

# Debt Buyers' Abuse of Louisiana Courts Creates Problems for Consumers

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Louisiana consumers are feeling the adverse effects of the growing debt-buying industry. The industry is composed of a few large and many small companies that purchase past-due debt for pennies on the dollar from issuers of consumer credit, and then try to recover that debt from consumers. Because the debt buyers own the debt they are collecting, their profit margin is determined solely by their ability to recover the debt at minimal cost. This often inspires the use of aggressive tactics, which can include familiar maneuvers like incessant telephone calls, and now, in an increasingly popular tactic, the improper use of the court system through the filing of unlawful suits.

In 1977, the United States Congress passed the Fair Debt Collection Practices Act (FDCPA) to address abusive, deceptive and unfair debt collection practices by debt collectors.<sup>1</sup> The Federal Trade Commission recently has noted specific areas of concern with regard to recovery through judicial action, including: (1) filing suits based on insufficient evidence; (2) failing to properly notify consumers of suits; (3) the high prevalence of default judgments; and (4) improperly garnishing exempt funds from bank accounts.<sup>2</sup> In fact, in many cases, the debt buyer has not even satisfied the prima facie elements needed for a debt-recovery suit.

Abuses by debt buyers are of urgent concern. In some Louisiana courts, more than 10 percent of new cases in the past few years have been lawsuits filed by debt-buying companies.<sup>3</sup> Sometimes, this percentage is even higher. In Jefferson Parish's 2nd Parish Court, for example, nearly 25 percent of the total filings in 2012 were made by six major debt-buying companies.<sup>4</sup>

The lack of regulation of this industry makes the court system a weapon for debt-buying companies to the detriment of Louisiana consumers. The Louisiana Unfair Trade Practices Act (LUTPA), based on federal law, appears to allow the state government and consumers to sue debt buyers for unjust actions.<sup>5</sup> Yet, while other state governments have been proactive in protecting consumers from abusive practices in the debt-buyer industry, there have been few actions in Louisiana against debt-buying companies for unfair or deceptive conduct.

## Filing Suits on Open Account

In Louisiana, a suit to collect credit-card debt is called a suit on an open account. In order to prevail, the plaintiff must prove a valid credit agreement, ownership of the debt through a lawful chain of title, and the amount owed. Problems typically begin in the debt-buying plaintiff's petition. Often, the petition will state the amount owed but fail to provide any material facts regarding the date the credit line was issued, the date the debt went into default, or any sort of breakdown of the amount owed.<sup>6</sup> Most alarming are instances when the petitioner fails to state how it obtained the account because, without establishing chain of title or ownership of the open account, the debt buyer presents no right of action to claim the amount owed.<sup>7</sup>

Regardless, suits of this kind frequently move forward. A lack of information presents a major hurdle, especially for unrepresented consumer defendants. The deficiency of information can be attributed to the debt-buying process itself, during which portfolios containing debts with varying age and little historical information are sold and resold. This makes it confusing for the defendant who, after the lawsuit is filed, is served with a petition notifying him or her of a debt owed to an unfamiliar company with which he or she has never done business.

Even before a lawsuit is filed, this lack of information is particularly harmful when the prescriptive period to file suit has already run. Debt buyers sometimes induce unaware consumers to make a payment by threatening suit despite the fact that the debt has prescribed and is unenforceable.<sup>8</sup> Some debt buyers go so far as to use false affidavits to prove the debt.<sup>9</sup> Such practices conducted by debt buyers without proper inquiry may constitute violations of the FDCPA.<sup>10</sup>

Defendant consumers, who are likely unfamiliar with the litigation process and frequently do not have means to hire an attorney, may do nothing, usually resulting in a default judgment in favor of the debt collector. Armed with the default judgment, the debt buyer can then seek garnishment of the debtor's wages and bank accounts and pursue other means to enforce the judgment. Sometimes the debt buyer and the consumer will enter into a consent judgment to pay the full amount of the principal and interest in

addition to costs and fees; the consumer is told that by entering into the agreement, he or she can avoid litigation and additional fees, even though the debt buyer has failed to make a prima facie case against the typically unrepresented defendant.

## Deficient and Inaccurate Pleadings

Because the information provided by debt-buying plaintiffs is sparse and at times inaccurate, a defendant who knows and understands his or her rights or is represented by counsel should have numerous defenses available. A review<sup>11</sup> of debt-collection cases in the Orleans Parish 1st City Court gives an idea of the predicament faced by Louisiana consumers, particularly highlighting the impact a proper defense makes:

- ▶ 91 percent of defendants did not have counsel.
- ▶ Half of the cases resulted in default judgments.
- ▶ All cases resulting in consent judgments involved defendants without counsel.
- ▶ The majority of cases where the defendant was represented resulted in either a settlement or dismissal of the case.

## Possible Solutions

There are a number of ways to address the pervasive issues in Louisiana, which include efforts to impede the plaintiff debt buyer from taking advantage of the judicial system and to educate the defendant debtors of their rights. A multipronged approach is suggested.<sup>12</sup>

First, there should be enforcement and clarification of existing Louisiana laws. Although prosecution power exists under LUTPA, it appears to be a toothless threat against the debt-buying industry. Some advocates would encourage the Louisiana Attorney General's Office to take a more assertive role in supporting the widespread use of LUTPA against unfair and deceptive trade practices by debt buyers. For example, the website of the Texas Attorney General provides public information regarding debt-collection practices, including material on practices prohibited by the Texas Debt Collection Act and penalties for violations.<sup>13</sup>

Second, additional state legislation could

be implemented. To begin, state and municipal governments should enact legislation that prohibits a debt-collection claim from being brought unless certain documentation is presented, including (1) the account name or credit card name; (2) the account number; (3) the date of issue or origination of the account; (4) the date of the charge-off or breach of account; (5) the full chain of title of the debt; and (6) whether the plaintiff seeks ongoing interest and attorney fees. The presentation of these elements enforces the requirement that plaintiffs meet their evidentiary burden prior to judgment (specifically default judgment) in their favor.<sup>14</sup>

Also, the Legislature should pass reforms requiring that, along with the service of a debt buyer's petition, the plaintiff must include a notice with the basic information about the debt, including a description of the collector, why the plaintiff is bringing the suit, that the debt sold to the debt buyer originated from the named issuer, and proof of ownership of the debt or chain of title. Furthermore, the plaintiff also should include the time period in which the defendant debtor must respond with an answer and directions to the defendant about legal service options.

Additionally, like the federally required notice the debt collector must provide to the debtor five days after initial contact, the Legislature also should require that the following information be included in the notice: (1) the name of the original creditor; (2) an itemization of the principal, total interest and total fees that make up the debt; (3) the fact that if the debtor disputes the debt, then the debt buyer must suspend collection efforts until the debt buyer obtains verification of the debt and mails this verification to the consumer; and (4) the fact that the debtor can request the debt buyer cease contacting the debtor about the debt if the debtor requests so in writing.

Third, judicial checklists should be created for cases instituted by debt buyers. Implicitly included in this proposal is the simultaneous education of the judiciary about the issue, which is necessary to remedy the problem. State court judges should be informed regarding the collection of past due debts. A checklist would ensure that debt buyers are meeting the burdens of proof to establish a right to judgment on an open account.

Fourth, debt-buyer litigation should

become a pro bono focus. Increased awareness about the need for volunteer services in these cases would help to address the issue, particularly because debtors typically appear without counsel. While some pro bono programs exist to aid defendants in debt-buyer and debt-collection cases, opportunities involving additional training and continuing legal education can lead to the involvement of more attorneys.

Fifth, additional information should be made available to defendant debtors regarding their rights and options in responding to a debt-collection suit. For example, state-sanctioned publications on the Internet and a checklist of the debtor's rights in such a suit would help alleviate the informational disparity between debt buyers and self-represented debtors. Also, the creation of a standardized petition would streamline litigation and expedite resolution by the courts, especially when dealing with unrepresented defendants.

## Conclusion

In summary, the crux of the concern in Louisiana debt-buyer cases is twofold — the consumer's understandable lack of knowledge about his rights and the paucity of evidence provided by debt buyers to establish a prima facie case for a suit on open account. Other states have enacted consumer-friendly measures, protecting their access to justice. It may be time for Louisiana to consider reforms that would ensure fairness for all parties.

## FOOTNOTES

1. "Debt buyers" are included in the definition of debt collectors. See 15 U.S.C. § 1692(a)(6).

2. Fed. Trade Com'n, "Repairing A Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration," ii (July 2010), available at: <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting-debt-collection-report.pdf>.

3. Statistics are based on a study by Louisiana Appleseed volunteers Andrew J. Graeve, Kyle W. Siegel and Amy E. Duncan.

4. *Id.*

5. See, e.g., La. R.S. 51:1404, 1408.

6. See Complaint No. 11-51881 (2012) (1st City Court for the City of New Orleans).

7. See, e.g., Bureaus Inv. Grp. No. 2, L.L.C. v. Howard, 06-273 (La. App. 5 Cir. 11/14/06), 947 So.2d 37 (finding that the record did not support the plaintiff's allegations that it owned the debt owed by the defendant because the record contained no "bill of sale" from the original creditor to the plaintiff).

8. An action on an open account is subject to liberative prescription of three years, La. Civ.C. art. 3494 (4), which begins to run from the date of the last charge, purchase, payment or credit entry on the account.

9. Mark A. Moreau, Strategies for Representing the La. Consumer § 3.11 (Debt Buyer Lawsuits) 125, in *La. Legal Services & Pro Bono Desk Manual* (2013), available at: <http://loyno.edu/~probono/manual/consumer.pdf>.

10. *Id.*

11. Statistics are based on a sample of 117 debt-collection cases filed in 2011 in Orleans Parish 1st City Court, studied by Andrew J. Graeve, Kyle W. Siegel and Amy E. Duncan.

12. The multipronged approach was developed by Amy E. Duncan, Andrew J. Graeve and Kyle W. Siegel. It is based on strategies of other jurisdictions, the needs of vulnerable defendants and the data the authors collected.

13. Atty. Gen'l of Texas Ken Paxton, *Debt Collection*, [www.texasattorneygeneral.gov/cpd/debt-collection](http://www.texasattorneygeneral.gov/cpd/debt-collection) (last visited 1/3/16).

14. These requirements are modeled after Tex. R. Civ. Pro. § 508.2 (2013), available at: [www.supreme.courts.state.tx.us/rules/trcp/trcp\\_part\\_5.pdf](http://www.supreme.courts.state.tx.us/rules/trcp/trcp_part_5.pdf).

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