THEODORE ROOSEVELT AMERICAN INN OF COURT

March 14, 2016 – 5:30 p.m. to 8:30 p.m.

Nassau County Bar Association

PRESENTED BY:

Michael Ciaffa, Esq.
Fred Hirsh, Esq.
Craig Robins, Esq.
Richard G. Gertler, Esq.
Robert L. Pryor, Esq.

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DEBT DECEPTION

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AGENDA

1. Assigned debt industry overview – ethics of assigned debt cases – 30 minutes
2. Litigation of assigned and other debt cases and collection issues – 30 minutes
3. Federal Fair Debt Collection Practices Act – 30 minutes
4. Bankruptcy issues involved with assigned and other debt cases – 30 minutes

DEBT DECEPTION

How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers

May 2010

THE LEGAL AID SOCIETY
MAKING THE CASE FOR HUMANITY

LEGAL SERVICES

NEDAP

URBAN JUSTICE

DEBT DECEPTION

How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers

May 2010

THE LEGAL AID SOCIETY
NEIGHBORHOOD ECONOMIC DEVELOPMENT ADVOCACY PROJECT
MFY LEGAL SERVICES
URBAN JUSTICE CENTER, COMMUNITY DEVELOPMENT PROJECT

ACKNOWLEDGMENTS

This report was produced by a team of organizations that provide legal services to lower-income New Yorkers. Claudia Wilner, Senior Staff Attorney at the Neighborhood Economic Development Advocacy Project (NEDAP), co-wrote and co-edited the report with Nasoan Sheftel-Gomes, Staff Attorney at the Urban Justice Center, who also managed the research team. Brian Paul, a former intern with the Urban Justice Center, conducted extensive research and data analysis and contributed to initial drafts. Alexis Iwanisziw, Program Associate with NEDAP, provided extensive statistical analysis and created maps for the report. Carolyn Coffey, Senior Attorney at MFY Legal Services, April Newbauer, Attorney-in-Charge of the Civil Practice -- Queens Neighborhood Office of The Legal Aid Society, and Tashi Lhewa, Staff Attorney at The Legal Aid Society, researched, wrote, and edited sections of the report.

The team would like to thank the following court personnel, without whom the report could not have been written: Justice Fern Fisher, Deputy Chief Administrative Judge; Ernesto Belzaguy and Carol Alt, former and current First Deputy Chief Clerk, NYC Civil Court, respectively; Assistant Deputy Chief Clerks, Mike Boyle (Civil Court, New York County); Monica Dingle (Civil Court, Queens County); Lorraine Kenny (Civil Court, Richmond County); Ron Romano, (Civil Court, Kings County); and Eddy Valdez (Civil Court, Bronx County). The authors would also like to thank the following colleagues for their invaluable assistance, recommendations, and support: Harvey Epstein, Project Director of the Community Development Project at the Urban Justice Center; Dora Galacatos, Senior Counsel to the Feerick Center for Social Justice at Fordham Law School; Sarah Ludwig and Josh Zinner, Co-Directors of NEDAP; Robert A. Martin, Associate Director, DC 37 Municipal Employees Legal Services; Lori McNeil, Director of Research and Policy for the Homelessness Outreach and Prevention Project at Urban Justice Center; and Matthew Schedler, Staff Attorney at CAMBA Legal Services.

Last but not least, the authors would like to recognize our clients – low-income and working poor New Yorkers who have borne the brunt of predatory debt collection practices.

ABOUT THE ORGANIZATIONS

THE LEGAL AID SOCIETY -- the nation's oldest and largest not-for-profit legal services organization -- is more than a law firm for the poor. It is an indispensable component of the legal, social, and economic fabric of New York City -- passionately advocating for low-income individuals and families across a variety of civil, criminal and juvenile rights matters, while also fighting for legal reform. The Legal Aid Society has performed this role in City, State and federal courts since 1876. It does so by capitalizing on the diverse expertise, experience, and capabilities of 850 of the brightest legal minds. These 850 Legal Aid Society lawyers work with 600 social workers, investigators, paralegals and support and administrative staff. Through a network of borough, neighborhood, and courthouse offices in 25 locations in New York City, the Society provides comprehensive legal services in all five boroughs of New York City for clients who cannot afford to pay for private counsel. The Society's legal program operates three major practices -- Civil, Criminal and Juvenile Rights -- and receives volunteer help from law firms, corporate law departments and expert consultants that is coordinated by the Society's Pro Bono program. Annually, the Society handles more than 300,000 cases and legal matters for clients with civil, criminal, and juvenile rights problems. The Legal Aid Society takes on more cases for more clients than any other legal services organization in the United States and it brings a depth and breadth of perspective that is unmatched in the legal profession.

MFY LEGAL SERVICES, INC. ("MFY") was founded on the principle of equal access to justice through community-based legal representation of poor New Yorkers. Working in concert with neighborhood social service providers and community advocates, MFY provides advice and representation to over 8,500 New Yorkers each year and initiates affirmative litigation that impacts many thousands of people. Through its Consumer Rights Project, MFY provides advice and representation to consumers who are harassed by debt collectors, sued in New York courts, and affected in various ways by consumer issues. Our client population is comprised of poor and low-wage workers, persons with mental and physical disabilities, and senior citizens. MFY represented Robert Druce in *Centurion Capital Corp. v. Druce*, 14 Misc. 3d 564, 828 N.Y.S.2d 851 (Civ. Ct. N.Y. Cty 2006), the first New York decision to clarify that debt buyers are considered "debt collectors" for purposes of Department of Consumer Affairs licensing under New York City Administrative Code § 20-489.

NEIGHBORHOOD ECONOMIC DEVELOPMENT ADVOCACY PROJECT ("NEDAP") works to promote community economic justice and to eliminate discriminatory economic practices that harm communities and perpetuate inequality and poverty. Through coalition organizing, advocacy, community education, legal services and other strategies, NEDAP promotes fair lending and financial justice in New York's low income neighborhoods and communities of color. Through its Consumer Law Project, NEDAP provides direct legal services to thousands of low-income New Yorkers each year, builds the capacity of legal services and community-based organizations to address consumer financial justice issues, and advocates for systemic reform.

URBAN JUSTICE CENTER, COMMUNITY DEVELOPMENT PROJECT ("UJC") is a non-profit organization that serves New York City's most vulnerable residents through a combination of direct free legal service, systemic advocacy, community education and political organizing. UJC staff represent almost 9,000 low-income and working poor New Yorkers every year. UJC's Community Development Project was formed in September 2001 to provide free legal, technical, research and policy assistance to grassroots community groups engaged in a wide range of community development efforts throughout New York City, including consumer debt work. Since 2005, UJC has represented alleged debtors in consumer credit, cell phone and medical debt cases in the New York City Civil Court. UJC has also represented victims of consumer fraud and unfair debt collection practices in affirmative litigation in State and Federal court.

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EXECUTIVE SUMMARY

In recent years, legal services offices have been deluged by requests for help from thousands of New Yorkers who have found themselves fighting extraordinary debt collection abuse. This abuse comes in the form of frivolous lawsuits filed by debt buyers – a relatively new and fast-growing segment of the debt collection industry. Debt buyers often fail to notify people of the lawsuits filed against them and file lawsuits without having proof of their claims. The people sued – frequently very low-income, elderly, or disabled individuals – cannot effectively defend themselves. They have no legal representation, are intimidated by the court process, lack knowledge of their legal defenses, face language barriers, or do not receive notice of the lawsuits. For these reasons, despite offering no proof of their claims, debt buyers routinely win court judgments against hundreds of thousands of New Yorkers each year. The cumulative impact of these judgments is enormous: Between January 2006 and July 2008, the top 26 debt buyers extracted more than $1 billion in judgments against New York City residents.

Debt buyer lawsuits are overwhelmingly concentrated in New York's lowest-income communities and communities of color, with devastating results. Armed with default judgments, debt buyers can seize people's assets, freeze their bank accounts, or garnish their wages to collect the debts. Judgments also appear on credit reports, preventing people from being able to secure housing, obtain credit, and even find employment. Judgments are enforceable for 20 years, and even longer in some cases.

In this report, we examine lawsuits filed by debt buyers and their profound impact on low- and moderate-income New Yorkers, lower-income communities, and communities of color. We begin, in Part I, with background on the debt buying industry, including an analysis of the debt buyer business model and collection methods. Part II focuses on debt buyer lawsuits, particularly the systemic problems at the root of these lawsuits. In Part III, we highlight specific findings from a study of debt buyer lawsuits in New York City. We draw results from two data sets: (1) a 365-case sample of lawsuits brought by the 26 debt buyers who filed the greatest number of cases in New York City between January 2006 and July 2008 ("Court Sample"); and (2) a 451-case sample of callers to NEDAP's legal hotline who were sued by a creditor or debt buyer in 2008 ("Client Sample"). Finally, in Part IV, we recommend policy and legislative reforms to address the problems documented in this report.

Key Findings

The 26 debt buyers examined in this study filed 457,322 lawsuits in the New York City Civil Court from January 2006 through July 2008 and were awarded an estimated $1.1 billion in judgments and settlements.[1] Our key findings, based on our analysis of the Court Sample, are:

- **Debt buyers prevailed in more than nine out of ten lawsuits (94.3%), usually by obtaining default judgments – automatic judgments entered in favor of the debt buyer because the person sued did not appear in court.**
- **Virtually all (95%) of people with default judgments entered against them by debt buyers resided in low- or moderate-income neighborhoods, and more than half (56%) lived in predominantly black or Latino neighborhoods.**
- **Not a single person sued in the Court Sample was represented by an attorney. Overall, only 1% of people sued by debt buyers in New York City are represented by counsel.**
- **Only 10% of people sued answered the summons and complaint.**
- **41% of cases were brought by debt buyers who remained unlicensed with the New York City Department of Consumer Affairs (DCA) until legally compelled to obtain a license in July 2009. Cases filed by these debt buyers had a default judgment rate of 86.7%, far higher than the rate of 72.6% among debt buyers who were licensed during the period of the study.**

- **In nearly two-thirds of cases (64.1%), the debt buyers were represented by one of five law firms known for their high volume of debt collection cases: Cohen & Slamowitz, Forster & Garbus, Mel S. Harris and Associates, Mullooly, Jeffrey, Rooney & Flynn, and Rubin & Rothman.**
- **Nearly half of cases (47.7%) involved service by one of four process serving agencies: AAA Attorney Service, Accu-Serve, Capital Process Servers, and Samserv.**

Our key findings, based on our analysis of the Client Sample, are:

- **69% of people sued by debt buyers were black or Latino.**
- **35% of cases brought by debt buyers were clearly meritless, and 66% of these clearly meritless cases were brought against black or Latino clients.**
- **At least 71% of people sued were either not served or served improperly.**

Key Recommendations

Immediate legislative and regulatory action is needed to end abusive debt collection lawsuits. Here are our key recommendations:

- **Prohibit debt buyers from filing lawsuits without evidence.**
  Debt buyers routinely file frivolous lawsuits against low-income New Yorkers even though they have no evidence to prove the debts are owed. The New York State legislature should crack down on this unfair practice by enacting the Consumer Credit Fairness Act (CCFA), which would raise the bar on what information debt buyers have to submit to the court when filing lawsuits and applying for default judgments.

- **Aggressively regulate and monitor process servers.**
  Many people never receive notice of debt buyer lawsuits because process servers routinely engage in "sewer service" – failing to serve court papers and filing false affidavits of service with the courts. The New York City Council recently passed groundbreaking legislation intended to curb this unlawful practice. The New York City Department of Consumer Affairs (DCA) should implement strong regulations to carry out the new law and make enforcement of the new law an agency priority.

- **Expand government enforcement action against debt collectors.**
  The New York State Attorney General and the New York City DCA should continue to take aggressive action against the debt collection industry and use the findings of this report to initiate new investigations. The Federal Trade Commission (FTC) should continue to make debt collection an agency priority, with specific focus on the debt buying industry.

- **Ensure judicial review of default judgments and settlements.**
  Court clerks, rather than judges, routinely grant default judgments to debt buyers despite glaring legal deficiencies in their applications. Many people sued are pressured into unfair and unaffordable settlements that leave them in a worse position than if they had ignored the lawsuits. To ensure fundamental fairness, additional resources need to be provided to the courts so that judges can review default judgment applications and settlement agreements.

- **Increase legal representation and resources for people sued by debt buyers.**
  Overall, only 1% of people sued by debt buyers in New York City are represented by counsel. The abusive practices described in this report have flourished because of the gross imbalance of power between represented debt buyers and unrepresented New Yorkers. New York City and State should correct this imbalance by supporting increased legal representation and resources for low-income people sued by debt buyers.

I. THE DEBT BUYER BUSINESS MODEL

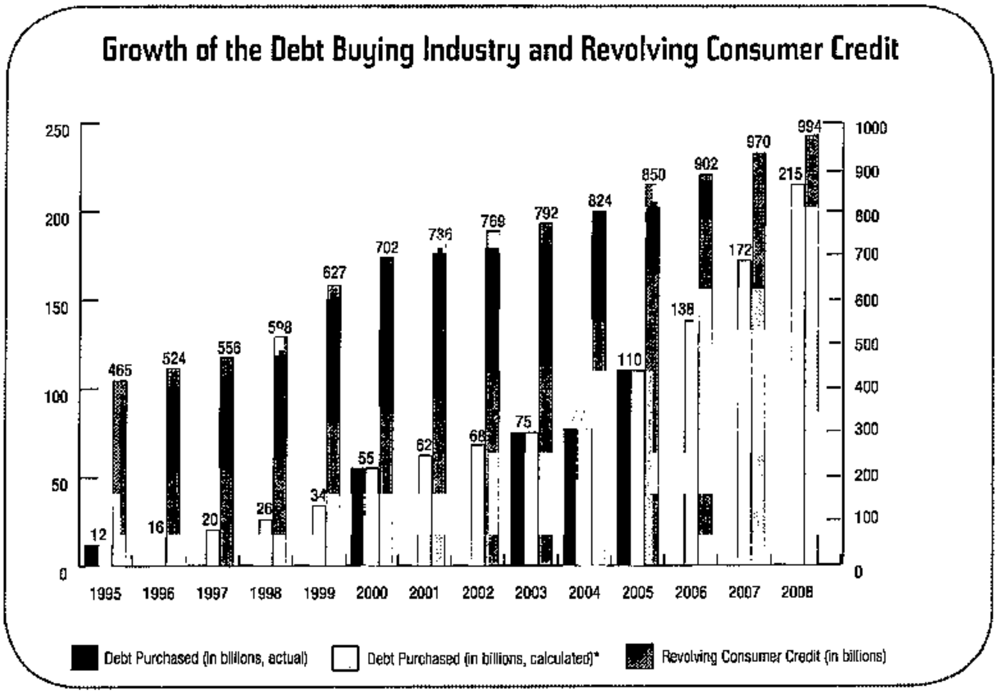
Debt buyers purchase defaulted debt -- including credit card debt, car loans, student loans, cell phone bills, medical bills, and health club bills -- for pennies on the dollar.[2] They purchase these debts in portfolios, from original creditors or from other debt buyers and debt brokers.[3] Debt buyers then attempt to collect the debts using a variety of methods, ranging from telephone calls to lawsuits.[4] If a debt buyer is unsuccessful in its collection efforts, it often resells the debt portfolio to yet another debt buyer, which in turn resells the portfolio if it too is unable to collect.[5]

Emergence of the Debt Buying Industry

The sale and trading of charged-off[6] debt portfolios has its origin in the 1987 savings and loan crisis.[7] In the aftermath of the crisis, Congress created the Resolution Trust Corporation (RTC) to close insolvent thrifts, return insured deposits and sell any remaining assets to the private sector.[8] In the early 1990s, the RTC auctioned off $458.5 billion in failed thrift assets.[9] A handful of debt buying companies began purchasing, collecting and profiting from these low-cost debt portfolios.[10] After the RTC sold all of the failed thrift assets, these debt buying companies found new business opportunities by shifting their focus to buying and collecting charged-off consumer debts.[11]

The emergence of the debt buying industry coincided with an explosion over the last two decades in the availability and use of consumer credit. Between 1990 and 2005, for example, the amount of outstanding credit card debt in the United States grew from $237 billion to more than $802 billion – an increase of 238%.[12] During this time living expenses rose while real wages declined.[13] Many low-income and working poor families came to rely on credit cards to pay for essential expenses when their salaries failed to cover their basic needs.[14] Worse, many borrowers were entrapped by subprime credit cards – credit cards with low credit limits but exorbitant interest rates and fees, often marketed to lower-income individuals who had limited access to mainstream financial services.[15] Subprime credit cards eventually accounted for more than a quarter of the credit card market.[16] As debt loads became unmanageable, credit card charge-offs escalated,[17] creating a fertile market for the debt buying industry.

By 2005, debt buyers in the United States were purchasing more than $110 billion in face value of debt each year.[18] Charged-off credit card debt accounted for roughly 91% of this figure.[19] Debt buyers also enjoyed explosive revenue growth from 2001 to 2006, with net income at four major firms increasing more than 700% during this period.[20]



*Debt buyer purchases not available for all years. Dollar value of debt buyer purchases for the years 1996-1999, 2001-2002, and 2006-2008 were estimated using a combination of published data and industry growth rates. Debt Buyer Sources: Credit and Collections World, Federal Reserve Bank of Philadelphia and Washington Post. Revolving Consumer Credit Source: Federal Reserve Board, Release G19.

Debt Buyers' Corporate Structures

Debt buyers organize their businesses using a variety of corporate structures, but their business practices are similar across these structures and are consistently problematic for consumers.

Four publicly traded debt buyers actively purchase and collect portfolios of debt: Asset Acceptance Capital Corp., Asta Funding, Encore Capital Group, and Portfolio Recovery Associates. These companies collect debts for others, purchase and collect their own debt portfolios, and resell packaged debt portfolios to smaller regional debt buyers.[21] They raise money to finance their purchases by issuing stock and by using credit lines from banks,[22] which are often also major credit card issuers.[23] Because publicly traded debt buyers have annual reporting requirements, more is known about their business models than about other types of debt buyers.

There are as many as 500 privately owned debt buyers in the United States.[24] Little is known about how they finance their operations, though like publicly traded debt buyers, they most likely rely on private investors, commercial loans, and lines of credit. Some privately owned debt buyers have been purchased in whole or in part by private equity firms, hedge funds or other financial services companies that provide financial backing for the debt buyers' activities. For example, private equity firms and other financial services companies have purchased stakes in debt buyers like Collect America (the parent of debt buyers CACH and CACV),[25] Sherman Financial Group (the parent of debt buyer LVNV Funding),[26] and Arrow Financial Services (a Sallie Mae company),[27] as well as public debt buying firms such as Encore Capital Management.[28]

Some debt buyers are actually owned by the principals of debt collection law firms.[29] These companies typically purchase smaller, regionally specific debt portfolios from the large debt buyers and resellers.[30] Examples from the Court Sample include the following law firms and related debt buying LLCs: Mel S. Harris and Associates (Pinpoint Technologies); Cohen & Slamowitz (Gemini Asset Recoveries and Metro Portfolios); Eltman Eltman & Cooper (Erin Capital Management); and Mullooly, Jeffrey, Rooney & Flynn (NY Financial Services).

Major banks are a financial life force of the debt buying industry. They offer credit on unaffordable terms to consumers, sell the resulting debts to debt buyers, and finance the debt buyers' purchases with commercial lines of credit. For example, Bank of America, JPMorgan Chase, and Citibank, three of the five largest credit card issuers in the United States,[31] provide a significant amount of financing to Encore Capital Group, one of the largest debt buyers by revenue.[32] Encore currently enjoys a revolving loan commitment of $327.5 million from 11 banks; Bank of America and JPMorgan Chase finance nearly one third of that revolving loan commitment, with credit lines of $50 million each, while Citibank provides $25 million.[33]

What Debt Buyers Purchase

When debt buyers purchase debts, they become legal owners of those debts, but obtain very little information about them.[34] Debt buyers usually receive an electronic file that includes only a person's name and social security number, last known address, the amount allegedly owed, the charge-off date, and the date and amount of the last payment.[35] The portfolio does not include documentation of the debt, such as the governing contracts and account statements.[36] This information is insufficient to ensure that the debt buyers collect the correct amount from the correct person.[37] Debt portfolios are regularly sold on an "as is" basis, without consideration for whether collection of the debts in the portfolio is legal.[38]

Debt buyers' ability to obtain additional documentation from the original creditor is extremely limited: they may purchase the right to request such documentation in a limited number of cases, or they may not have access to any supporting documentation at all.[39] If the debt is resold to another debt buyer, obtaining such documentation becomes even more difficult, as most second and subsequent sales of debt portfolios do not include any direct access to the additional documentation from the original creditor, which means that those debt buyers almost certainly lack the documentation needed to support lawsuits filed against people whose names appear in their portfolios.[40]

The price of the debt is influenced by the availability of and demand for charged-off debts, the perceived likelihood of collection, and the quality of the debt.[41] Debt buyers also consider debtors' personal characteristics when assessing the value of a portfolio. Some, like Asset Acceptance and Portfolio Recovery Associates, use borrower demographics,[42] and most consider borrower assets, such as whether the borrower works or owns a house.[43] Debt portfolios that were previously worked and then resold by debt buyers are worth less because the first buyer or buyers of the portfolio have already skimmed the easily collected debts from the portfolio.[44] There are even markets for debts that are not legally collectable, such as debts discharged in Chapter 7 bankruptcy or debts of the deceased.[45]

In 2008, debt portfolios were selling for as much as 12 cents per dollar of debt, but have since fallen to between four and seven cents per dollar for newly charged-off credit card debt – between one and three cents per dollar, and for older or harder to collect debts, are selling for even lower.[46]

Debt Buyer Collection Methods

Debt buyers employ a range of collection tactics, from sending collection letters to filing lawsuits.[47] Reporting debts to the credit bureaus is also a powerful, but low-cost option for debt buyers, as consumers who are trying to secure a loan will often check their credit reports and repay any past due debts that are being reported, whether or not they actually owe the debts, in order to improve their credit scores.[48] If consumers are willing but not able to pay the alleged debts, some debt buyers even offer to refinance them on sub-prime credit cards that have deceptive terms and high fees.[49] Debt buyers claim that these high-cost cards give consumers a chance to rebuild their credit while paying off their debt in installments, but this scheme can ensnare consumers into using a predatory product to repay debts they might not even owe or be obligated to pay.

II. DEBT BUYER LAWSUITS

Over the past decade, evidence from both debt buyers and court records show that debt buyers have turned increasingly to filing lawsuits to collect debts.[50] Data from the four publicly traded debt buyers reveal an increased focus on legal collections each year since 2002.[51] At Encore Capital Group, for example, legal collections accounted for 48% of gross collections in 2008, up from 20% in 2003.[52] Respondents to a debt collection industry survey reported a "surge in legal collection placements" as part of their response to the 2008 economic crisis.[53] One prominent debt buyer saw a 95% increase in revenue from legal collections during the first quarter of 2009.[54] In 2007, Asta Funding's Chief Financial Officer put it simply: "We're looking to sue."[55]

In recent years, civil courts across the country have been overwhelmed by surges in debt collection filings. The Federal Trade Commission recently observed that "[t]he majority of cases on many state court dockets on a given day often are debt collection matters" and that the glut of debt collection cases has "posed considerable challenges to the smooth and efficient operation of courts."[56] In New York City, debt collectors filed approximately 300,000 lawsuits *per year* between 2006 and 2008.[57] The vast majority of cases result in default judgments – automatic wins for the debt buyer because the person sued did not appear in court.[58]

"Sewer Service"

A major reason for the high rate of default judgments is the fact that many people do not know they have been sued.[59] Evidence suggests that people rarely receive notice of lawsuits brought by debt buyers.[60] Debt buyers often send notices to addresses associated with the underlying credit card accounts, which are often outdated and no longer valid.[61]

Worse, many of the process servers hired to serve papers in consumer credit actions engage in "sewer service" – the practice of failing to serve court papers (and instead throwing them in the "sewer") and filing false affidavits of service with the courts. The problem has been well documented in New York.[62] In 2008, the New York State Attorney General on behalf of the Chief Adminstrative Judge of New York filed suit against 35 debt collection law firms and two debt collection companies. The case, *Pfau v. Forster & Garbus*, seeks to vacate more than 100,000 default judgments allegedly entered because of sewer service by a single process serving agency. The case is currently pending.

Payment practices within the debt collection industry appear to contribute to the high rates of sewer service in debt buyer cases. Debt collection law firms usually enter into bulk contracts with process serving agencies, which, in turn, hire individual process servers to carry out the service.[63] These process servers often work as independent contractors, not salaried employees, and are paid on a piecework basis of $3-6 per completed service.[64] These wages have not increased significantly since 1986,[65] and are, in fact, so low that it is impossible for a process server to serve all papers properly and still make the minimum wage.[66] Process servers who serve papers in non-debt collection matters earn significantly more.[67] On top of that, most debt collection law firms will not pay process servers for unsuccessful attempts at service, a practice that further encourages process servers to lie about having completed service.[68]

Lack of Proof

The staggering number of default judgments obtained through sewer service masks the fact that debt buyers rarely have admissible evidence of the debt and that many cases are meritless.[69] As discussed above, debt buyers typically do not purchase documentation of debts, such as credit applications bearing signatures, the contracts that applied to each account, account statements, or customer service records that would confirm or clarify fraud claims or customer disputes. While some debt buyers have a contractual right to obtain a portion of this information in a limited number of cases, this is far from the norm.[70] In the vast majority of cases filed, debt buyers cannot provide documentation of the underlying debt.[71] The law requires that debt buyers provide proof of their claims in order to win a case. If a debt buyer cannot do so, and the case is contested, the case must be dismissed.[72]

Lack of Legal Representation

Unfortunately, few debt buyer cases are contested. Most people do not receive notice and thus are not aware of the court proceedings, and most of those who do receive notice and appear have no legal representation.[73] Court statistics reveal that only 1% of people sued by creditors have legal counsel.[74] The law requires litigants, whether represented or not, to raise important defenses or else waive them, even though they generally have no knowledge of their legal rights.[75] Most people are afraid of what might happen to them in court and are unprepared to defend themselves.[76] Debt buyers take advantage of this imbalance of power to pressure people into unaffordable settlements on debts that cannot be proven.[77] By contrast, in the rare event that an individual has counsel, debt buyers tend to abandon cases, presumably because they know they will have difficulty producing the documentation to prove their cases at trial.[78]

Case in Point: Mel S. Harris and Associates LLC

As one of the larger debt collection law firms in New York City, the firm of Mel S. Harris and Associates LLC ("the Harris Firm") offers an example of typical debt buyer litigation practices in consumer debt lawsuits and the challenges these tactics present to the people sued.

People sued by the Harris Firm are often faced with lawsuits that allege unfamiliar debts, filed by debt buyers whose names they do not recognize. The firm's pleadings reviewed for this report featured complaints that all referred vaguely to a "retail charge account"[79] and rarely listed a specific account number. Three debt buyers represented almost exclusively by the Harris Firm – LR Credit,[80] Pinpoint Technologies,[81] and Rushmore Recoveries[82] – do not maintain public websites or offer any information to the public. Though it filed more cases than any other debt buyer in New York City from January 2007 through July 2008 (a total of 49,900 cases), LR Credit avoided licensing by the DCA until legally compelled to do so in July 2009. Pinpoint Technologies never obtained a license from the DCA.[83]

Debt buyers represented by the Harris Firm achieved an initial default judgment rate of 94%, compared to 77.7% for all other debt buyers reviewed in our study. Only 3.6% of people sued by the Harris Firm filed an answer.

Individuals sued by the Harris Firm find themselves without the information necessary to properly defend themselves in court. One of the few people in our study who answered a Harris Firm summons described this predicament perfectly: "I have doubts about this debt. There is no specific information. I don't know if I owe the money."

As stated before, debt collection lawsuits, especially those resulting in default judgments, have a significant impact on low- and moderate-income New Yorkers.[84] Debt buyers use default judgments to freeze people's bank accounts, garnish their wages, and pressure them into unaffordable settlements.[85] Judgments also appear on credit reports, preventing people from being able to secure housing, obtain credit, and even find employment.[86] The cumulative impact of these judgments when examined over multiple years is appalling.

This case study and the others that follow in the report are typical cases from NEDAP's legal hotline and exemplify the problem of meritless cases filed by debt buyers.

Ms. V*, a single working mother who lives in the Bronx, supports four children, and speaks only Spanish, had six default judgments against her, all obtained by debt buyers. Ms. V learned about the lawsuits for the first time when the debt buyers started garnishing her wages. Ms. V was not served in any of the cases. Three of the six lawsuits were served at the wrong address, and the remaining three alleged substitute service on a fictitious family member. As for the underlying debts, Ms. V did not believe that they were hers. In addition, it appeared that several of the debt buyers had obtained default judgments on the same alleged debt.*

III. THE STUDY: THE SCOPE AND IMPACT OF DEBT BUYER LAWSUITS IN NEW YORK CITY

In an effort to learn more about debt buyer lawsuits and their impact on New Yorkers and their neighborhoods, we undertook a study of debt buyer filings from January 2006 through July 2008.[87] We began by identifying the 26 debt buyers that filed the most lawsuits in New York City. We then reviewed a stratified sample of 365 case files (the "Court Sample") selected to provide a full and accurate snapshot of lawsuits filed by debt buyers throughout the five boroughs of New York City. We reviewed the Court Sample for a range of data and recorded the outcomes for 336 of the 365 cases.[88] We supplemented the Court Sample with a 451-case data set comprised of records of people who called NEDAP's legal hotline in 2008 because they had been sued by a creditor or debt buyer (the "Client Sample"). Together, these data sets allowed us to gain a clearer picture of debt buyer lawsuits, including their impact on New Yorkers and their neighborhoods, and to identify several areas of abuse that raise particular concern and deserve further scrutiny.

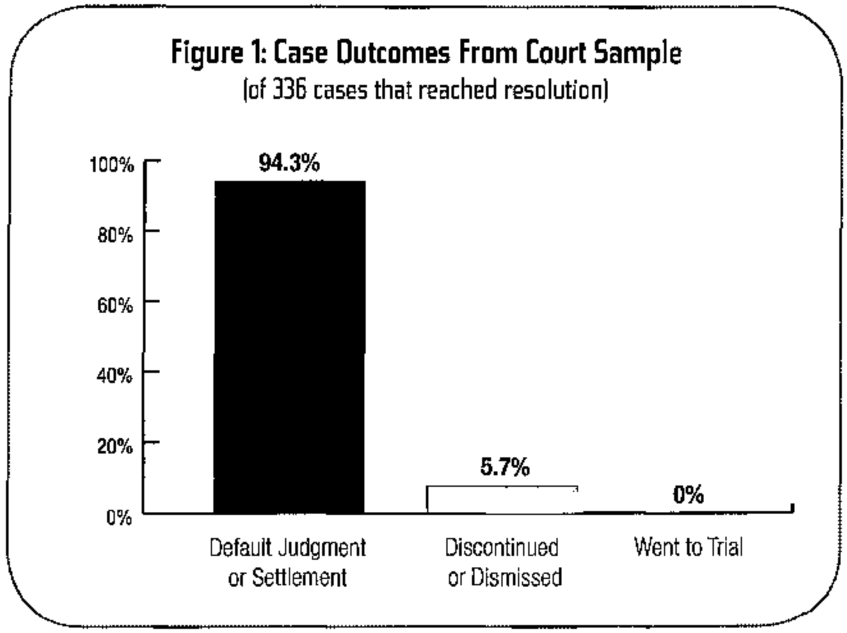
Case Outcomes Overwhelmingly Favor Debt Buyers

Below is a summary of outcomes in the 336 cases from the Court Sample that had reached a resolution at the time we reviewed the files. In the vast majority of cases, 94.3%, the outcomes favored the debt buyers.

- **Four out of five cases (81.4%) initially resulted in default judgments for the debt buyers.**
- **24 people entered into settlement agreements, of whom more than half stated in court papers that they questioned the validity of the debt or believed the charges were inflated.**
- **No person sued was represented by counsel (in contrast to the general population where 1% of defendants are represented).**
- **No cases went to trial.**
- **Most of the cases (82%) concerned credit card debts, and the rest were a combination of cell phone, health club, and other debts.**

With respect to the amounts of the debts, our analysis showed the following:

- **The median debt amount alleged was $2,150.**
- **The median default judgment awarded was $2,577. Because default judgments entitle debt buyers to recover the full amount of the alleged debt, plus court costs and 9% interest, a default judgment is always worth more than an alleged debt. In our sample, debt buyers used default judgments to inflate the alleged debt amounts by nearly 20%.**
- **Debt buyers in the Court Sample alleged debts ranging from $340 to $24,963, for a total of $1.31 million.**
- **Extrapolating from the Court Sample, a fair estimate of the total amount awarded to these debt buyers from January 2006 through July 2008 was a staggering $1,098,430,663 -- over one billion dollars.[89] The impact of these lawsuits is overwhelmingly concentrated in low- and moderate-income communities and communities of color.**



Our findings also raise questions about whether people are receiving actual notice of debt buyer lawsuits.

- **In the Court Sample, less than 10% of people sued answered the summons and complaint.**
- **In the Client Sample, 71% of people sued were either not served or served improperly, and more than half received no notice of the lawsuit at all.**
- **Only 8% of people in the Client Sample were properly served.[90]**
- **Nearly half (47.7%) of cases in the Court Sample involved service by one of four process serving agencies – AAA Attorney Service, Accu-Serve, Capital Process Servers, or Samserv.**
- **Two of the three individual process servers who served the most cases in the Court Sample have checkered histories: one featured prominently in the *Pfau* case and the other recently had his process server license revoked.**

***Mr. R**, a 48-year-old man from the Bronx, first discovered that he had been sued by a debt buyer when his debit card was denied while he was shopping for groceries. He went to his bank and learned that his bank account had been frozen by a debt buyer that had obtained an $18,000 default judgment against him. The debt buyer had sued him for an account he had never owned; served him at an address where he had never lived; and even gotten his name wrong in the court papers. After Mr. R obtained advice from an attorney, he filed an order to show cause and was able to vacate the default judgment and release his bank account. He also raised the defense of identity theft/ mistaken identity, and his case was dismissed when the debt buyer's lawyers failed to show up in court.*

Our review of the Client Sample suggests that many cases brought by debt buyers are, in fact, meritless. Furthermore, the filing of meritless cases disproportionately affects people of color. Our analysis of the Client Sample shows that:

- **69% of people sued by debt buyers were black or Latino.**
- **35% of cases brought by debt buyers were clearly meritless.**[91]
- **66% of these clearly meritless cases were brought against black or Latino clients.**
- **Overall, nearly 25% of all debt buyer lawsuits consisted of meritless cases filed against black or Latino clients.**

That 35% of debt buyer lawsuits were identified as clearly meritless does not indicate that the remaining 65% of cases were meritorious. Many of the remaining cases in the Client Sample were also not proven, and were ultimately dismissed because the debt buyer could not produce evidence of the debt. Of course, all of the people in the Client Sample had access to advice and assistance from an attorney, unlike most people sued by debt buyers.

***Ms. P**, a 35-year-old woman from Brooklyn, was sued by a debt buyer on a credit card account that her ex-husband had opened in her name without her knowledge. The debt buyer's process server claimed to have served her at an address at which she had not lived for four years, and which had been converted to a commercial property prior to the date of service. Ms. P did not get notice of the lawsuit, and the debt buyer entered a default judgment against her. Ms. P's first notice that she had been sued was a restraint on her bank account, which resulted in Ms. P being charged hundreds of dollars in legal and insufficient funds fees by her bank. After obtaining advice from an attorney, Ms. P was ultimately able to get the judgment vacated and the case dismissed for improper service.*

Impact on New York City Neighborhoods

Abusive debt buyer lawsuits not only harm individual New Yorkers but also have a deleterious impact on New York City's low- and moderate-income communities and communities of color, which bear the brunt of abusive debt buyer lawsuits. Default judgments obtained by debt buyers are overwhelmingly concentrated in these communities, where thousands of New Yorkers are subject to wage garnishment and other types of judgment enforcement, such as frozen bank accounts. In other words, these practices strip lower income neighborhoods and communities of color of community assets, not only destabilizing households but also jeopardizing financial security in entire neighborhoods.

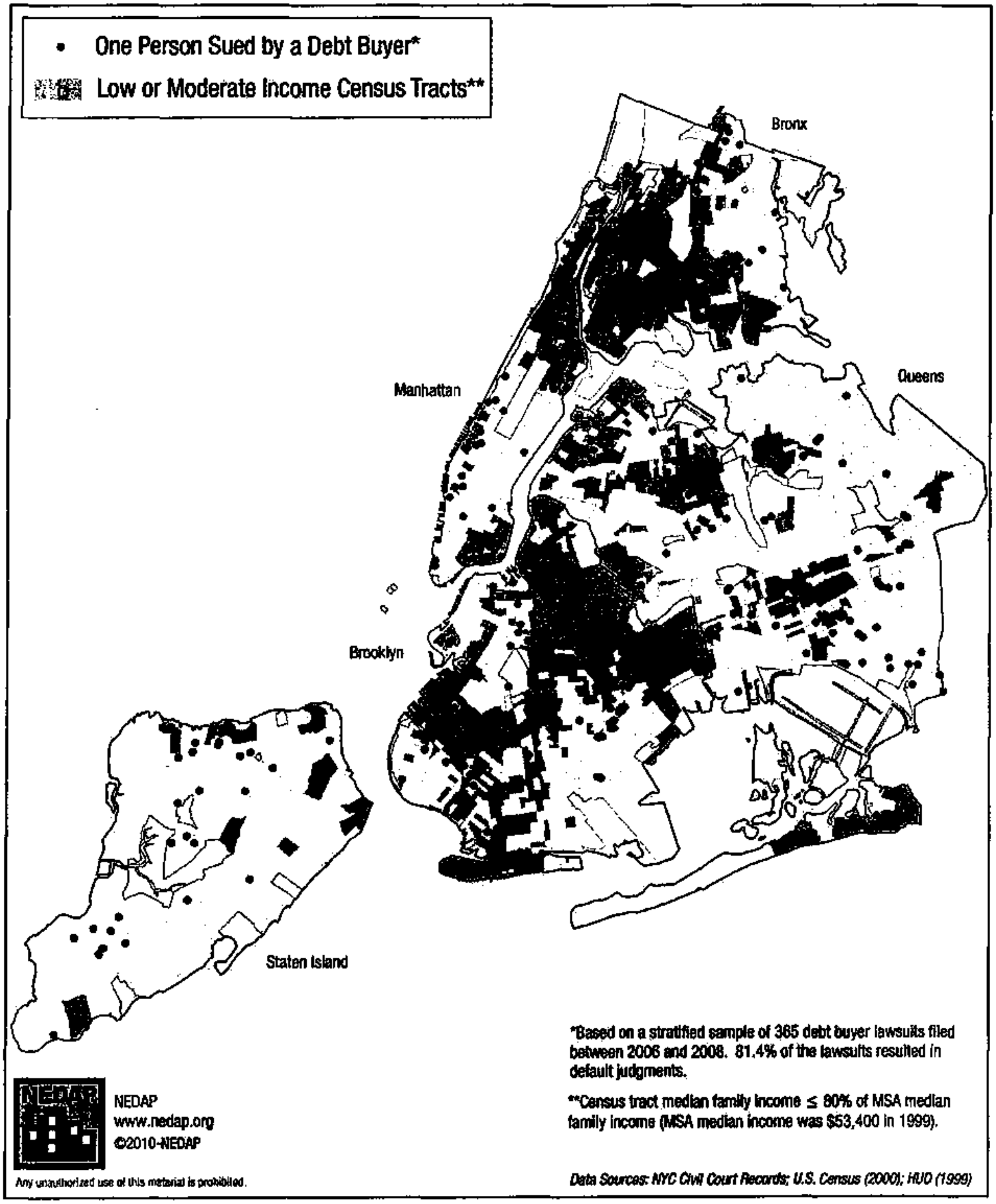
As Map 1 illustrates, 91% of people sued by debt buyers and 95% of people with default judgments entered against them live in low- or moderate-income communities.[92] In the 12 zip codes with the highest concentration of lawsuits in our study, one in four families lived below the federal poverty level.[93]

Debt buyer judgments also disproportionately affect people living in New York City's communities of color. As Map 2 illustrates, 51% of people sued by debt buyers and 56% of people with default judgments entered against them lived in communities in which the population is more than 50% black or Latino.

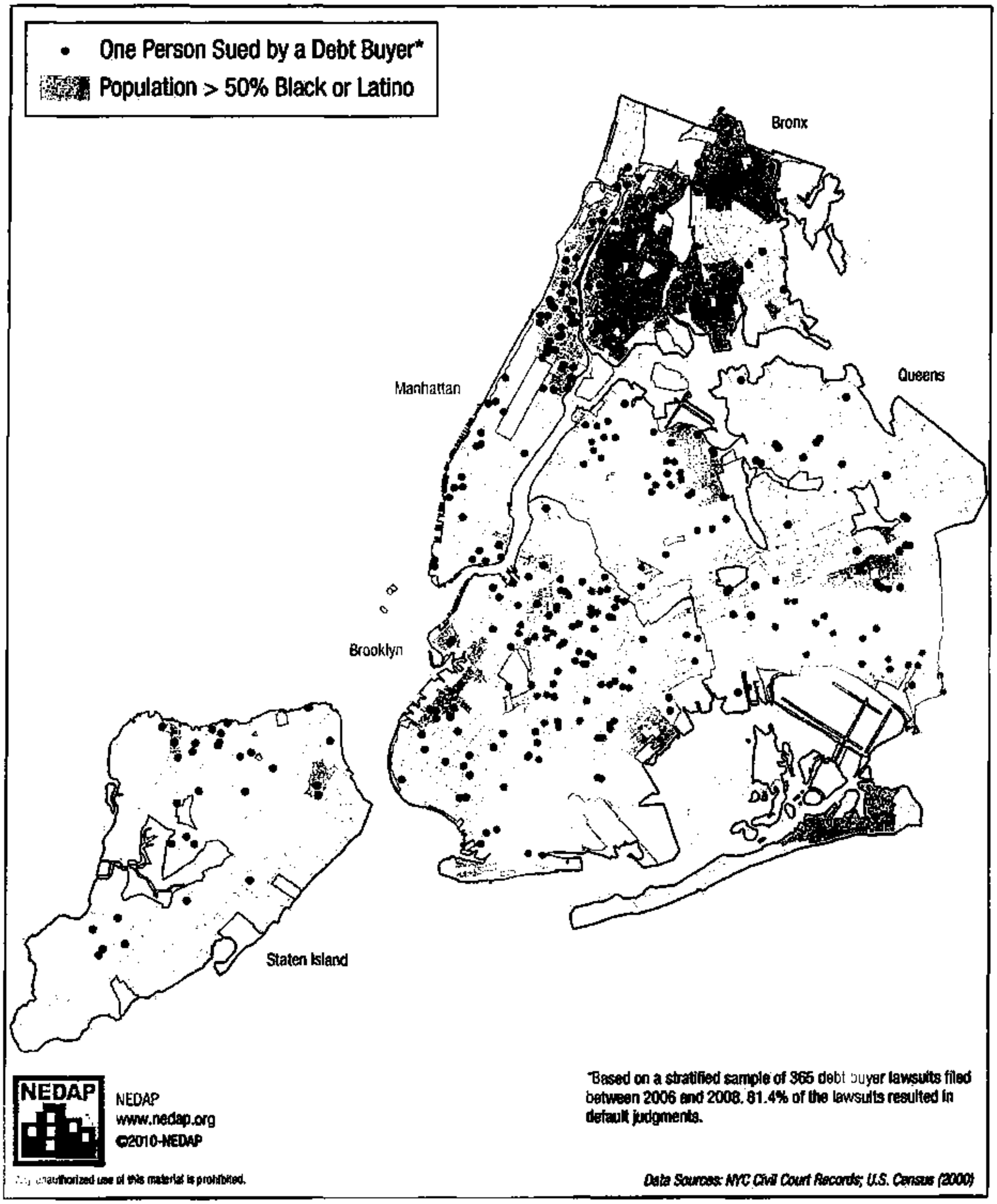
***Ms. F**, a senior citizen whose only income is Social Security and a small pension, was sued by a debt buyer for an alleged Sears account. Ms. F had never shopped at Sears and was a victim of identity theft. Even though Ms. F was not properly served, she did receive notice of the case in time to file an answer and appear in court. At her court date, the debt buyer's attorney threatened her by telling her that if she did not make payment arrangements they would seize her personal property. Ms. F was scared, but she nevertheless asked to see proof of the debt. Ms. F's case was ultimately discontinued when the debt buyer couldn't provide any proof.*

Debt Buyer Lawsuits in Low and Moderate Income Communities

New York City



Debt Buyer Lawsuits in Communities of Color
New York City



The Positive Impact of Licensing and Regulation

As part of this study, we examined whether the existing regulatory structure protected New Yorkers from debt collection abuse. New York City has long required debt collectors to obtain a license from DCA in order to collect debts from city residents.[94] However, during the period of the study, several debt buyers asserted that they did not have to be licensed because they were "passive" entities and not engaged in traditional debt collection activities. In response to those assertions, the New York City Council amended the definition of "debt collection agency" in March 2009 to expressly include all debt buyers.[95] As of July 2009, all debt buyers must be licensed to collect debts in New York City and to file debt collection lawsuits in court.[96]

Our study, which was conducted before the New York City Council clarified the licensing law, demonstrates that licensing and regulation has a positive impact on debt buyers' behavior. In our Court Sample, unlicensed debt buyers brought more than 40% of cases. Unlicensed debt buyers obtained a significantly higher percentage of default judgments than licensed debt buyers, suggesting that unlicensed debt buyers engaged in more abusive practices.[97]

Unrepresented Defendants, Improvident Settlements

When people do appear in court, judges and court personnel actively encourage settlement because it tends to free up court resources and allows the court to remove cases from the crowded calendar.

Collection attorneys typically take people into the hallways for one-sided settlement discussions, out of earshot of judges and other court personnel.[98] In these conversations, attorneys exert extreme pressure upon people to pay some part of the debt regardless of their defenses or the debt buyer's lack of proof. This is a trend seen across the country, and raises questions of how fair the outcomes in these cases can be, given such an uneven playing field.[99]

In the Court Sample, most settlement agreements provided for a payment plan of $50 - $100 per month, with the condition that if the individual defaulted in payment, the debt buyer would be able to enter judgment for the full amount of the debt, plus costs and interest. Defaults in payment were not uncommon, leading us to conclude that people are often pressured into unaffordable and unsustainable settlements.[100] Settlements thus provided a potential bonanza for debt buyers. When people in the Court Sample defaulted on their settlements, debt buyers were able to obtain judgments that exceeded the original debts by nearly 24%. Defaulted settlements offered the worst possible outcomes for individuals and the best possible outcomes for debt buyers.

When unrepresented people enter into settlements, they often waive significant defenses on which they could have prevailed if they had understood how to assert them. In one case from the Court Sample, E.O., a resident of Queens, was sued by a debt buyer called Palisades Collection in 2007. A default judgment was entered and her bank account was frozen. She swore that she was never served and had no knowledge of the lawsuit until her account was frozen. She expressed great confusion over the allegation that she had a debt with a company called "Palisades," suggesting that she did not even know the plaintiff suing her, but eventually she settled anyway. Another person, D.P. of Staten Island, was also sued by Palisades Collection over an AT&T Wireless debt. D.P. stated in court papers that she did not owe the debt and denied ever having a relationship with AT&T, but she settled the case anyway for $60 per month, even though Palisades never produced any evidence that she owed the debt. A third defendant agreed to pay $50 per month to a debt buyer on a debt that she asserted had previously been discharged in bankruptcy.

In one shocking example, a debt buyer called Colorado Capital Investments sued B.P. of Manhattan twice for the same debt. In the first case, she obtained a dismissal *with prejudice*, which means that the court made a final determination that she did not owe the debt, and the case could never be brought against her again. Despite this result, Colorado Capital Investments sued B.P. again two years later on the same debt. This second suit was unlawful and never should have been filed, but B.P. ultimately agreed to settle this unlawfully filed case for $75 per month.

Insuffcent Scrutiny of Applications for Default Judgments

In *Debt Weight*, the Urban Justice Center found that debt buyers routinely obtained default judgments even though they almost always failed to submit the proof required by law.[101] Our study shows that these practices continue. In the Court Sample, debt buyers never provided an affidavit from someone with personal knowledge of the facts of the case, as is required under New York law.[102] Despite these glaring deficiencies in their applications, debt buyers regularly obtained default judgments.

The problem is exacerbated by the Court's practice of giving applications for default judgments to clerks instead of judges. Court clerks are often not lawyers, and they do not have the ability to assess whether the application meets minimum evidentiary standards. This practice results in large part from the overwhelming volume of debt collection lawsuits and the Court's lack of sufficient resources to handle the increased caseload. Nevertheless, the lack of any meaningful review by someone with judicial training makes the process ripe for abuse.

Custodian of Records.

In our analysis of the Court Sample, one person stood out for signing an unusually large number of affidavits in support of debt buyer requests for default judgments. This individual identified himself as the "custodian of records" for LR Credit, Pinpoint Technologies, and Rushmore Recoveries, and provided an affidavit in support of every default judgment sought by these three companies, swearing that he had "personal knowledge of the facts" of each case. If we extrapolate to every case filed by these companies in a year, this affiant would have signed 47,503 affidavits in the year 2007 alone, claiming to have personal knowledge of the facts of each and every one of these cases.

It can be argued that the Court's current practice of allowing clerks to review applications for default judgments does not comply with New York law. In New York, clerks may grant default judgments only when the amount sought is a "sum certain" – that is, an amount easily verifiable from the papers submitted in support of the application. The amount of most consumer debts is not easily verifiable, because in order to determine how much, if anything, a person owes on a consumer debt, the court would typically have to review a complicated contract, with multiple amendments, and months' or years' worth of account statements. New York law requires that judges, not clerks, perform this kind of detailed review.[103]

Pattern and Practice of Improper Debt Collection Among Law Firms

In New York, a small number of law firms commence the vast majority of debt collection cases. These firms employ questionable litigation practices that, viewed as a whole, reveal systemic problems in the judicial system.[104]

- **Out of the 23 debt buyer law firms in the Court Sample, 11 were named in the *Pfau* case.**
- **64% of debt buyers in the Court Sample were represented by one of five law firms in New York -- Cohen & Slamowitz, Forster & Garbus, Mel S. Harris and Associates, Mullooly, Jeffrey, Rooney & Flynn, or Rubin & Rothman.**

Common observable practices by these law firms include:

- **Filing lawsuits without having or being able to produce any proof;**
- **Seeking default judgments on the basis of false and/or legally inadequate affidavits;**
- **Hiring process serving agencies that routinely fail to serve people; and,**
- **Using heavy-handed settlement tactics at the courthouse against unrepresented people.**

Ms. W*, a 38-year-old woman from Brooklyn, was a victim of identity theft in 1999 and subsequently filed a police report. Nearly 10 years later, in 2008, she received a letter from a debt collection law firm claiming that she owed $1000 on an AT&T Wireless account used from around 1999 to 2002, though she had never owned an AT&T Wireless phone. She contacted the law firm and confirmed that she had never lived at the address that it had on file for the alleged debt. She also faxed the law firm a copy of her police report and proof that she had been living at a different address at the time in question. She did not hear back from the law firm. Then, in January 2009, her husband went to their bank and discovered that their joint bank account had been frozen by the same law firm. She had never received any notice from the law firm that she was being sued or that they had obtained a default judgment against her. When she contacted the law firm, she was told that the information she had sent the firm was insufficient. However, after filing an order to show cause, Ms. W was able to get the judgment vacated and case dismissed.*

IV. RECOMMENDATIONS: BRING FAIRNESS AND JUSTICE TO DEBT COLLECTION IN NEW YORK

"It's the wild, wild west out there."[105] Our report shows a desperate need for reforms in all areas of the debt buying industry and at all stages of the debt collection process.[106]

1. Prohibit debt buyers from filing lawsuits without evidence, and increase penalties for filing of meritless lawsuits.

Immediate action is needed to address the problem of abusive debt collection lawsuits. At the local level, New York State should enact the Consumer Credit Fairness Act (CCFA). The proposed law would require court papers to include more information about the alleged debts, thereby preventing debt buyers from routinely filing meritless lawsuits and obtaining judgments on invalid debts. In addition, by reducing the statute of limitations in debt collection cases, CCFA would encourage debt buyers to file claims in a timely manner and better protect low- and moderate-income consumers from the excessive accumulation of interest charges and late fees.[107]

At the national level, Congress should amend the Fair Debt Collection Practices Act (FDCPA) to address the abuses described in this report. The FDCPA should explicitly prohibit debt buyers from filing lawsuits without having evidence to support their claims. Congress should enact tougher penalties for violations of the FDCPA by providing for injunctive relief and raising the amount of statutory damages, which have not changed in more than 30 years,[108] from $1000 to $4000 for individuals. Furthermore, statutory damages should be available *per violation*, not per case.

2. Aggressively regulate and monitor process servers.

The high rate of default judgments in cases involving debt buyers is due in part to fraudulent practices in the process serving industry. The New York City Council, with the support of the New York City Department of Consumer Affairs (DCA), recently passed groundbreaking legislation intended to curb these unlawful practices. The DCA should implement strong regulations to carry out the new law and make enforcement of the new law an agency priority.

3. Step up government enforcement actions against debt collectors and law firms.

We commend the New York State Attorney General's office for the affirmative steps it has taken to combat abusive debt collection practices. The problems uncovered by the Attorney General indicate widespread, systemic abuses in the debt collection industry.[109] We urge the Attorney General to continue to take aggressive action against the debt collection industry.

We also urge the New York City Department of Consumer Affairs (DCA) to take aggressive action to combat debt buyer abuses. The DCA should conduct periodic audits of individual companies, and suspend and revoke licenses where warranted. The DCA should also enforce the law against entities that engage in illegal and abusive debt collection activities, including sewer service.

Finally, we encourage the Federal Trade Commission (FTC) to focus on reforming the debt buying industry. In 2009, the FTC held regional roundtable discussions on "Protecting Consumers in Debt Collection Litigation and Arbitration," which focused on debt buyer lawsuits. The FTC should use the information gathered from these roundtables to address the problems described in this report.

4. Strengthen Courthouse Protections for People Sued by Debt Buyers.

- **Ensure Judicial Review of Default Judgments.**

In the vast majority of cases, the debt buyers seek a default judgment against the person sued. Largely due to the increased volume of debt collection lawsuits, these applications for default judgments are reviewed by court clerks, not by judges, a practice that does not conform to New York law. Court clerks often are not attorneys, and they lack the legal training and expertise necessary to evaluate applications for default judgments in debt collection cases. As a result, debt buyers routinely obtain default judgments despite glaring legal deficiencies in their applications.

Our data suggests that the New York City Civil Court has issued thousands of default judgments on legally insufficient applications. To rectify this untenable situation, debt buyers should have to present proper documentation of their claims--ideally to judges, not clerks. Additional resources should be provided to the Civil Court to accomplish this.

- **Review Settlement Agreements for Fundamental Fairness.**

Our report demonstrates that people who make settlement agreements with debt buyers usually fare worse than people who default. Many people are pressured into unfair and unaffordable agreements in which they are doomed to fail, with dire consequences. Debt buyers must be required to produce evidence of the debt before the parties begin settlement negotiations. In addition, judges should review settlement agreements to ensure that they are fundamentally fair. Courts should not allow unrepresented people to enter into agreements that will leave them in a worse position than they would be in if a default judgment were enforced or allow people who only receive exempt income to enter into settlement agreements without understanding that their income cannot be collected by creditors.

- **Educate Judicial Personnel About the Debt Buying Industry and its Misuse of the Courts.**

In bringing the *Pfau* litigation, the Court has played a leadership role in the effort to remedy some of the worst debt collection practices. Additional resources should be provided to the Court to enhance efforts to educate members of the judiciary and key court personnel about the debt buying industry and its nationwide practice of flooding the courts with lawsuits based on little or no proof in hopes of obtaining a default judgment. Judicial personnel must be informed of these practices so they can properly scrutinize debt buyer lawsuits and prevent the courts from becoming an extension of the debt collection industry. To that end, we urge the Office of Court Administration to incorporate training on debt collection and debt industry practices into the mandatory annual trainings for judges, court attorneys, and clerks.

5. Increase Legal Representation and Resources for People Sued by Debt Buyers.

In the limited instances when people sued by debt buyers are represented by counsel, it makes all the difference in the world. Debt buyers often walk away from cases rather than fight what they know will be a losing battle. The same occurs when unrepresented litigants assert their rights by requesting proof of the debt. Unfortunately, the vast majority of people sued have no access to legal counsel and no knowledge of their rights, leaving them vulnerable to the many abuses described in this report.

Debt Weight highlighted the need for legal services to be available in the courthouse to provide basic information and advice to unrepresented litigants. The Civil Legal Advice and Resource Office (CLARO) currently provides such services in Brooklyn, Queens, Manhattan and the Bronx for several hours per week. CLARO, however, has the capacity to serve less than 2% of the approximately 300,000 people sued each year by debt collectors in the New York City Civil Court. Funding for the legal services organizations that support CLARO should be increased and the program's hours expanded so that more people can access this valuable resource.

Many low-income people -- particularly those who are elderly, disabled or do not speak English -- need legal representation, not simply advice. Unfortunately, most legal services programs do not provide assistance in debt collection cases and low-income people cannot afford to pay private attorneys to represent them. New York City and State should find ways to provide more legal representation for low-income people sued by debt buyers. Certainly, local legal services offices should be funded to provide this assistance. Fee-shifting statutes, which would provide an award of attorney's fees for the successful defense of a debt collection lawsuit, could fund legal services programs and convince private attorneys to take on these cases at affordable rates.

APPENDICES

APPENDIX A: Methodology

This study draws results from two data sets: (1) a 365-case sample of lawsuits brought by the 26 debt buyers that filed the greatest number of debt collection lawsuits in New York City between January 2006 and July 2008 ("Court Sample"); and (2) a 451-case sample of callers to NEDAP's legal hotline who were sued by a creditor or debt buyer in 2008 ("Client Sample").

To select the Court Sample, we identified the top 26 debt buyers using the Office of Court Administration's eCourts system. The Chief Clerk at the New York City Civil Court provided us with the index numbers for the 441,143 cases filed by the 26 debt buyers from January 2006 through July 2008. We then designed a randomly selected, stratified, 365-case sample of debt buyer lawsuits. The sample size for each of the 26 debt buyers was in proportion to its overall share of cases in New York City. We then selected, for each debt buyer, cases from each borough in proportion to that borough's share of all debt buyer lawsuits filed in New York City. For example, LVNV Funding, with 27,210 cases filed from January 2006 to June 2008, was allotted 25 cases in the sample: 5 from the Bronx, 8 from Brooklyn, 4 from Manhattan, 6 from Queens, and 2 from Staten Island. Gemini Asset Recoveries, which filed 1,855 cases during this period, was assigned 5 cases, 1 from each borough. Because we wanted to ensure that at least one Staten Island filing per debt buyer was included in the sample, Staten Island is over-represented, comprising 9% of the 365 case sample but only 4% of cases filed in New York City by these debt buyers during the study period.[1] We reviewed all selected case files by hand in 2009 for several key criteria and uniformity of data entry, and we recorded outcomes for 336 of the 365 cases.[2]

The Client Sample is a data set collected from NEDAP's legal hotline. The Client Sample includes the case records of 451 hotline callers from 2008. These callers were chosen from NEDAP's database because they had been sued by a creditor or debt buyer. When clients call NEDAP's hotline they go through an intake process that records extensive case details and demographic information. Case details recorded include how the client was served; the nature of the client's defenses to the lawsuit, if any; and the name of every original creditor, debt buyer and law firm involved in the client's case. The demographic data collected include gender, race, and age, among others. All of NEDAP's hotline callers must meet certain eligibility criteria to receive assistance.[3] In addition, they are self-selected as they chose to seek help from a legal services office. As a result, these callers' cases may not be fully representative of all debt buyer lawsuits in New York City.

[1] The other four boroughs are accurately represented in the sample, with Brooklyn accounting for 31%, Queens at 24%, the Bronx at 20%, and Manhattan at 16%, all within 3% of the true distribution.

[2] At the time of review, the other 29 cases remained pending with no resolution.

[3] NEDAP hotline clients must live in New York City and may have a maximum income of 250% of the federal poverty level.

APPENDIX B: List of Debt Buyers Included in Court Sample, by County

	County					
Plaintiff	**Bronx**	**Brooklyn**	**Manhattan**	**Queens**	**Staten Island**	**Total**
Arrow Financial Services	3	5	2	4	1	**15**
Asset Acceptance	6	10	4	8	2	**30**
Atlantic Credit & Finance	1	2	1	2	1	**7**
CACH—Collect America[1]	2	3	2	2	1	**10**
CACV—Collect America	1	1	1	1	1	**5**
Cavalry Portfolio Services	1	2	1	2	1	**7**
Collins Financial Services	1	1	1	1	1	**5**
Colorado Capital Investments	1	1	1	1	1	**5**
Credigy Receivables	1	2	1	2	1	**7**
Elite Recovery Services	1	1	1	1	1	**5**
Erin Capital Management	3	6	3	4	1	**17**
Gemini Asset Recoveries	1	1	1	1	1	**5**
Independence Receivables	1	1	1	1	1	**5**
LR Credit (all entities)	10	15	8	12	5	**50**
LVNV Funding	5	8	4	6	2	**25**
Metro Portfolios	3	5	2	4	1	**15**
Midland Funding	8	12	7	10	3	**40**
North Star Capital Acquisition	2	3	2	2	1	**10**
NY Financial Services	3	5	2	4	1	**15**
Palisades Collection	5	8	4	6	2	**25**
Pinpoint Technologies	3	5	2	4	1	**15**
Portfolio Recovery Associates	2	3	2	2	1	**10**
RAB Performance Receivables	2	3	2	2	1	**10**
RJM Acquisitions	1	1	1	1	1	**5**
Rushmore Recoveries	3	5	2	4	1	**15**
Worldwide Asset Purchasing	1	2	1	2	1	**7**
Total	**71**	**111**	**59**	**89**	**35**	**365**

[1] Collect America changed its name to SquareTwo Financial in December, 2009. *See* Press Release, Square Two Financial, Square Two Financial, Formerly Collect America, Unveils New Name and Look (Dec. 16, 2009), *available at* http://www.squaretwofinancial.com/about-us/press/corporate-news/.

APPENDIX C: Summary of Court Statistics

NEW YORK CITY CIVIL COURT FILINGS STATISTICS

YEAR	KINGS	QUEENS	BRONX	NEW YORK	RICHMOND	TOTAL CITY WIDE
2008	TOTAL: 192,567 NF: 44,670 CC: 95,048	TOTAL: 181,799 NF: 79,264 CC: 80,887	TOTAL: 131,566 NF: 54,265 CC: 65,072	TOTAL: 84,500 NF:*29,476 CC:*41,634	TOTAL: 29,087 NF: 11,334 CC:16,102	TOTAL: 619,519 NF: *219,009 CC: *298,743
2007	TOTAL: 203,677 NF: 61,738 CC: 95,871	TOTAL: 179,334 NF: 79,491 CC: 81,317	TOTAL: 107,932 NF: 32,762 CC: 64,000	TOTAL:81,127 *Case type data not available*	TOTAL: 26,209 NF: 9,189 CC: 15,344	TOTAL: 598,276
2006	TOTAL: 214,861 NF: 65,835 CC: 106,240	TOTAL:181,706 NF:74,973 CC:85,234	TOTAL:113,164 NF: 34,054 CC:73,894	TOTAL: 81,932 *Case type data not available*	TOTAL: 26,009 NF: 10,637 CC:13,942	TOTAL: 617,672
2005	166,514	141,752	80,368	70,282	18,811	477,727
2004	133,334	129,397	57,271	66,486	12,981	399,469
2003	128,428	125,475	86,950	74,591	10,734	426,178
2002	98,787	107,121	70,172	55,047	8,467	339,594
2001	81,608	67,816	41,811	49,051	7,261	247,547
2000	70,278	54,513	37,374	44,184	6,296	212,645
1999	72,540	57,318	27,234	44,891	6,025	208,808
1998	77,751	56,640	27,658	45,680	7,191	214,920
1997	83,569	53,086	26,396	46,448	6,919	216,410
1996	75,351	46,438	23,861	45,765	6,377	197,792
1995	72,244	37,870	23,513	46,672	6,082	192,437
1994	70,980	38,549	22,273	48,098	6,070	187,970
1993	80,353	38,194	21,959	50,594	6,323	197,423
1992	80,943	44,605	24,946	56,947	6,897	214,338
1991	80,600	49,577	26,096	66,458	7,671	230,402
1990	81,795	50,117	29,378	75,613	7,330	244,233
1989	71,459	47,124	27,556	76,220	6,258	229,117
1988	73,108	44,988	27,005	71,648	5,647	222,396
1987	84,405	50,721	29,234	81,696	6,419	252,475
1986	82,343	43,664	30,156	97,756	6,387	260,306
1985	80,058	42,265	28,397	102,959	6,380	260,059
1984	75,294	40,289	15,485	102,428	6,312	250,202

NF - No Fault actions filed
CC - Consumer Credit actions filed
**New York County case management system is unable to generate statistics, therefor stats are estimates based on ratios form other counties. Statistics will be available from 6/9/08 on.*

ENDNOTES

[1] *See* Appendix B for a list of debt buyers included in the Court Sample.

[2] *See, e.g.*, National Consumer Law Center, *Fair Debt Collection* 7 (6th ed. 2008) [hereinafter *Fair Debt Collection Manual*] (noting that as accounts become more delinquent, they are heavily discounted and a debt buyer typically pays only pennies on the dollar); U.S. Government Accountability Office, *Credit Cards: Fair Debt Collection Practices Act Could Better Reflect the Evolving Debt Collection Marketplace and Use of Technology* 29 (Sept. 2009) [hereinafter *GAO Report*], *available at* http://www.gao.gov/new.items/d09748.pdf.

[3] GAO Report, supra note 2, at 26.

[4] *Id.* at 29.

[5] *Id.*

[6] "Charge off" is an accounting term for retail credit loans that have been delinquent or past due for 180 days and which the creditor treats as a loss.

[7] Caroline Mayer, *As Debt Collectors Multiply, So Do Consumer Complaints*, Wash. Post, July 28, 2005, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/07/27/AR2005072702473.html; TheDebtTrader.com, *Debt Industry Overview*, (2000), *at* http://www.thedebttrader.com/indushis.html.

[8] Federal Deposit Insurance Corporation, *An Examination of the Banking Crises of the 1980s and Early 1990s* 100 (1997), *available at* http://www.fdic.gov/bank/historical/history/vol1.html.

[9] Lee Davison, *The Resolution Trust Corp. and Congress, 1989-1993, Part II: 1991-1993,* 18 FDIC Banking Review No. 3, 23 (2006), *available at* http://www.fdic.gov/bank/analytical/banking/index.html.

[10] Mayer, *supra* note 7.

[11] TheDebtTrader.com, *supra* note 7.

[12] U.S. Government Accountability Office, *Credit Cards: Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers* 57 (Sept. 2006), *available at* http://www.gao.gov/new.items/d06929.pdf.

[13] Jose A. Garcia, Demos, *Borrowing to Make Ends Meet: The Rapid Growth of Credit Card Debt in America* (2007), *available at* http://www.demos.org/pubs/stillborrowing.pdf.

[14] *Id.* (finding that medical debt and unemployment were significant contributors to household credit card debt loads); *see also* Jose Garcia, Tamara Draut, Demos, *The Plastic Safety Net: How Households are Coping in a Fragile Economy* (2009), *available at* http://www.demos.org/pubs/psn.pdf.

[15] Rishawn Biddle, *Credit Cards: Defaults Force Issuers to Beat a Retreat,* 25 Los Angeles Bus. J. 43 (2003), *available at* http://www.thefreelibrary.com/Credit+cards:+defaults+force+issuers+to+beat+a+retreat-a0109847989.

[16] Margo Anderson, *From Subprime Mortgages to Subprime Credit Cards,* 19 Communities & Banking 4, 23 (Fall 2008).

[17] Federal Reserve Board, *Charge-Off and Delinquency Rates on Loans and Leases at Commercial Banks, at* http://www.federalreserve.gov/releases/chargeoff/ (last updated Feb. 23, 2010).

[18] Paul Legrady, *Welcome to a New World of Debt,* 11 Collections & Credit Risk 5, 26 (May 2006).

[19] *Id.*

[20] *See* Asset Acceptance, Inc., Annual Reports (Form 10-K) (2001-2006); Asta Funding, Inc., Annual Reports (Form 10-K) (2001-2006); Encore Capital Group, Inc., Annual Reports (Form 10-K) (2001-2006); Portfolio Recovery Associates, Inc., Annual Reports (Form 10-K) (2001-2006).

[21] *Standards for Insuring the Security, Confidentiality, Integrity and Protection of Customer Records and Information: Proposed Rule and Request For Public Comment on 16 C.F.R. Part 314 By the Federal Trade Commission* (2001) (comments by the Debt Buyers Association), *available at* http://www.ftc.gov/privacy/glbact/safeguard/dba.htm.

[22] *See, e.g.*, Asset Acceptance, Inc., Annual Report (Form 10-K) 45 (2009); Asta Funding, Inc., Annual Report (Form 10-K) 29 (2009); Portfolio Recovery Associates, Inc., Annual Report (Form 10-K) 56 (2009); *see also* Press Release, Encore Capital Group, Inc., Encore Capital Group Announces Fourth Quarter and Full Year 2009 Results and New Revolving Credit Facility (Feb. 8, 2010), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=115920&p=irol-newsArticle&ID=1385087&highlight=.

[23] Jeremy Simon, *For Credit Card Issuers, There's Plenty of Room at the Top*, June 6, 2006, *at* http://www.creditcards.com/credit-card-news/us-bank-credit-card-issuers-acquisitions-1264.php.

[24] Mayer, *supra* note 7.

[25] Will Shanley, *KRG Capital Purchases Collect America*, The Denver Post, Nov. 29, 2005, *available at* http://www.denverpost.com/business/ci_3260145. Collect America has an unusual business model: the company licenses proprietary collection software to law firms that collect debts placed with them by Collect America, effectively turning the law firms into Collect America's franchisees. Interestingly, these law firms are also barred from collecting debts not placed by Collect America unless those debts were purchased from a short list of suppliers approved by the company. *See* Complaint, *Collect Am. Ltd. v. Law Office of Curtis O Barnes, P.C.*, 2005-CV-1803 (D. Colo. 2005).

[26] *See* Radian Group Inc., About Radian, *at* http://www.radian.biz/page?name=AboutUs (stating that Radian has a 29% equity interest in Sherman Financial Group) (last visited April 11, 2010); *Waite v. LVNV Funding*, No. 09-00295-KD-C, 2009 U.S. Dist. LEXIS 48233 (S.D. Ala. Jun. 9, 2009).

[27] *See* Sallie Mae, SLM Corporation (Sallie Mae) Trademarks and Service Marks *at* http://www.salliemae.com/about/copyright.htm (last visited April 11, 2010); Bethany McClean, Sallie Mae's Private Side, *Fortune* (Apr. 30, 2007), *available at* http://money.cnn.com/magazines/fortune/fortune_archive/2007/05/14/100008715/index.htm.

[28] Caitlin Devitt, *So Sue'Em. Debt Buyers Are Increasingly Going to Court to Increase Recoveries and Justify Prices Being Paid for Debt Portfolios in a Demand Driven Market*, 12 Collections and Credit Risk 7, 32 (Jul. 2007), *available at* http://www.highbeam.com/doc/1G1-166618590.html.

[29] GAO Report, *supra* note 2, at 24; John Russo, *Attorneys Buying Bad Debt?*, Debt 3 (Nov. 1, 2008), *available by subscription at* http://www.highbeam.com/doc/ 1P3-1632099381.html (copy on file with authors). Russo recommends that any law firm interested in buying debt should "get started by setting up an LLC or a corporation as the debt buying entity" because "many states don't allow attorneys to own or have a vested interest in their files." *See also* Devitt, *supra* note 28, at 32 (stating that in 2007, Gary Wood, President of Collins Financial, estimated that his company resold 20% to 25% of its debt portfolios to a network of 2,000 attorneys).

[30] Devitt, *supra* note 28; Kit Ladwig, *Hot Prospects and Hot Tamales*, Collections & Credit Risk (May 2003).

[31] Simon, *supra* note 23.

[32] Darren Waggoner, *Encore Capital Reports Uptick in Revenue, Collections*, Collections & Credit Risk (Feb. 8, 2010), *available at* http://www.collectionscreditrisk.com/news/encore-capital-reports-uptick-in-revenue-collections-3000633-1.html.

[33] Encore Capital Group, Form 8-K, Credit Agreement, Exhibit 10.1, Feb. 8, 2010, *available at* http://www.sec.gov/Archives/edgar/data/1084961/000119312510024359/dex101.htm (detailing in the Commitment Schedule amounts of revolving loan commitments made by individual lenders to Encore Capital Group).

[34] Fair Debt Collection Manual, *supra* note 2, at 9 (citing case law pertaining to what debt buyers buy). *See also* GAO Report, *supra* note 2, at 44-45; Federal Trade Commission, *Collecting Consumer Debts: The Challenges of Change* 22-23 (Feb. 2009) [hereinafter FTC Report], *available at* http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf.

[35] FTC Report, *supra* note 34, at 19; GAO Report, *supra* note 2, at 44.; *see also* Jim Dwyer, *In Civil Court, One Nation, Under Debt*, N.Y. Times, Oct. 10, 2008, at A19, *available at* http://www.nytimes.com/2008/10/11/nyregion/11about.html.

[36] Randy Nicola, *9 Keys to Successful Debt Buying*, Debt3, at 5 (May 1, 2007) (quoting Tony Jackson, vice president of sales at Collins Financial Services as saying: "Media availability can be spotty."); *Collecting Consumer Debts: The Challenges of Change: Request for Comments, Original Papers, and Participation By the Federal Trade Commission* (2007) (comments by Barbara A. Sinseley on behalf of Debt Buyers' Association) (stating: "In fact, it is common for a debt buyer initially to receive only a computerized summary of the creditor's business records...").

[37] FTC Report, *supra* note 34, at 22-23; *Protecting Consumers in Debt Collection Litigation and Arbitration: A Roundtable Discussion by the Federal Trade Commission* (2009) (public comments by David B. Mertz, President, Compliance Security Partners, LLC), *available at* http://www.ftc.gov/os/comments/debtcollectroundtable2/544507-00006.pdf.

[38] *See* Account Sale Agreement Between Capital One Bank and Centurion Capital Corporation (Dec. 8, 2005) (redacted copy on file with the authors); Purchase and Sale Agreement Between Citibank (South Dakota), N.A. and Unifund CCR Partners (Feb. 28, 2005) (copy on file with the authors).

[39] GAO Report, *supra* note 2, at 28, 44-45; *see also* Account Sale Agreement Between Capital One Bank and Centurion Capital Corporation, *supra* note 38; Purchase and Sale Agreement Between Citibank (South Dakota), N.A. and Unifund CCR Partners, *supra* note 38.

[40] GAO Report, *supra* note 2, at 44-45.

[41] *Id.* at 28 (citing a debt broker and concluding:"[T]he issuer's underwriting criteria, the average account balance, and the amount of documentation available all can affect the price of a portfolio.").

[42] *See* Portfolio Recovery Associates, Inc., Annual Report (Form 10-K) (Mar. 1, 2007); Asset Acceptance, Inc., Annual Report (Form 10-K) (Feb, 27, 2006).

[43] Devitt, *supra* note 28.

[44] GAO Report, *supra* note 2, at 28-29; Collections and Credit Risk, *Debt Portfolio Prices Edge Higher* (Mar. 23, 2010), *at* http://www.collectionscreditrisk.com/news/debt-portfolio-prices-edge-higher-3001103-1.html.

[45] Robert Berner and Brian Grow, *Prisoners of Debt*, Business Week, Nov. 12, 2007, *available at* http://www.businessweek.com/magazine/content/07_46/b4058001.htm; David Streitfeld, *You're Dead? That Won't Stop the Debt Collector*, N.Y. Times, Mar. 4, 2009, at A1, *available at* http://www.nytimes.com/2009/03/04/business/04dead.html?_r=1&scp=1&sq=dead%20newest%20frontier&st=cse.

[46] Kaulkin Ginsberg, *Getting Current on Pricing in the U.S. Credit Card Debt Purchasing Market*, InsideARM, Mar. 24, 2009, *at* http://www.insidearm.com/go/arm-analysis/getting-current-on-pricing-in-the-u-s-credit-card-debt-purchasing-market.

[47] GAO Report, *supra* note 2, at 29.

[48] Berner and Grow, *supra* note 45.

[49] Press Release, Federal Trade Commission, FTC Sues Subprime Credit Card Marketing Company for Deceptive Credit Card Marketing (June 10, 2008), *available at* http://www.ftc.gov/opa/2008/06/compucredit.shtm.

[50] Portfolio Recovery Associates, Inc., Annual Report (Form 10-K) 15 (Feb. 28, 2008).

[51] *See* Asset Acceptance, Inc., Annual Report (Form 10-K) (2001-2006); Asta Funding, Inc., Annual Report (Form 10-K) (2001-2006); Encore Capital Group, Inc., Annual Report (Form 10-K) (2001-2006); Portfolio Recovery Associates, Inc., Annual Report (Form 10-K) (2001-2006).

[52] Encore Capital Group, Leveraging Intellectual Capital, Presentation to Investors (June 9, 2009) (written materials on file with the authors).

[53] Patrick Lunsford, *More Payment Plans and Legal Collections, Say ARM Companies in Survey*, InsideArm, Jan. 27, 2009, *available at* http://www.insidearm.com/go/arm-news/-more-payment-plans-and-legal-collections-say-arm-companies-in-survey.

[54] Brendan Conway, *Collection Agencies Call Up Revenue in Recession*, Wall St. J., June 24, 2009, at B3B.

[55] Devitt, *supra* note 28, at 32 (quoting Asta's chief executive officer).

[56] FTC Report *supra* note 34, at 55.

[57] *See* New York City Civil Court Filing Statistics 1984 – 2008, attached at Appendix C. *See also* Urban Justice Center, *Debt Weight: The Consumer Credit Crisis in New York City and its Impact on the Working Poor* (Oct. 2007) [hereinafter *Debt Weight*], *available at* http://www.urbanjustice.org/pdf/publications/CDP_Debt_Weight.pdf; Dwyer, *supra* note 35; New York City Bar Association, Out of Service: A Call to Fix the Broken Process Service Industry (April 2010), *available at* http://www.nycbar.org/pdf/report/uploads/ProcessServiceReport4-10.pdf.

[58] *See, e.g.*, Debt Weight, *supra* note 57, at 1; New York City Bar Association, *supra* note 57, at 2.

[59] FTC Report *supra* note 34, at 56-57 ("Consumer groups report that consumers frequently do not appear to contest debt collection lawsuits because they have not been properly served, and, if they do not appear, the court enters a default judgment."); New York Appleseed, *Due Process and Consumer Debt: Eliminating Barriers to Justice in Consumer Credit Cases*, at 12 (2010) [hereinafter *Appleseed Report*], *available at* http://ny.appleseednetwork.org/LinkClick.aspx?fileticket=dFHdRj22CXY%3d&tabid=252 ("Sewer service, or the intentional failure to serve a defendant, remains the single most effective barrier to court.").

[60] MFY Legal Services, Inc., *Justice Disserved: A Preliminary Analysis of the Exceptionally Low Appearance Rate by Defendants in Lawsuits Filed in the Civil Court of the City of New York* 2 (June 2008) [hereinafter MFY Report], *available at* http://www.mfy.org/Justice_Disserved.pdf.

[61] Appleseed Report, *supra* note 59, at 12.

[62] Frank M. Tuerkheimer, *Service of Process in New York City: A Proposed End to Unregulated Criminality*, 72 Colum. L. Rev. 847 (1972); N.Y. Attorney General, N.Y. City Dep't of Consumer Affairs, and The N.Y. City Dep't of Investigations, *A Joint Investigative Report into the Practice of Sewer Service in New York City* (1986) [hereinafter *N.Y. Attorney Gen. Investigative Report*]; *Barr v. Dep't of Consumer Affairs*, 70 N.Y.2d 821, 822-23 (1987) (discussing "a continuing and pervasive problem of unscrupulous service practices by licensed process servers"); Matthew Goldstein, *Process Server's License Revoked by Consumer Agency for Fraud*, N.Y. Law Journal, Feb. 7, 1996, at 1; MFY Report, *supra* note 60, at 4; David Caruso, The Associated Press, *Court Papers Went Undelivered; Process Server Faces Charges*, N.Y. Law Journal, April 15, 2009, at 1:4 (reporting on American Legal Process CEO William Singer's guilty plea of scheme to defraud in the first degree); Press Release, Office of Attorney General, Cuomo Announces Guilty Plea of Process Server Company Owner Who Denied Thousands of New Yorkers Their Day in Court (Jan. 15, 2010), *available at* http://www.ag.ny.gov/media_center/2010/jan/jan15a_10.html; Ray Rivera, *Council Seeks to Crack Down on Process Servers Who Lie*, N.Y. Times, Feb. 26, 2010, *available at* http://www.nytimes.com/2010/02/27/nyregion/27sewer.html?scp=1&sq=Council%20Seeks%20to%20Crack%20Down%20on%20Process%20Servers%20Who%20Lie&st=cse.

[63] *See, e.g.*, An Exploratory Public Hearing on Process Server Practices in New York City by the New York City Department of Consumer Affairs (June 13, 2008) [herinafter DCA Process Server Hearing Transcript or Transcript) (transcript on file with authors), at 188-189 (testimony of Douglas Preston Riley).

[64] *See, e.g.*, *id.* at 109 (testimony of Alex Shafran); *id.* at 134 (testimony of Jay Brodsky); *id.* at 198 (testimony of Chris Rossi); *id.* at 207 (testimony of Bob Gulinello). Under New York law (CPLR § 308), a process server must serve papers in one of three ways. The process server can effect "personal service" by giving the summons and complaint directly to the defendant. The process server can effect "substitute service" by giving the summons and complaint to a trustworthy individual at the defendant's home or place of employment and also sending a copy of the summons and complaint to the defendant via first class mail. Finally, if the process server goes to the defendant's home or place of business multiple times and is unable to find the defendant or a person who will accept service for the defendant, the process server may resort to "nail and mail service." This method of service involves affixing one copy of the summons and complaint to the door of the defendant's residence or place of employment and mailing a second copy to the defendant via first class mail. A process server is required to employ "due diligence" to serve the defendant via personal or substitute service before resorting to nail and mail service.

[65] N.Y. Attorney Gen. Investigative Report, *supra* note 62, at 2.

[66] *Id.*

[67] *See, e.g.*, DCA Process Server Hearing Transcript, *supra* note 63, at 170; *id* at 187 (testimony of Douglas Preston Riley).

[68] *See, e.g.*, *id.* at 158 (testimony of Samson Newman).

[69] Robert Martin, District Council 37 Municipal Employees Legal Services, *Where's The Proof? When Debt Buyers are Asked to Substantiate Their Claims in Collection Lawsuits Against NYC Employees and Retirees, They Don't*, (December 2009) (finding that debt buyers were unable to substantiate their claims in 94.5% of cases reviewed); FTC Report *supra* note 34, at 56 ("Debt collectors have insufficient evidence at the time they file a complaint to show that they are seeking to recover the correct amount from the right consumer"); *see also* Appleseed Report, *supra* note 59, at 23-24; John Collins Rudolph, *Pay Garnishments Rise as Debtors Fall Behind*, N.Y. Times, Apr. 1, 2010, at B1, *available at* http://www.nytimes.com/2010/04/02/business/economy/02garnish.html; Jim Dwyer, *Hello Collections? The Worm Has Turned*, N.Y. Times, Nov. 29, 2009, *available at* http://www.nytimes.com/2009/11/29/nyregion/29about.html; Dwyer, *supra* note 35.

[70] GAO Report, *supra* note 2, at 28.

[71] Appleseed Report, *supra* note 59, at 28.

[72] *See, e.g., Citibank (S.D.), N.A. v. Martin*, 11 Misc.3d 219 (Civ. Ct. N.Y. Co. 2005) (discussing standards of proof in consumer credit cases).

[73] Appleseed Report, *supra* note 59, at 1 ("Debtor defendants are virtually never represented by counsel."); Rudolph, *supra* note 69.

[74] Response to FOIL Request to New York Office of Court Administration, Sept. 3, 2009.

[75] FTC Report, *supra* note 34, at 56. ("Consumer groups also assert that consumers who are not represented by counsel may not know what evidence to present or how to present it."); Appleseed Report, *supra* note 59, at 2, 21-23 ("Since all creditors are represented by counsel and the defenses available to debtors can be complex, the gross disparity in representation means that debtors almost never raise the overwhelming majority of legitimate defenses available to them."); Rudolph, *supra* note 69 ("'If the consumers were armed with more education about how to defend themselves against these debts, they'd be successful,' said Jeffrey Lipman, a civil magistrate in Des Moines.").

[76] Rudolph, *supra* note 69.

[77] FTC Report *supra* note 34, at 57 ("In short, the view of consumer groups concerning debt collection litigation was aptly described in a *Boston Globe* article: 'Collectors are almost never asked to prove the debts they claim; defendants are rarely informed of their rights. And debtors, usually too strapped to afford a lawyer, have to contend with this legal mismatch alone.'"); Appleseed Report, *supra* note 59, at 18 ("Plaintiffs' counsel may pressure unrepresented defendants into unfavorable settlements."); Rudolph, *supra* note 69.

[78] Martin, *supra* note 69, at 4; FTC Report *supra* note 34, at 57; Rudolph, *supra* note 69.

[79] A sample complaint states that: "said action is based upon a Retail Charge Account Agreement executed by defendant with FIRST USA BANK." The phrase "retail charge account" is used by other debt buyers to describe a credit agreement between a consumer and individual retailer, for example, Best Buy or Target, but the Harris Firm uses it to refer to any type of consumer debt.

[80] Leucadia National Group (LUK), a publicly traded, highly diversified holding company that operates essentially like a private equity group, owns 19 different "LR Credit" companies, which are listed in Exhibit 21 of Leucadia's annual report. Leucadia National Corp., Annual Report (Form 10-K Exhibit 21) (Feb, 27, 2009).

[81] Pinpoint Technologies appears to be a debt buying shell company of the Harris Firm. The officer listed for Pinpoint Technologies in the New York State corporate filings database is an "S98-SHarri" located at the address of the Harris Firm. Related companies Pinpoint Technologies Too and 3 are owned by partners of the Harris firm.

[82] We were unable to find information on Rushmore Recoveries' ownership.

[83] However, according to the website of the New York City DCA, a Pinpoint Technologies Too, LLC and a Pinpoint Technologies 3, LLC are licensed debt collection agencies.

[84] Appleseed Report, *supra* note 59, at 2, 24.

[85] Martin, *supra* note 69, at 3, 7; FTC Report, *supra* note 34, at 57; Appleseed Report, *supra* note 59, at 2, 24; *see also* Rudolf, *supra* note 66.

[86] National Consumer Law Center, *Fair Credit Reporting,* 5, 114 (5th ed. 2002); *see also* Appleseed Report, *supra* note 59, at 2; Kristin McNamara, *Bad Credit Derails Job Seekers,* Wall St. J., Mar. 16, 2010, at D6.

[87] *See* Appendix A for the complete methodology.

[88] At the time of review, the remaining 29 cases were pending with no activity.

[89] A total of 457,322 cases filed by our twenty six debt buyers from January 2006 through July 2008, multiplied by .932—the percentage of successful cases in our sample—equals 426,224 likely successful cases, multiplied by our median amount awarded of $2,577.12, equals $1,098,430,663.

[90] In the remaining 21% of cases, it was impossible to determine whether the person was properly served.

[91] A case was classified as clearly meritless if it had any of the following characteristics: the debt was the result of mistaken identity or identity theft, the debt had been previously paid, the debt had been discharged in bankruptcy, or the statute of limitations on the debt had expired. *See* Appendix A for the complete methodology.

[92] Low- and moderate-income communities are communities in which the median family income was less than $42,720 per year in 1999. *See* Federal Financial Institutions Examination Council, U.S. Census and HUD Estimated MSA Median Family Incomes for 1999 HMDA Reports, *at* http://www.ffiec.gov/hmda/pdf/msa99inc.pdf.

[93] The poverty level is defined as income of $8,501 per year for an individual and $16,895 for a family of four with two adults and two children. *See* U.S. Census Bureau, Poverty: 1999 2 (May 2003), *available at* http://www.census.gov/prod/2003pubs/c2kbr-19.pdf.

[94] N.Y. City Admin. Code § 20-488 (2009) (stating that the City Council's stated purpose in enacting a licensing requirement was to "protect the interests, reputations and fiscal well-being of the citizens of this city against those agencies who would abuse their privilege of operation.").

[95] The definition is: "a buyer of delinquent debt who seeks to collect such debt either directly or through the services of another by, including but not limited to, initiating or using legal processes or other means to collect or attempt to collect such debt." N.Y. City Admin. Code § 20-489 (2009). The Committee Report evidences the New York City Council's intent to clarify, not alter, existing law. It indicates that the bill is aimed at "clarifying the definition of debt collection agency . . . to address debt buyer arguments . . . that once they contract collection of the debt to another party they are engaged in 'passive' collection and as such are not required to be licensed as a debt collection agency by DCA." Robert Newman, Alix Pustilnik, Committee Report of the Governmental Affairs Division 7-8 (Feb. 25, 2009) (on file with authors). *See also Kuhne v. Cohen & Slamowitz, LLP*, 579 F.3d 189, 196-97, (2d Cir. 2009) ("The text and legislative history of this amendment make clear that its definition of debt collection agency includes those entities . . . that have made the argument that they are not subject to the licensing requirements because they themselves do not engage directly in the collection activities.").

[96] The process of obtaining a debt collection license requires filling out a relatively simple application, available online, and paying a $150 fee for a two-year license.

[97] Licensed firms obtained default judgments in 72.6% of cases, whereas unlicensed firms obtained default judgments in 86.7% of cases.

[98] Appleseed Report, *supra* note 59, at 28.

[99] Jonathan D. Glater, *In a Downturn, More Act as Their Own Lawyers,* N.Y. Times, April 10, 2009, at B1, *available at* http://www.nytimes.com/2009/04/10/business/10lawyer.html?scp=1&sq=In%20a%20Downturn,%20More%20Act%20as%20Their%20Own%20Lawyers&st=cse.

[100] *See also* Appleseed Report, *supra* note 59, at 28-29 ("The percentage of defendants who default on the settlement agreement also presents a sobering statistic.").

[101] Debt Weight, *supra* note 57, at 18-22.

[102] Under New York law, a debt buyer must provide "proof of the facts constituting the claim, the default and the amount due" in order to obtain a default judgment. N.Y. C.P.L.R. § 3215(f) (McKinney, 2010). This proof must be established by an affidavit from a party who has personal knowledge of the facts of the case. Debt buyers attempt to meet this requirement by submitting an affidavit from one of their employees. However, these employees have no connection to the original creditor, do not have access to the original creditor's books and records, and lack personal knowledge of the facts to which they attest. These affidavits are, by definition, insufficient to meet even the minimal requirements necessary for a default judgment.

[103] *See Reynolds Securities, Inc. v. Underwriters Bank & Trust Co.*, 44 N.Y.2d 568 (1978) (explaining that a clerk may not enter a default judgment in a case in which damages cannot be determined without extrinsic proof). A recent directive issued by the Civil Court of the City of New York, DRP-182, does not solve this problem. This directive requires debt buyers, when applying for a default judgment, to supply the clerk with additional affidavits in support of their claims. The required affidavits, however, are so vague as to be virtually meaningless.

[104] In many cases these firms appear to be connected to debt collection companies, with the same address in many cases.

[105] Isaac Wolf, *FTC Opens Initial Study of Consumer Debt Purchasers*, Scripps Howard News Service, Jan. 7, 2010, *at* http://public.shns.com/content/ftc-opens-initial-study-consumer-debt-purchasers (quoting Ira Rheingold, executive director of the National Association of Consumer Advocates).

[106] Members of the debt buying industry have proposed "self-regulation" as the solution to the admitted problems associated with the industry. *See* Darren Waggoner, *An Industry Flight to Action: Leaders in Collections and Debt Buying Take a Long-Term Look at the Merits of Self-Regulation*, Collections and Credit Risk (June 1, 2008), *available at* http://www.highbeam.com/doc/1G1-180513925.html (quoting David Paris, chief executive officer of Zenith Acquisition Corp., the parent company of North Star Capital Acquisition, a debt buyer in our sample, as saying: "If we can demonstrate that we are moving in the right direction, people will give us more latitude . . . If we do nothing, regulators might feel like they should do something."). Leading debt collection trade groups are also undertaking a major lobbying effort to convince state and federal governments that less regulation, not more, is what is needed. In fact, ACA International (formerly the American Collectors Association), the primary trade organization for debt collectors and debt buyers, opened a full-time Washington lobbying office in March 2008, and the National Association of Retail Collection Attorneys (NARCA), hired a public relations firm to spread its message on Capitol Hill. *See* David Streitfeld, *Debt Collectors Try to Put on a Friendlier Face*, N.Y. Times, Mar. 14, 2008, *available at* http://www.nytimes.com/2008/03/14/business/14collect.html?scp=1&sq=Debt%20Collectors%20Try%20to%20Put%20on%20a%20Friendlier%20Face&st=cse.

[107] The current law gives the creditor or debt buyer six years from the date of default to file a lawsuit against the borrower. CCFA would reduce this period to three years and would also bar debt collectors from collecting debts on which the statute of limitations has expired.

[108] FTC Report, *supra* note 34, at 66.

[109] *See* Press Release, Office of Attorney Gen., Attorney General Cuomo Announces Reform Deal with Three NY Debt Collection Companies Over Deceptive Techniques, (June 2, 2009), *available at* http://www.oag.state.ny.us/media_center/2009/june/june2a_09.html; Press Release, Office of Attorney Gen., *Attorney General Cuomo Sues to Throw Out Over 100,000 Faulty Judgments Entered Against New York Consumers in Next Stage of Debt Collection Investigation* (Jul. 23, 2009), *available at* http://www.oag.state.ny.us/media_center/2009/july/july23a_09.html.

For more information contact:

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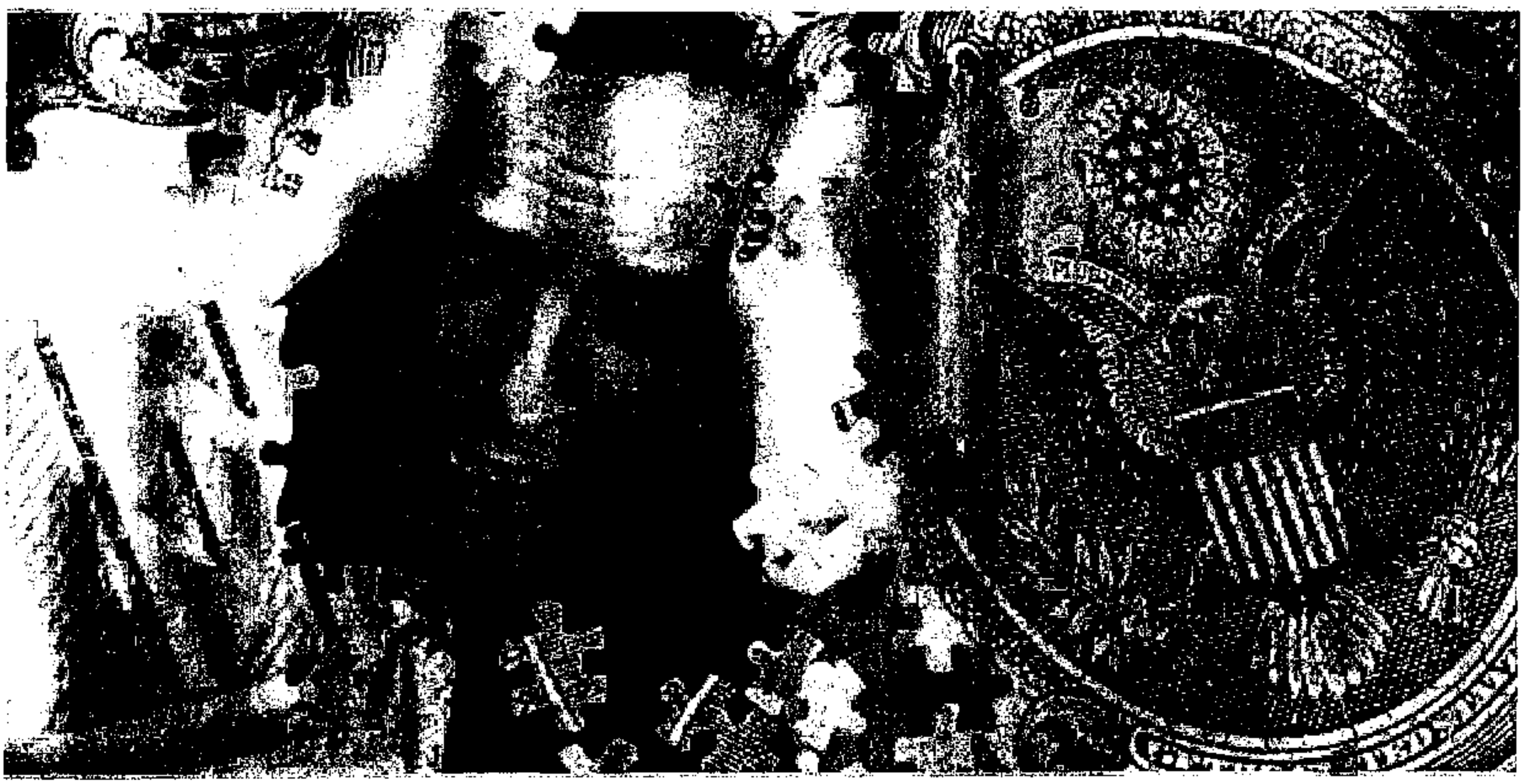
THE DEBT MACHINE

HOW THE COLLECTION INDUSTRY HOUNDS CONSUMERS AND OVERWHELMS COURTS



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ABOUT THE AUTHORS

Rick Jurgens is an investigative reporter and advocate with the National Consumer Law Center.

Robert J. Hobbs is deputy director of the National Consumer Law Center.

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EXECUTIVE SUMMARY

While financial crisis and recession have wreaked havoc on the American economy, the pain has been especially intense for consumers. Millions are now burdened with unpayable debts after they were enticed into borrowing during the credit boom.

During that boom, loans became easy to get, difficult to understand and eventually—for many—impossible to repay. These consumers and debts are now fodder for a vast machine that converts consumer misery into corporate profits.

This debt collection machine—financed by Wall Street and closely tied to credit card issuers and other lenders—includes collections companies with an army of 400,000 deployed in call centers and other operations. It also includes large law firms, speculators that buy and sell consumer obligations and other specialists.

The debt machine sometimes generates revenue by persuading willing and able consumers to make payments. When that fails, it grinds on by securing legal judgments that empower creditors to garnish wages, attach bank accounts, seize cars and other assets and extend the lives of uncollected debts, sometimes for decades. Often, the grab extends to people who have already repaid or never owed the debts—parents, children, people with similar names, victims of identity theft. Harassment, threats and even jail become tools of the collection trade.

In pursuit of judgments, creditors and collectors have swamped small claims and other state courts with a torrent of lawsuits. They file mass produced suits that do not clearly identify the debt involved. They often send notice of lawsuits to old or incorrect addresses. And by inserting forced arbitration clauses in millions of credit card and other consumer loan contracts, collectors and creditors have carved out shortcuts to judgments, and denied many consumers a day in a real court.

The operations of this well-funded and insatiable debt machine long ago outstripped existing consumer protections. To protect consumers and the American economy, urgently needed measures include:

- strengthening and updating of the three-decade-old Fair Debt Collection Practices Act.
- establishment of a Consumer Financial Protection Bureau as well as updated rules and enhanced enforcement by the Federal Trade Commission.
- a restoration of fairness and due process to debt collection suits in state courts.
- a permanent ban on forced arbitration of disputes between creditors and consumers.
- enactment of laws that ensure that consumers can pursue class actions and injunctions against abusive collectors.

THE DEBT MACHINE

HOW THE COLLECTION INDUSTRY HOUNDS CONSUMERS AND OVERWHELMS COURTS

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I. IN THE JAWS OF THE MACHINE

"Forgive my spelling," read the answer filed in March 2008 by the defendant in a debt claim lawsuit in a Montana court. "I have a head injury and writing dose (sic) not come easy."

The writer was Tim McCollough, a Laurel, Mont., man living on Social Security after a disabling head injury in 1990. He said that he had not had any dealings with the issuer of the credit card for "well over 8 ½ years" and so the debt claim was barred by Montana's five- year statute of limitations.

"This is the third time they have brought me to court on this account," he wrote. "Do I have to sue them so I can live quietly in pain?"

To a consumer, falling into the jaws of the debt machine can be a humiliating, infuriating and damaging experience. A Boston *Globe* 2006 investigative report on the debt industry's treatment of consumers described "a debtor's hell where bank accounts are drained, wages are attached, property confiscated, and threats of jail are an everyday occurrence."[1]

First come the calls, from employees of a confusing alphabet soup of corporate claimants and law firms that the alleged debtor may never have heard of.

Then there may be a summons to appear in state court or a notice of arbitration. Neither is likely to offer a clear explanation of how the process works or what rights a consumer has in it.

Later there is likely to be a judgment that empowers the creditor to garnish wages or seize a debtor's car, bank account or other property. That judgment may also prolong the life of a consumer's obligation to pay the claimed amount, sometimes for decades.

Typically, such judgments are issued by default after a consumer fails to receive or respond to a notice of the hearing or arbitration, or show up to contest a creditor's claim.

But, as McCollough's ordeal showed, even a consumer who contests an invalid claim faces an uphill battle to win justice.

The suit to which McCollough was responding had been filed on April 17, 2007 by a North Dakota law firm representing CACV, a Colorado debt buyer which had bought the claim against McCollough six years earlier. CACV's lawsuit claimed that he owed nearly $10,000, including $3,800 in charges he allegedly made to a credit card he got from Chase Manhattan Bank in 1994 as well as $5,500 in interest and collection costs and $480 in attorney fees.

The lawsuit triggered anxiety, pain, anger and adrenaline. It also caused McCollough to fight with his wife and suffer severe headaches.[2]

Court records show that McCollough's pursuers knew that in going after him they were stretching the envelope on a claim that Chase had charged off in 2000. In January 2007, a lawyer at Johnson, Rodenberg & Lauinger ("JRL"), the law firm that filed the suit, wondered in writing whether the claim had expired under Montana's five-year statute of limitations. But CACV, without providing any documentation, said the claim was alive and the law firm went ahead and filed suit against McCollough. Even after CACV backtracked and informed its lawyers that the claim was time-barred, the law firm pursued the lawsuit

[1] "No Mercy for Consumers" by the Boston Globe Spotlight Team, July 30, 2006.

[2] "Order Denying Defendant's Motion for a New Trial and to Amend the Judgment," entered July 27, 2009, in Timothy McCollough vs. Johnson, Rodenberg & Lauinger, CV-07-166-BLG-CSO, U.S. District Court for Montana, Billings Division, p. 25.

for months. It even tried to get McCollough to waive his defense.

Things turned around only when McCollough got his own lawyer. Facing an alleged debtor with legal representation,[3] the collections law firm quickly emailed CACV, the debt buyer it was representing, asking for "everything you can get for documentation as soon as possible. We need to request everything available from the original creditor, **not just the things that you normally request**" (emphasis added). Among the materials the law firm wanted for the credit card account were the "application, statements, card member agreement, copies of payments (and) copies of any correspondence."

But the debt buyer had bad news for its lawyers. Such "media" are only kept for seven years after charge-off, it responded. The collection law firm's subpoena for Chase Manhattan, the original card issuer, to supply documents was also unsuccessful.

With nothing to buttress its claim, CACV in December 2007 instructed its lawyers to drop the collection lawsuit against McCollough.

McCollough didn't go away. He then filed his own lawsuit alleging that "JRL took a 'factory' approach to litigation, filing a high volume of lawsuits against alleged debtors based upon scant, often unverified information."[4] During one 18-month period the law firm filed 2,700 debt collection lawsuits in rural Montana courts, and a majority of those lawsuits resulted in default judgments against consumers, according to a document introduced by McCollough's attorney.[5]

In April 2009, a federal court jury in Montana awarded McCollough $250,000 in compensatory damages, $60,000 in punitive damages and $108,000 in attorney's fees and costs. McCollough was awarded only $1,000 in statutory damages, a seeming pittance that actually is the maximum amount allowable because that provision of the Fair Debt Collection Practices law has not been adjusted for inflation since its enactment in 1977.[6]

By pursuing their lawsuit, McCollough and his attorney also provided a valuable exposure of the abuses that occur in the modern debt industry. For example, a lawyer for JRL said that his firm had sued McCollough when it had no documentation of his debt, and that in that case and "probably" in others it had sought to collect attorney's fees without having a contract that gave the firm that right.[7]

Such abuses have become more widespread as automation and industrialization have increased the reach, scope, efficiency

[3] McCollough's lawyer, John Heenan, is a member of the National Association of Consumer Advocates and one of 300 lawyers listed at the organization's web site (**www.naca.net**) who do not require a fee to take the cases of harassed consumers.

[4] "Order Denying Defendant's Motion for a New Trial and to Amend the Judgment," entered July 27, 2009, in Timothy McCollough vs. Johnson, Rodenberg & Lauinger, CV-07-166-BLG-CSO, U.S. District Court for Montana, Billings Division, p. 13.

[5] Ibid, p. 8, also Order re Judgment, entered June 3, 2009, p. 18.

[6] The final outcome of McCollough's case remains to be decided. JRL's appeal of the jury verdict and damage award is pending before the U.S. 9th Circuit Court of Appeals. But McCollough feels that he has already accomplished something important. He said that his lawsuit and local news coverage of it has "started an avalanche of people standing up to the collection agencies. This is the first thing I've been truly proud of since (my) head injury."

[7] "Order Denying Defendant's Motion for a New Trial and to Amend the Judgment," entered July 27, 2009, in Timothy McCollough vs. Johnson, Rodenberg & Lauinger, CV-07-166-BLG-CSO, U.S. District Court for Montana, Billings Division, pp. 20-21.The verdict has been appealed.

A Credit Boom

The modern debt industry is a byproduct of the massive expansion of consumer lending by banks, other major financial institutions and aggressive small lenders. The total of loans outstanding to consumers exceeded $2.5 trillion in 2009, having doubled in about 13 years. Total credit card and other revolving credit outstanding alone approached nearly $1 trillion at its peak.

and profitability of collecting debts. Secondary markets have grown, where creditors sell "bad" debts for pennies on the dollar to bargain hunters who know how to squeeze more money out of debtors. Law firms specializing in debt collection have expanded geographically and now offer a range of services to creditors. By 2007, the debt industry employed 217,000 collectors and others and posted annual revenue of $58 billion.[8]

Millions of consumers are now vulnerable to painful encounters with the debt industry. A single episode of unemployment, illness, disability, divorce or other financial difficulty may trigger forceful collection activity. An error or overreach by a collector may also embroil a consumer in a debt dispute.

Millions of debt disputes end up in court or in private arbitration proceedings that frequently ride roughshod over the rights of consumers.[9]

The Great Recession has put even more stress on consumers. The rate at which consumers fell from one to six months behind on credit card payments averaged about 4.4 percent from 1991 to 2007, then jumped to 6.6 percent in early 2009.[10] By the end of the year, insured banking institutions charged off 9.1 percent of their credit card loans, nearly triple the 3.4 percent rate at the end of 2006.[11]

Now it seems that debt collectors are everywhere. The industry estimates that it has more than 1 billion contacts with consumers annually.[12] In a recent survey by Scripps Research Center at Ohio University, nearly half of the respondents reported that they had received a telephone call from a collector. Two in five said they had been asked to pay an incorrect amount, and one in three reported

[8] *Value of Third-Party Debt Collection to the U.S. Economy in 2007: Survey and Analysis*, prepared for ACA International, June 12, 2008, p.8. Credit card issuers also employ thousands of collectors who mainly pursue consumers with accounts that are delinquent but not yet charged off. See U.S. Government Accountability Office, "Credit Cards: Fair Debt Collection Practices Act Could Better Reflect the Evolving Debt Collection Marketplace and Use of Technology," GAO-09-748, September 2009, p. 19.

[9] This report focuses on debt collections through state small claims courts. Problems in the forced arbitration system are described in "Forced Arbitration: Consumers Need Permanent Relief" by Robert J. Hobbs and Rick Jurgens, National Consumer Law Center, April 2010. A call by regulators for stronger consumer protections in both venues is laid out in "Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration," Federal Trade Commission, July 2010.

[10] U.S. Government Accountability Office, "Credit Cards: Fair Debt Collection Practices Act Could Better Reflect the Evolving Debt Collection Marketplace and Use of Technology," GAO-09-748, September 2009, p. 5.

[11] See FDIC—Statistics on Depository Institutions Report, at **www2.fdic.gov/sdi/rpt_Financial.asp**.

[12] U.S. Government Accountability Office, "Credit Cards: Fair Debt Collection Practices Act Could Better Reflect the Evolving Debt Collection Marketplace and Use of Technology," GAO-09-748, September 2009, p. 35.

receiving multiple calls that seemed to constitute harassment.[13]

Abuses aren't rare. In 2009, the Federal Trade Commission received about 88,200 complaints from consumers about third-party debt collectors—more than it received about any other industry.[14] Add in another 32,100 complaints

[13] See results of a Scripps Survey Research Center poll of 1,001 respondents completed Sept. 26, 2009 and posted at **www.newspolls.org/surveys/SHOH42.**

[14] Federal Trade Commission, *Annual Report 2010: Fair*

The Collectors

The basic tool of a debt collector is the telephone. Each day tens of thousands of collectors file into cubicles in cities from Buffalo to Yuma, and use automated dialers to call alleged debtors and try to persuade them to send money.[1]

As a group, third-party collectors posted $11.5 billion in contingency fee revenue in 2007, according to an industry study.[2] The average contingent rate—the portion of collections that collectors kept for themselves—was 28 percent in 2005.[3] Total employment at third-party collection firms was 152,000.[4] The largest collector is NCO Group, a Pennsylvania company with annual revenue of $1.5 billion that is owned by JPMorgan Chase. NCO grew through a series of acquisitions, most notably a February 2008 deal in which it bought Outsourcing Solutions Inc., the number two debt collector, for $339 million.[5]

According to its most recent securities filings, NCO Group deploys 6,800 automated dialers in 98 collection centers in the United States and eight other countries, including Canada, Mexico, the Philippines, Australia and the UK.[6] About 17,700 NCO employees and 1,400 subcontractors worked those phones. NCO Group posted $1.2 billion in debt collection revenue in 2009, including about $600 million in contingency fees retained after consumers handed over more than $3 billion.[7]

In recent years, collectors have expanded globally, enlisting low-wage employees in distant countries in the campaign to extract payments from American consumers. For example, Encore Capital Group, a debt buyer with an in-house collection operation, has said that it plans to boost from 350 to 1,100 the number of collectors at its "high performing, low cost site in India" that opened in late 2005. The Indian site, which had already posted gross collections of $4 million by early 2009, will have operating costs only one-third as high as its United States operations, Encore said.[8]

[1] See "Collecting Consumer Debt in America" in Federal Reserve Bank of Philadelphia *Business Review*, Second Quarter, 2007, p. 11-24.

[2] *Value of Third-Party Debt Collection to the U.S. Economy in 2007: Survey and Analysis*, prepared for ACA International, June 12, 2008, p. 8.

[3] See "Collecting Consumer Debts: The Challenges of Change," a Workshop Report from the Federal Trade Commission, February 2009, p. 3.

[4] Ibid, p. 13.

[5] See Form 10-K for the fiscal year ended Dec. 31, 2008, filed with U.S. Securities and Exchange Commission by NCO Group Inc., p. 42. Debt collectors' profits are not immune to economic setbacks. OSI, which NCO obtained for $325 million, commanded a much loftier price tag in a 1999 deal where Madison Dearborn Partners, a private equity firm, ponied up $800 million for OSI.

[6] Form 10-K for the fiscal year ended Dec. 31, 2008, filed with U.S. Securities and Exchange Commission by NCO Group Inc., pp, 10, 37.

[7] Form 10-K for the fiscal year ended Dec. 31, 2009, filed with U.S. Securities and Exchange Commission by NCO Group Inc., pp. 9, 30.

[8] Encore Capital Group, "Leveraging Intellectual Capital," Investor Presentation, June 9, 2009.

FTC Complaints 2009

NATURE OF COMPLAINTS AGAINST COLLECTORS	NUMBER RECEIVED IN 2009
Called repeatedly or continuously	41,028
Sought to collect debts that were not owed, amounts over what was owed, debts that had been discharged in bankruptcy or impermissible fees, interest or expenses	37,052
Failed to send consumers required notices of their FDCPA rights and the claims against them	22,708
Falsely threatened lawsuits or other actions	18,438
Repeatedly called third parties seeking information about consumers with alleged debts	16,926
Called and used obscene, profane or abusive language	14,321
Called consumers at work	11,973
Falsely threatened to arrest consumers or seize their property	11,505
Disclosed purported debts to consumers' employers, relatives, children, neighbors or friends	10,758
Failed to provide written verification of debts after it was requested by consumers	10,158
Called consumers outside the permissible hours of 8 A.M. to 9 P.M. or at other inconvenient times	9,684
Continued to contact consumers even after consumers sent written "cease communication" notices	7,411
Used, or threatened to use, violence against consumers	2,517

Sources: Federal Trade Commission, Annual Report 2010: Fair Debt Collection Practices Act, p. 6-10, posted on-line at **www.ftc.gov/os/2010/04/P104802fdcpa2010annrpt.pdf.**

about creditors' in-house collectors, and debt collection accounted for nearly 120,000 complaints to the agency—more than one of every five complaints received.[15]

That record only tells part of the story. The FTC notes that its complaint data "may understate the extent to which consumers have concerns about the practices of debt collectors" because some consumers, perhaps not aware of the FTC's enforcement role, may only file complaints with collectors, creditors or other enforcement agencies.[16] The increasing volume of consumer complaints to the FTC is strong evidence that the FDCPA needs more teeth to pull rogue debt collectors into line.

Other consumers filed lawsuits against collectors and creditors. The volume of such lawsuits has increased steadily in recent years, so that in 2009 a total of 6,463 civil cases were filed in federal courts alleging violations of the Fair Debt Collection Practices Act or Fair Credit Reporting Act.[17] The FDCPA regulates third party debt collectors, and allows consumers to file lawsuits as individuals or as a

Debt Collection Practices Act, p. 3-4, posted on-line, **www.ftc.gov/os/2010/04/P104802fdcpa2010annrpt.pdf.**

[15] Federal Trade Commission, *Annual Report 2010: Fair Debt Collection Practices Act*, p. 4-5, posted on-line, **www.ftc.gov/os/2010/04/P104802fdcpa2010annrpt.pdf**

[16] Federal Trade Commission, *Annual Report 2010: Fair Debt Collection Practices Act*, p. 2, posted on-line, **www.ftc.gov/os/2010/04/P104802fdcpa2010annrpt.pdf**

[17] "Civil Suits Against ARM Companies Soar in 2009: US Courts," InsideARM, March 17, 2010.

class against alleged violators. The law entitles consumers who prevail to collect actual and statutory damages, attorney fees and costs.[18] The amounts that may be recovered by consumers have not been adjusted since the law was enacted in 1978, so that the law now provides substantially less deterrence to debt collection abuses.

II. LIMITS ON COLLECTORS

During the early years of the United States, consumers unable or unwilling to pay creditors' claims were imprisoned. While the jailing of debtors has become rare in the 21st century, creditors continue to pursue consumers and treat them harshly.

A series of investigative reports by the Chicago Tribune in April 1974 shone a spotlight on such harsh treatment. Headlines included "Bill Collection Terror Tactics," "Bill Collectors Here Show No Fear of the Law," and "They Try Anything to Catch a Debtor."

Underneath the headlines, Tribune reporters described a grim reality facing debtors and consumers. "Hoaxes are an integral part of bill collection," the Tribune reported. One collector offered this advice to an undercover reporter trying to learn the ropes: "You've got to overpower them. Shout them down. Don't let them get a chance to tell you anything."[19]

The Tribune's debt collection expose—which ran on the front page alongside reports of the Watergate break-in, Hank Aaron's home run record and the kidnapping of Patty Hearst—focused on the lack of collection laws or licensing requirements in Illinois and ineffectual federal regulation. "Disregarding the FTC is no big thing," the Tribune noted. "The most unscrupulous do it all the time, and do not worry about it." Collectors frequently posed as police or lawyers, called and threatened consumers' employers, forged court orders and sent collection notices on fabricated letterhead of a non-existent law firm.[20]

In the wake of the Tribune series, Illinois Congressman Frank Annunzio filed legislation that, after wending its way through Congress, was signed into law on Sept. 20, 1977 as the Fair Debt Collection Practices Act.[21] The FDCPA mainly aimed to prevent the use of threats and harassment by third-party collectors.

But since the FDCPA was passed, much has changed. Lending and some credit prices soared as decisions by federal courts and regulators cleared the way for banks to ignore state usury laws that had previously imposed ceilings on interest rates. Free to hike interest rates and levy fees as much as they wanted, banks went on a lending spree, aggressively marketing home loans and credit cards. Extensive borrowing became integral to millions of household budgets, a contributing factor to economic growth and a profit bonanza for lenders.

Along the way, the doors of the credit market swung open to some previously excluded consumers—the young, the elderly, females, minorities, people in cyclical industries and blue collar workers. Yet many of those same consumers found themselves obligated to pay unsustainably high fees and interest rates.

[18] Fair Debt Collection, by Robert Hobbs, et al, National Consumer Law Center, Sixth Edition, 2008, p. 327.
[19] Chicago Tribune, April 7 to April 11, 1974.

[20] Ibid.
[21] "Rollercoaster Ride" by Anne Rosso, Collector magazine, May 2008, p. 72.

And it became harder to escape debt. Obligations lasted longer and extended further than would have been imaginable in an earlier era. Credit card debt accumulated in many households, and it came with higher interest rates and fees—which lenders could unilaterally increase, making it even more difficult for a borrower to pay off a high balance. Federal bankruptcy "reform," passed in 2005, put additional obstacles and much higher costs in front of desperate debtors considering that path as a way to pay down their debts or get a fresh start.

Even as the law raised the costs and risks faced by debtors, aggressive corporate collectors moved into the business. Just how aggressive was revealed in a 2004 civil complaint by the Federal Trade Commission that characterized Capital Acquisitions & Management Corp. (CAMCO) as "a debt collection company gone wild."[22]

The FTC had been paying attention to CAMCO since at least 2002. CAMCO specialized in buying—and then hounding consumers to pay—debts that were so old that they could no longer be pursued in court or reported to credit agencies.[23] CAMCO's collectors aggressively threatened consumers with arrest, lawsuits or bad credit reports. Ignoring the FDCPA, CAMCO's collectors regularly used profanity, called consumers at their workplaces and continued to call after being told to stop, the FTC found.[24]

In 2004, the FTC filed its first civil complaint against CAMCO.[25] Without admitting civil liability, CAMCO agreed to pay a $300,000 penalty and entered into a consent order barring future violations of the FDCPA.[26]

But that didn't stop CAMCO. In the eight months after it signed the consent order, the FTC received more than 2,000 consumer complaints about the company. The FTC eventually found that CAMCO had violated the consent order by continuing to threaten and abuse consumers, and by continuing to threaten to file lawsuits on debts on which such actions were barred by state statutes of limitations.[27]

FDCPA violations seemed programmed into the corporate DNA of CAMCO, which had its headquarters in an eight-story office building in Rockford, Ill., and several hundred employees who collected millions of dollars annually from consumers. Former employees estimated that anywhere from half to 80 percent of the millions of dollars the company collected came from harassed consumers who had *never* owed the money in the first place! "In many cases, CAMCO does not even have the social security number of the original debtor," the FTC said. ""Thus CAMCO simply makes efforts to find people with the same name in the same geographic area and then calls trying to collect."[28]

In December 2004, the FTC filed a second complaint against CAMCO, and a judge appointed a receiver to take over CAMCO and

[22] FTC vs. CAMCO, 04C7781, Memorandum filed Dec. 2, 2004, p. 1.
[23] Ibid, p. 3.
[24] "Debt Buyer/Debt Collection Companies and Their Principals Settle FTC Charges," Federal Trade Commission release, March 24, 2004.
[25] FTC vs. CAMCO, 04C7781, Memorandum filed Dec. 2, 2004, p. 2
[26] FTC vs. CAMCO, 04C7781, Consent Decree, March 24, 2004, p. 2.
[27] FTC vs. CAMCO, 04C7781, Memorandum filed Dec. 2, 2004, p. 3, 4-8.
[28] Ibid, p. 4.

sell its assets.[29] Eventually, CAMCO and its top executive were each ordered to pay $1 million to settle FTC charges.[30]

The demise of CAMCO didn't mark the end of abusive collections. In Texas, a debt collector demanding payment of a disputed $81 credit card bill during the summer of 2007 unleashed a barrage of more than 40 telephone calls to Allen Jones. The collectors, who were employed by a Berwyn, Pa., company called Advanced Call Center Technologies LLC, also left eight racist and obscenity-laced messages on the answering machine of Jones, a 26-year-old African American small businessman.

With the voice mails—in which obscenities were interspersed with the N-word and urgings that he go pick cotton—as evidence, Jones sued ACCT.[31] He also presented corroborating testimony from a Virginia consumer who had received a voicemail message from an ACCT collector asking if the consumer was in bed with his mother or his sister.

Although the company denied that its employees had made the calls as part of their jobs, and suggested that a collector might have had a personal beef with Jones, a jury disagreed and awarded Jones $50,000 for mental anguish and $1.5 million in punitive damages. It found that ACCT and its employees violated the Texas Debt Collection Act, engaged in unreasonable collection efforts and invaded Jones' privacy, and that the company was negligent in hiring, supervising, training and retaining a supervisor. [32]

Collection abuses remain widespread. In New York during 2009, Attorney General Andrew Cuomo shut down two debt collection operations, including one that he said was run by a convicted felon with collectors who posed as police officers and threatened to jail consumers.[33] The attorney general later obtained court orders that barred from the debt collection industry the convicted felon and two other principals of debt operations that used eight names at four locations in western New York State.[34]Cuomo also sued to shut down another operation that he accused of sexually harassing consumers and threatening

[29] FTC vs. CAMCO, 04C7781, Temporary Restraining Order with Asset Freeze and other Relief, issued Dec. 3, 2004.

[30] "Debt Collector Settles with FTC for Abusive Practices," Federal Trade Commission release, March 12, 2007.

[31] Jones' lawsuit showed the importance of voice recordings as evidence in lawsuits against debt collection abuses. Jones was fortunate that the collectors pursing him left voice mail messages, since Texas, like a dozen other states, makes it a crime for consumers to tape record harassing debt collection calls without the debt collector's consent. Federal law needs to override state laws so consumers can tape record harassing live calls from debt collectors. That would be a real deterrent to the increasing number of harassing calls by debt collectors.

[32] "Chesco-based collection firm loses harassment case" by Trish Wilson, Philadelpia Inquirer, June 4, 2010, p. B3; Jason Whitely, "Vulgar voicemails force debt collector to pay $1.5 million" (May 28, 2010) ("This is your mother******* wake-up call you little lazy a** b****," a collector said on one. "Get your mother******* n****r ass up and go pick some mother****** cotton fields."), available at **www.wfaa.com/news/consumer/Vulgar-voicemails-force-debt-collector-to-pay-15M-95163714.html**.

[33] "Attorney General Cuomo Shuts Down New York Debt Collection Operation that Used Illegal Scare Tactics to Threaten Consumers across the Country," release dated June 23, 2009; Attorney General Cuomo Launches Inquiry into Debt Collectors across New York State," release dated May 27, 2009.

[34] "Attorney General Cuomo Secures $275K in Restitution for Victims of a New York Debt Collection Operation that Used Illegal Scare Tactics to Threaten Consumers," Release dated Feb. 9, 2010.

The Lawyers

Within the debt machine, about one out of every 20 delinquent accounts gets referred to a law firm that specializes in debt collection. Specialized collection law firms posted about $1.2 billion in revenue in 2006, according to one industry estimate.[1]

A majority of those referrals come from debt buyers.[2] In 2009 Encore Capital Group spent $113 million to file 375,000 lawsuits against alleged debtors who forked over $233 million, accounting for about 48 percent of Encore's total collections for the year.[3] That same year, Portfolio Recovery Associates Inc. spent $31.3 million to file lawsuits that generated $86.7 million in collections.[4]

A revealing picture of the role of debt collecting lawyers emerged in the wake of the collapse of Mann Bracken, the self-proclaimed leader of the sector. Before it shut down in early 2010, Mann Bracken's web site described the enterprise as "a national law firm that combines (via recent merger) 3 of the top 5 law firms specializing in the practice of collections and creditors' rights law."

Bankruptcy filings by Axiant, Mann Bracken's back-office affiliate, showed the scope of the firm's operations. In 2008, Mann Bracken and Axiant had 1,069 employees, operated two call centers and "had an infrastructure that supported 35,000 lawsuits per month, 20,000 arbitration filings per month and $55 million in collections per month."[5] The firm also offered its clients "skip tracing" of elusive alleged debtors, execution of garnishments and liens and pursuit of claims through arbitration.

Mann Bracken's shut-down followed exposure by Minnesota's Attorney General of Mann Bracken's ties to the leading arbitration provider.[6] The shutdown of Mann Bracken gave some relief to debtors, including the dismissal of tens of thousands of debt lawsuits in Maryland and some other states. It also opened the door to challenges to the validity of judgments already won by the law firm.

A rare glimpse at the working and financial relations between a debt collecting law firm and its debt buyer client came in a recent filing by debt buyer Asta Funding that spelled out some of the terms of its March 2007 agreement with the Wolpoff & Abramson law firm. The law firm, which later merged into Mann Bracken, kept 24 percent of the money it collected itself or 30 percent of collections made by vendors that it had engaged. In the deal, Asta engaged the law firm to collect 335,000 "receivables" with a face value of $896.5 million, and required the law firm to "initiate litigation" on each claim within 18 months and keep "employed ... in a senior capacity" its name partners, Ronald M. Abramson and Stuart J. Wolpoff.[7]

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[1] See **www.creditcollectionsworld.com/pagedisplay.html?pagename=topcollectionslawfirms**, viewed Aug. 26, 2009.
[2] National Association of Retail Collection Attorneys (NARCA) Comments for Federal Trade Commission Debt Collection Workshop, p. 4.
[3] Form 10-K for the fiscal year ended Dec. 31, 2009, filed with the U.S. Securities and Exchange Commission for Encore Capital Group, pp. 31, 46.
[4] Form 10-K for the fiscal year ended Dec. 31, 2009, filed with the U.S. Securities and Exchange Commission by Portfolio Recovery Associates Inc., p. 43-4.
[5] Declaration of Keith Bolt in Support of Chapter 11 Petition and First Day Motions, filed Nov. 20, 2009 in re Axiant LLC debtor in the United States Bankruptcy Court for the District of Delaware, Case No. 09-14118, p. 2.
[6] See "Attorney General Swanson Sues National Arbitration Company for Deceptive Practices," release dated July 14, 2009, posted on-line at **www.ag.state.mn.us/consumer/pressrelease/090714nationalarbitration.asp**.
[7] Exhibit 10.4, Subservicing Agreement dated March 2, 2007, filed with Form 10-Q/A filed March 12, 2009, for the quarterly period ended March 31, 2007, with U.S. Securities and Exchange Commission by Asta Funding Inc.

them with arrest or physical harm.[35] Cuomo charged each of the firms with attempting to collect non-existent debts or debts no longer valid because of the state's statute of limitations.[36]

And to this day, some debtors end up behind bars. In 2009, Minnesota courts issued 845 arrest warrants against debtors, half of whom owed less than $3,500 and one who owed only $85. Other states where debtors can end up jailed include Arkansas, Arizona, Illinois, Indiana and Washington.[37]

III. SMALL CLAIMS COURTS

To observe the reach and power of the modern debt machine, one need only pay a visit to a local small claims court. Every day hundreds of these low-level state courts mass produce judgments against debtors. These judgments can be used—depending on each state's laws—to garnish wages or seize assets from a "debtor." A judgment can also extend the life of a claim decades beyond limits imposed by state statutes.[38]

Collection claims are handed over to lawyers "where it appears the debtor is able, but unwilling, to pay," according to one large collector.[39] That appearance must be pretty widespread, judging by the huge volume of creditors' and collectors' claims that clog many low-level state courts. Ira Leibsker, a Chicago collection attorney, told a recent FTC workshop "that there are literally probably tens of millions of lawsuits being filed, and more will be filed as time goes on."[40] Faced with mounting claims and exhausted judicial resources, state courts sometimes do little more than rubber stamp claims.[41]

The debt machine has transformed the character of many small claims courts. Such courts were created in the early 20th century to allow quick and inexpensive resolution of disputes where the financial stakes were small.[42] Reformers envisioned streamlined and

[35] "Attorney General Cuomo Sues to Shut Down Buffalo-based Debt Collection Operation that Illegally Harassed and Threatened Consumers Nationwide," release dated Aug. 18, 2009.

[36] "Attorney General Cuomo Announces Reform Deal with Three NY Debt Collection Companies over Deceptive Techniques," release dated June 2, 2009.

[37] "Debtors and the New Breed of Collectors" by Chris Serres and Glenn Howatt of the Minneapolis Star Tribune, June 6, 2010, p. 1A.

[38] Collection Actions: Defending Consumers and their Assets, First Edition, 2008, National Consumer Law Center, p. 30.

[39] Form 10-K, filed Feb. 11, 2009 by Encore Capital Group with the U.S. Securities and Exchange Commission.

[40] See transcript for Aug. 5, 2009 for "Protecting Consumers in Debt Collection Litigation and Arbitration: A Roundtable Discussion" a workshop hosted by the Federal Trade Commission and Northwestern Law School's Searle Center, p. 239, posted on-line at **http://www.ftc.gov/bcp/workshops/debtcollectround/090805-CHIL/transcript-90805.pdf**.

[41] See "Dignity faces a steamroller: Small-claims proceedings ignore rights, tilt to collectors" by Boston Globe spotlight team, July 31, 2006 as well as "Debt Weight: The Consumer Credit Crisis in New York City and its Impact on the Working Poor" (October 2007) available online at **www.urbanjustice.org/pdf/publications/CDP_Debt_Weight.pdf** and "Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers" (May 2010), available online at **www.nedap.org/pressroom/documents/DEBT_DECEPTION_FINAL_WEB.pdf**.

[42] "Small Claims, Complex Disputes: A Review of the Small Claims Literature," by Barbara Yngvesson and Patricia Hennessy, *Law &Society Review, Vol. 9, No. 2 (Winter 1975)*, pp. 221-3.

simplified court proceedings where litigants represented themselves that would reduce "the wide disparity between the ability of the richer and poorer classes to utilize the machinery of the law."[43]

From the beginning, skeptics worried that such courts might gradually be transformed "from a forum in which the 'average man' could recover a legitimate claim, to a forum in which businessmen and landlords (some 'average' but others both politically and economically powerful) would bring claims to be dealt with (in their favor) in a summary manner."[44]

Turns out the skeptics were right. Lenders, debt buyers and other creditors have learned how to use small claims and other low-level courts as a low-cost machine for turning claims into judgments against consumers who have fallen behind on payments.[45]

Costs vary. A recent study found that the cost of filing a $1,000 claim in small claims court ranged from $30 in Maryland to $130 in Illinois.[46] A large debt buyer told investors that it decides whether to file collection lawsuits after analyzing the alleged debtors and the "legal process, state-specific, and jurisdictional information."[47]

Collectors have taken over small claims and other low level courts in state after state. In **Massachusetts**, "the people's court has become the collectors' court," the Boston Globe said in its 2006 investigation into the debt industry.[48] The Globe found that the state's debt collectors filed 575,000 lawsuits between 2000 and 2005, or three out of every five civil lawsuits. In Boston, 40,000 debt collection suits accounted for 85 percent of all small claims cases over a five year period. Credit card giant Capital One alone filed 38,000 lawsuits in a four-year period.[49]

The vast majority of court cases resulted in judgments in favor of creditors. In Massachusetts, such a judgment extends the life of a debt to 20 years or more, allows it to accrue interest at an annual rate of 12 percent (doubling in less than 6 years if not paid down) and empowers collectors to get court orders that

[43] Reginald Heber Smith, quoted in "Small Claims, Complex Disputes: A Review of the Small Claims Literature," by Barbara Yngvesson and Patricia Hennessy, *Law &Society Review, Vol. 9, No. 2 (Winter 1975)*, p. 221.

[44] "Small Claims, Complex Disputes: A Review of the Small Claims Literature," by Barbara Yngvesson and Patricia Hennessy, *Law &Society Review, Vol. 9, No. 2 (Winter 1975)*, p. 227.

[45] A large debt buyer said that filing cases against debtors in small claims and similar courts "allows us to work accounts that we would not normally pursue through the use of contingent fee collection attorneys because of cost." See Portfolio Recovery Associates Inc. Form 10-K for 2008, p. 11.

[46] "Broke but not Bankrupt: Consumer Debt Collection in State Courts" by Richard M. Hynes, Florida Law Review, January 2008, p. 10.

[47] Encore Capital Group, "Leveraging Intellectual Capital," Investor Presentation, June 9, 2009. Such state-specific and jurisdictional variations in court rules, costs and operations provide one motive for buying and selling debt. In cases where "debtor-friendly laws" in a certain jurisdiction prompt a large debt buyer to view claims there as less valuable, other debt buyers and collectors familiar and experienced with collections in that jurisdiction may see an opportunity to transform their expertise into profits. As a large debt buyer told investors, "Certain states have more debtor-friendly laws than others and, therefore, are less desirable from a collectability perspective." Portfolio Recovery Associates Inc. Form 10-K for the fiscal year ended Dec. 31, 2007, filed with the U.S. Securities and Exchange Commission, p. 8.

[48] "Dignity faces a steamroller: Small-claims proceedings ignore rights, tilt to collectors" by Boston Globe spotlight team, July 31, 2006.

[49] Ibid.

obligate consumers to make payments or face the threat of jail. Creditors can also use judgments to seize automobiles or other property, garnish wages, put a lien on a home or have a civil arrest warrant issued.[50] The *Globe* characterized Massachusetts small claims courts as "a de facto arm of a fast-growing and aggressive industry that has swamped court dockets with lawsuits—cases that often lead to threats of jail for debtors."[51]

Debtors were at a disadvantage in Massachusetts courts. Notices were vague and confusing, and often sent to the wrong addresses. Only one in five defendants even showed up for court hearings. In addition, while defendants generally represented themselves, creditors were usually represented by a lawyer. And although creditors technically had the burden of proving their claims, they were rarely asked to provide supporting evidence or documentation.[52]

A recent study found creditors had had a huge impact on **Virginia**'s legal system. A review of two decades of electronic court records found that "each year hundreds of thousands of Virginians are sued for defaulting on consumer debts."[53] Low level courts processed creditors' claims against consumers at an astonishing annual rate of one collection lawsuit for every 20 residents, and the great majority of those lawsuits resulted in judgments against consumers.[54]

The Virginia study also found that debt collections, which accounted for a majority of filings in the state's civil courts, were "concentrated in cities and counties with lower median income and homeownership rates; higher incidences of poverty and crime; and higher concentrations of relatively young and minority residents."[55]

In **New York City**, a deluge of 180,000 collection lawsuits filed by seven large collection firms during 2007 accounted for three out of 10 civil court filings, according to a 2007 study.[56] Similarly, 26 debt buyers filed 457,000 lawsuits and obtained $1.1 billion in judgments during a 31-month period that ended in July 2008. The debt buyers prevailed in 94 percent of the lawsuits, while only 10 percent of the alleged debtors responded to a summons and complaint and only 1 percent had legal representation.[57]

MFY Legal Services, which conducted the 2007 study, concluded that many "defendants do not appear in court because they are unaware of the lawsuit due to improper service."[58]

Why many alleged debtors didn't know that they were being sued was spelled out

50 Ibid.
51 Ibid.
52 Ibid.
53 "Broke but not Bankrupt: Consumer Debt Collection in State Courts" by Richard M. Hynes, Florida Law Review, January 2008, p.46.
54 Ibid, p. 48-9, 55.

55 Ibid, p. 6.
56 "Justice Disserved: A Preliminary Analysis of the Exceptionally Low Appearance Rate by Defendants in Lawsuits Filed in the Civil Court of the City of New York," MFY Legal Services Inc., Consumer Rights Project, June 2008, p. 4.
57 "Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-income New Yorkers" by The Legal Aid Society, Neighborhood Economic Development Advocacy Project, MFY Legal Services and the Urban Justice Center's Community Development Project, May 2010, p. 1.
58 "Justice Disserved: A Preliminary Analysis of the Exceptionally Low Appearance Rate by Defendants in Lawsuits Filed in the Civil Court of the City of New York," MFY Legal Services Inc., Consumer Rights Project, June 2008, p.5.

in criminal complaints filed in April 2009 by New York Attorney General Andrew Cuomo. Cuomo alleged that tens of thousands of defendants in New York debt collection lawsuits were denied their day in court by improper service, often referred to as "sewer service."[59] Three months later, Cuomo filed a lawsuit seeking to void about 100,000 default judgments with a total face value of more than $500 million. Those judgments were won in lawsuits by 35 law firms that hired a firm that Cuomo alleged regularly failed to serve notice to defendants.[60]

Courts in other states also churn through collection lawsuits. At a recent FTC workshop, judges from **Iowa** and **Michigan** estimated that 85 to 90 percent of the collection lawsuits filed in their courts resulted in defaults, while an **Illinois** judge noted that in his court "the tubs of default records are enormous, so you'll have sometimes, in a collection call, 300 to 600 default orders to go through."[61]

Mass processing of claims against consumers is widespread. In **Minnesota** during 2008, state courts issued more than 51,000 uncontested judgments in favor of collectors—mostly large banks and debt buyers—seeking $462 million from consumers, the Minneapolis Star Tribune found.[62]

A year earlier, Illinois' Cook County Circuit Court topped that output by issuing about 60,000 default judgments to resolve more than half of the 119,000 lawsuits filed by creditors, according to the Chicago Tribune.[63]

In some areas, hospitals led the collections charge. In western Virginia during a 66-month period, nonprofit Carilion Clinics obtained 40 percent of all judgments issued by the Roanoke District Court, or 33,000 judgments that had a face value of $61.6 million and yielded $25 million in revenue.[64] In **Maryland** during a five-year period, Johns Hopkins and other non-profit hospitals filed 132,000 collection lawsuits that yielded $100 million in judgments.

Evidence indicates that debt collectors' use of some small claims and other low level

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[59] "Attorney General Cuomo Announces Arrest of Long Island Business Owner for Denying Thousands of New Yorkers Their Day in Court," news release of April 14, 2009, posted on-line at **www.oag.state.ny.us/media_center/2009/apr/apr14a_09.html**. Cuomo filed five felony charges (forgery, fraud and three counts of filing a false instrument) against American Legal Process, a Long Island process server, and the same charges, as well as a misdemeanor charge of committing fraud as a notary public, against ALP's owner. The company "failed to provide proper legal notification to thousands of New Yorkers facing debt-related lawsuits, causing them unknowingly to default and have costly judgments entered against them without the chance to respond or defend themselves," the attorney general said.

[60] "Attorney General Cuomo Sues to Throw Out over 100,000 Faulty Judgments Entered Against New York Consumers in Next Stage of Debt Collection Investigation," release dated July 23, 2009.

[61] See transcript for Aug. 5, 2009 for "Protecting Consumers in Debt Collection Litigation and Arbitration: A Roundtable Discussion" a workshop hosted by the Federal Trade Commission and Northwestern Law School's Searle Center, p. 34, posted on-line at **http://www.ftc.gov/bcp/workshops/debtcollectround/090805-CHIL/transcript-90805.pdf**

[62] "Default surge: Misery by numbers; A deteriorating job market is blamed for a record amount of judgments in Minnesota in 2008, and 2009 might be worse" by Randy Furst and Glenn Howatt, Minneapolis Star Tribune, March 8, 2009.

[63] "Debt collectors pushing to get their day in court: More aggressive strategies fill court dockets, result in mistaken identities" by Ameet Sachdev, Chicago Tribune, June 8, 2008.

[64] "Carilion cases dominate general district docket" by Laurence Hammack, Roanoke Times, Sept. 14, 2008.

state courts increased in recent years. In Cook County, the annual crop of default judgments doubled from 2000 to 2007.[65] In Minnesota, the volume of debt collection lawsuits doubled from 2006 to 2008, and the volume of default judgments rose 58 percent in a single year.[66] In three counties in the San Francisco Bay Area, the number of lawsuits filed to collect consumer debts rose to 96,000 in 2009 from 53,700 in 2007.[67] In New York City, researchers concluded that a surge in debt collection lawsuits was a major contributor to a near tripling in all civil court lawsuits, from 213,000 in 2000 to 618,000 in 2007.[68]

Disclosures from some debt buyers show a similar trend. Encore Capital Group, which hires outside law firms to do collections on a contingency fee basis, reported that its lawyers filed nearly 450,000 lawsuits in 2008, up 18 percent in a year.[69] That same year, Portfolio Recovery Associates Inc. paid outside attorneys $33 million in contingency fees, up 14 percent from $29 million in 2007.[70]

The huge volume of collection lawsuits has nearly exhausted the capacity of state courts and created an urgent need for state laws that provide a more robust framework to ensure that small claims and other courts respect and protect the rights of consumers who are sued.

IV. CREATIVE COLLECTIONS

Back in February 2008, early in the Great Recession, members of DBA International, a trade association for companies that buy, sell and collect debts, gathered in a plush Las Vegas hotel ballroom for their annual convention. The scene posed a striking contrast to the dreary routine in local small claims courts.

Platters of shrimp and fountains of chocolate were set out for the attendees. Former baseball great Johnny Bench gave a rambling but entertaining "motivational" speech. Two tickets to attend an upcoming party at the Playboy mansion were auctioned off. (The winning bid was a mere $4,000).

"We're really an optimistic business," Samir Shah, president of a Syosset, N.Y., debt buyer called RJM Acquisitions/Island National Group, told the gathering. "We believe man is good and wants to pay their debts."

But Bob Deter of Hudson & Keyse, another debt buyer, warned of hard times coming: "Debt

[65] "Debt collectors pushing to get their day in court: More aggressive strategies fill court dockets, result in mistaken identities" by Ameet Sachdev, Chicago Tribune, June 8, 2008.

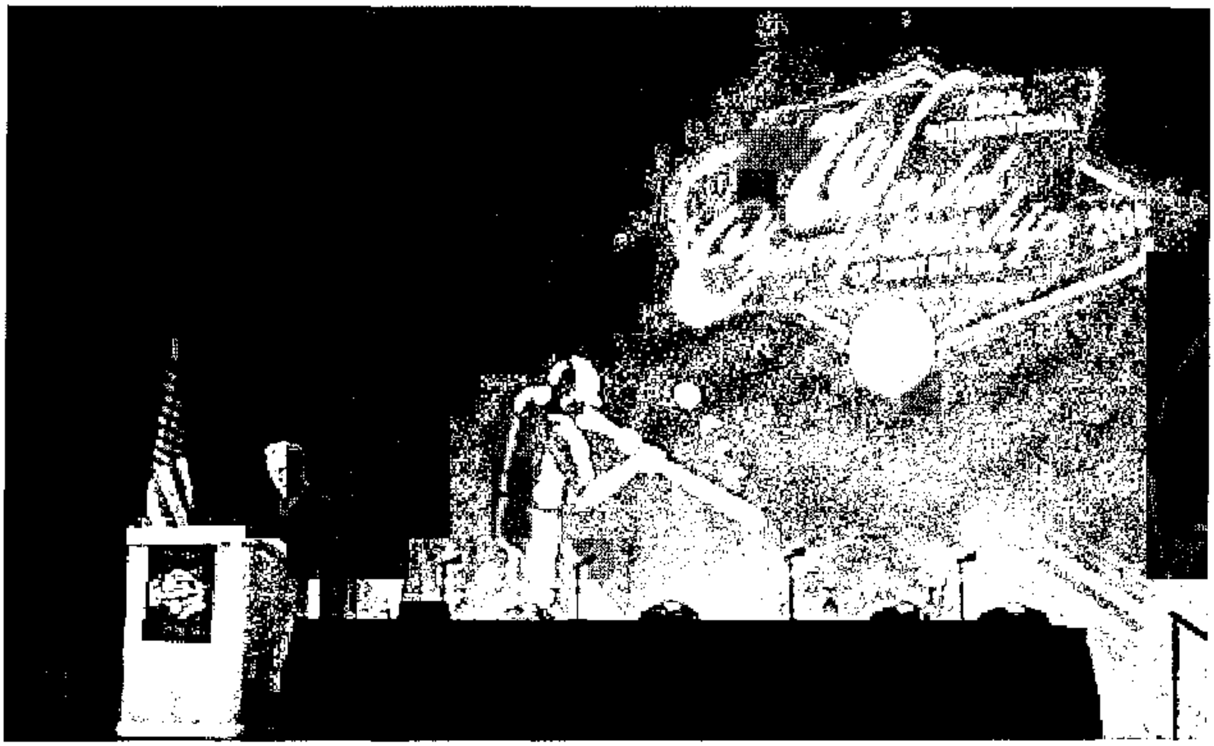
[66] "Default surge: Misery by numbers; A deteriorating job market is blamed for a record amount of judgments in Minnesota in 2008, and 2009 might be worse" by Randy Furst and Glenn Howatt, Minneapolis Star Tribune, March 8, 2009.

[67] "Some Lawyers Want to Keep Debt Collection Out of the Courts" by Bernice Yeung, in the New York Times, April 22, 2010.

[68] "Justice Disserved: A Preliminary Analysis of the Exceptionally Low Appearance Rate by Defendants in Lawsuits Filed in the Civil Court of the City of New York," MFY Legal Services Inc., Consumer Rights Project, June 2008, p.5.

[69] Encore Capital Group Form 10-K for 2008, p. 3, 39.

[70] Form 10-K for the fiscal year ended Dec. 31, 2008, filed with the U.S. Securities and Exchange Commission by Portfolio Recovery Associates Inc. But because of the lack of uniform data, it is hard to generalize about trends in filings in small claims and similar courts. A recent study of small claims courts concluded that "the civil filing rate of most states has remained fairly stable since the mid-1970s. "Broke but not Bankrupt: Consumer Debt Collection in State Courts" by Richard M. Hynes, Florida Law Review, January 2008, p. 32.



DBA conference session

collectors are going to have to get creative . . . in order to keep the liquidations up."[71]

Creativity is nothing new for collectors. The techniques and scope of collections have grown with the debt industry. Collectors use sophisticated data collection and marketing practices more typically associated with selling products and offers of credit.

One collector specializes in pursuing debtors to the grave—and beyond. "Dead people are the newest frontier in debt collecting, and one of the healthiest parts of the industry," the New York Times reported recently.[72] DCM Services LLC, a Minneapolis company, describes itself as a "collection agency focused exclusively on decedent debt resolution." DCM says its "estate-focused, survivor-sensitive recovery" will help creditors protect their brands and reputations by eliminating "unnecessary contact with loved ones of the deceased account holder."[73]

Other collectors aim to extract payments of alleged debts from consumers by dangling

[71] Remarks at DBA International Conference in Las Vegas, Feb. 6, 2008.

[72] "You're Dead? That Won't Stop the Debt Collector" by David Streitfield in the New York Times, March 4, 2009.

[73] "Executive Brief: Deceased Debt Sales" and "Credit Solutions for Life," both by DCM Services LLC, on file with authors.

Debt Buyers

In a strange twist, debt has begun to attract interest from investors and speculators. Always on the prowl for new places where money can generate a hefty profit, these debt buyers acquire portfolios—some quite large—made up of receivables. These receivables represent claims against debtors that are valuable if they generate revenue that exceeds the costs of acquiring them and extracting payments from borrowers.

Debt buyers generally keep a low profile. The industry's most recent estimate for the face value of receivables—mostly credit card accounts—that changed hands between debt buyers sellers dates back to 2005, when volume was put at $110 billion. That marked a dramatic increase since 1993, when the volume of receivables sold was only $6 billion.[1]

Creditors sell debt in order to clean up their books and generate some revenue. Buyers pony up because they usually pay only pennies on the dollar, so that even relatively meager collections can generate rich profits.

For example, the chief executive of Sherman Financial Group, a Greenville, S.C., company that describes itself as the largest debt buyer, said in a 2006 presentation that in 10 years it had invested $2.6 billion to purchase 25 million accounts from which it had collected $3.8 billion.[2] In 2009, Sherman posted revenue of $1.25 billion and net income of $135.6 million.[3]

From 2006 through 2008, Encore Capital Group paid $584 million, or 3 cents on the dollar, to acquire more than 11,000 portfolios of debt with a total face value of $17.1 billion. Encore, which in a recent presentation to investors touted its "demonstrated history of generating strong cash flows," has collected nearly triple what it has paid for its debt portfolios and posted annual profits ranging from $15 million to $31 million.[4]

Consumers can be the losers in these deals. They can face years of badgering from creditors to pay debts—even when claims are erroneous, disputed, already settled, discharged in bankruptcy or older than allowed by a jurisdiction's statute of limitations.

In fact, some debt buyers exult in their ability to prolong the life of debt. At a trade association conference in Las Vegas, David Rosenberg, chief executive of debt buyer Unifund, boasted of a long earning curve: "There are parts of the portfolio that continue to perform even after 10 years." Not to be outdone, Samir Shah of RJM Acquisitions said his collection firm—which sends out glossy fliers offering premiums and "rewards programs" to consumers who pay up—looks at debt "as a forever sort of thing."

This is more than hot air. During the summer of 2009, Portfolio Recovery Associates reported that it continued to collect revenue from debts purchased as many as 13 years earlier.[5]

Some leading debt buyers are playing with chips provided by JPMorgan Chase and other giant financial institutions. Encore Capital and rival Asset Acceptance Corp. are each is backed by more than $200 million in credit from JPMorgan Chase. The bank group behind Portfolio Recovery includes JPMorgan Chase, Bank of America, SunTrust, Wells Fargo and Royal Bank of Canada.

The Great Recession, by cutting prices paid for bad debts, proved a boon for debt buyers with deep pockets or rich backers. For example, Encore Capital

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[1] *Comments of ACA International Regarding the Debt Collection Workshop,* FTC File P074805, filed June 6, 2007, p.40.

[2] See "Radian 2006 Investor Day—Final," Nov. 9, 2006, on FD (Fair Disclosure) Wire.

[3] Radian Group Form 10-K for 2009, filed with the U.S. Securities and Exchange Commission, p. 225. , Radian, a mortgage insurance company, recently sold its 28.7 percent stake in Sherman to a group of Sherman's managers.

[4] See Form 10-K for the fiscal year ended Dec. 31, 2008, filed with U.S. Securities and Exchange Commission by Encore Capital Group, pp. 20, 36, 41; Encore Capital Group, "Leveraging Intellectual Capital," Investor Presentation, June 9, 2009.

[5] "Buyers of bad debt bide time as U.S. consumers fret" by Sweta Singh, Reuters, July 22, 2009.

Group reported "prices for fresh charge-offs (receivables that are sold immediately after charge-off) have declined from 8%–13% of face value in early 2008 to 6%–10% of face value in late 2008."[6] One industry source noted some old debts selling for less than a penny on the dollar.[7]

Debt buying can be perilous for investors. In February 2007, Asta Funding Inc. paid $300 million to purchase a portfolio of bad debts, or receivables, with a face value of $6.9 billion from Great Seneca Financial Corp., an affiliate of the former Wolpoff & Abramson law firm. The deal, Asta's Chief Executive Gary Stern told analysts, put "Asta in a very solid position for potential future revenue and earnings growth."[8]

That's not how it worked out. Asta posted a staggering $91 million loss in 2009, prompting a competitor to identify it as one of the "key players" in the debt industry that had been forced to the sidelines by "large purchasing mistakes."[9]

Recently, debt prices have begun to firm. The cost of recently charged off credit card receivables reached 8 cents on the dollar by May 2010, up from as low as 3 cents on the dollar in March 2009, according to an industry source.[10]

[6] Encore Capital Group Form 10-K for 2008, filed with U.S. Securities and Exchange Commission by Encore Capital Group, p. 22.
[7] "Getting Current on Pricing in the U.S. Credit Card Debt Purchasing Market" by Mark Russell of Kaulkin Ginsberg, posted March 24, 2009 by InsideARM and viewed on-line at www.insidearm.com/go/arm-analysis/getting-current-on-pricing-in-the-u-s-credit-card-debt-purchasing-market, July 1, 2009.
[8] See "Asta Funding Signs Definitive Agreement to Purchase $6.9 Billion Portfolio" on PR Newswire, Feb. 9, 2007, and transcript of Asta Funding conference call, March 9, 2007.
[9] See Asta Funding Inc. Reports Fourth Quarter and Fiscal Year-End 2009 Results" on PR Newswire, Dec. 15, 2009, and "Leveraging Intellectual Capital" November 2009 Investor Presentation by Encore Capital Group, slide 13.
[10] "Debt Buyers Experiencing Bumpy Ride on Prices" in InsideARM, May 20, 2010.

offers of luxury items. Shah told the Las Vegas debt buyers gathering that at his firm, "We believe we're in the direct marketing business and we're selling collections."

How do you "sell" collections? Shah said his firm sends a targeted debtor a letter every 60 days with a different settlement offer. The letters include glossy fliers that offer flat panel TVs and other gifts as premiums to consumers who make payments. "We get a lot of calls out of curiosity, just to see if we're real."

Other collectors pursue debtors in what Business Week magazine called "a financial version of Night of the Living Dead, (where) debts forgiven by bankruptcy courts are springing back to life to haunt consumers."[74] That occurs when collectors acquire and pursue claims against consumers who have sought relief under the bankruptcy law. That law exists in part to offer a fresh start to debt-burdened consumers who submit to a court-supervised distribution of their existing assets.

[74] "Prisoners of Debt; The fresh start promised by bankruptcy is under attack as big lenders keep squeezing money out of consumers whose debts were canceled by the courts," by Robert Berner and Brian Grow in Business Week, Nov. 12, 2007, p. 44.

DBA conference speakers: Sherman Financial Group executive Bryan Faliero (top); Unifund founder and CEO David Rosenberg (bottom)

One company describes itself as "the provider of choice for the complex and often legally intensive bankruptcy debt recovery and servicing process for many leading credit card and durable consumer goods creditors."[75] Its advertisements promise prospective clients "an unparalleled increase in profitability from your bankruptcy consumer receivables."[76]

Among those who looked toward bankruptcy for new collections opportunities was credit card giant Capital One. In November 2008, Capital One acknowledged filing thousands of claims against consumers that had been discharged, or erased, in earlier bankruptcy cases. The bank estimated that it had filed 5,600 previously discharged claims and improperly collected $340,000 but blamed a glitch that occurred when it outsourced and automated its bankruptcy claims filing work.[77]

Other collectors seek to give new life to seemingly expired debts using credit card offers. For example, Atlanta-based CompuCredit Corp. offered so-called zombie cards to consumers whose debts to CompuCredit or other lenders were older than the applicable statutes of limitations or the seven-year limit for reporting to credit agencies, the FTC said.

The offered cards were designed to function as "a debt collection device, not new credit," federal regulators said in a 2008 action that resulted in orders to CompuCredit and three bank partners to pay $127 million in fines and restitution to credit card customers.

Creditors offer consumers the opportunity to charge debts to the new zombie cards because the transaction has the potential to erase the statute of limitations on the old debt and restart the clock on a new cycle of delinquency and default for the debtor.

For example, CompuCredit's offer "misrepresented that consumers would receive immediately a credit card if they agreed to

[75] Web site of B-Line LLC at **www,blinellc.com/careers.htm**, viewed Sept. 18, 2008.
[76] Advertisement at **wwww.insidearm.com/special/index.cfm?=ad=4412**, viewed Sept. 18, 2008.

[77] First Interim Report of Court-Appointed Auditor, Melanie L. Cyganowski, filed Sept. 25, 2009 in Adversary Proceeding 08-01272 in U.S. Bankruptcy Court for the District of Massachusetts, Eastern Division.

transfer an existing debt to the credit card," according to the FTC.[78]

Many took the bait. More than 3.6 million consumers signed up for the cards even though the credit offered equaled only 5 percent of their existing debt and they did not receive cards or have the debts cleared from their credit reports until they paid off a portion, ranging from 25 percent to 50 percent, of that old debt.[79]

V. TAG TEAM COLLECTORS, DAISY CHAIN DEBT

To a consumer, a debt may seem like a simple —if painful—obligation. A bank or company that extended a loan seeks to get repaid.

But as the debt industry has metastasized into a confusing amalgam of big and small collectors, mysterious buyers and multifaceted law firms, debt has been transformed into a type of financial asset that frequently changes hands in giant portfolios.

So a beleaguered borrower being pressured to repay an overdue or disputed obligation is likely to wrestle against not just a single bank or creditor but an entire tag team of creditors, buyers, collectors and lawyers.

The results can be daunting. Collection calls and lawsuits may come from a dizzying array of corporate and legal entities. Claimants and claims may be unfamiliar or undecipherable to alleged debtors. Meanwhile, collectors and lawyers may lack documentation of their ownership of those claims or of how the alleged obligations were incurred or computed.

An affidavit factory

It promised to be no easy undertaking when, in May 2007, Jeanie Cole of Hill County, Mont., engaged a lawyer and set out to challenge the claim by Portfolio Recovery Associates, a New York debt buyer, that it owned and had the right to pursue a $5,900 claim against Cole.

Nine months earlier, Portfolio Recovery had sued Cole claiming that $5,900 was the balance on an inactive account left over from when she had held a credit card from Providian National Bank. In response to Cole's challenge, Portfolio Recovery produced a notarized affidavit signed by a Providian representative named Martha Kunkle affirming that in December 2005 Providian had sold Portfolio Recovery its right to collect from Cole the money Providian had lent her years ago.

Then things got odd. Cole, with the aid of her lawyers, discovered another affidavit from Providian that was also signed by Martha Kunkle—but in different handwriting. After Cole's lawyer pointed out the discrepancy, a judge ordered Portfolio Recovery to produce Kunkle and the notary for her depositions. When, after 16 months, Portfolio Recovery still hadn't produced Kunkle or the notary, the judge threw out the company's lawsuit and hit it with $6,000 in sanctions.

Cole didn't stop. She next filed a federal lawsuit alleging violations of the FDCPA and the Racketeer Influenced Corrupt Organizations Act by Portfolio Recovery, a Colorado debt buyer called CACV LLC, a North Dakota collection law firm and two bank employees.

[78] Complaint for Permanent Injunction and other Equitable Relief, Federal Trade Commission vs. CompuCredit Corp. and Jefferson Capital Systems LLC, United States District Court for the Northern District of Georgia, Atlanta Division, 1:08-CV-1976.
[79] Ibid, pp. 7-8.

Cole's lawsuit, which was later certified as a class action, describes the web of transactions that ensnared Cole and tens of thousands of other alleged debtors after Providian, a major credit card issuer, was acquired by Washington Mutual in October 2005. When Washington Mutual than sold charged-off credit card "receivables" to debt buyers like Portfolio Recovery and CACV, it faced the prospect of providing evidence to support collection efforts by the debt buyers.

Cole's lawsuit alleged that the bank came up with an unconventional, and illegal, solution. Washington Mutual "operated a false affidavit factory whereby hundreds of false and misleading affidavits were signed and notarized each day." The notary public sat between two other WaMu employees and notarized their affidavits" which they had been ordered to sign with Martha Kunkle's name.[80]

In March 2010, a federal magistrate in Montana gave final approval to a pair of settlements with the debt buyers who bought claims from WaMu in which 15,000 alleged debtors would be awarded settlements ranging from $25 to $555 each depending upon the types of notice they received and whether they contested debt lawsuits.[81]

[80] See Seconded Amended Complaint filed March 9, 2009 in Jeanie Cole, et al vs. Portfolio Recovery Associates LLC, 2008cv00036, in U.S. District Court for the District of Montana, Great Falls Division.

[81] See Final Order and Judgment and Final Order and Judgement as to Defendants CACV of Colorado LLC and CACH LLC,, both issued March 19, 2010 in Jeanie Cole, et al vs. Portfolio Recovery Associates LLC, 2008cv00036, in U.S. District Court for the District of Montana, Great Falls Division.

An industry lags

The problems exposed by Cole's lawsuit are the tip of an iceberg. With billions of dollars of debt obligations, legal claims and judgments changing hands each year, volume has far outstripped the record-keeping capability and commitment of the debt machine. Meanwhile, the industry has failed to invest to create the infrastructure necessary to keep track of vital information about the "receivables" that pass between collectors, debt buyers and lawyers.

As a result, debt buyers pursuing a claim rarely have the application for the credit card that supposedly was the source of that claim. Nor are debt buyers likely to have a copy of a signed contract, charge slips, records of payments or disputes or a written assignment of the claim.[82]

"When accounts are transferred to debt collectors, the accompanying information often is so deficient that the collectors seek payment from the wrong consumer or demand the wrong amount from the correct consumer," an FTC workshop found.[83] A debt buyer commonly gets "only a computerized summary of the creditor's business records when it purchases a portfolio."[84]

An industry newsletter recently described the resulting chaos. Debt passes among collectors and buyers. Each may use hardware and software that is different from and incompatible with that of other firms. Paper records don't always follow or "may have been damaged, miscopied or otherwise (be) incorrect."

[82] See Fair Debt Collection by National Consumer Law Center, 2008, Sixth Edition, p. 9.

[83] See "Collecting Consumer Debts: The Challenges of Change," a Workshop Report from the Federal Trade Commission, February 2009, p. 22.

[84] Ibid.

That leaves collectors trying to document the validity of a debt "at the mercy of a wayward box of files."[85]

Consumers' rights are compromised as obligations pass through the debt selling bazaars. Elusive or missing records can present a serious obstacle to consumers seeking to recognize, question or challenge a claim that they owe a debt. And even when an obligation appears settled, consumers may find themselves still pursued by a new corporate adversary who has jumped into the ring.

Just how crazy it gets was illustrated recently when a New Jersey judge threw out a $17,492 judgment against the holder of a Chevy Chase Bank Visa card after a lawyer for the debt buyer pursuing the claim attempted to prove its validity by using a Wikipedia page about J.P. Morgan & Co.'s 2004 purchase of Bank One. Noting that it was "entirely possible for a party in litigation to alter a Wikipedia article, print the article, and thereafter offer it in court in support of any given position," the appeals court ruled the debt buyer had not proved the validity of its claim. The court also noted that the debt buyer's lawyer testified that he had personally reviewed a bill of sale for the debt that had been delivered in a compact disc, but that compact disc had not been entered in evidence.[86]

In February, a district court judge in Nassau County, New York slapped a large debt collection law firm with $14,800 in sanctions after a consumer challenged what the judge characterized as typical abuses in the operations of the debt machine. In August 2004 the law firm of Eltman, Eltman & Cooper had sued Patricia Bohnet, a bookkeeper for a charity, on behalf of a debt buyer, Erin Services Co., that had purchased a debt that Bohnet allegedly owed to credit card issuer First USA. The collection complaint included an affidavit claiming that Bohnet had been personally served at an address that she had moved away from six years earlier, and a default judgment was entered in October 2004. But after Bohnet went to court to dispute the debt, Judge Michael Ciaffa found that the collection firm had "failed to provide a scintilla of evidence that defendant was actually indebted to First USA many years ago, or that (the debt buyer) acquired a lawful assignment of a bona fide debt." The judge also wrote in his decision that lawyers representing debt buyers "seem especially prone to pursuing claims improperly, often at the expense of the most vulnerable members of our society.[87]

Sometimes the victims of the industry chaos are other debt buyers. In November 2009, Florida debt buyer Steven Goldberg pled guilty to counts of wire fraud and mail fraud and was sentenced to 71 months in prison. Goldberg admitted as part of a plea deal that he had broken promises to pay $13.6 million to buy 94,000 consumer debt accounts from creditors and collectors. Then, without even

[85] "Debt Portfolio Registration Services Fill an Operational and Regulatory Gap," InsideARM, July 22, 2009.

[86] See Superior Court of New Jersey, Appellate Division, Docket No. A-1388-07T31338-07T3, Palisades Collection LLC v. Steven Graubard, per curiam, posted on-line at **lawlibrary.rutgers.edu/courts/appellate/a1338-07.opn.html**.

[87] See Linda Almonte v. JP Morgan Chase Bank NA, Cause No. 2010ci02947, in the District Court of Bexar County, Texas, Plaintiff's Original Petition filed Feb. 22, 2010; "Ex-Chase VP sues over her firing" by Patrick Danner in the San Antonio Express-News, March 4, 2010, p. 1C.

getting titles to those claims, he had pocketed $2.8 million by reselling some of those accounts to other debt buyers.[88]

Some states have begun to address this problem. In North Carolina, the Consumer Economic Protection Act of 2009 requires that debt buyers document their ownership of a claim, the terms of the contract, the amount and the original creditor, and itemize all fees and charges.[89]

The FTC has also addressed the issue. In September 2008, the FTC accused Bear Stearns, an investment bank acquired by JPMorgan Chase in 2008, of "paying inadequate attention to the integrity of consumers' loan information" in a portfolio of 475,000 mostly subprime mortgage loans that it serviced and securitized.[90]

The agency alleged that Bear Stearns violated the FDCPA as well as lending laws when it "neglected to obtain timely and accurate information on consumers' loans, made inaccurate claims to consumers and engaged in unlawful collection and servicing practices." The FTC also alleged that Bear Stearns' servicing unit routinely made collection calls and sent collection notices "before it has obtained complete loan information from the seller and before it has conducted quality control and other data integrity checks to ensure the accuracy of the representations it makes to borrowers."[91]

Bear Stearns paid $28 million "to redress consumers" and was ordered to "possess and rely upon competent and reliable evidence to support claims made to consumers about their loans."[92]

That order caught the attention of debt collectors and buyers. An article in a trade publication characterized the decision as "the most important regulatory action to impact the ARM (debt collection) industry since the passage of the Fair Debt Collection Practices Act." The article warned collectors that "changes are required in the whole process of buying/selling debt" to ensure that the chain of title can be verified and that holders of claims can have access to records of loan agreements and account statements.[93]

VI. RECOMMENDATIONS

Robust consumer protections are needed to ensure that debtors' rights are respected throughout the collection process, beginning when collectors contact consumers, and continuing through court and arbitration proceedings and as judgments are enforced.

Over the past decade, the debt industry grew rapidly in reach, clout and resources. Yet until the current crisis, debt industry leaders

[88] See Sentencing Minutes filed Nov. 13, 2009 and Factual Proffer Supporting Change of Plea filed Aug. 14, 2009 in United States of America vs. Steven Goldberg, 2009cr80030, in U.S. District Court, Southern District of Florida.

[89] See Consumer Economic Protection Act of 2009 posted on-line at **http://www.ncleg.net/EnactedLegislation/SessionLaws/PDF/2009-2010/SL2009-573.pdf.**

[90] Plaintiff Federal Trade Commission's Complaint for Permanent Injunction and Other Equitable Relief in Federal Trade Commission v. EMC Mortgage Corp. and the Bear Stearns Companies, U.S. District Court for the Eastern District of Texas, Sept. 9, 2008, pp. 3-4.

[91] Ibid, p. 5.

[92] "Bear Stearns and EMC Mortgage to Pay $28 Million to Settle FTC Charges of Unlawful Mortgage and Debt Collection Practices," release from Federal Trade Commission, Sept. 9, 2008.

[93] "$28 Million FTC Settlement with Bear Stearns/EMC has Significant Impact on ARM Industry" by David Mertz, InsideARM, Oct. 16, 2008.

and some government officials shrugged off calls for stronger consumer protections or expressed their preference for "self-regulation."

But others saw that the party had to end. As one debt buyer warned his peers in early 2008, "If we don't regulate ourselves, somebody is going to come in and regulate us for us."[94]

The time for intervention is now at hand. Recent exposures of excesses, abuses and conflicts of interest have demonstrated a need for change that even many in the industry find themselves hard-pressed to deny. That has created an unusual opportunity to enact substantial reforms and ensure that strong consumer protections are part of any plan to repair a broken industry.

Effective reform must ensure that all players in the debt industry are bound by the rule of law, principles of fairness and respect for individual consumers. Anything less will only contribute to lingering economic stagnation and the financial devastation of millions of households.

The Federal Trade Commission recently called upon Congress to update the 33-year-old Fair Debt Collection Practices Act.[95] **The National Consumer Law Center joins in that call and recommends that, in order to both update and strengthen the FDCPA, it be be amended to:**

- give consumers the right to record collection calls, so that collectors can be made accountable for their illegal use of insulting and obscene language.
- increase to at least $5,000 the statutory damages that can be awarded to abused consumers and allow courts to award statutory damages for <u>each</u> violation so that the bad apples pay for multiple offenses. This increase is needed to offset the effect of inflation since the law was passed.
- base class action damages on a collector's revenue, not manipulated net worth computations, so that debt collectors will begin to pay attention to consumer complaints about their unresponsive and abusive practices.
- prohibit confidentiality requirements for all settlements of consumer claims so that rogue debt collectors are held accountable for their disregard of the law.
- require that debt collectors, before initiating collection efforts, possess certain basic information about the debt including, at the minimum: (1) proof of indebtedness; (2) the date that the debt was incurred and the date of the last payment; (3) the identity of the original creditor as known to the consumer; (4) the amount of the debt principal and an itemization of all interest, fees or charges added to it by the original creditor and all subsequent holders; and (5) the chain of title if the debt has been sold.
- require that debt collectors, before filing a complaint, possess the basic information listed above in a form admissible in the court, certify that fact in the

[94] Stacey Schachter, an executive of Outsourcing Solutions Inc., a debt collection firm later acquired by NCO Group, speaking at the DBA International conference in Las Vegas in February 2008.

[95] FTC, *Collecting Consumer Debts: The Challenges of Change—A Workshop Report (Feb. 2009)*, available at **www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf**.

complaint, and certify to the court or arbitrator that the collector possesses any license required by state law.

- require that the creditor and each subsequent holder of the debt must retain and pass on to the next holder all communications from the consumer concerning the debt and information about all known disputes and parties.
- require that initial written communication to the consumer should include the name of the original extender of credit, as well as an itemization of fees and interest included in the debt.
- require that when a consumer requests verification of the debt, collectors verify with a reasonable investigation that is responsive to the consumer's specific dispute.
- require that collectors disclose to a consumer that she or he cannot be sued when the collector seeks payment for a time barred debt.
- require that debt collectors inform consumers of their right to have the collector cease communications and consumers are allowed to exercise this right orally.
- limit to statutory damages the application of the FDCPA bona fide error defense for debt collectors, so that a consumer can recover actual damages, such as illegal fees that she or he paid.

Congress should also make permanent the recent breakthrough in the struggle to end binding mandatory arbitration. Mandatory predispute arbitration clauses should be banned from all consumer credit contracts (as called for by the Arbitration Fairness Act of 2009).

VII. CONCLUSION

It is time to reshape the debt collection industry upon a foundation that includes effective prohibitions on abusive collections and shuts down "legal" assembly lines that mass produce judgments against alleged debtors.

The growth of consumer credit leads to the growth in consumer debt, and in collections. The failure to rein in collection abuses with effective consumer protection laws and oversight by regulators will block households and the economy from reaping the potential benefits of available and reasonably priced consumer credit.

APPENDIX

A limited window into the wealth and power of the debt industry comes from the securities filings of five debt companies as well as some other securities filings and reports from industry publications.

The industry has a massive appetite for debt. In 2009, five companies that disclosed results in filings to the Securities and Exchange Commission—Asset Acceptance, Encore Capital, Portfolio Recovery, Asta Funding and NCO Group—paid $744 million to acquire debt receivables purportedly owed by consumers with a combined face value of about $24 billion.

Similarly, Collections and Credit Risk Magazine reported that in 2008 a group of seven companies—including those five and two others: Sherman Financial Group and Unifund—purchased debt with a combined face value of $42 billion.

The disclosures also show big banks' financial stakes in the debt industry. Most notably, JPMorgan Chase is the majority owner of NCO Group and leads or participates in bank groups that in 2009 provided more than $940 million in loans and credit lines to three other debt firms.

Some Large Debt Companies 2009

COMPANY	STOCK SYMBOL	HEADQUARTERS	NUMBER OF COLLECTORS	ANNUAL REVENUE ($MILLION)	NET INCOME ($MILLION)	FACE VALUE OF DEBT PURCHASED, ($MILLION)
Sherman Financial Group	na	Greenville, S.C.	not disclosed	$1,245.7	$135.6	not disclosed
Asset Acceptance Capital Corp.	AACC	Warren, Mich.	1,009	$ 171.3	$(16.4)	$4,459.8
Encore Capital Group	ECPG	San Diego, Calif.	888	$ 316.4	$ 33.0	$6,500.0
Portfolio Recovery Associates	PRAA	Norfolk, Va.	1,903	$ 281.1	$ 44.3	$8,109.7
Asta Funding	ASFI	Englewood Cliffs, N.J.	105 total employees	$ 70.3	$(90.7)	$ 577.0
NCO Group	na	Horsham, Pa.	19,100	$1,563.9	$(84.2)	$4,300.0

Sources: Filings by companies with Securities and Exchange Commission; also filings by Radian Group Inc.

Some Large Debt Companies 2009 (*continued*)

EXPEN-DITURE ON DEBT, ($MILLION)	COLLECTIONS RECEIPTS ($MILLION)	YEAR	FINANCING	OWNERSHIP
not disclosed	not disclosed	2009	not disclosed	Sherman Capital LLC and Meeting Street Partners II own "all outstanding membership interests" in SFG, according to an SEC filing by Radian Group Inc. in May 2010 when it sold its 28.7 ownership stake to those entities for $172 million.
$121.9	$334.0	2009	**JPMorgan Chase** administers syndicate that provides $100 million revolving credit and $150 million term loan	35.7 percent by **Quad-C Management**, a Charlottesville, Va., investment company; 16.1 percent by **D3 Family Funds LP**, an investment company founded by David Nierenberg; 12.3 percent by **CEO Nathaniel F. Bradley IV**; and 11 percent by **Heartland Advisors**, an investment company founded by William Nasgovitz
$256.6	$487.8	2009	**JPMorgan Chase** administers syndicate that provides $327.5 million revolving credit	24.9 percent by funds controlled by **J. Christopher Flowers**; 14.9 percent by **Red Mountain Capital Partners**; 10.7 percent by **Heartland Advisors**; 7.2 percent by **Dimensional Fund Advisors** (2009 proxy, need to update)
$288.9	$433.5	2009	Group of banks including **Bank of America, Wachovia, RBC Centura, SunTrust** and **JPMorgan Chase** provide a $365 million line of credit.	10.2 percent by **Capital Research Global Investors**; 6.9 percent by **BlackRock Inc**; 6.7 percent by **Waddell & Reed Financial**; 5.4 percent by Riverbridge Partners.
$19.6	not disclosed	2009	**Bank Leumi** provides $6 million revolving credit line	25.4 percent by entities related to the family of CEO Gary Stern; 12.6 percent by **Peters MacGregor Capital Management**; 9.2 percent by **Private Capital Management**; 5.9 percent by **Wellington Management Co.**; 5.7 percent by **First Wilshire Securities Management**
$56.6	$1,246.6	2009	**Morgan Stanley** administers syndicate that provides $569 million term loan and $100 million revolving credit	80.0 percent by affiliates of **JPMorgan Chase**; 6.0 percent by affiliates of **Citigroup**

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Boston Headquarters:
7 Winthrop Square
Boston, MA 02110-1245
Phone: 617/542-8010
Fax: 617/542-8028
www.nclc.org

Washington Office:
1001 Connecticut Ave, NW
Suite 510
Washington, DC, 20036
Phone: 202/452-6252
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Sykes v. Mel S. Harris and Associates LLC 780 F.3d 70

United States Court of Appeals, Second Circuit. February 10, 2015 780 F.3d 70 90 Fed.R.Serv.3d 1793 RICO Bus.Disp.Guide 12, 584 (Approx. 41 pages)

United States Court of Appeals,
Second Circuit.

Monique SYKES, Rea Veerabadren, Kelvin Perez, Clifton Armoogam, Individually and on behalf of all others similarly situated, Plaintiffs –Appellees,

v.

MEL S. HARRIS AND ASSOCIATES LLC, Mel S. Harris, Todd Fabacher, Michael Young, Kerry Lutz, Esq., LR Credit 18, LLC, L–Credit, LLC, Leucadia National Corporation, LR Credit, LLC, LR Credit 10, LLC, Samserv, Inc., William Mlotok, Benjamin Lamb, David Waldman, Joseph A. Orlando, Michael Mosquera, John Andino, LR Credit 14, LLC, LR Credit 21, LLC, Philip M. Cannella, Defendants–Appellants.[1]

Docket Nos. 13–2742–cv, 13–2747–cv, 13–2748–cv.
Argued: Feb. 7, 2014.
Decided: Feb. 10, 2015.

Synopsis

Background: Debtors filed putative class action against debt-buying company, law firm, and process server alleging they had engaged in fraudulent scheme to obtain default judgments against debtors in civil court, in violation of Fair Debt Collection Practices Act (FDCPA), Racketeer Influenced and Corrupt Organizations Act (RICO), and New York law. Plaintiffs moved for class certification, and the United States District Court for the Southern District of New York, Denny Chin, Circuit Judge, 285 F.R.D. 279, certified two classes. Defendants appealed.

Holdings: The Court of Appeals, Pooler, Circuit Judge, held that:

1 district court did not abuse its discretion in determining that proposed class of debtors met commonality requirement for class certification;

2 district court did not abuse its discretion in determining that common issues of law and fact predominated over any individual ones, as required for class certification;

3 district court did not abuse its discretion in determining that class action was superior method for resolving debtors' claims;

4 *Rooker-Feldman* doctrine did not bar debtors' action;

5 Full Faith and Credit Act did not bar debtors' action; and

6 district court did not abuse its discretion in certifying debtors' claims under provision of federal class action rule providing for injunctive relief if defendant acted or refused to act on grounds that apply generally to the class.

Affirmed.

Jacobs, J., filed separate dissenting opinion.

West Headnotes (22)

Change View

1 **Federal Courts** Class actions

Court of Appeals reviews district court's decision to certify a class for abuse of discretion, the legal conclusions that informed its decision de novo, and any findings of fact for clear error. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

2 **Federal Civil Procedure** Class Actions
Class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

1 Case that cites this headnote

3 **Federal Civil Procedure** Evidence; pleadings and supplementary material
Party seeking class certification must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, and that other requirements of rule governing class actions are met. Fed.Rules Civ.Proc.Rule 23 (a), 28 U.S.C.A.

1 Case that cites this headnote

4 **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues
Commonality requirement for class certification obligates plaintiff to demonstrate that the class members have suffered the same injury; this does not mean merely that they have all suffered a violation of the same provision of law. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

8 Cases that cite this headnote

5 **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues
To satisfy the predominance criterion for class certification, individual questions need not be absent; the predominance rule requires only that those questions not predominate over the common questions affecting the class as a whole. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

6 Cases that cite this headnote

6 **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues
Common issues may predominate, as required for class certification, when liability can be determined on a class-wide basis, even when there are some individualized damage issues. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

5 Cases that cite this headnote

7 **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues
Meeting the class action predominance requirement requires plaintiffs to show that they can prove, through common evidence, that all class members were injured by the alleged conspiracy; that is not to say the plaintiffs must be prepared at the certification stage to demonstrate through common evidence the precise amount of damages incurred by each class member, but court expects the common evidence to show all class members suffered some injury. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

8 Cases that cite this headnote

8 **Racketeer Influenced and Corrupt Organizations** Elements of violation in general
Racketeer Influenced and Corrupt Organizations Business, property, or proprietary injury; personal injuries
Racketeer Influenced and Corrupt Organizations Causal relationship; direct or indirect injury

To prevail on a civil Racketeer Influenced and Corrupt Organizations Act (RICO) claim, plaintiffs must show (1) a substantive RICO violation; (2) injury to the plaintiff's business or property, and (3) that such injury was by reason of the substantive RICO violation. 18 U.S.C.A. § 1962.

1 Case that cites this headnote

9 **Antitrust and Trade Regulation** Nature and Elements
Antitrust and Trade Regulation Public impact or interest; private or internal transactions
To maintain a cause of action for deceptive practices under New York law, a plaintiff must show: (1) defendant's conduct is consumer oriented, (2) defendants is engaged in a deceptive act or practice, and (3) plaintiff was injured by this practice; first element may be satisfied by showing that the conduct at issue potentially affects similarly situated consumers. N.Y.McKinney's General Business Law § 349.

10 **Federal Civil Procedure** Consumers, purchasers, borrowers, and debtors
District court did not abuse its discretion in determining that proposed class of debtors met commonality requirement for class certification in action against debt-buying company, law firm, and process server, based on defendants' alleged conduct of systematically filing false affidavits of merit and, in many instances, false affidavits of service, in order to fraudulently procure default judgments against the debtors in civil court. Fair Debt Collection Practices Act, § 802, 15 U.S.C.A. § 1692; 18 U.S.C.A. § 1961 et seq.; N.Y.McKinney's Judiciary Law § 487; Fed.Rules Civ.Proc.Rule 23(a)(2), 28 U.S.C.A.

11 **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues
Commonality prerequisite for class certification is satisfied if there is a common issue that drives the resolution of the litigation such that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

6 Cases that cite this headnote

12 **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues
Determination as to whether class may be certified, on theory that questions common to class members predominate, may require a court to consider how a trial on the merits would be conducted if a class were certified. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

3 Cases that cite this headnote

13 **Federal Civil Procedure** Consumers, purchasers, borrowers, and debtors
District court did not abuse its discretion in determining that common issues of law and fact predominated over any individual ones, as required for certification of debtors' putative class action against debt-buying company, law firm, and process server, since all claims were based on defendants' alleged uniform, widespread practice of filing automatically-generated, form affidavits of merit not based on personal knowledge and, in many instances false affidavits of service, to obtain default judgments against debtors in civil court. Fair Debt Collection Practices Act, § 802, 15 U.S.C.A. § 1692; 18 U.S.C.A. § 1961 et seq.; N.Y.McKinney's Judiciary Law § 487; Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

14 **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues
In determining whether class may be certified, fact that damages may have to be ascertained on an individual basis is a factor that the court must consider in

deciding whether issues susceptible to generalized proof outweigh individual issues. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

3 Cases that cite this headnote

15 **Federal Civil Procedure** Representation of class; typicality; standing in general
Class certification requirement that plaintiff be adequate representative of class is satisfied unless plaintiff's interests are antagonistic to the interest of other members of the class. Fed.Rules Civ.Proc.Rule 23(a)(4), 28 U.S.C.A.

10 Cases that cite this headnote

16 **Federal Civil Procedure** Consumers, purchasers, borrowers, and debtors
District court did not abuse its discretion in determining that class action was superior method for resolving debtors' claims against debt-buying company, law firm, and process server for violations of Racketeer Influenced and Corrupt Organizations Act (RICO), Fair Debt Collection Practices Act (FDCPA), and New York state law, even though defendants asserted that New York state court was superior forum; there was no basis to conclude that plaintiffs could proceed as a class in the state court, as that court had jurisdiction only over actions in which the value of the controversy was $25,000 or less, and New York law would provide plaintiffs no right of action, could not address the gravamen of the plaintiffs' allegations as it could only vacate the default judgments against them, and denied plaintiffs any control over the course of the litigation. Fair Debt Collection Practices Act, § 802, 15 U.S.C.A. § 1692; 18 U.S.C.A. § 1961 et seq.; N.Y.McKinney's Judiciary Law § 487; Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.; McKinney's N.Y.City Civ.Ct.Act § 202; N.Y.McKinney's CPLR Rule 5015.

17 **Courts** Federal-Court Review of State-Court Decisions; Rooker-Feldman Doctrine
Rooker-Feldman doctrine bars the federal courts from exercising jurisdiction over claims brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.

3 Cases that cite this headnote

18 **Courts** Debtor and creditor; bankruptcy; mortgages, liens, and security interests
Rooker-Feldman doctrine did not bar debtors' putative class action alleging debt-buying company, law firm, and process server engaged in fraudulent scheme to obtain default judgments against debtors in civil court, in violation of Fair Debt Collection Practices Act (FDCPA), Racketeer Influenced and Corrupt Organizations Act (RICO), and New York law, where consumers did not seek to overturn state court judgments, and claims sounding under FDCPA, RICO, and state law spoke not to the propriety of the state court judgments, but to the fraudulent course of conduct that defendants pursued in obtaining such judgments. Fair Debt Collection Practices Act, § 802, 15 U.S.C.A. § 1692; 18 U.S.C.A. § 1961 et seq.; N.Y.McKinney's Judiciary Law § 487.

5 Cases that cite this headnote

19 **Judgment** Full Faith and Credit
Full Faith and Credit Act did not bar debtors' putative class action alleging debt-buying company, law firm, and process server engaged in fraudulent scheme to obtain default judgments against debtors in city civil court, in violation of Fair Debt Collection Practices Act (FDCPA), Racketeer Influenced and Corrupt Organizations Act (RICO), and New York law, even though defendants asserted that the state courts treated judgments entitling them to recovery as valid; whatever was required in civil court would not decide the issue of liability for defendants, rather, the conduct of defendants, and the question of whether that conduct was ultimately fraudulent, would decide their liability. 28 U.S.C.A. § 1738;

Fair Debt Collection Practices Act, § 802, 15 U.S.C.A. § 1692; 18 U.S.C.A. § 1961 et seq.; N.Y.McKinney's Judiciary Law § 487.

1 Case that cites this headnote

20 **Federal Courts** Matters of Substance
Court of Appeals declined to decide, in the first instance, issue of whether Fair Debt Collection Practices Act (FDCPA) permitted plaintiff to assert claims for a false statement that was made to a party other than the debtor. Fair Debt Collection Practices Act, § 802 et seq., 15 U.S.C.A. § 1692 et seq.

3 Cases that cite this headnote

21 **Federal Civil Procedure** Consumers, purchasers, borrowers, and debtors
District court did not abuse its discretion in certifying debtors' claims alleging debt-buying company, law firm, and process server engaged in fraudulent scheme to obtain default judgments against debtors in civil court, in violation of Fair Debt Collection Practices Act (FDCPA), Racketeer Influenced and Corrupt Organizations Act (RICO), and New York law, under provision of federal class action rule providing for injunctive relief if defendant acted or refused to act on grounds that apply generally to the class; although defendants asserted that individualized issues of service differentiated class members from one another and named plaintiffs would not benefit because they already had their default judgments vacated, relief to each member of the class did not require that the relief to each member of the class be identical, only that it be beneficial, and named plaintiffs might each still be subject to a further action by defendants. Fair Debt Collection Practices Act, § 802, 15 U.S.C.A. § 1692; 18 U.S.C.A. § 1961 et seq.; N.Y.McKinney's Judiciary Law § 487; Fed.Rules Civ.Proc.Rule 23(b)(2), 28 U.S.C.A.

4 Cases that cite this headnote

22 **Federal Courts** Judgment and Relief
Court of Appeals declined to decide, in the first instance, issue whether Racketeer Influenced and Corrupt Organizations Act (RICO) permitted private injunctive relief. 18 U.S.C.A. § 1961 et seq.

Attorneys and Law Firms

*73 Paul D. Clement, Bancroft PLLC, Washington, DC (Candice Chiu, *74 Bancroft PLLC, Washington, DC; James R. Asperger and Maria Ginzburg, Quinn Emanuel Urquhart & Sullivan LLP, New York, NY; Marc A. Becker, London, UK; Brett A. Scher, Kaufman Dolowich & Voluck LLP, Woodbury, NY, on the brief), for Defendants–Appellants Mel S. Harris LLC, Mel S. Harris, Michael Young, David Waldman, Kerry Lutz, and Todd Fabacher.

Miguel A. Estrada, Gibson, Dunn & Crutcher LLP, Washington, DC (Scott P. Martin, Gibson, Dunn & Crutcher LLP, Washington, DC; Michael Zimmerman, Zimmerman Jones Booher LLC, Salt Lake City, UT; Lewis H. Goldfarb and Adam R. Schwartz, McElroy, Deutsch, Mulvaney & Carpenter LLP, Morristown, NJ; Mark D. Harris, Proskauer Rose LLP, New York, NY, on the brief), for Defendants–Appellants Leucadia National Corporation, L–Credit, LLC, LR Credit, LLC, LR Credit 10, LLC, LR Credit 14, LLC, LR Credit 18, LLC, LR Credit 21, LLC, Joseph A. Orlando, and Philip M. Cannella.

Jack Babchik, Babchik & Young LLP, White Plains, NY, for Defendants–Appellants Samserv, Inc., William Mlotok, Benjamin Lamb, Michael Mosquera, and John Andino.

Matthew D. Brinckerhoff, Emery Celli Brinckerhoff & Abady LLP, New York, N.Y. (Jonathan S. Abady, Debra L. Greenberger and Vasudha Talla, Emery Celli Brinckerhoff & Abady LLP, New York, NY; Josh Zinner, Susan Shin and Claudia Wilner, New Economy Project, New York, NY; Carolyn E. Coffey and Ariana Lindermayer, of counsel to Jeanette Zelhoff, MFY Legal Services, New York, NY; Charles J. Ogletree, Jr., Harvard Law School, Boston, MA, on the brief), for Plaintiffs–Appellees.

Jean Constantine–Davis, AARP Foundation Litigation, Washington, DC, on behalf of Amici Curiae AARP, National Association of Consumer Advocates, and National Consumer Law Center, in support of Plaintiffs–Appellees.

Danielle F. Tarantolo, New York Legal Assistance Group, New York, NY, on behalf of Amicus Curiae Consumer Advocates, in support of Plaintiffs–Appellees.

Sarang Vijay Damle, Senior Counsel, Consumer Financial Protection Bureau, Washington, DC (Meredith Fuchs, General Counsel, To–Quyen Truong, Deputy General Counsel, David M. Gossett, Assistant General Counsel, Jessica Rank Divine, Attorney, Consumer Financial Protection Bureau, Washington, DC; Jonathan E. Nuechterlein, General Counsel, John F. Daly, Deputy General Counsel for Litigation, Theodore (Jack) Metzler, Attorney, Federal Trade Commission, Washington, DC, on the brief), on behalf of Amici Curiae The Consumer Financial Protection Bureau and Federal Trade Commission, in support of Plaintiffs –Appellees.

Before: JACOBS, CALABRESI, and POOLER, Circuit Judges.

Opinion

Judge JACOBS dissents in a separate opinion.

POOLER, Circuit Judge:

These consolidated appeals are taken from the September 4, 2012 class certification opinion, *Sykes v. Mel Harris & Assocs., LLC,* 285 F.R.D. 279 (S.D.N.Y.2012) (*"Sykes II"*), and March 28, 2013 class certification order of the United States District Court for the Southern District of New York (Denny Chin, *Circuit Judge*). Defendants in this case comprise three entities: "(1) various subsidiaries of Leucadia National Corporation ("Leucadia") that purchase and collect consumer debt; (2) Mel S. Harris and Associates LLC ("Mel Harris"), a law firm specializing in debt collection litigation; [and] (3) Samserv, Inc. ("Samserv"), a process service company." *75 *Sykes II,* 285 F.R.D. at 283. Defendants also include "associates of each of the foregoing entities," *id.*, and we respectively refer to them as the Leucadia defendants, Mel Harris defendants, and Samserv defendants (as did the district court).

The district court's March 28, 2013 order certified two classes. The first class, certified pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, comprises "all persons who have been or will be sued by the Mel Harris defendants as counsel for the Leucadia defendants ... assert[ing] claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961; New York General Business Law (GBL) § 349; and New York Judiciary Law § 487." Special App'x at 46.

The second class, certified pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, comprised "all persons who have been sued by the Mel Harris defendants as counsel for the Leucadia defendants in ... New York City Civil Court and where a default judgment has been obtained. Plaintiffs in the Rule 23(b)(3) class assert claims under RICO; the Fair Debt Collection Practices Act [(FDCPA)], 15 U.S.C. § 1692; GBL § 349; and New York Judiciary Law § 487." Special App'x at 47.

We conclude that the district court did not abuse its discretion in certifying either class.

Affirmed.

BACKGROUND

We draw our facts from the district court's class certification opinion, which depended on "the depositions, declarations, and exhibits submitted ... in connection with" the motion for class certification. *Sykes II,* 285 F.R.D. at 283. The district court, as was proper, only resolved "factual disputes to the extent necessary to decide the class certification issue." *Id.* citing *In re Initial Public Offerings Sec. Litig.,* 471 F.3d 24, 27, 41–42 (2d Cir.2006). It did not resolve "factual assertions relate[d] to the merits ... but state[d] them as the parties' assertions," and we will follow that practice. *Id.* Where we are required to supplement the background as laid out by the district court by virtue of the arguments of the parties on appeal, we will also refer to the depositions, declarations, and exhibits which formed the record before the district court at class certification.

I. Plaintiffs

"**Monique Sykes**, Rea Veerabadren, Kelvin Perez, and Clifton Armoogam are New York City residents who were each sued by various defendants in debt collection actions commenced in New York City Civil Court between 2006 and 2010." *Sykes II,* 285 F.R.D. at 283. Each plaintiff "denies being served with a summons and complaint in their respective action.... Defendants, nevertheless, were able to obtain default judgments against them." *Id.*

II. Defendants' Alleged Default Judgment Scheme

A. Default Judgments

These default judgments, in the words of plaintiffs, are the result of defendants' construction of a "default judgment mill." The "mill" operates in this fashion: first, by obtaining charged-off consumer debt; second, by initiating a debt-collection action by serving a summons and complaint on the purported debtor; and third, by submitting fraudulent documents to the New York City Civil Court in order to obtain a default judgment.

At the first step, "[p]laintiffs allege that the Leucadia and Mel Harris defendants entered into joint ventures to purchase *76 debt portfolios, and then filed debt collection actions against the alleged debtors with the intent to collect millions of dollars through fraudulently-obtained default judgments." *Id.*

At the second step, Mel Harris would employ "a software program ... designed by [Mel Harris employee] Mr. [Todd] Fabacher." Appellees' App'x at 157. Fabacher is employed as a "director of information technology for Mel Harris." *Sykes II,* 285 F.R.D. at 284. His program "selects and organizes debts for the generation of a summons and complaint for each debt. These documents are signed by an attorney, and bundled together in batches of 50. Each batch is sent to a single process serving company." Appellees' App'x at 157. Further, the process serving company associated with each debt is saved by this computer program, so "the process serving company associated with any particular debt can be readily ascertained." Appellees' App'x at 157.

To effectuate this second step, Leucadia and Mel Harris defendants would hire a process server, often Samserv. *Sykes II,* 285 F.R.D. at 283. Plaintiffs allege that "Samserv routinely engaged in 'sewer service' whereby it would fail to serve the summons and complaint but still submit proof of service to the court." *Id.* This proof of service was first delivered to Mel Harris, which, "[a]fter process [wa]s allegedly served, ... receive[d] from the process serving company an electronic affidavit of service." Appellees' App'x at 157. After receiving this affidavit of service, the system designed by Fabacher "automatically organize[d] and print [ed] a motion for a default judgment [and] an affidavit of merit ... within approximately 35 days after the date of service of process." Appellees' App'x at 157–58.

Having generated these documents, at the third step, "[a]fter a debtor failed to appear in court for lack of notice of the action, the Leucadia and Mel Harris defendants would then apply for a default judgment by providing the court with ... an 'affidavit of merit' attesting to their *personal knowledge* regarding the defendant's debt and an affidavit of service as proof of service." *Sykes II,* 285 F.R.D. at 283 (emphasis added).

Before the district court at the class certification stage, there was substantial evidence of the scope and impacts of this alleged scheme. "Between 2006 and 2009, various Leucadia entities filed 124,838 cases," and Mel Harris represented Leucadia in 99.63 percent of those cases. *Id.* at 284. "The 'vast majority' of such cases were adjudicated without appearance by the defendant debtors, indicating the likelihood that a default judgment was entered." *Id.* Further, "[b]etween 2007 and 2010 various Leucadia entities obtained default judgments in 49,114 cases in New York City Civil Court." *Id.*

B. Affidavits of Service

The district court concluded that "[b]etween January 2007 and January 2011, Samserv defendants performed service of process in 94,123 cases filed by Mel Harris in New York City Civil Court, 59,959 of which were filed on behalf of Leucadia defendants." *Id.* In evaluating the evidence submitted by plaintiffs with respect to Samserv's practice of engaging in sewer service, the district court concluded that there was "substantial support for plaintiffs' assertion that defendants regularly engaged in sewer service." *Id.* This conclusion was based on the fact that "[r]ecords maintained by defendants reveal hundreds of instances of the same process server executing service at two or more locations at the same time," *id.,* as well as the fact that "[t]here were ... many other occasions where multiple services were *77 purportedly made so close in time that it would have been impossible for the process server to travel from one location to the other as claimed." *Id.*

Plaintiffs point out that the record before the district court also included a number of other irregularities. For example, "in 2,915 instances, a process server claimed to have attempted or completed service *before* the date that the service was assigned to that process server—[a] physical impossibility." Appellees' App'x at 163. Additionally, process servers often reported 60 service attempts in a single day, Appellees' App'x at 183, and the six particular process servers who accounted for a majority of service performed by Samserv for Mel Harris "reported high volumes of service, including hundreds of days on which they claimed to have made more than 40 visits in a single day," Appellees' App'x at 165. However, an experienced process server attested to the fact that "based on [his] experience, ... it is unlikely that a process server could regularly make more than 25 service attempts at personal residences in one day." Appellees' App'x at 153. Finally, "[t]he six process servers also reported widely divergent rates of personal, substitute, and nail and mail service." Appellees' App'x at 165. There was no evidence in the record at class certification that would explain the divergent rates for the means of service. Plaintiffs finally point out that, despite the district court's order that Samserv defendants produce logbooks recording their service attempts by October 6, 2009, which could ostensibly confirm service, none have been turned over.

C. Affidavits of Merit

The district court provided a complete overview of the process for generating affidavits of merit, the facts of which are not challenged on appeal. "The affidavits of merit submitted by the Mel Harris and Leucadia defendants ... follow a uniform format." *Sykes II*, 285 F.R.D. at 284. Fabacher "attests that he is 'an authorized and designated custodian of records' for" one of the Leucadia entities that owns the charged-off debt, in New York City Civil Court. *Id.* He affirms that because he " 'maintain[s] the ... records and accounts ... including records maintained by and obtained from [the collection entity's] assignor' ... he is 'thereby fully and personally familiar with, and [has] *personal knowledge* of, the facts and proceedings relating to the [debt collection action].' " *Id.* (first, second, fourth, and fifth alterations in original) (emphasis added).

The district court explained the crux of the issue as follows:

> Typically, Fabacher does not receive the original credit agreements between the account holders and the creditors. Instead, he receives a bill of sale for the portfolio of debts purchased that includes 'sample' credit agreements and 'warranties' made by the seller regarding the debts in the portfolio. In many instances, such agreements do not exist. If they do exist, Fabacher's 'standard practice' does not entail reviewing them before endorsing an affidavit of merit. He instead relies on the warranties made by the original creditor....
>
> Fabacher produces the affidavits of merit for signature in batches of up to 50 at a time. He 'quality check[s]' one affidavit in each batch and if it is accurate, he signs the remaining affidavits in the batch without reviewing them. The quality check consists of ensuring that information printed on the affidavit matches the information stored in the Debt Master database.

Id. at 285 (alteration in original). Reviewing these allegations at an earlier stage in the proceedings, the district court concluded **78* that "[a]ssuming 260 business days a year, Fabacher had to have personally (and purportedly knowledgeably) issued an average of twenty affidavits of merit per hour, i.e., one every three minutes, over a continuous eight-hour day." *Sykes v. Mel Harris & Assocs., LLC*, 757 F.Supp.2d 413, 420 (S.D.N.Y.2010) ("*Sykes I* ").

Plaintiffs point out that the practice of Leucadia defendants in purchasing these charged-off debts, which involves acquiring only limited information with respect to the character of this debt, is not uncommon in the secondary consumer debt market. Typical information transmitted in the purchase of a consumer debt will include the consumer's name, address, and the amount owed. *See* Federal Trade Commission, *The Structure and Practices of the Debt Buying Industry*, 34–35 (Jan.2013), *available at* http://www.ftc.gov/sites/default/files/documents/reports/structure-andpractices-debt-buying-industry/debtbuyingreport.pdf (last visited Feb. 6, 2015). It is extremely rare, however, that the purchaser of the debt will receive any underlying documentation on the debt. *Id.*

III. Proceedings Below

Monique Sykes commenced this action against "some of the Leucadia, Mel Harris, and Samserv defendants" on October 6, 2009, alleging FDCPA and GBL claims. *Sykes II*, 285 F.R.D. at 285. Rea Veerabadren joined the action on December 28, 2009, and "class allegations and RICO claims were added." *Id.* Kelvin Perez joined the suit on March 31, 2010, at the filing of a second amended complaint, which added the New York Judiciary Law claim against Mel Harris. *Id.*

Defendants moved to dismiss, and the district court denied the motion. In adjudicating the motion to dismiss, the district court reasoned, inter alia, that the FDCPA claims were not time-barred under the relevant one-year statute of limitations for Sykes and Perez on the grounds that those claims had been equitably tolled. *Sykes I,* 757 F.Supp.2d at 421–22. This was because, the district court found, "sewer service purposefully ensures that a party is never served, [therefore] it is plausible that defendants' acts were 'of such character as to conceal [themselves]' to warrant equitable tolling." *Id.* at 422 (second alteration in original) (quoting *Bailey v. Glover,* 88 U.S. (21 Wall.) 342, 349–50, 22 L.Ed. 636 (1874)).

For their part, Samserv defendants moved to dismiss the FDCPA claims on the grounds that they were not "debt collectors" for the purposes of the FDCPA. *Id.* at 423 (citing exemptions for process servers under 15 U.S.C. § 1692a(6)(D)). The district court disagreed, reasoning that the FDCPA "protects process servers only 'while' they serve process," and therefore "Samserv defendants' alleged failure to serve plaintiffs process and provision of perjured affidavits of service remove them from the exemption." *Id.*

Leucadia and Samserv defendants further argued that plaintiffs lacked standing to bring their claims under RICO. *Id.* at 427. This was because, according to defendants, plaintiffs could neither establish an injury to their property interest nor that "the RICO violations were [ ] the proximate cause of their injuries" *Id.* The district court disagreed, reasoning that "defendants' pursuit of default judgments and attempts to enforce them against plaintiffs proximately caused their injuries, *see Baisch v. Gallina,* 346 F.3d at 366, 373–74 (2d Cir.2003), which include the freezing of personal bank accounts and incurring of legal costs to challenge those default judgments." *Id.* at 427–28.

Finally, Leucadia and Mel Harris defendants challenged the district court's subject *79 matter jurisdiction under the *Rooker–Feldman* doctrine, "because plaintiffs are effectively appealing from a state-court judgment." *Id.* at 429. The district court rejected this argument as well. First, the district correctly noted that the doctrine would only apply if "a plaintiff invites a district court to review and reject an adverse state-court judgment." *Id.* (citing *Hoblock v. Albany Cnty. Bd. of Elections,* 422 F.3d 77, 85 (2d Cir.2005)). The district court then concluded that "plaintiffs assert claims independent of the state-court judgments and do not seek to overturn them." *Id.*

Following the district court's decision, plaintiffs moved for class certification, as well as for another opportunity to amend their complaint. *Sykes II,* 285 F.R.D. at 285. The third amended complaint (the operative complaint on appeal) added Clifton Armoogam as plaintiff and an additional Leucadia entity as defendant. *Id.* The district court granted the motion for class certification on September 4, 2012. *Id.* at 294. Leucadia and Mel Harris defendants obtained new counsel after this decision.

On March 28, 2013, the district court adopted plaintiffs' proposed class certification order. The two classes certified are as follows.

> Pursuant to Federal Rule of Civil Procedure 23(b)(2), a class is certified of all persons who have been or will be sued by the Mel Harris defendants as counsel for the Leucadia defendants in actions commenced in New York City Civil Court and where a default judgment has been or will be sought. Plaintiffs in the Rule 23(b)(2) class assert claims under [RICO], [GBL] § 349, and New York Judiciary Law § 487.
>
> Pursuant to Rule 23(b)(3), a class is certified of all persons who have been sued by the Mel Harris defendants as counsel for the Leucadia defendants in actions commenced in New York City Civil Court and where a default judgment has been obtained. Plaintiffs in the Rule 23(b)(3) class assert claims under RICO; the [FDCPA]; GBL § 349, and New York Judiciary Law § 487.

Special App'x at 46–47.

JURISDICTION

The district court exercised jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. § 1367, and 15 U.S.C. § 1692k(d). After certification, each defendant timely petitioned for leave to appeal the grant of certification pursuant to Rule 23(f) of the Federal Rules of Civil Procedure. Our court granted these petitions July 19, 2013. We have jurisdiction pursuant to 28 U.S.C. § 1292(e).

STANDARD OF REVIEW

1 "We review a district court's decision to certify a class under Rule 23 for abuse of discretion, the legal conclusions that informed its decision *de novo,* and any findings of fact for clear error." *In re U.S. Foodservice Inc. Pricing Litig.,* 729 F.3d 108, 116 (2d Cir.2013) ("*In re U.S. Foodservice* ").

DISCUSSION

I. Legal Standards

A. Class Certification

2 "The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.' " *Wal–Mart Stores, Inc. v. Dukes,* ––– U.S. ––––, 131 S.Ct. 2541, 2550, 180 L.Ed.2d 374 (2011) (quoting *Califano v. Yamasaki,* 442 U.S. 682, 700–701, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979)). Two classes of plaintiffs were certified in this case, under both Rule 23(b)(2) and **80* Rule 23(b)(3) of the Federal Rules of Civil Procedure. As such, plaintiffs must meet both the requirements for the particular relief, injunctive or monetary, sought under those two rules, as well as the threshold requirements for class certification under Rule 23(a).

1. Rule 23(a) Prerequisites

3 Rule 23(a) of the Federal Rules of Civil Procedure provides that a class may be certified only if four prerequisites have been met: numerosity, commonality, typicality, and adequacy of representation. *See Dukes,* 131 S.Ct. at 2550; *accord In re Nassau Cnty. Strip Search Cases,* 461 F.3d 219, 225 (2d Cir.2006). Specifically, the Rule provides as follows:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a). These remaining requirements "do[ ] not set forth a mere pleading standard. A party seeking class certification must ... be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Dukes,* 131 S.Ct. at 2551.

4 The Supreme Court has recently clarified the commonality requirement under Rule 23 (a). "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. This does not mean merely that they have all suffered a violation of the same provision of law." *Id.* (internal quotation marks and citation omitted). Interpreting this requirement in the context of sexual discrimination claims in violation of Title VII of the Civil Rights Act, the Court instructed that such claims "must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve *an issue* that is central to the validity of each one of the claims in one stroke." *Id.* at 2551 (emphasis added). Furthermore, the Court noted that in certain "context [s] ... '[t]he commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.' " *Id.* at 2551 n. 5 (alteration in original) (quoting *Gen. Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, 157–58, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)).

2. Rule 23(b)(2) Requirements for Injunctive Relief

Beyond these prerequisites, Rule 23(b) provides additional considerations for a district court to consider prior to the certification of a class. Under Rule 23(b)(2), a class action may only be maintained if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief ... is appropriate respecting the class as a whole." Fed.R.Civ.P. 23(b)(2). The Supreme Court has clarified that certification of a class for injunctive relief is only appropriate where "a single injunction ... would provide relief to each member of the class." *Dukes,* 131 S.Ct. at 2557.

***81 3. 23(b)(3) Requirements**

Rule 23(b)(3) imposes two additional burdens on plaintiffs attempting to proceed by class action, namely, predominance and superiority. Specifically, a class may be certified only if the district court determines as follows:

> [T]he questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed.R.Civ.P. 23(b)(3).

In assessing the justifications for the creation of Rule 23(b)(3) classes the Supreme Court has observed as follows:

> While the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high, the Advisory Committee had dominantly in mind vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.... "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir.1997).

Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (some internal quotation marks and citations omitted).

5 With respect to common issues, Rule 23(b)(3), by its plain terms, imposes a "far more demanding" inquiry into the common issues which serve as the basis for class certification. *Id.* at 623–24, 117 S.Ct. 2231. While the inquiry may be more demanding, the Supreme Court has also instructed that Rule 23(b)(3) "does *not* require a plaintiff seeking class certification to prove that each elemen[t] of [her] claim [is] susceptible to classwide proof." *Amgen Inc. v. Conn. Ret. Plans and Trust Funds*, — U.S. ——, 133 S.Ct. 1184, 1196, 185 L.Ed.2d 308 (2013) (internal quotation marks omitted) (alterations in original). Rather, all that is required is that a class plaintiff show that "common questions 'predominate.' " *Id.* (quoting Fed.R.Civ.P. 23(b)(3)). That is, "[i]ndividual questions need not be absent. The text of Rule 23(b)(3) itself contemplates that such individual questions will be present. The rule requires only that those questions not predominate over the common questions affecting the class as a whole." *Messner v. Northshore Uni. HealthSystem*, 669 F.3d 802, 815 (7th Cir.2012).

6 7 Furthermore, "[c]ommon issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damage issues." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 139 (2d Cir.2001); *see also Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir.2013) ("[T]he presence of individualized damages cannot, by itself, defeat class certification **82* under Rule 23(b)(3)."). The Supreme Court has explicitly determined that it is "clear that individualized monetary claims belong in Rule 23(b)(3)." *Dukes*, 131 S.Ct. at 2558. For the purposes of class certification, however, plaintiffs cannot "identif[y] damages that are not the result of the wrong." *Comcast Corp. v. Behrend*, — U.S. ——, 133 S.Ct. 1426, 1434, 185 L.Ed.2d 515 (2013). That is, "the plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability." *Leyva*, 716 F.3d at 514. Put another way,

> [t]he plaintiffs must ... show that they can prove, through common evidence, that all class members were ... injured by the alleged conspiracy.... That is not to say the plaintiffs must be prepared at the certification stage to demonstrate through common evidence the precise amount of damages

> incurred by each class member. But we do expect the common evidence to show all class members suffered *some* injury.

In re Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 252 (D.C.Cir.2013) (internal citations omitted).

Finally, the disjunctive inquiry that district courts must engage in prior to class certification requires analysis of the predominance of common issues, as well as a determination that class certification is the superior method for adjudicating these claims. Fed.R.Civ.P. 23(b)(3). Rule 23(b)(3) also lists four factors—individual control of litigation, prior actions involving the parties, the desirability of the forum, and manageability—which courts should consider in making these determinations. Fed.R.Civ.P. 23(b)(3)(A)-(D). By the structure of the rule, these factors seem to apply both to the predominance and superiority inquiry. However, while these factors, structurally, apply to both predominance and superiority, they more clearly implicate the superiority inquiry. *See, e.g., Vega v. T-Mobile USA Inc.*, 564 F.3d 1256, 1278 (11th Cir.2009) ("In determining superiority, courts must consider the four factors of Rule 23(b)(3).").

While Rule 23(b)(3) sets out four individual factors for courts to consider, manageability "is, by the far, the most critical concern in determining whether a class action is a superior means of adjudication." 2 William B. Rubenstein, Newberg on Class Actions § 4.72 (5th ed. West 2014). As a component of manageability, in determining whether a class action in a particular forum is a superior method of adjudication, courts have considered "when a particular forum is more geographically convenient for the parties ... or, for example, when the defendant is located in the forum state." *Id.* § 4.71.

B. Claims for Relief

1. FDCPA

Plaintiffs allege that Leucadia, Mel Harris, and Samserv defendants acted in violation of various provisions of the FDCPA. The FDCPA was enacted "to eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e). The statute provides for civil liability for a wide range of abusive actions, and plaintiffs focus their claims on violations of Section 1692e and Section 1692f of the statute.

Section 1692e prohibits "false or misleading representations," and provides as follows:

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section: ... (2) The false representation of—(A) the character, amount, or legal status of any debt ... (8) Communicating or threatening to communicate to **83* any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.... (10) The use of any false representation or deceptive means to collect or attempt to collect any debt....

15 U.S.C. § 1692e(2), (8), (10). Section 1692f, for its part, prohibits a debt collector from "us[ing] unfair or unconscionable means to collect or attempt to collect any debt." *Id.* § 1692f. The FDCPA limits actions to those brought "within one year from the date on which the violation occurs." *Id.* § 1692k(d).

Violations of these provisions expose a debt collector to civil liability. 15 U.S.C. § 1692k. The district court concluded, and defendants do not meaningfully challenge, that "[l]iability under the FDCPA can be established irrespective of whether the presumed debtor owes the debt in question." *Sykes II*, 285 F.R.D. at 292; *see also Baker v. G.C. Svcs. Corp.*, 677 F.2d 775, 777 (9th Cir.1982) ("The Act is designed to protect consumers who have been victimized by unscrupulous debt collectors, regardless of whether a valid debt actually exists."). In the case of a class action, named plaintiffs' damages are capped at $1,000. 15 U.S.C. § 1692k(a)(2)(A)-(B). Class damages are capped at $500,000 or 1 per centum of the net worth of the debt collector. *Id.* § 1692k(a)(2)(B). Prevailing plaintiffs are also entitled to costs and attorney's fees. *Id.* § 1692k(a)(3). The FDCPA instructs that, in the case of a class action, that damages should be assessed, inter alia, on the basis of "the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional." *Id.* § 1692k(b)(2).

2. RICO

8 To prevail on their civil RICO claims in this case, "plaintiffs must show (1) a substantive RICO violation under [18 U.S.C.] § 1962, (2) injury to the plaintiff's business or property, and (3) that such injury was by reason of the substantive RICO violation." *In re U.S. Foodservice*, 729 F.3d at 117. Plaintiffs allege Leucadia, Mel Harris, and Samserv defendants together formed a RICO enterprise for the purposes of 18 U.S.C. § 1961(4), which the district court found plausible at the motion to dismiss stage. *Sykes I*, 757 F.Supp.2d at 426. Plaintiffs further allege here that defendants, as part of this enterprise, engaged in acts of wire and mail fraud in violation of 18 U.S.C. §§ 1341, 1344, which can serve as predicate acts for a violation of 18 U.S.C. § 1962(c). The district court concluded that plaintiffs had plausibly alleged that "defendants' pursuit of default judgments and attempts to enforce them against plaintiffs proximately caused their injuries, which include the freezing of personal bank accounts and incurring of legal costs to challenge those default judgments." *Sykes I*, 757 F.Supp.2d at 427–28.

3. State Law Claims

9 Plaintiffs finally bring two claims under state law. First, plaintiffs bring claims pursuant to New York's General Business Law, which prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." N.Y. Gen. Bus. L. § 349(a). "To maintain a cause of action under § 349, a plaintiff must show: (1) that the defendant's conduct is 'consumer oriented'; (2) that the defendants is engaged in a 'deceptive act or practice'; and (3) that the plaintiff was injured by this practice." *Wilson v. Nw. Mut. Ins. Co.*, 625 F.3d 54, 64 (2d Cir.2010) ***84** (citing *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 623 N.Y.S.2d 529, 532–33, 647 N.E.2d 741 (1995)). With respect to the first element, it "may be satisfied by showing that the conduct at issue 'potentially affect[s] similarly situated consumers.' " *Id.* (alteration in original) (quoting *Oswego Laborers' Local 214 Pension Fund*, 623 N.Y.S.2d at 533, 647 N.E.2d 741). The statute provides that an individual "may bring an action ... to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions." N.Y. Gen. Bus. L. § 349(h). The law also provides that a court may award attorney's fees and also treble damages "up to one thousand dollars, if the court finds the defendant wilfully or knowingly violated this section." *Id.*

Second, plaintiffs bring a claim pursuant to the New York Judiciary Law against the Mel Harris defendants. New York law provides that "[a]n attorney ... who ... [i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with the intent to deceive the court or any party ... [i]s guilty of a misdemeanor, and ... he forfeits to the party injured treble damages, to be recovered in a civil action." N.Y. Jud. L. § 487.

II. Application

A. The Proposed Classes Satisfy the Requirements of Commonality & Typicality Under 23(a)[2]

10 11 Rule 23(a)'s commonality prerequisite is satisfied if there is a common issue that "drive[s] the resolution of the litigation" such that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 131 S.Ct. at 2551. Consideration of this requirement obligates a district court to determine whether plaintiffs have "suffered the same injury." *Id.* (internal quotation marks omitted). The district court concluded that plaintiffs had satisfied the commonality requirement of Rule 23(a). Specifically, the district court reasoned as follows:

> [Plaintiffs'] overarching claim is that defendants systematically filed false affidavits of merit and, in many instances, false affidavits of service to fraudulently procure default judgments in New York City Civil Court. Whether a false affidavit of merit or a false affidavit of service or both were employed in a particular instance, the fact remains that plaintiffs' injuries derive from defendants' alleged unitary course of conduct, that is, fraudulently procuring default judgments.

Sykes II, 285 F.R.D. at 290 (internal quotation marks and citation omitted). The district court thus determined that the common injury in this case, which was the same for all plaintiffs, is a fraudulently procured default judgment. We conclude that this commonality determination was not an abuse of discretion.

1. Affidavits of Merit

At the outset, Leucadia and Mel Harris defendants principally argue that, by characterizing ***85** the common issue in this litigation as one involving the false and fraudulent affidavits of merit, the district court impermissibly discounted the importance of the affidavits of service. Thus, Leucadia defendants suggest that "the district court, by elevating the importance of the affidavits of merit and minimizing the importance of the affidavits of service, impermissibly rewrote Plaintiffs' substantive claims." Mel Harris, likewise, suggest that "the District Court elevated the importance of the affidavits of merit only by impermissibly rewriting plaintiffs' substantive claims to fit the class-action procedure." We disagree. The operative complaint in this case makes clear that both sewer service and false affidavits of merit are necessary to effectuating defendants' alleged scheme. Thus, while the operative complaint alleges that sewer service is "the primary reason" few defendants appear in New York City Civil Court to defend against debt collection actions, plaintiffs have made clear that this is but one component of the overarching debt collection plan effectuated by defendants. Thus, plaintiffs allege that "in order to secure an otherwise legally unobtainable judgment on default, Defendants fraudulently swear to the courts that they have actually served their victims, when they have not, and that they have admissible proof that a debt is owed, when they do not." Joint App'x at 54. We see nothing impermissible in the district court determining that defendants' scheme, which had multiple components, was a "unitary course of conduct" that depended on false affidavits of merit for its success. *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir.1997).

Second, such a framework makes sense, as it is not disputed that these false affidavits of merit are necessary to the scheme to procure fraudulently obtained default judgments based on what is required in state court. The New York City Civil Court has jurisdiction over debt collection actions that seek to recover damages of $25,000 or less. N.Y.C. Civ.Ct. Act § 202. Section 3215 of the New York Civil Practice Law and Rules governs the procedures for obtaining a default judgment in these courts. Section 3215(a) permits plaintiffs seeking "a sum certain" to make an application "to the clerk within one year after the default. The clerk, upon submission of the requisite proof, shall enter judgment for the amount demanded in the complaint...." N.Y. C.P.L.R. § 3215(a). Requisite proof, in turn, is defined in Section 3215(f) as "proof of service of the summons and the complaint ... and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party." *Id.* § 3215(f). Thus, both affidavits of service, as well as affidavits of merit, are necessary to obtain default judgments, though neither, independently, is sufficient.

Plaintiffs' contention is that Fabacher's statement in each one of the affidavits of merit, that he is "personally familiar with, and [has] personal knowledge of, the facts and proceedings relating to" the default judgment action, *see, e.g.,* Appellees' App'x at 10, is false. The reason such statements are false is that Fabacher has not reviewed, nor do defendants actually possess, documents relevant to the underlying debt.

Resolving the question of whether this contention is false "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes,* 131 S.Ct. at 2551. With respect to the FDCPA, determining whether Fabacher's statement is indeed false resolves the central basis for FDCPA liability in this case, namely, the prohibition on making "any false, deceptive, or misleading representation ... in connection with the collection of any debt." 15 U.S.C. § 1692e. Similarly, ***86** the prohibition on "deceptive acts or practices," N.Y. Gen. Bus. L. § 349(a), and the prohibition on attorney's engaging in "deceit," N.Y. Jud. L. § 487, can fairly be said to turn on the falsity of Fabacher's representation of personal knowledge. Both wire and mail fraud, the predicate acts underlying plaintiffs' theory of RICO liability, may be established "by means of false or fraudulent ... representations." 18 U.S.C. § 1341 (mail fraud); *id.* § 1343 (wire fraud). False affidavits of merit thus provide independent bases for liability for each of the claims advanced by plaintiffs. While the resolution of this question will not address each element of each of these claims, that is not required for there to be a common question under Rule 23. *See Amgen,* 133 S.Ct. at 1196. The district court did not abuse its discretion by finding that a fraudulently obtained state court judgment that depended on the filing of a false affidavit of merit could serve as a common issue satisfying Rule 23(a).

2. Affidavits of Service

12 Moreover, even assuming that the district court was required to determine that the false affidavits of service were susceptible to class-wide proof, we would still conclude that the district court did not abuse its discretion in finding that the requirements of Rule 23(a) were satisfied. The district court found, on the basis of the evidence before it, that there was "substantial support for plaintiffs' assertion that defendants regularly engaged in sewer service." *Sykes II,* 285 F.R.D. at 284. Further, determining whether to certify a class may require a court "to consider how a trial on the merits would be conducted if a class were

certified." *Bell Atl. Corp. v. AT & T Corp.*, 339 F.3d 294, 302 (5th Cir.2003) (internal quotation marks omitted) (discussing predominance requirement under Rule 23(b)(3)).

Plaintiffs articulate two distinct reasons why they will be able to bring forward at trial competent evidence which will prove the fraudulent nature of the affidavits of service. First, they suggest that the affidavits of service will not be entitled to credibility, given the district court's finding that "defendants regularly engaged in sewer service." *Sykes II*, 285 F.R.D. at 284. Absent the affidavits of service, the only other means that Samserv defendants would have at their disposal to prove service would be contemporaneous logbooks, which process servers are required to keep by law. N.Y. Gen. Bus. L. § 89cc. Absent these logbooks, the testimony of process servers cannot be credited. *First Commercial Bank of Memphis v. Ndiaye*, 189 Misc.2d 523, 733 N.Y.S.2d 562, 565 (N.Y.Sup.Ct.2001) ("Testimony of a process server who fails to keep records in accordance with statutory requirements cannot be credited.").

Second, plaintiffs aver that, because Samserv defendants have been ordered to turn over their logbooks to plaintiffs, but have not, they will be able to prove fraud by spoliation. Rule 37(b)(2)(A) of the Federal Rules of Civil Procedure permits, in the case of a failure to comply with a discovery order, the district court to, inter alia, "direct[ ] that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims." Fed.R.Civ.P. 37(b)(2)(A)(i). Proof of fraudulent service might thus be achieved on a class-wide level. Defendants misread the requirements of Rule 23(a) when they suggest that these theories of class-wide proof fail to "affirmatively demonstrate [plaintiffs'] compliance with" Rule 23(a). *Dukes*, 131 S.Ct. at 2551. All that must be proven, at this stage, is that "there are *in fact* sufficiently ... common questions of law or fact." *Id.* Anticipating proof of failures of service in the manner suggested ***87** by plaintiffs is in keeping with demonstrating a common question of fact based on the district court's obligation to anticipate "how a trial on the merits would be conducted if a class were certified." *Bell Atl. Corp.*, 339 F.3d at 302 (internal quotation marks omitted).

In sum, the district court did not abuse its discretion in determining that plaintiffs had demonstrated sufficiently common questions of law or fact to satisfy the prerequisites of Rule 23(a).

B. The District Court did Not Abuse its Discretion in Certifying the 23(b)(3) Class

13 While Rule 23(b)(3) also speaks in terms of commonality, it imposes a "far more demanding" inquiry. *Amchem*, 521 U.S. at 623–24, 117 S.Ct. 2231. By its terms, it anticipates the existence of individual issues: the class may only be certified if "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed.R.Civ.P. 23(b)(3). The mere existence of individual issues will not be sufficient to defeat certification. Rather, the balance must tip such that these individual issues predominate. But the district court must establish that a class action is superior to "other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(3). We conclude that the district court did not abuse its discretion in finding these requirements met, and thus certifying this class under Rule 23(b)(3).

1. Common Questions of Law and Fact Predominate

Defendants submit that individual issues will predominate over common issues in this case because the district court will be forced to confront individual issues with respect to damages, timeliness, and service. We conclude that the district court did not abuse its discretion in finding that these issues, even if they are individualized in certain respects, do not predominate over class issues.

a. Damages

In making its decision on the propriety of class certification, the district court reasoned as follows:

> Every potential class member's claim arises out of defendants' uniform, widespread practice of filing automatically-generated, form affidavits of merit based on 'personal knowledge' and, in many instances, affidavits of service, to obtain default judgments against debtors in state court. Whether this practice violates the FDCPA, New York GBL § 349, New York Judiciary Law § 487, and/or constitutes a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c) and (d) does not depend on individualized considerations.... The Court recognizes that should defendants be found liable on some or all of these claims, individual issues may exist as to causation and damages as well as to whether a class member's claim accrued within the applicable

> statute of limitations. This, however, does not preclude a finding of predominance under Rule 23(b)(3).

Sykes II, 285 F.R.D. at 293.

Plaintiffs' operative complaint seeks three kinds of damages: statutory damages; "actual and/or compensatory damages ... in an amount to be proven at trial"; and what plaintiffs refer to as "incidental damages." Joint App'x at 219–20. It is not disputed that statutory damages under GBL § 349 can be assessed on the basis of common proof, as they are capped at $50. N.Y. Gen. Bus. L. § 349(h). Furthermore, Congress has devised a generally applicable formula for class action damages **88* under the FDCPA, one which caps damages at $500,000 and provides that district courts consider, among other factors, the scope of the violations of the FDCPA as well as the number of individuals implicated by fraudulent debt collection practices. 15 U.S.C. § 1692k(b)(2).

The only individualized damages inquiries that "may exist," *Sykes II*, 285 F.R.D. at 293, are those that turn, in plaintiffs' words, on "the return of the money extracted from them as a result of ... fraudulent judgments," as well as incidental damages. We conclude that inquiries into these damages are not sufficient grounds on which to conclude that the district court's determination that individualized damages issues will not predominate in this case was an abuse of discretion. In the first place, plaintiffs point out that the amount of any money extracted from plaintiffs is stored by defendants themselves. Because the evidence necessary to make out such damages claims, while individual, is easily accessible, such individual damage considerations do not threaten to overwhelm the litigation. *See Leyva*, 716 F.3d at 514.

Second, defendants misstate the central holding of *Comcast* in an attempt to advance the argument that individual damages issues predominate in this case. It is true that the Court, in *Comcast*, reversed a grant of class certification on the grounds that individual damages issues precluded certification. But these damages claims were individual because, based on undisputed evidence, the plaintiffs' "model f[e]ll[ ] ... short of establishing that damages [were] capable of measurement on a classwide basis." 133 S.Ct. at 1433. This was only so, however, because the sole theory of liability that the district court determined was common in that antitrust action, overbuilder competition, was a theory of liability that the plaintiffs' model indisputably "failed to measure" when determining the damages for that injury. *Id.* This is not the case here. The common theory of liability that plaintiffs advance is dependent on a fraudulent course of conduct that was allegedly engaged in by defendants, in violation of multiple federal and state statutes. That liability model is uniquely tied to the damages, which plaintiffs claim they are entitled to with respect to each claim that they advance, whether under the FDCPA, RICO, or state statutes. *Comcast* did not rewrite the standards governing individualized damage considerations: it is still "clear that individualized monetary claims belong in Rule 23(b)(3)." *Dukes*, 131 S.Ct. at 2558. All that is required at class certification is that "the plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability." *Leyva*, 716 F.3d at 514. Plaintiffs in *Comcast*, admittedly, could not do so. Plaintiffs here have satisfied that standard.

14 Third, defendants suggest that the district court did not engage in the "rigorous analysis" required at the class certification stage. In doing so, they emphasize that the district court's statement that individualized questions "do[ ] not preclude a finding of predominance under Rule 23(b)(3)" was not sufficient to make out the opposite conclusion, namely, that common questions did predominate. *Sykes II*, 285 F.R.D. at 293. Defendants' quest for magic words overlooks the vast number of common issues that the district court identified as necessary to resolve this litigation. It is true that the law of this Circuit is that the fact that "damages may have to be ascertained on an individual basis ... is ... a factor that we must consider in deciding whether issues susceptible to generalized proof 'outweigh' individual issues." *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir.2008), *abrogated on other *89 grounds by Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639, 128 S.Ct. 2131, 170 L.Ed.2d 1012 (2008), *as recognized by In re U.S. Foodservice*, 729 F.3d at 119. However, from the above it is clear that individual damages did factor into the district court's analysis. The district court simply found that these individual considerations did not outweigh other issues which were common, such as the following:

> (1) whether defendants' practice of filing affidavits of merit and/or affidavits of service with respect to the plaintiff class members violates the FDCPA; (2) whether defendants collectively constitute a RICO enterprise within the meaning of 18 U.S.C. § 1961(4); (3) whether defendants have engaged in a pattern of racketeering activity in connection with the collection of debt in

violation of 18 U.S.C. § 1962(c) and (d); (4) whether defendants have used deceptive acts and practices in the conduct of their businesses in violation of New York GBL § 349; and (5) whether the Mel Harris defendants have engaged in deceit and collusion with intent to deceive the courts and any party therein in violation of New York Judiciary Law § 487.

Sykes II, 285 F.R.D. at 293. Defendants concede that each of these questions is one that is common to the members of the class certified under Rule 23(b)(3). They merely quibble with the district court's assessment that, on balance, these ultimate issues of liability outweigh the individualized concerns that they raise. On reviewing the district court's certification order, this is not a sufficient contention on which we may rely to conclude that the district court abused its discretion in certifying this class.

b. Timeliness

The district court acknowledged, as well, that individualized issues of timeliness may inhere in the class "should defendants be found liable on some or all of these claims." *Id.* at 293. Defendants argue, again, that the district court was wrong to find that the presence of such individual issues did not indicate that individual issues would predominate. Plaintiffs respond that they do not invoke equitable tolling. Plaintiffs are correct: in support of their motion for class certification before the district court, plaintiffs averred that they "do not seek to include as class members persons whose claims accrued outside the statute of limitations for each substantive claim.... Indeed, only individuals whose claims accrued within one year prior to the filing of the Complaint will seek relief on the FDCPA claim." *Sykes v. Mel Harris & Assocs.*, No. 09–cv–8486 (DC), ECF No. 99, at 27.

Defendants point out that the district court had earlier relied on equitable tolling in order to determine that the claims of Sykes and Perez were timely under the FDCPA. They do not claim that plaintiffs are estopped from arguing that equitable tolling does not apply based on the district court's determination that Sykes and Perez could bring actions under the FDCPA on the basis of equitable tolling. *Sykes I*, 757 F.Supp.2d at 413. Rather, the only argument with any impact advanced by any of the defendants with respect to this matter is one made by Mel Harris defendants, who argue that disclaiming equitable tolling "simply trades (without eliminating) a serious Rule 23(b)(3) predominance problem for a Rule 23(a) adequacy problem: Class counsel's decision to abandon equitable tolling may render the remaining claims a marginally better 'fit' for class treatment. But that comes at the expense of class members they represent who have claims that are timely only because of equitable tolling...."

15 *90 We see no merit in this contention. Under Rule 23(a)(4) of the Federal Rules of Civil Procedure, adequacy is satisfied unless "plaintiff's interests are antagonistic to the interest of other members of the class." *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir.2000). The fact that some class members may advance RICO, GBL, and Judiciary Law claims on the basis of the date that the complaint was filed (as they have longer statutes of limitations, *see Gaidon v. Guardian Life Ins. Co. of America*, 96 N.Y.2d 201, 727 N.Y.S.2d 30, 34, 750 N.E.2d 1078 (2001) (three years for GBL claims), *Lefkowitz v. Appelbaum*, 258 A.D.2d 563, 685 N.Y.S.2d 460, 461 (2d Dep't 1999) (three years for New York Judiciary Law); *Agency Holding Corp. v. Malley–Duff & Assocs.*, 483 U.S. 143, 156, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987) (four years for RICO)) does not mean the interests of these class members are antagonistic to those other members of the class that also advance FDCPA claims.

While it may be true that disclaiming equitable tolling for Sykes and Perez may necessitate the district court to limit the sorts of claims that these named plaintiffs may bring, that is a determination for the district court to make in the first instance. It is certainly not a justification for reversing the district court's grant of class certification: at the most, if Sykes's and Perez's FDCPA claims are time-barred, this only means that they cannot assert claims under the FDCPA. The practical import of such a rule is that Sykes and Perez may be members of a subclass, advancing only a portion of the claims certified under Rule 23(b)(3). Such subclasses are contemplated by the Federal Rules, *see* Fed.R.Civ.P. 23(c)(5), and may be certified after the original certification order is upheld. *See Marisol*, 126 F.3d at 378 (holding that the district court did not abuse its discretion in certifying the class but suggesting that prior to trial the district court "ensure that appropriate subclasses are identified").

It is within plaintiffs' prerogative to disclaim equitable tolling, and they may do so without sacrificing the adequacy of representation, especially as defendants make no actual attempt to show why such a disclaimer may be antagonistic. It is for the district court to determine the impact of this disclaimer on the specific claims particular plaintiffs may bring, but it may do that at a future date, without our disturbing the class certification order.[3]

c. Causation

The district court also determined that individual causation issues may exist in this case, *Sykes II*, 285 F.R.D. at 293, but nevertheless found that such causation issues would not predominate. We agree.

Individual issues related to causation in this case are formulated by defendants on appeal as individual issues related to service. Thus, for example, Mel Harris advance the argument that "a class member who was properly served and paid debts that he actually owed has sustained a radically ***91** different 'injury' from an unserved member subject to a default judgment for a debt he did not owe." Likewise, Leucadia defendants submit that "where the entry of judgment resulted from a debtor's failure to appear despite adequate notice, the debtor must articulate a different theory of injury." None of these contentions are availing.

First, with respect to the FDCPA claims, the district court concluded that the existence of an underlying debt was unnecessary in order to establish liability under that statute. *Sykes II*, 285 F.R.D. at 292. Affidavits of merit, submitted to the Civil Court, were allegedly fraudulent in attesting to "personal knowledge" of the existence of such underlying debt, and were also necessary to obtaining the default judgments that plaintiffs allege were fraudulently obtained. We fail to recognize any individualized causation issues with respect to plaintiffs' claims under the FDCPA. *See Baker*, 677 F.2d at 777 (actual debt is not necessary to bring claims under the FDCPA).

Second, where causation does seem most relevant to us, and where we presume the district court recognized such individualized causation issues, was with respect to plaintiffs' claims under RICO. This is because RICO requires that the alleged injury to plaintiffs' "business or property ... was by reason of the substantive RICO violation." *In re U.S. Foodservice*, 729 F.3d at 117. This causation analysis will require the district court to identify (1) the property interest that is protected by RICO, as alleged by plaintiffs, and (2) whether the injury to that interest was caused by the RICO violation. The district court at least found that the injuries to plaintiffs included "freezing of personal bank accounts and incurring of legal costs to challenge those default judgments." *See Sykes I*, 757 F.Supp.2d at 427–28. Defendants do not challenge that this is a sufficient property interest on appeal. Nor do they bring forward any evidence that the damage to these property interests was not the result of default judgments. What they do argue, however, is that if a debt was actually owed, and a default judgment was achieved by means of proper service, a plaintiff cannot actually be an injured party under RICO to the extent that defendants extracted money based on a default judgment. The argument has force. But it remains a single arguably individual issue among the myriad common issues that we have already noted. We will not upset the district court's determination that plaintiffs have carried their burden to show that common issues predominate on the basis of defendants' construction of this hypothetical class plaintiff alleging one particular claim.

Third, none of the potential causation issues related to service suggest that Samserv is not a proper class defendant in this case. It is true that Samserv was kept in this litigation with respect to the FDCPA claims on the basis that it could not claim the benefits of the FDCPA's exemption for process servers on the grounds that the district court concluded, at the motion to dismiss stage, that plaintiffs adequately alleged that Samserv engaged in sewer service. *Sykes I*, 757 F.Supp.2d at 423. This does nothing to absolve Samserv of claims under RICO, however, which premises Samserv's liability on its participation in a RICO conspiracy. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495–97, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985). Nor, based on our conclusions regarding the amenability of class claims regarding common proof of the falsity of Samserv's affidavits of service, *supra* at pp. 86–87, does it mean that Samserv is not a proper defendant with respect to plaintiffs' FDCPA claims.

***92** In short, the district court properly considered the evidence before it. It concluded that, while individual issues existed in this case, they did not predominate over common issues. Defendants wish the district court had performed this balancing equation differently. But that is not sufficient for us to find that the district court abused its discretion in certifying this class under Rule 23(b)(3).

2. Proceeding by Class is a Superior Method of Adjudication

a. Defendants' Theory of Superiority is Unpersuasive

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Mel Harris defendants raise, for the first time on appeal, the novel theory that the district court's superiority analysis was incorrect because it undervalued the obligation to consider the "desirability ... of concentrating the litigation of the claims in the particular forum." Fed.R.Civ.P. 23(b)(3)(C). In particular, Mel Harris suggest that "[i]f the gravamen of this case ... really were the adequacy of the affidavits of merits filed with the New York City Civil Court, surely *that* court is the superior forum to hear the complaint and devise any remedies." [4]

This is a fine rhetorical point that depends for its strength on a complete misreading of (1) the jurisdiction of the New York City Civil Court, (2) the requirements of Rule 23(b)(3), and (3) the gravamen of plaintiffs' complaint.

In the first place, there is no basis to assert that plaintiffs' claims even could be heard as a class in the New York City Civil Court. These courts have jurisdiction only over those actions in which the value of the controversy is $25,000 or less. N.Y.C. Civ.Ct. Act § 202. While individual plaintiffs might seek to bring their actions in such a court based on this amount-in-controversy limitation, there is no basis to conclude that plaintiffs could proceed as a class there. The argument amounts to little more than Mel Harris's expression of a preference that their alleged widespread fraudulent behavior be dealt with in a piecemeal fashion. That is not how plaintiffs have chosen to proceed. The fact that Mel Harris would have preferred plaintiffs to have advanced their claims differently cannot make it a requirement under Rule 23(b)(3).

Second, the forum analysis of Rule 23(b)(3) is not grounded in a consideration of the comparative value of pursuing a claim in federal or state court. Defendants' authorities on this issue, which are apparently the only authorities that have ever conducted a superiority analysis by reference to the availability of relief in a federal or state forum, have not considered claims analogous to those brought by *93 plaintiffs here. *Kamm v. Cal. City Dev. Corp.*, 509 F.2d 205 (9th Cir.1975) dealt with a case in which putative class plaintiffs had already been represented by the State Attorney General in a prior action with putative class defendants. *Id.* at 207–08. The same was true of two other cases defendants rely on for the proposition that analysis of state court action is required to determine whether a federal forum is superior. *Cartwright v. Viking Indus., Inc.*, 2009 WL 2982887, at *14 (E.D.Cal. Sept. 14, 2009) (referencing ongoing state litigation); *Plant v. Merrifield Town Ctr., Ltd. P'ship*, 2008 WL 4951352, at *3 (E.D.Va. Nov. 12, 2008) (same). While there has been state court litigation in this case, it is not state court litigation which advances the claims that plaintiffs advance now. Further, we will not credit the statement of the United States District Court of the Eastern District of Louisiana, that "strains on the state judicial system after Hurricane Katrina" supported a federal forum for particular plaintiffs' claims, as support for Mel Harris's contention that analysis of the superiority requires a consideration of the comparative merits of a state or federal court. *Turner v. Murphy Oil USA, Inc.*, 234 F.R.D. 597, 610 (E.D.La.2006). The *Turner* court purported to consider the value of state versus federal court writ large, but did so only in the context of resource strains on state court, which have not been alleged here. And this observation was far from necessary to the holding, given that the district court prefaced this observation by recognizing the value of certifying a class in order to "centralize these proceedings." *Id.* Defendants here seek the opposite of centralization: rather, they seek the fragmentation of each of plaintiffs' claims into, perhaps, hundreds of thousands of actions. The overwhelming weight of authority suggests that the forum requirement is one that centers on geography, rather than a comparative analysis of the benefits available under either federal or state law. Rubenstein, *supra*, § 4.71. Mel Harris's authorities have not convinced us otherwise.

Third, Mel Harris's argument depends on a misreading of the gravamen of plaintiffs' allegations. It is ultimately not the procedures of New York City Civil Court, or the ultimate default judgments, that are at issue in this case. It is, rather, the fraudulent means that defendants employed in order to obtain those judgments. These means are the basis of claims that sound both in federal and in state law. To the extent that the district court had jurisdiction to entertain these claims, we see no basis for rewriting Rule 23(b)(3)(C) to impose a limit on the district court's power.

Even if we were to credit Mel Harris's argument that forum analysis requires us to consider state fora as opposed to federal fora, we would not conclude that the district court abused its discretion in concluding that proceeding by class is superior to alternatives for adjudicating these claims. Fed.R.Civ.P. 23(b)(3). Defendants engage in no other consideration of the 23 (b)(3) factors. They do not even engage with the district court's conclusions that a class action "is, without question, more efficient than requiring thousands of debtors to sue individually." *Sykes II,* 285 F.R.D. at 294. Echoing the Supreme Court's concerns in *Amchem,* 521 U.S. at 617, 117 S.Ct. 2231, the district court concluded that "class members' interest[ ] in litigating separate actions is likely minimal given their potentially limited means with which to do so and the prospect of relatively small recovery." *Sykes II,* 285 F.R.D. at 294 (citing Fed.R.Civ.P. 23(b)(3)(A)).

Nor are we convinced that proceeding in state court is, as the dissent suggests, "superior in every way" to class action. *See infra* Op. pp. 98, 101–02. New York law provides for the en masse vacatur of **94* default judgments obtained through fraud or other illegal means upon the application of an administrative judge, who "*may* bring a proceeding to relieve a party or parties" from such judgments. N.Y. C.P.L.R. § 5015(c) (emphasis added). Having initiated this proceeding, the administrative judge, rather than the judgment defaulter, acts as the petitioner before a different judge who is to decide the application. *See,* N.Y. C.P.L.R. § 5015 (McKinney), Practice Commentaries, C5015:13; *see also, Mead v. First Trust & Deposit Co.*, 90 Misc.2d 930, 397 N.Y.S.2d 295, 297 (N.Y.Sup.Ct.1977) (acknowledging denial of amicus curiae status to legal services corporation that requested proceedings under forerunner provision to § 5015(c) because it "was interested in the outcome of the proceeding"). Notwithstanding its remedial purposes, this discretionary procedure (1) provides plaintiffs no right of action, (2) cannot address the gravamen of the plaintiffs' allegations here as it could only vacate the default judgments against them, and (3) denies plaintiffs any control over the course of the litigation. The dissent's distaste for "hungry lawyers," and aversion to awarding attorneys' fees in class actions, *see infra* Op. pp. 101-02, 103, cannot justify requiring plaintiffs, under the guise of Rule 23(b)(3)'s superiority analysis, to pass through the threshold of the state courthouse to seek relief that cannot seriously be entertained as an adequate, let alone superior, substitute for proceeding by class on these claims.

b. Defendants' *Rooker–Feldman* and Full Faith & Credit Arguments are Unavailing at the Class Certification Stage

Just how far Mel Harris's superiority arguments fall from the mark of requiring reversal of the district court's class certification order under Rule 23(b)(3)(C) becomes even clearer when considered in light of the two doctrinal bases on which defendants argue that class certification was inappropriate in light of federalism concerns, namely, the *Rooker–Feldman* doctrine and the Full Faith and Credit Act. We take these arguments in order.

17 *Rooker–Feldman* bars the federal courts from exercising jurisdiction over claims "brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005). We have clarified that in order to satisfy the requirements of *Rooker–Feldman*, the defendant must satisfy the following four requirements:

> First, the federal-court plaintiff must have lost in state court. Second, the plaintiff must complain of injuries caused by a state-court judgment. Third, the plaintiff must invite district court review and rejection of that judgment. Fourth, the state-court judgment must have been rendered before the district court proceedings commenced.

Hoblock, 422 F.3d at 85 (internal quotation marks and modifications omitted). The causation requirement is only satisfied if "the third party's actions are produced by a state court judgment and not simply ratified, acquiesced in, or left unpunished by it." *Id.* at 88.

18 The district court concluded, at the motion to dismiss stage, that "plaintiffs assert claims independent of the state-court judgments and do not seek to overturn them." *Sykes I*, 757 F.Supp.2d at 429. We agree. As explained previously, claims sounding under the FDCPA, RICO, and state law speak not to the propriety of the state court judgments, but to the **95* fraudulent course of conduct that defendants pursued in obtaining such judgments.

Leucadia defendants, for their part, offer the more subtle argument that the causation components of *Rooker–Feldman* required the district court to exclude from its class certification order "remittance" damages, by which Leucadia means the compensatory damages that plaintiffs claim defendants have extracted as a result of the entry of a default judgment. We disagree.

The crux of the issue, as identified by Leucadia, is not simply *Rooker–Feldman*, but rather the requirement that the district court's certification order "define the class and the class claims, issues, or defenses, and must appoint class counsel." Fed.R.Civ.P. 23(c)(1)(B). Leucadia's argument is that the certification order under Rule 23(b)(3), which identifies all of the above but does not exclude the certain category of damages that Leucadia believes is not cognizable under *Rooker–Feldman*, finds no basis in the text of Rule 23, nor in the class certification decisions that we have identified.

Even if we credited Leucadia's contention that the state court judgment satisfied the causal requirements of *Rooker–Feldman*, rather than acting as ratification of a harm that resulted from fraudulent conduct on behalf of defendants, *Hoblock*, 422 F.3d at 85, the contention would have no merit. There is no textual basis to endorse Leucadia's view that certain categories of damages must be carved out of a class certification order under Rule 23(c)(1)(B). The requirements are that the class, the class claims, and issues, be identified. Fed.R.Civ.P. 23(c)(1)(B). The district court's class certification order did just that: it identified a class of individuals that it defined as "all persons who have been sued by the Mel Harris defendants as counsel for the Leucadia defendants." Special App'x at 47. It further identified the claims as those arising under RICO, the FDCPA, GBL § 349, and New York Judiciary Law § 487. Special App'x at 47.

There are good reasons for these limited requirements. The district court's order is not a final statement of the merits, just as class certification is not an opportunity to "engage in free-ranging merits inquiries." *Amgen*, 133 S.Ct. at 1194–95. We see no use in a class certification order that is required to list all possible defenses to all possible damage claims, nor do we see, in the text of Rule 23, any requirement for it.

19 Nor, in our view, do defendants' arguments sounding under the Full Faith and Credit Act fare much better. The act requires that state court proceedings must be afforded "the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State ... from which they are taken." 28 U.S.C. § 1738. Defendants urge that such doctrine bars us from considering plaintiffs' damages claims seeking the return of default judgments, because state courts treated judgments entitling them to recovery as valid. We decline to consider this argument, however, for the same reasons that the district court declined to carve out specific damages that might be available to the class based on its certification order: such a determination is simply not required under Rule 23(c)(1)(B). [5]

***96** A word may be in order, however, to illustrate how far afield defendants' arguments sounding in federalism require us to go from the ultimate merits of plaintiffs' claims. The parties remonstrate over whether or not Fabacher's declaration as to "personal knowledge" was in fact required to make out an application for a default judgment in New York Civil Court. Thus, Mel Harris in particular have asked us to consider a Directive of the New York Civil Court, issued in 2009. This directive imposes burdens on third-party creditors seeking default judgments in addition to those imposed under Section 3215 of the CPLR. N.Y.C. Civ.Ct. Directive DRP–182 (May 2009). This Directive requires, in particular, that a third-party debt collector include "[a]n Affidavit of a Witness of the Plaintiff, which includes a chain of title of the accounts, completed by the plaintiff/plaintiff's witness." *Id.* This form affidavit only requires the witness to attest to the chain of title "to the best of [his or her] knowledge." *Id.* Plaintiffs, for their part, point to a checklist prepared by the New York City Civil Court, which directs parties pursuing a default judgment to submit "an Affidavit of Facts from a person with personal knowledge of the facts." New York City Civil Court, *Entering Civil Judgments*, http://www.courts.state.ny.us/COURTS/nyc/civil/judgments_atty.shtml #checklist (last visited Feb. 6, 2015).

Whether or not Fabacher was required to attest to personal knowledge of the underlying debt in his affidavit of merit, as plaintiffs contend, or whether a more lax standard governs his affidavits, as Mel Harris contend, is ultimately irrelevant to adjudicating liability under any of the claims that plaintiffs have brought. What matters is that, in hundreds of thousands of forms, he did attest to this knowledge, despite the undisputed fact, at the class certification stage, that he did not in fact actually review underlying documentation related to these loans. Whatever was required in New York City Civil Court will not decide the issue of liability for these defendants. The conduct of defendants, and the question of whether this conduct was ultimately fraudulent, will decide their liability. The federal system, with its guarantees of concurrent jurisdiction, and the federal laws under which plaintiffs seek relief, permit as much.

3. We Decline to Decide, in the First Instance, Whether the FDCPA Permits Claims for the False Statements Alleged Here

Defendants raise a final issue related to the propriety of class certification, namely, the question of whether or not the FDCPA permits a plaintiff to assert claims for a false statement that was made to a party other than the debtor.

20 We must determine the propriety of making a decision on this issue at this stage in the proceedings. Plaintiffs point out that we are not to "engage in free-ranging merits inquiries at the certification stage." *Amgen*, 133 S.Ct. at 1194–95. And it is undisputed that the question of whether false statements, such as those made by Fabacher in his affidavits of merit, made to third parties are actionable under the FDCPA is a question common to the class under both Rule 23(a) and 23(b)(3): resolving that such statements are not actionable would "resolve an issue that is central to the validity" of the FDCPA claim "in one stroke." *Dukes*, 131 S.Ct. at 2551. Indeed, the district court's class certification decision stated that "there is a question of law as to whether *97 making false representations in court, rather than to a debtor, violates the FDCPA," *Sykes II*, 285 F.R.D. at 290, but ultimately did not pass on the issue. We think this the proper determination, as it is unlikely that the Federal Rules, which require a plaintiff to identify a common question at the class certification stage, also require the district court to resolve that question at the same stage in the litigation. The district court did not commit error in declining to rule definitively on whether the FDCPA covers the false statements at issue in this case.

We decline to address this question, in the first instance,[6] on appeal. *See Dardana Ltd. v. Yuganskneftegaz*, 317 F.3d 202, 208 (2d Cir.2003) ("It is this Court's usual practice to allow the district court to address arguments in the first instance."). We leave it to the district court to decide this issue at a later stage of the litigation.

C. The District Court Did Not Abuse its Discretion in Certifying the Rule 23(b)(2) Class

1. Proposed Injunctive Relief Benefits All Class Members

21 Injunctive relief is appropriate if "the party opposing the class has acted or refused to act on grounds that apply generally to the class." Fed.R.Civ.P. 23(b)(2). The district court concluded that such relief was appropriate because of "defendants' uniform filing of false affidavits in state court to fraudulently procure default judgments against putative class members." *Sykes II*, 285 F.R.D. at 293. This injunction, as currently sought by plaintiffs, includes four elements: first, a direction that defendants "cease engaging in debt collection practices that violate the FDCPA, RICO, N.Y. GBL § 349, and N.Y. Jud. Law § 487;" second, a direction that defendants locate and notify class members that a default judgment has been entered against them and that "they have the right to file a motion with the court to re-open their case;" third, a direction that defendants "serve process in compliance with the law in any and all future actions;" and fourth, a direction that defendants' affidavits of merit in future actions reflect their personal knowledge of the facts. Joint App'x at 219.

The Supreme Court has clarified that certification of a class for injunctive relief is only appropriate where "a single injunction ... would provide relief to each member of the class." *Dukes*, 131 S.Ct. at 2557; *Amara v. CIGNA Corp.*, 775 F.3d 510, 522 (2d Cir.2014) (noting that the Supreme Court in *Dukes* "simply emphasized that in a class action certified under Rule 23(b)(2), 'each individual class member' is not 'entitled to a *different* injunction' " (emphasis in original) (quoting *Dukes*, 131 S.Ct. at 2557)). Mel Harris submit that this proposed injunctive relief does not satisfy this standard, because individualized issues of service differentiate class members from one another, and the named plaintiffs will not benefit because they "have already had their default judgments vacated."

This claim is without merit. "[R]elief to each member of the class," does not require that the relief to each member of the class be identical, only that it be beneficial. *Dukes*, 131 S.Ct. at 2557–58. And while Mel Harris attempt to refocus the proposed injunctive relief on the affidavits of service, it is clear that the proposed injunctive relief sweeps broadly enough to benefit each class member. There is no support for the contention, for example, that because certain class members received *98 service, they will not be provided relief by the notification proposed by the injunction as well. *See Amara*, 775 F.3d at 522 (finding decertification of Rule 23(b)(2) class not required where certain class members, who might not benefit from injunction's reformation of retirement plan, received "some benefit in the form of new notice" of changes to the plan). Furthermore, while named plaintiffs have had their default judgments vacated, they might each still be subject to a further action by these same defendants. The district court did not abuse its discretion in concluding that plaintiffs had satisfied the requirements of Rule 23(b)(2).

2. We Decline to Decide, in the First Instance, Whether RICO Permits Private Injunctive Relief

22 Defendants finally argue that injunctive relief is not available under RICO. For the same reasons that we found the district court did not commit error in declining to rule on the availability of relief under the FDCPA, we find that the district court did not commit error in declining to decide, at the class certification stage, whether RICO permits private injunctive relief.

Because the district court did not reach this question below, we decline to address it for the first time[7] on appeal. *See Dardana,* 317 F.3d at 208.

CONCLUSION

For the foregoing reasons, the opinion and order of the district court is hereby affirmed.

DENNIS JACOBS, Circuit Judge, dissenting:

This class action alleges that the defendant firms cut sharp corners in obtaining default judgments against the class members in the Civil Court of New York City. On this interlocutory appeal from class certification, the panel concludes that the superiority and predominance prerequisites to a Rule 23(b)(3) damages class have been satisfied. I respectfully dissent.

The *superiority* ruling is error because a statutory procedure is available, in the Civil Court itself, for redressing such an allegedly wide-ranging fraud—one that is superior in every way to this unwieldy federal class action. The district court's *predominance* ruling cannot be sustained because the court failed to perform, as is necessary, a rigorous weighing of common and individualized issues. The majority also holds that a Rule 23(b)(2) equitable and declaratory relief class was properly certified even though the named plaintiffs can get no benefit from that supposed relief because they have already achieved vacatur (or discontinuance) of the default judgments against them.

This is class litigation for the sake of nothing but class litigation.

I

Four plaintiffs, on behalf of a class of over 100,000, sued a buyer of bad debts (the "Leucadia defendants"), a law firm (the "Mel Harris defendants"), and a process server ("Samserv"), alleging that they fraudulently obtained default judgments against the class members. The alleged scheme proceeded in two steps: (1) a process server, sometimes a Samserv employee (but more often than not, not) engaged in sewer service, and then prepared a fraudulent affidavit of service; and (2) the debt buyer and the law firm generated and submitted standardized affidavits of merit *99 falsely attesting to personal knowledge of the debt. *See* N.Y. C.P.L.R. 3215(f) (requiring "proof of the facts constituting the claim, the default and the amount due").

The dominant focus of the complaint is the fraud in service of process;[1] although plaintiffs do not actually deny that many class members received proper service. But service is too individualized an issue for class certification. The point was recognized implicitly by the district court,[2] and acknowledged more directly by its dismissal of one named plaintiff's claim as time-barred because service had been effected more than a year prior to the entry of default. *Sykes v. Mel Harris & Assocs., LLC,* 757 F.Supp.2d 413, 422 (S.D.N.Y.2010) ("*Sykes I* "). Plaintiffs' backstop contention—that irregularities in Samserv's logbooks should allow for a presumption that *all* service was fraudulent—is easily refuted.[3]

To patch this hole, plaintiffs changed focus to the affidavits of merit (all of which were generated by a software program used by a single Mel Harris employee) as the "glue" holding together this miscellaneous and diverse class. *Wal-Mart Stores, Inc. v. Dukes,* — U.S. ——, 131 S.Ct. 2541, 2552, 180 L.Ed.2d 374 (2011). (The putative debts are to Sears, a credit card company, a bank, and a gym.[4])

The district court certified two classes: (1) a Rule 23(b)(3) class seeking money damages for "all persons who have been sued by the Mel Harris defendants as counsel for the Leucadia defendants in actions commenced in New York City Civil Court and where a default judgment has been obtained"; and (2) a Rule 23(b)(2) class seeking equitable and declaratory relief for "all persons who have been or will be sued by the Mel Harris defendants as counsel for the Leucadia defendants in actions commenced in New York City Civil Court and where a default judgment has or will be sought." *100 *Sykes v. Mel Harris & Assocs., LLC,* 285 F.R.D. 279, 294 (S.D.N.Y.2012) ("*Sykes II* "). Plaintiffs in both classes assert claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"),[5] New York General Business Law,[6] and (as against the Mel Harris defendants alone) New

York Judiciary Law. [7] The damages class also alleges Fair Debt Collection Practices Act ("FDCPA") claims. [8]

II

It is useful and diplomatic to set out first the points of my agreement with the majority. I agree that it was no abuse of discretion to find that the Rule 23(a) prerequisites—numerosity, commonality, typicality, and adequacy of representation—are met. There is a common issue as to whether the affidavits of merit were fraudulent, and the claims asserted about the affidavits of merit are typical. Fed.R.Civ.P. 23(a)(2), (3); *see also, e.g., Gen. Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, 157 n. 13, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982) ("The commonality and typicality requirements of Rule 23(a) tend to merge."). That issue alone is unlikely to be decisive, but the "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes,* 131 S.Ct. at 2551. Thus, unlike in *Dukes,* all of the claims are held together by "glue," *id.* at 2552—or some dabs of it.

I also agree that the amount of debt owed by each class member, which defendants urge as an individualized issue that defeats certification, is beside the point. The harm can be viewed as the obligation created by a fraudulent default judgment, so that it should not matter that the original debt may remain, and be unaffected. *See Hamid v. Stock & Grimes, LLP,* 876 F.Supp.2d 500, 501–03 (E.D.Pa.2012) ("It is clear from its underlying purpose that debtors may recover for violations of the FDCPA even if they have defaulted on a debt.... If [plaintiff's] payment was not a proper element of actual damages under the FDCPA, a debt collector could harass a debtor in violation of the FDCPA, as a result of that harassment collect the debt, and thereafter retain what it collected."); *accord Abby v. Paige,* No. 10–23589–CIV, 2013 WL 141145, at *8–9 (S.D.Fla. Jan. 11, 2013); *cf. Sparrow v. Mazda Am. Credit,* 385 F.Supp.2d 1063, 1071 (E.D.Cal.2005) ("[S]trong policy reasons exist to prevent the chilling effect of trying FDCPA claims in the same case as state law claims for collection of the underlying debt."); *Isa v. Law Office of Timothy Baxter & Assocs.,* No. 13–cv–11284, 2013 WL 5692850, at *3 (E.D.Mich.2013) ("Congress did not intend for collectors to engage in violations, enter judgments, and use state law on judgment execution to force payment to creditors.").

The last point of my agreement with the majority is that the substantive legal questions the defendants invite us to answer either counsel in favor of commonality and typicality, or are entirely tangential to the class certification decision and best left unanswered at this stage. One such question—what is required for an affidavit of merit under New York law?—is a common question of law in this case. In any event, "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to **101* determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds,* ––– U.S. ––––, 133 S.Ct. 1184, 1194–95, 185 L.Ed.2d 308 (2013).

III

In my view, the damages class was improperly certified. Rule 23(b)(3) requires first, that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy" and second, that "the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed.R.Civ.P. 23(b)(3). The Rule specifies, as "matters pertinent to these findings," "the desirability or undesirability of concentrating the litigation of the claims *in the particular forum* " and "the likely difficulties in managing a class action." Fed.R.Civ.P. 23(b)(3)(C)-(D) (emphasis added). These very factors counsel against certification here. *See Madison v. Chalmette Refining, LLC,* 637 F.3d 551, 554 (5th Cir.2011) ("The decision to certify a class is within the broad discretion of the district court, but that discretion must be exercised within the framework of Rule 23." (internal quotation marks and alterations omitted)).

A

The district court concluded that a federal class action is a superior method for resolving this litigation over state court proceedings, because: (1) it is more efficient than requiring thousands of individual suits; (2) most class members would not litigate given the small recovery and their limited means; (3) the conduct all occurred in New York; and (4) any problems could be alleviated through use of class management tools. *See Sykes II,* 285 F.R.D. at 294. The majority endorses this analysis. *See supra* Op. pp. 91–94.

Even if a federal class action were a good way to remedy an allegedly massive and pervasive fraud perpetrated on a New York court, it cannot be superior to the adequate remedial scheme already offered by the courts of New York. State law provides that, "on motion of any interested person," a party may be relieved from a judgment based on the grounds of, *inter alia*, "excusable default," "fraud, misrepresentation, or other misconduct of an adverse party." N.Y. C.P.L.R. 5015(a)(1), (3). And, on an application by an administrative judge, vacatur may be granted *en masse* "upon a showing that default judgments were obtained by fraud, misrepresentation, illegality, unconscionability, lack of due service, violations of law, or other illegalities." *Id.* 5015(c); *cf. Jack Mailman & Leonard Flug DDS, P.C. v. Whaley*, No. 31880/02, 2002 WL 31988623, at *6 (N.Y.C.Civ.Ct. Nov. 25, 2002) (forwarding the court's decision "to the administrative judge for the possible institution of proceedings in conformity with C.P.L.R. 5015(c)"). Because vacatur *en masse* is done by an administrative judge, it is a remedy that is broad, wholesale, effective, and easy. The only remaining salient advantage of this federal class action is attorneys' fees, which do not much help the members of the class.

The majority observes that the availability of recourse to state avenues for relief was not raised in the district court. *See supra* Op. pp. 91 & n. 4. True, defendants' superiority arguments in their opposition to class certification focused on the existence of issues personal to each class member, as well as manageability, and the prospect of "mini-trials just to determine the threshold issue of class membership." *See* Mem. of Law in Opp'n to Class Cert., Dkt. No. 90 at 22–23. But that is because the complaint was chiefly predicated on sewer service, an issue as to which facts ***102** varied from debtor to debtor, whereas class counsel (at least for current purposes) shifted focus to the submission of materially false affidavits of merit. In any event, the district court's ruling on superiority rests on the determination that a class action is "without question, more efficient than requiring thousands of debtors to sue individually." *Sykes II*, 285 F.R.D. at 294. It is this consideration that is obviated by the New York procedure. *See* N.Y. C.P.L.R. 5015(c). "[T]he Legislature has gone so far as to create a special subdivision allowing an administrative judge to bring a proceeding to vacate default judgments *en masse* where obtained by fraud, misrepresentation ... lack of service, ... or other illegalities." *Shaw v. Shaw*, 97 A.D.2d 403, 467 N.Y.S.2d 231, 233 (2d Dep't 1983) (internal quotation marks omitted).

Rule 23 requires consideration of any other "available method[ ] for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(3); *see also id.* advisory committee notes (observing the court "ought to assess the relative advantages of alternative procedures" and stating that "[a]lso pertinent is the question of the desirability of concentrating the trial of the claims in the particular forum"). One such "method" that is "available" is afforded by the New York Legislature for redressing harms alleged in this case by recourse to the Civil Court, in which the alleged wrong was done. In the majority's view, "the forum analysis of Rule 23(b)(3) is not grounded in a consideration of the comparative value of pursuing a claim in federal or state court." *Supra* Op. p. 92. That seems to me error, at least when the state court remedy affords relief—available *en masse*—for harm that was suffered in that forum.

Amici briefs filed by consumer advocacy groups explain that unscrupulous debt collection practices abuse the legal process, and demonstrate that this well-documented problem has drawn the attention of all levels of government for years. But that observation does not speak to a need for federal class action remedies. As the parties point out, the Civil Court has recently issued directives regarding "Default Judgments on Purchased Debt," imposing new and additional requirements on third-party debt collectors like the Leucadia defendants.[9] Collectors must now include an "Affidavit of Sale of Account by Original Creditor" and an "Affidavit of the Sale of the Account by the Debt Seller" for each debt re-sale. *Cf. Shaw*, 467 N.Y.S.2d at 234 ("A judgment obtained without proper service of process is invalid, even when the defendant has actual notice of the law suit, because as a prophylactic measure such rule is necessary to prevent 'sewer service' ") (citing *Feinstein v. Bergner*, 48 N.Y.2d 234, 239–41, 422 N.Y.S.2d 356, 397 N.E.2d 1161 (1979)).

The New York court system needs no helping hand from a federal class action initiative. The majority observes that plaintiffs' claims cannot be heard as a class in Civil Court. *See supra* Op. p. 92. But class litigation is not an end in itself. It is simply a "device to vindicate the rights of individuals class members." *In re Gen. Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1127 n. 33 (7th Cir.1979); *see also Blaz v. Belfer*, 368 F.3d 501, 504 (5th Cir.2004) (explaining a class action is merely a procedural device). New York's Civil Court provides such a device. N.Y. C.P.L.R. 5015(c). The majority also discounts the state procedure because it is implemented by judges. *See supra* Op. pp. 93–94. But one would have thought that to be an advantage; it reduces the *103 burden on plaintiffs and may obviate the need for counsel altogether.

The majority's other critiques of the state procedure are easily disposed of. Vacatur *en masse* is discretionary—so are many aspects of class certification. *See id.* at 94. The majority cites to the district court's observation that a class action is—"without question"—a more efficient way of proceeding. *Id.* at 94. But the state remedy is far more speedy than a cumbersome class action. In state court, all that is needed is to push on an open door. And that, evidently, is what the class representatives themselves did; they have all had their judgments vacated or discontinued. Thus, the door of the state court is open for the vacatur of the default judgments *en masse*, without class certification, subclasses, hungry lawyers, or issues of process and statutes of limitations. *Cf. In re Aqua Dots Prods. Liability Litig.*, 654 F.3d 748, 752 (7th Cir.2011) ("A representative who proposes that high transaction costs (notice and attorneys' fees) be incurred at the class members' expense to obtain a refund that already is on offer is not adequately protecting the class members' interests."). The countervailing benefits of a class action accrue almost entirely to the lawyers in a fee-rich environment, and leave trivial benefits for consumption by the class.

B

"Rule 23(b)(3)'s predominance criterion is even more demanding" than the "rigorous analysis" mandated under Rule 23(a), and requires a "close look at whether common issues predominate over individual ones." *Comcast Corp. v. Behrend*, —— U.S. ——, 133 S.Ct. 1426, 1432, 185 L.Ed.2d 515 (2013) (internal quotation marks omitted); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615, 623–24, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) ("Even if Rule 23(a)'s commonality requirement may be satisfied by that shared experience, the predominance criterion is far more demanding.").

The district court acknowledged problems that might easily be viewed as fatal: "individual issues may exist as to causation and damages as well as to whether a class member's claim accrued within the applicable statute of limitations." *Sykes II*, 285 F.R.D. at 293. The district court nevertheless hoped that these problems could be dealt with through "a number of management tools," and cited "appointing a magistrate judge or special master to preside over individual damages proceedings, decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages, creating subclasses, or altering or amending the class." *Id.* at 293–94 (internal quotation marks omitted).

No doubt, resourceful judges can seek or find ways to overcome difficulties. But predominance cannot be determined without a careful balancing of the individualized issues against the common issues. It is not enough to discount problems on the basis of hope and confidence. *Compare In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 131 (2d Cir.2013) ("[C]lose inspection of this case reveals that any class heterogeneity is minimal and is dwarfed by common considerations susceptible to generalized proof.") *with Sykes II*, 285 F.R.D. at 292 ("[U]se of sewer service and false affidavits of service may warrant equitable tolling. Even still, though, the Court can address such issues at later stages of the litigation if necessary." (citation omitted)).

The existence of such management tools, which are always at hand, does not help to distinguish a claim that justifies certification from a claim that does not. *Cf.* *104 *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1176, 1184 (11th Cir.2010) ("[A] class action with numerous uncommon issues may quickly become unmanageable."); *cf. also In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 42 (2d Cir.2006) ("Plaintiffs' own allegations and evidence demonstrate that the Rule 23 requirement of predominance of common questions over individual questions cannot be met under the standards as we have explicated them."). The useful inquiries are why such tools will be needed and how they would be used. What proceedings are envisioned for the magistrate judge? The magistrate judge who hears a hundred thousand claims, four a day, would finish work in about a century. What subclasses, or "amended" or "alternative" classes would serve—and who would represent *any* of them, seeing as how all of the default judgments against the present class representatives have already been vacated or withdrawn? A better-considered case-management tool is de-certification. *See* Fed.R.Civ.P. 23(c)(1)(C).

Specifically, many claims in this case may be defeated by the statute of limitations. The issue demands a close scrutiny that has not been given. If members were served (or otherwise notified) of the default judgment more than one year before the class action commenced, they cannot now rely on equitable tolling. *See New York v. Hendrickson Bros.*, 840 F.2d 1065, 1083 (2d Cir.1988) (equitable tolling only appropriate if plaintiff was ignorant of cause of action because of defendant's concealment). A member-by-member inquiry concerning service of process will likely be required. Moreover, all members served after April 1, 2008 were provided supplemental notice by the state court before a default judgment was entered, *see* N.Y. Comp.Codes R. & Regs. tit. 22, § 208.6(h)(2); so what will be required is individualized examination of whether a plaintiff was served and whether notice was effected by the court's new system.

In an effort to skate past this appeal, class counsel now jettison their clients' defense of equitable tolling, and propose to include as class members only persons whose claims are not barred by the statute of limitations. But the district court (for one) seemed to think the plaintiffs were still seeking the benefit of equitable tolling when it certified the class. *See Sykes II*, 285 F.R.D. at 292. Crucially, the class definition does not exclude claims based on the date of filing.

Even if this maneuver succeeds (it appears it has), *see supra* Op. pp. 89–90, plaintiffs are simply trading a commonality problem for problems of typicality and adequacy of representation: the district court earlier relied on equitable tolling in order to save the FDCPA claims of two of the named plaintiffs.

IV

Class certification for equitable and declaratory relief under Rule 23(b)(2) is likewise deeply flawed. Such a class may only be certified if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed.R.Civ.P. 23(b)(2). In other terms, "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Dukes*, 131 S.Ct. at 2557.

The named plaintiffs seek an injunction that would do absolutely nothing for them. The injunction sought would direct defendants to (1) conform their debt collection practices to the laws cited in the complaint, (2) locate and notify class members that a default judgment has been entered against them and that they have the right ***105** to file a motion to re-open, (3) serve process in compliance with law, and (4) produce and file affidavits of merit that truthfully reflect personal knowledge. *See* Third Am. Compl. ¶ 80. *But the default judgments against all of the named plaintiffs were already vacated or discontinued before they asserted these claims. See id.* ¶¶ 131, 161, 215, 330; *Sykes I*, 757 F.Supp.2d at 429 ("In fact, all plaintiffs have had the default judgments against them vacated or discontinued."). They get nothing from the equitable relief they seek (absent any speculation that they will be subject to future suits and default judgments by the Leucadia and Mel Harris defendants). "[A] single injunction or declaratory judgment" will therefore not "provide relief to each member of the class." *Dukes*, 131 S.Ct. at 2557.

V

I cannot figure out what Samserv is doing here. The common thread identified by the district court was the preparation of the allegedly fraudulent affidavits of merit. Samserv had no role in drafting those affidavits. Moreover, fewer than half the class members were served with process (or given sewer service) by Samserv. And though plaintiffs respond that Samserv was still part of the RICO enterprise, the only common RICO issue identified is the affidavits of merit.

A class certification order cannot reach a defendant based on a purportedly common underlying thread unrelated to that defendant's conduct. *See* Fed.R.Civ.P. 23(c)(1)(b) ("An order that certifies a class action must define the class and the class claims, issues, or defenses...."); *see also, e.g., In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d at 41 (stating "a district judge may certify a class only after making determinations that each of the Rule 23 requirements has been met").

The majority's proposal that the district court may certify subclasses is no answer to these problems, for reasons set forth above. *See supra* Op. n. 3; *see also Sacred Heart Health Sys.*, 601 F.3d at 1184 (finding subclasses "no answer" when common questions did not predominate and concluding class action was not superior to other available means for fairly adjudicating claims).

Certification of this misbegotten class will generate grinding of gears and spinning of wheels for years to come, notwithstanding an effective, superior, and immediately available remedy in state court.

All Citations

780 F.3d 70, 90 Fed.R.Serv.3d 1793, RICO Bus.Disp.Guide 12,584

Footnotes

1 The Clerk of the Court is directed to amend the caption as above.

2 As previously noted, the Supreme Court has acknowledged that, in certain "context[s] ... '[t]he commonality and typicality requirements of Rule 23(a) tend to merge.' " *Dukes,* 131 S.Ct. at 2551 n. 5 (second alteration in original). The district court analyzed both typicality and commonality and found that the proposed class satisfied the typicality requirement "for many of the same reasons they meet the commonality requirement." *Sykes II,* 285 F.R.D. at 291. Defendants and plaintiffs agree that in this case, the commonality and typicality considerations are sufficiently merged to warrant their consideration in tandem.

3 For similar reasons, defendants'—and the dissent's, *see infra* p. 105 —contentions regarding the inappropriateness of certifying a class to bring claims against Samserv, when Samserv admittedly did not serve process on all individuals who were sued or will be sued in New York City Civil Court by Mel Harris on behalf of Leucadia, are also misplaced. Plaintiffs who were not served by Samserv allege no FDCPA or GBL claims against Samserv—they only bring RICO claims. Carving out such claims may also be the subject of an appropriate subclass under Rule 23(c)(5), but this is for the district court to determine in the first instance. *See Marisol,* 126 F.3d at 379 ("Rule 23 gives the district court flexibility to certify subclasses as the case progresses and as the nature of the proof to be developed at trial becomes clear.").

4 The dissent intimates that Mel Harris cannot be expected to have previously raised this superiority theory, as their arguments below were tailored to plaintiffs' emphasis on sewer service, which involved questions of fact unique to each debtor. *See infra* Op. p. 101–02. According to the dissent, class counsel's shift in the focus of the complaint, to the submission of false affidavits of merit, accounts for the new state-forum argument. But this explanation falls flat, as any shift in the focus of plaintiffs' allegations has not affected the nature of defendants' contentions. Mel Harris defendants continue to insist that resolution of plaintiffs' claims will require "individualized showings," now related to the affidavits of merit, which will result in "one hundred thousand mini-trials." Further, the state procedural remedy the dissent endorses to address these claims concurrently, *see infra* Op. pp. 101–03, could have been raised by Mel Harris before the district court, as that provision applies to sewer service, *see* N.Y. C.P.L.R. § 5015(c) (providing, upon application of an administrative judge, for en masse vacatur of default judgments obtained, inter alia, by "fraud, misrepresentation, ... *lack of due service,* ... or other illegalities" (emphasis added)).

5 It may also be, on full adjudication of the merits of this issue, that the district court may determine that the issue has not been properly raised. The requirement that federal courts afford full faith and credit to state court judgments is an argument that federal courts must give res judicata effect to the state court judgment. *See Kremer v. Chem. Constr. Corp.,* 456 U.S. 461, 481–82, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982). Res judicata is an affirmative defense that must be pleaded. *See* Fed.R.Civ.P. 8(c). Defendants have not asserted a res judicata defense in their answers.

6 We have not ruled on whether an FDCPA claim may be brought for misrepresentations made to third parties. *Kropelnicki v. Siegel,* 290 F.3d 118, 128 (2d Cir.2002).

7 We have yet to decide whether RICO allows for private injunctive relief. *See, e.g., Motorola Credit Corp. v. Uzan,* 202 F.Supp.2d 239, 243 (S.D.N.Y.2002).

1 *See* Third Am. Compl. ¶ 4 ("[S]ewer service is the primary reason so few of the people sued by Defendants appear in court to defend themselves."); *see also supra* Op. p. 85 (acknowledging complaint's emphasis on sewer service but concluding "plaintiffs have made clear that this is but one component of the overarching debt collection plan").

2 *See Sykes v. Mel Harris & Assocs., LLC,* 285 F.R.D. 279, 290 (S.D.N.Y.2012) ("*Sykes II* ") ("[Plaintiffs'] overarching claim is that defendants *systematically* filed false affidavits of merit and, *in many instances,* false affidavits of service to fraudulently produce default judgments...." (emphasis added)); *id.* at 291 ("[I] ndividualized proof of service or lack thereof is not fatal to the prerequisite of commonality. Here, defendants' uniform course of conduct was to file an allegedly false affidavit of merit and, *at least in some instances,* an allegedly false affidavit of service." (emphases added)).

3 *See Wal–Mart Stores, Inc. v. Dukes,* — U.S. ——, 131 S.Ct. 2541, 2555, 180 L.Ed.2d 374 (2011) ("Even if [statistical proof] established ... a pay or promotion pattern that differs from the nationwide figures or the regional figures in *all* of Wal–Mart's 3,400 stores, that would still not demonstrate that commonality of issue exists...."); *id.* at 2556 ("Respondents' anecdotal evidence suffers from the same defects, and in addition is too weak to raise any inference that all the individual, discretionary personnel decisions are discriminatory."); *id.* at 2561 ("Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' a class cannot be certified on the premise that Wal–Mart will not be entitled to litigate its statutory defenses to individual claims." (citations omitted)); *see also 650 Fifth Ave. Co. v. Travers Jewelers Corp.,* No. LT75766/20, 2010 WL 4187936, at *4 (N.Y.C.Civ.Ct.2010) ("Where a respondent rebuts an affidavit of service with a sworn denial of service, the petitioner must establish jurisdiction by a preponderance of the evidence at a traverse hearing.").

4 *See* Third Am. Compl. ¶¶ 136, 166, 198, 269.

5 *See supra* Op. pp. 83, 86, 91–92; *see also* 18 U.S.C. § 1962(c).

6 *See supra* Op. pp. 93–94, 87; *see also* N.Y. Gen. Bus. Law §§ 349(a), (h).

7 *See supra* Op. p. 84; *see also* N.Y. Jud. Law § 487.

8 *See supra* Op. pp. 82–83, 85–86, 88, 91–92; *see also* 15 U.S.C. §§ 1692e, 1692f, 1692k(a).

9 *Available at* http://www.courts.state.ny.us/courts/nyc/SSI/directives/DRP/drp182.pdf.

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KeyCite Blue Flag – Appeal Notification
Petition for Certiorari Docketed by MIDLAND FUNDING, LLC, ET AL. v. SALIHA MADDEN, U.S., November 10, 2015

786 F.3d 246
United States Court of Appeals,
Second Circuit.

Saliha MADDEN, on behalf of herself and all others similarly situated, Plaintiff–Appellant,
v.
MIDLAND FUNDING, LLC, Midland Credit Management, Inc., Defendants–Appellees.

No. 14–2131–cv.
|
Argued: March 19, 2015.
|
Decided: May 22, 2015.

Synopsis

Background: Credit card customer of national bank brought putative class action against debt collector, who had purchased customer's debt from the bank, claiming that collector violated the Fair Debt Collection Practices Act (FDCPA) and New York usury law by charging and attempting to collect interest at a rate higher than that permitted under New York law. The United States District Court for the Southern District of New York, Cathy Seibel, J., denied class action certification and entered judgment for debt collector. Customer appealed.

[Holding:] The Court of Appeals, Straub, Circuit Judge, held that the National Bank Act (NBA) did not preempt customer's claims that debt collector violated New York usury laws by charging and attempting to collect interest at an impermissibly high rate.

Reversed in part, vacated in part, and remanded.

West Headnotes (5)

[1] **Banks and Banking**
Nature and status

"National banks" are corporate entities chartered not by any State, but by the Comptroller of the Currency of the United States Department of the Treasury.

Cases that cite this headnote

[2] **Banks and Banking**
What rate of interest may be charged
States
Banking and financial or credit transactions

National Bank Act (NBA) did not preempt credit card customer's putative class action claims that debt collector violated New York usury laws by charging and attempting to collect interest at a rate higher than that permitted under New York law, even though debt collector was assignee of national bank that had issued the credit card, where debt collector, who had purchased the debt from the issuer, acted on its own behalf, and not on behalf of the issuer, in attempting to collect on the debt. 12 U.S.C.A. § 85; N.Y.McKinney's General Business Law § 349; N.Y.McKinney's Penal Law § 190.40.

1 Cases that cite this headnote

[3] **States**
Preemption in general

Preemption can generally occur in three ways: where Congress has expressly preempted state law, where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law, or where federal law conflicts with state law.

2 Cases that cite this headnote

[4] **Banks and Banking**
What law governs; preemption
States
Banking and financial or credit transactions

National Bank Act (NBA) provides the exclusive cause of action for usury claims against national banks, and therefore completely preempts analogous state-law usury claims. 12 U.S.C.A. § 85.

2 Cases that cite this headnote

[5] **Banks and Banking**
What law governs; preemption
States
Banking and financial or credit transactions
To apply National Bank Act (NBA) interest rate preemption to an action taken by a non-national bank entity, application of state law to that action must significantly interfere with a national bank's ability to exercise its power under the NBA. 12 U.S.C.A. § 85.

2 Cases that cite this headnote

Attorneys and Law Firms

***247** Daniel Adam Schlanger, Schlanger & Schlanger LLP, Pleasantville, N.Y. (Peter Thomas Lane, Schlanger & Schlanger LLP, Pleasantville, N.Y.; Owen Randolph Bragg, Horwitz, Horwitz & Associates, Chicago, IL, on the brief), for Saliha **Madden**.

Thomas Arthur Leghorn (Joseph L. Francoeur, on the brief), Wilson Elser Moskowitz Edelman & Dicker LLP, New York, N.Y., for Midland Funding, LLC and Midland Credit Management, Inc.

Before: LEVAL, STRAUB and DRONEY, Circuit Judges.

Opinion

STRAUB, Circuit Judge:

This putative class action alleges violations of the Fair Debt Collection Practices Act ("FDCPA") and New York's usury law. The proposed class representative, **Saliha Madden**, alleges that the defendants violated the FDCPA by charging and attempting to collect interest at a rate higher than that permitted under the law of her home state, which is New York. The defendants contend that Madden's claims fail as a matter of law for two reasons: (1) state-law usury claims and FDCPA claims predicated on state-law violations against a national bank's assignees, such as the defendants here, are preempted by the National Bank Act ("NBA"), and (2) the agreement governing Madden's debt requires the application of Delaware law, under which the interest charged is permissible.

The District Court entered judgment for the defendants. Because neither defendant is a national bank nor a subsidiary or agent of a national bank, or is otherwise acting on behalf of a national bank, and because application of the state law on which Madden's claims rely would not significantly interfere with any national bank's ability to exercise its powers under the NBA, we reverse the District Court's holding that the NBA preempts Madden's claims and accordingly vacate the judgment of the District Court. We leave to the District Court to address in the first instance whether the Delaware choice-of-law clause precludes Madden's claims.

The District Court also denied Madden's motion for class certification, holding that potential NBA preemption required individualized factual inquiries incompatible with proceeding as a class. Because this conclusion rested upon the same erroneous preemption analysis, we also vacate the District Court's denial of class certification.

BACKGROUND

A. Madden's Credit Card Debt, the Sale of Her Account, and the Defendants' Collection Efforts

[1] In 2005, **Saliha Madden**, a resident of New York, opened a Bank of America ("BoA") credit card account. BoA is a national bank. [1] The account was governed ***248** by a document she received from BoA titled "Cardholder Agreement." The following year, BoA's credit card program was consolidated into another national bank, FIA Card Services, N.A. ("FIA"). Contemporaneously with the transfer to FIA, the account's terms and conditions were amended upon receipt by Madden of a document titled "Change In Terms," which contained a Delaware choice-of-law clause.

Madden owed approximately $5,000 on her credit card account and in 2008, FIA "charged-off" her account (i.e., wrote off her debt as uncollectable). FIA then sold Madden's debt to Defendant–Appellee Midland Funding, LLC ("Midland Funding"), a debt purchaser. Midland Credit Management, Inc. ("Midland Credit"), the other defendant in this case, is an affiliate of Midland Funding that services Midland Funding's consumer debt accounts. Neither defendant is a national bank. Upon Midland Funding's acquisition of Madden's debt, neither FIA nor BoA possessed any further interest in the account.

In November 2010, Midland Credit sent Madden a letter seeking to collect payment on her debt and stating that an interest rate of 27% per year applied.

B. Procedural History

A year later, Madden filed suit against the defendants—on behalf of herself and a putative class—alleging that they had engaged in abusive and unfair debt collection practices in violation of the FDCPA, 15 U.S.C. §§ 1692e, 1692f, and had charged a usurious rate of interest in violation of New York law, N.Y. Gen. Bus. Law § 349; N.Y. Gen. Oblig. Law § 5–501; N.Y. Penal Law § 190.40 (proscribing interest from being charged at a rate exceeding 25% per year).

On September 30, 2013, the District Court denied the defendants' motion for summary judgment and Madden's motion for class certification. In ruling on the motion for summary judgment, the District Court concluded that genuine issues of material fact remained as to whether Madden had received the Cardholder Agreement and Change In Terms, and as to whether FIA had actually assigned her debt to Midland Funding. However, the court stated that if, at trial, the defendants were able to prove that Madden had received the Cardholder Agreement and Change In Terms, and that FIA had assigned her debt to Midland Funding, her claims would fail as a matter of law because the NBA would preempt any state-law usury claim against the defendants. The District Court also found that if the Cardholder Agreement and Change In Terms were binding upon Madden, any FDCPA claim of false representation or unfair practice would be defeated because the agreement permitted the interest rate applied by the defendants.

In ruling on Madden's motion for class certification, the District Court held that because "assignees are entitled to the protection of the NBA if the originating bank was entitled to the protection of the NBA ... the class action device in my view is not appropriate here." App'x at 120. The District Court concluded that the proposed class failed to satisfy Rule 23(a)'s commonality and typicality requirements because "[t]he claims of each member of the class will turn on whether the class member agreed to Delaware interest rates" and "whether the class member's debt was validly assigned to the Defendants," *id.* at ***249** 127–28, both of which were disputed with respect to Madden. Similarly, the court held that the requirements of Rule 23(b)(2) (relief sought appropriate to class as a whole) and (b)(3) (common questions of law or fact predominate) were not satisfied "because there is no showing that the circumstances of each proposed class member are like those of Plaintiff, and because the resolution will turn on individual determinations as to cardholder agreements and assignments of debt." *Id.* at 128.

On May 30, 2014, the parties entered into a "Stipulation for Entry of Judgment for Defendants for Purpose of Appeal." *Id.* at 135. The parties stipulated that FIA had assigned Madden's account to the defendants and that Madden had received the Cardholder Agreement and Change In Terms. This stipulation disposed of the two genuine disputes of material fact identified by the District Court, and provided that "a final, appealable judgment in favor of Defendants is appropriate." *Id.* at 138. The District Court "so ordered" the Stipulation for Entry of Judgment.

This timely appeal followed.

DISCUSSION

Madden argues on appeal that the District Court erred in holding that NBA preemption bars her state-law usury claims. We agree. Because neither defendant is a national bank nor a subsidiary or agent of a national bank, or is otherwise acting on behalf of a national bank, and because application of the state law on which Madden's claims rely would not significantly interfere with any national bank's ability to exercise its powers under the NBA, we reverse the District Court's holding that the NBA preempts Madden's claims and accordingly vacate the judgment of the District Court. We also vacate the District Court's judgment as to Madden's FDCPA claim and the denial of class certification because those rulings were predicated on the same flawed preemption analysis.

The defendants contend that even if we find that Madden's claims are not preempted by the NBA, we must affirm because Delaware law—rather than New York law—applies and the interest charged by the defendants is permissible under Delaware law. Because the District Court did not reach this issue, we leave it to the District Court to address in the first instance on remand.

I. National Bank Act Preemption

[2] The federal preemption doctrine derives from the Supremacy Clause of the United States Constitution, which provides that "the Laws of the United States which shall be

made in Pursuance" of the Constitution "shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. According to the Supreme Court, "[t]he phrase 'Laws of the United States' encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization." *City of New York v. FCC,* 486 U.S. 57, 63, 108 S.Ct. 1637, 100 L.Ed.2d 48 (1988).

[3] "Preemption can generally occur in three ways: where Congress has expressly preempted state law, where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law, or where federal law conflicts with state law." *Wachovia Bank, N.A. v. Burke,* 414 F.3d 305, 313 (2d Cir.2005), *cert. denied,* 550 U.S. 913, 127 S.Ct. 2093, 167 L.Ed.2d 830 (2007). The defendants appear to suggest that this case involves "conflict preemption," which "occurs when compliance with both state and federal law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the ***250** full purposes and objective of Congress." *United States v. Locke,* 529 U.S. 89, 109, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000) (internal quotation marks omitted).

[4] The National Bank Act expressly permits national banks to "charge on any loan ... interest at the rate allowed by the laws of the State, Territory, or District where the bank is located." 12 U.S.C. § 85. It also "provide [s] the exclusive cause of action" for usury claims against national banks, *Beneficial Nat'l Bank v. Anderson,* 539 U.S. 1, 11, 123 S.Ct. 2058, 156 L.Ed.2d 1 (2003), and "therefore completely preempt[s] analogous state-law usury claims," *Sullivan v. Am. Airlines, Inc.,* 424 F.3d 267, 275 (2d Cir.2005). Thus, there is "no such thing as a state-law claim of usury against a national bank." *Beneficial Nat'l Bank,* 539 U.S. at 11, 123 S.Ct. 2058; *see also Pac. Capital Bank, N.A. v. Connecticut,* 542 F.3d 341, 352 (2d Cir.2008) ("[A] state in which a national bank makes a loan may not permissibly require the bank to charge an interest rate lower than that allowed by its home state."). Accordingly, because FIA is incorporated in Delaware, which permits banks to charge interest rates that would be usurious under New York law, FIA's collection at those rates in New York does not violate the NBA and is not subject to New York's stricter usury laws, which the NBA preempts.

[5] The defendants argue that, as assignees of a national bank, they too are allowed under the NBA to charge interest at the rate permitted by the state where the assignor national bank is located—here, Delaware. We disagree. In certain circumstances, NBA preemption can be extended to non-national bank entities. To apply NBA preemption to an action taken by a non-national bank entity, application of state law to that action must significantly interfere with a national bank's ability to exercise its power under the NBA. *See Barnett Bank of Marion Cnty., N.A. v. Nelson,* 517 U.S. 25, 33, 116 S.Ct. 1103, 134 L.Ed.2d 237 (1996); *Pac. Capital Bank,* 542 F.3d at 353.

The Supreme Court has suggested that that NBA preemption may extend to entities beyond a national bank itself, such as non-national banks acting as the "equivalent to national banks with respect to powers exercised under federal law." *Watters v. Wachovia Bank, N.A.,* 550 U.S. 1, 18, 127 S.Ct. 1559, 167 L.Ed.2d 389 (2007). For example, the Supreme Court has held that operating subsidiaries of national banks may benefit from NBA preemption. *Id.; see also Burke,* 414 F.3d at 309 (deferring to reasonable regulation that operating subsidiaries of national banks receive the same preemptive benefit as the parent bank). This Court has also held that agents of national banks can benefit from NBA preemption. *Pac. Capital Bank,* 542 F.3d at 353–54 (holding that a third-party tax preparer who facilitated the processing of refund anticipation loans for a national bank was not subject to Connecticut law regulating such loans); *see also SPGGC, LLC v. Ayotte,* 488 F.3d 525, 532 (1st Cir.2007) ("The National Bank Act explicitly states that a national bank may use 'duly authorized officers or agents' to exercise its incidental powers." (internal citation omitted)), *cert. denied,* 552 U.S. 1185, 128 S.Ct. 1258, 170 L.Ed.2d 68 (2008).

The Office of the Comptroller of the Currency ("OCC"), "a federal agency that charters, regulates, and supervises all national banks," *Town of Babylon v. Fed. Hous. Fin. Agency,* 699 F.3d 221, 224 n. 2 (2d Cir.2012), has made clear that third-party debt buyers are distinct from agents or subsidiaries of a national bank, *see* OCC Bulletin 2014–37, Risk Management Guidance (Aug. 4, 2014), *available at* http://www.occ.gov/news–issuances/bulletins/ ***251** 2014/bulletin–2014–37.html ("Banks may pursue collection of delinquent accounts by (1) handling the collections internally, (2) using third parties as agents in collecting the debt, or (3) selling the debt to debt buyers for a fee."). In fact, it is precisely because national banks do not exercise control over third-party debt buyers that the OCC issued guidance regarding how national banks should manage the risk associated with selling consumer debt to third parties. *See id.*

In most cases in which NBA preemption has been applied to a non-national bank entity, the entity has exercised the powers of a national bank—i.e., has acted on behalf of a national bank in carrying out the national bank's business. This is not the case here. The defendants did not act on behalf of BoA or FIA in attempting to collect on Madden's debt. The defendants acted solely on their own behalves, as the owners of the debt.

No other mechanism appears on these facts by which applying state usury laws to the third-party debt buyers would significantly interfere with either national bank's ability to exercise its powers under the NBA. *See Barnett Bank*, 517 U.S. at 33, 116 S.Ct. 1103. Rather, such application would "limit [ ] only activities of the third party which are otherwise subject to state control," *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 191 (2d Cir.2007), and which are not protected by federal banking law or subject to OCC oversight.

We reached a similar conclusion in *Blumenthal*. There, a shopping mall operator, SPGGC, sold prepaid gift cards at its malls, including its malls in Connecticut. *Id.* at 186. Bank of America issued the cards, which looked like credit or debit cards and operated on the Visa debit card system. *Id.* at 186–87. The gift cards included a monthly service fee and carried a one-year expiration date. *Id.* at 187. The Connecticut Attorney General sued SPGGC alleging violations of Connecticut's gift card law, which prohibits the sale of gift cards subject to inactivity or dormancy fees or expiration dates. *Id.* at 187–88. SPGGC argued that NBA preemption precluded suit. *Id.* at 189.

We held that SPGGC failed to state a valid claim for preemption of Connecticut law insofar as the law prohibited SPGGC from imposing inactivity fees on consumers of its gift cards. *Id.* at 191. We reasoned that enforcement of the state law "does not interfere with BoA's ability to exercise its powers under the NBA and OCC regulations." *Id.* "Rather, it affects only the conduct of SPGGC, which is neither protected under federal law nor subject to the OCC's exclusive oversight." *Id.*

We did find, in *Blumenthal*, that Connecticut's prohibition on expiration dates could interfere with national bank powers because Visa requires such cards to have expiration dates and "an outright prohibition on expiration dates could have prevented a Visa member bank (such as BoA) from acting as the issuer of the Simon Giftcard." *Id.* at 191. We remanded for further consideration of the issue. Here, however, state usury laws would not prevent consumer debt sales by national banks to third parties. Although it is possible that usury laws might decrease the amount a national bank could charge for its consumer debt in certain states (i.e., those with firm usury limits, like New York), such an effect would not "significantly interfere" with the exercise of a national bank power.

Furthermore, extension of NBA preemption to third-party debt collectors such as the defendants would be an overly broad application of the NBA. Although national banks' agents and subsidiaries exercise national banks' powers and receive protection under the NBA when doing so, ***252** extending those protections to third parties would create an end-run around usury laws for non-national bank entities that are not acting on behalf of a national bank.

The defendants and the District Court rely principally on two Eighth Circuit cases in which the court held that NBA preemption precluded state-law usury claims against non-national bank entities. In *Krispin v. May Department Stores*, 218 F.3d 919 (8th Cir.2000), May Department Stores Company ("May Stores"), a non-national bank entity, issued credit cards to the plaintiffs. *Id.* at 921. By agreement, those credit card accounts were governed by Missouri law, which limits delinquency fees to $10. *Id.* Subsequently, May Stores notified the plaintiffs that the accounts had been assigned and transferred to May National Bank of Arizona ("May Bank"), a national bank and wholly-owned subsidiary of May Stores, and that May Bank would charge delinquency fees of up to "$15, or as allowed by law." *Id.* Although May Stores had transferred all authority over the terms and operations of the accounts to May Bank, it subsequently purchased May Bank's receivables and maintained a role in account collection. *Id.* at 923.

The plaintiffs brought suit under Missouri law against May Stores after being charged $15 delinquency fees. *Id.* at 922. May Stores argued that the plaintiffs' state-law claims were preempted by the NBA because the assignment and transfer of the accounts to May Bank "was fully effective to cause the bank, and not the store, to be the originator of [the plaintiffs'] accounts subsequent to that time." *Id.* at 923. The court agreed:

> [T]he store's purchase of the bank's receivables does not diminish the fact that it is now the bank, and not the store, that issues credit, processes and services customer accounts, and sets such terms as interest and late fees.

> Thus, although we recognize that the NBA governs only national banks, in these circumstances we agree with the district court that it makes sense to look to the originating entity (the bank), and not the ongoing assignee (the store), in determining whether the NBA applies.

Id. at 924 (internal citation omitted). [2]

Krispin does not support finding preemption here. In *Krispin,* when the national bank's receivables were purchased by May Stores, the national bank retained ownership of the accounts, leading the court to conclude that "the real party in interest is the bank." *Id.* Unlike *Krispin,* neither BoA nor FIA has retained an interest in Madden's account, which further supports the conclusion that subjecting the defendants to state regulations ***253** does not prevent or significantly interfere with the exercise of BoA's or FIA's powers.

The defendants and the District Court also rely upon *Phipps v. FDIC,* 417 F.3d 1006 (8th Cir.2005). In that case, the plaintiffs brought an action under Missouri law to recover allegedly unlawful fees charged by a national bank on mortgage loans. The plaintiffs alleged that after charging these fees, which included a purported "finder's fee" to third-party Equity Guaranty LLC (a non-bank entity), the bank sold the loans to other defendants. The court held that the fees at issue were properly considered "interest" under the NBA and concluded that, under those circumstances, it "must look at 'the originating entity (the bank), and not the ongoing assignee ... in determining whether the NBA applies.' " *Id.* at 1013 (quoting *Krispin,* 218 F.3d at 924 (alteration in original)).

Phipps is distinguishable from this case. There, the national bank was the entity that charged the interest to which the plaintiffs objected. Here, on the other hand, Madden objects only to the interest charged after her account was sold by FIA to the defendants. Furthermore, if Equity Guaranty was paid a "finder's fee," it would benefit from NBA preemption as an agent of the national bank. Indeed, *Phipps* recognized that " '[a] national bank may use the services of, and compensate persons not employed by, the bank for originating loans.' " *Id.* (quoting 12 C.F.R. § 7.1004(a)). Here, the defendants do not suggest that they have such a relationship with BoA or FIA. [3]

II. Choice of Law: Delaware vs. New York

The defendants contend that the Delaware choice-of-law provision contained in the Change In Terms precludes Madden's New York usury claims. [4] Although raised below, the District Court did not reach this issue in ruling on the defendants' motion for summary judgment. [5] Subsequently, in the Stipulation for Entry of Judgment, the parties resolved in the defendants' favor the dispute as to whether Madden was bound by the Change In Terms. The parties appear to agree that if Delaware law applies, the rate the defendants charged Madden was permissible. [6]

***254** We do not decide the choice-of-law issue here, but instead leave it for the District Court to address in the first instance. [7]

III. Madden's Fair Debt Collection Practices Act Claim

Madden also contends that by attempting to collect interest at a rate higher than allowed by New York law, the defendants falsely represented the amount to which they were legally entitled in violation of the FDCPA, 15 U.S.C. §§ 1692e(2)(A), (5), (10), 1692f(1). The District Court denied the defendants' motion for summary judgment on this claim for two reasons. First, it held that there was a genuine dispute of material fact as to whether the defendants are assignees of FIA; if they are, it reasoned, Madden's FDCPA claim would fail because state usury laws—the alleged violation of which provide the basis for Madden's FDCPA claim—do not apply to assignees of a national bank. The parties subsequently stipulated "that FIA assigned Defendants Ms. Madden's account," App'x at 138, and the District Court, in accord with its prior ruling, entered judgment for the defendants. Because this analysis was predicated on the District Court's erroneous holding that the defendants receive the same protections under the NBA as do national banks, we find that it is equally flawed.

Second, the District Court held that if Madden received the Cardholder Agreement and Change In Terms, a fact to which the parties later stipulated, any FDCPA claim of false representation or unfair practice would fail because the agreement allowed for the interest rate applied by the defendants. This conclusion is premised on an assumption that Delaware law, rather than New York law, applies, an issue the District Court did not reach. If New York's usury law applies notwithstanding the Delaware choice-of-law clause, the defendants may have made a false representation or engaged in an unfair practice insofar as their collection letter to Madden stated that they were legally entitled to charge interest in excess of that permitted by New York law. Thus, the District Court may need to revisit this conclusion after deciding whether Delaware or New York law applies.

Because the District Court's analysis of the FDCPA claim was based on an erroneous NBA preemption finding and a premature assumption that Delaware law applies, we vacate the District Court's judgment as to this claim.

IV. Class Certification

Madden asserts her claims on behalf of herself and a class consisting of "all persons residing in New York [ ] who were sent a letter by Defendants attempting to collect interest in excess of 25% per annum [ ] regarding debts incurred for personal, family, or household purposes." Pl.'s Class Certification Mem. 1, No. 7:11–cv–08149 (S.D.N.Y. Jan. 18, 2013), ECF No. 29. The defendants have represented that they sent such letters with respect to 49,780 accounts.

*255 Madden moved for class certification before the District Court. The District Court denied the motion, holding that because "assignees are entitled to the protection of the NBA if the originating bank was entitled to the protection of the NBA ... the class action device in my view is not appropriate here." App'x at 120. Because the District Court's denial of class certification was entwined with its erroneous holding that the defendants receive the same protections under the NBA as do national banks, we vacate the denial of class certification.

CONCLUSION

We REVERSE the District Court's holding as to National Bank Act preemption, VACATE the District Court's judgment and denial of class certification, and REMAND for further proceedings consistent with this opinion.

All Citations

786 F.3d 246

Footnotes

1 National banks are "corporate entities chartered not by any State, but by the Comptroller of the Currency of the U.S. Treasury." *Wachovia Bank v. Schmidt,* 546 U.S. 303, 306, 126 S.Ct. 941, 163 L.Ed.2d 797 (2006).

2 We believe the District Court gave unwarranted significance to *Krispin* 's reference to the "originating entity" in the passage quoted above. The District Court read the sentence to suggest that, once a national bank has originated a credit, the NBA and the associated rule of conflict preemption continue to apply to the credit, even if the bank has sold the credit and retains no further interest in it. The point of the *Krispin* holding was, however, that notwithstanding the bank's sale of its receivables to May Stores, it retained substantial interests in the credit card accounts so that application of state law to those accounts would have conflicted with the bank's powers authorized by the NBA. The crucial words of the sentence were "in these circumstances," which referred to the fact stated in the previous sentence of the bank's retention of substantial interests in the credit card accounts. As we understand the *Krispin* opinion, the fact that the bank was described as the "originating entity" had no significance for the court's decision, which would have come out the opposite way if the bank, notwithstanding that it originated the credits in question, had sold them outright to a new, unrelated owner, divesting itself completely of any continuing interest in them, so that its operations would no longer be affected by the application of state law to the new owner's further administration of the credits.

3 We are not persuaded by *Munoz v. Pipestone Financial, LLC,* 513 F.Supp.2d 1076 (D.Minn.2007), upon which the defendants and the District Court also rely. Although the court found preemption applicable to an assignee of a national bank in a case analogous to Madden's suit, it misapplied Eighth Circuit precedent by applying unwarranted significance to *Krispin* 's use of the word "originating entity" and straying from the essential inquiry—whether applying state law would "significantly interfere with the national bank's exercise of its powers," *Barnett Bank,* 517 U.S. at 33, 116 S.Ct. 1103, because of a subsidiary or agency relationship or for other reasons.

4 The Change In Terms, which amended the original Cardholder Agreement, includes the following provision: "This Agreement is governed by the laws of the State of Delaware (without regard to its conflict of laws principles) and by any applicable federal laws." App'x at 58, 91.

5 We reject Madden's contention that this argument was waived. First, although the defendants' motion for summary judgment urged the District Court to rule on other grounds, it did raise the Delaware choice-of-law clause. Defs.' Summ. J. Mem. 4 & n. 3, No. 7:11–cv–08149 (S.D.N.Y. Jan. 25, 2013), ECF No. 32. Second, this argument was not viable prior

to the Stipulation for Entry of Judgment due to unresolved factual issues—principally, whether Madden had received the Change In Terms.

6 We express no opinion as to whether Delaware law, which permits a "bank" to charge any interest rate allowable by contract, *see* Del. Code Ann. tit. 5, § 943, would apply to the defendants, both of which are non-bank entities.

7 Because it may assist the District Court, we note that there appears to be a split in the case law. *Compare Am. Equities Grp., Inc. v. Ahava Dairy Prods. Corp.,* No. 01 Civ. 5207(RWS), 2004 WL 870260, at *7–9 (S.D.N.Y. Apr. 23, 2004) (applying New York's usury law despite out-of-state choice-of-law clause); *Am. Express Travel Related Servs. Co. v. Assih,* 26 Misc.3d 1016, 1026, 893 N.Y.S.2d 438 (N.Y.Civ.Ct.2009) (same); *N. Am. Bank, Ltd. v. Schulman,* 123 Misc.2d 516, 520–21, 474 N.Y.S.2d 383 (N.Y.Cnty.Ct.1984) (same) *with RMP Capital Corp. v. Bam Brokerage, Inc.,* 21 F.Supp.3d 173, 186 (E.D.N.Y.2014) (finding out-of-state choice-of-law clause to preclude application of New York's usury law).

End of Document

Rules of the Chief Administrative Judge

PART 130. Costs And Sanctions

SUBPART 130-1. Awards Of Costs And Imposition Of Financial Sanctions For Frivolous Conduct In Civil Litigation

SUBPART 130-2. Imposition Of Financial Sanctions Or Costs For Unjustified Failure To Attend A Scheduled Court Appearance

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Section 130-1.1 Costs; sanctions.

(a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part. This Part shall not apply to town or village courts, to proceedings in a small claims part of any court, or to proceedings in the Family Court commenced under Article 3, 7 or 8 of the Family Court Act.

(b) The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both. Where the award or sanction is against an attorney, it may be against the attorney personally or upon a partnership, firm, corporation, government agency, prosecutor's office, legal aid society or public defender's office with which the attorney is associated and that has appeared as attorney of record. The award or sanctions may be imposed upon any attorney appearing in the action or upon a partnership, firm or corporation with which the attorney is associated.

(c) For purposes of this Part, conduct is frivolous if:

(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false.

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the (1) circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

(d) An award of costs or the imposition of sanctions may be made either upon motion in compliance with CPLR 2214 or 2215 or upon the court's own initiative, after a reasonable opportunity to be heard. The form of the hearing shall depend upon the nature of the conduct and the circumstances of the case.

Historical Note
Sec. filed Oct. 31, 1988; amds. filed: Oct. 9, 1997; Jan. 8, 1998; June 25, 1998 eff. June 19, 1998. Amended (a).

Section 130-1.1a Signing of papers.

(a) Signature. Every pleading, written motion, and other paper, served on another party or filed or submitted to the court shall be signed by an attorney, or by a party if the party is not represented by an attorney, with the name of the attorney or party clearly printed or typed directly below the signature. Absent good cause shown, the court shall strike any unsigned paper if the omission of the signature is not corrected promptly after being called to the attention of the attorney or party.

(b) Certification. By signing a paper, an attorney or party certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, (1) the presentation of the paper or the contentions therein are not frivolous as defined in section 130-1.1(c) of this Subpart, and (2) where the paper is an initiating pleading, (i) the matter was not obtained through illegal conduct, or that if it was, the attorney or other persons responsible for the illegal conduct are not participating in the matter or sharing in any fee earned therefrom, and (ii) the matter was not obtained in violation of 22 NYCRR 1200.41-a [DR 7-111].

Historical Note
Sec. filed Oct. 9, 1997; amd. filed Jan. 8, 1998 eff. March 1, 1998. Amended eff. date from Jan. 1, 1998 to March 1, 1998.

Revised February 01, 2007

Section 130-1.2 Order awarding costs or imposing sanctions.

The court may award costs or impose sanctions or both only upon a written decision setting forth the conduct on which the award or imposition is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount awarded or imposed to be appropriate. An award of costs or the imposition of sanctions or both shall be entered as a judgment of the court. In no event shall the amount of sanctions imposed exceed $10,000 for any single occurrence of frivolous conduct.

Historical Note
Sec. filed Oct. 31, 1988; amds. filed: Oct. 9, 1997; Jan. 8, 1998 eff. March 1, 1998. Amended eff. date from Jan. 1, 1998 to March 1, 1998.

Section 130-1.3 Payment of sanctions.

Payments of sanctions by an attorney shall be deposited with the Lawyers' Fund for Client Protection established pursuant to section 97-t of the State Finance Law. Payments of sanctions by a party who is not an attorney shall be deposited with the clerk of the court for transmittal to the Commissioner of Taxation and Finance. The court shall give notice to the Lawyers' Fund of awards of sanctions payable to the fund by sending a copy of the order awarding sanctions, or by sending other appropriate notice, to the Lawyers' Fund for Client Protection, 119 Washington Avenue, Albany, NY 12210.

Historical Note
Sec. filed Oct. 31, 1988; amds. filed: May 22, 1995; Oct. 13, 1999 eff. Oct. 7, 1999.

Section 130-1.4 Application to officers other than judges of the courts of the Unified Court System.

The powers of a court set forth in this Subpart shall apply to judges of the housing part of the New York City Civil Court and to support magistrates appointed pursuant to section 439 of The Family Court Act, except that the powers of Family Court support magistrates shall be limited to a determination that a party or attorney has engaged in frivolous conduct, which shall be subject to confirmation by a judge of the Family Court who may impose any costs or sanctions authorized by this Subpart.

Historical Note
Sec. filed Oct. 31, 1988; amd. filed March 29, 2001 eff. March 26, 2001.

Section 130-1.5 Exception.

This rule shall not apply to requests for costs or attorneys' fees subject to the provisions of CPLR 8303-a.

Historical Note
Sec. filed Oct. 31, 1988 eff. Jan. 1, 1989.

Section 130-2.1 Costs; sanctions.

(a) Notwithstanding and in addition to the provisions of Subpart 130-1 of this Part, the court, in its discretion, may impose financial sanctions or, in addition to or in lieu of imposing sanctions, may award costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, upon any attorney who, without good cause, fails to appear at a time and place scheduled for an action or proceeding to be heard before a designated court. This Part shall not apply to town or village courts or to proceedings in a small claims part of any court.

(b) In determining whether an attorney's failure to appear at a scheduled court appearance was without good cause and in determining the measure of sanctions or costs to be imposed, the court shall consider all of the attendant circumstances, including but not limited to:

(1) the explanation, if any, offered by the attorney for his or her nonappearance;

(2) the adequacy of the notice to the attorney of the time and date of the scheduled appearance;

(3) whether the attorney notified the court and opposing counsel in advance that he or she would be unable to appear;

(4) whether substitute counsel appeared in court at the time previously scheduled to proffer an explanation of the attorney's nonappearance and whether such

substitute counsel was prepared to go forward with the case;

(5) whether an affidavit or affirmation of actual engagement was filed in the manner prescribed in Part 125 of the Uniform Rules for the Trial Courts of the Unified Court System;

(6) whether the attorney on prior occasions in the same action or proceeding failed to appear at a scheduled court action or proceeding;

(7) whether financial sanctions or costs have been imposed upon the attorney pursuant to this section in some other action or proceeding; and

(8) the extent and nature of the harm caused by the attorney's failure to appear.

(c) The court, as appropriate, may impose any such financial sanctions or award costs upon an attorney personally or upon a partnership, firm, corporation, government agency, prosecutor's office, legal aid society or public defender's office with which the attorney is associated and that has appeared as attorney of record.

(d) The imposition of sanctions or award of costs may be made either upon motion or upon the court's own initiative, after a reasonable opportunity to be heard. The form of the hearing shall depend upon the nature of the attorney's failure to appear and the totality of the circumstances of the case.

Historical Note
Sec. filed Oct. 31, 1988; amds. filed: Nov. 2, 1989; May 22, 1995; Oct. 9, 1997; Jan. 8, 1998 eff. March 1, 1998. Amended eff. date from Jan. 1, 1998 to March 1, 1998.

Section 130-2.2 Order imposing sanctions and costs.

The court may impose sanctions or award costs or both only upon a written memorandum decision or statement on the record setting forth the conduct on which the award or imposition is based and the reasons why the court found the attorney's failure to appear at a scheduled court appearance to be without good cause. The imposition of sanctions or an award of costs or both shall be entered as a judgment of the court. In no event shall the total amount of sanctions imposed and costs awarded exceed $2,500 for any single failure to appear at a scheduled court appearance.

Historical Note
Sec. filed Oct. 31, 1988; amds. filed: Nov. 2, 1989; May 22, 1995; Oct. 9, 1997; Jan. 8, 1998 eff. March 1, 1998. Amended eff. date from Jan. 1, 1998 to March 1, 1998.

Section 130-2.3 Payment of sanctions.

Payments of sanctions shall be deposited with the Lawyers' Fund for Client Protection established pursuant to section 97-t of the State Finance Law.

Historical Note
Sec. filed Oct. 31, 1988; amds. filed: Nov. 2, 1989; May 22, 1995 eff. July 1, 1995.

Section 130-2.4 Application to officers other than judges of the courts of the Unified Court System.

The powers of a court set forth in this Subpart shall apply to judges of the housing part of the New York City Civil Court, support magistrates appointed pursuant to section 439 of the Family Court Act, and judicial hearing officers, except that:

(a) the power of the Family Court hearing examiners shall be limited to a determination that an attorney, without good cause, has failed to appear at a time and place scheduled for a Family Court proceeding, which shall be subject to confirmation by a judge of the Family Court who may impose any sanctions authorized by this Subpart; and

(b) the powers of judicial hearing officers shall be limited to civil cases.

Historical Note
Sec. filed Nov. 2, 1989; amds. filed: May 22, 1995; March 29, 2001

New Consumer Credit Rules and Resources

Overview and Applicability of New Rules

Additional Notice Requirement

Required Affidavits, Effective Dates and Fillable Forms:

- Additional Notice
- Affirmation of Non-Expiration of Statute of Limitations
- Affidavit of Facts by Original Creditor
- Affidavit of Facts and Sale of Account by Original Creditor
- Affidavit of Facts and Purchase of Account by Debt Buyer Plaintiff
- Affidavit of Purchase and Sale of Account by Debt Seller
- Additional Note for Debt Buyer Actions

Overview and Applicability of New Rules

On April 30, 2014, Chief Judge Jonathan Lippman announced that, subject to a 30-day public comment period, the court system would adopt major reforms addressing default judgment applications in consumer credit cases, including those commenced by third-party debt buyers. The new rules and affidavits are intended to ensure a fair legal process and address documented abuses, including entry of default judgments despite insufficient or incorrect factual proof, expiration of the applicable statute of limitations and failed service of process.

Effective October 1, 2014, the new rules apply to default judgment applications in consumer credit collection cases where such applications are made to the clerk under CPLR 3215(a) in the Supreme Court, New York City Civil Court, City Courts outside New York City, and District Courts. The new default judgment rules apply to consumer credit transactions involving revolving or open-end credit extended by a financial institution to an individual primarily for personal, family or household purposes, with terms that include periodic payment provisions, late charges and interest accrual. **This definition applies to credit card debt only.** It does not apply to debt incurred in connection with, among others, medical services, student loans, auto loans or retail installment contracts.

The new rules require original creditor and debt buyer plaintiffs to submit specific affidavits that meet substantive legal and evidentiary standards for entry of a default judgment under New York law. In addition, plaintiffs must submit to the clerk an additional notice of a consumer credit action to be mailed by the clerk to the debtor at the address where process was served. The Administrative Orders promulgating the new consumer credit rules, as well as the applicable rules by court type, are as follows:

- Administrative Order dated September 15, 2014
- Administrative Order dated December 23, 2014
- New York City Civil Court: 22 NYCRR §§ 208.14-a and 208.6(h)
- City Courts outside the City of New York: 22 NYCRR §§ 210.14-a and 210.14-b
- Nassau and Suffolk District Courts: 22 NYCRR §§ 212.14-a and 212.14-b
- Supreme & County Courts: 22 NYCRR §§ 202.27-a and 202.27-b

Additional Notice Requirement

Effective October 1, 2014, at the time of filing proof of service of the summons and complaint, or at any time thereafter, the plaintiff must to submit to the clerk a stamped, unsealed envelope containing an Additional Notice of Consumer Credit Action addressed to the defendant at the address where process was served. The face of the envelope shall contain as a return address the appropriate court clerk's office. The additional notice is to be mailed promptly by the court clerk to the defendant. No default judgment may be entered unless there has been compliance with this requirement and at least 20 days have elapsed from the date of mailing. No default judgment may be entered if the additional notice is returned to the court as undeliverable, unless the address at which process was served matches the defendant's address on record with the New York State Department of Motor Vehicles. It is the plaintiff's responsibility to obtain and submit any DMV records to the court clerk. It is the responsibility of the court clerk to ensure that the address on the DMV record matches the address where process was served.

Please note that the content of the additional notice for the New York City Civil Court differs from the additional notice applicable in other courts.

Required Affidavits, Effective Dates and Fillable Forms

Pursuant to the new rules, the plaintiff must file the following papers as indicated below when seeking a CPLR 3215(a) default judgment in a consumer credit transaction for credit card debt. For your convenience, these required papers are provided as fillable PDF forms as follows:

Additional Notice of Consumer Credit Action — NYC Civil Court (all actions)

Additional Notice of Consumer Credit Action — all other courts (all actions)
(i.e., City Courts outside NYC, District Courts, and Supreme & County Courts)

- Effective 10/1/14, required for ***ALL*** CPLR 3215(a) default judgment applications filed by Original Creditors and Debt Buyers ***irrespective of when the action was commenced or when the debt was purchased.***
- Informs the defendant that a consumer credit action has been filed against them by the plaintiff.

- The Additional Notice must be submitted with an envelope:
    1. addressed to the defendant at the same address where the plaintiff served the summons and complaint upon defendant
    2. bearing the return address of the applicable Court Clerk's Office
    3. with first-class postage affixed
- NOTE: When using the fillable form, type the name and address of the court where the default judgment application was filed in the applicable fields. This name and address should match the return address on the envelope.

<u>Affirmation of Non-Expiration of Statute of Limitations</u> (all actions)

- Effective 10/1/14, required for ***ALL*** CPLR 3215(a) default judgment applications filed by Original Creditors and Debt Buyers ***irrespective of when the action was commenced or when the debt was purchased.***
- Must be executed by plaintiff's counsel affirming that the applicable statute of limitations has not expired.

<u>Affidavit of Facts by Original Creditor</u> (Original Creditor actions only)

- Effective 10/1/14, required for ***ALL*** CPLR 3215(a) default judgment applications filed by Original Creditors.
- The plaintiff must attach the following exhibits:
    - Copy of credit agreement as defined in the new rules
    - If it is not contained in the credit agreement, other business records of the Original Creditor that set forth the following required information:
        - Name of the defendant
        - Last four digits of the account number
        - Date and amount of the last payment
        - Date and amount of charge-off balance
        - Amounts of any post-charge-off interest and post-charge-off fees and charges, less any post-charge-off credits or payments made by or on behalf the defendant
    - If seeking a judgment on Account Stated cause of action, must also complete paragraph 3 and attach a copy of final account statement

<u>Affidavit of Facts and Sale of Account by Original Creditor</u> (Debt Buyer actions only)

- Effective 10/1/14 through 6/30/15, required for CPLR 3215(a) default judgment applications filed by Debt Buyers ***if the debt was purchased from an Original Creditor on or after 10/1/2014.***
- Effective 7/1/15, required for ***ALL*** CPLR 3215(a) default judgment applications filed by Debt Buyers ***irrespective of when the debt was purchased from an Original Creditor.***
- Establishes that:
    - there was a contract between the Original Creditor and the defendant
    - there was a breach of the contract by the defendant
    - the Original Creditor sold the delinquent consumer credit account to a Debt Buyer
    - the status of the account at the time of sale
- The following exhibits must be attached:
    - Copy of Bill of Sale or written Assignment of Account
    - Copy of credit agreement as defined in the new rules
    - If it is not contained in the credit agreement, other business records of the Original Creditor that set forth the following required information:
        - Name of the defendant
        - Last four digits of the account number
        - Date and amount of the last payment, if any
        - Date and amount of charge-off balance
        - Amounts of any post-charge-off interest and post-charge-off fees and charges, less any post-charge-off credits or payments made by or on behalf the defendant
        - Balance due at the time of sale
    - If seeking a judgment on Account Stated cause of action, must also complete paragraph 4 and attach a copy of final account statement

<u>Affidavit of Facts and Purchase of Account by Debt Buyer Plaintiff</u> (Debt Buyer actions only)

- Effective 10/1/14 through 6/30/15, required for CPLR 3215(a) default judgment applications filed by Debt Buyers ***if the debt was purchased from an Original Creditor on or after 10/1/2014.***
- Effective 7/1/15, required for ***ALL*** CPLR 3215(a) default judgment applications filed by Debt Buyers ***irrespective of when the debt was purchased from an Original Creditor.***
- Establishes that the Debt Buyer Plaintiff now owns the account, the chain of title of the account, and the current status of the account.
- The plaintiff must attach the following exhibits:
    - Business records that set forth:
        - Name of the defendant
        - Last four digits of the account number
        - Amount of charge-off balance
        - Amounts of any post-charge-off interest and post-charge-off fees and charges, less any post-charge-off credits or payments made by or on behalf the defendant

        - Amount defendant currently owes on the account

<u>**Affidavit of Purchase and Sale of Account by Debt Seller**</u> (Debt Buyer actions only)

- Effective 10/1/14 through 6/30/15, required for CPLR 3215(a) default judgment applications filed by Debt Buyers ***if the debt was purchased from an Original Creditor on or after 10/1/2014***.
- Effective 7/1/15, required for ***ALL*** CPLR 3215(a) default judgment applications filed by Debt Buyers ***irrespective of when the debt was purchased from an Original Creditor***.
- Establishes the purchase of the account by one Debt Buyer and the subsequent sale of the account to another Debt Buyer as well as the status of the account at the time of sale.
- The following exhibits must be attached:
    - Copy of Bill of Sale or written Assignment of Account
    - Business records that set forth:
        - Name of the defendant
        - Last four digits of the account number
        - Amount of charge-off balance
        - Amounts of any post-charge-off interest and post-charge-off fees and charges, less any post-charge-off credits or payments made by or on behalf the defendant
        - Balance due at the time of sale
    - A separate affidavit is required for each Debt Seller that owned the account before the plaintiff, as applicable

Additional Note for Debt Buyer Actions

- Effective 10/1/14 through 6/30/15, the following are required ***if the debt was purchased from an Original Creditor BEFORE 10/1/2014***:
    - <u>Additional Notice</u>
    - <u>Affirmation of Non-Expiration of Statute of Limitations</u>
    - The plaintiff must affirm that the debt was purchased from an Original Creditor ***BEFORE*** 10/1/2014 and must attach proof of that fact.

[*1]

Erin Servs. Co., LLC. v Bohnet
2010 NY Slip Op 50327(U) [26 Misc 3d 1230(A)]
Decided on February 23, 2010
District Court Of Nassau County, Second District
Ciaffa, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on February 23, 2010

District Court of Nassau County, Second District

Erin Services Co., LLC., Plaintiff(s)

against

Patricia Bohnet, S/H/A PATRICIA BONNET, Defendant(s)

19984/04

Eltman, Eltman & Cooper, P.C. 90 William Street, New York, NY 10038, attorney for Plaintiff

Patricia Bohnet, 15 Dorothy Place, Lynbrook, NY 11563, Defendant Pro se

Lawyers' Fund for Client Protection

Michael A. Ciaffa, J.

"High volume" debt collection law practices are subject to the same ethical rules as apply to lawyers handling any other civil litigation matter. While mistakes can be made by any law office, lawyers engaged in the collection of assigned debts seem especially prone to pursuing claims improperly, often at the expense of the most vulnerable members of our society.

On a case-by-case basis, improper litigation practices in such cases are typically corrected through vacatur of a default judgment and dismissal of the complaint. Sometimes, it turns out that the plaintiff has obtained judgment based upon faulty proof of service, and/or inadequate proof. The debts, in many cases, are quite old, having been "written off" long ago by the original creditor. Proof of assignment is usually lacking. And when the debtor asks for verification and documentation, the plaintiff rarely is in a position to provide it.

This matter, regrettably, involves a veritable "perfect storm" of mistakes, errors, misdeeds, and improper litigation practices by plaintiff's counsel, Eltman, Eltman & Cooper, P.C. Defendant, Patricia Bohnet, was the victim of these improper actions. As explained more fully below, plaintiff's counsel are being sanctioned for multiple acts of frivolous conduct throughout the course of this matter. On no fewer than 18 occasions, counsel failed to satisfy its ethical obligation under Rule 130. Based upon the record adduced before this Court, substantial sanctions, totaling $14,800.00, are wholly warranted.

HISTORY OF PROCEEDINGS

[*2]

The Court file indicates that this assigned-debt lawsuit was commenced in August 2004, and resulted in a default judgment entered by the Clerk on October 21, 2004. Nearly five years later, by Order to Show Cause dated July 10, 2009, defendant Bohnet moved for an order vacating and setting aside the default judgment and dismissing the complaint.

This Court signed the Order to Show Cause based upon defendant's facially meritorious affidavits, which raised *bona fide* issues respecting the underlying judgment. Among other claims, defendant presented sworn allegations concerning false and faulty service of process, the absence of notice and an opportunity to be heard before a judgment was entered, improper debt-collection practices, and plaintiff's failure to provide verification of the underlying debt in response to defendant's repeated requests.

The Order to Show Cause included an explicit direction requiring "Personal Appearance" by all parties. Notwithstanding this direction, plaintiff's counsel failed to appear on the return date, without excuse or explanation.

Defendant Bohnet appeared as required on the return date. After hearing testimony from her, in open court, I concluded, upon her affidavits and sworn testimony, that the 2004 default judgment had been obtained through a demonstrably false affidavit of service. That affidavit, on its face, claimed that defendant had been personally served at a certain Lynbrook address on July 30, 2004. However, defendant hadn't lived at that address since 1998. Moreover, defendant, in fact, had no actual notice of the action until June 2009, when she was contacted and harassed at her job by someone affiliated with plaintiff's counsel's office. Defendant repeatedly sought verification from plaintiff's counsel regarding the underlying alleged debt and the judgment plaintiff had obtained. Plaintiff's counsel were completely uncooperative and abusive to her.

In the face of defendant's sworn statements, counsel's failure to appear, and defendant's testimony in open court, I issued an order vacating the default judgment and dismissing the complaint with prejudice. My order specifically ordered counsel for plaintiff to appear for a hearing on sanctions under Rule 130 for frivolous conduct in connection with the prosecution of this action.

When the matter was next heard, a *per diem* attorney with no personal knowledge appeared in lieu of plaintiff's counsel. Defendant complained, at that time, that representatives of plaintiff's counsel had been continuing to hound her for payment of the alleged debt, through multiple calls to her home and cell phone. The latter acts took place *after* the Court had issued an order dismissing the action. The Court accordingly issued a further order directing counsel to refrain from calling defendant, and again directing counsel to appear for a sanctions hearing.

An inexperienced associate appeared on November 12, 2009, bringing with him little from his file. The associate had no proof from the firm's file establishing any of the facts underlying the claim. He had no proof that defendant once owed a debt to First USA, as alleged. He had no proof that defendant ever defaulted on any such debt. He had no proof that his firm's [*3]client Erin Services Co., LLC., had ever obtained a lawful assignment of any such debt. He had no proof that anyone actually provided defendant with notice of the assignment. He offered no proof that anyone from Erin Services ever contacted defendant, before bringing suit, attempting to collect the alleged debt. Although he claimed, in conclusory fashion, that his firm currently followed certain

procedures for verifying the address of persons they intended to sue, he could notdescribe the procedures followed in 2004, when defendant was first sued.

In the face of this meager presentation, defendant testified convincingly that her experience with Erin Services and its counsel had scared her. In order to contest its baseless claims, she was required to take off several days from work. And the continued calls she kept getting, after the judgment had been vacated, were extremely disturbing to her.

The proceedings on November 11, 2009, ended with a direction requiring counsel to produce its "complete" file, save privileged documents, for the Court's review. The Court's expectation was that the file would show, better than any other evidence, whether counsel had satisfied its ethical duty, at each step in the process, to move forward with the claim only if it had a valid factual and legal basis for doing so. Regrettably, counsel, once again, failed to produce its complete file, and it failed to present a further defense of its misconduct.

Instead of providing its complete file, counsel submitted a CD-ROM to the court, containing a jumble of computer entries. The submission raised more questions than it answered. Most notably, the computer entries show that in May 2004, the firm records incorrectly listed defendant's address as being in East Rockaway, New York. However, the following month, in June 2004, the records show an unexplained change from that address to a second incorrect address - her former residence in Lynbrook. The latter listing was apparently the factual predicate for sending the process server to defendant's former residence address, where service was purportedly made upon her, personally.

No explanation is offered for why the firm believed that one address or the other was the correct one. No proof of due diligence in investigating the accuracy of the different listings is submitted. The computer records are also notable for what they fail to include: namely, proof of the assignment of the original account by First USA, proof that defendant actually owed money on that account at the time of the assignment, and proof that plaintiff had a good faith basis for pursuing the claim at the time the action was commenced in 2004. Indeed, to this day counsel has failed to provide a scintilla of evidence that defendant was actually indebted to First USA many years ago, or that plaintiff Erin Services acquired a lawful assignment of a *bona fide* debt.

FINDINGS RESPECTING BASIS FOR SANCTIONS

Based upon the papers before me, the testimony submitted, and the absence of contrary evidence, from which an adverse inference may be drawn, the Court finds that plaintiff's counsel, [*4]Eltman, Eltman & Cooper, P.C., has engaged in the following frivolous and sanctionable conduct under Part 130 of the Uniform Court Rules:

1.Failing to properly investigate in 2004 whether defendant actually resided at the Lynbrook address listed on the summons;

2.Advising its process server, without making a diligent investigation, to make service at that address;

3.Failing to supervise/oversee its process server with respect to making proper service upon defendant;

4.Filing an affidavit of service that it knew or should have known included a false claim of personal service upon defendant;

5.Filing a "verified complaint" without investigating the factual basis for its claims that First USA extended credit to defendant, that defendant failed to make required payments, and that $3,158.68 was duly demanded by First USA and was then due and owing.

6.Filing a "verified complaint" without investigating whether First USA had duly and properly assigned all right, title and interest in the account to the plaintiff, Erin Services Co., LLC, prior to commencement of the action;

7.Failing to investigate whether plaintiff had taken an assignment of a claim for the sole purpose of bringing suit upon it, in violation of Judiciary Law §489;

8.Failing to investigate whether defendant had been given notice of the assignment before plaintiff commenced suit against defendant as an alleged assignee;

9.Filing with the complaint an affidavit from an assistant secretary of the plaintiff, falsely claiming "personal knowledge" of facts respecting the alleged underlying debt;

10.Requesting and obtaining a default judgment against defendant which it knew or should have known was supported by insufficient proof and/or

false and/or fraudulent affidavits;

11.Attempting to enforce a default judgment it knew or should have known was invalidly obtained;

12.Failing to investigate, in good faith, defendant's protests in 2009, that the judgment had been improperly obtained; [*5]

13.Failing to investigate, in good faith, whether the underlying claim had a valid factual and legal basis when filed, upon defendant's verification request in 2009;

14.Failing to appear in Court, as ordered, in response to defendant's order to show cause;

15.Disobeying the Court's order of dismissal by continuing efforts to collect the alleged debt from defendant following dismissal of the complaint;

16.Harassing and/or maliciously injuring defendant through phone calls to her home and cell phone following dismissal of the complaint;

17.Failing to send an attorney with knowledge of the facts to Court on the October 21, 2009 hearing date, causing its rescheduling;

18.Failing to produce counsel's complete file, as directed, in connection with the sanctions hearing.

SANCTIONS AWARDED

The sanctions to be awarded must, necessarily, be sufficient to deter the kind of egregious conduct presented. Keeping in mind the limits imposed by §130-1.2, the Court grants sanctions in the amount of $2,500.00 for the service of process-related violations (#1-4), $2,500.00 for failing to assess the legal and factual basis for the claim (#6-9), $2,500.00 for improperly obtaining and trying to enforce a default judgment against defendant (#10-11); $1,000.00 for delaying final resolution by ignoring defendant's protests and objections (#12-13), $1,000.00 for failures to appear in Court and/or sending persons lacking knowledge (#14 and 17); $500.00 for disobedience of the Court's order requiring production of plaintiff's complete file (#18); and $4,800.00 payable to defendant, directly, as compensation for being subjected to continued harassing and improper phone calls (#15-16) and for having to take time off from work to obtain judicial relief in this matter. Except for the last amount, the sanctions shall be payable to the Lawyers' Fund for Client Protection. All payments shall be made within

30 days.

SO ORDERED:

DISTRICT COURT JUDGE

Dated: February 23, 2010

CC:Eltman, Eltman & Cooper, P.C.

Patricia Bohnet, Pro se

Lawyers' Fund for Client Protection

MAC:ju 12/1/09

LR Credit 21 LLC v Paryshkura
2010 NY Slip Op 20538 [30 Misc 3d 805]
December 22, 2010
Ciaffa, J.
District Court Of Nassau County, Second District
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
As corrected through Friday, April 15, 2011

[*1]

LR Credit 21 LLC, Plaintiff, **v** **Tatyana Paryshkura, Defendant.**

District Court of Nassau County, Second District, December 22, 2010

APPEARANCES OF COUNSEL

Mel Harris & Associates, New York City, for plaintiff. *Tatyana Paryshkura*, defendant pro se.

{**30 Misc 3d at 806} OPINION OF THE COURT

Michael A. Ciaffa, J.

Supplemental Decision Allowing Defendant to Withdraw Consent to Settlement

The adversary system works fairly well in civil cases where the parties are each represented by counsel. It works less well when one side has an attorney and the other appears pro se.

In consumer debt matters, in particular, the defendant rarely has the benefit of a lawyer's help. This is not surprising. Persons who are being sued for an alleged indebtedness typically are individuals with multiple financial problems. Regardless of whether they legitimately owe the alleged debt, or not, most cannot afford to hire a lawyer. As a consequence, those who appear must typically do so, pro se.

A defendant's pro se status often makes the court's role more difficult. On the one hand, to quote Chief Justice Roberts, judges act as umpires; their job is "to call balls and strikes and not to pitch or bat." On the other hand, judges have peculiar responsibilities in cases involving pro se litigants. They include, in many cases, supervision of the settlement process, both in and out of court. If it appears that a party with counsel has taken "undue advantage" over an uncounseled litigant, judges have the power and duty to make appropriate inquiries of the parties, and in appropriate cases, allow the defendant to withdraw from a proposed settlement.

In this assigned debt matter, precisely such a situation was presented. Plaintiff's counsel submitted a proposed "stipulation of payment" purporting to settle the action shortly in advance of a scheduled trial. At a conference respecting the proposed [*2] settlement that was held, at the court's request, on December 3, 2010, defendant advised the court that she has been "intimidated" into signing the stipulation. The court determined that defendant should be allowed to withdraw her consent to the settlement. This decision explains at some length the legal basis for that determination.

The principles applied by the court can be traced back to ancient common law. (*See e.g. Becker v Lamont*, 13 How Prac 23 [Sup Ct, NY County 1855].) Well before the Civil War, our courts were granting relief from settlements "made in ignorance of material circumstances affecting the case." (*Id.* at 26.) So, too, our state courts' judges have long recognized "the common{**30 Misc 3d at 807} principle" that they are empowered to "protect those who are unable to protect themselves" against adversaries who might take "undue advantage" of them. (*Id.*)

Tested by time, experience, and the wisdom of ages, these common-law rules still live today. Circumstances may have changed over time, but the principles remain the same. In more recent years our state's appellate courts have noted "many times" that relief from a stipulation may be granted if enforcement "would be unjust or inequitable or [would] permit the other party to gain an unconscionable advantage." (*Weitz v Murphy*, 241 AD2d 547, 548 [2d Dept 1997].) "[A]lmost any given state of facts" may justify such relief. (*Id.*)

Of course, the court's power to relieve a party from the terms of a stipulation requires "a showing of good cause." (*Matter of Frutiger*, 29 NY2d 143, 149-150 [1971].) However, "good cause" may be found even in the absence of proof of "fraud, collusion, mistake, accident, or some other ground of the same nature." (*Id.* at 150.) As the Court of Appeals made plain in *Frutiger*, "[i]t is sufficient if it appears that either party has inadvertently, inadvisably or improvidently entered into an agreement which will take the case out of the due and ordinary course of proceeding in the action, and in so doing may work to his prejudice." (*Id.*, quoting *Van Nuys v Fitsworth*, 10 NYS 507, 508 [1890].)

Furthermore, in cases where the parties "can be restored to substantially their former position," the courts "as a general rule" should exercise such power "if it appears that the stipulation was entered into unadvisedly or that it would be inequitable to hold the parties to it." (*Matter of Frutiger* at 150, quoting *Magnolia Metal Co. v Pound*, 60 App Div 318, 320 [1st Dept 1901].) Through such judicial oversight, the court properly exercises its control over the proceedings "with a view to a final disposition . . . [on the] merits." (*Van Nuys v Fitsworth*, 10 NYS at 508.)

The circumstances at hand presented a classic case for granting such judicial relief. The defendant, in this case, ignorant of her rights, signed an imprudent settlement, agreeing to pay plaintiff, a debt buyer, monthly sums otherwise needed for food and rent. The settlement agreement obligated her to make payments to plaintiff, monthly, for more than four years. Although settlements like this often benefit both debtors and creditors, the defendant told the court, in no uncertain terms, that she had [*3]been "intimidated" into the signing of the settlement, and{**30 Misc 3d at 808} that plaintiff had convinced her that she had no choice but to capitulate to plaintiff's demands.

Under the circumstances presented, it was painfully obvious to the court that plaintiff obtained the settlement outside of court by taking undue advantage of defendant. The judges of this court, and the lawyers practicing before them, know all too well that debt buyers rarely have readily available proof to establish an assigned debt claim. The pennies paid by debt buyers for the right to pursue stale and questionable claims certainly do not justify misleading and heavy-handed collection tactics outside of court. When such matters actually come on for trial, they are typically abandoned, dismissed or compromised for a small fraction of their hypothetical value.

Equally important, when the court scheduled a conference to address the proposed settlement, plaintiff's counsel was told that it should send an attorney with "complete knowledge of the file." Nevertheless, the attorney appearing for plaintiff was unable to provide the court with proof of the alleged assignment, proof of notice of the assignment, or proof of the underlying debt. The absence of such proof weighs heavily in favor of allowing defendant to withdraw her consent to the settlement. Allowing her to do so has the effect of restoring the case to the status quo ante, through which plaintiff may, if able to do so, pursue its claim on the merits, while protecting the rights of a pro se defendant to insist upon competent proof before a court can issue judgment upon the claimed indebtedness.

For these reasons, as the court previously determined in open court, and as it reiterates in this decision, this case shall proceed to trial on January 27, 2011. In the absence of a new, mutually agreeable settlement, the claims of plaintiff, pursuant to its alleged status as the assignee of a debt owed by defendant, shall be heard on the merits.

COUNSELORS AT LAW

Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP

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ATTORNEY PROFILES

OF COUNSEL

Michael A. Ciaffa
mciaffa@forchellilaw.com
Download VCard

Michael A. Ciaffa (St. John's University School of Law, 1977) is Of Counsel in the Firm's Litigation Department. He handles a wide variety of complex civil litigation matters, from their inception through appeal.

Throughout the course of legal career spanning more than three decades, Mr. Ciaffa has achieved notable success litigating high profile commercial cases, partnership disputes, insurance coverage issues, and lawsuits challenging illegal or unconstitutional government actions.

Mr. Ciaffa was a Nassau County District Court Judge from 2009-2014, where he presided over the busy trial and motion calendar, hearing thousands of no-fault disputes and other civil matters. During his tenure, he had many "Decisions of Interest" published in the *New York Law Journal*. More than two dozen of his most notable decisions were also accepted for publication in the New York Miscellaneous Reports – the most of any District Court Judge during his six years on the bench.

Prior to that role, he worked as a litigator at private firm for many years. Before that, he served as the Law Secretary to Justice Jeffrey G. Stark of the Supreme Court, Nassau County, where he helped author hundreds of decisions, including more officially published opinions that the rest of the Judges of the Nassau Supreme Court combined.

Mr. Ciaffa is a member of the New York State and Nassau County Bar Associations. He is admitted to practice law in the State of New York, and before the United States District Courts for the Southern and Eastern Districts of New York, the U.S. Court of Appeals for the Second Circuit, and the United States Supreme Court.

Practice Areas: Litigation

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Fred Hirsh is a retired Judge of the Nassau County District Court. He served as a Judge of the District Court from March 2008 through December 2014 and from March 2002 through December 2002. While sitting as a District Court Judge, Fred was primarily assigned to Civil Term and handled hundreds, if not thousands of collection matters.

Fred served as Principal Law Clerk, which is the OCA title for the position everyone else knows as Law Secretary, to Nassau County Supreme Court Justice Leonard Austin from January 2003 through March 2008.

Fred was an attorney in private practice for 24 years prior to his appointment to the District Court in 2002 handling primarily plaintiff and defendant's personal injury actions, appeals, commercial litigation including collection matters, estate and real estate matters

Fred is presently semi-retired handling occasion litigation and estate matters.. He is a member of the Board of Directors and General Counsel to Queens Cluster Federal Credit Union.

Fred is graduate of Brooklyn Law School and Hamilton College.

CRAIG D. ROBINS, ESQ.

Website: www.BankruptcyCanHelp.com
Blog: www.LongIslandBankruptcyBlog.com

35 Pinelawn Road, Suite 218-E
Melville, New York 11747
TEL (516) 496-0800

Craig D. Robins, Esq., has been a practicing attorney for over 30 years. During most of this time, he has devoted his practice almost exclusively to bankruptcy, foreclosure defense and debt-related matters. Mr. Robins has had experience in thousands of bankruptcy cases which has included representing both consumers in Chapter 7 and 13 cases, and businesses in Chapter 11 cases.

Craig D. Robins, Esq. received a Bachelor of Arts degree from Emory University in 1981. He studied law in London, England from 1982 to 1983 through the Notre Dame Law School Concannon Program in International Law. He received a Juris Doctorate from Western New England Law School in 1984. He was admitted to the Massachusetts and New York Bars in 1985 and the Florida Bar in 1987. He is also admitted to practice in various Federal District Courts, the United States Tax Court, and the United States Claims Court. Mr. Robins briefly interned as a judicial law clerk to the Honorable Richard Wallach, Supreme Court Judge (New York, First Department).

Martindale-Hubbell, the nationally recognized service that rates attorneys by peer review, has rated Mr. Robins "high to very high."

Mr. Robins has written extensively on bankruptcy law and has authored over 200 published articles on a variety of topics including bankruptcy law and procedure, bankruptcy legislation, bankruptcy practice, and the interaction of bankruptcy law on personal injury cases and matrimonial rights. He continues to be a regular columnist on bankruptcy law for the *Suffolk Lawyer* where he has written for about 25 years, and frequently writes articles for the *Nassau Lawyer* and *Attorney of Nassau*.

Mr. Robins is recognized as an authority on bankruptcy law and practice and is often sought out by the media. He has lectured on bankruptcy law for the Nassau County Bar Association and has discussed bankruptcy law on radio and television talk shows and news programs.

In addition to bankruptcy, Mr. Robins actively defends foreclosure cases brought against Long Island homeowners. The New York Times wrote a page-one story about a foreclosure case that he successfully dismissed.

He has been interviewed on News 12 several times and has been interviewed and quoted in *Newsday* and the *New York Law Journal* about 25 times. Since 1991, he has also been actively involved in giving presentations on bankruptcy law to attorneys and Federal and State Court Judges through the Theodore Roosevelt Chapter of the American Inns of Court, of which he is a member and also sits on its executive board. While Chairman of that organization's annual banquet, he hosted dinners honoring United States Supreme Court Justice Samuel A. Alito, Jr., and New York's highest judge, Judith S. Kay, Chief Judge of the New York State Court of Appeals.

In addition, Mr. Robins is active in the Bankruptcy Committees of both the Nassau and Suffolk Bar Associations, and is on the Mentor Program of the Suffolk County Bar Association where he is called upon to provide assistance on bankruptcy law to younger members of the Bar. He is a long-time member of the American Bankruptcy Institute and the National Association of Consumer Bankruptcy Attorneys.

Mr. Robins is a founding co-chairman of the Nassau County Bar Association's Pro-Bono Bankruptcy Committee. He holds the distinction of having represented more pro bono debtors than any other attorney on Long Island. The Nassau County Bar Association awarded Mr. Robins a Presidential Recognition Award for his dedication in representing pro-bono consumer debtors in bankruptcy proceedings and also awarded him the Pro-Bono Attorney of the Year Award. Mr. Robins was recognized by the Volunteer Lawyers Project for his pro-bono work when he was named Pro-Bono Attorney of the Month twice. *Newsday* honored Mr. Robins by naming him in its "Winners" column for his dedication to community work.

Mr. Robins has represented a wide and diverse range of debtors in bankruptcy cases. In addition to representing numerous typical Long Islanders, he represented a former New York Yankees baseball player, dozens of professionals including attorneys, doctors, dentists and C.P.A.'s, and a variety of businesses, ranging from a professional sports franchise to multi-million dollar companies to mom-and-pop storefronts.

When not practicing law, Mr. Robins enjoys traveling and bicycle riding. He was a competitive bicycle racer for over thirty years and won numerous races. He is also an avid photographer known for his avante garde style. His images, which have won numerous awards, have appeared in museums and galleries, and have been published in *The New York Times* and *Newsday*, and on several magazine covers. He lives in Suffolk County with his wife and son.

[Feb. 2016]

Hailey Kantrow is a 2015 graduate from The Pennsylvania State University with a degree in Political Science. Hailey is currently a first year student at Touro Law School and is interested in Family Law. This summer, Hailey will be working for Greenberg and Greenberg adoption firm in Roslyn.

Hailey Kantrow

45 Independence Way, Miller Place, NY 11764
631-379-7687
Hailey-Kantrow@Tourolaw.edu

Education:

Touro College Jacob D. Fuchsberg Law Center, Central Islip, NY
Juris Doctor Candidate, May 2018
Activities: Nassau County Inn of Court, *Student Member*
Family Law Society, *Secretary*
Trial Advocacy Practice Society, *Team Member*
1L Pro Bono Project, Uncontested Divorce
Court Observation Program, Suffolk County Family Court
Awards: Merit Scholarship

The Pennsylvania State University, University Park, PA
Bachelor of Arts in Political Science, May 2015
Concentration in Media Relations
Activities: Penn State Dance MaraTHON, Penn State Mock Trial, Penn State Lion Scout Tour Guide
Awards: Dean's List: Spring 2013; Spring 2014; Fall 2014

Experience:

Greenberg & Greenberg, Roslyn, NY — Starting May 2016
Legal Intern
Recently accepted a part-time, summer, position. Will be working with adoption attorneys on office matters, working with clients, and researching new and changing state laws. Will also be shadowing attorney visits to court.

Irving's Bagel Store, State College, PA
Cashier, Sandwich/ Drink Maker — March 2015–May 2015
Developed costumer service skills while working in a team environment. Refined the skill of multi-tasking.

Pier 1, Lake Grove, NY
Part time Sales Lead for New Associates — May 2014–January 2015
Familiarized new associates with the "Pier 1" way. Responsibilities included working cash register, opening and closing shifts, in addition to overnights, for new floor sets.

Penn State Lion Line Fundraising, State College, PA
University Telephone Fundraiser — September 2012–December 2013
Raised money for Penn State University student academics by cold calling university alumna. Developed strong telephone communication and extensive interpersonal skills.

Law Offices of Avrum J. Rosen PLLC, Huntington, NY
Receptionist — May 2009–March 2011
Used computer and telephone skills to help keep office organized and on time with filings and mailings.

Other:

Interests: Childcare; Fundraising for the fight against pediatric cancer
Associations: New York State Bar Association; Suffolk County Bar Association

Timothy Wan, Esq.
Chief Operating Officer
Smith Carroad Levy & Wan, P.C.
5036 Jericho Turnpike, Suite 201
Commack, NY 11725
Phone: 631-499-5400
FAX: 631-493-0189
TWAN@SMITHCARROAD.COM
http://www.smithcarroad.com

Timothy Wan is the managing partner of Smith Carroad Levy & Wan, focusing on Creditor's Rights, commercial litigation and consumer collection. In his 15 year career, Mr. Wan has tried several hundred cases, the majority of which were against pro se litigants, on behalf of health care providers, contractors and landscapers, and small business owners. Mr. Wan has been the President of the Commercial Lawyers Conference of New York, NYS Creditor's Bar Association, since January 2011. Mr. Wan is the immediate Past Chair of the Eastern Region of the Commercial Law League of America, a Past Chair of the CLLA Young Member's Section, and currently serves on the Board of Governors, as well as the Chair of the National Education Committee. Mr. Wan is also the author of the New York chapter of the textbook, **"Judgment Enforcement"** published by Wolters Klewer Publishing. Mr. Wan is also a featured columnist and on the Board of Associate Editors for Commercial Law World.