Foreword

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To pay for the hallmarks of a decent middle-class life, American families have found it increasingly necessary to borrow money. We tell our children that a college degree is essential for their success in the modern economy, but few students can afford the ever-increasing costs of higher education without incurring student loans.[1] We extoll the virtues and benefits of homeownership, but the high cost of housing requires most homeowners to have a mortgage loan.[2] As middle-class wages have remained stagnant, consumers have looked to credit to pay for essential expenses like transportation, medical bills, and childcare. As a result, many American households find themselves deeply in debt.

Too often, these debts have proven to be disastrous. Countless students sought to learn essential job skills and borrowed heavily to do so, but instead became the victims of high-cost, fraudulent, for-profit schools that offered no meaningful vocational training.[3] Homeowners across the country are still grappling with the consequences of the predatory subprime mortgage loans that caused the financial crisis of 2008.[4] While debt may allow some families to succeed, debt cripples the aspirations and ambitions of many others—approximately seventy-seven million Americans have at least one delinquent debt on their credit report.[5]

Given the challenges that consumer debt poses to the economic security of so many people, I applaud the *Harvard Law & Policy Review* for devoting this issue to discussing the rights and obligations of creditors and debtors

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[1] *See* Jeffrey Sparshott, *Congratulations, Class of 2015. You're the Most Indebted Ever (For Now)*, WALL ST. J. (May 8, 2015), http://blogs.wsj.com/economics/2015/05/08/congratulations-class-of-2015-youre-the-most-indebted-ever-for-now/ [https://perma.cc/Z4SL-S88D].

[2] *See Selected Housing Characteristics: 2011–2015 American Community Survey 5-Year Estimates*, U.S. CENSUS BUREAU: AM. FACTFINDER, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_15_5YR_DP04&src=pt [https://perma.cc/M2PN-MFM3].

[3] *See, e.g.*, Staff of S. Comm. on Health, Educ., Labor and Pensions, 112TH CONG., FOR PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS (Comm. Print 2012).

[4] *See* Robert Hennelly, *America's Foreclosure Crisis Isn't Over*, CBS NEWS: MONEY WATCH (Jan. 26, 2016, 5:00 AM), http://www.cbsnews.com/news/americas-foreclosure-crisis-isnt-over/ [https://perma.cc/MX4F-C6UL].

[5] Stu Kantor, *1 in 3 Americans with a Credit File Has Debt Reported in Collections*, URBAN INST. (July 29, 2014), http://www.urban.org/1-3-americans-credit-file-has-debt-reported-collections [https://perma.cc/HHG9-APK7] (extrapolating from sample of credit reports of seven million American adults).

and to the appropriate policy responses to America's ongoing struggles with debt.

This issue features contributors from a variety of backgrounds, including consumer advocates, scholars, and researchers. Lisa Stifler of the Center for Responsible Lending summarizes developments in the debt collection industry and surveys potential policy solutions at the state and federal level. Professor Dalié Jiménez and Alexei Alexandrov, both formerly of the Consumer Financial Protection Bureau (CFPB) investigate whether the elimination of consumer bankruptcy protections for private student loans has lessened the cost of those loans. Professors Atif Mian and Amir Sufi also address topics of debt discharge and forgiveness and argue that prudent government policy should encourage and facilitate the reduction of household debt burdens during economic downturns. Departing from the topic of consumer debt, Harry Stein of the Center for American Progress addresses the political debate over the national debt and argues that misunderstandings concerning the fiscal health of the nation have unnecessarily discouraged federal policymakers from making important investments in infrastructure and safety net programs. Finally, Professor Andrew Dawson re-examines the respective roles of the state and federal governments in municipal bankruptcies and advocates for cooperation between state and federal authorities.

As the contributors to this issue argue, legislation at the state and federal levels could certainly lessen many challenges faced by families across the nation as a result of consumer debt. In this introduction, however, I focus on the particular concerns of government agencies that are charged with enforcing consumer protection law. State attorneys general, specifically, are typically responsible for enforcing state laws that prohibit consumer-oriented businesses from engaging in unfair and deceptive acts and practices (UDAP). In most states, UDAP laws apply to individuals and companies engaged in the collection of debts, and require such debt collectors to conduct their businesses in a fair and honest manner.[6]

Through its enforcement of Massachusetts consumer protection law, my office is committed to ensuring that creditors do not abuse the considerable power they wield over debtors who cannot afford to repay their debts. The Massachusetts UDAP statute gives the Attorney General the authority to make rules that define unfair and deceptive practices,[7] and we have used this authority to prohibit debt collectors from harassing and abusing debtors.[8] We have enforced these rules against a variety of businesses, from mortgage companies[9] to student loan servicers.[10]

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[6] *See* CAROLYN CARTER, NAT'L CONSUMER LAW CTR., CONSUMER PROTECTION IN THE STATES: A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES 15 (2009), https://www.nclc.org/images/pdf/udap/report_50_states.pdf [https://perma.cc/8S5J-PNBL].

[7] MASS. GEN. LAWS ch. 93A, § 2(c) (2016).

[8] 940 MASS. CODE REGS. 7.00 (1987).

[9] *See* Assurance of Discontinuance, *In re* Ditech Financial LLC, No. 16-2437E (Mass. Super. Ct. Aug. 4, 2016).

While we will continue the work of protecting struggling families from abusive debt collectors, the integrity of state courts in the debt collection process is also a special concern for state law enforcement. Debts are fundamentally a product of state law and all efforts to collect debts ultimately rely on the power of state courts. Debt collectors can ask a state court to enter judgment against the debtor, order the debtor's employer to garnish the debtor's wages, and authorize a sheriff to seize the debtor's property. All debt collection relies on a common background assumption: that the state will ultimately intervene on the collector's behalf to enforce the collector's rights. Debt collectors are even the beneficiaries of expedited judicial process in the form of small claims courts, where debtors typically have limited access to discovery and other due process protections.[11]

State law enforcement officers have a special responsibility to ensure that debt collectors conduct themselves in a fair and honest fashion when they seek judicial intervention. We must not permit debt collectors to abuse their easy access to the courts. Debt collectors must not use the civil justice system as a tool to pursue baseless claims, or as a means to harass or abuse vulnerable debtors. Civil law enforcement has the authority, means, and experience to identify when debt collectors are abusing their power and are unfairly compelling consumers to pay debts they do not owe or should not have to pay.

I. Debt Collection Law Firms Obtain Hundreds of Thousands of Judgments Without Proof of the Debt or the Meaningful Involvement of Attorneys

Ordinarily, we expect that the process of civil litigation will lead toward the truth. A party pursuing a civil claim must possess a good-faith basis for the allegations of her complaint and must then subject those allegations to discovery and opposition by her adversary. Before making a decision, we expect that the trier of fact will consider all of the pertinent evidence and make the findings that best fit that evidence. As a result, the initiation and litigation of a civil case, while imperfect as any human endeavor, should at least improve the court's understanding of whether the plaintiff's allegations are true.

This is frequently not an accurate description of litigation commenced by debt collectors. Most states are now home to large debt collection law firms, which can employ hundreds of non-attorney collectors and only a

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[10] *See AG Healey Secures $2.4 Million, Significant Policy Reforms in Major Settlement with Student Loan Servicer*, Mass.gov (Nov. 22, 2016), http://www.mass.gov/ago/news-and-updates/press-releases/2016/ag-healey-secures-2-4-million-student-loan-servicer.html [https://perma.cc/CMM7-LF29].

[11] *See* Human Rights Watch, Rubber Stamp Justice: U.S. Courts, Debt Buying Corporations, and the Poor 50–51 (2016), https://www.hrw.org/sites/default/files/report_pdf/us0116_web.pdf [https://perma.cc/KFW3-S4FL].

handful of lawyers.[12] With scant staff and little meaningful preparation, these firms have filed millions of civil cases that defendants, typically low-income consumers, lack the resources to contest.[13] The practices of these firms have recently attracted the attention of civil enforcement authorities, including the Massachusetts Attorney General's Office.

The CFPB recently obtained large fines against two such firms, the Georgia law firm of Frederick J. Hanna & Associates, P.C., and a similar debt collection firm in New Jersey, Pressler and Pressler, LLP. According to the CFPB, these firms inundated their state courts with debt collection lawsuits. The Hanna firm, for instance, filed 350,000 debt collection cases between 2009 and 2013.[14] Yet both firms employed only a tiny number of attorneys to oversee this enormous volume of litigation.[15] The firms relied on hundreds of non-attorney debt collectors to draft complaints and other legal documents, which were frequently based on little more than information contained in spreadsheets supplied by the creditor.[16] Once prepared, these pleadings were subject only to a cursory and superficial review by one of the firms' few attorneys.[17] The Hanna firm "arranged for one attorney to sign about 138,000 lawsuits," leaving the attorney "literally . . . less than a minute to approve each suit."[18] The few attorneys at Pressler were responsible for approving a similarly enormous number of lawsuits. The review process at the Pressler firm was described as follows:

> Each day, [Attorney] Gulko goes through the electronic "feed" of all the complaints prepared by the Summons and Complaint team. On average, he reviews 300 to 400 complaints per day; some days, he has reviewed as many as 1,000. *Via* the feed, each draft complaint appears on one of Gulko's two computer monitors. On the other monitor appears a summary of basic information . . . . Gulko's review is intended to ensure that the complaint accurately reflects the basic data supplied by the client (name, address, amount of debt) . . . . Pressler admits that Gulko does not look at anything aside from the information on the second computer

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[12] *See* Jacob Gershman, *Debt Collection Law Firms Face Regulatory Scrutiny*, WALL ST. J.: LAW BLOG (Aug. 4, 2014, 11:07 AM), http://blogs.wsj.com/law/2014/08/04/debt-collection-law-firms-face-regulatory-scrutiny/ [https://perma.cc/QD2U-PW6Y]; Complaint at ¶ 14, Consumer Fin. Prot. Bureau v. Frederick J. Hanna & Assocs., P.C., 114 F. Supp. 3d 1342 (N.D. Ga. 2015) (No. 1:14-cv-02211-AT-WEJ).

[13] *See* FED. TRADE COMM'N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION 7 (2010) ("Most alleged debtors fail to answer complaints or otherwise defend themselves in debt collection actions.").

[14] *See* Complaint, *supra* note 12, at ¶ 13.

[15] *See Hanna*, 114 F. Supp. 3d at 1349; Bock v. Pressler & Pressler, LLP, 30 F. Supp. 3d 283, 290 (D.N.J. 2014).

[16] *See Hanna*, 114 F. Supp. 3d at 1349–50 (asserting that "the Firm routinely relied on affidavits that its lawyers knew or should have known were executed by persons who lacked personal knowledge of the facts"); *Bock*, 30 F. Supp. 3d at 289.

[17] *See Hanna*, 114 F. Supp. 3d at 1349–50; *Bock*, 30 F. Supp. 3d at 289.

[18] *Hanna*, 114 F. Supp. 3d at 1349.

> screen unless something is "unusual or incomplete or in any way peaks [sic] [his] interest." If there are no red flags and he is satisfied with the accuracy of the populated information on the complaint, then Gulko types "GD" (for "good"), generating his electronic signature and transmitting the complaint to Pressler's "JEFIS Department" for electronic filing with the court.[19]

Courts concluded that the practices of both the Hanna and Pressler firms violated the Fair Debt Collection Practices Act (FDCPA). The CFPB and the Hanna firm subsequently entered into a consent order requiring the firm to obtain evidence of allegations before filing a complaint and to pay a substantial civil monetary penalty to the CFPB.[20] Similarly, the CFPB and the Pressler firm also entered into a consent order requiring, as with the Hanna firm, radical reformation of the firm's practices and the payment of a sizeable penalty.[21]

The Commonwealth of Massachusetts is no stranger to such practices. In 2015, my office filed an enforcement action against the biggest debt collection firm in our state, Lustig, Glaser & Wilson, P.C. The Lustig firm has filed more than one hundred thousand lawsuits in Massachusetts small claims and district courts, but employs just four attorneys authorized to sign complaints, and only one of those attorneys is permitted to authorize the filing of a lawsuit.[22] The Lustig firm's non-attorney employees prepare complaints on the basis of nothing more than a "summary electronic data file" from the firm's clients containing information about as many as one thousand alleged debts.[23] The Lustig firm nevertheless sued thousands of Massachusetts consumers without ever consulting the consumer's original credit application, the terms and conditions of credit, the consumer's payment history, last billing statement, or charge-off statement.[24]

The lawsuits of the Lustig firm, and of other debt collection law firms like it, are only infrequently exposed to the scrutiny of an adversary in the civil justice system. Most debt collection defendants do not obtain counsel and do not appear in court, in many or most instances because they cannot afford representation and do not understand the process of civil litigation. Instead, most debt collection defendants default, enabling the debt collection firms to move for default judgments, where courts assume the firms' factual allegations are true.

As a result, debt collection lawsuits routinely result in judgments against millions of Americans every year, which entitle their judgment credi-

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[19] *Bock*, 30 F. Supp. 3d at 290.

[20] *See* Stipulated Final Judgment and Order, *Hanna*, 114 F. Supp. 3d 1342 (No. 1:14-cv-02211-AT).

[21] *See* Pressler & Pressler, LLP, CFPB No. 2016-CFPB-0009 (Apr. 25, 2016).

[22] Complaint at ¶¶ 20, 69, Com. v. Lustig, Glaser & Wilson, P.C., No. 15-3852 (Mass. Super. Ct. Dec. 21, 2015).

[23] *Id.* at ¶ 23.

[24] *Id.* at ¶ 57.

tor to use state power to compel payment.[25] These judgments, however, are founded on little more than entries in a spreadsheet. Our ordinary confidence that civil judgments are founded on a review of pertinent evidence is not justified in light of these practices.

II. Debt Collection Firms Enable Debt Buyers to Obtain Judgments on the Basis of Inaccurate and Incomplete Information

It should come as no surprise that debt collection law firms enable their clients to prevail in court based on facts that cannot be proven or are simply false. Firms like Lustig, Pressler, and Hanna frequently represent so-called "debt buyers": publicly-traded national corporations that purchase deeply discounted portfolios of tens or even hundreds of thousands of extremely delinquent debts from the original creditor. These debt buyers frequently lack evidence that a consumer actually owes a debt and sometimes possess inaccurate information about the debtor's identity or amount owed. Thanks to the willing facilitation of debt collection law firms, however, they are able to obtain enforceable judgments nonetheless.

Two of the largest of these debt buyers, Portfolio Recovery Associates (Portfolio) and Encore Capital (Encore), entered into consent orders with the CFPB in September 2015.[26] In its investigation of Encore, the CFPB concluded that "[i]n numerous instances, Debt sellers have provided data files to Encore containing inaccurate information as to the identity of the Consumer obligated to pay the Debt, the age of the Debt, the amount of the Debt, the interest rate, and other material information about the Debt."[27] Moreover, the CFPB found, "Sellers typically have not provided Encore with any Consumer-level documentation about most individual Debts, such as account statements, records of payments, and the underlying contracts signed by the Consumers."[28]

Debt collection law firms nevertheless filed hundreds of thousands of collection suits on behalf of debt buyers such as Encore and Portfolio.[29] The allegations in a substantial percentage of these lawsuits could not be proven or were false—and the debt collection firms knew it.[30] In the rare instances in which defendants appeared in court and challenged debt collection suits, debt collection firms were typically unable to produce evidence in support of

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[25] Paul Kiel, *So Sue Them: What We've Learned About the Debt Collection Lawsuit Machine*, ProPublica (May 5, 2016 6:57 AM), https://www.propublica.org/article/so-sue-them-what-weve-learned-about-the-debt-collection-lawsuit-machine [https://perma.cc/Y9WB-W24L].

[26] Encore Capital Group, Inc., CFPB No. 2015-CFPB-0022 (Sept. 9, 2015); Portfolio Recovery Associates, CFPB No. 2015-CFPB-0023 (Sept. 9, 2015).

[27] Encore Capital Group, Inc. at ¶ 30, CFPB No. 2015-CFPB-0022 (Sept. 9, 2015).

[28] *Id.* at ¶ 32.

[29] *Id.* at ¶ 48.

[30] *See, e.g.*, Complaint, *supra* note 22, at ¶ 57.

their claims. The Commonwealth's complaint against the Lustig firm alleges that the firm failed in such circumstances to obtain proof from their clients:

> The Debt Buyers often told the Lustig Firm that the prior owner had purged the requested records from its files, that the Debt Buyer was entitled to only a limited number of documents, or that the Debt Buyer's time to request documents from the prior owner of the debt had expired.[31]

Instead of proving the allegations of their complaint, debt collection firms often agreed simply to dismiss their case when faced with a defendant's opposition.

Taken as a whole, the practices of the debt buyers and their lawyers undermine the integrity of our civil justice system. Debt buyers typically lack full documentation of their alleged debts and do not or cannot ensure the accuracy of their collection efforts. They nevertheless are able to rely on judicial enforcement for the collection of their debts, but only because their lawyers are willing to file lawsuits without proof. These practices systematically compromise public confidence that the outcome of litigation is just and founded on fact.

III. Debt Collection Law Firms Use Judgments to Coerce Payment from the Poorest Consumers

The tools available to a judgment creditor are powerful. These tools permit a creditor to garnish a debtor's wages, to attach real and personal property, and to do so for a period of time that may span multiple decades. Because of their easy access to the civil justice system, debt buyers and debt collection law firms use these tools frequently and without hesitation.

It is problematic enough for debt buyers to garnish a consumer's wages without being able to prove the existence of that consumer's debt. The debt collection industry's use of judgment remedies is still more troubling because their collection efforts so often target the low-income consumers with limited knowledge of and access to the legal system. These economically vulnerable consumers should ordinarily be protected by state exemption laws.[32] Through their exemption schemes, states typically protect a consumer's wages below a certain (very low) threshold. Both state and federal law protect anti-poverty benefits such as Supplemental Security Income and Temporary Assistance to Needy Families from collection efforts. Creditors cannot garnish these forms of exempt income, nor can they seek a court order compelling a debtor to make payments based on such income. A debtor earning only exempt income essentially has no obligation to pay that

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[31] *Id.* at ¶ 60.

[32] *See generally* Lea K. Shepard, *Creditor's Contempt*, 2011 BYU L. Rev. 1509, 1536–38 (2011).

income to creditors. The policy inherent in exemption laws recognizes that these debtors likely face dire hardships already.

While both public policy and exemption law theoretically protect low-income debtors, in reality debt collectors and their law firms profit enormously from consumers who receive exempt income. Because debt collection firms cannot seek to garnish such income, they turn instead to another device—in personam actions or proceedings.[33] Struggling debtors face the possibility of arrest, detention, and—at least theoretically—imprisonment in these actions. Most states authorize a judgment creditor to seek an in-court examination of the debtor's finances, after which the court may order the debtor to make a payment in a certain monthly amount. If the debtor does not appear at the scheduled hearing, a warrant, sometimes called a body attachment or a capias warrant, will issue for the debtor's arrest. These warrants typically authorize a sheriff or constable to detain the debtor, to compel the debtor to appear in court, or, if no court is in session, to imprison the debtor until the appropriate court session resumes. These warrants are terrifying, especially to the majority of consumers who cannot afford to retain counsel.

If a judgment creditor knows that a debtor receives only exempt income, there should be no reason to seek an in personam proceeding. No court will order a debtor to make payments out of exempt income. Debt collection firms nevertheless threaten debtors whose income is wholly exempt with arrest. They hope that such threats will so terrify debtors that they will make payments out of their poverty wages or Social Security benefits. These threats are a very successful means of collecting the meager income of the desperately poor. In the enforcement filed by my office against the Lustig debt collection firm, the Commonwealth alleges that:

> [T]he Lustig Firm routinely initiated . . . examinations [and] small claims payment hearings against consumers and served Capias civil arrest warrants, despite knowing that no court would ever order the consumers to pay the Lustig Firm any amount whatsoever. The Lustig Firm nevertheless sought these examinations, hearings, and arrest warrants in order to frighten and harass consumers, and to coerce consumers into making payments from Social Security benefits, and other exempt income, which the Lustig Firm . . . had no right to collect.[34]

Not only do debt collection firms and debt buyers obtain court judgments on the basis of unsubstantiated and inaccurate allegations, but they then use these judgments as leverage for coercing payments from the most economically vulnerable. Civil law enforcement agencies must not tolerate such abuses of our judicial system.

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[33] *See id.* at 1522–27.
[34] Complaint, *supra* note 22, at ¶ 54.

IV. State Attorneys General Can and Should Protect the Integrity of State Civil Justice

State civil law enforcement agencies—and state attorneys general in particular—already have at their disposal the authority to fight these judgments and other debt collection misconduct. Courts have now held that the above-described practices of large debt collection law firms violate the FDCPA and the Consumer Financial Protection Act (CFPA).[35] Similarly, numerous courts have held that coercive threats of arrest and garnishment are also violations of the FDCPA.[36] State Unfair and Deceptive Practices laws typically incorporate violations of federal consumer protection laws like the FDCPA.[37] Moreover, the CFPA authorizes state attorneys general to bring cases themselves for violations of that Act.[38] Even without legislative reform, state attorneys general have authority under existing state and federal statutes to bring enforcement actions against debt collection law firms that violate norms of fairness and honesty in the debt collection process.

State law enforcement authorities have a fundamental interest in deterring unfair and deceptive debt collection. Debt collection owes its existence and effectiveness to state legal systems. The rights of creditors are creations of state law, and debt collectors rely—quite successfully—on the power of state judiciaries to enforce those rights. Civil enforcement agencies are best positioned to ensure that debt collectors do not take unfair advantage of their access to the civil justice system and do not use the legal system as means to take unfair advantage of the most vulnerable.

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[35] *See* Consumer Fin. Prot Bureau v. Frederick J. Hanna & Associates, P.C., 114 F. Supp. 3d 1342, 1349 n.2 (N.D. Ga. 2015); Bock v. Pressler & Pressler, LLP, 30 F. Supp. 3d 283, 290 n.6 (D.N.J. 2014).

[36] *See, e.g.*, *In re* Accelerated Recovery Sys., Inc., 431 B.R. 138 (W.D. Va. 2010); Fed. Trade Comm'n v. LoanPointe, LLC, 525 Fed. Appx. 696 (10th Cir. 2013); Aitken v. Debt Mgmt. Partners, LLC, 12-4006 WL 1810345 (C.D. Ill. Apr. 17, 2015); Gradisher v. Check Enforcement Unit, Inc., 210 F. Supp. 2d 907 (W.D. Mich. 2002); Davis v. Commercial Check Control, Inc., 98 C 631 WL 89556 (N.D. Ill. Feb. 16, 1999).

[37] *See, e.g.*, Mass. Gen. Laws ch. 93a, § 2 (2016); 940 Mass. Code Regs. 3.16 (2016).

[38] *See* 12 U.S.C. § 5565 (2012).