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**Written Comments of MFY Legal Services, Inc.
to the
Federal Trade Commission Debt Collection Roundtable**

My name is Carolyn E. Coffey and I am a senior staff attorney in the Consumer Rights Project at MFY Legal Services. MFY Legal Services provides legal services to more than 5,000 low-income and immigrant clients in New York every year. We are the largest legal services provider for people with mental disabilities in New York City and we have several other projects to help low-income New Yorkers, including our Foreclosure Prevention Project, Lower Manhattan Justice Project, and Consumer Rights Project. We launched our Consumer Rights Project four years ago in response to our clients' growing demand for legal representation and information about debt collection and other consumer issues. The Consumer Rights Project advises, counsels, and provides representation to hundreds of people every year, and also engages in impact litigation and legislative advocacy on the City, State, and Federal levels to effect wide-ranging reforms that will protect vulnerable New Yorkers.

I thank you for the opportunity to comment on the issues raised at the Federal Trade Commission's Debt Collection Roundtable held in Washington, D.C. on December 4, 2009. In particular, MFY wishes to expand on the questions raised by the FTC regarding service of process.

Why aren't more consumers defending against collection suits?

In our experience, in New York City, the primary reason more consumers are not defending against collection suits is because they are not being served with notice of these lawsuits. The clients who call our consumer hotline are rarely, if ever, served properly—most of them find out about the lawsuit only after a judgment has been entered and their wages are garnished, their bank account is frozen, or they discover the judgment on their credit report. Although we have spoken to a number of consumers who do not respond because of feeling intimidated by the court process or because of confusion about how the process works, the vast majority of consumers whom we assist have never been served with a summons and complaint.

To what extent are consumers failing to participate in collection suits because they were not served with process?

In 2008, MFY issued a report, *Justice Disserved: A Preliminary Analysis of the Exceptionally Low Appearance Rate by Defendants in Lawsuits Filed in the Civil Court of the City of New York* (*available at* http://www.mfy.org/Justice_Disserved.pdf). This report examined more than 180,000 cases filed in the Civil Court and catalogued how default

judgments entered due to improper service wreak havoc on the lives of New Yorkers. The report concluded that the appearance rate by defendants in lawsuits initiated by the seven largest debt collection law firms was only 10 percent. The remaining defendants who never appear face the devastating repercussions of these default judgments: instead of having an opportunity to defend themselves in court, consumers first learn of litigation against them when their wages are garnished or their bank accounts are frozen. Undoing the effects of a judgment prove to be extremely difficult and burdensome, particularly for *pro se* defendants, many of whom are elderly, disabled, and poor.

The severity of the crisis of improper service in New York cannot be overstated, and is best reflected by the filing by the New York State Attorney General of *Pfau v. Forster & Garbus* on July 21, 2009, which seeks to vacate 100,000 default judgments across New York State which are tainted by fraudulent claims of service by a single process serving company.

What are the other reasons for failure to participate?

Other reasons consumers fail to defend against collection suits include that many people are sued by debt-buying companies that they have never heard of before and therefore, do not believe they owe any money and do not need to respond. Another reason people do not defend against suits is because of the prevalence of stolen and mistaken identity and the mistaken belief that the consumer has no reason to respond because it is not a valid claim against them. Finally, in New York City, which is diverse and populated with people for whom English is not their primary language, many consumers simply do not understand that they are being sued or understand how to respond to a lawsuit.

What can courts and others do to increase consumer participation in debt collection suits?

One way the courts and others can increase consumer participation in debt collection suits is by adopting the additional notice requirement Chief Clerk's Memorandum 176, Additional Notice on Consumer Credit Actions, put in place by the New York City Civil Court in April of 2008. This rule seeks to avoid the entry of default judgments in cases where consumers are not properly served, and an identical provision is included as a part of state-wide legislation currently pending in New York. The rule requires the clerk of court to send an additional notice of the lawsuit to defendants. If the notice is returned as undeliverable by the postal service, the clerks will not enter an application for default judgment.

One solution often proposed by the courts is increased mediation or arbitration. However, it is our opinion that these "solutions" are not effective for *pro se* defendants in the least, and are instead short-cuts that undermine the court process, particularly in debt-buyer cases. In our experience, mediation is just another way for debt buyers to win their cases without having to provide any evidence or prove their prima facie case. Rather than allow *pro se* defendants to see a judge and put a plaintiff to its proof, under the mediation process *pro se* defendants are often browbeaten by mediators and debt

collection attorneys into settling debts they may not even owe, and are discouraged from asserting defenses are asking for proof of the debt.

A better idea is for courts to sponsor and endorse programs in courthouses that are staffed by legal services or pro bono attorneys who can assist defendants in debt collection suits. The Civil Court in New York City should be commended for partnering with local bar associations and legal services organizations to initiate successful projects in courthouses in four of the five boroughs where trained volunteer attorneys provide defendant debtors with legal advice and assistance regarding how to reach favorable settlements, file answers, seek discovery, and oppose motions. Although the programs are sometimes criticized by the debt collection industry, consumer advocates would counter that it is hardly unfair to inform consumers of their defenses and their rights in the face of a lawsuit where the plaintiff is represented by counsel and is at an undeniable advantage. Further, the court process and the rules of civil procedure have been developed with the assumption that both sides are represented by counsel, but in New York City, 99 percent of the defendants in consumer credit cases are *pro se*. Providing them with some modicum of knowledge helps to level the playing field for nonattorneys.

What actions should lawmakers, the courts, the FTC, the industry, or others take to address service of process and consumer participation issues?

A few ways to address problems with service of process and consumer participation include requiring process servers to be licensed and bonded (and the effective enforcement of licensing requirements), and the legislature's creation of a private right of action to pursue process servers and the amendment the FDCPA to allow claims against process servers. Another option is to hold debt collection attorneys and their clients liable under the FDCPA for the conduct of the process servers they hire. The maxim that "you pay for what you get" is true in the process serving context: there is a direct correlation between how much debt collection law firm pays for service and the quality of return. Finally, as Attorney General Cuomo has done in New York State, state attorneys general should actively investigate the debt collection and process serving industry, and where necessary, initiate criminal and civil proceedings against process servers who blatantly commit fraud and flout the law.

We applaud the Federal Trade Commission for holding these important roundtables and urge the Commission to effect much-needed reform in the area of debt collection. Thank you.

--Submitted January 8, 2010