

**Testimony of Massachusetts Law Reform Institute,
National Association of Consumer Advocates, and
National Consumer Law Center, on behalf of its low-income clients**

**Written Testimony for the Massachusetts Division of Banks and the
Massachusetts Office of the Attorney General
Responding to the Debt Collection Informational Session
October 18, 2016**

Thank you for the opportunity to provide additional comments following the September 22, 2016 listening session conducted by the Division of Banks (“DOB”) and the Office of the Attorney General (“OAG”) regarding the current state of debt collection and regulation in the Commonwealth. The written testimony below addresses licensing debt buyers (Section II) and law firms (Section III).

I. Debt Collection in Massachusetts

Debt collection affects millions of Massachusetts residents. In 2014, the Urban Institute reported that nearly *1 in 4* Massachusetts residents with credit reports had a debt in collection due to non-payment of a bill and that the average amount of the debt was \$4,602.¹

Between 2004 and 2013, 1.9 million lawsuits were filed in small claims and district courts across the Commonwealth.² Of these 1.9 million lawsuits, *at least 1.2 million were filed by professional debt collectors.*³ These numbers are consistent with the Boston Globe’s previous report that professional debt collectors filed an estimated 575,000 lawsuits in these same courts between 2000 and 2005.⁴ Moreover, these numbers indicate that reforms enacted since the Boston Globe’s groundbreaking reporting on debt collection in 2006 have not stemmed the tide of debt collection litigation in Massachusetts courts.

¹ Caroline Ratcliffe, et al. Urban Institute, [Delinquent Debt in America](#), at 9 (July 30, 2014).

² Jessica Mendoza, et al., [“Collection claims abuses move up to higher courts,”](#) Boston Globe (Mar. 28, 2015).

³ Id.

⁴ M. Resendez, F. Latour, [“No Mercy for Consumers,”](#) Boston Globe (July 30, 2006).

II. Licensing Debt Buyers

A. The Massachusetts Debt Collection Law Establishes a Framework for Licensing All Debt Collectors, Including Debt Buyers.

The Massachusetts Debt Collection Law (“DCL”) expresses the public policy of the Commonwealth that consumers be protected from debt collectors that engage in, or are likely to engage in, unfair and/or deceptive practices. To give effect to this policy, the Legislature required that entities seeking to operate a debt collection business in the state be licensed by the DOB. An applicant for a license to conduct business as a “debt collector” in Massachusetts must demonstrate to the DOB Commissioner’s satisfaction that the applicant’s “financial responsibility, character, reputation, integrity and general fitness . . . are such as to command the confidence of the public and to warrant the belief that the business . . . will be operated lawfully, honestly and fairly.” G.L. c. 93, §24B(a). The DOB Commissioner may deny a license if the applicant does not have a positive net worth; has violated any state or federal law governing debt collection practices; has defaulted on a debt; has committed any dishonest or deceptive act bearing on the applicant’s fitness to function as a debt collector; or has an adverse credit history. 209 CMR 18.04(2)(a) – (f).

Debt collection licenses are issued for one-year terms (G.L. c. 93, §24B(b)), and upon request a licensee must disclose such books and records as to enable the DOB Commissioner to determine whether it is complying with DCL’s requirements as well as other laws and regulations covering consumer debt collection practices in Massachusetts. G.L. c. 93, §24D. A violation of the DCL constitutes a per se unfair and deceptive trade practice proscribed by G.L. c. 93A, §2, and a criminal offense punishable by a fine of not more than five hundred dollars or by imprisonment for not more than three months, or both. G.L. c. 93, §28.

The DCL defines the term “debt collector” in two ways: first, as any person who “uses an instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of a debt,” and second, as any person who “regularly collects or attempts to collect, *directly or indirectly*, a debt owed or due or asserted to be owed or due another.” G.L. c. 93, §24 (emphasis supplied).

When the DCL, which is modeled on the federal Fair Debt Collection Practices Act (“FDCPA”), was amended in 2003, federal courts that had considered the effect of section 1602(6)(f)(iii) of the FDCPA had concluded that the statute demonstrated the intent of Congress that persons who acquire debts after default – “debt buyers” -- be considered debt collectors, a position adopted by the FTC. See *F.T.C. v. Check Investors Inc.*, 502 F.3d 159 (3rd Cir. 2007).⁵ The rationale for including debt buyers in the definition of debt collector is that both types of entities lack an “ongoing relationship” with a debtor. *Gomes v. Midland Funding, LLC.*, 2012 WL 7801376 (Mass. Super. Sept. 19, 2012), quoting *Schlosser v. Fairbanks Capital Corp.*, 323 F.2d 534, 536 (7th Cir. 2003). Both types of entities should therefore be subject to the same rules, because “those who maintain an ongoing relationship with the debtor are more likely to behave in a way that protects their good will when collecting past due accounts, whereas those who will have no future contact with the consumer will not be so constrained.” *Id.*⁶

⁵ The section states in pertinent part that the term “debt collector” does not include “a person collecting or attempting to collect a debt owed or due or asserted to be owed or due another to the extent the activity . . . concerns a debt which was not in default at the time it was obtained by the person.”

⁶ As the Court explained in *Check Investors*: “one cannot be both a ‘creditor’ and a ‘debt collector,’ as defined in the FDCPA, because those terms are mutually exclusive . . . [i]f the one who acquired the debt *continues to service it*, it is acting much like the original creditor that created the debt. On the other hand, if it simply acquires the debt *for collection*, it is acting more like a debt collector.” 502 F.3d at 173 (emphases supplied)(citation and internal quotations omitted).

In an “Industry Letter” issued June 16, 2006, the DOB announced that “a ‘debt buyer’⁷ who otherwise meets the definition of a ‘debt collector,’ would be subject to the Commonwealth’s Debt Collection Law and would now be required to obtain a license.”⁸ In reaching this conclusion, the DOB agreed with the above analysis.⁹

B. DOB Erred in Departing from Statutory Language To Carve Out an Exemption from the Licensing Requirement for so-called “Passive Debt Collectors.”

Following the issuance of the June 2006, “Industry Letter,” and in response to inquiries regarding its scope, on October 13, 2006 the DOB issued Opinion Letter 06-060, which provided in part that debt buyers that “engage[] only in the practice of purchasing delinquent consumer debts for investment purposes without undertaking any activities to directly collect on the debt” need not be licensed as debt collectors in Massachusetts. The DOB characterized such entities as “passive debt buyers,” a term that does not exist in the DCL. In the years since the issuance of Opinion Letter 06-060, DOB has issued a number of additional opinion letters consistent with its position that “passive debt buyers” need not be licensed as debt collectors in Massachusetts because they do not engage in “direct” debt collection.

In 2013, DOB promulgated new regulations amending 209 CMR 18.02 to redefine the definition of “debt collector” to make that definition consistent with earlier opinion letters. While the original regulatory definition tracked the statutory definition precisely, the amendment added the following language: “Debt collector shall also include any person who buys or acquires debt

⁷ On its website, the DOB says that a debt buyer is a category of debt collector, which it defines as an entity that “purchases debt that is already in default and attempts to collect on this purchased debt.” Massachusetts Division of Banks, [Debt Collections](#).

⁸ Joseph A. Leonard, Jr., Massachusetts Division of Banks, [Industry Letter Concerning the Massachusetts Debt Collection Statutes, and its Applicability to Debt Buyers, So Called](#) (June 16, 2006).

⁹ Some courts have since issued contrary rulings, but DOB’s original position has not changed and it remains the clear majority position.

that is in default at the time of purchase or acquisition and seeks to collect such debt *directly*.” (emphasis supplied).

The language in 209 CMR 18.02 and in DOB’s “Industry Letters” articulating that policy – carving out an exclusion from the definition of “debt collector” those debt buyers who collect or attempt to collect debts “indirectly” -- is invalid. As demonstrated above, the language is irreconcilably contrary to the plain language of the DCL and to the public policy of the Commonwealth that consumers should be protected from debt collectors engaging in, or likely to engage in, unfair or deceptive practices. It is also contrary to the Commonwealth’s consumer protection policies.

c. DOB’s Exemption from Licensing Requirements for “Passive” Debt Collectors Undermines the State’s Public Policy in Favor of Consumer Protection.

Currently, a “passive” debt buyer is not subject to any of DOB’s debt collection regulations, which only apply to “debt collectors.” Although the OAG’s debt collection regulations apply to debt buyers,¹⁰ these regulations do not provide for licensing or require the kind of scrutiny that comes with licensing. Moreover, some of the OAG regulations require greater degrees of culpability to trigger liability.¹¹ Thus, “passive” debt buyers may fall through the cracks under the current regulatory framework, falling short of the robust consumer protection envisioned by the DCL.

The DOB accepts the proposition that “active debt buyers” -- companies that purchase charged-off debt and then have direct contact with consumers in attempting to collect debts -- must be licensed as debt collectors but exempts “passive” debt buyers from licensing

¹⁰ 940 CMR 7.03.

¹¹ For example, a violation of 940 CMR 7.07 lies only lies for a “knowingly false representation . . . as to the character, extent or amount of the debt.”

requirements because they do not “take part in any activities to directly collect on the debt.”¹² However, the DOB has stated that debt buyers are simply a category of debt collectors¹³ and the DCL makes no distinction between “direct” and “indirect” collection activity in determining whether an entity must be licensed as a debt collector. As such, it is inconsistent to distinguish between direct and indirect collection for debt buyers because no such distinction is made for debt collectors. Moreover, even if such a distinction were valid, there seems little justification for classifying collection efforts carried out in the debt buyer’s name – such as bringing lawsuits and reporting accounts to credit bureaus – as “indirect” collection activity. Although an attorney for the debt buyer signs pleadings and a collection agency furnishes information to the credit bureaus, in each instance the debt buyer is directly making representations that certain facts are true and that monies are owed. In such circumstances it is fundamentally unfair to insulate debt buyers from liability for conduct which would otherwise be unlawful.

A debt buyer warrants even greater regulatory scrutiny than a traditional debt collector. First, a debt buyer acquires accounts only after charge-off has occurred, sometimes years later. In contrast, a traditional collection agency often begins collection efforts prior to charge-off. Account-level documentation is not typically provided at time of purchase, and the debt buyer may have to pay a fee to obtain documentation after purchase. As a result, debt buyers do not ordinarily request documentation unless the debt is challenged by the debtor and the debt is deemed collectible, meaning that nearly all collections of debt buyer accounts commence and are completed without supporting documentation. In some cases, accounts are acquired from another debt buyer rather than the original creditor. In this situation, the existence of supporting documentation is even more uncertain.

¹² Massachusetts Division of Banks, [Debt Collections](#).

¹³ *Id.*

What debt buyers receive when they purchase a portfolio of charged-off debts is essentially a data file -- the great majority of accounts acquired by debt buyers are not accompanied by account level documentation such as account agreements and account statements. The FTC's 2013 study of the debt buying industry resulted in the following conclusion:

[Debt] buyers received few underlying documents about debts. Although buyers received the data file and some other information about the debts . . . they obtained very few documents related to the purchased debts at the time of sale or after purchase. For most portfolios, buyers did not receive any documents at the time of purchase. Only a small percentage of portfolios included documents, such as account statements or the terms and conditions of credit. . . . In purchase and sale agreements obtained in the study, sellers generally disclaimed all representations and warranties with regard to the accuracy of the information they provided at the time of sale about individual debts - essentially selling debts, with some limited exceptions, "as is." [E]ach year buyers sought to collect about one million debts that consumers asserted they did not owe. The proper handling of this large number of disputed debts is a significant consumer protection concern.¹⁴

Echoing these findings, a 2014 article published by the Federal Reserve Bank of Boston explained:

The accounts are sold "as is," pursuant to contracts in which the banks state that the debts may not be owed, the amounts claimed may not be accurate, and documentation may be missing. Despite the broad disclaimers, debt buyers then pursue these accounts and seek to collect 100 percent of the face value of debts for which they paid only 3 percent or 4 percent of face value- sometimes much less. The people pursued are often the elderly, the poor, and low-income families with limited resources to hire a lawyer or take a day off from work to go to court and challenge dubious claims. Instead, they tend to either enter into a settlement or fail to appear in court. They are then subjected to a default judgment and subsequent wage garnishment.¹⁵

The scope of the problem in Massachusetts is substantial: in 2015, unlicensed debt buyers filed approximately one-third of the 149,022 civil, small claims, and supplementary process actions in the District Courts in the state – about 50,000 cases. (And the true number is

¹⁴ Fed. Trade Comm'n, [The Structure and Practices of the Debt Buying Industry](#) (Jan. 2013).

¹⁵ Holland, Peter A., "[Debt-Buyer Lawsuits and Inaccurate Data](#)," *Communities and Banking* (Spring 2014).

likely higher, since our survey was limited to the debt buyers operating in Massachusetts of which we are currently aware.)

Many defendants in consumer collection cases do not contest collection lawsuits. A significant percentage of defendants are challenged by poverty, disability or age, and many others are simply intimidated by the legal system. Many consumers sued by an original creditor default in court; the default rate is likely even higher in cases brought by debt buyers because the consumer never had a relationship with the debt buyer and doesn't recognize the name. Also, in most debt buyer cases, years have passed since the account was last active -- accounts acquired by debt buyers may not be sued on until just before the statute of limitations runs. In these situations, even if information regarding the original account is in the complaint, the consumer is unlikely to recognize it nearly six years later.

Another problem resulting from the fact that so-called “passive” debt buyers are not required to be licensed is that consumers are often confused about who this company is whose name appeared in a collection letter, phone call, or credit report. If the consumer is sophisticated enough to research the company in the Nationwide Multistate Licensing System (NMLS) database, he or she may find that the company is not licensed here. Seeing that the company is not licensed, the consumer might naturally fear that the collection attempt is a scam from a fake debt collector.¹⁶ In contrast, a consumer who looks up a licensed debt collector in the NMLS database sees a link for consumer complaints and is connected directly with the DOB website providing information about filing a complaint.¹⁷ Thus, a debt buyer’s absence from the NMLS database may also impede consumer complaints.

¹⁶ See Fed. Trade Comm’n, [Fake Debt Collectors](#) (Feb. 2012).

¹⁷ Massachusetts Division of Banks, [File a Consumer Complaint](#).

D. Midland Funding's Collection Activities Highlight Concerns about Exempting Certain Debt Buyers from Licensing Requirements.

By far the most active “passive” debt buyer in Massachusetts is Midland Funding.

According to the Massachusetts Trial Court Electronic Case Access website, in 2015 Midland alone filed 32,009 civil, small claims, and supplementary process cases in the state’s District Courts and in the Boston Municipal Court – more than one case in five.¹⁸ These cases, each of which names Midland as the plaintiff (or, in the supplementary process context, the “applicant” or “creditor”), consist of lawsuits seeking to establish liability to Midland on consumer debt accounts purchased by Midland; post-judgment lawsuits seeking wage attachments against judgment debtors; post-judgment lawsuits seeking property attachments against judgment debtors; and post-judgment supplementary process actions seeking payment orders against judgment debtors.

¹⁸ In addition to Midland’s 32,009 cases filed in 2015, according to the Massachusetts Trial Court Electronic Case Access website the following entities – each alleged, on information and belief, to be “debt buyers” - filed civil, small claims, and supplementary process cases in Massachusetts District Courts and Boston Municipal Courts in 2015 as follows:

- LVNV Funding: 5,224 cases;
- Waterfront Capital: 3,934 cases;
- CACH, LLC: 2,993 cases;
- Jefferson Capital Systems, LLC: 1,335 cases;
- Second Round Sub, LLC: 291 cases;
- Asset Acceptance : 263 cases;
- Main Street Acquisition Corp.: 220 cases;
- First Financial Investment Fund: 199 cases;
- Soaring Capital: 119 cases;
- Arrow Financial Services: 118 cases;
- Bureaus Investment Group: 102;
- Troy Capital, LLC: 101 cases;
- Razor Capital, LLC: 98 cases;
- First Resolution Investment Corp.: 72 cases;
- Security Credit Services: 51 cases;
- Elite Recovery Services, Inc.: 44 cases;
- Livingston Financial, LLC: 25 cases.

According to the Nationwide Multistate Licensing System, none of the entities named above are licensed as debt collectors in Massachusetts. In total, Midland and the 17 additional unlicensed debt buyers listed here filed 47,198 out of 149,022 civil, small claims, and supplementary process cases in Massachusetts District Courts and Boston Municipal Courts in 2015, which represents 31.7% of all such cases filed.

Also, according to the PACER case locator for the federal courts, since January 2011 a total of 180 proofs of claim have been filed by Midland in bankruptcy cases of Massachusetts residents. Nearly all of these identified Midland as the “creditor.”

A September 9, 2015 “Consent Order” issued by the United States Consumer Financial Protection Bureau” (“CFPB”) against Midland in Administrative Proceeding No. 2015-CFPB-0022, illustrates the scope and gravity of the problems that unlicensed debt buyers present to the state’s consumers.

The CFPB order is captioned: “In the matter of Encore Capital Group, Inc., Midland Funding, LLC, Midland Credit Management, Inc. and Asset Acceptance Capital Corp.” Encore Capital Group is Midland’s parent company, and as used in the Consent Order the term “Encore” includes Midland. Although Midland did not admit to the Order’s factual findings or legal conclusions, it nonetheless stipulated to the issuance of the Order and the CFPB’s jurisdiction. Among the Order’s factual findings concerning Midland’s debt collection practices are the following:

- (a) In numerous instances, Debt sellers have provided data files to [Midland] containing inaccurate information as to the identity of the Consumer obligated to pay the Debt, the age of the Debt, the amount of the Debt, the interest rate, and other material information about the Debt. Nevertheless, [Midland] continued purchasing Consumer Debt from these sellers. Order, ¶30.
- (b) [Midland] collects disputed Debt itself and also assigns disputed Debt to law firms and third-party Debt collectors. In numerous instances, [Midland] has assigned disputed Debt to law firms and third-party Debt collectors without informing them that the Debt is disputed and without forwarding correspondence

it has received from Consumers in support of their disputes. As a result law firms evaluating [Midland] accounts for litigation did not know which accounts are disputed, and disputing Consumers have been forced to re-start the dispute process each time [Midland] transfers a debt. Order, ¶43.

(c) In most states, [Midland] has threatened and filed suit before verifying that account-level documentation exists to substantiate its claim in court. In numerous instances, [Midland] has filed suit after requests for account-level documentation have been denied. Order, ¶51.

(d) In many jurisdictions, [Midland] has been able to obtain a settlement or a default judgment against a Consumer using an affidavit as its only evidence. Many of these affidavits contain false or misleading testimony. Order, ¶55.

(e) In thousands of cases, for which [Midland] possessed no account-level documentation evidencing the Consumer's responsibility for the Debt, [Midland] obtained a settlement or judgment based solely on an affidavit referencing the Consumer's failure to dispute the Debt. Order, ¶57

(f) [Midland] has routinely requested and used affidavits from sellers that contain false or misleading statements regarding the seller's review of unattached records. Order, ¶60.

(g) In numerous instances, [Midland] has threatened and filed suit on Debt that was past the applicable statute of limitations. Order, ¶66.

We believe that the findings of misconduct in the CFPB case demonstrate that if Midland Financial were licensed in Massachusetts as the DCL requires, that license would now be under DOB review. These findings highlight how the fundamental problems with debt buyer

collections have nothing to do with whether the debt buyer is "active" or "passive" – rather, they are endemic to the industry as a whole.

The experiences of Massachusetts consumer attorneys mirror the findings that the CFPB made against Midland Financial. For example:

- Debt buyers filed suit against a client on an account that had already been paid, settled, dismissed, or discharged in bankruptcy;
- Court complaints filed by debt buyers allege that the subject accounts were assigned to it by the original creditor, a patently false representation;
- When a lawyer appears on behalf of a consumer, the debt buyer often voluntarily dismisses the case because it does not have any documentation of the debt;
- Despite the absence of documentation, courts frequently find the consumer liable – often based solely on an affidavit without supporting evidence; and
- When documentation is provided, it rarely includes original, account-level documentation like the account application or chain of title.

These and other abusive collection practices observed by Massachusetts consumer attorneys suggest that problems are widespread among debt buyers operating in the state.

E. The Trend in Other Jurisdictions is Toward Making “Passive” Debt Buyers Subject to Licensing Requirements.

In recent years, eight jurisdictions—Arkansas, Idaho, Illinois, Maryland, New York City, North Carolina, Virginia and Washington – have specified that “passive” debt buyers fall within the purview of debt collectors subject to state or city licensing requirements. Only one state, Tennessee, has taken the contrary position.

In North Carolina, state lawmakers enacted legislation specifying that debt buyers, “passive” or otherwise, are debt collectors subject to state licensing requirements. In 2009, North

Carolina passed the Consumer Economic Protection Act, amending N.C. Gen. Stat. § 58-70-15 to include in the meaning of “collection agency” the term “debt buyer,” defined as:

a person or entity that is engaged in the business of purchasing delinquent or charged-off consumer loans or consumer credit accounts, or other delinquent consumer debt for collection purposes, whether it collects the debt itself or hires a third party for collection or an attorney-at-law for litigation in order to collect such debt.

As this final clause makes clear, “collection agency” includes both debt buyers who collect on the debt themselves and also debt buyers who retain either attorneys or third-party collection agencies to collect on their accounts.

In 2013, Illinois and Washington followed North Carolina’s lead when both states amended their respective Collection Agency Acts to include language identical¹⁹ or nearly identical²⁰ to the North Carolina amendment. Tennessee, however, has taken the opposite course, amending its licensing statute to exempt:

Any person that holds or acquires accounts, bills or other forms of indebtedness through purchase, assignment, or otherwise; and only engages in collection activity through the use of a licensed collection agency or an attorney authorized to practice law in this state.

Tenn. Code Ann. § 62-20-103(a)(9)(2014).

Likewise, the majority of state and federal courts that have interpreted state licensing statutes have held that “passive” debt buyers are debt collectors that must comply with state licensing requirements for debt collectors. The Maryland Court of Special Appeals,²¹ the

¹⁹ “‘Debt buyer’ means a person or entity that is engaged in the business of purchasing delinquent or charged-off consumer loans or consumer credit accounts or other delinquent consumer debt for collection purposes, whether it collects the debt itself or hires a third-party for collection or an attorney-at-law for litigation in order to collect such debt.” 225 Ill. Comp. Stat. Ann. 425/2.

²⁰ “‘Collection agency’ means and includes ... (d) Any person or entity that is engaged in the business of purchasing delinquent or charged off claims for collection purposes, whether it collects the claims itself or hires a third party for collection or an attorney for litigation in order to collect such claims.” Wash. Rev. Code. § 19.16.100(4).

²¹ *Finch v. LVNV Funding, LLC*, 212 Md. App. 748, 759 n. 6 (2013) (rejecting passive-active distinction amongst debt collectors) (citing *Bradshaw v. Hilco Receivables, LLC*, 765 F. Supp. 2d 719, 727 (D. Md. 2011)).

Washington Supreme Court,²² and the Illinois Supreme Court²³ all rejected the argument that a “passive” debt buyer is not a debt collector. The Supreme Court of Arkansas held that a debt buying firm that purchases delinquent accounts but assigns its collection activities to a law firm is a collection agency as defined in Ark. Code Ann. § 17-24-101.²⁴ In New York City, where debt collection agencies are required to be licensed under the New York City Administrative Code, one judge in the Civil Court of New York City held that any entity other than the original creditor that undertakes collection efforts must be duly licensed.²⁵ In a separate case, the same judge held that collection efforts include use of the court system to collect and not just “traditional collection activities ... such as sending dunning letters or making telephone calls” explaining:

Plaintiffs and its industry advocates would have the court and others believe it purchases debt either for the “fun” of it or to wallpaper the walls of their offices as if it were useless Confederate money circa 1866 or unredeemable stock certificates after the October 1929 crash, when the real purpose is to try to collect the debt from the debtors. To not require [debt buyers] to be licensed is akin to the “brains” of the operation in some film noir classic gets off the hook but the guys who do the dirty work go to jail . . .”²⁶

²² *Gray v. Suttell & Associates*, 181 Wash. 2d 329, 340-41 (2014). In *Gray*, the Washington Supreme Court considered the debt collection statute as of 2008 because the case was filed before the statute was amended in 2013.

²³ *LVNV Funding, LLC v. Trice*, 32 N.E.3d 553 (Ill. 2015). Although the Illinois Supreme Court did not use the term “passive debt buyer” in its decision, the argument was raised by LVNV in its brief. Brief for Plaintiff-Appellee, LVNV Funding LLC at 6, *LVNV Funding, LLC v. Trice*, 32 N.E.3d 553 (Ill. 2014) (No. 116129).

²⁴ In *Simpson v. Cavalry SPVI, LLC*, 2014 Ark. 363 (2014), the Arkansas Supreme Court rejected the difference between direct and indirect collection and held that a debt buying firm that purchased delinquent accounts but assigned its collection activities to a law firm was a collection agency as defined in Ark. Code Ann. § 17-24-101. Similarly, in *LVNV Funding, LLC v. Trice*, 32 N.E.3d 553 (Ill. 2015), the Illinois Supreme Court rejected the arguments of LVNV Funding, LLC, a noted passive debt buyer, that it was not a debt collector subject to state licensing requirements because it hired others to collect the debts it owned. “The argument that the public is protected from the abuses of unscrupulous debt buyers by their utilization of attorneys is equally meritless. It is, after all, the debt buyers who supply the evidence and witnesses to attorneys in the myriad complaints they file.” *Id.* at 560.

²⁵ See *In re Pinpoint Techs., LLC*, 5 N.Y.S.3d 329 (N.Y. Civ. Ct. 2014).

²⁶ *Centurion Capital Corp. v. Guarino*, 966 N.Y.S.2d 345 (Civ. Ct. 2012).

In Hawaii and Rhode Island, federal district courts interpreting state licensing statutes held that unlicensed debt buyers who retain attorneys to initiate collections are in violation of state licensing requirements.²⁷

Similarly, in three states administrative agencies have adopted the position that “passive” debt buyers are to be treated as debt collectors for the purposes of state licensing requirements. State departments from Idaho and West Virginia issued policy statements and administrative notices that “passive” debt buyers are debt collectors and must be licensed as such.²⁸ A licensing board from Maryland issued an advisory notice that debt buyers who retain attorneys to initiate collection through lawsuit are to be considered debt collectors engaging in collection activities, regardless of whether that attorney is a licensed collection agency.²⁹

F. Conclusion

The DCL wisely requires debt collectors to obtain licenses and requires the DOB to examine debt collectors' organization, finances, and history of consumer claims to determine whether they should be entitled to collect debts in the Commonwealth. We therefore urge the DOB to reverse its current policy of exempting so-called “passive” debt buyers from this important consumer protection safeguard.

²⁷ *Goray v. Unifund CCR Partners*, 2007 WL 4260017, *11 (D. Haw. 2007) (holding firm that regularly accepted the assignment of claims was a debt collector); *Fiorenzano v. LVNV Funding, LLC*, 2012 WL 2562415 (D.R.I. 2012) (holding that a self-identified passive debt buyer was a debt collector for purposes of the RIFDCPA registration requirement).

²⁸ On July 16, 2009, the Idaho Department of Finance issued a policy statement where it wrote that “[b]ecause debt buyers’ business is, in fact, the collection of debts, the Department is of the opinion that debt buyers are subject to the provisions of the [Idaho Collection Agency Act] as being, at a minimum, engaged indirectly in the business of collecting indebtedness.” Idaho Department of Finance Policy Statement 2009-01. On April 26, 2010, the West Virginia Tax Department issued an administrative notice with its determination that debt purchasers who engage in “passive” debt collection must “comply with the licensing, bonding, and other provisions of the [West Virginia Collection Agency Act of 1973].” Administrative Notice 2010-19 Treatment of Debt Purchasers Pursuant to the West Virginia Collection Agency Act of 1973, as amended.

²⁹ Md. State Collection Agency Licensing Bd. Advisory Notice 05–10, May 5, 2010

III. Licensing Law Firms

Collection law firms frequently employ non-attorney collectors to perform debt collection activities such as mailing dunning letters or answering calls from consumers. Non-attorneys may also be involved in preparing pleadings for court filings or other aspects of litigations.

Under the Fair Debt Collection Practices Act, collection attorneys must meaningfully review debts before demanding payment.³⁰ Numerous cases have highlighted the inadequate involvement of attorneys who are supervising collection processes that are largely managed through a combination of automation and non-attorney review.³¹ These problems were described succinctly by the court in a recent case brought by the Consumer Financial Protection Bureau against a law firm in Georgia:

The Bureau maintains that, although the Georgia Collection Suits “may have featured the signatures of attorneys,” these lawsuits were in fact “prepared and filed without meaningful attorney involvement” in either the decision to initiate the lawsuit or in the preparation of the pleadings. (*Id.* ¶¶ 17, 28.) To support this assertion, the Bureau points to a number of facts. For example, during the relevant time, the Firm allegedly employed hundreds of non-attorney staff but only between 8 and 16 attorneys. (*Id.* ¶ 14.) The Firm then delegated to the non-attorneys many important responsibilities including determining whether a case was “suit worthy,” determining the alleged principal, interest, and attorneys' fees owed, and actually drafting complaints. (*Id.* ¶ 16.) The Bureau further alleges that the Firm's attorneys routinely relied on “an automated system and support-

³⁰ National Consumer Law Center, Fair Debt Collection Practices §5.5.6.2 (8th ed. 2014) (discussing cases).

³¹ See, e.g., *id.*; *Leshner v. Law Offices Of Mitchell N. Kay, P.C.*, 650 F.3d 993 (3d Cir. 2011) (collection letters presented on a law firm's letterhead falsely implied that an attorney, acting as an attorney, was involved in collecting the debt); *Bock v. Pressler & Pressler, LLP*, 30 F. Supp. 3d 283, 287 (D.N.J. 2014), *as corrected* (July 1, 2014), *as corrected* (July 7, 2014) (“The process by which Pressler prepares complaints almost entirely involves automation and non-attorney personnel . . . The state court complaint filed in the state action here . . . was reviewed by an attorney for approximately four seconds.”); *Cordes v. Frederick J. Hanna & Assocs., P.C.*, 789 F. Supp. 2d 1173 (D. Minn. 2011) (even if “form” letters were created by an attorney and each was sent pursuant to his standing instructions, those facts do not necessarily constitute meaningful attorney involvement); *Miller v. Upton, Cohen & Slamowitz*, 687 F. Supp. 2d 86 (E.D.N.Y. 2009) (“debt collection letters and litigation documents were regularly mass-produced at UCS by non-lawyers at the push of a button”).

staff research” to determine (1) “whether consumers had sought relief in bankruptcy”; (2) “whether their debts were barred by limitations”; and (3) “legally significant facts such as each consumer’s date of initial contract and the date the consumer last made a payment.” (*Id.*)

Once the Firm delegated these tasks to non-attorney staff or automated systems, the few attorneys on staff were allegedly left to essentially skim and sign the prepared pleadings. The Firm’s attorneys thus allegedly gave “only cursory review to” the suits the Firm was filing, “checking the pleadings prepared by non-attorney support staff for grammar and spelling errors.” (*Id.* ¶ 18.) The alleged expectation was that the lawyer would spend “no more than one minute reviewing and signing the pleadings prepared by support staff.” (*Id.*) This makes sense, given the alleged ratio of the volume of lawsuits filed to the number of attorneys at the Firm. In 2009 and 2010, for instance, the Firm allegedly arranged for one attorney to sign about 138,000 lawsuits, averaging about 1,300 collection suits each week. (*Id.* ¶ 15.) Assuming this one attorney did nothing but review and sign collection suits for eight hours a day, five days per week, for every week of the year without vacation, the lawyer would literally have less than a minute to approve each suit. (*See id.*) For these reasons, the Bureau alleges that the “Firm’s attorneys did not exercise independent professional judgment in determining whether to file the Georgia Collection Suits or what remedies to seek.” (*Id.* ¶ 18.)³²

Similar allegations have been raised with respect to collection practices involving at least one Massachusetts collection law firm.³³

Licensing law firms would level the playing field between law firm and other debt collection firms in Massachusetts that are engaged in the same types of collection activities. This is especially true where law firms employ non-attorney employees who engage in collection work with little or no oversight by collection attorneys.

Moreover, licensing law firms would be in keeping with the 1986 amendment to the Fair Debt Collection Practices Act. This amendment expanded coverage to attorneys regularly

³² *Consumer Fin. Prot. Bureau v. Frederick J. Hanna & Associates, P.C.*, 114 F. Supp. 3d 1342, 1349 (N.D. Ga.), *motion to certify appeal denied sub nom. Consumer Fin. Prot. Bureau v. Frederick J. Hanna & Associates, P.C.*, 165 F. Supp. 3d 1330 (N.D. Ga. 2015).

³³ *Commonwealth v. Lustig, Glaser & Wilson*, Complaint ¶¶ 67, 69 (Suffolk County Superior Court Dec. 21, 2015) (collection letters falsely claimed that files had been reviewed by attorneys and attorneys signing complaints did not meaningfully review complaints or review underlying documentation).

collecting debts under the FDCPA.³⁴ At that time, Congress found that some law firms had become indistinguishable from collection agencies. Data showed that by 1985 more lawyers were regularly collecting consumer debts than were persons working in the non-lawyer debt collection industry. Some collection law firms were advertising their exemption from the FDCPA as an advantage.³⁵

A few jurisdictions currently require some collection law firms to be licensed. Connecticut's licensing statute exempts attorneys but not law firms.³⁶ The Connecticut Department of Banking has taken a "no action" position regarding licensing law firms if at least one partner of the firm is licensed is admitted to the bar in Connecticut and *only* that individual performs consumer collection work.³⁷ According to the Nationwide Mortgage Licensing System & Registry, the Massachusetts-based debt collection law firm Lustig, Glaser & Wilson, P.C. is currently licensed as a consumer collection agency in Connecticut. Maryland excludes certain attorneys from its licensing statute if they are collecting a debt for a client. That exclusion does not apply, however, if the attorney employs a non-attorney whose primary task is collection of

³⁴ Pub. L. No. 99-361, 100 Stat. 768 (effective July 9, 1986).

³⁵ *Oversight Hearing on FDCPA and H.R. 4617 Before the Subcomm. on Consumer Affairs and Coinage of the House Comm. on Banking, Fin. and Urban Affairs*, 98th Cong., 2d Sess. (Jan. 31, 1984); *Hearings on H.R. 237, Before the Subcomm. on Consumer Affairs and Coinage of the House Comm. on Banking, Fin. and Urban Affairs*, 99th Cong., 1st Sess. (Oct. 22, 1985); H.R. Rep. No. 405, 99th Cong., 1st Sess. (Nov. 26, 1985) *reprinted in* 1986 U.S.C.C.A.N. 1752, 132 Cong. Rec. H10534 (daily ed. Dec. 2, 1985) (statement of Rep. Annunzio).

³⁶ Conn. Gen. Stat. Ann. § 36a-800; Decl. Ruling, *Petition of Persels and Assocs., LLC* at 9 n.9 (Conn. Dept. of Banking Sept. 11, 2012).

³⁷ Decl. Ruling, *Petition of Persels and Assocs., LLC* at 9-10 (Conn. Dept. of Banking Sept. 11, 2012).

debts.³⁸ Similarly, New York City exempts attorneys and law firms from licensure as debt collection agencies only to the extent that they perform activities “that may only be performed by a licensed attorney” but not with regard to attempting to collect through the mail or by phone like traditional debt collection agencies.³⁹

IV. Statements of Interest

Massachusetts Law Reform Institute (MLRI) is a nonprofit statewide legal services advocacy and support center. Since 1968, MLRI has represented low-income individuals and groups on legal issues of statewide importance in the areas of employment, housing, health care, income supports, family law, immigration and disability rights. Our organization has a significant interest in protecting the state’s consumers against the abusive debt collection practices described in this testimony.

The National Association of Consumer Advocates (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, and law professors and students whose primary practice or area of study involves the protection and representation of consumers. NACA’s mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and to serve as a voice for its members and consumers in the ongoing struggle to curb unfair and oppressive business practices. Compliance with the FDCPA and state debt collection laws, and their faithful application to consumers, have been a continuing focus of NACA since its inception. Protection of the consumers for whose benefit these laws were enacted is one of

³⁸ Md. Code Ann., Bus. Reg. § 7-102. Although the statute speaks about lawyers instead of law firms, a search on the Maryland Department of Labor Licensing and Regulation’s website to lookup licensed entities indicates that a number of law firms are licensed.

³⁹ Administrative Code of City of NY § 20-489

NACA's goals, both within the consumer finance field as well as the larger arena of the consumer rights movements.

The National Consumer Law Center (NCLC) is a national research and advocacy organization focusing on the legal needs of consumers, especially low income and elderly consumers. For over 47 years NCLC has been the consumer law resource center to which legal services and private lawyers, state and federal consumer protection officials, public policy makers, consumer and business reporters, and consumer and low-income community organizations across the nation have turned for legal answers, policy analysis, and technical and legal support. Fair debt collection has been a major focus of the work of NCLC. NCLC publishes *Fair Debt Collection* (8th ed. 2014), a comprehensive treatise to assist attorneys and debt collectors to comply with the law, and *Collection Actions* (3rd ed. 2014), detailing defenses to consumer debts. NCLC has filed comments at a number of state and federal level regarding proposed legal reforms related to debt collection. These comments are filed on behalf of NCLC's low-income consumers.