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Federal Trade Commission
Office of the Secretary
Room H-135 (Annex A)
600 Pennsylvania Avenue
N.W., Washington, DC 20580

**Re: Debt Collection Roundtable – Comment, Project No. P094806.
Protecting Consumers in Debt Collection Litigation and Arbitration**

To Whom It May Concern:

Consumers Union of U.S., Inc, the nonprofit publisher of *Consumer Reports*, appreciates the opportunity to participate in the discussion about ways the Federal Trade Commission can protect consumers in debt collection litigation and arbitration. Since its inception, Consumers Union has worked to protect consumers, including by empowering consumers to protect themselves with reliable information to make educated decisions in the marketplace. Though the Fair Debt Collection Practices Act (FDCPA) aims to provide consumers with adequate information to respond to debt collection actions, it is not doing so in practice and the FTC should declare certain practices and omissions by debt collectors to be unfair practices, in order to ensure the intent of the law is fulfilled.

Many of the problems found in the debt collection industry stem from lack of information flow. Original creditors do not transfer important identifying information to debt buyers, which leave subsequent debt collectors without adequate information to respond to FDCPA verification requests from consumer debtors. Compounding this problem is the Fourth Circuit decision which interprets the FDCPA's verification standard to be so low that it has been rendered meaningless.¹ Often this leads a debt collector to file an unsubstantiated lawsuit, at which point the FDCPA has failed in its purpose to facilitate fair practices in the collection of valid debts.

The key to fulfilling the intent of the FDCPA without unfair conduct or consequences is to implement changes in the legal framework which encourage more complete information flow between creditors, debt buyers and collectors, and consumer debtors. We appreciate the recommendations made by the FTC in the February 2009 workshop report, that Congress should amend the FDCPA in certain essential ways.² In the meantime, there is more the FTC

¹ Chaudry vs. Gallerizzo, 174 F3D 394, 406 (4th Cir.1999).

² Federal Trade Commission, Collecting Consumer Debts, The Challenges of Change, A Workshop Report, (February 2009) at 26, available at <http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf>. The FTC recommends that Section 809(a) be amended to require debt collectors to provide validation notices that include: (i) statements notifying consumers of two significant rights they have under the FDCPA; (ii) the name of the original creditor; and (iii) an itemization of the principal, total interest, and total fees that make up the debt.

can do with its authority under Section 5 of the FTC Act to ensure that debt collection is not rife with unfair practices.

Establishing a Definition for Basic Validation Information

Basic validation information is the central packet of information to which all parties to a collection action must have access. The importance of retaining this information begins when the original creditor sells the debt to a buyer. It is also essential when a collector notifies a consumer that a collection effort has begun, to ensure accuracy. And if the matter must be settled in court, early and equal access by all parties to the same information is absolutely vital to ensuring a fair and just litigation process.

There are multiple sources that can be combined to come up with a definition of “basic validation information” which should include both “baseline” and “baseline plus” information.

<u>Source</u>	<u>Baseline Information</u>
Current FDCPA Section 809(a)	<ul style="list-style-type: none">• Amount of debt• Name of creditor• Statement re: assumption of debt validity in the absence of a dispute• Statement re: if the debt is disputed the debt collector will “verify”• Statement re: upon written request the collector will provide name of original creditor if different from current.
FTC rec. from Feb. workshop report	<ul style="list-style-type: none">• Statements notifying consumers of two significant rights they have under the FDCPA• Name of original creditor• Itemization of: total principal, interest, fees and other charges that have been added to the debt.
	<u>Baseline Plus Information</u>
NCLC comment to FTC, 6/6/07	<ul style="list-style-type: none">• Proof of indebtedness signed by the consumer• Date that debt was incurred and date of last payment• Chain of title if debt has been sold
California Code of Civil Procedure- Small Claims Court	<ul style="list-style-type: none">• Original debt,• Each payment credited to the debt,• Each fee and charge added to the debt,• Each payment credited against those fees and charges,• All other debits or charges to the account,• Explanation of the nature of those fees, charges, debits, and all other credits to the debt, by source and amount.

The proposed amendments detailed by the FTC in the February workshop report are a step in the right direction and establish adequate baseline requirements, but the Commission should also propose amending the FDCPA to include a definition of “basic validation information,” which would include, in addition to the “baseline” information, a good faith requirement to retain as much of the “baseline plus” validation information as possible and convey all information to

the relevant parties during each stage of the debt collection process, both before and at the commencement of litigation.

Selling and Buying Debt

Because the sellers of debt routinely fail to pass on important validation and historical information about the debt relationship, there is a high likelihood of mistakes and/or confusion about the identity of the debtor and creditor and the actual amount owed. It will be beneficial for both the debt collectors as well as the debtor to have the basic validation information retained so that verification requests can be easily fulfilled and litigation can be avoided. If a lawsuit is inevitable, then both parties will have the basic information necessary to build the case and to evaluate whether to defend that case.

The FTC should declare it to be an unfair practice to sell debt without passing on the basic validation information as defined above, as well as the following historical information about the debt³:

- All communications asserted by the consumer that dispute the debt.
- Any and all validation information
- Whether any settlement has been reached concerning the debt
- Whether the debt is beyond the statute of limitations
- Whether the consumer is or has been represented by an attorney and the attorney's contact information.
- Whether the consumer has informed the collector that a time or place is inconvenient to the consumer for communication
- Whether the debt has been discharged or listed in bankruptcy
- Any illness or disability claimed by the consumer or known to the collector
- Any known or claimed violation of the FDCPA to date
- Any other relevant information

Initial Collection Communication

The basic validation information defined above should be included in the initial communication statement required by Section 809(a.) By providing this information, consumers will more often recognize the debt. This will allow the consumer to begin the productive process of examining his or her own records, locating any discrepancies between the consumer's records and the creditor's records, and either seeking to discuss a payment arrangement or seeking to contest the collection activity.

In addition, the Commission should declare it to be an unfair practice to initiate a debt collection action without passing onto the consumer the basic validation information as defined. If this information was legally required to be passed onto the debt buyer, now debt collector, at the time of sale it would not be burdensome to require it be provided upon initial collection communication.

³ The National Consumer Law Center and the National Association of Consumer Advocates, Comments to the Federal Trade Commission Regarding the Fair Debt Collection Practices Act (June 6, 2007), at 28-29, available at <http://www.ftc.gov/os/comments/debtcollectionworkshop/529233-00018.htm>.

Filing a Collection Complaint

Debt collection litigation is not a typical adversarial situation. In practice, most defendants are not represented by counsel while most plaintiffs do have attorneys and are familiar with the court system. Because debts are sold, and due to the absence of substantial information about the debt in the complaint, the debtor may not even recognize the debt or the plaintiff creditor. Identity theft adds complexity. Combine this with the high rate of default judgments and there is substantial evidence that the court system is being used to produce default judgments based on unsubstantiated claims. To prevent the use of the public court system to turn an unsubstantiated claim into a judgment, a person seeking to collect a debt in court should be required to submit basic validation information as part of the complaint. Such a requirement may encourage third party collectors and debt buyers to insist that this information be provided when the debt is assigned or purchased.

There are two existing state statutory models for requiring validation type information before using the courts for collection. The California Code of Civil Procedure imposes a special requirement for information about the debt as part of any small claims court complaint. This unique statutory scheme can be used as guidance for what information should be part of every complaint filed in court to enforce the payment of a debt. The law requires a statement of calculation of liability which states the following:⁴

- Original debt,
- Each payment credited to the debt,
- Each fee and charge added to the debt,
- Each payment credited against those fees and charges,
- All other debits or charges to the account,
- Explanation of the nature of the fees, charges, debits, by source and amount.

Though the CA law prohibits third party debt collectors from suing in small claims court⁵, this requirement could be applied successfully in states that do not have such restrictions on debt collectors and could be a special requirement imposed in connection with the filing of debt collection cases in superior court as well as small claims court. The FTC is in the unique position to conclude that filing a lawsuit without substantiated evidence is an unfair practice under the FDCPA and the Commission should use this authority immediately.

A second statute illustrating the value of requiring more specific information about the debt prior to litigation is the widely enacted Uniform Commercial Code Section 9-616, governing collection attempts on secured debt. Though the debt collection problems being discussed in this forum generally stem from unsecured debt, the requirements detailed in Article 9 of the UCC can provide guidance, and their widespread enactment shows that providing debtors with baseline information about how an amount sought was calculated will not substantially interfere with the ability to collect debts.

UCC Section 9-616 requires important information be communicated to the obligor when the secured party demands payment for any deficiency after collateral is sold. This information helps the debtor to evaluate whether the amount claimed is the proper amount. It also has an important side benefit of requiring that the creditor in fact allocate all rebates and credits against the debt before starting the collection process.

⁴ CAL. CIV. PROC. CODE § 116.222 (2009).

⁵ CAL. CIV. PROC. CODE § 116.420 (2009).

UCC Section 9-616 requires the secured party to provide an explanation of surplus or deficiency (if owed) to clarify the status of a defaulted debt following the sale of collateral. The explanation statement requires the following information:

- Aggregate amount of debt that was secured by the property that was sold, and whether this amount reflects a rebate of unearned interest or credit service charge as a specified date
- Amount of the proceeds of the sale
- Aggregate amount of the obligations after deducting the amount of proceeds
- Amount, (by aggregate or type) and the types of expenses (prep, holdings, processing, attorneys fees) related to the sale
- Amount, (by aggregate or type) and types of credits (rebates of interest or service charges) to which the obligor is entitled
- Amount of surplus or deficiency

The provisions of these two laws are there to ensure that the parties to a particular type of debt collection action are informed of all relevant details. Providing this type of information up front should increase the likelihood that the amount sued for is the amount owed, and should give the consumer the ability to choose an educated course of action- to defend the lawsuit or to try to negotiate a payment plan or settlement with the debt collector.

Conclusion

Better retention and transfer of information early on, at each stage of the debt collection process will ensure that the public court system is not exploited to turn unsubstantiated claims into judgments. The FTC should declare certain practices and omissions by debt collectors to be unfair practices, in order to ensure the intent of the Fair Debt Collection Practices Act is fulfilled. We would like to applaud the Commission for looking into ways to address the problems that exist in debt collection litigation and look forward to its continuing work on these important issues.

Sincerely,

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