No. 35709

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LINDA BARR,

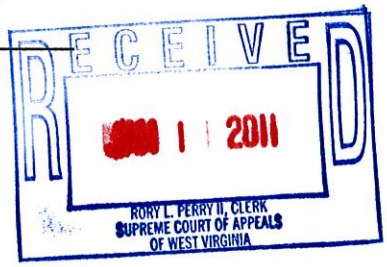
Plaintiff,

v.

NCB MANAGEMENT SERVICES, INC., and HSBC BANK NEVADA, N.A.,

Defendants.

PROPOSED *AMICI* BRIEF OF AARP, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES AND NATIONAL CONSUMER LAW CENTER IN SUPPORT OF PLAINTIFF



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I. STATEMENT OF INTEREST[1]

The resolution of the issue before this Court, "[w]hether a consumer has a private cause of action against a non-creditor debt collector pursuant to the West Virginia Consumer Credit and Protection Act, W.Va. Code § 46A-2-122, *et seq.*," has enormous implications for consumers. Debt collection telephone calls and lawsuits have increased across the county, corresponding to rapidly rising debt loads, exorbitant credit card fees, and the current economic downturn. Out of necessity and in rapidly increasing numbers, people are using high cost credit cards to pay for expenses of daily living such as groceries, medical care, prescription drugs, house payments, and urgent house repairs. Despite the convenience credit cards provide, problems occur for too many people when they cannot pay off the full amount due, carry forward a balance, and are overwhelmed in a downward spiral of exorbitant interest rates, fees and penalties, and other billing practices that quickly drive them hopelessly further into debt. This downward spiral worsens and traps even more households in recessionary periods.

Outstanding debt load has increased by millions of dollars due to a variety of unfair practices, which can then become the subject of questionable debt collections. Indeed, "[a] debtor could pay nearly 100% of what she owed every year for the rest of her life, and thanks to the traps built in to her credit card, she would keep paying until she died—and still not pay off her card." *Examining The Billing, Marketing, And Disclosure Practices Of The Credit Card Industry And Their Impact On Consumers, Before the S. Comm. on Banking, Housing & Urban Affairs*, 110th Cong. 3 (Jan. 25, 2007) (statement of Prof. Elizabeth Warren). According to West Virginia Attorney General McGraw, "[t]he credit card industry and predatory lenders have sometimes saddled West Virginia consumers with exorbitant debts... This unfortunate situation

[1] Pursuant to Rule 30 of the West Virginia Rules of Appellate Procedure, no counsel for a party authored this brief in whole or in part and no counsel for a party or other person made a monetary contribution specifically intended to fund the preparation or submission of this brief.

has now evolved into a multibillion-dollar debt-buying industry in which unlawful tactics are used to coerce consumers to pay debts they may not owe with funds they do not have." Press Release, *Attorney General McGraw Recovers $7.9 Million for West Virginians from NJ Lawyer Hecker and APM Collection Agencies,* (Nov. 16, 2010), http://www.wvago.gov/press.cfm?fx=more&ID=546 (accessed Jan. 7, 2010).

Not only do people carry more credit card debt than before, but more are being buried in what may be considered *unaffordable* debt. An increasing number of people have debt payments that exceed 40% of their income, and this increase is especially acute for older age groups. The consequences of unaffordable debt can be devastating, especially at a time in one's life when income typically decreases and remaining working years are limited. In addition, money devoted to servicing debt makes less available for savings and other resources to preserve income security and financial independence, or even to pay for the basic necessities of life. Debt collectors frequently prey upon the extreme vulnerability of such people, making their abusive collection practices particularly egregious.

AARP, the National Association of Consumer Advocates, (hereinafter "NACA"), and the National Consumer Law Center, (hereinafter "NCLC"), have a significant interest in ensuring that persons injured by unfair, deceptive, abusive, fraudulent, discriminatory, or other prohibited practices have the means to remedy abuses prohibited by the West Virginia Consumer Credit and Protection Act.

AARP is a non-partisan, non-profit organization. As the leading organization representing the interests of people aged 50 and older, AARP is deeply concerned about older people who may be especially vulnerable to debt collection abuses, particularly in light of their growing levels of debt. To protect and preserve the financial security of the oldest and most

vulnerable portion of the population, AARP assists older people in numerous ways. For example, West Virginia ElderWatch is a program of the AARP Foundation and the West Virginia Attorney General's Office. The Attorney General's Office of Consumer Protection refers all calls from consumers age 50+ to ElderWatch, where trained volunteers help the consumers fill out the consumer complaint paperwork and guide them through the process. As of November 2009, ElderWatch helped more than 14,517 West Virginia consumers since the program was launched on February 1, 2006. AARP Foundation Litigation provides advocacy and legal representation to older people, including in cases involving consumer protection, debt collection abuses, identity theft, predatory lending, mortgage foreclosure, fair housing, disability rights, employment, health, ERISA, securities, and a variety of other issues.

NACA is a nationwide organization of more than 1,500 members, including West Virginia attorneys, who represent and have represented hundreds of thousands of consumers victimized by fraudulent, abusive and predatory business practices. As an organization fully committed to promoting justice for consumers, NACA's members and their clients are actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means.

NCLC is a non-profit corporation, organized in 1969 to conduct research, education and litigation to promote consumer justice. One of the NCLC's primary objectives is to provide assistance to attorneys advancing the interests of their low-income and elderly clients in the area of consumer law. Accordingly, NCLC has focused considerable attention on laws to prevent abusive debt collection and unreliable disclosure of the terms of consumer credit transactions. The Fair Debt Collection Practices Act and state consumer protection statutes have been a major focus of the work of NCLC. NCLC publishes *Fair Debt Collection* (6th ed. 2008 & 2009 Supp.)

and *Unfair and Deceptive Acts and Practices* (7th Ed. 2008 & 2009 Supp.), comprehensive treatises, each over 1000 pages, to assist attorneys, creditors and debt collectors in complying with the law.

II. OPERATIVE FACTS IN THE UNDERLYING CASE

Amici incorporate by reference the statement of facts provided in the brief of the Plaintiff.

III. DISCUSSION AND ARGUMENT

This Court consistently and affirmatively has held that the duties and prohibitions of the West Virginia Consumer Credit and Protection Act apply to debt collectors like the Defendant herein. *See* Order Certifying Issue to Supreme Court of Appeals of West Virginia, (hereinafter "Order"), pp. 4-5. This case raises the issue of whether the penalties and remedies for violations of the Act are equally applicable to them. Specifically, the certified question is "[w]hether a consumer has a private cause of action against a non-creditor debt collector pursuant to the West Virginia Consumer Credit and Protection Act, W.Va. Code § 46A-2-122, *et seq.*," (hereinafter "CCPA" or "Act").

The CCPA is "a comprehensive attempt on the part of the West Virginia Legislature to extend protection to consumers and persons who obtain credit in state." *Harper v. Jackson Hewitt*, No. 35295, *18 (Benjamin, J.) (Nov. 23, 2010) (rejecting Defendants' argument that because it is not a "creditor," statute of limitation provision of CCPA not applicable). This Court has recognized that "[n]ot only did the Legislature regulate various consumer and credit practices, but it went further and established the right to civil action for damages on behalf of persons who have been subjected to practices that violate certain provisions of the Act." *Harless v. First Nat. Bank in Fairmont*, 162 W.Va. 116, 125, 246 S.E.2d 270, 276 (1978).

Despite legal protection from abusive debt collectors, for over ten years debt collection problems have been the number one complaint by consumers to governmental agencies nationwide. Even with efforts by state legislatures, state Attorneys General, and the Federal Trade Commission to protect consumers, collection abuses continue to cause significant suffering and anguish. Older persons are particularly vulnerable to abusive debt collection practices. Debt collection agencies and debt buyers aggressively pursue collection of debts, often in violation of laws prohibiting abusive collection practices, in order to coerce payment of alleged debts – even those of questionable validity.

The intent of the legislature to put an end to such practices would be significantly frustrated if people had no remedy when they are subjected to prohibited debt collection practices by non-creditor debt collectors. Debt collectors must not be permitted to evade the prohibitions of the CCPA merely because they act on behalf of or purchase debts originally owed to another. As this Court has held, "[t]he statute was designed to protect consumers against unscrupulous collection practices, by whomever perpetrated." *Thomas v. Firestone Tire and Rubber Co.*, 164 W.Va. 763, 770, 266 S.E.2d 905, 909, Syl. Pt. 3 (1980).

A. The West Virginia Consumer Credit and Protection Act Provides Consumers with a Cause of Action Against Any Person Violating Prohibited Debt Collection Practices

Article 5 of the CCPA, W.Va. Code § 46A-1-101, *et seq.*, provides for civil liabilities and criminal penalties for violations of the Act. In particular, W.Va. Code § 46A-5-101(1) provides consumers with the right to bring a civil action for damages and penalties when, *inter alia*, prohibited debt collection practices have occurred. The statute provides in pertinent part:

> **If a creditor has violated** the provisions of this chapter applying to ... fraudulent or unconscionable conduct [or] any prohibited debt collection practice ... the **consumer has a cause of action** to recover actual damages **and in addition a right in an action to recover from the person violating this chapter a penalty**

> in an amount determined by the court not less than one hundred dollars nor more than one thousand dollars...

W.Va. Code § 46A-5-101(1) (emphasis added).

Creditors commonly utilize the services of professional debt collector agencies like Defendant NCB to collect and/or negotiate payment on a debt. In attempting to collect a debt, a "creditor" may violate the Act through his/its own conduct or through the acts of an agent/debt collector retained to collect the debt. This Court has recognized that it "would be incongruous to suggest that a creditor could evade the requirements of the statute by collecting his own debt in unconscionable fashion, while another would be held to account if it enlisted the service of a professional collector to pursue the same course of action." *Thomas,* 164 W.Va. at 770, 266 S.E.2d at 909; *In re Machnic*, 271 B.R. 789, 792 (S.D.W.Va. 2002) (holding a "credit card issuer" responsible on an agency theory for the acts of its attorney who engaged in improper debt collection practices under the Act).

Despite this settled law, Defendant in the proceeding below argued that the remedies available to consumers in W.Va. Code § 46A-5-101(1) apply only to debt collection violations perpetrated by creditors because, *inter alia,* the statute refers to "creditors" and not specifically to "debt collectors." *See* Order, p. 3. This argument ignores the fact that the legislature provided a separate and broader "right in an action to recover from the person violating this chapter" with "person" being defined as an "individual" or "organization." W.Va. Code §§ 46A-5-101(1) and 46A-1-102(31), respectively.

Plainly read, the statute specifically provides consumers a "cause of action" against a "creditor" and "a right in an action to recover from the person violating this chapter," including a non-creditor debt collector. "A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute." *Meadows*

v. Wal-Mart Stores, Inc., 207 W.Va. 203, 530 S.E.2d 676, Syl. Pt. 3 (1999). To hold that the statute gives consumers a right to bring an action only against a creditor would require this Court to ignore the word "and" in the statute, as well as remove the word "person" and substitute the word "creditor" in its place, both of which this Court has found improper. *See West Virginia Ins. Guar. Ass'n v. Potts*, 209 W.Va. 682, 687, 550 S.E.2d 660, 665 (2001) (refusing to substitute the word "occurrence" for "claim" in order to aggregate multiple claims arising from a single accident under the Guaranty Act); *Dunlap v. Friedman's, Inc.*, 213 W.Va. 394, 397, 582 S.E.2d 841, 844 FN 6 (2003) ("this Court cannot substitute its own judgment for that of the legislature and significantly rewrite the statute").

In any event, the second sentence clearly contemplates a cause of action against a non-creditor debt collector. This Court, in *Harper v. Jackson Hewitt,* recently rejected a narrow reading of the remedial provisions of the CCPA, finding "the second sentence of the statute" "more broadly provides" a cause of action that "is not limited specifically to creditors." *Id.,* No. 35295 at *23. The second sentence provides:

> With respect to ***violations of this Chapter arising from*** consumer credit sales or consumer loans made pursuant to revolving charge accounts or revolving loan accounts. . . no action pursuant to this subsection may be brought more than four years after the violations occurred.

W. Va. Code §46A-5-101(1) (emphasis added). Thus, regardless of whether a violation is perpetrated by a creditor or non-creditor, a consumer has a cause of action "with respect" to those "violations" because prohibited debt collections clearly "aris[e] from consumer credit sales or consumer loans." W. Va. Code §46A-5-101(1).

Moreover, this Court should not interpret the CCPA to exempt debt collectors from the remedial provisions of the statute where the legislature did not expressly do so. "If the language of an enactment is clear and within the constitutional authority of the law-making body which

passed it, courts must read the relevant law according to its unvarnished meaning, without any judicial embroidery." *West Virginia Health Care Cost Review Authority v. Boone Memorial Hosp.*, 196 W. Va. 326, 472 S.E.2d 411, Syl. Pt. 4, (1996). *See Williamson v. Greene*, 200 W.Va. 421, 426, 490 S.E.2d 23, 28 (1997) ("Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted"). This Court's reasoning in *Harper,* that given the "broad sweeping language" of the CCPA no exemption will be found if the legislature did not specifically provide it, is instructive. *Harper*, No.35295 at *18. The Court noted:

> we are persuaded by the fact that if the Legislature intended that only those who receive direct consumer payments be covered by the CSOA, it could have expressly so-provided. Likewise, given this broad sweeping language, if the Legislature intended that tax preparers be exempted from the CSOA, it could have expressly included tax preparers in the list of exemptions found in W. Va. Code §46A6C-2(b). However, the Legislature chose to do neither of these things.

Id.

B. Any Ambiguity in the Remedies Provisions of The West Virginia Consumer Credit and Protection Act Must Be Resolved in Favor of Providing Consumers with a Cause of Action Against Any Person Violating Prohibited Debt Collection Practices

If this Court agrees with the District Court that it is unclear whether the West Virginia legislature intended to provide consumers with a cause of action against "a non-creditor debt collector," *see* Order, p. 5, a fair interpretation of W.Va. Code § 46A-5-101(1) compels a finding that a cause of action lies against both a "creditor" and any other "person," contrary to Defendant's position.[2] Indeed, this interpretation is consistent with this Court's recognition that

[2] *See e.g. Hereford v. Meek*, 132 W.Va. 373, 386, 52 S.E.2d 740, 747 (1949) ("A statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning"). *See accord, Sizemore v. State Farm Gen. Ins. Co.*, 202 W.Va. 591, 596, 505 S.E.2d 654, 659 (1998); *Dunlap*, 213 W.Va.

W.Va. Code §46A-5-101(1) is a "remedial statute to be liberally construed to protect consumers from unfair, illegal, or deceptive acts." *Dunlap*, 213 W.Va. at 399, 582 S.E.2d at 846. *See accord, Chevy Chase Bank v. McCamant*, 204 W.Va. 295, 302, 512 S.E.2d 217, 224 (1998) (finding the broad and remedial purpose of the Act is to "protect consumers from unfair, unconscionable, fraudulent, and abusive practices of debt collectors").

Conversely, a finding that the remedial provisions of W.Va. Code §46A-5-101(1) do not apply to "non-creditor debt collectors" runs contrary to the broad remedial purposes and previous interpretations of the Act. This Court has recognized that

> the plain meaning of W.Va. Code § 46A-2-122 requires that the provisions of article 2 of Chapter 46A regulating improper debt collection practices in consumer credit sales must be applied alike to all who engage in debt collection, be they professional debt collectors or creditors collecting their own debts.

Thomas, 164 W.Va. at 769, 266 S.E.2d at 908.[3] It is unlikely and contradictory that the Legislature would "comprehensively" prohibit debt collectors and others from engaging in unfair, deceptive and unconscionable debt collection practices but fail to provide the means to combat and remedy such abuses. Under the Defendant's interpretation, a debt collector could repeatedly telephone a widow on Christmas Day, use obscene language and generally threaten and harass her regarding payment of a debt, all without remedy by the widow against the debt collector under the Act. "Such a strained interpretation would conflict with common sense." *Id.*

C. Abusive Debt Collectors Plague Consumers Because Chances They Will Be Caught Are Minimal and Consequences To Them Are Cheap

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at 398, 582 S.E.2d at 845; Syl. Pt. 3, *Francis O. Day Co., Inc. v. Director, Div. of Envtl. Protection*, 191 W.Va. 134, 443 S.E.2d 602 (1994) ("Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.").

[3] "Debt Collection means any action, conduct or practice of soliciting claims for collection or in the collection of claims owed or due or alleged to be owed or due by a consumer." W.Va. Code § 46A-2-122(c).

Debt collection abuses continue to plague consumers because even when a debt collector violates the law, the chances they will be caught are minimal and the consequences to them are cheap. Debt collectors frequently file lawsuits that may not be factually valid and which they are not prepared to litigate, with the expectation that a large number of consumers will not defend themselves. Collectors benefit from the probability that debtors will not defend themselves, since most debt buyer lawsuits result in victory by default. A recent report found, for example, that in New York City collectors obtained default judgments in 80% of cases filed in 2006, and 90% of those cases were brought by debt buyers, similar to experiences in other jurisdictions. Urban Justice Center, *Debt Weight: The Consumer Credit Crisis in New York City and its Impact on the Working Poor*, 17 (Oct. 2007).

While the Attorney General has authority to enforce certain criminal and administrative penalty provisions of the Act, the legislature relies on private litigation to further the public's interest in enforcement in addition to enforcement by taxpayer-funded governmental agencies. "West Virginia is in the majority of states that grant enforcement power to both consumers and the State." *Shirley White, et al. v. Wyeth, F/K/A American Home Products, et al.*, No. 35296 (McHugh, J.) (Dec. 17, 2010). Defendant's argument to the contrary is at odds with the clear legislative intent to authorize private enforcement of the protections guaranteed by the CCPA. In *Harless*, this Court recognized

> Moreover, under Article 7 of the Act, the Attorney General is given broad powers to supervise, investigate and prosecute violations in order to see that compliance with the Act is maintained. Notwithstanding the broad grant of powers to the Attorney General, the Act still preserves the "remedies available to consumers under this chapter or under other principles of law and equity." W.Va.Code, 46A-7-113.

162 W.Va. at 125, 246 S.E.2d at 276.

Moreover, a private cause of action is necessary to enforce consumer protection laws because "in practice, public agencies lack sufficient financial resources to monitor and detect all

wrongdoing or to prosecute all legal violations." Deborah H. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 69 (Rand Inst. for Civil Justice 2000). In West Virginia, there are only three Assistant Attorneys General assigned to enforce the CCPA. *See The West Virginia Attorney General's Report On The Activities Of The Consumer Protection And Antitrust Divisions* 2 (May 10, 2010), *available at* http://www.wvago.gov/pdf/annualreports/2009_report.pdf (accessed Jan. 7, 2011). Even with targeted enforcement actions by state Attorneys General and the FTC to combat widespread abuses by relatively large debt collectors, debt collection abuses continue to cause vulnerable consumers substantial suffering and anguish. *See, e.g.* Press Release, *Attorney General McGraw Settles with Five More Collection Agencies; $1Million in Refunds for 492 West Virginia Consumers* (Aug. 25, 2008), http://www.wvago.gov/press.cfm?ID=445&fx=more (accessed Jan. 7, 2011) (announcing settlement of charges that consumers were coerced into accepting credit for which they were not qualified and did not understand, and which was collected years later by third parties engaging in prohibited and sometimes abusive practices, in violation of the CCPA). Indeed, one federal official reasoned that "[g]oing after them one-by-one with the legal and resource restraints we work under is a little like playing Whac-a-Mole . . . ." Michael Taylor, *How the FDA Is Picking Its Food Label Battles,* The Atlantic (2010), *available at* http://www.theatlantic.com/food/print/2010/07/how-the-fda-is-picking-its-food-label-battles/59927 (accessed Jan 9, 2011).

Similar arguments raised by defendants seeking to evade liability for their alleged violations of law have been rejected by courts across the country. *See, e.g., Feeney v. Dell Inc.*, 908 N.E.2d 753, 764 (Mass. 2009) (as purposes of Massachusetts's consumer-protection statute reflect, "availability of the Attorney General's enforcement authority is . . . not sufficient to

ensure that the goals of the statute are realized"); *Cooper v. QC Fin. Servs., Inc.*, 503 F. Supp. 2d 1266, 1289 (D. Ariz. 2006) ("The mere possibility that a state agency may at some time file an enforcement action should not preclude Plaintiff and other similarly situated consumers from seeking a legal remedy . . . ."); *Ting v. AT&T*, 182 F. Supp. 2d 902, 920 (N.D. Cal. 2002), *aff'd in part, rev'd in part*, 319 F.3d 1126 (9th Cir. 2003) (rejecting argument that FCC is forum before which class members can "effectively vindicate" right to recover damages from AT&T); *Gentry v. Super. Ct.*, 165 P.3d 556, 569 (Cal. 2007) (rejecting argument that availability of enforcement by Labor Commissioner is "adequate substitute for classwide arbitration"); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 276 (Ill. 2006) (state attorney general's authority to bring action insufficient, given office's need to allocate "scarce resources to a variety of issues affecting consumers"); *Vasquez-Lopez v. Beneficial Or., Inc.*, 152 P.3d 940, 950 (Or. Ct. App. 2007) ("possibility of state action cannot reliably serve as a substitute for private actions," given attorney general's contention that amount of consumer fraud in state "far exceeds" ability to investigate and prosecute it); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1004 (Wash. 2007) (noting declaration by consumer-protection chief that attorney general's office lacked "sufficient resources to respond to many individual cases" and often relied on private class actions).

D. Debt Collection Abuses Increasing As Industry Evolves

Consumer complaints about debt collection practices to state Attorneys General and the Federal Trade Commission have exceeded those for any other specific industry for over ten years.[4] Complaints about in house and third-party debt collectors totaled 119,364 and accounted

[4] News Release, *Top 10 List of Consumer Complaints for 2008* (March 12, 2010), http://www.naag.org/top-10-list-of-consumer-complaints-of-2008-resource-list.php (accessed Jan. 9, 2011); Federal Trade Commission, *Annual Report 2010: Fair Debt Collection Practices Act* 5 (Ap. 2, 2010).

for 22.8% of all complaints the FTC received in 2009. Federal Trade Commission, *Annual Report 2010: Fair Debt Collection Practices Act* 5 (Ap. 2, 2010).

During this same period, the "non-creditor" debt collection industry has evolved substantially. "The most significant change . . . has been the advent and growth of debt buying (i.e., the purchasing, collecting, and reselling of debts in default)." Federal Trade Commission, *Collecting Consumer Debts: The Challenges of Change, A Workshop Report* iv (Feb. 2009) (hereinafter "*Challenges of Change*"). It is anticipated the collection industry overall will reap annual revenues worth $11.6 billion by 2011, while estimated revenue for collection law firms is $2.3 billion. *Challenges of Change* at 13.

Both consumers and the courts are vulnerable to manipulation and abuse by the debt buying industry because, by design, the industry pursues collections based on inherently inadequate and inaccurate data. According to West Virginia Attorney General Darrell McGraw, abusive debt collections by debt buyers significantly harm consumers despite the important protections granted by the CCPA. McGraw explains, "[m]y office continues to be concerned about the increasingly widespread practice in which alleged defaulted accounts, mostly credit card debts, are sold to debt purchasers for pennies on the dollar, years after the default and when proof of the debt may no longer exist." Press Release, *McGraw Settles with Five More Collection Agencies, supra.*

The West Virginia Legislature has prohibited abusive collection practices. Yet debt collection abuses are the natural consequence of a collection industry which rewards collection mills for having inadequate information in an overburdened judicial system in which most judgments are granted by default. In order to effectuate the intent of the legislature in enacting

the CCPA, this Court must reject Defendant's argument that non-creditor debt collectors are exempt from the remedial provisions of the Act.

1. Debt Buyers Seek To Collect Stale Debt Previously Considered Uncollectible

The increase in consumer problems with debt collection is due substantially to debt collection by debt buyers. Defendant's argument, if accepted, would shield debt buyers as well as collection agencies like Defendant from responsibility under the CCPA. Debt buyers focus on collection of debts previously considered by creditors to be worthless because the cost of collection exceeded the potential value. Greater efficiencies in the collection of debts, fed by technological and communications advances have reduced transaction costs which traditionally hampered collections of small value and stale debts. *See* Robert M. Hunt, *Collecting Consumer Debt in America,* Fed. Res. Bank Phila. Bus. Rev., 15-16 (Q2 2007) (describing the advent of WATS lines, predictive dialing, and computer software spurring debt collections); *Challenges of Change* at 13.

Stale debt has become a commodity that is parsed, sold, and often resold multiple times at auction to the highest bidder.[5] Most stale debt is purchased in bulk for minimal cost, "fetching anywhere from fractions of a cent to four cents on the dollar." *Debt Portfolio Prices Edge Higher,* Collections & Credit Risk, (March 23, 2010), http://www.collectionscreditrisk.com/news/debt-portfolio-prices-edge-higher-3001103-1.html. Debt buyers usually do not purchase the documents and most of the data related to the accounts, further avoiding the costs of record keeping. Additional cost savings is achieved through the packaging and sale of debts without credible evidence to establish legal title. A single sale often

[5] *See SEC v. Merchant Capital, LLC*, 483 F.3d 747, 750-51 (11th Cir. 2007); Suein Hwang, *Small Claims: Once-Ignored Consumer Debts Are Focus of Booming Industry*, Wall St. J., A4 (Oct. 25, 2004).

involves hundreds or thousands of accounts and they are often sold multiple times. Yet consumers (and therefore the courts) seldom question the debt buyer's assertion of ownership. "[D]ebt collection efforts are initiated and proceed through the court process despite insufficient proof demonstrating that a debt is actually due and owing." *Comment of New York City Department of Consumer Affairs Submitted to FTC* 2 (Nov. 9, 2007), http://www.ftc.gov/os/comments/debtcollectionworkshop/529233-0055.pdf (accessed Jan. 9, 2011).

The legal and judicial environments are critical to the interests of the debt buying industry because judicial collection is used increasingly to collect and re-age stale debt.[6] Debt buyers typically pay less for debt in "certain states [that] have more debtor-friendly laws than others and are, therefore, less desirable from a collectability perspective." Portfolio Recovery Associates, LLC, *2008 Annual Report to SEC Form 10-K,* 8 (Feb. 27, 2009) (hereinafter "*Portfolio 10-K*").[7]

This trend is having a significant impact on courts, which operate at ground zero of the debt collection explosion.[8] Burgeoning dockets of collections cases are overburdening courts

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[6] Securing even a minimal payment from a debtor will extend the statute of limitations. Obtaining a judgment permits collectors in nearly every state to pursue debt collection indefinitely. *See* William Houston Brown, 1 *The Law of Debtors and Creditors* § 6:79 (rev. ed. Supp. 2007).

[7] Portfolio Recovery Associates is one of 5 publicly traded debt buyers. The others are Asset Acceptance Corp., Encore Capitol Group, Inc., Asta Funding Inc., and First City Financial Corp. There are thousands of privately held debt buyers. *See Comment of DBA Submitted to FTC* 2 (June 2, 2007), *available at* http://www.ftc.gov/os/comments/debtcollectionworkshop/529233-00010.htm (accessed Jan. 9, 2011) (hereinafter "*DBA Comment*").

[8] An exposé of debt collectors' mill flooding the Massachusetts trial courts illustrated the enhanced role of the debt collector on the court's mostly debt collection docket. Michael Rezendes, Beth Healy, Francie Latour, Heather Allen, and Walter V. Robinson (ed.), *Debtor's Hell, IV Part Series,* Boston Globe (July 30, 2006) (hereinafter "*Debtor's Hell*"). In Virginia

across the country. "Judges have expressed concern that the burden of handling the number of debt collection lawsuits on their dockets is making it difficult for them to handle other cases in an expeditious manner." *Challenges of Change* at 56. While the FTC acknowledges the persistence and increasing incidence of abusive debt collection complaints, it believes that "states should take primary responsibility to address abuses in the debt collection process" because "[v]irtually all collection proceedings are decided in state court through the application of state substantive and procedural law." *Challenges of Change* at 65. Accordingly, "[t]he judiciary continues to provide an important role in safeguarding consumer rights and in overseeing the fairness of the debt collection process." *MBNA America Bank, N.A., v. Nelson*, 15 Misc. 3d 1148[A], *1, 841 N.Y.S.2d 826 (Table N.Y. Civ Ct. 2007).

2. Inadequate and Inaccurate Data Inevitably Begets Abusive Collection Practices

Both consumers and the courts are vulnerable to manipulation and abuse by the debt buying industry because, by design, the industry pursues collections based on inherently inadequate and inaccurate data. According to the FTC, "[w]hen 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." *Challenges of Change* at 25. The *MBNA* court warned, for example, that:

> The entire [debt buying] industry is a game of odds, and in the end as long as enough awards are confirmed to make up for the initial sale and costs of operation the purchase is deemed a successful business venture. However, during this process mistakes are made, mistakes that may seriously impact consumers and their credit.

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courts, 70-80% of all filings are collection cases. Richard Hynes, *Broke But Not Bankrupt: Consumer Debt Collection In State Courts,* 60 Fla. L. Rev. 1, 51 (2008). In New York City, annual filing of debt collection cases increased by more than 60% between 2002 and 2007. Urban Justice Center, *Debt Weight: The Consumer Credit Crisis in New York City and its Impact on the Working Poor*, 1 (Oct. 2007).

MBNA, 15 Misc. 3d at *1.

This record keeping problem is compounded by multiple re-sales of debt. For example, according to an officer of an Illinois debt buyer who had purchased, or ostensibly purchased, bad paper, "[t]he same portfolio is sold to multiple buyers; the seller doesn't actually own the portfolio put up for sale; half the accounts are out of statute [of limitation]; accounts are rife with erroneous information; access to documentation is limited or nonexistent." Corinna C. Petry, *Do Your Homework; Dangers often lay hidden in secondary market debt portfolio offerings. Here are lessons from the market pros that novices can use to avoid nasty surprises,* Collections & Credit Risk 24, Vol. 12, No. 3. (March 2007).

In most debt buyer transactions, only small portions of electronic data regarding the alleged account is provided or available to the first debt buyer, despite the fact that original "[c]reditors typically store itemized data for all of their accounts in large electronic databases during the entire time they own the accounts." *Challenges of Change* at 31. Typically, "the initial data provided by the seller [ ] includes information such as the date of delinquency, the date of last payment, last known address, balance due, the debtor's personal identification information, and the history of the account." *DBA Comment, supra* n.7, at 8. Critical information necessary to validate debts that is typically *omitted* when the debt is sold includes:

- consumer complaints about billing errors
- payments made but not credited
- settlement agreements
- evidence of identity theft
- evidence showing who is an account holder responsible for the whole account balance rather than merely an account user
- evidence that the consumer is represented by an attorney
- the contract terms, or
- payment history.

Comment of NCLC and NACA Submitted to FTC 12-13 (June 6, 2007), *available at* http://www.ftc.gov/os/comments/debtcollectionworkshop/529233-00018.pdf (accessed Jan. 9, 2011) (hereinafter "*NCLC Comment*").

The limited data that is purchased often provides an inadequate basis to support, let alone upon which to seek a judgment. Debt buyers do not pay for – *and have very limited or no access to* – documentation which would constitute admissible evidence to prove the alleged debtor in fact opened the account, used the credit card, or agreed to the terms, interest rates, or attorneys fees imposed and added to the purported principal amount. This is so despite the fact that "[i]t is unsurprising when a consumer/debtor contacted by a collection agency about a seven-year-old debt would question whether it was a valid obligation." *Midland Funding, LLC v. Brent,* 3:08-cv-1434, 2009 WL 2437243, *8 (N.D. Ohio 2009). When debt is resold, subsequent purchasers have even less access to the original account data.

As a result of the inadequacy of the data and the inability of collectors to gain access to any information about the account being collected, alleged debtors are deprived of important protection to seek validation of a debt, challenge erroneous transactions, or demonstrate how much of their debt is due to purchases versus questionable finance charges and junk fees. *See In re Blair, Amended Order Overruling Objection to Claims,* Civ. No. 02-1140 (W.D.N.C. Feb. 10, 2004) (finding claims against 31 different individuals in bankruptcy court by major credit card company revealed that on average, 57% of the debts consisted of interest and fees). Moreover, alleged debtors with valid disputes face significant frustration as a result of the industry-wide failure to purchase adequate information.

Debt buyers concede that the industry's lack of such records fail to "serve the interests of consumers in obtaining documentation of disputed accounts or the legitimate interests of credit

grantors and debt collectors in collecting debts that are genuinely owed." *Comment of Portfolio Recovery Associates, Inc., Submitted to FTC* 2 (June 5, 2007), *available at* http://www.ftc.gov/os/comments/debtcollectionworkshop/index.shtm (accessed Jan. 9, 2011). They also acknowledge that lack of information masks valid defenses: "[i]f the credit originator fails to comply with applicable statutes, rules and regulations, it could create claims and rights for consumers that could reduce or eliminate their obligations to repay the account and have a possible material adverse effect on us." *Portfolio 10-K* at 18.

Despite industry-wide recognition of the data problems, collectors unfairly and inaccurately portray alleged debtors as "deadbeats." They often seek to excuse their own role in ignoring valid defenses and inaccurate information, claiming that "[t]he due diligence process and representations and warranties in the purchase agreement help ensure the accuracy and integrity of the debts sold." *DBA Comment* at 12. But according to a trade association representing approximately 6000 credit and collection company members,

> No amount of due diligence prior to the purchase of a portfolio can cure deficiencies in the original data transmitted by an original credit grantor. As long as there are willing sellers of partially or unverified or incomplete consumer data, the market will downwardly adjust purchase prices to permit the sales of such portfolios with downstream effects on consumers.

Comment of ACA International Submitted to FTC 43 n.55 (June 6, 2006), *available at* http://www.ftc.gov/os/comments/debtcollectionworkshop/529233-00016.pdf (accessed Jan. 9, 2011).

Moreover, even if a particular collector agrees to cease collection following the validation process, it may nevertheless sell the debt to another debt buyer, who will in turn have inadequate or erroneous information about the debt and will not know the alleged debtor has a valid dispute. Debt buyers are also known to sell debt which is ostensibly the result of identity

theft, settled, discharged in bankruptcy, or which has been paid in full. *NCLC Comment at* 27-28. Each time a disputed debt is re-sold, a debtor must re-engage in the same frustrating and often futile process to dispute the debt. Such debt has been dubbed "zombie debt" for apt reasons; it is hard to defend against and it seemingly never dies.[9]

The systemic inadequacy of the data subjects alleged debtors to common debt collection abuses including the filing of lawsuits collectors know or should know to be time-barred and seeking of attorneys' fees to which the collector is not entitled. In light of these problems, West Virginia Attorney General McGraw warns that "[c]onsumers should be skeptical whenever a collection agency threatens legal action." Press Release, *Attorney General McGraw Continues Efforts to Stop Unfair Debt Collection; Settlement Yields $404,000 for WV Consumers* (Feb. 18, 2010) (reaching settlement with three companies that used very different approaches to collect debts that were often disputed, sometimes non-existent, and in the case of one company, so old that the time to sue had expired), available at http://www.wvago.gov/press.cfm?fx=more&ID=507 (accessed Jan. 7, 2011).

The collection abuses inherent in the lack of adequate data are compounded by collection mills which automate and streamline their collections to increase profits at the expense of consumers. Courts have disapprovingly found that "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." *Erin Servs. Co., LLC. v. Bohnet*, 2010 NY Slip Op 50327U, *1 (N.Y. Dist. Ct. Feb. 23, 2010). Lacking adequate proof, debt buyers nevertheless

[9] There are numerous accounts of such collections. *See, e.g.*, Eileen Ambrose, "*Debt That Won't Die*," Baltimore Sun (May 6, 2007); Michael Rezendes, Beth Healy, Francie Latour, Heather Allen, and Walter V. Robinson (ed.), *Debtor's Hell, IV Part Series,* Boston Globe (July 30, 2006); Liz Pulliam Weston, *The Basics: 'Zombie Debt' is Hard to Kill,* MSN Money (c. May 18, 2006); Caroline Mayer, *New Breed Of Collectors Has Debtors Seeing Red,*" Washington Post (May 28, 2005).

pursue purported debtors simply by offering up a robo-signed affidavit from an employee in their loss recovery department and/or suing on an account-stated theory. *See, e.g., Johnson v. MBNA*, 357 F.3d 426 (4th Cir. 2003) (finding investigation of dispute by wife inadequate where MBNA could not locate credit application showing whether husband, wife, or both were responsible for card purchases); *Portfolio Acquisitions, LLC v. Feltman*, 391 Ill.App.3d 642, 909 N.E.2d 876 (2009) (holding if collector cannot produce written contract, must comply with shorter statute of limitations for unwritten contract); *Basile v. Blatt, Hasenmiller, Leibker & Moore, LLC*, 632 F. Supp. 2d 842 (N.D. Ill. 2009) (rejecting affidavit of indebtedness as insufficient to prove a written contract); *Citibank (SD) N.A., v. Whiteley*, 149 S.W.3d 599 (Mo. Ct. App. 2004) (holding bank failed to prove by substantial evidence account stated claim); *Asset Acceptance Corp. v. Proctor*, 804 N.E.2d 975 (Ohio Ct. App. 2004) (holding creditor failed to provide evidence that would permit a calculation of the balance due).

3. Collectors File Claims In Order To Coerce Payment Of Questionable Debt

Debt buyers have learned to work the judicial system to win judgments and coerce payments. *See* Press Release, *McGraw Settles with Five More Collection Agencies, supra* (describing complaint of a Westover, WV woman who was coerced to pay $700 on a disputed debt after a collector hounded her at work). Collectors may ignore evidence that conclusively demonstrates they have the wrong person or the statute of limitations has run on the debt. It is not unusual for a person to be forced to pay the same debt twice to a debt buyer. *See e.g. Overcash v. United Abstract Grp.*, 549 F. Supp.2d 193 (N.D.N.Y. 2008); *Chiverton v. Fed. Fin. Grp., Inc.*, 399 F. Supp.2d 96 (D. Conn. 2005); *Assoc. Fin. Servs. Co. v. Bowman, Heintz, Bocisa, & Vician, P.C.*, 2004 U.S. Dist. LEXIS 6520 (S.D. Ind. March 31, 2004); *Capital Credit & Collection Serv., Inc. v. Armani*, 206 P.3d 1114 (Or. Ct. App. 2009).

The potential ramifications of a judgment may be enough to make an alleged debtor fold his hand, even if he has a valid defense:

> [T]he judgment will impose costs on the consumer by damaging the consumer's credit rating. . . [which] does more than merely raise the consumer's cost of credit. A damaged credit score can make it difficult to rent an apartment, find a job, or even purchase automobile insurance. . . . credit reports typically do not record the filing of the lawsuit, but they do record judgments. Therefore, a civil filing serves as a credible threat to inflict harm on the defendant and may induce the defendant to pay.

Richard Hynes, *Broke But Not Bankrupt: Consumer Debt Collection In State Courts,* 60 Fla. L. Rev. 1, 20 (2008). As one court noted, even if an alleged debtor knows she has a valid defense, she may nevertheless pay to make the collector stop harassing her:

> even if the consumer realizes that she can use time as a defense, she will more than likely still give in rather than fight the lawsuit because she must still expend energy and resources and subject herself to the embarrassment of going into court to present the defense; this is particularly true in light of the costs of attorneys today.

Miller v. Upton, Cohen & Slamowitz, -- F. Supp. 2d --, 1:01-cv-01126-RRM-RML, 2009 U.S. Dist. LEXIS 92414 21-22, 2009 WL 3212556, (E.D.N.Y. Sept. 30, 2009).

Thus, when a lawsuit is filed, even "[a]n unsophisticated consumer . . . knows the price of poker has just gone up." *Avila v. Rubin*, 84 F.3d 222, 229 (7th Cir. 1996). The typical alleged debtor faced with a court summons may believe that a collector would not be able to bring a case that could not be proven in court and that he has no choice but to make payments if he wishes to avoid a judgment. *See Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1489 (M.D.Ala. 1987) (reasoning that unsophisticated "consumers would unwittingly acquiesce" to a time-barred lawsuit instead of defending against it). Indeed, many older people believe they will have to go to jail if they are summonsed to court. *See* Donna S. Harkness, *When Over-The-Limit is Over The Top: Addressing The Adverse Impact of Unconscionable Consumer-Credit Practices on the Elderly*, 16 Elder L.J. 1, 3-4 (2008).

IV. CONCLUSION

For the reasons stated herein, *Amici* respectfully request that this Court hold that the West Virginia Consumer Credit and Protection Act, W.Va. Code § 46A-5-101(1) provides consumers with a private cause of action against a non-creditor debt collector.

Respectfully submitted,

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No. 35709

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LINDA BARR,

Plaintiff,

v.

NCB MANAGEMENT SERVICES, INC., and HSBC BANK NEVADA, N.A.,

Defendants.

CERTIFICATE OF SERVICE

I, Brett J. Preston, counsel for *Amici* AARP, the National Association of Consumer Advocates, and the National Consumer Law Center do hereby certify that the foregoing **"Proposed *Amici* Brief of AARP, the National Association of Consumer Advocates and the National Consumer Law Center in Support of Plaintiff"** has been served on Tuesday, January 11, 2011, by mail to the following:

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