



# DEFENDING Junk-Debt-Buyer Lawsuits

By Peter A. Holland

I sued you, you didn't file an answer,  
and you didn't come to court.  
What more do I need to prove?

—Remark made by an attorney for a junk-debt buyer

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Consumer advocates are well aware of the rise in bogus lawsuits filed by junk-debt buyers.<sup>1</sup> The sheer volume of these cases is astronomical. For example, in Maryland, Midland Funding Limited Liability Company filed more than 7,000 lawsuits in the months of November and December 2011.<sup>2</sup> On March 9, 2011, one lawyer in Maryland filed 130 lawsuits on behalf of LVNV Funding Limited Liability Company.<sup>3</sup> Does anybody expect that Midland Funding or the lawyer mentioned above intend to appear in court and prosecute these cases? Of course not. They are filing these lawsuits based on two historically accurate assumptions: (1) the vast majority of consumers will not show up or contest the lawsuits, and (2) a majority of judges will award a default judgment in the vast majority of cases, based on documents, often inaccurately described as affidavits, submitted by the plaintiff.<sup>4</sup>

<sup>1</sup>This article builds on Clinton Rooney's *Defense of Assigned Consumer Debt*, 43 CLEARINGHOUSE REVIEW 542 (March–April 2010). Because Rooney's article is outstanding and remains current, I will avoid significant overlap. I refer the reader to Rooney's article for a more substantive treatment of standing, causes of action for contract and account stated, and the defense of statute of limitation and tolling. Like Rooney, I focus on defense of junk-debt-buyer lawsuits, but many of the same strategies can be employed in the defense of original creditor lawsuits. While some examples in this article are drawn from cases in Maryland, the litigation tactics of junk-debt buyers are substantially similar, if not virtually identical, across the country.

<sup>2</sup>Midland Funding Limited Liability Company, Midland Credit Management Incorporated, Encore Capital Group Incorporated, and related entities paid a fine of \$998,000 to the state of Maryland to settle charges against them of alleged illegal conduct (Press Release, Maryland Department of Labor, Licensing and Regulation, Maryland Commissioner of Financial Regulation, Attorney General Announce Settlement Agreement with National Debt Collector (Dec. 17, 2009), <http://bit.ly/zdWleO>).

<sup>3</sup>As of the date of this article, LVNV Funding Limited Liability Company is subject to a cease-and-desist order from the state of Maryland. Alleged violations include operating without a license, knowingly filing false affidavits, intentionally misrepresenting the amount of claims and collecting impermissible compound interest, knowingly collecting unauthorized attorney fees and prejudgment interest at unauthorized rates, and "filing cases which the relevant assignment documents evidence that LVNV did not have valid title of the consumer claims at issue" (Press Release, Maryland Department of Labor, Licensing and Regulation, Maryland Commissioner of Financial Regulation Suspends Collection Agency Licenses of LVNV Funding LLC and Resurgent Capital Services (Oct. 28, 2011) <http://bit.ly/z3r15F>).

<sup>4</sup>Depending on your state, this may be described as an affidavit judgment, a default judgment, a summary judgment, or a similar term. Whatever the language, it suggests that a judge has (in theory) read a statement submitted by the plaintiff, made under the penalty of perjury and based on personal knowledge, claiming that the plaintiff owns an account and that the defendant owes money to the plaintiff by virtue of an assignment of the account from the original creditor to one or more intermediary assignees, resulting in the plaintiff's current ownership of the account.

All across the United States, junk-debt-buyer lawsuits have overwhelmed the courts and wrought untold havoc on the lives of consumers. These cases have resulted in homelessness, needless bankruptcies, job loss, marital stress, divorce, depression, hopelessness, and illegal garnishments. That judgments against consumers are part of a zero-sum game is often overlooked. In these cases every bogus judgment deprives a legitimate creditor of the chance to get paid from scarce resources. A Chapter 7 bankruptcy discharge does not discriminate between legitimate and illegitimate unsecured creditors; with very few exceptions, it discharges any debt which is unsecured.<sup>5</sup> Thus the legitimate creditor to whom money is owed is materially harmed by the junk-debt buyer, who extracts money based on an illegitimate claim and forces people into bankruptcy. In short, a broad effort to defend these cases not only will help individual consumers but also could improve the entire U.S. economy by preserving precious resources to pay what is legitimately owed and avoiding paying for what is not. Here I survey the landscape of the junk-debt-buyer industry and advise consumer advocates engaged in the battle against unscrupulous junk-debt buyers.

### A Brief Overview of the Junk-Debt-Buyer Industry

Junk debt is assigned debt that is purchased for pennies on the dollar with little or no documentation of the underlying contract, the payment history, or the chain of assignment.<sup>6</sup> Often the consumer does not owe any money at all. Almost universally, even if there is an underlying obligation, as a matter of contract law,

the consumer does not owe the amount that is being claimed in the form of interest, late fees, and attorney fees.

At the outset we must distinguish between original creditors and junk-debt buyers. The former had some business transaction with the consumer. The latter are total strangers to the consumer, and, hoping to make a killing, have merely invested in a portfolio of cheap assets. Junk-debt buyers purchase old credit card and other accounts already abandoned by the original creditor, and then the junk-debt buyers sue on them. Not uncommonly someone can get sued twice on the same debt, get sued on an account one never had, get sued long past the statute of limitations, or get sued on a debt already discharged in bankruptcy. In junk-debt-buyer cases, the standards of professionalism for some lawyers are so low that it is no longer news to discover that a lawyer filing a debt-buyer lawsuit robo-signed the complaint, or that documents submitted by the plaintiff contain forged or robo-signed signatures.<sup>7</sup>

Advocates must educate judges and the public about the crucial distinction between traditional debt collection and the attempt to collect on junk debt. Trying to collect money actually owed on a credit card to an original creditor differs greatly from a junk-debt investor trying to collect on its own behalf. Such an investor paid only pennies on the dollar for the consumer's debt and is seeking a windfall of one hundred cents on the dollar. Notably the returns being sought through the use of our nation's court system are attractive on Wall Street. Some publicly traded junk-debt buyers have reported record earnings.<sup>8</sup>

<sup>5</sup>U.S. Bankruptcy Code, 11 U.S.C. § 524(a)(1).

<sup>6</sup>This section contains a brief overview of the junk-debt-buyer industry. For a more detailed overview, see the following studies: Claudia Wilner & Nasoan Sheftel-Gomes, *The Legal Aid Society et al., Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers* 13 (May 2010), <http://bit.ly/aTIND4>; Rachel Terp & Lauren Bowne, *East Bay Community Law Center & Consumers Union of United States, Past Due: Why Debt Collection Practices and the Debt Buying Industry Need Reform Now* (Jan. 2011), <http://bit.ly/GCSUX6>; Rick Jurgens & Robert J. Hobbs, *National Consumer Law Center, The Debt Machine: How the Collection Industry Hounds Consumers and Overwhelms Courts*, 21, 23 (July 2010), <http://bit.ly/GGthnU>; and my *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 *JOURNAL OF BUSINESS AND TECHNOLOGY LAW* 259 (2011), <http://bit.ly/GHBLIX>.

<sup>7</sup>See *Midland Funding v. Brent*, 644 F. Supp. 2d 961 (N.D. Ohio 2009); Jeff Horwitz, "Robo" Credit Card Suits Menace Banks, *AMERICAN BANKER*, Jan. 30, 2012, <http://bit.ly/GFb9wW>.

<sup>8</sup>See *infra* notes 30–32.

Sales of accounts to junk-debt buyers occur only after the original creditor makes the business decision not to outsource the collection or pursue the collection itself.<sup>9</sup> In fact, plaintiff's debt-buyer status indicates that the original creditor made a business decision to sell off the account for a few cents on the dollar rather than outsource collection of the account or collect the account in-house.<sup>10</sup> In light of this, every time a junk-debt buyer intones that people should pay the debts it is trying to collect, bear in mind that the original creditor has already decided that the account is not worth pursuing. Therefore the original creditor is not asserting a claim and will receive no benefit if the case is won and no detriment if the case is lost.

The old adage "you get what you pay for" is particularly true in junk-debt-buyer cases. The junk-debt buyers claim to have bought various accounts, but sales of accounts are haphazard at best. As a recent action by a former employee of one major bank revealed, what is being sold is often not what it appears to be.<sup>11</sup> The junk-debt buyers routinely lack the documentation to prove the terms and conditions of underlying credit card contracts and usually lack the proof necessary to show the entire chain of assignment. That the original creditor elected to sell an account is a red flag that the account has defects and little—if any—documentation. Indeed, almost every agreement between original creditor and initial purchaser (and between the original purchaser and each subsequent assignee) is made without representations and warranties, without recourse, and often without any duty on the part of the seller to investigate the accuracy of what it is selling. In sum, once the banks sell off summaries of alleged accounts at fire-sale prices, they do not want to be bothered with them again and

no longer have any financial interest in the accounts included in the summary of accounts sold.

A complicating aspect is that much of this junk debt is sold through wholesalers that purchase the junk debt from large institutions and then resell the junk debt to junk-debt buyers. The resold junk debt is often packaged in smaller and more focused bundles such as geographic-specific debt (e.g., debtors with Maryland addresses), type of debt (e.g., auto loans, credit card loans, etc.), and age of debt (i.e., older debt is cheaper than current debt). The criteria for these bundles may include debt discharged in bankruptcy or clearly beyond the statute of limitations for any litigation-based collection effort.

The problems resulting from this overall lack of proof or accuracy are myriad, leading to thousands of dubious judgments entered by default. In recommending changes in Maryland's court rules for collecting assigned debt, the Maryland Court of Appeals Standing Committee on Rules of Practice and Procedure stated:

The problem, which has been well documented by judges, the few attorneys who represent debtors, and the Commissioner of Financial Regulation, is that the plaintiff often has insufficient reliable documentation regarding the debt or the debtor and, had the debtor challenged the action, he or she would have prevailed. In many instances, when a challenge is presented, the case is dismissed or judgment is denied. In thousands of instances, however, there is no challenge, and judgment is entered by default.<sup>12</sup>

<sup>9</sup>For a description of the overall problem of lack of proof in debt-buyer lawsuits, see *The One Hundred Billion Dollar Problem in Small Claims Court*, *supra* note 6.

<sup>10</sup>Although beyond the scope of this article, one part of the decision by the original creditor is the potential for lender's insurance.

<sup>11</sup>See *infra* note 46.

<sup>12</sup>Maryland Court of Appeals Standing Committee on Rules of Practice and Procedure, 171st Rules Committee Report to the Maryland Court of Appeals 7 (July 1, 2011), <http://bit.ly/GUNppk>.

This observation is validated by the industry itself. Specifically, in a January 19, 2011, letter to the Maryland Court of Appeals Standing Committee on Rules of Practice and Procedure, the Association of Credit and Collection Professionals, an industry representative, stated its concern about the requirement that a junk-debt buyer must give the court “a certified or otherwise properly authenticated photocopy or original of certain documentation establishing proof the consumer debt at issue existed.”<sup>13</sup> The reason why the industry opposes the requirement of “proof the consumer debt at issue existed” is that, in its own words,

[t]he above documentation is often unattainable for a variety of reasons, the most important of which is that the original creditor no longer has the information or did not have it when selling an account or turning the account over for collection. Particularly in the context of credit cards, financial institutions are not required under federal law to maintain this type of information beyond two years.<sup>14</sup>

Can a consumer successfully sue an entity for breach of contract without offering any proof of the terms and conditions of the contract? That is what junk-debt buyers presume to do every day, hundreds of thousands of times per year, in courts across our nation.

### Tips for Defending Consumers in Junk-Debt-Buyer Lawsuits

I offer the following tips to help CLEARINGHOUSE REVIEW readers protect consumers from illegal and unethical abuse while educating judges about the essential differences between cases brought by original creditors and those brought by junk-debt buyers.<sup>15</sup>

#### 1. Read the Complaint and Supporting Documentation Carefully

Read the complaint and accompanying documents multiple times, highlighter in hand, while looking for intentional deceptions, errors, and omissions that could help your client prevail. First, look for defects on the face of the complaint. For example, the named plaintiff might be a different corporation from the entity named in the supporting documents. This occurs with surprising frequency. Second, if your state requires debt buyers to be licensed as debt collectors, check whether the debt buyer is licensed. Suing without a license creates standing issues, and, according to an increasing number of courts, it constitutes a violation of the Fair Debt Collection Practices Act.<sup>16</sup> The junk-debt buyer is subject to the Fair Debt Collection Practices Act because the junk-debt buyer allegedly acquires the debt after default.

Third, look for the failure to prove the existence of (or the terms and conditions of) the alleged underlying contract. Failure to prove the contract is the rule rather than the exception. Often a contract is not even attached to the complaint. More often, some well-worn photocopy sample of a terms-and-conditions mailer is attached. This sample is often illegible, and almost never signed by the consumer. On close inspection, the printing date on this document often reveals that it was generated years after the account was allegedly opened. Also, the terms and conditions submitted may not be from the original creditor identified by the junk-debt buyer but are presented to make the claim appear supported.

Fourth, the debt buyer is usually unable to prove a complete and unbroken chain of title. Without a valid chain of title, the debt buyer does not have standing to sue.

<sup>13</sup>Letter from Association of Credit and Collection Professionals to Maryland Court of Appeals Standing Committee on Rules of Practice and Procedure 2 (Jan. 19, 2011) (in my files).

<sup>14</sup>*Id.*

<sup>15</sup>While the scope of this article is limited to junk-debt buyers, many of the same issues are in original creditor cases, as evidenced by the story of Chase Bank and Linda Almonte (see *infra* note 51).

<sup>16</sup>Fair Debt Collection Practices Act § 1692e(5), 15 U.S.C. §§ 1692–1692p; “[T]his Court interprets Section 1692e(5) of the FDCPA to include the taking of ‘action that cannot legally be taken’” (*Bradshaw v. Hilco Receivables Limited Liability Company*, 765 F. Supp. 2d 719, 730 (D. Md. 2011)).

Attached to the complaint may be one or more bills of sale that purport to transfer ownership of unspecified accounts, for unspecified consideration, pursuant to unspecified representations and warranties. The lack of account details makes tying in the assignments to the account claimed against the person sued impossible. Closer inspection often reveals discrepancies in the corporations doing the alleged assigning, in the dates of assignment, and other falsehoods and omissions.

Fifth, if the debt buyer cannot prove the terms and conditions of the underlying contract, then it cannot prove any contractual right to receive interest, late fees, or attorney fees. In that case, at best it would be able to prove *quantum meruit* or unjust enrichment. However, because the debt buyer almost never has an accounting of all charges and payments showing how the payments were allocated (interest, principal, and late fees), it is unable to prove damages for *quantum meruit* or unjust enrichment. Further, is the *quantum merit* claim limited to what the junk-debt buyer paid? How does equity support giving the junk-debt buyer more than what it expended?

Sixth, read all documents carefully with an eye toward the statute of limitations. Keep in mind that if your opponent cannot prove a contract governed by the law of some other state, then the statute of limitations of your state is what applies. Further, keep in mind that in many states the statute of limitations is considered procedural. If the junk-debt buyer elected to sue there, it is subject to that state's limitation of actions notwithstanding any choice-of-law provision. Cases are frequently filed outside the statute of limitations.

Seventh, use a highlighter to illuminate misleading statements and omissions in the junk-debt-buyer documents. For example, highlight for the judge the fact that the bill of sale states explicitly that there are no representations or warranties of any kind, including representa-

tions about validity, collectability, or the statute of limitations. Similarly, where applicable, highlight the fact that, according to the debt buyer's own records, your client's alleged account was sold to an entity other than the plaintiff who is suing your client. Or you might highlight for the judge all of the places where the junk-debt buyer improperly redacted information, such as the name of the data file it allegedly purchased, the purchase price of the portfolio, and other material information.

There may be other fatal defects, such as obviously forged signatures, whiteouts and blackouts in documents, assertions in the complaint that the plaintiff loaned money to the defendant, and similar indicia of bogus claims.<sup>17</sup> Revealing the defects in these documents does not require a deep background in consumer law. It just requires a cup of coffee, your undivided attention, a yellow highlighter, and a red pen.

## 2. Know the Elements of an "Account Stated" Cause of Action

Often the complaint is pled as an account stated. This cause of action requires proof of (1) prior transactions that establish a debtor-creditor relationship between the parties, (2) an express or implied agreement between the parties as to the amount due, and (3) an express or implied promise from the debtor to pay the amount due.<sup>18</sup> Proving that there has been a past relationship, an agreement as to the amount due, or an agreement to pay the amount due is impossible because most junk-debt-buyer lawsuits are filed without the plaintiff talking to the consumer ahead of time. Further, unless the junk-debt buyer can prove its status as assignee, the other elements do not even come into play.

The junk-debt buyer often argues that the defendant never objected when the credit card bills were filed, or when the lawsuit was filed, or when the plaintiff sent a demand of payment to the defen-

<sup>17</sup>Because the debt buyer claims to have purchased an account already in default, the debt buyer cannot possibly be the entity that loaned the money.

<sup>18</sup>1 Am. Jur. 2d *Accounts & Accounting* § 26 (2012).

dant. This argument fails because “the mere rendition of an account, by one party to another, does not alone establish an account stated.”<sup>19</sup>

### 3. Scrutinize the Supporting Affidavit

An affidavit in support of summary judgment has very strict requirements. Most states track the federal rule almost verbatim. Federal Rule of Civil Procedure 56(c)(4) states: “An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.”<sup>20</sup>

Often the affidavit begins by stating that all facts set forth below are based “on my personal knowledge,” but then the oath at the end is made merely “to the best of my information, knowledge and belief.” Translation: “I have personal knowledge to the best of my information, knowledge and belief.” A short motion to strike the affidavit is appropriate in such cases. Moreover, calling this universal defect to the attention of the courts is appropriate because these bogus affidavits are almost always identical in thousands of cases. Judgments based on affidavits that are defective on their face should be denied.

### 4. Master the Relevant Rules of Evidence

The Federal Rules of Civil Procedure and Evidence are cited here, but you need to determine your state’s analogue to the relevant federal rules. First, never forget that an affidavit for summary judgment has three requirements, pursuant to your state’s analogue to Federal Rule of Civil Procedure 56(c): (1) it must be based on

personal knowledge; (2) it must contain facts admissible in evidence; and (3) it must affirmatively show that the affiant is competent to testify to the matters stated.<sup>21</sup> Most affidavits do not hold up under scrutiny. Even if they purport to be based on personal knowledge (which they often do not), a debt-buyer assignee is highly unlikely to have personal knowledge of the consumer, of the debt, or of the business-record-keeping practices of the original creditor or prior assignees.

Second, most of the debt buyer’s documents are just pages or fragments taken from larger documents. For example, the bill of sale is almost always an exhibit to some larger document, and it almost always refers to an asset sale and purchase or forward flow agreement. But those documents, which contain the terms and conditions governing the bill of sale, including any representations, warranties, and disclaimers, are never submitted. The list of accounts described in the bill of sale is never submitted either. Federal Rule of Evidence 106, which deals with the “remainder of or related writings,” says that you are entitled to demand that the remainder be introduced.<sup>22</sup> Do not allow the plaintiff to introduce document fragments without insisting that the plaintiff introduce the entire document(s). This applies to monthly statements as well because monthly statements are merely summaries compiled from other documents.

Third, always be mindful of relevance.<sup>23</sup> Whether your client defaulted on a credit card is not relevant unless the junk-debt buyer can prove that it has standing to sue, and vice versa. Fourth, Federal Rules of Evidence 601, 602, and 603 address competency, personal knowledge, and taking an oath or affirmation.<sup>24</sup>

<sup>19</sup>*Id.* § 29.

<sup>20</sup>FED. R. CIV. P. 56(c)(4). The Maryland Rules of Civil Procedure track the Federal Rules of Civil Procedure (see Md. R. 3-306 (2012) (The Maryland Rules of Civil Procedure are issued by the Maryland Court of Appeals Standing Committee on Rules of Practice and Procedure and are referred to as the “Maryland Rules”)). Effective January 1, 2012, Maryland Rule 3-306 has been amended to be more demanding of debt buyers’ proof.

<sup>21</sup>FED. R. CIV. P. 56(c).

<sup>22</sup>FED. R. EVID. 106.

<sup>23</sup>*Id.* 401.

<sup>24</sup>*Id.* 601, 602, 603.

These rules can be used to demonstrate that evidence is admissible only if there is a witness who can testify on the basis of personal knowledge. Debt buyers literally offer affidavits as testimony at contested trials, and some judges accept them. But remember that, even in an affidavit, competency, personal knowledge, and an oath or affirmation must be affirmatively demonstrated to the courts, pursuant to Federal Rule of Civil Procedure 56(c). Fifth, remember that all documents must be properly authenticated. Tattered, illegible, robo-signed photocopies of the purported business records of third-party entities are not self-authenticating.<sup>25</sup>

Sixth, simplify the hearsay rules. An opposing party's statements are always admissible.<sup>26</sup> A junk-debt buyer should not be able to authenticate, let alone admit into evidence, the records of third-party entities as business records under Federal Rule of Evidence 803(b)(6) because they were not created by the junk-debt buyer.<sup>27</sup> Even if you cannot convince a judge to exclude the records categorically, you can argue to exclude them under Rule 803(b)(6) if the "source of information [ ] or the method or circumstances of preparation of the record indicate a lack of trustworthiness." Put simply, the junk-debt buyer relies on the records of others to prove its case. Keeping these records out of evidence because they are hearsay not subject to any of the hearsay exceptions means that the junk-debt buyer cannot make a *prima facie* case. Remember that documents can have multiple levels of hearsay and that to be admissible each statement must fit an exception to the hearsay rule.<sup>28</sup>

And, seventh, use Federal Rule of Evidence 201 to ask the court to take judicial notice of facts such as that your junk-debt-buyer plaintiff employs felons, was fined by the Federal Trade Commission, settled a nationwide class action for fraudulent affidavits, or whatever else you deem highly relevant to your case.<sup>29</sup> Give the court the articles cited in this article, and ask it to take judicial notice of the junk-debt industry's practices.

Junk-debt buyers sometimes argue that they are the good guys. They claim that, by holding people accountable for their irresponsible financial behavior, they help keep down the cost of credit for everybody. Again, this is the time to emphasize that your plaintiff is an investor in the equivalent of penny stocks. The fantasy that the debt-buyer system is keeping the cost of credit down evaporated when the bank decided to sell off the debt at a fraction of its face value. For example, in the third quarter of 2011, Asset Acceptance Capital Corporation paid three cents on the dollar for junk debt.<sup>30</sup> Encore Capital Group paid four cents on the dollar in the fourth quarter of 2011.<sup>31</sup> And Portfolio Recovery Associates Incorporated paid seven cents on the dollar in the fourth quarter of 2011.<sup>32</sup>

## 5. Do Not Fall into the "Rules of Evidence Do Not Apply in Small Claims" Trap

Less than 1 percent of consumers who appear in collection courts are represented by counsel. These courts are unequal playing fields not only because consumers have no lawyers but also because junk-debt buyers have convinced judges, consumers, and consumer attorneys that

<sup>25</sup>Fed. R. Civ. P. 901, 902(11).

<sup>26</sup>Fed. R. Evid. 801.

<sup>27</sup>*Id.* 803(b)(6).

<sup>28</sup>*Id.* 803.

<sup>29</sup>*Id.* 201.

<sup>30</sup>Press Release, Asset Acceptance Capital Corporation, Asset Acceptance Capital Corp. Reports Third Quarter 2011 Results (Nov. 1, 2011), <http://bit.ly/HbwMmp> (\$38.5 million to purchase \$1.3 billion face value).

<sup>31</sup>Press Release, Encore Capital Group Inc., Encore Capital Group Announces Fourth Quarter and Full Year 2011 Financial Results (Feb. 9, 2012), <http://bit.ly/GUhxBx> (\$136.7 million to purchase \$3.8 billion).

<sup>32</sup>Press Release, Portfolio Recovery Associates Inc., Portfolio Recovery Associates Reports Fourth Quarter and Full Year 2011 Results (Feb. 16 2012) (<http://bit.ly/GUdD9w>) (\$89.9 million to purchase \$1.21 billion).

the rules of evidence do not apply in small claims.<sup>33</sup> The junk-debt buyers downplay the fact that, even in a small-claims tribunal, witnesses must be competent to testify on the basis of personal knowledge of the matters asserted. They also downplay the fact that the judges are responsible for gatekeeping functions put in place to ensure due process of law. Yet, on a regular basis, judges in junk-debt-buyer cases admit documents and document fragments into evidence, including documents identified as affidavits, even when there is no witness to authenticate the documents, let alone provide any testimony demonstrating indicia of reliability.

The “anything goes in small-claims court” trap is easily avoided by pointing out to the judge that, even in a small claim, documents can only come into evidence through a witness who is competent to testify to the matters asserted, and whose testimony is based on personal knowledge. For example, in Maryland, Rule 5-101 states that the rules of evidence do not apply in small-claims actions except for those rules relating to the competency of witnesses.<sup>34</sup> Use your state analogue to Federal Rules of Evidence 601, 602, and 603.<sup>35</sup>

Witnesses must be competent to testify to the matters at issue, have personal knowledge, and take an oath, even in small claims where the rules of evidence might not otherwise apply. Further, axiomatic to most (but not all) judges is that documents can be introduced only through a sponsoring witness, who is subject to cross-examination (except cross-examination is not required in summary judgment of affidavit judgment cases).

## **6. Emphasize the Plaintiff's Lack of Standing**

Over the past few years, as robo-signing has become more common, a paradigm shift has occurred. For more and more

judges, the image of an assault on the integrity of the courts is replacing the image of deadbeat consumers. Always remember that you are fighting to (1) ensure due process; (2) avoid the very real danger of getting sued twice on the same debt, or sued on someone else's debt (such as in the increasing number of identity theft cases), or sued on time-barred debt; and (3) make sure that if a judgment is entered against your client, it is not illegally inflated by unsubstantiated interest, late fees, or attorney fees. And always remember what you are fighting against: (1) an assault on the integrity of the courts; (2) robo-signing; (3) lawsuit abuse; (4) litigation for profit; and (5) the lawsuit lottery system perpetuated by a business model that is characterized by suing without sufficient proof of standing, liability or damages, and banking on a flooded court system to provide a default judgment in an amount that is between ten and fifty times greater than what was paid for the claim.

## **7. Research Every Entity and Every Person Who Signed Any Document**

As more and more court documents are being scanned by clerk's offices, robo-signing and suspect signatures become easier to detect. For example, type the name of the person who signed your affidavit into Google with the name of the debt buyer, and then compare signatures. Often, you discover that your affiant has somebody else signing his signature. Further, you may come across some deposition testimony online where your affiant admitted that he signed hundreds or even thousands of affidavits a day without verifying anything to which he had sworn.<sup>36</sup>

## **8. Develop a Strategy for Each Case**

In debt-buyer cases, some plaintiffs' lawyers enter their appearances long before trial. Others merely show up when

<sup>33</sup>See Wilner & Sheftel-Gomes, *supra* note 6, at 1, stating that, of a sample of 365 court cases, not a single person was represented by counsel. Anecdotally, in my numerous experiences observing court proceedings, I saw only one consumer represented by an attorney (other than consumers represented by the University of Maryland School of Law's Consumer Protection Clinic).

<sup>34</sup>Md. R. 5-101 (2012).

<sup>35</sup>Fed. R. Evid. 601, 602, 603.

<sup>36</sup>See *Brent v. Midland Funding Limited Liability Company*, 2011 U.S. Dist. LEXIS 98763 (N.D. Ohio Sept. 1, 2011).

the case is called, knowing in advance that the plaintiff will be unprepared to try its case that day, even though court rules state that plaintiffs shall be prepared.<sup>37</sup> This strategy results in a defense verdict before some judges, while other judges merely grant a continuance to allow the plaintiff to secure a witness. Know your judge, and tailor your strategy accordingly.

The same reasoning applies to whether or not to bring your client to the trial. Because the trial is usually about the debt buyer's standing and proof of assignment, your client cannot testify about anything that is relevant. The days when judges would demand that defendants admit that they had credit cards and did not pay their bills are, we hope, coming to an end in more jurisdictions. More and more judges are now willing to begin with the issues of standing and get to the underlying original obligation only after a complete and valid chain of assignment has been established—an occurrence which, by all reports, has never been seen by a consumer attorney.

If discovery is allowed in your case, decide whether you want it or not. The downside of engaging in discovery is that the process forces the plaintiff to prepare. The upside is that, if it does not result in an outright dismissal, you may actually get documents such as the asset sale and forward flow agreement and other documents that debt buyers never want you to see. Consider propounding requests for admission, if applicable in your state.

Decide if you want to file a pretrial motion to dismiss or engage in other motion practice. A good way to educate judges about junk-debt buyers is simply to file trial briefs that are clear enough to be understood by a first-year law clerk.<sup>38</sup> Consider developing a Brandeis brief that you can use in every case, accompanied by a specific bench memorandum

that describes the evidentiary deficiencies in the junk-debt buyer's case.<sup>39</sup>

## **9. Determine at the Outset Whether Your Client Is Judgment Proof**

Many people victimized by junk-debt buyers are elderly or disabled and survive on government benefits. Exemptions from judgment include social security, pensions, Veterans' Administration benefits, and (in Maryland) \$1,000 in family or household goods, \$5,000 for tools of the trade, and a \$6,000 wild card.<sup>40</sup> If your client is judgment proof, communicate this to the other side and, if necessary, file a notice of exempt income with the court prior to trial. Some junk-debt buyers will dismiss the case once they are apprised of the defendant's judgment-proof status because they may have hardship status guidelines for dismissal. If this tactic is not successful, then you should mount a vigorous defense to avoid further impairment of credit and to alleviate psychological stress for the client.

## **10. Communicate with Opposing Counsel**

Even in a small-claims case, maintaining respect and civility can result in the other side's willingness to send you what it has in terms of documentation. Once you have the relevant documents, you may consider calling opposing counsel and asking them to dismiss. This sometimes has very quick results, especially if you couple an argument about the weaknesses of the plaintiff's case with your client having no nonexempt assets.

## **11. Master the Most Common Defenses**

Issues such as securitization (who is the real party in interest?), standing to sue (do you really own this debt?), and injury in fact (they invested 2 cents on the dollar but are suing for the full 100 cents on

<sup>37</sup>In Maryland, "[i]f the defendant files a timely notice of intention to defend pursuant to Rule 3-307, the plaintiff shall appear in court on the trial date prepared for a trial on the merits" (Md. R. 3-306(e)(1) (2012)).

<sup>38</sup>As the saying goes, "Argue for the judge. Write for the clerk."

<sup>39</sup>Brandeis briefs contain statistics and information relevant to the issues at hand, in addition to general legal arguments that can be applied to multiple cases.

<sup>40</sup>Md. CODE ANN. CTS. & JUD. PROC. § 11-504 (2012).

the dollar; how have they been injured 100 cents on the dollar?) can raise profound and fascinating jurisdictional issues that should not be overlooked. But these cases are easily won by reading the documents carefully, employing common sense, understanding some basic legal principles, and maintaining a determination to turn around a train that sometimes seems to have already left the station. Here are the common defenses that you need to master:

**Contract Not Proven.** Use your civil pattern jury instructions and demand that the plaintiff prove each element of a contract, each element of a material breach, and each element of damages and mitigation of damages. The plaintiff may have a difficult time proving mitigation of damages when it is merely an investor that paid only pennies on the dollar as an investment under a buyer-beware contract, and the plaintiff cannot claim that the consumer caused any damages. Rather, the entire enterprise was speculation on the part of the investor.

**Account Stated Not Proven.** Account stated requires a new relationship between the junk-debt buyer and the consumer, and a specific agreement by the consumer to pay a specific amount. Usually the consumer has no recollection of any demand being made by the junk-debt buyer, let alone the terms of the alleged agreement.

**Assignment Not Proven.** The yellow highlighter will take care of this. In hundreds of cases reviewed, I have never seen an instance where the junk-debt buyer could prove a valid chain of assignment from the original creditor to the junk-debt buyer.

**Damages Not Proven.** Damages, like liability, must be proven by a preponderance of the evidence, and they cannot be

speculative or based on guesswork. The plaintiff is hard put to argue that damages are anything other than speculative when there is no contract in evidence setting forth the actual terms and conditions of the original contract (such as interest and late fees allowed) and no complete history of all payments setting forth the usage of the card, breaking down payments into principal versus interest. In most states, one may not collect interest (excluding prejudgment interest), late fees, or attorney fees except pursuant to specific terms in the contract. Often the junk-debt buyer has only a charge-off amount with no hint of what portions are principal, interest, junk fees, and attorney fees.<sup>41</sup> If the junk-debt buyer has added interest charges, it is charging interest on interest. There is no way the junk-debt buyer can explain this if all it received was a balance.

**Statute of Limitations.** Violations of the statute of limitations are rampant. In fact, a junk-debt buyer can target debt that is time-barred; this type of debt is much cheaper to buy. While the statute of limitations may vary from state to state, the date of default is fairly easy to ascertain. Given that the charge-off occurs 180 days after default, we can safely assume that the date of default was at least 180 days prior to when the original creditor first sold the account.<sup>42</sup> Always remember that suing on a time-barred account—or even the threat to do so—is likely a Fair Debt Collection Practices Act violation.<sup>43</sup>

**Identity Theft.** The Federal Trade Commission's most recently published edition of the *Consumer Sentinel Network Data Book* states that identity theft was the most common complaint received by the Consumer

<sup>41</sup>"Charge-off amount" is an industry term without a clear definition. Practitioners generally define the term as the balance on the account on the date that the bank wrote off or charged off the account. The Maryland Rules define "charge-off" as "the act of a creditor that treats an account receivable or other debt as a loss or expense because payment is unlikely" (Md. R. 3-306(a)(1) (2012)).

<sup>42</sup>The Uniform Retail Credit Classification and Account Management Policy sets the charge-off at 180 days after delinquency (Federal Financial Institutions Examination Council, Uniform Retail Credit Classification and Account Management Policy: Final Notice, 65 Fed. Reg. 36903 (June 12, 2000), <http://1.usa.gov/GTwzVz>). See also Internal Revenue Code, Bad Debts, 26 U.S.C. § 166 (2012) (providing deduction for worthless debt); 26 C.F.R. § 1.166-2(d) (2012) (evidence of worthlessness of debt as applied to banks); Rev. Rul. 2001-59, <http://1.usa.gov/GU4UGw> (Craig Wojay, Office of the Associate Chief Counsel (Financial Institutions and Products), is the principal author of this revenue ruling).

<sup>43</sup>"A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt" (15 U.S.C. § 1692(e)); see, e.g., *Kimber v. Federal Financial Corporation*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987) ("a debt collector's filing of a lawsuit on a debt that appears to be time-barred, without the debt collector having first determined after a reasonable inquiry that that limitations period has been or should be tolled, is an unfair and unconscionable means of collecting the debt").

Sentinel Network in 2010, accounting for 19 percent of all complaints.<sup>44</sup> Debt collection was the runner-up, accounting for 11 percent of all complaints. The Federal Trade Commission “estimates that as many as 9 million Americans have their identities stolen each year.”<sup>45</sup> Despite this fact, some junk-debt buyers will not dismiss their claims when these consumers appear in court *pro se*.

**Usury.** Any interest rate over about 30 percent used to be considered usurious. Thanks to the U.S. Supreme Court, today anything goes.<sup>46</sup> Interest rates of 500, 600, or 700 percent may be shocking to the conscience, but they are no longer the exclusive province of street-corner loan sharks. Some of our nation’s biggest banks are behind the Internet firewall of many payday lenders.<sup>47</sup> While principles of National Bank Act preemption apply to certain entities, there are still plenty of instances where the originators of these loans were not exempt from state usury caps, and thus the junk-debt buyer is not entitled to collect.

**Authorized User Not Liable.** Cosigners are joint obligors on a loan. Authorized users are not. Junk-debt buyers frequently sue authorized users, perhaps because the data files do not always differentiate between authorized users and

cosigners. Raising and proving authorized user status means no liability.

**Fraud and Illegality.** Still valid—and highly relevant—in junk-debt-buyer cases are two common-law defenses: fraud and illegality. One increasingly documented problem is the hiring of convicted felons. For example, in 2011 the Minnesota Department of Commerce took action against eight collection agencies and stated that, “[i]n numerous instances, credit card numbers, bank accounts, and personal financial information of vulnerable, financially stressed people were handed over to criminals. It should come as no surprise what happened next.”<sup>48</sup> More recently, the same watchdog fined NCO Financial Systems Inc. \$250,000.00 for employing convicted felons.<sup>49</sup>

## 12. Screen Every Case for Affirmative Claims

The Fair Debt Collection Practices Act and many state consumer protection acts prohibit a wide range of unfair or deceptive practices in the collection of alleged debts.<sup>50</sup> At the initial interview and beyond, inquire about any contacts the consumer has had with the junk-debt buyer or its lawyers. Knowingly suing on time-barred debt, threats of jail, abusive lan-

<sup>44</sup>Federal Trade Commission, CONSUMER SENTINEL NETWORK DATA BOOK FOR JANUARY–DECEMBER 2010, at 3 (March 2011), <http://1.usa.gov/GUnWuR>.

<sup>45</sup>Federal Trade Commission, Fighting Back Against Identity Theft (n.d.), <http://1.usa.gov/Habech>.

<sup>46</sup>A national bank may export the home state’s interest rate, regardless of state usury caps, the U.S. Supreme Court held in 1978 (*Marquette National Bank of Minneapolis v. First of Omaha Service Corporation*, 439 U.S. 299, 308 & n.24 (1978)). For a fascinating look at the predictable consequences of this holding, see Patrick McGeehan, *Soaring Interest Compounds Credit Card Pain for Millions*, NEW YORK TIMES, Nov. 21, 2004, <http://nyti.ms/H8oqNJ>, and *Secret History of the Credit Card*, Frontline (Nov. 23, 2004), <http://to.pbs.org/H8B7dV>. There is no federal cap on interest rates, nor are there state caps in the following states, which are home to the following credit card companies: South Dakota (Citibank), Utah (American Express), Virginia (Capital One), Delaware (Chase, MBNA, Morgan Stanley, HSBC), or New Hampshire (Provident) (Frontline, Map: Snapshot of the Industry (Nov. 23, 2004), <http://to.pbs.org/GToyDJ>).

<sup>47</sup>Nathaniel Popper, *Big Banks Play Key Role in Financing Payday Lenders*, LOS ANGELES TIMES, Sept. 15, 2010, <http://lat.ms/GTCyag>. For a discussion of banks’ direct involvement in originating payday loans, see Rebecca Borné et al., Center for Responsible Lending, *Big Bank Payday Loans: High-Interest Loans Through Checking Accounts Keep Customers in Long-Term Debt* (July 2011), <http://bit.ly/HeScOP>.

<sup>48</sup>Press Release, Minnesota Department of Commerce, Commerce Takes Action Against Eight Collection Agencies (Oct. 6, 2011), <http://bit.ly/HbpPSw>.

<sup>49</sup>Press Release, Minnesota Department of Commerce, Commerce Department Working to Keep Convicted Felons out of Your Wallet (Feb. 17, 2012), <http://bit.ly/Hdu8Ov>. According to NCO’s website, the company uses the “NCO Trigger Program” to “help companies recover accounts after all collection efforts have been exhausted and the accounts have been charged off” (NCO, Collection Services (2012), <http://bit.ly/HeU8qy>).

<sup>50</sup>Fair Debt Collection Practices Act, 15 U.S.C. § 1692d–f.

guage, contacting employers, and other blatantly illegal conduct are on the rise. Often the junk-debt buyer takes payments prior to suing and then fails to credit those payments (or even mention them) in the lawsuit. As noted above, these junk-debt buyers are not immune from the Fair Debt Collection Practices Act.

### 13. Consider Subpoenaing the Forward Flow Agreement

As with some of the prior tips, the argument against subpoenaing the forward flow agreement is that it may force the plaintiff to prepare and hurt your client's case. Anecdotal experience, however, is that junk-debt buyers never want you to see all of the disclaimers contained in the forward flow agreement. In essence, the agreement and related documents show no warranty of anything at all, and sometimes there is an express representation that no investigation has been made by the seller to verify the validity or accuracy of any account being sold. Reports concerning the sale of charged-off debt by JP Morgan Chase show the depth of this problem. In 2010 the *New York Times* reported the story of Linda Almonte, who blew the whistle on JP Morgan Chase's sale of 23,000 delinquent accounts, which had a face value of \$200 million:

"We found that with about 5,000 accounts there were incorrect balances, incorrect addresses," she said. "There were even cases where a consumer had won a judgment against Chase, but it was still part of the package being sold."<sup>51</sup>

Stories like this underscore that most sales of junk debt are made without any representations or warranties and often without any duty by the seller to investi-

gate the validity of the debt or the accuracy of its records.

### 14. Settlements of Affirmative Claims Should Include Certain Terms

One of the biggest problems of junk debt is its zombielike nature. It just keeps reappearing and is hard to kill. Thus, whenever you settle an affirmative claim, the concept of finality should be foremost in your mind. You want judgment in favor of your client (and release of judgment against your client, if applicable). You should also insist on deletion of the trade line with the three credit reporting agencies.<sup>52</sup> In the settlement agreement include language stating that this is the settlement of a disputed debt. If your client did not owe the money as alleged, it should not be portrayed as otherwise. The agreement should also include a statement that no IRS Form 1099 will be issued (which is sent when an undisputed debt is forgiven, possibly resulting in taxable income to your client).<sup>53</sup>

### 15. Use Manuals and Listservs

The National Consumer Law Center's manuals addressing junk-debt-buyer cases, *Collection Actions* and *Fair Debt Collection*, are essential references for any consumer advocate.<sup>54</sup> To these invaluable resources, add a copy of your state's court rules. Keep these items on your desk, and use them often. The National Consumer Law Center also maintains valuable listservs on debt defense and the Fair Debt Collection Practices Act. Join them.

### Final Thoughts

Until now junk-debt buyers have faced little to no opposition. They have had little financial incentive to verify the validity of their claims. They have flooded the courts with bogus documents to ex-

<sup>51</sup>David Segal, *Debt Collectors Face a Hazard: Writer's Cramp*, NEW YORK TIMES, Nov. 1, 2010, at A1, <http://nyti.ms/HhzFnK>.

<sup>52</sup>Keep in mind that the same debt may appear more than once on your client's credit report. It may have been reported by the original creditor and by more than one junk-debt buyer. A dismissal may allow the junk-debt buyer to continue reporting the debt because there has been no determination by the court of the validity of the debt. If the court enters judgment for the alleged debtor, there has been a determination and any reference on the credit report to the debt and the junk-debt buyer should be deleted.

<sup>53</sup>See ROBERT J. HOBBS ET AL., NATIONAL CONSUMER LAW CENTER, THE PRACTICE OF CONSUMER LAW 153-70 (2d ed. 2006).

<sup>54</sup>JONATHAN SHELDON ET AL., NATIONAL CONSUMER LAW CENTER, COLLECTION ACTIONS (2d ed. 2011); ROBERT J. HOBBS ET AL., NATIONAL CONSUMER LAW CENTER, FAIR DEBT COLLECTION (7th ed. 2011).

tract hundreds of millions of dollars from unsophisticated consumers, fewer than 1 percent of whom are represented by a lawyer.<sup>55</sup> Allowing debt buyers to run roughshod over consumers and the courts is a denial of due process. It enriches junk-debt buyers at the expense of consumers, legitimate creditors, and our judicial system. I hope that the tips offered here will be of some guidance in going out and restoring access to justice for the consumers and families who often are being forced—wrongly—to decide between paying legitimate creditors,

paying junk-debt buyers, and filing for bankruptcy. Trying and winning these cases will have the systemic impact of helping restore a sense of justice and fairness which lies trapped beneath the heavy weight of the junk-debt buyer.

### **Author's Acknowledgments**

*Thank you to all of my colleagues and former students who continue the pursuit of justice and due process, sometimes in the face of ridicule and disdain, often with financial sacrifice.*

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<sup>55</sup>Wilner & Sheftel-Gomes, *supra* note 6, at 3, 9. In a study of New York City debt collection cases, researchers found that creditors obtained default judgment in 81.4 percent of cases in their sample. Less than 1 percent of people sued by creditors had legal counsel (*id.* at 7–8). In my experience, in Maryland less than 1 percent of defendants are represented in debt-buyer cases.