and Giroux eds., 1st. ed. 2014) (detailing how a portfolio of debt was "stolen" from its claimed owner and how consumers were contacted by multiple collectors for the same debt, each claiming to own the debt); Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 J. Bus. & Tech. L. 259 (2011) [hereinafter Holland, *One Hundred Billion Dollar Problem*] (discussing problems of robo-signing and lack of adequate proof by debt buyers of ownership of the debt, that the defendant owes the debt, and that the amount claimed is owed).

[54] *See infra* note 57 and accompanying text; *see also* Royal Fin. Grp., LLC v. Perkins, 414 S.W.3d 501, 506 (Mo. Ct. App. 2013). During the course of litigation, debt-buyer plaintiff Royal Financial Group admitted that it did not purchase the debt from the original creditor, did not have evidence of prior ownership transfers, could not provide any representations on the accuracy or enforceability of the debt (as it had received no warranties), and had no documentation of the debt establishing that the defendant actually owed the debt or the claimed fees, interest, and charges. *Id.* The court concluded that "the record clearly demonstrates that Royal could not legally prosecute its claim and never had any intention to do so. As such, the petition was an empty threat of further action that could not legally be taken . . . ." *Id.*

[55] *See, e.g.*, *Royal Fin. Grp.*, 414 S.W.3d at 506 (stating that the record showed the debt buyer could not prosecute its claim against a consumer, as it could not establish its standing by showing its status as an assignee); *see also* Jiménez, *supra* note 19, at 82–83.

[56] *See, e.g.*, Portfolio Recovery Assocs., LLC v. Metcalf, No. 14-ADMS-70014, 2015 WL 9597882, at *2 (Mass. App. Div. Dec. 11, 2015) (holding summary judgment inappropriate where debt buyer attempted to prove ownership, among other facts, with hearsay evidence); Midland Funding, LLC v. Stimpson, No. CV-14-830 (Idaho Dist. Ct. Dec. 15, 2014), https://www.nclc.org/images/pdf/unreported/midland-v-stimpson_appellate_decision_12162014.pdf [https://perma.cc/NFR4-J3K4] (finding "no evidence of the necessary linkage between the bulk account sale and the individual account of this defendant" and therefore ownership was not proven); Midland Funding, LLC v. Gillane, No. CV136009766S, 2014 WL 5138020, at *1 (Conn. Super. Ct. Sept. 11, 2014) (holding that an affidavit stating that the debt buyer was the owner of the debt, without more, was insufficient to establish the chain of title for the debt).

necessary documentation to prove ownership of the debt.[57] However, these cases are not the norm, and most debt-buyer lawsuits go unchallenged.[58]

B. Debt Collectors Attempt to Collect Time-Barred Debt

A significant concern arises when debt collectors and debt buyers collect, sue, or threaten suit on time-barred debts (i.e. debts older than the time period in which a creditor can bring a lawsuit). Statutes of limitations protect consumers and courts alike by ensuring that the evidence necessary for the case will exist at the time of the lawsuit, whether documentation or witness testimony.[59] According to the Supreme Court, "[s]tatutes of limitations . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time."[60]

In most states, the running of a statute of limitations in civil actions does not extinguish the cause of action, but rather the defendant must raise the issue as an affirmative defense.[61] Thus, in debt collection suits, debts beyond the statute of limitations are not automatically extinguished in the overwhelming majority of states; if a lawsuit is filed, the consumer must raise this issue in court, or the debt buyer will be able to proceed with its lawsuit.[62] Further, in many states, when an individual makes a payment on or otherwise affirms a time-barred debt, that action may "revive" the debt and trigger the start of a new limitations period.[63]

The primary issues regarding the aging of debts in the debt-buying process are twofold. First, the incomplete or inaccurate transferred information may cause debt buyers to unknowingly attempt to collect or sue based on time-barred debt. For example, in its study of the debt-buying industry, the FTC found that only about one-third of accounts purchased by debt buyers

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[57] *See Midland Funding, LLC*, 2014 WL 5138020, at *1; *see also* CACH, LLC v. Askew, 358 S.W.3d 58 (Mo. 2012); CACH, LLC v. Kulas, 21 A.3d 1015 (Me. 2011); Unifund CCR Partners v. Youngman, 89 A.D.3d 1377 (N.Y. App. Div. 2011); Shipley v. Unifund CCR Partners, 331 S.W.3d 27 (Tex. App. 2010); Green v. Calvary Portfolio Servs., LLC, 700 S.E.2d 741 (Ga. Ct. App. 2010).

[58] *See infra* notes 89–95 and accompanying text.

[59] United States v. Kubrick, 444 U.S. 111, 117 (1979) ("[T]hey protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.") (citations omitted).

[60] *Id.*

[61] *See, e.g.*, Methodist Healthcare Sys. of San Antonio, Ltd. v. Rankin, 307 S.W.3d 283, 287 (Tex. 2010) (describing difference between statute of limitations and statute of repose).

[62] In Wisconsin and Mississippi, debts are extinguished automatically when the statute of limitations expires, and in North Carolina, only debt buyers are prohibited from collecting or suing on time-barred debt. *See infra* notes 233, 228–29 and accompanying text.

[63] *See, e.g.*, KAN. STAT. ANN. § 60-520 (West 2016) (statute of limitations period restarts following a partial payment or written acknowledgement of liability in any case on a contract); Davis v. World Credit Fund I, LLC, 543 F. Supp. 2d 953, 957 (N.D. Ill. 2008) ("Under Illinois law, '[i]t is clear that part payment of a debt tolls the statute of limitations such that it commences to run from the date of last payment.'") (citations omitted).

included information on the date of default at the time of purchase.[64] Second, as is explained in more detail below, the debt-buyer "lawsuit mill" business model, coupled with the fact that statute of limitations is an affirmative defense, gives debt buyers strong incentive to file lawsuits on time-barred debt with the aim of obtaining default judgments.[65]

The risk to consumers is clear—"most consumers do not know or understand their legal rights with respect to the collection of time-barred debt."[66] Although courts have generally held that bringing a lawsuit to collect time-barred debt is an unfair or deceptive practice under the federal Fair Debt Collection Practices Act (FDCPA),[67] there is currently no widespread prohibition or ban on the practice. Further, many courts have held that collecting on time-barred debt without a threat to sue is not a violation of the FDCPA.[68] As a result, the FTC concluded that "[a] major concern related to debt buying is the conduct of some debt buyers in collecting, threatening to sue, or suing on debt that is time-barred."[69]

C. Debt Collectors Cut Corners in the Legal Process to Support Their Claims in Court

Debt collectors' heavy reliance on litigation to collect debt coupled with inadequate proof of the debts has resulted in collectors cutting corners to advance their cases in state courts. Similar to the automation that facilitated the massive wave of foreclosures in this country from the late 2000s to early 2010s,[70] debt buyers use "robo-signed" (signed without knowledge of the

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[64] *See* DEBT BUYING INDUSTRY, *supra* note 18, at T-10 (finding thirty-five percent of accounts purchased included the date of default at the time of purchase based on an analysis of five million accounts purchased by six large debt buyers over a six-month period in 2009); Mary Spector, *Debts, Defaults and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. L. & BUS. REV. 257, 291–92 (2011); *see also* DEBT BUYING INDUSTRY, *supra* note 18, at 30 (study of Texas debt-collection lawsuits found that more than ninety-five percent of the cases studied lacked information about the date of default).

[65] *See infra* notes 80–84 and accompanying text.

[66] FED. TRADE COMM'N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION 26 (2010), https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf [https://perma.cc/DL2L-DUFJ] [herein after REPAIRING A BROKEN SYSTEM].

[67] *See, e.g.*, Basile v. Blatt, Hasenmiller, Leibsker & Moore LLC, 632 F. Supp. 2d 842, 845 (N.D. Ill. 2009); Kimber v. Fed. Fin. Corp., 668 F. Supp. 1480, 1488 (M.D. Ala. 1987).

[68] *See, e.g.*, Huertas v. Galaxy Asset Mgmt., 641 F.3d 28 (3d Cir. 2011) (finding collection letter attempting to collect time-barred debt not deceptive under FDCPA because under state law, the debt is not extinguished, just the remedy); Freyermuth v. Credit Bureau Servs., Inc., 248 F.3d 767 (8th Cir. 2001) (no FDCPA violation for collection attempt on time-barred debt where no threat of or actual litigation on time-barred debt). *But see* Buchanan v. Northland Grp., Inc., 776 F.3d 393 (6th Cir. 2015) (holding that collection letter containing a settlement offer for a time-barred debt could plausibly mislead an unsophisticated consumer and thus violate the FDCPA); McMahon v. LVNV Funding, LLC, 744 F.3d 1010 (7th Cir. 2014) (holding that a settlement offer on a time-barred debt violates the FDCPA).

[69] DEBT BUYING INDUSTRY, *supra* note 18, at 44.

[70] *See, e.g.*, Adam Levitin, *The Paper Chase: Securitization, Foreclosure, and the Uncertainty of Mortgage Title*, 63 DUKE L.J. 637, 638 (2013) (estimating that seven million homes

facts or without an attempt to verify the facts) and false affidavits to support debt-collection litigations.[71] To obtain a default judgment against a borrower, a debt collector usually submits an affidavit of proof of the debt. Whether or not a case is contested by the consumer, a debt collector will frequently use affidavits to establish proof of the debt or to support business records being entered as evidence in the cases.[72]

Unfortunately, examples of robo-signing and false affidavits are not hard to find. Following a whistleblower scandal,[73] the Office of the Comptroller of the Currency conducted a two-year investigation into JPMorgan Chase, finding that the bank filed false and improperly signed affidavits in court in its own debt-collection lawsuits.[74] The CFPB and a group of state attorneys general found that the bank had also enabled illegal debt-buyer activity by supplying debt buyers with false affidavits in support of the collectors' suits against consumers.[75] Further, two of the country's largest debt buyers, Encore Capital Group and Portfolio Recovery Associates, were penalized for the use of robo-signed and false affidavits by the CFPB in 2015,[76] though those actions were certainly not the first time the debt collectors were found to have engaged in the illegal activity.[77]

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were lost to foreclosure from July 2007–June 2013); Aleatra P. Williams, *Foreclosing Foreclosure: Escaping the Yawning Abyss of the Deep Mortgage and Housing Crisis*, 7 Nw. J.L. & Soc. Pol'y 455 (2012) (detailing the U.S. housing crisis from 2007–12); Cong. Oversight Panel, November Oversight Report: Examining the Consequences of Mortgage Irregularities for Financial Stability and Foreclosure Mitigation 6–7 (2010), https://www.gpo.gov/fdsys/pkg/CPRT-111JPRT61835/pdf/CPRT-111JPRT61835.pdf [https://perma.cc/2NQS-TNTG] (examining the U.S. foreclosure crisis and related problems).

[71] *See supra* Part I.C.

[72] *See, e.g.*, Fed. R. Evid. 803(6) (allowing admission of business records by "certification"); Ark. R. Evid. 803(6); Ill. R. Evid. 803(6).

[73] Jeff Horwitz, *How a Whistleblower Halted JPMorgan Chase's Card Collections*, Am. Banker (Mar. 15, 2012), http://www.americanbanker.com/issues/177_52/jpmorgan-chase-credit-card-collections-1047573-1.html [https://perma.cc/4EFL-PMJM].

[74] Consent Order at 4, JPMorgan Chase Bank, No. AA-ED-13-76 (OCC Sept. 18, 2013), http://www.occ.gov/static/enforcement-actions/ea2013-138.pdf [https://perma.cc/S6Q8-R6CK].

[75] *See* Press Release, Bureau of Consumer Fin. Prot. Bureau, CFPB, 47 States, and D.C. Take Action Against JPMorgan Chase for Selling Bad Credit Card Debt and Robo-Signing Court Documents (July 8, 2015), http://www.consumerfinance.gov/about-us/newsroom/cfpb-47-states-and-d-c-take-action-against-jpmorgan-chase-for-selling-bad-credit-card-debt-and-robo-signing-court-documents/ [https://perma.cc/3SKV-LSBU].

[76] *See generally* Consent Order, Portfolio Recovery Assocs., LLC, CFPB No. 2015-CFPB-0023 (Sept. 8, 2015), http://files.consumerfinance.gov/f/201509_cfpb_consent-order-portfolio-recovery-associates-llc.pdf [https://perma.cc/AK74-6G65] [hereinafter Portfolio Recovery Consent Order 2015]; Consent Order, Encore Capital Grp., CFPB No. 2015-CFPB-0022 (Sept. 3, 2015), http://files.consumerfinance.gov/f/201509_cfpb_consent-order-encore-capital-group.pdf [https://perma.cc/RV6V-6Q2T] [hereinafter Encore Capital Consent Order 2015].

[77] *See, e.g.*, Midland Funding LLC v. Brent, 644 F. Supp. 2d 961 (N.D. Ohio 2009) (finding that affidavits attached to debt collection complaints were both false and misleading and more specifically that one employee signed 200–400 affidavits per day, attesting to personal knowledge of the facts related to each case, despite having none); Jessica Silver-Greenberg, *Dead Soul is a Debt Collector*, Wall St. J. (Dec. 31, 2010), http://www.wsj.com/articles/SB10001424052970204204004576049902142690400 [https://perma.cc/Z95Z-QRZD] (detailing how the signature of a woman who died in 1995 was on thousands of affidavits filed by Portfolio Recovery Associates in debt collection lawsuits).

Debt buyers and their attorneys churn out collection lawsuits at an astounding pace, enabled by robo-signed or false affidavits. A 2010 study of New York debt-buyer cases found that one individual signed all affidavits filed by three debt buyers—and, if extrapolated to every case filed by those companies in one year, that individual would have signed affidavits in more than 47,500 cases during that year.[78] A *New York Times* article highlighted that an employee of one large debt buyer testified in court that she signed approximately two thousand affidavits *per day*, and in each affidavit, she swore that she personally reviewed and verified the debts sought in the lawsuits, even though she did not.[79]

By filing hundreds of thousands of debt-collection lawsuits annually on behalf of debt collectors and creditors, many law firms act as "lawsuit mills."[80] These cases are being filed "without meaningful attorney involvement" to ensure that the cases are backed by evidence establishing proof of ownership of the debt or proof the debt is actually owed.[81] For example, one regional collection law firm was filing so many cases while employing only one attorney to review the cases before that the attorney would spend only a few minutes, sometimes seconds, reviewing each case.[82] At some law firms, non-attorney staff or even computer systems decide which accounts to pursue in court and fill out the court documents, with attorneys giving the documents only cursory review and adding their signatures.[83]

The high-volume, "lawsuit mill" business model employed by debt collectors fuels use of false or robo-signed affidavits in support of the cases filed. As is detailed below, these deceptive documents mask the insufficiency of the evidence supporting the lawsuits and mislead consumers and the courts,[84] allowing debt collectors to obtain easy judgments against consumers.

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[78] WILNER & SHEFTEL-GOMES, *supra* note 27, at 14.

[79] David Segal, *Debt Collectors Face a Hazard: Writer's Cramp*, N.Y. TIMES (Oct. 31, 2010), http://www.nytimes.com/2010/11/01/business/01debt.html?ref=us [https://perma.cc/3Y9Y-MT33].

[80] Consent Order at 5, Pressler & Pressler, LLP, CFPB No. 2016-CFPB-0009 (Apr. 25, 2016), http://files.consumerfinance.gov/f/documents/201604_cfpb_consent-order-pressler-pressler-llp-sheldon-h-pressler-and-gerard-j-felt.pdf [https://perma.cc/49A9-UAVN] [hereinafter Pressler Consent Order 2016] (stating that the law firm filed more than 500,000 debt-collection cases on behalf of clients from 2009–14); Complaint at ¶¶ 16–18, 28, Consumer Fin. Prot. Bureau v. Frederick J. Hanna & Assocs., P.C., No. 14-cv-02211-AT-WEJ (N.D. Ga. July 14, 2014) [hereinafter CFPB Hanna Complaint].

[81] CFPB Hanna Complaint, *supra* note 80.

[82] Pressler Consent Order 2016, *supra* note 77, at 7.

[83] *Id.*

[84] *See, e.g.*, *id.* at ¶¶ 36–45; Encore Capital Consent Order 2015, *supra* note 76 at ¶¶ 86–89, 106–11 (use of false affidavits misleading under federal law).

D. Debt Buyers Rely on Default Judgments to Win Cases

A direct outcome of the increased focus on litigation and of the failure of state courts to scrutinize the case filings[85] is that a significant proportion of debt-collection lawsuits end in default judgment. As one expert put it, "[T]he primary goal of debt-buyer lawsuits is to turn unsecured debt into court judgments, fully secured and fully collectable through garnishment and other enforcement proceedings."[86] Debt collectors have increased their use of the court system, relying on the assumption that for various reasons, the majority of defendants will not show up in court when sued—"90% of our cases are default judgments. We show the judge our math and if no one disputes we get our judgment."[87] According to a large debt buyer, "Our legal collection efforts over time have led to the development of a significant number of awarded judgments on our owned accounts, which we believe will help generate future cash flows."[88]

When a consumer does not respond to or otherwise appear in court to defend a collection lawsuit, the plaintiff debt collector typically wins by way of a default judgment.[89] One consequence is that many of the unfair, deceptive, and abusive practices already highlighted in this subsection, such as inadequate proof of the debt, time-barred debt, and robo-signed or false affidavits, inevitably go unchallenged. As a result, debt collectors obtain default judgments against consumers in cases that never should have been filed in the first instance, often based on questionable evidence, such as falsified court documents.[90]

There are many reasons why individuals do not respond to or appear in court to defend a debt-collection lawsuit. They may lack adequate notice of the case, either because the debt collector engaged in "sewer service" (the practice of intentionally filing false affidavits of service of process in court), or because the debt collector used the wrong address due to inaccurate or outdated records.[91] Consumers are frequently confused about the plaintiff who is suing, since the company is one with which they had not done busi-

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[85] *See infra* notes 133–40 and accompanying text.

[86] Holland, *Junk Justice*, *supra* note 31, at 183.

[87] *See* Portfolio Recovery Consent Order 2015, *supra* note 76, at ¶ 28 (quoting Portfolio Recovery Associates' Vice President for Collections); *see also* SquareTwo Fin. Corp., Annual Report (Form 10-K) 6 (Apr. 26, 2016) (reporting an increase in collection proceeds due to "legal collections," increasing from 41.3% of "domestic cash proceeds" in 2013 to 59.9% in 2015); PRA Grp., Inc., Annual Report (Form 10-K) 40 (Feb. 26, 2016) ("During 2012 and 2013, we expanded the number of accounts brought into the legal collection process . . . ."); Encore Capital Grp., Inc., Annual Report (Form 10-K) 21, 39 (Feb. 24, 2016) (noting that the company "ha[s] substantial collection activity through [its] legal channel" and reporting continuous increase in collection proceeds from "legal collections" from 2013–15).

[88] SquareTwo Fin. Corp., *supra* note 87, at 6.

[89] *See, e.g.*, MO. ANN. STAT. § 517.131 (West 2016) ("A default judgment may be entered in favor of a party filing a claim . . . when the opposing party has been duly and timely served with summons and does not appear in court on the return date or subsequent date to which the case has been continued.").

[90] Holland, *One Hundred Billion Dollar Problem*, *supra* note 53, at 263.

[91] ALBIN-LACKEY, *supra* note 3, at 36–38.

ness, or they are confused by the court process.[92] Other individuals do not appear because they are unable to take the time off from work to appear in court. Yet others are ashamed—being in debt carries a stigma that can be hard to overcome.[93]

Default judgments are the norm in debt-collection lawsuits, though there are certainly differences among courts. In 2010, the FTC reported that rates of default judgments in debt collection cases ranged from sixty to ninety-five percet.[94] A study of cases in New York State found that in 2011, eighty percent of all default judgments in the state were in debt-collection cases.[95] An Indiana study found that debt collectors obtained default judgments in seventy-three percent of cases filed in 2009.[96] In Texas, where the default judgment rate for debt-collection cases in 2014 and 2015 was approximately thirty percent, that rate was still "more than twice the rate of default judgments entered in other cases."[97]

Though there is growing awareness of problems with debt buyer lawsuits, judges and clerks generally do not challenge the evidence debt buyers offer.[98] "[M]any judges behave as though debt buyer[s] . . . are entitled to default judgments as a matter of right when defendants fail to answer the case . . . . They issue default judgments . . . with alarming automaticity and speed, without asking for evidence in support of the claims or subjecting them to scrutiny."[99] As the then-chief judge of New York's court system put it: "You were signing a lot of shallow judgments."[100]

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[92] *Id.* at 34–35 (quoting a Michigan judge who said he often entered default judgments, only to have consumers seek to have them overturned, explaining they had no clue who was suing them in the first place); *see also* Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 CAL. L. REV. 79, 119–20 (1997) (discussing findings of David Caplovitz's 1970s study of consumer cases filed in New York, Detroit, and Chicago courts, including confusion about the legal process).

[93] *See, e.g.*, Erin El Issa, *7 in 10 Americans See Added Stigma in Credit Card Debt, Survey Shows*, NERDWALLET (Jan. 19, 2016), https://www.nerdwallet.com/blog/credit-cards/credit-card-debt-stigma-2016/ [https://perma.cc/7U4Z-2THU] (survey results showing that seventy percent of Americans think credit card debt carries greater stigmas).

[94] REPAIRING A BROKEN SYSTEM, *supra* note 64, at 7.

[95] SHIN & WILNER, *supra* note 31, at 3.

[96] Judith Fox, *Do We Have a Debt Collection Crisis? Some Cautionary Tales of Debt Collection in Indiana*, 24 LOY. CONSUMER L. REV. 355, 381 (2012).

[97] Mary Spector & Ann Baddour, *Collection Texas-Style: An Analysis of Consumer Collection Practices In and Out of the Courts*, 67 HASTINGS L.J. 1427, 1448 (2016) (the default judgment rate increased slightly from 29.7% in 2014 to 31.6% in 2015). The study of 2014 and 2015 cases confirmed earlier findings of a 2011 study, which found that the rate of default judgments was less than that for dismissals. *See* Mary Spector, *Debts, Defaults and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. L. & BUS. REV. 257, 296 (2011). The reasons for the lower default judgment rate and higher dismissal rate compared to other states are unknown.

[98] ALBIN-LACKEY, *supra* note 3, at 38–52; Beth Healy, *Debtors' Hell, Part II: A Court System Compromised: Dignity Faces a Steamroller: Small-Claims Proceedings Ignore Rights, Tilt to Collectors*, BOS. GLOBE (July 31, 2006), http://archive.boston.com/news/special/spotlight_debt/part2/page1.html [https://perma.cc/S6WJ-UMCQ].

[99] ALBIN-LACKEY, *supra* note 3, at 38–39.

[100] *Id.* at 39.

III. Abusive Debt-Collection Practices Cause Severe Harm to U.S. Households

The financial impact of debt-collection abuses on U.S. households is not yet fully understood. Many of the harms are difficult to calculate because the full scope of abusive collection practices is incomplete. However, based on recent enforcement actions and other reports, the costs of these abuses to individuals and households are substantial. For example, in New York alone, four debt buyers were ordered to vacate more than thirty-five million dollars in judgments wrongfully obtained against state residents.[101] The CFPB consent orders with Encore Capital Group and Portfolio Recovery Associates required the companies to pay sixty-two million dollars in refunds to consumers and stop collecting more than $128 million in debt for more than 89,000 consumers nationwide.[102]

While these numbers are a snapshot, they offer an indication of the magnitude of the direct financial costs that abusive and illegal debt-collection practices have on U.S. households. Because the indirect costs of dealing with abusive debt collection practices (such as costs of defending the lawsuit) are unknown, the true financial harm to consumers is likely substantially more significant. In addition, the following harms are evident and are explored in more detail in this part: (a) a disproportionate impact on vulnerable consumers; (b) added financial costs to consumers; (c) taking advantage of overwhelmed courts and unrepresented consumers; and (d) inadequate income and asset protections.

A. Debt-Collection Practices Have a Disproportionate Impact on Vulnerable Communities

As is detailed in this section, various reports and news articles demonstrate that communities of color, low- and moderate-income communities, military service members, and older Americans experience higher rates of abusive debt-collection practices and debt-collection lawsuits. With default and other judgments obtained in court, the debt collector's or creditor's ability to enforce a judgment for an extended amount of time[103] prevents individuals from being able to make ends meet or get a fresh start.[104]

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[101] *See infra* note 218 (citing multiple debt-buying judgments in New York).

[102] Portfolio Recovery Consent Order 2015, *supra* note 76; Encore Capital Consent Order 2015, *supra* note 76.

[103] *See supra* notes 42–44 and accompanying text.

[104] *See* Kiel & Waldman, *supra* note 31, at 20 (describing how a borrower has been paying a $4,900 debt for more than three years, for which a debt has paid more than $8,500, even though more than $2,400 of the $6,900 judgment remains); Paul Kiel, *When Lenders Sue, Quick Cash Can Turn Into a Lifetime of Debt*, ProPublica (Dec. 13, 2013, 11:46 AM), https://www.propublica.org/article/when-lenders-sue-quick-cash-can-turn-into-a-lifetime-of-debt [https://perma.cc/CTV2-3BSR] [hereinafter Kiel, *When Lenders Sue*] (detailing the various events after a creditor obtained a judgment against a debtor, including wage garnishment, bank

Among communities of color, debt collection lawsuits are far more common, and some studies indicate that a greater percentage of cases end in default judgments when defendants are from communities of color and low- and moderate-income communities. A groundbreaking study of cases in St. Louis, Chicago, and Newark found that, even accounting for income, majority black neighborhoods experienced debt collection lawsuits and judgments at a rate two times that of mostly white neighborhoods.[105]

In St. Louis's black neighborhoods, debt collectors and creditors extracted thirty-four million dollars from residents with judgments obtained from 2008 to 2012.[106] In Newark, majority black neighborhoods had almost three times the number of judgments, as compared to white neighborhoods.[107] More than half of the over sixty thousand judgments obtained against residents of majority black neighborhoods were from lawsuits filed by debt buyers, while debt buyers obtained less than half of the judgments in white neighborhoods.[108] These debt-buyer lawsuits are typically for balances that are "about 30 percent smaller than the average suit by a major bank."[109]

These sobering findings are not anomalies—other studies report similar findings and suggest that income levels also play a role in differences in the rates of default judgments.[110] A study of New York cases found that the ten zip codes with the highest concentrations of default judgments per capita were all predominately non-white communities, with some of the communities categorized as lower-income communities but others considered middle-income communities.[111] Similarly, in New York City, more than ninety percent of defendants in debt-buyer cases with default judgments against them lived in low- and moderate-income communities.[112]

While specific reasons for the disparities are not fully known, the differences may be due in part to the fact that African American households

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account seizure, attempts to seize payroll card, overstating the amount owed, and effectively garnishing one hundred percent of the debtor's wages).

[105] Kiel & Waldman, *supra* note 31, at 2.

[106] *Id.* at 4.

[107] Annie Waldman & Paul Kiel, Racial Disparity in Debt Collection Lawsuits: A Study of Three Metro Areas 25 (2015), https://static.propublica.org/projects/race-and-debt/assets/pdf/ProPublica-garnishments-whitepaper.pdf [https://perma.cc/P5CK-JTZV].

[108] *Id.*; *see also* Kiel & Waldman, *supra* note 31, at 10.

[109] Kiel & Waldman, *supra* note 31, at 11.

[110] *See, e.g.*, Spector & Baddour, *supra* note 97, at 1457–58 (study of Texas debt-collection lawsuits, finding "somewhat higher likelihood of default judgments in precincts with a higher non-White population"); Holland, *Junk Justice*, *supra* note 31, at 218–21 (study of Maryland debt-collection litigation pursued by debt buyers finding that "[d]ebt buyers sued disproportionately in jurisdictions with larger concentrations of poor people and racial minorities" and that "the counties with the fewest proportionate share of lawsuits are richer and less diverse than [the state] as a whole").

[111] Shin & Wilner, *supra* note 31, at 5 ("Six of the ten zip codes are clustered in predominantly middle-income, black communities . . . .").

[112] Wilner & Sheftel-Gomes, *supra* note 27, at 10 (finding that ninety-one percent of people sued by debt buyers were from a low- or moderate-income community, while ninety-five percent of people with a default judgment won by a debt buyer against them were from such communities and that "in the 12 zip codes with the highest concentration of lawsuits in our study, one in four families lived below the federal poverty level").

make less money and hold fewer assets than similarly situated white households.[113] African American families are thus less likely to be able to resolve seemingly small debts. The disparities may also be because African American communities are also targeted for more costly and risky predatory loan products that are more likely to fail and end up in collections.[114]

Senior citizens, many of whom live on fixed incomes, are also frequently victims of debt-collection abuses. Reports suggest that older Americans are sometimes pressured or threatened into lawsuit settlements with harassing phone calls, threats to personal property, and threats of the loss of what little money they have.[115]

In addition, military servicemembers may be vulnerable to debt collection abuses due to the steady pay members receive as well as their unique role within the military. Servicemembers complain to the CFPB about debt collection abuses at almost twice the rate of the civilian population.[116] These debt collection abuses can be especially oppressive for servicemembers: debt collectors threaten to report the servicemember's unpaid debt to his or her commanding officer, have the member demoted, or even have the member's

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[113] *See* Rakesh Kochhar & Richard Fry, *Wealth Inequality Has Widened Along Racial, Ethnic Lines Since End of Great Recession*, PEW RESEARCH CTR. 1, 3 (Dec. 12, 2014), http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/ [https://perma.cc/Q3VF-JF8T] (finding the median wealth of white families ($141,900) to be thirteen times that of black families ($11,000) based on an analysis of Federal Reserve's Survey of Consumer Finances); JESSE BRICKER ET AL, FED. RESERVE BULL. VOL. 100 NO. 4, CHANGES IN U.S. FAMILY FINANCES FROM 2010 TO 2013: EVIDENCE FROM THE SURVEY OF CONSUMER FINANCES 4 (2014) (finding white incomes were higher than incomes of non-white or Hispanic families). *See generally* Kiel & Waldman, *supra* note 31.

[114] *See, e.g.*, Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 AM. SOC'Y REV. 629, 630 (2010) (black neighborhoods, among others, were targeted for riskier mortgage products and as a result had more foreclosures); Steven M. Graves, *Landscapes of Predation, Landscapes of Neglect: A Location Analysis of Payday Lenders and Banks*, 55 PROF'L GEOGRAPHER 303, 303 (2003) (finding that areas with higher populations of racial minorities were targeted by payday lenders for site locations, while avoided by traditional banks).

[115] *See, e.g.*, WILNER & SHEFTEL-GOMES, *supra* note 27, at 10 (highlighting a client story from a senior citizen on fixed income who was sued by a debt buyer); *see also* CONSUMER FIN. PROT. BUREAU, A SNAPSHOT OF DEBT COLLECTION COMPLAINTS SUBMITTED BY OLDER AMERICANS (2014), http://files.consumerfinance.gov/f/201411_cfpb_snapshot_debt-collection-complaints-older-americans.pdf [https://perma.cc/AC49-6SF8] (detailing various complaints submitted to the agency by older Americans, including illegal threats to garnish exempt income such as Social Security benefits and pension payments); Rachel Terp & Lauren Bowne, *Past Due: Why Debt Collection Practices and the Debt Buying Industry Need Reform Now* 1, 10 (2011), http://consumersunion.org/pdf/Past_Due_Report_2011.pdf [https://perma.cc/B6EF-LQYR] (offering client stories of senior citizens who dealt with debt collection and debt buyer abusive practices).

[116] CONSUMER FIN. PROT. BUREAU, SERVICEMEMBERS 2015: A YEAR IN REVIEW 1–2, 8–10 (2016), http://files.consumerfinance.gov/f/201603_cfpb_snapshot-of-complaints-received-from-servicemembers-veterans-and-their-families.pdf [https://perma.cc/H998-SURB]. Interestingly, among military complaints to the FTC, debt collection ranks third, behind identity theft and imposter scams. Among enlisted military members, debt collection complaints ranked second. *See* FED. TRADE COMM'N, CONSUMER SENTINEL NETWORK DATA BOOK FOR JANUARY–DECEMBER 2015 19 (2016).

security clearance revoked.[117] Although active-duty servicemembers are afforded certain protections under the Servicemember Civil Relief Act (SCRA) for their debts and debt collection lawsuits,[118] these protections may not be effective for a servicemember when a debt is sold and re-sold to subsequent debt buyers with inadequate documentation.[119]

B. Debt Buyers Increase the Amount of the Debt with Extra Charges

Various costs and fees can significantly inflate the amount consumers ultimately owe. When collecting out of court, debt collectors often try to impose additional charges such as so-called "convenience fees" without consent or deceptively steer consumers to payment options that come with "convenience fees."[120] Debt collectors also use court judgments to inflate the amounts owed by adding court costs, interest, and attorneys' fees, some of which are not authorized by the underlying loan contract.[121] These various costs can inflate judgment amounts by up to twenty percent.[122]

These collection costs are on top of the pre- and post-judgment interest—which are usually set by contract and state statute respectively—that accumulates on the debts. In some states, post-judgment interest can be set by contract, which allows judgments to grow almost exponentially due to

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[117] CONSUMER FIN. PROT. BUREAU, COMPLAINTS RECEIVED FROM SERVICEMEMBERS, VETERANS, AND THEIR FAMILIES 13 (2014), http://files.consumerfinance.gov/f/201403_cfpb_snapshot-report_complaints-received-servicemembers.pdf [https://perma.cc/Q2YP-SCDR].

[118] 50 U.S.C. App. § 521, 527 (2016) (providing for the appointment of an attorney for active-duty servicemembers in court cases and limiting interest rate on a loan or obligation owed by an active-duty servicemember to six percent, for those loans above that amount).

[119] *See, e.g.*, Complaint at 5, United States. v. Santander Consumer USA, Inc., No. 3:15-cv-00633 (N.D. Tex. Feb. 25, 2015) (alleging violations of SCRA for conducting car repossessions without obtaining a court judgment, in violation of 50 U.S.C. § 532); Consent Order, JPMorgan Chase Bank, CFPB No. 2013-138 (Sept. 18, 2013) [hereinafter JPMorgan Chase Consent Order 2013] (finding that JPMorgan Chase failed to ensure compliance with the SCRA interest rate and debt collection litigation protections); Press Release, U.S. Dep't of Justice, Justice Department Reaches $60 Million Settlement with Sallie Mae to Resolve Allegations of Charging Servicemembers Excessive Rates on Student Loans (May 13, 2014), https://www.justice.gov/opa/pr/justice-department-reaches-60-million-settlement-sallie-mae-resolve-allegations-charging [https://perma.cc/VSQ9-A9CY] (highlighting allegations in com plaint that Sallie Mae violated the interest rate and default judgment protections in the SCRA).

[120] *See, e.g.*, Quinteros v. MBI Assocs., Inc., 999 F. Supp. 2d 434 (E.D.N.Y. 2014) (holding at the motion to dismiss stage that the plaintiff consumer had pledged sufficient facts for a court to find that the defendant debt collector charged a convenience fee in violation of the FDCPA and made false and misleading statements with respect to the convenience fee also in violation of the FDCPA); Complaint, FTC v. Green Tree Servicing LLC, No. 15-cv-02064 (D. Minn. Apr. 21, 2015) (alleging the mortgage servicer deceptively steered consumers to making payments by a method that charged convenience fees, giving the impression there was no other alternative).

[121] WILNER & SHEFTEL-GOMES, *supra* note 27, at 8.

[122] *Id.* (finding that default judgments obtained by debt buyers in New York City were inflated by almost twenty percent); Holland, *Junk Justice*, *supra* note 31, at 206–07 (finding that in all debt-buyer cases that ended in a judgment, debt buyers had an average of eighteen percent of the claimed debt amount added to the judgment).

double- and triple-digit interest rates.[123] It is no surprise then that for many individuals facing court judgments obtained by debt collectors and creditors, paying off the judgments seems like a Sisyphean task, one that prevents them from digging out of debt, improving their financial circumstances, and building savings and wealth.

C. Debt Buyers Take Advantage of Overwhelmed Courts & Pro Se Consumers

With the growth of debt-collection litigation, such lawsuits have overwhelmed state courts, particularly small-claims courts. "The majority of cases on many state court dockets on a given day often are debt collection matters."[124] In 2008, *The Chicago Tribune* reported that the approximately one hundred thirty thousand debt collection lawsuits filed in 2008 in Cook County, Illinois, the home of the city of Chicago, was more than double the number in 2000.[125] During the start of the Great Recession, more than three hundred thousand debt collection cases were filed *each year* from 2006 to 2008 in New York.[126] The explosion of cases is by and large driven by debt buyers.[127] In New Jersey, for example, debt buyers obtained one hundred forty thousand court judgments against state residents in 2008, which is up from five hundred court judgments in 1996.[128] Though case filings have decreased since the height of the Great Recession, the volumes are still well above the levels of the 1990s.[129]

The state courts that hear debt collection cases are ill-equipped to deal with this massive volume. Courtrooms are often run inefficiently, cases are not given the attention they need or deserve, and judges struggle to adequately handle all of the cases on their dockets.[130] The relentless volume of

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[123] *See, e.g.*, MO. REV. STAT. § 408.040.2 (2016) ("In all nontort actions, interest shall be allowed on all money due upon any judgment or order of any court from the date judgment is entered by the trial court until satisfaction be made by payment, accord or sale of property; all such judgments and orders for money upon contracts bearing more than nine percent interest shall bear the same interest borne by such contracts, and all other judgments and orders for money shall bear nine percent per annum until satisfaction made as aforesaid."); *see also* Kiel, *When Lenders Sue*, *supra* note 104 (detailing how a one thousand dollar high-cost installment loan ballooned into a forty thousand dollar debt due to a triple-digit interest rate on the loan and unlimited statutory post-judgment interest rates).

[124] COLLECTING CONSUMER DEBTS, *supra* note 17, at 55.

[125] Ameet Sachdev, *Debt Collectors Pushing to Get Their Day in Court*, CHI. TRIB. (June 8, 2008), http://articles.chicagotribune.com/2008-06-08/news/0806080066_1_debt-collectors-court-papers-pushing [https://perma.cc/8BL7-D3YX].

[126] Terry Carter, *Debt-Buying Industry and Lax Court Review are Burying Defendants in Defaults*, AM. BAR ASS'N J. (Nov. 1, 2015, 4:20 AM), http://www.abajournal.com/magazine/article/debt_buying_industry_and_lax_court_review_are_burying_defendants_in_default [https://perma.cc/Z6MM-RFKF].

[127] *See supra* Part I.C.

[128] Kiel, *supra* note 27, at 2.

[129] *Id.*

[130] *See generally* ALBIN-LACKEY, *supra* note 3; COLLECTING CONSUMER DEBTS, *supra* note 17, at 56; Healy, *supra* note 98. Inadequate funding from the state government makes matters even worse.

cases often results in consumers facing a judicial system where they are treated as presumptively liable.[131]

State courts are not hapless victims, however. The judicial system and individual courts also play a central role in the harm caused to consumers:

> [T]he courts' own failures and shortcomings are a key part of the problem. The problem with statements [that place blame on debt collectors] is that they cast the courts as innocent bystanders, or perhaps even a second set of victims. In reality, the courts are central to the problem and bear direct responsibility for the translation of defective lawsuits into court judgments that hurt poor families.[132]

Instead of scrutinizing cases and supporting documents in order to protect the integrity of the court system, courts encourage negotiations and settlements, even going so far as to set up special dockets or courtrooms—so-called "judgeless courtrooms" or "rocket dockets"—run by debt-collection attorneys and without judicial oversight.[133] These negotiations often occur even if a defendant may have a valid defense or legal ground upon which to challenge the lawsuit[134] and allow debt collectors to obtain quick settlement agreements for debts (which are enforced by a judgment) absent judicial scrutiny or adequate due process.

Many courts, as a matter of efficiency and due to limited resources, encourage unrepresented individuals to talk with collection attorneys to agree to a settlement or payment plan.[135] These settlement talks take place even though *pro se* consumer defendants may have "significant defenses on which they could have prevailed if they had understood how to assert them."[136] In a handful of courts, these settlement conferences are part of the official court structure, as is the case of the "rocket docket" in Maryland.[137] However, for most, if not all, low-level or small claims cases, the phenomenon of the "hallway conference" is nothing new.[138] Courts and debt-collection attorneys view these conferences as "time honored tradition[s]" meant

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[131] Healy, *supra* note 98.

[132] ALBIN-LACKEY, *supra* note 3, at 32.

[133] *Id.* at 57–60 (describing "judgeless courtrooms" in Maryland and Philadelphia); *see also* Maria Aspan, *Courthouse "Rocket Dockets" Give Debt Collectors Edge Over Debtors*, AM. BANKER (Feb. 11, 2014), http://www.americanbanker.com/issues/179_29/courthouse-rocket-dockets-give-debt-collectors-edge-over-debtors-1065545-1.html [https://perma.cc/X2RL-RNUA] (describing Maryland "resolution conferences").

[134] ALBIN-LACKEY, *supra* note 3, at 56–57 (describing scenarios of defendants being pressured into dropping objections or defenses during settlement conferences).

[135] *See* WILNER & SHEFTEL-GOMES, *supra* note 27, at 13; *see also* ALBIN-LACKEY, *supra* note 3, at 53–63; APPLESEED & JONES DAY, *supra* note 44, at 28.

[136] WILNER & SHEFTEL-GOMES, *supra* note 27, at 13.

[137] *See* Aspan, *supra* note 133, and accompanying text.

[138] *See, e.g.*, ALBIN-LACKEY, *supra* note 3, at 54–57; *see* Engler, *supra* note 92, at 121 (discussing a 1970s study of small claims courts and its findings on the use of "hallway conferences" to settle debts).

as a "disarming experience,"[139] and yet, for unrepresented consumer defendants, such negotiations can result in settlements "on terms they do not understand and cannot afford."[140]

The clogged court systems—and harmful solutions adopted in response—injure individuals by jeopardizing the due process rights to which they are entitled. Although there is a constitutional right to representation in criminal cases, no such corresponding right, or "civil *Gideon*," exists in civil cases. In cases where individuals do appear at a court proceeding when sued by a creditor or debt buyer, they usually lack legal representation.[141] Low- and moderate-income consumers are often unable to afford legal representation, and legal services providers' ability to represent such consumers is incredibly limited, perhaps increasingly so.[142] Additionally, because of the nature of debt-collection cases and the small dollar amount involved, many private attorneys do not take debt-defense cases.[143]

The numbers are bleak: only one to ten percent of consumer defendants retain representation in debt-collection cases.[144] When consumers appear *pro se*, debt collectors and their attorneys hold a distinct knowledge advantage over unrepresented consumers, resulting in a clear power imbalance to the detriment of the *pro se* debt-collection defendant. Most unrepresented consumer defendants are unaware of potential defenses to raise, such as the running of the statute of limitations or an objection to unreliable or questionable evidence. "Viable defenses to debt buyer lawsuits can be quite difficult for a layperson to articulate and deploy effectively in front of a skeptical judge."[145] When a defense is not raised, it is waived.[146]

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[139] ALBIN-LACKEY, *supra* note 3, at 54 (quoting president of the Michigan Creditors Bar Association).

[140] Holland, *Junk Justice*, *supra* note 31, at 224; *see also* APPLESEED & JONES DAY, *supra* note 44, at 28 ("Unrepresented defendants are at a significant disadvantage and can be pressured into one-sided settlements, settling for amounts similar to or greater than those demanded in the complaints, which may include unknown interest and fees.").

[141] *See*, *e.g.*, Kiel, *So Sue Them*, *supra* note 27, at 4–5 (about nine percent of debtors in Missouri debt collection cases had attorneys in 2013, while three percent did in New Jersey); Samantha Liss, *When a Nonprofit Health System Outsources Its ER, Debt Collectors Follow*, ST. LOUIS POST-DISPATCH (Apr. 17, 2016) (finding that in only 17 out of 1,078 debt collection cases filed by a local emergency room did defendant patients have an attorney, or about 1.5% of the cases filed); Holland, *Junk Justice*, *supra* note 31, at 226 (comparing rates of defendant representation from various studies—zero to ten percent of defendants have counsel in debt collection lawsuits).

[142] LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS, AN UPDATED REPORT OF THE LEGAL SERVICES CORPORATION 12 (2009), http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf [https://perma.cc/X4XB-7ZUD] (half of all those who seek legal assistance from LSC-funded organizations are turned away due to inadequate funding and other resources).

[143] Holland, *One Hundred Billion Dollar Problem*, *supra* note 53, at 266 (citations omitted) ("[A] successful defense in a debt buyer case will not produce any funds to be paid to a defense counsel.").

[144] *See* Holland, *Junk Justice*, *supra* note 31, at 226.

[145] ALBIN-LACKEY, *supra* note 3, at 53.

[146] *See, e.g.*, Ariz. R. Civ. P. 12(h) (2016) (defense generally waived if not included in motion, answer, or reply); Miss. R. Civ. P. 12(h)(1) (2016); N.J. Ct.R. 4:6-7 (2016); McNulty

Data indicates that unrepresented defendants who entered into settlement agreements may not be better off than those who received default judgments. A Maryland study found that more than seventy percent of the consent judgments involving *pro se* defendants were for the amount claimed in the lawsuit complaint.[147] Debt-collection attorneys often give defendants the impression that they have no possible defenses (or ability to raise them) or are otherwise unable to negotiate a more favorable outcome.[148] The message *pro se* defendants hear in these settlement talks is that it is not a question of whether the debt is actually owed or in what amount, but when the attorney or his client will be paid, as this collection attorney makes abundantly clear: "Ma'am, you heard what the judge said. Just tell me what you can pay and we'll do it so no further action is taken against you. But I can't go much lower than $50 a month, I'll tell you that."[149] As an indication that the settlements are unaffordable, a sizeable proportion of the settlement agreements end in default because the consumers are unable to make payments.[150] While other agreements may not end in default, they are nonetheless unaffordable when they result in consumers being unable to afford day-to-day living expenses.[151]

On the other hand, the benefit of having representation is clear: fewer cases end in a judgment for the plaintiff debt collector, and when they do, it is for an amount significantly less than that claimed in the complaint. For example, in the recent study of debt collection lawsuits in forty Texas counties, the plaintiff debt collector won only about fifteen percent of the cases where the defendant had an attorney, while the defendant won about twenty-seven percent of those cases.[152] In *pro se* consumer cases, the debt collector won in more than half of the cases, while the unrepresented defendant won in only thirteen percent.[153] In the Maryland study, where only two percent of the cases involved individuals with attorney representation, debt buyers ob-

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v. Heitman, 600 S.W.2d 168, 173 (Mo. Ct. App. 1980) ("However [sic] to take advantage of the statute of limitations as an affirmative defense, it must be pleaded and established. If the statute is not pleaded, it is waived.") (citations omitted) *superceded by statute on other grounds*, Mo. Ann. Stat. § 210 842, *as recognized by* Schultz By And Through Schultz v. Haile, 840 S.W.2d 263 (Mo. Ct. App. 1992).

[147] *See* Holland, *Junk Justice*, *supra* note 31, at 213–14 (author's calculations, based on findings from the Maryland study).

[148] *See* ALBIN-LACKEY, *supra* note 3, at 55 ("He told her that she had no choice but to pay his client the full amount she allegedly owed and that the only real issue was how much time he was willing to give her to satisfy the debt.").

[149] *Id.* at 55–56. (quoting a debt-collection attorney speaking to a defendant consumer outside of the courtroom).

[150] *See* APPLESEED & JONES DAY, *supra* note 44, at 28–29 (finding thirteen percent of settlement agreements in the study ended in default).

[151] *See id.* (finding that settlement amounts were for slightly less than the amount pleaded in the complaints); *see also supra* note 142 and accompanying text; Terp & Bowne, *supra* note 115, at 10 (highlighting story of eighty-two-year-old woman who agreed to settle debt for one thousand dollars more than what she owed, despite the fact that she could not afford the settlement, was left with insufficient income to pay for food, and as a result, had to get meals from the food bank).

[152] Spector & Baddour, *supra* note 97, at 1463.

[153] *Id.*

tained a judgment in only fifteen percent of the cases, and "recovered only 21% of the principal amount sought in the complaints."[154] Put another way, more than seventy percent of the time consumers with attorney representation either prevailed against the plaintiff debt buyer or had their cases dismissed.[155]

D. Existing Laws That Protect Certain Income and Assets from Seizure Are Insufficient

State and federal laws provide for various protections of wages and income, benefits, and other assets from collection and seizure to satisfy court judgments. These exemption laws are meant to protect individuals from poverty and provide individuals with sufficient means to subsist.[156] Under federal law, a certain percentage of an individual's wages are exempt from seizure,[157] and states can elect to protect more wages from collection.[158] Additionally, a panoply of federal and state laws also exempt other funds from collection, such as Social Security and Supplemental Security Income,[159] disability benefits,[160] child support and alimony payments,[161] unemployment benefits,[162] workers' compensation benefits,[163] public assistance,[164] pension

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[154] Holland, *Junk Justice*, *supra* note 31, at 211.

[155] *Id.* at 212–13.

[156] *See, e.g.*, In re Dwyer, 305 B.R. 582, 585 (Bankr. M.D. Fla. 2004) (explaining that the state's exemption laws "were designed to protect individuals from utter destitution thereby relieving the state of the burden of supporting destitute families"); CARTER & HOBBS, *supra* note 37, at 7–8; Shepard, *supra* note 40, at 1538 ("A debtor (especially a low-income debtor) facing one or more collection attempts can seek refuge in exemption laws, which are designed to protect debtors and their families from destitution, and to provide debtors with a means of financial rehabilitation.") (citations omitted).

[157] 15 U.S.C. § 1673(a) (2012) (exempting the greater of seventy-five percent of an individual's weekly "disposable earnings" or disposable earnings up to thirty times the federal minimum hourly wage).

[158] *Id.* at § 1677(1) (providing that the federal law does not preempt state laws "prohibiting garnishments or providing for more limited garnishment").

[159] 42 U.S.C. §§ 407(a), 1383(D)(i) (2016) (prohibiting execution, garnishment, levy, or other seizure of Social Security and Supplemental Security Income benefits).

[160] *See, e.g.*, 5 U.S.C. § 8346 (2016) (exempting federal civil service disability retirement benefits from seizure); TENN. CODE ANN. § 26-2-111(1)(C) (West 2016) (exempting disability and illness benefits from "execution, seizure or attachment").

[161] *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 11-504(b)(6) (West 2014) (exempting child support payments from garnishment).

[162] *See, e.g.*, IOWA CODE ANN. § 96.15(3) (West 2016) (exempting unemployment benefits from attachment, garnishment, levy, or other seizure so long as the funds are not commingled with other funds).

[163] *See, e.g.*, FLA. STAT. ANN. § 440.22 (West 2016) (exempting workers' compensation benefits from claims of creditors, execution, attachment, or other seizure).

[164] *See, e.g.*, N.Y. SOC. SERV. LAW § 137-a (McKinney 2016) (exempting public assistance benefits from income execution and installment payment orders).

and retirement funds,[165] and veterans' benefits.[166] Further still, state laws protect certain amounts of real and personal property.[167]

These protections are often inadequate to prevent families from falling into poverty due to wage garnishment, particularly because the exemption laws are outdated and have not kept pace with changes in society or inflation.[168] Additionally, for many of the protections, the burden is on individuals to claim any exemptions.[169] This burden is difficult to meet when consumers, especially those without the benefit of an attorney, are unaware of these exemptions and how to claim them.[170] Further, nothing prohibits individuals from voluntarily making payments with income exempt from seizure, a fact that is particularly problematic in the context of court-approved settlement agreements.

The inadequate levels of protection combined with the voluntary nature of obtaining these protections often mean that individuals are faced with unaffordable payment agreements or court judgments, as in the case of this Detroit resident: "I don't have money for my baby's diapers. My lights and gas is off right now. My paycheck is about 300 a week and sometimes I only bring home 220. I can't afford [the garnishment] out of my check. I barely even get anything to begin with."[171] Abusive and coercive behavior by debt collectors and collection attorneys simply exacerbates these harms.

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[165] *See, e.g.*, WIS. STAT. ANN. § 815.18(3)(j) (West 2016) (exempting certain retirement and pension funds from seizure).

[166] *See, e.g.*, 38 U.S.C. § 5301 (2016) (exempting veterans' benefits from creditors' claims and banning the attachment, garnishment, or other seizure of veterans' benefits).

[167] State homestead exemption laws generally protect certain, though varying, levels of real property from execution, while other laws exempt personal property like household goods or "tools of the trade." *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-1101 (2016) (exempting up to $150,000 in real property, condominium, or mobile home from execution); KY. REV. STAT. ANN. § 427.060 (West 2016) (exempting up to five thousand dollars in real property used as a residence); N.M. STAT. ANN. §§ 42-10-1, 42-10-2 (West 2016) (exempting personal property, tools of the trade, one motor vehicle, jewelry, furniture, clothes, books, and medical equipment in varying amounts based on whether a person is married/head of household or independent); UTAH CODE ANN. §§ 78B-5-505, 78B-5-506 (West 2016) (exempting certain household goods, personal property, clothes, furniture up to one thousand dollars, and one motor vehicle up to three thousand dollars, among other items).

[168] *See* CARTER & HOBBS, *supra* note 37, at 10–11.

[169] *See, e.g.*, In re Nguyen, 211 F.3d 105, 110 (4th Cir. 2000) (debtor claiming homestead exemption must follow procedural requirements in order to enjoy benefit of the exemptions); In re Lamb, 409 B.R. 534, 540 (Bankr. N.D. Fla. 2009) ("The obligation to claim and prove entitlement to the exemption is now rightfully on the Defendant in the garnishment action."); *see also* CARTER & HOBBS, *supra* note 37, at 23–26. *But see* Balanoff v. Niosi, 16 A.D.3d 53, 56 (N.Y. App. Div. 2005) ("Traditionally, the judgment debtor bears the burden of claiming and proving the applicability of an exemption, but only when the exempt status of the property is unclear to the judgment creditor or a levying officer . . . .") (citations omitted).

[170] *See* Shepard, *supra* note 40, at 1536, 1552–54.

[171] ALBIN-LACKEY, *supra* note 3, at 21.

IV. Policy Solutions Moving Forward

Many of the debt collection abuses detailed in Parts II and III are not new, although with changing business practices, evolve over time. Policy responses to abusive debt-collection practices must adapt to address emerging concerns. Yet over the past four decades, federal and state governments, regulators, and courts have been slow or reluctant to respond to widespread, continued, and new debt collection abuses, particularly concerning debt-collection litigation.

The FDCPA, the first-ever federal law to rein in illegal, unfair, and deceptive debt-collection practices, passed in 1977. In passing the legislation, Congress delineated both the need for and purpose of the legislation:

> (a) There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy . . . .
>
> (e) It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.[172]

Despite the passage of almost forty years and changes in industry practice, Congress has not updated the law in any substantive way to address new abusive debt-collection concerns, including those detailed in this article. At the state level, although the vast majority of states have statutes that address abusive debt-collection practices,[173] many of these state laws and regulations have also been on the books for decades, with few states seeking to improve them for the benefit of consumers and some states even rolling back protections.[174]

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[172] 15 U.S.C. § 1692(a), (e) (2012).

[173] *See* Nat'l Consumer Law Ctr., Fair Debt Collection, § 10.2.1 ("All but six states have statutes specifically dealing with abuses by debt collectors.").

[174] *See, e.g.*, 2015 Wis. Act 55 (A.B. 117) (2016) (reducing pleading requirements under the Wisconsin Consumer Protection Act); W. Va. Code Ann. § 46A-2-125(d) (West 2016) (setting a high maximum number of allowed calls a debt collector can make to a person at thirty calls per week and high limit of number of conversations at ten conversations per week); 2013 Tenn. Pub. Acts Ch. 186 (S.B. 224) (2016) (loosening evidentiary standards for business records used in support of credit card cases in state courts, sanctioning debt buyers' use of records created by the banks (including electronic spreadsheets), and overturning a state Supreme Court decision requiring more reliable documentation); 2013 Ark. Acts 1495 (2016) (establishing a presumption of accuracy in favor of the creditor or debt buyer in credit card debt cases of the amount owed and of ownership of the debt, placing the burden of disproving that presumption on the consumer); Ariz. Rev. Stat. Ann. §§ 44-7804, 44-7805 (2016) (loosening evidentiary standards in uncontested credit card debt collection cases by establishing minimal requirements for the documentation needed to prove the amount owed on a credit card).

In this part, I offer policy solutions for addressing the abusive collection practices and correlated consumer harms highlighted in this article. The solutions focus on addressing the broad range of problems that flow from the debt-buying industry business model, including the heavy reliance on debt collection litigation. Specifically, the recommendations can be categorized as follows: (a) changes to industry practices; (b) debt-collection litigation reforms; (c) enhanced support for consumers; and (d) effective enforcement of laws.

In discussing these policy solutions, I draw on examples of recent reform attempts across the country, offering suggested improvements as necessary. Many of these policy solutions are still quite new, and the full impact of these reforms are unknown. Anecdotal evidence suggests, however, that they are making a "profound and immediate" impact.[175] Annual reports from publicly traded debt buyers also indicate that increased attention to the issues surrounding debt selling and buying and the abuses associated with debt collection litigation have affected business. For example, according to one large debt buyer, there has been a significant reduction in the supply of charged-off debt available for purchase due to regulatory changes.[176] Another publicly traded debt buyer lists the changing regulatory environment as a potential risk factor for the company: "[O]ur ability to collect . . . may be negatively impacted by orders, laws or regulations which require that certain types of account documentation be in our possession prior to the institution of any collection activities."[177]

The recommendations outlined here reflect the normative goals laid out in the FDCPA, namely, to level the playing field between debt collectors and consumers. In doing so, the law recognizes the various societal and individual harms abusive debt collection practices cause and thus aims to remove any unfair leverage that collectors have over consumers to extract wrongful payments from them.

While these proposals represent significant changes in industry practices and thus will likely include costs to businesses, the proposals also have the potential to benefit collectors. With more accurate, detailed, and complete information, debt collectors can be sure they are collecting legitimate debts. Moreover, the costs associated with tracking down the right consumer or defending against wrongful collection attempts will decrease. Consumers,

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[175] N.C. Justice Ctr., Comment to the Consumer Financial Protection Bureau (Feb. 28, 2014), https://www.regulations.gov/document?D=CFPB-2013-0033-0355 [https://perma.cc/V7K8-4M32] (discussing impact of North Carolina's Consumer Financial Protection Act that brought much needed reforms to debt collection and debt collection litigation by debt buyers, including a dramatic drop in case filings); *see also* Attorneys Gen. of Ariz., et al., Comment to the Consumer Financial Protection Bureau at 9 (Feb. 28, 2014), https://www.regulations.gov/document?D=CFPB-2013-0033-0395 [https://perma.cc/2NHS-65TS].

[176] *See* Encore Capital Grp., Annual Report (Form 10-K) 14 (Feb. 24, 2016) ("We believe that this reduction in supply is also the result of certain financial institutions temporarily halting or curtailing their sales of charged-off accounts in response to increased regulatory pressure on financial institutions.").

[177] PRA Grp., Annual Report (Form 10-K) 19 (Apr. 26, 2016).

likewise, can be more certain that they are being pursued for debts they indeed owe and for the correct amounts.

A. Regulators Should Require Changes in Industry Practices to Prevent Abusive Debt Collection Practices

At the heart of many debt collection abuses and harms detailed in Parts II and III is the debt-buying business model. The large-scale sale and purchase of old debts, with limited information and documentation supporting the debts, coupled with the "lawsuit mill" approach to debt collection litigation provide few incentives for debt buyers to ensure accuracy or legitimacy of the debts and information used in collecting the debts. Changes to the industry's structure and business model are necessary to protect consumers against abusive practices. These solutions include: (1) requiring increased and accurate information in the debt collection process; (2) prohibiting the sale of debts "as is" and without warranties; (3) banning collection activity without sufficient information and documentation; and (4) prohibiting the sale and collection of certain debts, including time-barred debts.

1. Require Increased and Accurate Information and Documentation to be Transferred in the Debt-Collection Process

Creditors, debt collectors, and debt buyers should be required to pass on and make available more accurate information and account-level documentation in the debt-collection market. Many of the abuses and harms experienced by U.S. households subject to debt collection stem from the very limited information and documentation included when accounts are transferred from creditor (or debt buyer) to debt collector or debt buyer. Currently, there are few standards in place to regulate the flow of information in the debt-collection market.

More specifically, federal and state regulators, including the Office of the Comptroller of the Currency (OCC), the federal regulator for national banks, the CFPB, and other banking regulators, like the Federal Deposit Insurance Company (FDIC) or state financial services regulators, should require increased and accurate documentation and information for each debt sold at the time of sale or transfer. This information includes (1) documentation and information necessary to substantiate and verify the debt (i.e., information on the debt, the original creditor, the amount of the debt, the terms and conditions applicable to the account, and that the debt buyer is the true and only owner of the debt), (2) evidence that debt buyers must have to file lawsuits in state courts, and (3) additional information about the consumer, such as past collection history, any disputes on the debt, and whether the consumer has an attorney. If the information or documentation is incomplete, inaccurate, or does not exist, creditors and debt buyers should be prohibited from selling or purchasing the debt. Finally, any additional

information or documentation obtained following the acquisition of a debt must also be passed on to subsequent debt buyers.

These commonsense policy reforms have the potential to benefit both industry actors and consumers. For debt collectors, having more extensive information and documentation about consumers and the underlying debt will enable the more efficient collection of debt by ensuring they are pursuing the right person for the right amount of money. Consumers, on the other hand, will face fewer instances of being pursued or sued for debt owed by someone else or debt that they have already paid, settled, or discharged in bankruptcy.

Despite multiple calls over the years for this reform,[178] the concept has only recently taken hold. The OCC issued a guidance bulletin on banks' sale of charged-off debt in 2014, more than a decade after the debt-buying industry emerged.[179] The guidance makes clear that selling debt to debt buyers has the potential to expose banks to increased risk and expose consumers to debt-collection abuses:

> [B]anks must be cognizant of the significant risks associated with debt-sale arrangements, including operational, compliance, reputation, and strategic risks. Accordingly, banks that engage in debt sales should do so in a safe and sound manner and in compliance with applicable laws—including consumer protection laws—taking into consideration relevant guidance.[180]

To mitigate those risks and reduce the potential of harm to individuals while selling debt, the guidance states that banks should "[p]rovide accurate and comprehensive information regarding *each debt sold, at the time of sale*."[181] This information includes "copies of underlying account documents, and the related account information," an itemization of the amount owed, dates of last payment and default, and information about disputes or unresolved fraud claims for each account sold.[182] The breadth of the information and documentation required, the fact that it must be passed on for each account at the time of sale, and the requirement that the information should be accurate are necessary policies that ensure that adequate information is passed on in the debt-collection process, thus limiting the ability of collectors to engage in abusive debt-collection practices.

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[178] *See, e.g.*, Appleseed & Jones Day, *supra* note 44; Repairing a Broken System, *supra* note 66; Wilner & Sheftel-Gomes, *supra* note 27; Rick Jurgens & Robert J. Hobbs, Nat'l Consumer Law Ctr., The Debt Machine: How the Collection Industry Hounds Consumers and Overwhelms Courts 24–26 (2010), https://www.nclc.org/images/pdf/debt_collection/debt-machine.pdf [https://perma.cc/P2J6-LWKW]; Collecting Consumer Debts, *supra* note 17; Gov't Accountability Office, *supra* note 27, at 51–52.

[179] Office of the Comptroller of Currency, OCC Bulletin 2014-37, Consumer Debt Sales (Aug. 4, 2014), http://www.occ.treas.gov/news-issuances/bulletins/2014/bulletin-2014-37.html [https://perma.cc/DPL7-W89E].

[180] *Id.*

[181] *Id.* (emphasis added).

[182] *Id.*

Similarly, in a recent outline of potential proposals for its upcoming debt-collection rulemaking, the CFPB is considering provisions that will require debt collectors to pass on any information learned in the debt-collection process after acquiring a debt to subsequent debt collectors.[183] This information includes any dispute history of the debt, information about the consumer, and information about previous collection attempts.[184] Again, it is a sound policy solution that will ensure collectors have the most recent and relevant information when collecting debts.

A number of enforcement actions taken by the OCC, CFPB, and state attorneys general over the past three years likewise heighten requirements for banks engaged in debt sales.[185] These complaints, all involving JPMorgan Chase, alleged that Chase sold bad debts and enabled illegal debt buyer collection practices by knowingly selling faulty debts.[186] The settlement agreements require the bank to provide to debt buyers (1) account-level information and documentation about the consumer and the account at the time of sale and (2) additional information following the sale of the debt.[187]

Despite the recent regulatory activity, more action is needed. The OCC's bulletin on debt sales is simply guidance—it does not carry the force of a rule—and is missing key reforms that could help prevent abusive debt-collection practices by debt buyers. For example, while the guidance makes clear that "[c]ertain types of debt are not appropriate for sale," there is no explicit ban on the sale of any debt, including the sale of debt lacking the documentation outlined in the guidance.[188]

Additionally, the OCC and CFPB are the only regulators to act on the issue, leaving many common debt sellers that are entirely unregulated or overseen by other regulators[189] free to continue troublesome debt sales prac-

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[183] *See* Consumer Fin. Prot. Bureau, *Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking: Outline of Proposals Under Consideration and Alternatives Considered*, Appendix E (2016), https://www.financialservicesperspectives.com/wp-content/uploads/sites/6/2016/07/Debt_Collector_and_Debt_Buyer_Proposals_Under_Consideration.pdf [https://perma.cc/R9DC-KS5D].

[184] *See id.*

[185] *See, e.g.*, Consent Order, Chase Bank, USA N.A. and Chase Bankcard Services, Inc., CFPB No. 2015-CFPB-0013 (July 8, 2015), http://files.consumerfinance.gov/f/201507_cfpb_consent-order-chase-bank-usa-na-and-chase-bankcard-services-inc.pdf [https://perma.cc/43MS-467T] [hereinafter Chase Consent Order 2015]; Assurance of Voluntary Compliance, Chase Bank, USA N.A. and Chase Bankcard Services, Inc., CFPB No. 2015-CFPB-0013 (July 8, 2015), https://www.iowaattorneygeneral.gov/media/cms/Chase_Final_AVC_with_Signatures_286FD4A00AB23.pdf [https://perma.cc/KJ68-UQYT] [hereinafter Chase Assurance of Voluntary Compliance 2015]; JPMorgan Chase Consent Order 2013, *supra* note 119.

[186] *See* Chase Consent Order 2015, *supra* note 185; Chase Assurance of Voluntary Compliance 2015, *supra* note 185; JPMorgan Chase Consent Order 2013, *supra* note 119.

[187] *See, e.g.*, Chase Consent Order 2015, *supra* note 185 (requiring bank to transfer documentation providing information about the debt, original creditor, and consumer at the time of sale for each debt and to make available to the debt buyer, at no cost to the debt buyer, additional documentation on the account, such as account statements and the credit agreement, for a minimum of three years after the sale of the debt).

[188] Office of the Comptroller of Currency, *supra* note 179.

[189] These other common sellers include state-chartered banks and credit unions, non-depository financial institutions regulated at the state level, utility or telecommunication com-

tices. Finally, the CFPB's outline of its forthcoming debt collection rule only applies to third-party debt collectors and does not address requirements for creditors and debt sellers.[190] For any strong rule on debt collectors and debt buyers to be effective, the CFPB must also require creditors to pass on complete and accurate information in the debt-collection process.

2. Ban the Sale of Debts "As Is" and Without Warranties

Not only should regulators require more and accurate information in the debt sales process, but they must also prohibit banks and creditors from selling debts "as is" by requiring banks to retain liability for inaccuracies in the information passed on or the amounts claimed to be owed. Ultimately, the information a debt collector receives from a creditor is only as good as the representations and warranties included in the purchase and sale agreement or transfer contract. When debts are sold "as is" and without liability for any inaccuracies, the wrong people are sued or people are pursued for the wrong amount of money. Federal and state banking and financial regulators are in the ideal position to prevent these harms from the start of the process (debt sales) with strong regulations, in addition to effective supervision and enforcement actions.

Even though the OCC's guidance on debt sales encourages banks to "provide accurate and comprehensive information regarding each debt," there is no prohibition on selling debts "as is," nor is there a requirement that banks retain liability for the accuracy of accounts sold in the OCC's guidance on debt sales.[191] Likewise, in its consent agreement with JPMorgan Chase, instead of banning the sale of debts "as is," the CFPB simply requires the bank to "implement effective processes, systems, and controls to provide accurate documentation and information . . . in connection with [d]ebt [s]ales."[192] The sale of debts with adequate representations and warranties, not "as is," simply reinforces the requirement that the debts sold must be accurate and complete.

3. *Prohibit Collection Activity if Collectors Lack Sufficient Information and Documentation*

Just as more information should be mandated for each debt sold at the time of sale, that same information and documentation must be required in

panies, debt buyers that resell debts, and so-called "debt brokers," companies that purchase, repackage, and resell debts to debt buyers without attempting to collect the debts.

[190] *See* Consumer Fin. Prot. Bureau, *supra* note 183, at 4 ("The proposals under consideration . . . would apply to . . . the following categories for debts acquired in default: collection agencies, debt buyers, collection law firms, and loan servicers . . . . The Bureau expects to convene a second proceeding in the next several months for creditors and others engaged in collection activity who are covered persons under the Dodd-Frank Act but who may not be 'debt collectors' under the FDCPA.").

[191] Office of the Comptroller of Currency, *supra* note 179.

[192] Chase Consent Order 2015, *supra* note 185.

the debt-collection process. Regulators should prohibit debt collectors from collecting debts, in and out of court, without the necessary information and documentation. Collectors should be required to have and use information and original account-level documentation that is sufficient to substantiate claims of indebtedness as outlined above, not only when a consumer questions the collection attempt or defends a court action.

This proposal is, once again, a commonsense reform that will help to limit unwarranted collection attempts and lawsuits, yet is one that has only gained traction in recent years, particularly at the state level. In 2009, North Carolina passed the Consumer Economic Protection Act,[193] one of the first pieces of state legislation aimed at stopping debt-collection litigation abuses by debt buyers.[194] The law makes it an unfair practice to collect debt without proof of ownership and "reasonable verification" of the debt.[195] Similarly, California's Fair Debt Buying Practices Act[196] prohibits debt buyers from making written statements in an attempt to collect a debt without possessing information to establish ownership of the debt, the amount owed, and the date of default.[197] It also requires the debt buyer to have access to the account contract or other document showing the consumer's agreement to the debt and gives consumers the right to request the information and documentation the debt buyer must have.[198]

The New York Department of Financial Services issued recent debt-collection regulations requiring debt collectors to have and provide certain information about the debt with initial collection attempts, including an itemization of the debt following charge-off and the name of the original creditor.[199] The regulations also set out what collectors need to do to substantiate a charged-off debt when a consumer disputes the debt.[200] Once a consumer disputes the debt in writing, the debt collector must provide certain documentation and information establishing the debt and proof of ownership

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[193] *See* 2009 N.C. Sess. Law 2009-573 (S.B. 974).

[194] *See, e.g.*, Attorneys General of Arizona, et al, *supra* note 175, at 5–7 (listing state legislative reforms, starting with North Carolina in 2009); Andrew E. Hoke, *NC's Controversial Debt Buyer Law: Part of the Changing Collection Landscape*, THE NAT'L LIST BLOG (Aug. 16, 2016), https://blog.nationallist.com/2016/08/16/ncs-controversial-debt-buyer-law-part-of-the-changing-collection-landscape/ [http://perma.cc/SFCA-QHIA] ("The North Carolina legislature passed the Consumer Economic Protection Act (CEPA) in 2009. It was one of the first laws in the U.S. to impose requirements on debt buyers.").

[195] N.C. GEN. STAT. ANN. § 58-70-115 (West 2016) (requiring documentation of the name of the original creditor, the name and address of the consumer as it appeared in the original creditor's records, the original account number for the consumer's account, and an itemization of the amount claimed to be owed, including all fees and charges to meet the bar of "reasonable verification").

[196] 2013 Cal. Legis. Serv. Ch. 64 (S.B. 233) (West) (codified at CAL. CIV. CODE §§ 1788.50–.64 (West 2016), CAL. CIV. PROC. CODE §§ 581.5, 700.010, 706.103–.104, 706.10, 706.122 (West 2016)).

[197] *See* CAL. CIV. CODE § 1788.52(a) (West 2016).

[198] *See id.* at § 1788.52(b)–(c).

[199] N.Y. COMP. CODES R. & REGS. tit. 23, § 1.2 (2015).

[200] *See id.* at § 1.3.

of the debt within sixty days of the dispute and must suspend all collection attempts until the required information is provided.[201]

At the federal level, in a series of enforcement actions against debt buyers, the CFPB established new federal standards for debt buyers prohibiting them from collecting debts without a "reasonable basis."[202] Specifically, the debt buyers are banned from claiming that a consumer owes a specific debt unless the companies can substantiate the claim through a review of original account-level documentation reflecting the specific consumer and establishing amount owed.[203] The CFPB is considering similar, though somewhat weaker, standards for all debt collectors, not just those involved in the enforcement actions, in its upcoming debt-collection rule.[204] The agency is proposing that debt collectors possess and review certain "fundamental information" (but not documentation) about the consumer, debt, and ownership of the debt, along with a review for "warning signs" and a "representation of accuracy from the creditor," before pursuing collection attempts in order to establish a "reasonable basis for claims of indebtedness."[205]

These state and federal reform efforts certainly reflect improvements on the status quo, yet each of these actions are missing key pieces of information or requirements that are needed to help stop debt-collector abuses. For example, the New York debt-collection regulations do not require collectors to have information or documentation establishing a debt collector's right to collect the debt prior to collecting—the collector need only provide it if a consumer disputes a debt *in writing*.[206] As a result, New York individuals are still at risk of being pursued for debt they do not owe. Instead, this information should be required before collectors pursue any individual for a debt, not only when an individual lodges a dispute.

Similarly, even though the CFPB is considering proposing that debt collectors possess and review certain "fundamental information" before pursuing collection attempts, the standards included in the proposal are not strong enough. The proposal's framework suggests that debt collectors *could, but are not required to*, obtain and review certain sets of information and documentation at different stages in the debt-collection process—initial collection attempts, after a consumer disputes, before filing a lawsuit—with

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[201] *Id.* at § 1.4. This information includes a copy of judgment against the consumer or a signed contract or application, the charge-off statement, a description of the complete chain of title (including date of each sale or transfer), and documents reflecting the prior settlement reached with the consumer. *See id.* at §1.4(c).

[202] *See, e.g.*, Portfolio Recovery Consent Order 2015, *supra* note 76; Encore Capital Consent Order 2015, *supra* note 76.

[203] *See* Portfolio Recovery Consent Order 2015, *supra* note 76; Encore Capital Consent Order 2015, *supra* note 76.

[204] *See* Consumer Fin. Prot. Bureau, *supra* note 183, at 6–13.

[205] *See id.* at 7–9.

[206] *See* N.Y. COMP. CODES R. & REGS. tit. 23, § 1.4 (2015).

more information required at each stage.[207] The agency states that collectors need not have each piece of information, nor would it require them to confirm the information they receive.[208]

As a specific example, although the proposal suggests collectors should have a limited amount of "fundamental information" before they make the first collection attempt, "[that] information could still be conveyed in a spreadsheet, as is done typically today, without transferring the full underlying records."[209] Yet, electronic spreadsheets are easily manipulated. Without the underlying documentation supporting the claim of indebtedness (and right to collect), there is no way to confirm that the information in the spreadsheet is correct. Though the proposal suggests that collectors obtain a "representation of accuracy from the creditor," that representation is not an actual guarantee that the information is accurate. Instead, that representation only guarantees that the information transferred to the debt collector "is identical to the information in the debt owner's records."[210]

Simply put, the CFPB proposal does not require any baseline amount of accurate information or original account-level documentation that a debt collector must have in its possession and review before attempting to collect a debt. As a result, there is no prohibition on the sale of debt if the seller cannot provide the information necessary to substantiate a debt. Such a superficial and malleable standard has the potential to entrench abusive debt-collection practices even further by displaying federal approval for business practices that result in substantial harm to individuals and communities and "increase downstream costs to debt collectors."[211]

The CFPB states that it does not want to take an "overly prescriptive approach" and that it "intends to provide flexibility,"[212] but experience and research show that even if debt collectors can obtain or actually have information, they do not use it if they are not required to do so.[213] If the CFPB's proposal to address debt-collection abuses is adopted as currently outlined, little will change in the debt-collection market and many of the abuses currently harming consumers will continue.

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[207] Consumer Fin. Prot. Bureau, *supra* note 183, at 6–13 (emphasis added) (discussing the information and documentation that collectors may obtain and review at each stage of collection).

[208] *Id.* at 8 ("A collector could acquire a reasonable basis without obtaining each specific element on the list from the debt owner, for example, by substituting some or all of the information identified by the proposal with additional or alternative information.").

[209] *Id.*

[210] *Id.*

[211] *Id.* at 6.

[212] *Id.* at 7.

[213] *See* DEBT BUYING INDUSTRY, *supra* note 18, at 36 ("Thus, the Commission's analysis reveals that the debt buyers usually had all the information that the FDCPA currently requires debt buyers to provide consumers in validation notices at the beginning of the collection process . . . . In the Commission's experience, debt collectors, including debt buyers, generally do not provide this information to consumers when they provide consumers with validation notices.").

Critically, the agency should require that debt collectors and their attorneys possess and use information guaranteed by the creditors and original account-level documentation at the outset of collection substantiating the debt, establishing the proper individual being pursued, and establishing ownership of a debt before attempting to collect a debt. Requiring this documentation and information will help to ensure the right person is being pursued for the right amount of money by the proper debt collector.

4. Prohibit the Sale and Collection of Certain Debts

There are certain debts that simply should not be sold or be the subject of collection attempts or lawsuits. These debts include debts already paid or settled, debts discharged in bankruptcy, debts that are the result of identity theft or other fraudulent activity, and debts that cannot be substantiated with documentation. Federal and state regulators alike should ban the sale and collection of these debts.

Simply put, collection attempts and lawsuits on these types of debts are deceptive and abusive.[214] When debt buyers pursue individuals for these debts, they are forcing consumers to defend themselves and prove a negative (i.e., that the debt is not valid or is not owed), even though the burden should rightfully be on the debt collector to establish that a specific consumer owes a specific, valid debt.[215] Additionally, the collection of time-barred and other invalid debts puts consumers at greater risk of deceptive and abusive debt-collection practices, in large part because many consumers are unaware of their rights with respect to the collection of these debts, particularly time-barred debts.[216]

Debt that is beyond the statute of limitations should not be sold to debt buyers by original creditors or subsequently by debt buyers to other debt buyers. Lawsuits on time-barred debt should likewise be banned by the CFPB and states—they are already considered deceptive under federal law by most courts.[217]

Indeed, over the past decade, the most extensive reform efforts have focused on the collection of and lawsuits on time-barred debt. A number of

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[214] *See, e.g.*, OFFICE OF THE COMPTROLLER OF CURRENCY, *supra* note 179 ("Certain types of debt are not appropriate for sale. Debt clearly not appropriate for sale, because it likely fails to meet the basic requirements to be an ongoing legal debt, includes . . . " debt that has been settled or is in the process of settlement, debt protected by bankruptcy protection, debt due to fraud, and debt lacking evidence of ownership). *See generally* Encore Capital Consent Order 2015, *supra* note 76 (holding collection of time-barred debt to be a deceptive practice).

[215] *See supra* notes 45–58 and accompanying text; *see also* 15 U.S.C. § 1692f (2)(A) (making it illegal to falsely represent "the character, amount, or legal status of any debt"); Consumer Fin. Prot. Bureau, *supra* note 183, at 7 ("When a collector seeks to have a specific consumer pay a specific debt, the collector is at least implicitly claiming that the collector has reasonable support for its claims that the individual owes that debt or amount and that the collector is legally entitled to collect the debt.")

[216] *See, e.g.*, notes 66–69 and accompanying text.

[217] *See* note 67 and accompanying text.

states now prohibit lawsuits on time-barred debts.[218] Recent court rules established in New York require the attorney for the plaintiff creditor or debt buyer to submit a form signed by the attorney to the court affirming that the case was filed within the applicable statute of limitations.[219]

The CFPB is considering prohibiting lawsuits and threats of lawsuits on time-barred debts in its debt-collection rulemaking process.[220] At the state level, legislation or court rules should shift the burden of establishing that the debt is not time-barred to collectors and creditors suing, much as New York did.[221] Shifting the burden will operate to slow the "lawsuit mill" business model by forcing debt buyers and their attorneys to affirmatively ensure that the statute of limitations has not expired before filing a lawsuit instead of taking advantage of individuals who do not appear or otherwise adequately defend their rights.

Finally, the collection of time-barred debt should also be prohibited, particularly where consumers are not advised of the consequences of payment on a time-barred debt.[222] Three states prohibit all collection of time-barred debt.[223] A number of recent state policy reforms as well as federal enforcement actions allow the collection of time-barred debt so long as the collector provides disclosure of the status of the debt[224] and in some states,

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[218] *See, e.g.*, CAL. CIV. CODE § 1788.56 (West 2014); ME. STAT., tit. 32, § 11013(7) (2015); N.C. GEN. STAT. § 58-70-115 (2009) (unfair practice for debt buyer to file lawsuit or arbitration proceeding for time-barred debt); WASH. REV. CODE § 19.16.250(23) (2016); 2016 Conn. Acts 16-65 (Reg. Session); 2016 Md. Laws Ch. 579; *see also* Complaint, Commonwealth v. Lustig (Suffolk Co. Sup. Ct. 2015) (complaint for suits on time-barred debt, among other abuses); Press Release, N.Y. Att'y Gen. Office, A.G. Schneiderman Obtains Settlement with Fourth Debt Buyer Vacating $1.7m in Improperly Obtained Debt Collection Actions (Apr. 15, 2015), http://www.ag.ny.gov/press-release/ag-schneiderman-obtains-settlement-fourth-debt-buyer-vacating-17m-improperly-obtained [https://perma.cc/5NDJ-46RH] [hereinafter NYAG Debt Buyer Settlement] (vacating judgments obtained on time-barred debt); Press Release, N.Y. Att'y Gen. Office, A.G. Schneiderman Obtains Settlement From Major Debt Buyer Who Filed Thousands of Time-Barred Debt Collection Actions (Jan. 9, 2015), http://www.ag.ny.gov/press-release/ag-schneiderman-obtains-settlement-major-debt-buyer-who-filed-thousands-time-barred [https://permxa.cc/T9VM-8K9H] (vacating judgments obtained on time-barred debt); Press Release, N.Y. Att'y Gen. Office, A.G. Schneiderman Announces Settlements with Two Major Consumer Debt Buyers for Unlawful Debt Collection Actions (May 8, 2014), http://www.ag.ny.gov/press-release/ag-schneiderman-announces-settlements-two-major-consumer-debt-buyers-unlawful-debt [https://perma.cc/C5UB-TVY8] (vacating judgments obtained on time-barred debt).

[219] N.Y. COMP. CODES R. & REGS. tit. 22, §§ 202.27-a(e), 208.14-a(e), 210.14-a(e), 212.14-a(e) (2016) (requiring creditor or debt buyer attorney to file a form signed by the attorney that the case was filed within the applicable statute of limitations).

[220] *See* Consumer Fin. Prot. Bureau, *supra* note 183, at 19–20.

[221] *See* N.Y. COMP. CODES R. & REGS. tit. 22, §§ 202.27-a(e), 208.14-a(e), 210.14-a(e), 212.14-a(e) (2016).

[222] *See supra* notes 61–65 and accompanying text (describing the consequences of making payment on time-barred debt).

[223] WIS. STAT. § 893.05 (2015) (extinguishing the debt and remedy upon the running of the statute of limitations); MISS. CODE ANN. § 15-1-3 (2016) (extinguishing debt and remedy when statute of limitations expires); N.C. GEN. STAT. § 58-70-115(4) (2016) (declaring unfair practice for a debt buyer to collect time-barred debt).

[224] *See, e.g.*, CAL. CIV. CODE § 1788.52(d)(3) (West 2016); CONN. GEN. STAT. § 36a-805(14) (2016); Encore Capital Consent Order 2015, *supra* note 76; Consent Decree at 11,

the consequences of making a payment on a time-barred debt.[225] Yet other states provide that collectors may attempt to collect on time-barred debt but clarify that a payment on or affirmation of the debt does not revive the limitations period for purposes of filing a lawsuit.[226]

The CFPB, in its proposals on regulating debt collection, takes the latter approach of allowing the collection of time-barred debt only if the collector provides a disclosure of the status of the debt and potential legal consequences and the debt collector waives the right to sue on the debt.[227] However, such disclosures may not be enough to adequately protect consumers from abusive debt-collection practices associated with time-barred debt.[228] In fact, as the CFPB's own research suggests, "consumers may not fully understand such . . . disclosure[s], because it seems counterintuitive to them."[229] Therefore, reforms stronger than disclosure are required to adequately protect consumers and limit incentives collectors have to seek payment on time-barred debts.

B. Establish Court-Level Reforms to Prevent Debt-Collection Litigation Abuses

Because "consumers face a higher risk of harm during litigation than during other points in the collection process"[230] and actually are exposed to significant harms,[231] policy reforms have rightfully focused on ensuring adequate protections during debt-collection litigation. While federal regulators can set standards to ensure that statements made in the context of litigation are not unfair, deceptive, or misleading under the FDCPA, only states can

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United States. v. Asset Acceptance, LLC (M.D. Fla. 2012), https://www.ftc.gov/sites/default/files/documents/cases/2012/01/120131assetconsent.pdf [https://perma.cc/C8EY-Y3JR].

[225] *See, e.g.*, N.Y. Comp. Codes R. & Regs. tit. 23, § 1.3(b)(5); 940 Code Mass. Regs. 7.07(24) (2012); N.M. Code R. § 12.2.12.9(A)(5) (LexisNexis 2010). Private litigation has also resulted in case law holding that settlement offers made by debt collectors on time-barred debts and where the collectors do not disclose consequences of making a payment on a time-barred debt violate the FDCPA. *See, e.g.*, Buchanan v. Northland Grp., Inc., 776 F.3d 393 (6th Cir. 2015); McMahon v. LVNV Funding, Inc., 744 F.3d 1010 (7th Cir. 2014).

[226] *See, e.g.*, Me. Rev. Stat. Ann., tit. 32, § 11013(8) (2015); Minn. Stat. § 541.053 (2016).

[227] Consumer Fin. Prot. Bureau, *supra* note 183, at 21. The reasoning seems to be that the disclosure plus waiver will be sufficient to protect consumers against unwittingly paying on time-barred debt and reviving the statute of limitations by eliminating one incentive a collector has to seek a payment on a time-barred debt (i.e., revival of the limitations period).

[228] *See, e.g.*, Hosea H. Harvey, *Opening Schumer's Box: The Empirical Foundations of Modern Consumer Finance Disclosure Law*, 48 U. Mich. J.L. Reform 59, 62 (2014) (concluding that "generic credit card disclosures are not an effective solution for any of the problems associated with credit card use"); Jeff Sovern, *Can Cost-Benefit Analysis Help Consumer Protection Laws? Or at Least Benefit Analysis?*, 4 U.C. Irvine L. Rev. 1241, 1245–52 (2014) (discussing ineffectiveness of TILA disclosures pre-Great Recession); April Kuehnhoff & Margot Saunders, Nat'l Consumer Law Ctr., Zombie Debt: What the CFPB Should Do About Attempts to Collect Old Debt 2 (2015), http://www.nclc.org/images/pdf/debt_collection/report-zombie-debt-2015.pdf [https://perma.cc/88XF-J2UG].

[229] Consumer Fin. Prot. Bureau, *supra* note 183, at 21.

[230] *Id.* at 12.

[231] *See supra* Part III.

establish local judicial reforms.[232] Furthermore, despite the widespread nature of debt-collection litigation abuses, relatively few states have enacted judicial reforms to address the problems detailed in this article. Without statewide court reforms, changes to industry business practices will have limited effect on ending abusive debt-collection practices. These policy solutions include: (1) tightening evidentiary requirements for lawsuits and (2) increasing judicial review of debt-collection lawsuits.

1. Tighten Evidentiary Requirements for Debt-Collection Lawsuits

State legislatures should adopt legislation or state court systems should establish court rules that require debt buyers and collection law firms to possess and use more detailed and accurate information and evidence, including original account-level documentation when they sue to collect on the debts. Further, states should require plaintiffs in all debt-collection cases to establish through admissible evidence the debtor-defendant's underlying responsibility for the debt, the plaintiff's own standing to sue by virtue of an uninterrupted chain of title, and accurately calculated and legally sustainable charges, interest, and fees. Though much of this information is the same information that debt collectors should review and use when pursuing extralegal collections, due process and judicial integrity concerns mandate them in court proceedings.

Debt-collection litigation reforms have received the most attention around the country, though success at passing such reforms has been limited. Years after the federal government issued reports calling for state courts to require meaningful evidence in support of cases,[233] only a handful of states have passed such reforms.[234] While these reform efforts vary in detail, all require debt buyers and collection law firms to have, use, and file with the court enhanced information and documentation when filing complaints and seeking default judgments against consumers. For example, under North Carolina's law, debt buyers that file debt-collection lawsuits must attach to the complaint a copy of the contract signed by the consumer "evidencing the original debt" and proof of ownership of the debt.[235] Before a default judg-

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[232] *See generally* Erie R. Co. v. Tompkins, 304 U.S. 64, 78–79 (1938) ("Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state . . . .").

[233] *See, e.g.*, REPAIRING A BROKEN SYSTEM, *supra* note 66, at 14–21.

[234] *See, e.g.*, 2016 Conn. Acts 16-65 (Reg. Session); 2016 Md. Laws, Ch. 579; 2013 Cal. Legis. Serv. Ch. 64 (S.B. 233) (West); 2013 Minn. Sess. Law Serv. Ch. 104 (H.F. 80) (West); 2009 N.C. Sess. Laws 2009-573 (S.B. 974); CHIEF ADMIN. JUDGE OF COURTS, ADMIN. ORDER OF CHIEF ADMIN. JUDGE OF COURTS AO/185/14 (2014), https://www.nycourts.gov/rules/ccr/AO_185.14.pdf [https://perma.cc/CB62-9KMC] [hereinafter NY Chief Admin. Judge Order AO/185/14] (codified at N.Y. COMP. CODES R. & REGS. tit. 22, §§ 202.27-a, 202.27-b, 208.6(h), 208.14-a, 210.14-a, 210.14-b, 212.14-a, 212.14-b (2016)); ADMIN. DIRECTIVE OF THE CHIEF JUDGE OF THE COURT OF COMMON PLEAS FOR THE STATE OF DEL. NO. 2012-2 (2012) (supersedes DEL. CT. COM. PL. ADMIN. DIR. NO. 2011-1).

[235] 2009 N.C. Sess. Laws 2009-573 (S.B. 974).

ment is entered in a case brought by a debt buyer, the debt buyer must establish the debt using admissible evidence, including an itemization of the debt and all fees and charges.[236]

Most recently, New York established comprehensive court rules for all debt-collection cases filed in the state.[237] Much like other state policy changes, the New York court rules focus on eliminating frivolous collection lawsuits by ensuring that the creditor or debt buyer has sufficient information and evidence to establish that the correct consumer is being sued, the amount claimed to be owed is correct, that the action is not barred by the statute of limitations, and that the creditor or debt buyer has standing to sue by establishing complete chain of title.[238] Significantly, in actions filed by debt buyers, the reforms established by New York courts require affidavits from the original creditor and each subsequent owner to establish the debt and the complete chain of ownership.[239]

Even when a state successfully passes reforms, however, loopholes may remain. For example, the New York court rules for debt-collection cases apply only to collection lawsuits based on credit card debt.[240] This limitation is significant: there are numerous debts other than credit card debt, such as medical debt, utility bills, and student loan debt, that are subject to debt-collection litigation.[241] The rules also depend heavily on affidavits, raising robo-signing concerns.

Additionally, although the rules require debt buyers to submit a copy of the assignment or bill of sale of the account, they do not require that such documents include specific reference to the account subject to the lawsuit. However, this is little more than what is already filed in many cases, and as these cases have shown, debt buyers do little more than provide "evidence that some sort of bulk sale of accounts did occur" between a creditor and a debt buyer.[242] Specific reference in the assignment document to the account subject to the lawsuit is necessary—without it the collector cannot establish it has standing to sue.[243]

One common argument against tightening evidentiary and information requirements for debt-collection cases is that doing so will result in a reduc-

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[236] *Id.* at § 58-70-155.

[237] *See* NY Chief Admin. Judge Order AO/185/14, *supra* note 234.

[238] N.Y. COMP. CODES R. & REGS. tit. 22, §§ 202.27-a, 208.14-a, 210.14-a, 212.14-a (2016) (requiring additional proof for default judgments in consumer credit cases).

[239] *See id.*

[240] *See id.* at §§ 202.27-a(a)(1), 208.14-a(a)(1), 210.14a(a)(1), 212.14-a(a)(1) (2016) (defining "consumer credit transaction" as a "revolving or open-end credit transaction" and explicitly stating that the definition "does not include debt incurred in connection with, among others, medical services, student loans, auto loans or retail installment contracts").

[241] *See* DEBT BUYING INDUSTRY, *supra* note 18, at T-4. Although credit card debt is the most common form of debt purchased by debt buyers (and likely subject to lawsuits), the majority of debt bought and sold is in fact some other type of debt, such as medical debt, consumer loans, utilities or telecom debt, student loans, and others.

[242] Midland Funding, LLC v. Stimpson, No. CV-14-830, at *5 (Idaho Dist. Ct. Dec. 15, 2014), *available at* https://www.nclc.org/images/pdf/unreported/midland-v-stimpson_appellate_decision_12162014.pdf [https://perma.cc/NFR4-J3K4].

[243] *See supra* note 55 and accompanying text.

tion of credit available to consumers,[244] but research shows that this is not the case.[245] These reforms simply reiterate long-standing legal principles—that plaintiffs must have standing to bring suit and have sufficient evidence to establish the facts being alleged—and clarify what is specifically needed into order to establish standing and the facts of the case.

2. Increase Judicial Review of Debt-Collection Lawsuits

Even if additional evidence is required in debt-collection lawsuits, courts must nonetheless ensure that due process concerns are addressed and that cases are given adequate judicial review. Debt buyers or their law firms may still attempt to get default judgments based on evidence inadmissible in court.[246] In addition, the use of "hallway conferences," "judgeless courtrooms," or court clerk review of cases jeopardizes the legal rights of consumer defendants.[247] At best, the individuals reviewing the cases may make determinations on information and evidence about which they are not trained.[248] At worst, as in the case of "judgeless courtrooms," collection attorneys, not uninterested parties, are making decisions about the cases and approving potentially unaffordable settlement agreements between unrepresented consumers and debt-collection attorneys.[249]

The use of "judgeless courtrooms" should be eliminated since the harm to the consumer and integrity of the courts outweigh any efficiency benefits. Likewise, the use of "hallway conferences" should not be encouraged with unrepresented consumers—at the very least, there should be judicial review of any settlements arising from "conferences" with *pro se* consumers to ensure their legal rights are protected. Even in small claims courts, a modi-

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[244] *See* Todd J. Zywicki, *The Law and Economics of Consumer Debt Collections and Its Regulation* (George Mason Legal Sudies Research Paper No. LS 15-17 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2658326 [https://perma.cc/N87H-JTDD]; Viktar Fedaseyeu, *Debt Collection Agencies and the Supply of Consumer Credit* (Fed. Res. Bank of Phila. Working Paper No. 15-23 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2330451 [https://perma.cc/44X8-8WQW].

[245] *See, e.g.*, Leslie Parrish et al., Past Due: Debt-Collection Reforms that Protect Consumers Not Found to Restrict Credit Availability (2016), http://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl_past_due_debt_apr2016.pdf [https://perma.cc/GPH8-GVCN] (finding that debt-collection litigation reforms in Maryland and North Carolina did not result in consumer credit restrictions in those states).

[246] *See, e.g.*, Order, Portfolio Recovery Assocs., LLC v. Peach, Wake Co., N.C., Dist. Ct. (2016) (order granting motion to set aside default judgment and entry of default, finding that debt buyer plaintiff failed to comply with the requirements of the state's law requiring "properly authenticated business records" "to establish the amount and nature of the debt") (order on file with author).

[247] *See* Part III.C.

[248] *See, e.g.*, Terry Carter, *Debt-Buying Industry and Lax Court Review Are Burying Defendants in Defaults*, Am. Bar Assoc. J. (Nov. 1, 2015), http://www.abajournal.com/magazine/article/debt_buying_industry_and_lax_court_review_are_burying_defendants_in_default [https://perma.cc/3YGX-LM4V] (discussing concern that court clerks may be required to make legal determinations about information and documentation when reviewing debt-buyer cases).

[249] Albin-Lackey, *supra* note 3, at 57–60 (discussing Philadelphia judgeless court room).

cum of judicial review should be required to ensure that cases contain adequate support for the claims made. Judicial review will also ensure that consumers entering into to settlement agreements are not jeopardizing exempt funds that are necessary subsistence.

Increased judicial scrutiny may increase caseloads for local judges, but such an increase may not be significant if stronger state rules requiring detailed information and documentation in order to file lawsuits result in reducing the volume of cases filed in state courts. Even so, possible solutions exist to alleviate any potential uptick in caseloads. For example, courts in California are considering a checklist that court clerks "could use to winnow cases filed by debt buyers without wandering beyond their ministerial function and encroaching on a judicial one."[250] Other state and local courts use similar tools in small claims courts to ensure that service of process is proper, that sufficient required documentation is attached, and that the plaintiff establishes the amount owed through an itemization of the debt and its standing to sue through proof of ownership.[251]

C. Enhance Support and Protections for Consumers

Changes to industry business practices and court requirements are not enough to adequately protect consumers from abusive debt-collection practices. Most defendants in debt-collection cases who respond to the lawsuits are unrepresented and often unaware of their legal rights. To prevent debt buyers and their attorneys from using this fact to their advantage, more must be done to enhance support for *pro se* consumers during litigation and to protect them following a judgment. These protections are explored below in: (1) increasing legal support in court; and (2) improving asset and income protections.

1. Increase Legal Advice and Representation for Consumers

State and local bar associations and court systems, legal service providers and law school clinics should collaborate to establish programs that increase legal advice and representation for consumers. It is no surprise that studies show that legal representation and knowledge of legal rights help consumers defend their rights when faced with debt-collection lawsuits.[252] However, the vast majority of debt-collection cases end in default.[253] Some states have tried to make sure that defendants are receiving adequate notice of the lawsuits by requiring either advance notice of the intent to sue[254] or

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[250] Carter, *supra* note 248.

[251] *See, e.g.*, REPAIRING A BROKEN SYSTEM, *supra* note 66, at Appendix E (providing examples of state and local court judicial checklists for debt collection cases).

[252] *See supra* notes 152–55 and accompanying text.

[253] *See supra* notes 94–97 and accompanying text.

[254] *See* N.C. GEN. STAT. ANN. § 58-70-115(6) (West 2016) (making it an unfair practice for a debt buyer to file suit or initiate an arbitration proceeding against a consumer when the

sending an additional notice written in plain language informing the defendant that a case was filed against her.[255] Merely responding to and showing up for a case can result in better outcomes than a default judgment, though the potential for abuse remains.[256]

To address some of these concerns, various courts, legal services programs, and local bar associations have established in-court or same-day legal assistance programs. These programs allow unrepresented defendants to seek legal advice and representation for their cases from legal aid or volunteer attorneys or law school clinic students. For example, one district court in Michigan works with the local legal aid program to ensure that *pro se* defendants have the option to get legal advice about their cases—the court scheduled all debt-collection cases for the same morning every week when the legal aid program is always present to offer advice and sometimes representation.[257] Similar programs have been established in Maine,[258] New York City,[259] and in various jurisdictions throughout the country.[260]

These programs help to make sure that *pro se* defendants understand their rights when entering into settlement agreements or properly assert any legal defenses. In this way, debt buyers are not as likely to engage in unfair debt-collection practices such as pressuring consumers into making unaffordable settlement agreements that may also waive valid defenses to the underlying lawsuit. Though these programs may not provide full legal representation, they can nonetheless assist consumers in defending themselves and ensure that those who do respond are not treated unjustly by collection attorneys and the court system.

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debt buyer did not give the consumer at least thirty days' notice of its intent to file suit or initiate an arbitration proceeding).

[255] N.Y. COMP. CODES R. & REGS. tit. 22, §§ 202.27-b, 208.6(h), 210.14-b, 212.14-b (2016) (requiring plaintiffs in consumer credit cases to provide defendant consumers with additional notice of the filing of the case, which is mailed by the court clerk, and prohibiting a default judgment if the collector or creditor does not comply with the additional notice requirement or the additional notice is returned as undeliverable).

[256] Spector & Baddour, *supra* note 97, at 1463; Holland, *Junk Justice*, *supra* note 31, at 210.

[257] ALBIN-LACKEY, *supra* note 3, at 68–69.

[258] *See* ME. STATE BAR ASS'N, *Debtors' Fair Play Project*, 27 ME. B.J. 136 (Summer 2012) (describing the Debtors' Day in Court Project created by the Maine Volunteer Lawyers Project, which provides "know your rights" information and same-day representation for low-income consumers defending debt collection cases).

[259] *See* CLARO, http://www.claronyc.org/claronyc/default.html [https://perma.cc/3LZ3-QA8P].

[260] *See* APRIL KUEHNHOFF & CHERIE CHING, NAT'L CONSUMER LAW CTR., DEFUSING DEBT: A SURVEY OF DEBT-RELATED CIVIL LEGAL AID PROGRAMS IN THE UNITED STATES 11–20 (2016), http://www.nclc.org/images/pdf/debt_collection/debt-defense-survey-2016.pdf [https://perma.cc/8Y24-7DNQ] (providing multiple examples of projects created to offer legal representation and advice to low-income *pro se* consumers defending themselves in debt cases).

2. *Improve Income and Asset Protections for Consumers Subject to Judgments*

State legislatures and Congress should update state property exemption and wage garnishment laws to ensure that paying off an old debt (or multiple debts) does not push consumers into poverty. Though creditors certainly have the right to seek payment on judgments, individuals should not be left with insufficient money to meet basic living expenses or forced into poverty due to paying off such judgments. Yet this is exactly what happens for far too many people,[261] and states and the federal government have done little to help. Besides assisting consumers, increasing income and asset protections may also have the benefit of reducing reliance on "safety net" programs, such as food assistance programs (colloquially known as food stamps).

D. Ensure Effective Enforcement of Federal and State Debt-Collection Laws and Regulations[262]

Federal and state actors should rigorously enforce debt-collection laws and regulations. Strong laws are effective only if they are consistently defended. Furthermore, while legislative and regulatory responses to changing industry practices are often slow to develop, enforcement actions can be effective at stopping and preventing the widespread adoption of unfair and abusive debt-collection practices. For example, even though the FDCPA remains substantively the same since its passage almost forty years ago, enforcement actions have rightfully operated as a check on emerging abusive debt-collection practices. These actions curbed illegal practices such as the collection of and lawsuits on time-barred debt,[263] the sale of bad debts,[264] the use of robo-signed affidavits to support debt-collection lawsuits,[265] and mis-

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[261] *See, e.g.*, Kiel & Waldman, *supra* note 31; Kiel & Arnold, *supra* note 38.

[262] Although this subsection focuses on federal and state enforcement efforts, it is critical to note that the FDCPA includes both public and private enforcement mechanisms. *See* 15 U.S.C. § 1692k(a) (2012) ("[A]ny debt collector who fails to comply with any provision of this subchapter *with respect to any person is liable to such person* . . . .") (emphasis added). Private citizens brought more than ten thousand cases alleging FDCPA violations in each of the past six years. CFPB SEMI-ANNUAL REPORT, *supra* note 49, at 15. While these private enforcement actions over the almost forty years since the passage of the FDCPA necessarily addressed abusive debt collection practices, they are beyond the scope of this article.

[263] *See, e.g.*, Encore Capital Consent Order 2015, supra note 76; Consent Decree at 11, United States v. Asset Acceptance, LLC, (M.D. Fla. 2012), https://www.ftc.gov/sites/default/files/documents/cases/2012/01/120131assetconsent.pdf [https://perma.cc/C8EY-Y3JR]; Complaint, Commonwealth v. Lustig, Glaser & Wilson (Suffolk Co. Sup. Ct. 2015); NYAG Debt Buyer Settlement, *supra* note 218.

[264] *See, e.g.*, Chase Consent Order 2015, *supra* note 185; Chase Assurance of Voluntary Compliance 2015, *supra* note 185.

[265] *See, e.g.*, Portfolio Recovery Consent Order 2015, *supra* note 176; Chase Consent Order 2015, *supra* note 185; *see also* Steve Karnowski, *Debt Collector Midland Funding Agrees to Change Its Practices to Settle Minnesota Lawsuit*, ASSOCIATED PRESS (Dec. 12, 2012), http://www.startribune.com/business/183193931.html [https://perma.cc/22U4-PVXQ]; William E. Lewis, Jr., *West Virginia AG Sues Debt Collection Firm Over Fraudulent Practices*, KSL.COM (Mar. 12, 2012), http://www.ksl.com/?sid=19510940 [https://perma.cc/3SPZ-MYGJ]; Press

representing the status of, ownership of, or amount owed on the debt.[266] Debt collectors, debt buyers, and creditors must be held accountable for their illegal, unfair, deceptive, and abusive acts and practices in debt collections (or enabling such illegal activity by others). In the absence of legislative or regulatory reforms, effective law enforcement should protect consumers from those illegal practices.

V. A Word of Caution on Creditors' Collection Abuses

While the focus of this article is rightfully on debt buyers and debt-collection litigation abuses, creditors are not entirely innocent of illegal practices highlighted in this article. Furthermore, one possible result of some of the policy solutions suggested in this article is that creditors may alter their debt sales practices, preferring instead to keep the collection of charged-off accounts in house. In fact, there are some indications that exact result may be occurring.[267]

Debt buyers are not alone in relying on debt-collection litigation. In St. Louis, the most frequent collection plaintiff is a utility provider.[268] In other areas, high-cost finance companies like installment lenders file more lawsuits than any other company, a reflection of unlimited interest rates and easy court rules.[269] Credit card companies and banks like Capital One, Discover, and Citi also frequently file collection lawsuits.[270] Capital One, the country's largest subprime lender, is particularly litigious among creditors—it is estimated that at the height of the Great Recession, the lender filed more than half a million lawsuits annually.[271] In Chicago, the subprime auto lender

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Release, Tex. Att'y Gen. Office, Attorney General Abbott Charges Encore Capital Group with Violating Texas Debt Collection Laws (July 8, 2011), https://www.texasattorneygeneral.gov/oagnews/release.php?id=3786 [https://perma.cc/4UMJ-LNKH] [hereinafter TXAG Charges Encore].

[266] *See, e.g.*, Complaint, Fed. Trade Comm'n vs. Stark Law, LLC No. 16-cv-3463 (N.D. Ill. 2016); Settlement Agreement, LVNV Funding LLC, CFR-FY2012-012 (Md. Comm'r Fin. Reg. 2012), https://www.dllr.state.md.us/finance/consumers/pdf/lvnvsettle.pdf [https://perma.cc/ZC3T-6N5X]; Press Release, Md. Dep't of Labor, Licensing, and Regulation, Maryland Commissioner of Financial Regulation Suspends Collection Agency Licenses of LVNV Funding, LLC and Resurgent Capital Services (Oct. 28, 2011); TXAG Charges Encore, *supra* note 265.

[267] *See* Encore Capital Grp., Annual Report (Form 10-K) 14 (Feb. 24, 2016) ("We believe that this reduction in supply is also the result of certain financial institutions temporarily halting or curtailing their sales of charged-off accounts in response to increased regulatory pressure on financial institutions."); PRA Grp., Annual Report (Form 10-K) 19 (Feb. 26, 2016) ("Currently, a number of large banks that historically sold defaulted consumer debt in the United States are out of the debt sale market . . . . Should these conditions worsen, it could negatively impact our ability to replace our receivables with additional portfolios sufficient to operate profitably.").

[268] *See, e.g.*, Kiel & Waldman, *supra* note 31.

[269] *See* Kiel, *So Sue Them*, *supra* note 27.

[270] *See* Paul Kiel, *At Capital One, Easy Credit and Abundant Lawsuits*, ProPublica (Dec. 28, 2015), https://www.propublica.org/article/at-capital-one-easy-credit-and-abundant-lawsuits [https://perma.cc/DS3G-325W] [hereinafter Kiel, *At Capital One*].

[271] *Id.*

Credit Acceptance won "judgments against residents of mostly black neighborhoods at a rate 18 times higher than it did against residents of mostly white neighborhoods."[272]

Nonetheless, creditor debt-collection practices are regulated even less than third-party debt-collection practices. The FDCPA applies only to entities collecting debts on behalf of others or entities that acquired the debts when they were in default.[273] Creditors collecting their own debts in their own name are thus exempted from the law's requirements, including the broad prohibitions against unfair, abusive, and deceptive practices.[274] Historically, it was believed that creditors have an incentive to retain the customer's business (even if the consumer is in default) and therefore are more likely to treat a consumer fairly and in a non-abusive way, thus obviating the need for any regulations.[275]

Unfortunately, this carve-out has allowed creditors to engage in abusive, harassing, unfair, and deceptive collection practices that harm consumers and are difficult to stop.[276] Even though their volume may not be as significant as that of debt buyers, creditors are also frequent plaintiffs in state courts, suing customers for defaulted debts.[277] Nor are they immune from many of the same debt-collection litigation problems, including the high-volume court filings,[278] unsubstantiated debt-collection lawsuits,[279] and the use of false affidavits to support their cases.[280]

The policy solutions advanced in this article apply equally to creditors collecting and suing on their own debt. There is little justification for not extending some of the most basic and commonsense FDCPA protections to

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[272] *Id.* at 20–21.

[273] *See* 15 U.S.C. § 1692a(6) (2016) ("The term 'debt collector' means any person . . . who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.").

[274] *See* S. REP. NO. 95-382, at 3 (1977).

[275] *See id.*

[276] *See, e.g.*, Consent Order, EZCORP, Inc., CFPB No. 2015-CFPB-0031 (Dec. 16, 2015), http://files.consumerfinance.gov/f/201512_cfpb_ezcorp-inc-consent-order.pdf [https://perma.cc/ALQ8-37DF] (detailing, among other things, illegal visits to borrowers' homes and places of employment, coercing payments by leading borrowers to believe the only way to stop collection calls was to make a payment, and making various other deceptive and misleading statements to borrowers to support collection activities); Consent Order, ACE Cash Express CFPB No. 2014-CFPB-0008 (July 8, 2014), http://files.consumerfinance.gov/f/201407_cfpb_consent-order_ace-cash-express.pdf [https://perma.cc/5CCB-LSRX] (finding abuses such as excessive phone calls, repeated contact after consumer request to stop, tacking on illegal fees, threats of harm, and making various misleading and deceptive statements).

[277] *See* Chase Consent Order 2015, *supra* note 180; JPMorgan Chase Consent Order 2013, *supra* note 119.

[278] *See* Kiel, *At Capital One*, *supra* note 256 (finding that from 2008 to 2010 CapitalOne filed more than 500,000 debt collection lawsuits annually).

[279] *See* Chase Consent Order 2015, *supra* note 185; JPMorgan Chase Consent Order 2013, *supra* note 119.

[280] *See* Chase Consent Order 2015, *supra* note 185; JPMorgan Chase Consent Order 2013, *supra* note 119; *see also* Consent Order, Bank of Am., N.A., CFPB No. 2015-046 (May 29, 2015), http://www.occ.gov/static/enforcement-actions/ea2015-046.pdf [https://perma.cc/NV8M-U76V].

cover creditors as well. Concerns over judicial integrity and harm to consumers are no different, and the policy framework must ensure that no actor, whether creditor or debt buyer, may collect debts using unfair and abusive practices. Multiple states protect against unfair and abusive debt-collection practices by creditors,[281] and federal laws or regulations should follow suit.

Conclusion

Debt collection unquestionably plays a critical role in the functioning U.S. credit market. This article is not meant to suggest or argue otherwise. Yet, as the article explores, debt collection may expose American households to abuses, harassment, and other illegal conduct, particularly in the context of debt-collection litigation. An entire subset of the debt-collection industry was built on profiting off these financially distressed households by buying cheap, old, unsubstantiated debts and collecting and suing on the full amounts of those debts. These debt collectors and their attorneys have a history of flouting state laws and taking advantage of weaknesses in court rules. In doing so, they harm consumers and jeopardize the integrity of the judicial system.

The abusive debt-collection practices, which result in wrongful judgments obtained and unaffordable payments made to collectors, lead to the extraction of billions of dollars from financially distressed consumers for debts that they may not even owe or that may not be legally enforceable. Some of these financially distressed consumers may have been stuck in a cycle of predatory loan debt in the first place, which lead them to default on their loans. Others defaulted after unexpected financial events, such as medical emergencies.

For struggling households, abusive debt-collection tactics simply compound the harms caused by insufficient income and wealth, unexpected financial emergencies, or predatory lending products. The cumulative impacts of the predatory lending and abusive debt-collection practices are real, and as is explored in this article and elsewhere, vulnerable communities are more likely to be affected by these abuses.[282] To that end, establishing strong federal and state laws and regulations that address abusive debt-collection practices and engaging in effective enforcement of those policies will bring fairness to the credit market generally and debt collection specifically, and will ensure that consumers are protected from unnecessary harm.

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[281] *See, e.g.*, Conn. Gen. Stat. § 36a-646 (2016) ("No creditor shall use any abusive, harassing, fraudulent, deceptive, or misleading representation, device or practice to collect or attempt to collect any debt."); N.Y. Gen. Bus. Law § 601 (West 2016) (prohibiting certain abusive debt-collection practices by creditors).

[282] *See* Wolff, *supra* note 14, at 7.