J.Malik

November 18, 2009

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

Re: Debt Collection Roundtable-2 – Comment, Project No. P094806

To Whom It May Concern:

INTRODUCTION

My name is J. Malik. I am a consumer and debtor and I live in Michigan. I personally have experienced the ups and downs of credit and debt and litigation. I have prosecuted Fair Debt Collection Practices Act and Fair Credit Reporting Act cases for myself as a Pro Se litigant. I have also defended lawsuits filed against me as a Pro Se litigant. These lawsuits brought against me were filed by junk debt buyers, collection agencies as well as collection attorneys. I have studied the Fair Debt Collection Practices Act and Fair Credit Reporting Act extensively. I have also studied the Rules of Civil Procedure for Michigan and the Federal Rules of Civil Procedure extensively. I personally feel that being through this process on many levels I have a keen insight as a consumer and debtor.

LITIGATION AS A MAJOR PART OF DEBT COLLECTING

Litigation has consumed the dockets throughout Michigan. In Grand Rapids, MI alone, they devote entire Tuesdays to Motions filed by debt collectors. Subsequently a case which was filed with one judge will end up being heard by another. With the clogged dockets of the courts, in my experience the judges do not have the time to read through the file before them and thus skim through it during oral arguments. Unfortunately for the average Pro Se litigant, the tables are turned against them because they are either ill prepared or are not educated enough on their rights or the proper procedures for a Court of Law.

It is a common fact that debt collectors use the judicial system to resolve alleged debts they wish to collect. I have seen multiple comments to this forum as well as in response to Better Business Bureau complaints that this is not the truth. It is my opinion that once a debt collector realizes that a debtor is unable or unwilling to pay they use the judicial system to obtain a judgment - often by default because many consumers are confused, intimidated or unaware of the lawsuit - and often successfully because few consumers understand how to defend themselves in court. The judicial system regardless of what

most say or think is prejudiced against the debtor. I have seen this first hand in my own cases as well as by sitting in court for Motion hearings by debt collectors and those debtors attempting to defend themselves.

In Kent County Michigan, specifically the 61st Judicial District Court (max claims of $25,000.00) Asset Acceptance, LLC of Warren, MI has filed from 06/01/2009 to 11/18/2009 138 lawsuits. That is nearly an average of one lawsuit per day and that is for only one Judicial District alone. Midland Funding, LLC has filed from 06/01/2009 to 11/18/2009 103 lawsuits. Once again that is nearly an average of one lawsuit per day and that is for only one Judicial District alone. LVNV Funding, LLC has filed from 06/01/2009 to 11/18/2009 69 lawsuits. Arrow Financial Services, LLC from 06/01/2009 to 11/18/2009 has filed 75 lawsuits. *Source: http://www.grcourts.gov*

Based on the above in a mater of a little less than six months, four junk debt buyers have filed a total of 385 lawsuits in one Judicial District alone. That equals out to about an average of 2.30 per day. This is not including other junk debt buys and debt collectors such as NCO Financial Services, Cavalry Portfolio, Palisades Collection and Harvest Credit Management to mention a few who often sue in the original creditor's name. The truth of the matter as shown so clearly above is debt collectors use the courts to collect their debts because they have an advantage in a Court of Law.

In October 2009 in the 61st Judicial District Court, Asset Acceptance, LLC obtained 21 default judgments totaling an amount of $52,943.35. Considering Asset Acceptance, LLC is a junk debt buyer and on average pays .08 cents on the dollar for debt they stand to make a $48,707.88 profit assuming they do not settle the judgments with the debtors. To make it fair, I have included Capital One cases for the month of October. These cases are cases where Capital One has held onto its debt and not sold it. In October 2009 Capital One received Default Judgments or Default on Motion for Summary Judgments in 67 cases. The total of all the amounts in just these 67 cases was $183,042.26. *Source: http://www.grcourt.org/reports/2009/civil_1009.html*

The numbers above for just two creditors in one Judicial District in Michigan is astounding and quite frankly it is frightening. It has been my experience in my own litigation history as well as debtors on other internet boards that debt collectors often use false and misleading attempts in court to collect on their alleged debts. Most debtors are only able to go so far on their own as a Pro Se litigant without the help of an attorney. There are many factors for this reason. Most attorneys who can and will represent consumers desire a retainer up front which most of the time the debtor is unable to afford. If the debtor is unable to afford to pay an alleged debt, then they obviously are unable to afford legal representation, thus leaving them at a major disadvantage.

FALSE AND MISLEADING STATEMENTS IN MICHIGAN COURTS

There is an overwhelming issue here in Michigan. There is a theory which is called "account stated theory". This legal premise is found at MCL 600.2145 *et seq*. Junk debt buyers, debt collectors and the like often use this Michigan Statute in their collection

lawsuits even though the prerequisites of the Statute itself were not met prior to the filing of the lawsuit. This statute specifically calls for a "meeting of the minds" *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 331; 657 NW2d 759 (2002), quoting *Watkins v Ford, 69 Mich* 357, 361; 37 NW 300 (1888). It is hard to fathom that most debtors would have a meeting of the minds with any junk debt buyer or debt collector for that matter. Further, the creation of an account stated requires the assent of both parties to the account. *Kaunitz,* supra at 185.

Junk debt buyers, debt collectors and the like rely on MCL 600.2145 *et seq* The Statute states that in order for their to be prima facie evidence that there is an "account stated" between the parties, the Plaintiff must file an affidavit of indebtedness. This affidavit which is filed with the Initial Complaint and Summons must be dated within 10 days of the issuance of the Summons, this if at all rarely happens. Most affidavits filed by junk debt buyers, debt collectors and the like are often dated months before the issuance of the Summons and often by someone with no knowledge of the debt at issue. The clear and simple fact is the filing of the affidavit alone is false and misleading unless there was a true meeting of the minds and a "balance struck" between the parties in the action. *Keywell & Rosenfeld v Bithell*, 254 Mich. App. 300, 331; 657 N.W.2d 759 (2002). Moreover, most debtors do not know they have to file their own affidavit refuting the affidavit of the Plaintiff, but if the debtor fails to do this it then shifts the burden to the debtor, unfairly I might add. *Lipa v Asset Acceptance, LLC,* F Supp 2d (ED Mich, 2008) (noting that an uncontested affidavit filed under MCL 600.2145 merely shifts the burden of going forward with proof to the defendant).

MULTIPLE THEORIES OF RECOVERY WITH NO PROOF

Under the Fair Debt Collection Practices Act, it is the responsibility of the debt collector to obtain validation and forward it to the debtor upon request. Most of the time junk debt buyers can't or refuse to obtain verification from the original creditor and forward it to the consumer. In fact one junk debt buyer, Asset Acceptance, LLC uses its own letter head to make a print out from its own notes upon request for verification. Under the Fair Debt Collection Practices Act, this is not considered verification, yet Asset Acceptance, LLC will continue with its multiple collection efforts, which could include legal action. I myself have been a victim of Asset's bogus attempts to verify a debt and I had to sue them in order to get them to stop collecting on a debt they had no way of verifying. I am one person they did this to, think of all the other debtors they are suing in Courts of Law who they have done the same thing to and the debtor is none the wiser of his/her rights.

Debtors are often sued in courts all over this country based on multiple theories of recovery for a junk debt buyer or debt collector. The two other main theories are "breach of contract" and "implied contract". Based on the above paragraph and as shown more readily below most junk debt buyers and debt collectors have no way of proving an implied contract existed, let alone a breach of any contract. In most collection cases an affidavit is attached to the complaint, supposedly signed by someone with knowledge of the account. Usually with a junk debt buyer, an employee of that company will sign the

affidavit attesting to the facts of the account, including facts of how it was opened, when it was opened, the charges made on the account and the like. If Plaintiff wanted to enter this affidavit into evidence it would need to be supported by actual evidence or other competent witness[s] who were privy to the information at the time the alleged account was opened. *People v Hill*, 257 Mich. App. 126, 140; 667 N.W.2d 78 (2003). It is impossible for an employee of the junk debt buyer to have personal knowledge of the alleged debt in question, which creates an issue of material fact. Moreover, any affidavits, reports and the like prepared in advance of litigation are not admissible. *People v Huyser*, 221 Mich App 293, 298; 561 NW2d 481 (1997). Truly how many debtors without legal representation will know this? And if they know this, can effectively argue this before a Judge in a Court of Law? Any of the above actions constitute false and misleading actions on behalf of the junk debt buyer, debt collector and the like.

In the debt purchasing industry when an alleged debt is purchased it is nothing more than paper or merely a few lines in a computer file with an alleged debtors name, address, social security number, account number and alleged amount due and owing. There is no "paperwork" such as a contract, statements of account from the "original creditor" to back up the claim of the junk debt buyer. Nevertheless this same junk debt buyer will sue on these alleged account based on the theories mentioned above with no proof to back up their claim. I see it over and over again on consumer boards that are related to credit and debt such as www.creditboards.com and www.collectorsexposed.com. These junk debt buyers will file the suit, and when a debtor fights back and demands the Plaintiff prove they owe the debt, the debtor gets buried in motions, discovery and the like attempting to confuse, intimidate and trip them on court rules. The court dates get continued and the Plaintiff continues to get multiple continuances from the court, only in the end to dismiss the case without prejudice just so the debtor can go through it again. Junk debt buyers, debt collectors and the like should not be allowed to file a lawsuit against an alleged debtor unless they have the evidence aside from an affidavit to prove their case.

ACTIONS ON TIME BARRED DEBTS

One of the comments posted on the FTC website by Portfolio Recovery Associates. LLC states "No reputable debt collector ever intentionally files a lawsuit against a debtor after the statute of limitations has expired." This statement on its own is hard to fathom. Capital One for years had a provision in its own contract which stated "This contract is governed by the applicable laws of the State of Virginia". Virginia has a three year Statute of Limitations on such accounts. How many debtors were sued over the years by Capital One F.S.B or on behalf of Capital One F.S.B by junk debt buyers who bought the alleged debts after the three year applicable Statute of Limitations?

Mistakes do happen on time barred debts as Mr. Redmond on behalf of Portfolio Recovery Associates, LLC states "But debt collectors are human, and while the account information we rely on to calculate a statute of limitations is extremely reliable, no process is foolproof and mistakes occasionally take place (in every type of civil litigation)." However if a creditor, junk debt buyer or debt collector is going to sue on an

account every effort should be made avoid these mistakes. Unfortunately these mistakes are made far too often and then it is up to the debtor to contest the Complaint and fight it out in Court. For many debtors this is not possible for a multitude of reasons. Within this week alone (11/13/2009 – 11/18/2009) there are alleged lawsuits filed on time barred complaints against seven people with whom I know via the credit forums mentioned above. Yet these debtors have to take time away from their families, their work and their lives to defend these lawsuits when a simple due diligence effort on behalf of the Plaintiff most likely would have prevented the lawsuit in the first place.

FILING LEGAL ACTIONS AGAINST INCORRECT PERSONS

When a junk debt buyer purchases paper and it only has minimal information on an alleged debtor it is very possible to commence litigation against the wrong person. In this day and age of electronic information and such information being lifted, stolen or copied things can go awry. The little documentation that transpires between junk debt buyers and the like is extremely insufficient to ensure they have the correct debtor.

Not only is it in the case of a person or persons that might have the same names or ones similar to one another it also happens in the course of people who are authorized users. Myself for instance: I was the authorized user on my mother's jewelry store credit account. My mother defaulted on this account when the company she worked at for 17 years closed her store. Upon her default it was reported to my credit reports by the furnisher (Citibank). Moreover, all of a sudden her address and social security number was reported to my credit reports. When it was transferred to a debt collector (United Recovery Solutions) they started calling me and demanding I pay for her debt, one for which I never incurred a single penny. Shortly after she defaulted she had a legal action initiated against her. I was listed as the co-defendant on the Initial Complaint as due and owing for a debt that was not mine, one I did not incur and one I never agreed to pay for either by implied or any other means.

THE FAIR DEBT COLLECTION PRACTICES ACT NEEDS UPDATING

The Fair Debt Collection Practices Act was enacted over 30 years ago. And since that time it has been hardly updated to catch up to today's society. We have cell phones, fax machines, e-mails, voice mail and the like and the FDCPA is lagging very far behind today's technology and consequently debt collectors find loop holes. In the end it is left up to the Courts to determine how the FDCPA applies in today's society and we have varying opinions from our Courts across the Country. Many of the junk debt buyers, debt collectors and advocates of the collection industry have said we do not need new regulations. The industry as a whole does not want new regulation because the FDCPA is so outdated the industry uses loopholes in it as the Courts are divided over its interpretation. If we did not need new regulation and their were no abuses, or they are few and far between as the industry claims, then consumer complaints about debt collectors to the FTC and other agencies would not be nearly as high as they are.

I believe new laws and regulation should contain the following:

A) The filing of any lawsuit by any junk debt buyer and/or debt collector should contain the following ***prior*** to the commencement of a lawsuit:

aa) Original Statements and/or a ***signed*** contract between the alleged debtor and the original creditor.

bb) A clear chain of title from the inception of the account to the Plaintiff who is suing. This chain of title should be verifiable.

B) Any affidavits such as the ones mentioned in this letter should not be allowed as evidence if they are signed by an employee of the junk debt buyer and/or debt collector as they ***are not*** based on personal knowledge.

C) Any type of e-mail messages should be prohibited unless the debt collector has express authorization from the alleged debtor to communicate by those means.

D) Any messages left on a voice mail and/or answering machine should include the Miranda as provided under the FDCPA as explained in *Foti v. NCO* Financial Systems, Inc., 424 F.Supp.2d 643, 653 (S.D.N.Y. 2006).

E) Any initial communication with an alleged debtor ***should not*** be by a Summons and Complaint. It should be by a notice which conforms to 15 U.S.C. 1692g.

F) Any lawsuit initiated against an alleged debtor should be commenced where the debtor lived at the time of the commencement of the action. The provision which affords a debt collector to sue where the contract was initiated could be harmful to an alleged debtor especially one who might lives in a different state.

CONCLUSION

I appreciate the FTC allowing comments on these issues. With the current economic climate we are facing and the rapid advancement of technology, the FDCPA needs to be amended and new regulations put into place. These new regulations are needed to protect consumers and alleged debtors against the mounting abusive and illegal tactics and practices currently being used by the collection industry.

Thank You

J. Malik