

Case Nos. 11-3814, 11-3961, 11-4016, 11-4019, 11-4021

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ELAINE PELZER, et al.

Objectors-Appellants,

v.

MARTHA VASSALLE, et al.

Plaintiffs-Appellees,

and

MIDLAND FUNDING LLC, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Ohio, Western Division
Case No. 3:11-cv-0096, David A. Katz, District Judge

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF
OBJECTORS-APPELLANTS URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT OF AARP

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4)(1993) of the Internal Revenue Code and is exempt from income tax. AARP is also organized and operated as a non-profit corporation pursuant to Title 29 of Chapter 6 of the District of Columbia Code 1951.

Other legal entities related to AARP include AARP Foundation, AARP Services, Inc., Legal Counsel for the Elderly, and Experience Corps.

AARP has no parent corporation, nor has it issued shares or securities.

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TABLE OF AUTHORITIES

FEDERAL CASES

<i>Basile v. Blatt, Hasenmiller, Leibker & Moore, LLC</i> , 632 F. Supp. 2d 842 (N.D. Ill. 2009).....	22
<i>Bd. of Regents v. Tomanio</i> , 446 U.S. 478 (1980)	27
<i>Delawder v. Platinum Fin. Servs. Corp.</i> , 443 F. Supp. 2d 942 (S.D. Ohio 2005).....	17
<i>Discover Bank v. Owens</i> , 822 N.E.2d 869 (Ohio Mun. Ct. Clev. 2004).....	25
<i>Erin Servs. Co., LLC v. Bohnet</i> , 2010 NY Slip Op 50327U (N.Y. Dist. Ct. Feb. 23, 2010)	7
<i>Harvey v. Great Seneca Fin. Corp.</i> , 453 F.3d 324 (6th Cir. 2006)	10
<i>In re Blair</i> , Civ. No. 02-1140 (W.D.N.C. Feb. 10, 2004).....	25
<i>Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA</i> , 130 S. Ct. 1605 (2010).....	21
<i>Kimber v. Federal Fin. Corp.</i> , 668 F. Supp. 1480 (M.D.Ala. 1987).....	27, 28
<i>MBNA America Bank, N.A., v. Nelson</i> , 15 Misc. 3d 1148[A], 841 N.Y.S.2d 826 (N.Y. Civ. Ct. 2007)	12, 14
<i>McCullough v. JRL</i> , 637 F.3d 939 (2011)	9, 10
<i>Portfolio Acquisitions, LLC v. Feltman</i> , 391 Ill. App. 3d 642, 909 N.E.2d 876 (2009)	22
<i>R.R. Telegraphers v. Railway Express Agency</i> , 321 U.S. 342 (1944).....	27
<i>United States v. Kubrick</i> , 444 U.S. 111 (1979)	27

STATUTES

Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. 111-24, Title I, § 108, 123 Stat. 1743 (May 22, 2009), 15 U.S.C. § 1602.....26

RULES AND REGULATIONS

FED. R. CIV. P. 29(c)(4).....1

Garnishment of Accounts Containing Federal Benefit Payments, 76 F.R. 9939 (Feb. 23, 2011).....298

LEGISLATIVE HISTORY

Examining The Billing, Marketing, And Disclosure Practices Of The Credit Card Industry And Their Impact On Consumers, Before the S. Comm. on Banking, Housing & Urban Affairs, 110th Cong. 3 (Jan. 25, 2007).....26

MISCELLANEOUS

ACA International, The Path Forward: ACA International’s Blueprint for Modernizing America’s Consumer Debt Collection System (April 2011)17, 21, 22

Eileen Ambrose, Zombie Debt, Baltimore Sun (May 6, 2007)15

William Houston Brown, 1 The Law of Debtors and Creditors § 6:79 (rev. ed. Supp. 2007).....28

Cardhub.com, 2011 Credit Card Debt Study, available at http://education.cardhub.com/q1-2011-credit-card-debt-study/ (accessed Jan. 6, 2012).....26

Center For Responsible Lending, The Plastic Safety Net: The Reality Behind Debt In America: Findings From A National Household Survey Of Credit Card Debt Among Low-And Middle-Income Households (2005)25

Comment of DBA Int’l Submitted to FTC (June 2, 2007), available at http://www.ftc.gov/os/ comments/debtcollectionworkshop/529233-00010.pdf (accessed Jan. 6, 2012)13, 15

<i>Comment of Encore Capital Group and Midland Credit Management Submitted to FTC (July 31, 2009), available at http://www.ftc.gov/os/comments/debtcollectroundtable1/542930-00025.pdf (accessed Jan. 6, 2012)</i>	19
<i>Comment of Nat’l Consumer Law Cntr. Submitted to FTC (June 6, 2007), available at http://www.ftc.gov/os/comments/debtcollectionworkshop/529233-00018.pdf (accessed Jan. 6, 2012)</i>	15
<i>Comment of Portfolio Recovery Associates, Inc., Submitted to FTC (June 5, 2007), available at http://www.ftc.gov/os/comments/debtcollectionworkshop/529233-00022.pdf (accessed Jan. 6, 2012)</i>	17
DCMServices, www.dcmservices.com (accessed Jan. 6, 2012)	30
DCMServices.com, <i>Solutions: empathic active recovery</i> , http://www.dcmservices.com/solutions_empathetic_active.php (accessed Jan. 6, 2012)	30
<i>Debt Portfolio Prices Edge Higher, Collections & Credit Risk (March 23, 2010), available at http://www.collectionscreditrisk.com/news/debt-portfolio-prices-edge-higher-3001103-1.html (accessed Jan. 6, 2012)</i>	14
Charles Duhigg, “ <i>Bilking the Elderly with a Corporate Assist</i> ,” N.Y. Times (May 20, 2007)	29
Encore Capital Group, Inc., <i>Annual Report to SEC Form 10-K</i> (Feb. 14, 2011)	<i>passim</i>
FTC, <i>Annual Report 2011: Fair Debt Collection Practices Act</i> (March 21, 2011)	5
FTC, <i>Collecting Consumer Debts: The Challenges of Change, A Workshop Report</i> (Feb. 2009)	7, 11, 19
FTC, <i>Repairing A Broken System: Protecting Consumers In Debt Collection Litigation And Arbitration</i> (Jul. 2010)	10
Jose A. Garcia, Demos, <i>Borrowing to Make Ends Meet: The Rapid Growth of Credit Card Debt in America</i> (2007)	25

Jose Garcia, Tamara Draut, Demos, <i>The Plastic Safety Net: How Households are Coping in a Fragile Economy</i> (2009)	25
Government Accountability Office, <i>Credit Cards: Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers</i> , GAO-06-929 (Sept. 2006)	25
Donna S. Harkness, <i>When Over-The-Limit is Over The Top: Addressing The Adverse Impact of Unconscionable Consumer-Credit Practices on the Elderly</i> , 16 Elder L.J. 1 (2008)	29
Beth Healy, <i>Dignity Faces a Steamroller</i> , Boston Globe, July 31, 2006, available at http://www.boston.com/news/specials/debt/part2_main (accessed Jan. 6, 2012)	20
Peter A. Holland, <i>The One Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases</i> , 6 Md. J. of Bus. and Tech. L. 259 (2011).....	7, 20
Robert M. Hunt, <i>Collecting Consumer Debt in America</i> , Fed. Res. Bank Phila. Bus. Rev. (Q2 2007).....	12, 13
Richard Hynes, <i>Broke But Not Bankrupt: Consumer Debt Collection In State Courts</i> , 60 Fla. L. Rev. 1 (2008).....	5, 19
Javelin Strategy and Research, <i>2009 Identity Fraud Report</i> , available at http://www.businesswire.com/portal/site/Javelin-Identity-Fraud-Report/ (accessed Jan. 6, 2012)	24
Javelin Strategy and Research, <i>2011 Identity Fraud Survey Report: Consumer Version</i> , available at http://www.identityguard.com/downloads/javelin-2011-identity-fraud-survey-report.pdf (accessed Jan. 6, 2012)	24
Kathleen W. Johnson, <i>Recent Developments in the Credit Card Market and the Financial Obligations Ratio</i> , Fed. Res. Bulletin (Autumn 2005)	5
Jud. Council of Cal., <i>Trial Court Caseload Increases to Over 10 Million Filings</i> , Data Points (Aug. 2010), available at http://www.courts.ca.gov/datapoints10.pdf (accessed Jan. 6, 2012)	20

Sid Kirchheimer, <i>A Dead Debt? Bill collectors prey on grieving families</i> , AARP Bulletin (Mar. 2, 2009), available at http://www.aarp.org/ money/scams-fraud/info-02-2009/a_dead_debt_.html (accessed Jan. 6, 2012)	29
Deanne Loonin, <i>Life and Debt Cycle</i> , Pt. I and II, Nat'l Cons. Law Center (2006)	25
Matthew W. Ludwig, <i>Abuse, Harassment, and Deception: How the FDCPA is Failing America's Elderly Debtors</i> , 1 Elder L.J. 135 (2008)	29
Caroline Mayer, <i>New Breed Of Collectors Has Debtors Seeing Red</i> , Wash. Post (May 28, 2005).....	15
Lorraine Mirabella, <i>Judge Dismissed Hundreds of Maryland Debt Cases</i> , Baltimore Sun (Sept. 21, 2011), available at http://thinkdebtrelief.com/debt- relief-blog/money-news/maryland-judge-dismisses-another-314-debt- collection-cases-settles-hundreds-more/ (accessed Jan. 6, 2012).....	8
News Release, <i>Top 10 List of Consumer Complaints for 2008</i> , (Mar. 12, 2010), available at http://naag.org/top-10-list-of-consumer-complaints-of-2008- resource-list.php (accessed Jan. 6, 2012).....	4
Corinna C. Petry, <i>Do Your Homework; Dangers often lay hidden in secondary market debt portfolio offerings. Here are lessons from the market pros that novices can use to avoid nasty surprises</i> , Collections & Credit Risk, (March 2007), Vol. 12, No. 3	16
Phillips and Cohen, www.phillips-cohen.com/ (accessed Jan. 6, 2012)	30
Portfolio Recovery Associates LLC, <i>2008 Annual Report to SEC Form 10-K</i> (Feb. 27, 2009).....	14
Press Release, <i>Attorney General Cuomo Sues To Throw Out Over 100,000 Faulty Judgments Entered Against New York Consumers In Next Stage Of Debt Collection Investigation, 37 Law Firms and Collectors Named in Lawsuit for Failing to Properly Notify New Yorkers Being Sued for Owing Debt, Cuomo Seeks to Vacate Over 100,000 Faulty Judgments Statewide and Provide Restitution to Victims</i> (July 22, 2009), available at http://www.nydebthelp.com/ (accessed Jan. 6, 2012)	8

Press Release, WV AG Settlement with Debt Collector Includes \$7.9 million in Debt Cancellation (Nov. 17, 2010), *available at* <http://www.insidearm.com/daily/debt-collection-news/debt-collection/wv-ag-settlement-with-debt-collector-includes-7-9-million-in-debt-cancellation/> (accessed Jan. 6, 2012)8

Probate Finder OnDemand, www.probatefinder.com (accessed Jan. 6, 2012)30

Michael Rezendes, Beth Healy, Francie Latour, Heather Allen, and Walter V. Robinson (ed.), *Debtor’s Hell, 4 Part Series*, Boston Globe (July 30, 2006)19

Walter V. Robinson & Beth Healy, *Regulators, Policy Makers Seldom Intervene*, Boston Globe (Aug. 2, 2006).....11

David Segal, *Debt Collectors Face a Hazard: Writer's Cramp*, N.Y. Times (Nov. 1, 2010), *available at* <http://www.nytimes.com/2010/11/01/business/01debt.html> (accessed Jan. 6, 2012)6, 14

Chris Serres, *Death Won't Stop These Debt Collectors*, Star Tribune (Sept. 22, 2010), *available at* <http://www.startribune.com/investigators/103211324.html> (accessed Jan. 6, 2012).....30

Tom Shean, *Debt collection industry's methods draw scrutiny*, *Virginian-Pilot* (Jan. 30, 2011)15

Jessica Silver-Greenberg, *Boom in Debt Buying Fuels Another Boom – In Lawsuits*, *Wall St. J.* (Nov. 28, 2010)19

Jessica Silver-Greenberg, *Debts Go Bad, Then It Gets Worse* (Dec. 23, 2011), *available at* <http://online.wsj.com/article/SB10001424052970203686204577114530815313376.html#printMode> (accessed Jan. 6, 2012)24

Jessica Silver-Greenburg, *In Debt Collecting, Location matters*, *Wall.St.J.* (July 18, 2011), *available at* <http://online.wsj.com/article/SB10001424052702303365804576433763597389214.html> (accessed Jan. 6, 2012)21

David Streitfeld, *You're Dead? That Won't Stop the Debt Collector*,
N.Y. Times (March 3, 2009), available at <http://www.nytimes.com/2009/03/04/business/04dead.html?adxnnl=1&adxnnlx=1323162908-t/xHxtmJBMvZy1Od6vWF1w> (accessed Jan. 6, 2012).....30

Rachel Terp & Lauren Bowne, *Past Due: Why Debt Collection Practices and the Debt Buying Industry Need Reform Now*, Consumers Union (Jan. 2011).....11

Urban Justice Center, *Debt Weight: The Consumer Credit Crisis in New York City and its Impact on the Working Poor* (Oct. 2007).....20

Liz Pulliam Weston, *The Basics: 'Zombie Debt' is Hard to Kill*, MSN Money (July 7, 2006)15

Claudia Wilner, et al., *Debt Deception: How Debt Buyers Abuse The System To Prey On Lower-Income New Yorkers*, *Neighborhood Econ. Dev. Adv. Proj.* (May 2010)12

STATEMENT OF INTEREST¹

AARP is a non-partisan, non-profit organization. As the leading organization representing the interests of people aged 50 and older, AARP is greatly concerned about abusive practices being used to collect the growing level of debt being incurred by older people, many of whom are especially vulnerable to debt collection abuses and will be covered by the terms of this settlement.

Debt collection suits have increased across the county, corresponding to rapidly rising debt loads, exorbitant credit card fees, and the economic downturn. Out of necessity, people have used high cost credit to pay for necessities like groceries, medical care, prescription drugs, house payments, and urgent house repairs. Despite the convenience credit cards provide, problems occur for too many people when they cannot pay off the full amount due, carry forward a balance, and get caught in a downward spiral of exorbitant interest rates, fees and penalties, and other billing practices that quickly drive them hopelessly further into debt. This downward spiral worsens and traps even more households in recessionary periods. A variety of unfair practices by credit card lenders increased

¹ Pursuant to FED. R. CIV. P. 29(c)(4), counsel for AARP state that they authored the brief in whole, and neither party's counsel nor the parties themselves made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. AARP has filed a motion for leave to file this brief requesting that if leave is granted, this brief be considered filed as of the date leave is granted.

outstanding balances by millions of dollars, which has become the subject of sometimes questionable and abusive debt collections.

Not only do people carry more credit card debt than before, but more are being buried in what may be considered *unaffordable* debt. An increasing number of people have debt payments that exceed 40% of their income, and this increase is especially acute for older age groups. The consequences of unaffordable debt can be devastating, especially at a time in one's life when income typically decreases and remaining working years are limited. Many people do not have the resources to preserve their independence, financial security, or even to provide the basic necessities of life.

Many older people are subjected to abusive collection practices, which threatens their financial security and well-being. AARP has an interest in ending such abuses.

SUMMARY OF ARGUMENT

The settlement should be rejected. The collection industry employs a business model that produces predictably and inherently abusive debt collection. Despite legal protection, consumer complaints about abusive debt collection practices have exceeded those for any other specific industry for over a decade. Collection abuses such as those challenged in this case continue to cause substantial suffering and anguish to millions of financially vulnerable consumers.

Approval of the settlement cuts off the right of any person against whom a judgment has been entered by fraud to challenge such judgment. It enables debt buyers to continue to benefit from industry-wide practices and procedures that lead inexorably to rampant abusive debt collections, including: filing false and fraudulent affidavits in court; knowingly or indifferently suing the wrong consumer or for the wrong amount; filing lawsuits despite expiration of the statute of limitations, and; the sale and resale of disputed or discharged debt.

Whether the borrower might owe the debt is not the issue here. Permitting Encore/Midland to extract billions of dollars through the enforcement of millions of court judgments obtained by filing false affidavits undeniably works an extreme injustice. Contrary to the District Court finding that the settlement provides fair, reasonable, and adequate relief, ample case examples demonstrate that far more effective and creative remedies are available.

Approval of the settlement defeats the purposes of the class action mechanism to remedy systemic harm and preserve judicial resources. Instead, it cuts off the ability of absent class members to have their day in court to seek an effective remedy for judgments entered against them due to wide-spread fraud on the courts. Stamping the settlement with the court's imprimatur of approval makes the court appear to be an accessory to and complicit in the practices of the debt buying industry that lead to the fraud and abuse.

The debt buyer's business model is honed at all stages of the process to generate enormous profit from worthless debt. The corners debt buyers cut in order to reduce collection costs result predictably in abusive collections.

Alleged debtors who assert the invalidity of or a valid legal defense to an alleged debt are entitled to their day in court. Bullying a person to pay an invalid or discharged debt does not make the collection valid or defensible. Debt buyers use fraud to manipulate the power of the courts to force consumers to pay debts whether or not they owe it. Older people are particularly vulnerable to such practices. This Court should not permit the courts to be used as instrumentalities of such abuse.

ARGUMENT

I. The Settlement Should Be Rejected Because It Rewards Encore/ Midland For Engaging In Abusive And Harmful Collection Practices

While not all debt collection lawsuits are abusive, the collection industry employs a business model that produces predictably and inherently abusive debt collection. Despite legal protection, consumer complaints about abusive debt collection practices to state Attorneys General and the Federal Trade Commission ("FTC") have exceeded those for any other specific industry for over a decade.²

² News Release, *Top 10 List of Consumer Complaints for 2008* (Mar. 12, 2010), available at <http://naag.org/top-10-list-of-consumer-complaints-of-2008-resource-list.php> (accessed Jan. 6, 2012).

Complaints about significant abuses by third-party and in-house collectors in 2010 totaled 140,036, up from 119,609 complaints in 2009, and accounted for 27% of all complaints the FTC received. FTC, *Annual Report 2011: Fair Debt Collection Practices Act*, 5 (March 21, 2011) (noting that the number of complaints “may understate the extent to which the practices of debt collectors violate the law.”).

Even with targeted enforcement actions by state Attorneys General and the FTC to combat widespread abuses by relatively large debt collectors, such collection abuses continue to cause substantial suffering and anguish. *Id.* As explained by one commentator,

[T]he judgment will impose costs on the consumer by damaging the consumer's credit rating. . . [which] does more than merely raise the consumer's cost of credit. A damaged credit score can make it difficult to rent an apartment, find a job, or even purchase automobile insurance. . . . credit reports typically do not record the filing of the lawsuit, but they do record judgments. Therefore, a civil filing serves as a credible threat to inflict harm on the defendant and may induce the defendant to pay.

Richard Hynes, *Broke But Not Bankrupt: Consumer Debt Collection In State Courts*, 60 Fla. L. Rev. 1, 20 (2008) (hereinafter “*Hynes*”).

The increase in such abuses correspond, not surprisingly, to the increase in unaffordable consumer debt loads pushed onto financially stressed consumers, abusive credit card lending practices, identity fraud, and the increased financial stress consumers face in light of the economic downturn. *See* Kathleen W.

Johnson, *Recent Developments in the Credit Card Market and the Financial Obligations Ratio*, Fed. Res. Bulletin, 474 (Autumn 2005).

As aptly argued by the intervenors, approval of the settlement allows the enforcement of millions of judgments entered by fraud and cuts off the rights of any person to challenge those judgments. The settlement is inherently unfair, unreasonable and inadequate because it permits Encore/Midland to enforce millions of judgments obtained using fraudulent affidavits in the courts of every state in the nation. The practice of filing false affidavits, dubbed by the media as “robo-signing” in the foreclosure context, has been met with outrage by the public upon learning of such practices. Although a common and long-entrenched practice in the collections industry, it has garnered far less public attention. *See* David Segal, *Debt Collectors Face a Hazard: Writer's Cramp*, N.Y. Times, A1 (Nov. 1, 2010), *available at* <http://www.nytimes.com/2010/11/01/business/01debt.html> (accessed Jan. 6, 2012) (hereinafter “Segal”).

Approval of the settlement encourages debt buyers to continue to employ practices and procedures that lead inexorably to rampant abusive debt collections, including: filing false and fraudulent affidavits in court; knowingly or indifferently suing the wrong consumer or for the wrong amount; filing lawsuits despite expiration of the statute of limitations, and; the sale and resale of disputed or

discharged debt. See FTC, *Collecting Consumer Debts: The Challenges of Change, A Workshop Report*, iv (Feb. 2009) (hereinafter “*Challenges of Change*”).

A. The Broad Release Guarantees That Judgments Obtained Using False Affidavits Will Be Enforceable

Whether or not a judgment debtor might owe a debt is not the issue here. One cannot deny the extreme injustice of permitting Encore/Midland to continue collecting billions of dollars in ill-gotten gains, made possible only by the filing of false affidavits to obtain millions of court judgments. The dollar amount at issue in a typical collection lawsuit is relatively small and falls within the jurisdictional limit of many small claims courts. Peter A. Holland, *The One Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6, Md. J. of Bus. and Tech. L. 259, 263 (2011) (hereinafter “*Holland*”). The amounts nevertheless are significant to the individuals who are wrongfully sued despite being the victims of identity fraud or having paid or otherwise disputed the alleged debt. Courts have criticized that “lawyers engaged in the collection of assigned debts seem especially prone to pursuing claims improperly, often at the expense of the most vulnerable members of our society.” *Erin Servs. Co., LLC. v. Bohnet*, 2010 NY Slip Op 50327U, at *1 (N.Y. Dist. Ct. Feb. 23, 2010).

Contrary to the District Court finding that the settlement provides fair, reasonable, and adequate relief, ample numbers of cases demonstrate that far more effective and creative remedies are available. To combat the systemic and

individual harm inflicted by the debt buying and collection industry, particularly in response to schemes involving fraudulent affidavits or failure to serve legal process, state courts have dismissed hundreds of thousands of lawsuits and updated their court procedures to better protect against such abuses. *See e.g. See Lorraine Mirabella, Judge Dismissed Hundreds of Maryland Debt Cases*, Baltimore Sun (Sept. 21, 2011), *available at* <http://thinkdebtrelief.com/debt-relief-blog/money-news/maryland-judge-dismisses-another-314-debt-collection-cases-settles-hundreds-more/> (accessed Jan. 6, 2012) (describing dismissal of suits brought by collectors not licensed to sue in MD courts); Press Release, *WV AG Settlement with Debt Collector Includes \$7.9 million in Debt Cancellation* (Nov. 17, 2010), *available at* <http://www.insidearm.com/daily/debt-collection-news/debt-collection/wv-ag-settlement-with-debt-collector-includes-7-9-million-in-debt-cancellation/> (accessed Jan. 6, 2012) (abusive practices and unlicensed collector); Press Release, *Attorney General Cuomo Sues To Throw Out Over 100,000 Faulty Judgments Entered Against New York Consumers In Next Stage Of Debt Collection Investigation, 37 Law Firms and Collectors Named in Lawsuit for Failing to Properly Notify New Yorkers Being Sued for Owing Debt, Cuomo Seeks to Vacate Over 100,000 Faulty Judgments Statewide and Provide Restitution to Victims* (July 22, 2009), *available at* <http://www.nydebthelp.com/> (accessed Jan. 6, 2012). Individual lawsuits also provide injured plaintiffs with far more effective remedies.

See McCollough v. JRL, 637 F.3d 939 (2011) (affirming jury award of \$320,000 damages plus attorneys fees for collection of time-barred debt and abuse of the judicial process against pro se debtor with head injury).

Notwithstanding the statutory limit on FDCPA damages to \$500,000 in a class action, such examples provide credible substantiation to challenge the District Court's finding that the settlement is fair, reasonable, and adequate. The finding overlooks the power of state law and courts to provide appropriate equitable relief, protect the integrity of the state courts, and award substantial individual damages to remedy such egregious abuses.

B. The Settlement Cuts Off Remedies Instead Of Providing Relief To Injured Consumers and Preserving Judicial Resources

The settlement fails to remedy the systemic harm inflicted by the entry of millions of judgments and will fail to curb abusive collection actions flooding the courts. Worse, it cuts off the ability of any absent class member to have his or her day in court to seek a remedy for a judgment entered based on fraud. The broad release prevents challenges that may provide insight into the extent of the harm from fraudulent judgments and support reform of the debt buying and judicial debt collection procedures that permitted such rampant abuses in the first place.

The low bar set by the District Court in approving the proposed settlement will only embolden continued abusive collections. As will be discussed in Section II, *infra*, debt buyers have designed a business model that intentionally turns a

blind eye to the abuses resulting from cutting corners to boost profits. *See e.g. McCollough*, 637 F.3d at 948 (finding “[u]nwarranted reliance on a client is not a procedure to avoid error.”). Rather than implement procedures to avoid abusive practices, Encore/Midland and other debt buyers build into their business model the cost of settlements of class actions for abusive collections. *See* Encore Capital Group, Inc., *Annual Report to SEC Form 10-K*, 17-18 (Feb. 14, 2011) (hereinafter “*Encore 10-K*”). The District Court’s approval of the settlement explicitly sanctions such practices.

Essentially, approving this settlement will validate a “broken” collection system and reward rampant abusive collection practices. *See* FTC, *Repairing A Broken System: Protecting Consumers In Debt Collection Litigation And Arbitration*, i (Jul. 2010). It is one thing to permit debt collectors to file a valid debt collection action in court without having in its possession adequate proof of its claim. *See Harvey v. Great Seneca Fin. Corp.*, 453 F.3d 324, 333 (6th Cir. 2006); *see also McCollough*, 637 F.3d at 950 (noting difference in evidence needed to support the filing of a collection action compared to that necessary at the time of a summary judgment motion). It is quite another for the court to shrug off widespread and systemic fraud committed on the courts, permit enforcement of millions of judgments obtained by fraud, extinguish the rights of all class members to challenge such fraud, and permit the defendants to post billions of dollars in

profits as a result of such fraud. Stamping the settlement with the court's imprimatur of approval makes the court appear to be an accessory to and complicit in the practices of the debt buying industry that lead to the fraud and abuse. While justice is blind, it should not have blinders.

II. Debt Buyers Profit Enormously By Cutting Corners To Collect Stale And Worthless Debt

Because of the high profit margins, the debt buying industry has been described as “one of the sexiest, one of the most financially lucrative businesses you can get into.” Walter V. Robinson & Beth Healy, *Regulators, Policy Makers Seldom Intervene*, Boston Globe, Aug. 2, 2006, at A1 (quoting Donald Friedman, the chief operating officer of debt buyer Liberty Point Corporation). See Rachel Terp & Lauren Bowne, *Past Due: Why Debt Collection Practices and the Debt Buying Industry Need Reform Now*, 2, Consumers Union (Jan. 2011) (noting “industry estimates that the face value of debts that changed hands between debt buyers and sellers increased from \$6 billion in 1993 to \$110 billion in 2005” and “[b]etween 2001 and 2006, debt buyer revenue increased more than 700%”). Over the past few decades, it has blossomed into an industry with annual revenues exceeding \$11 billion. See *Challenges of Change*, at 13. Unfortunately for consumers:

The entire [debt buying] industry is a game of odds, and in the end as long as enough awards are confirmed to make up for the initial sale

and costs of operation the purchase is deemed a successful business venture. However, during this process mistakes are made, mistakes that may seriously impact consumers and their credit.

MBNA America Bank, N.A., v. Nelson, 15 Misc. 3d 1148[A], *2, 841 N.Y.S.2d 826 (Table) (N.Y. Civ. Ct. 2007); see Claudia Wilner, et al., *Debt Deception: How Debt Buyers Abuse The System To Prey On Lower-Income New Yorkers*, 6, *Neighborhood Econ. Dev. Adv. Proj.* (May 2010) (explaining ninety-five percent of 457,322 lawsuits filed by twenty-six debt buyers against people residing in low or moderate income neighborhoods ended in default judgments, and not a single person in the study was represented by counsel).

A. Debt Buyer Practices Designed To Cut Costs Predictably Result In Abusive Collections

The debt buyer's business model is honed at all stages of the process to generate enormous profit from worthless debts. See Robert M. Hunt, *Collecting Consumer Debt in America*, Fed. Res. Bank Phila. Bus. Rev., 15-16 (Q2 2007). The corners cut in order to reduce collection costs result predictably in abusive collections.

Although there are thousands of debt collectors, a few large debt buyers, including Encore/Midland, monopolize and shape the market by gaining

“exclusive negotiation rights” with credit grantors and sellers of debt.³ *See Encore 10-K at 3*. Debt buyers gain “forward flow” contracts that provide “a commitment to purchase receivables over a duration with specifically defined volume, frequency and pricing.” Such agreements provide a consistent volume of debt which helps provide “precision in forecasting and planning operational needs.” *Id.*

The value of a particular portfolio of debts is based upon the likelihood that a debtor will succumb to the pressure exerted by the threat or entry of a judgment, not the legitimacy of the debt. To determine what to pay for large portfolios of charged-off debt, debt buyers acquire “information regarding the included accounts, including certain information regarding the consumers themselves,” then purchase “additional information relating to credit, savings or payment behavior.” *Id.* Collectors use sophisticated computer models to predict which collection methods are most likely to achieve results with a particular debtor. *See Hunt*, at 15-16; *Encore 10-K*, at 2 (explaining “consumer intelligence program focuses on segmentation, marketing communications, and original research” providing competitive advantage, and “willingness-capability” framework allows match of “collection approach to an individual consumer’s payment behavior”).

³ Encore Capitol Group, Inc. is one of a handful of publicly traded debt buyers. Others are NCO Group, Asset Acceptance Corp., Portfolio Recovery Associates, Asta Funding Inc., and First City Financial Corp. There are thousands of privately held debt buyers. *See Comment of DBA Int’l Submitted to FTC*, 2 (June 2, 2007), available at <http://www.ftc.gov/os/comments/debtcollectionworkshop/529233-00010.pdf> (accessed Jan. 6, 2012).

“Older accounts, worked by more than one agency...fetch[] anywhere from fractions of a cent to four cents on the dollar.” *Debt Portfolio Prices Edge Higher, Collections & Credit Risk* (March 23, 2010), available at <http://www.collectionscreditrisk.com/news/debt-portfolio-prices-edge-higher-3001103-1.html> (accessed Jan. 6, 2012). Debt buyers pay less for debt in “certain states [that] have more debtor-friendly laws than others and, therefore, are less desirable from a collectability perspective.” Portfolio Recovery Associates LLC, *2008 Annual Report to SEC Form 10-K*, 8 (Feb. 27, 2009).

Debt is sold at such a cheap price for “the simple fact that the proof required to obtain a judgment in the creditor’s favor is lacking, *usually as a result of poor record keeping on the part of the creditor.*” *MBNA v. Nelson*, 15 Misc. 3d 1148[A], at *2 (emphasis added). *See also* Segal, at A1 (reporting JPMorgan Chase employee alleged finding “about 5,000 accounts [in a portfolio of 23,000 accounts with] incorrect balances, incorrect addresses....There were even cases where a consumer had won a judgment against Chase, but it was still part of the package being sold” to a debt buyer).

Unbeknownst to most debtors and courts, the debt buyers purchase only an electronic spreadsheet with basic information. Usually, “the initial data provided by the seller includes information such as the date of delinquency, the date of last payment, last known address, balance due, the debtor’s personal identification

information, and the history of the account.” *Comment of DBA Int’l Submitted to FTC*, 8 (June 2, 2007), available at <http://www.ftc.gov/os/comments/debtcollectionworkshop/529233-00010.pdf> (accessed Jan. 6, 2012). They do not purchase the actual accounts or any transaction history. The information necessary to verify disputed debts or prove a contested amount, especially for stale debt, is unavailable to a typical debt buyer from any source.

Debt buyers are also known to resell debt which is the result of identity theft, settled, discharged in bankruptcy, or which has been paid in full. *Comment of Nat’l Consumer Law Cntr. Submitted to FTC*, 27-28 (June 6, 2007), available at <http://www.ftc.gov/os/comments/debtcollectionworkshop/529233-00018.pdf> (accessed Jan. 6, 2012). Each time a disputed debt is re-sold, a debtor must re-engage in a frustrating and often futile process of disputing the debt or defending another lawsuit. Such debt has been dubbed “zombie debt” for apt reasons; it is hard to defend against and it seemingly never dies.⁴

The likelihood of abusive collections is increased significantly by multiple re-sale of debt. For example, according to an officer of an Illinois debt buyer who had purchased, or ostensibly purchased, bad paper, “[t]he same portfolio is sold to

⁴ See, e.g., Tom Shean, *Debt collection industry's methods draw scrutiny*, *Virginian-Pilot* (Jan. 30, 2011) (discussing use of affidavits ostensibly signed by employee who had been dead for over 10 years); Eileen Ambrose, *Zombie Debt*, *Baltimore Sun* (May 6, 2007); Liz Pulliam Weston, *The Basics: ‘Zombie Debt’ is Hard to Kill*, *MSN Money* (July 7, 2006); Caroline Mayer, *New Breed Of Collectors Has Debtors Seeing Red*, *Wash. Post* (May 28, 2005).

multiple buyers; the seller doesn't actually own the portfolio put up for sale; half the accounts are out of statute; accounts are rife with erroneous information; access to documentation is limited or nonexistent.” Corinna C. Petry, *Do Your Homework; Dangers often lay hidden in secondary market debt portfolio offerings. Here are lessons from the market pros that novices can use to avoid nasty surprises*, Collections & Credit Risk, 24, Vol. 12, No. 3 (March 2007). Despite the glaring deficiencies of such inadequate account information, hundreds of thousands of default judgments are entered by courts every year.

Rather than implement adequate procedures to avoid abusive collections, Encore/Midland and other debt buyers rely upon false affidavits and the likelihood that the volume of collections they file will return a sufficient return to recoup their initial, minimal investment.

B. False Affidavits Are Used To Obtain Millions Of Judgments

False affidavits – prepared, signed and filed by the hundreds of thousands in state courts across the country every year – are the lynch pin to the debt buyer operation. Incredibly, the entire industry is currently structured to ensure that a debt buyer will never have access to the information necessary to support entry of a valid judgment. Debt buyers nevertheless routinely make false claims that they have access to such information, have personally reviewed it, and can swear to the truthfulness of the allegations.

Although a debt buyer's lack of data predictably results in abusive practices, the chances of being caught are minimal and the consequences are cheap because it is relatively uncommon for a debtor to appear to defend a claim. When an alleged debtor does defend, the collector may be left scrambling: the data and documents necessary to verify a disputed amount or prove a claim by competent evidence are unavailable by the calculated design of the business model. Consequently, when a consumer appears in court to contest a claim, collectors will often dismiss the lawsuit, continue the court date until the debtor fails to appear, or sell the disputed debt to another debt buyer. *See Delawder v. Platinum Fin. Servs. Corp.*, 443 F. Supp. 2d 942, 944-45 (S.D. Ohio 2005).

Debt buyers do not deny that lack of information from the original creditor about the debt they have purchased “fail[s] to serve the interests of consumers in obtaining documentation of disputed accounts or the legitimate interests of credit grantors and debt collectors in collecting debts that are genuinely owed.” *Comment of Portfolio Recovery Associates, Inc., Submitted to FTC*, 2 (June 5, 2007), available at <http://www.ftc.gov/os/comments/debtcollectionworkshop/529233-00022.pdf> (accessed Jan. 6, 2012). *See* ACA International, *The Path Forward: ACA International's Blueprint for Modernizing America's Consumer Debt Collection System*, 17 (April 2011) (hereinafter “ACA Blueprint”). Lack of information also masks valid defenses that would reduce their profit: they “may be

precluded from collecting on receivables where the card issuer or originator failed to comply with applicable federal or state laws in generating or servicing the receivables that we have acquired” *Encore 10-K*, at 11.

Purchase agreements between debt buyers and original creditors typically acknowledge the risk that debts may be disputed or otherwise subject to valid defenses. To hedge against the risk, buyers “contracts typically contain provisions indemnifying [buyers] for losses owing to the originating institution’s failure to comply with applicable laws and other events.” *Id.* Thus, debt buyers bear no financial or legal risk for defenses that may be asserted against the original creditor. Such clauses permit debt buyers to turn a blind eye to – and avoid the negative consequences of – the probability that a portion of the debts they purchase will be disputed and subject to valid defenses.

C. Debt Buyers Overwhelm State Courts With Large Volumes Of Collection Lawsuits

The volume of abusive collections filed by debt buyers is interfering with the integrity of the judicial system in addition to inflicting significant suffering and anguish on individual consumers. Judicial collection of time-barred and/or unverifiable debt plagues court dockets across the country and impacts millions of consumers, whether or not they owed the debt in question. “Judges have expressed concern that the burden of handling the number of debt collection

lawsuits on their dockets is making it difficult for them to handle other cases in an expeditious manner.” *Challenges of Change*, 56.

Collectors flood the courts with collection cases they are not prepared to litigate and usually are unable to prove by competent evidence, relying on the high probability the debtor will not defend and they will obtain a default judgment. *See Comment of Encore Capital Group and Midland Credit Management Submitted to FTC*, 2 (July 31, 2009), available at <http://www.ftc.gov/os/comments/debtcollectroundtable1/542930-00025.pdf> (accessed Jan. 6, 2012) (explaining “default judgments represent a significant percentage of the judgments obtained by our companies and others in this industry”) (hereinafter “*Encore Comment*”). *See also* Jessica Silver-Greenberg, *Boom in Debt Buying Fuels Another Boom – In Lawsuits*, Wall St. J. Nov. 28, 2010 (reporting that industry estimates 94% of collections end in default and that “[t]he majority of borrowers don't have a lawyer, some don't know they are even being sued, and others don't appear in court, say judges.”).

An exposé of debt collectors’ mill flooding the Massachusetts trial courts illustrated the impact of debt collection on the court’s mostly debt collection docket. Michael Rezendes, Beth Healy, Francie Latour, Heather Allen, and Walter V. Robinson (ed.), *Debtor’s Hell, 4 Part Series*, Boston Globe (July 30, 2006). In Virginia courts, 70-80% of all filings are collection cases. *Hynes*, at 51. In New

York City, annual filing of debt collection cases increased by more than 60% between 2002 and 2007. Urban Justice Center, *Debt Weight: The Consumer Credit Crisis in New York City and its Impact on the Working Poor*, 1 (Oct. 2007). California courts likewise are experiencing record case filings. Jud. Council of Cal., *Trial Court Caseload Increases to Over 10 Million Filings*, Data Points, 1 (Aug. 2010), available at <http://www.courts.ca.gov/datapoints10.pdf> (accessed Jan. 6, 2012) (reporting “[a]n estimated 96,000 consumer debt-collection cases were filed in 2009 in Alameda, Contra Costa and San Francisco Counties alone, up from about 53,665 in 2007.”).

Debt buyers often choose to litigate in small claims courts because the evidence rules are less stringent. *Holland*, at 6. These small claims courts are disinclined or too overburdened to prevent abuse of unrepresented defendants by collectors, who are seldom asked to prove the debts they claim. See Beth Healy, *Dignity Faces a Steamroller*, Boston Globe (July 31, 2006), available at http://www.boston.com/news/specials/debt/part2_main (accessed Jan. 6, 2012).

D. Encore Gains Through The Settlement What The Debt Buying Industry Has Been Unsuccessful In Accomplishing Through Lobbying

The settlement’s broad release, which guarantees the enforceability of millions of judgments obtained through false affidavits, accomplishes for Encore/Midland industry priorities to reform court procedures and relax legal

standards to benefit collectors at the expense of vulnerable consumers. Such interests and the approval of the settlement conflict with the goal of the FDCPA to protect consumers from precisely such abuses. *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1608-09 (2010) (noting the FDCPA “was enacted to eliminate abusive debt collection practices; to ensure that debt collectors who abstain from such practices are not competitively disadvantaged; and to promote consistent state action to protect consumers.”).

Debt buyers are keenly aware that collection-friendly laws and court procedures are essential to their business model. *See Encore Comment*, at 2 (expressing concern with evidentiary and procedural rules and reporting “[its view that] the rate of default judgments does not depend on the type of action but rather on the processes in place for a particular court or judge”). Collection actions are filed in select judicial forums with collection-friendly judges and procedures. *See Jessica Silver-Greenburg, In Debt Collecting, Location matters*, Wall.St.J. (July 18, 2011), available at <http://online.wsj.com/article/SB10001424052702303365804576433763597389214.html> (accessed Jan. 6, 2012).

Steadfast in their thirst for even greater profit, debt buyers, including the defendants, have urged the courts and the FTC to alter the law to accommodate the changing nature of the credit card and debt buying industry. *See ACA Blueprint*, at 18 (urging amendment of Truth in Lending Act to require creditors to maintain

consumer account data for seven years from charge-off and enact seven year federal statute of limitations); *Portfolio Acquisitions, LLC v. Feltman*, 391 Ill. App. 3d 642, 647, 909 N.E.2d 876, 858 (2009) (rejecting argument urging relaxed evidentiary requirements, finding that although “the nature of credit card transactions and the relationships between the parties is complex and only made more difficult to analyze under modern realities,” courts “cannot escape the requirement” of the law); *Basile v. Blatt, Hasenmiller, Leibker & Moore, LLC*, 632 F. Supp. 2d 842 (N.D. Ill. 2009) (rejecting argument that affidavit of indebtedness is sufficient evidence of a written contract to extend statute of limitations).

Each of these strategies is pursued to enable debt buyers to use the coercive power of the court to pursue profits, even though they may claim the strategy serves the interests of consumers. They argue, for example, that “letters to consumers should . . . not be complicated with legal advice [and] more difficult for consumers to read and understand.” *Encore Comment*, at 3. Some have argued that a longer statute of limitations actually benefits consumers because it reduces confusion. *See ACA Blueprint*, at 18 (arguing for seven year statute of limitations even in states that currently limit statute to 3 years). Such disingenuous nonsense is clearly driven by concern for the company’s bottom line, not the welfare of consumers.

III. Alleged Debtors Who Defend Against Lawsuits Are Entitled To Their Day In Court

Mounting evidence shows that a significant number of alleged debtors pursued by debt buyers for stale debt do not owe the debts for which they are being sued. Many more have valid legal defenses. Some debt collectors attempt to portray alleged debtors as deadbeats to deflect criticism for abusively pursuing such debt. Even if such a characterization may accurately describe a portion of the allegedly delinquent debtors, it nevertheless fails to justify the abusive and illegal practices perpetrated by the debt buyer industry, to which older people are particularly vulnerable, as discussed below. Moreover, such a characterization certainly does not apply to those who do not owe the debt. Shockingly, the settlement prevents challenges even to judgments in such egregious cases.

A. Identity Fraud And Punitive Credit Card Lending Practices Beget Abusive Collections Of Invalid Or Disputed Debt

A significant portion of the stale debt circulating in debt buyer portfolios is not valid because it is the result of identity fraud, has been charged off in bankruptcy, or is the product of punitive and overreaching credit card lending practices designed specifically to trap the most vulnerable consumers in a cycle of debt.

1. Identify Fraud And Discharged Debt

Victims of identity fraud are not legally liable for unauthorized charges. Because debt buyers do not purchase information that would inform them of identity theft, victims may nevertheless be sued on a debt they do not owe, based upon a debt buyer affidavit falsely attesting to having first-hand knowledge to the accuracy of the allegations. Between 2004 and 2007, the cost of identify fraud has fluctuated between \$45 and \$60 billion annually, victimizing between eight and eleven million people per year. *See Javelin Strategy and Research, 2009 Identity Fraud Report, available at <http://www.businesswire.com/portal/site/Javelin-Identity-Fraud-Report/> (accessed Jan. 6, 2012).* Out-of-pocket costs for individual victims have increased to an average of \$631 because identity fraud is becoming harder to detect and remedy. *Javelin Strategy and Research, 2011 Identity Fraud Survey Report: Consumer Version, available at <http://www.identityguard.com/downloads/javelin-2011-identity-fraud-survey-report.pdf> (accessed Jan. 6, 2012).*

Similarly, debt that has been discharged in bankruptcy is not valid, yet is regularly pursued by collectors. *See Jessica Silver-Greenberg, Debts Go Bad, Then It Gets Worse (Dec. 23, 2011), available at <http://online.wsj.com/article/SB10001424052970203686204577114530815313376.html#printMode> (accessed Jan. 6, 2012) (describing “court-appointed auditor’s conclu[sion] earlier this year*

that Capital One pursued 15,500 ‘erroneous claims’ seeking money previously erased by a bankruptcy-court judge”).

2. Punitive Credit Card Practices

The “widespread financial exploitation of the [] poor by overbearing credit card companies” is also responsible for a significant amount of delinquent debt. *Discover Bank v. Owens*, 822 N.E.2d 869, 875 (Ohio Mun. Ct. Clev. 2004). Debt has been pushed with little regard for ability to pay onto consumers who are already in a stressed financial condition.⁵

Frequently, creditors make their profits not from the regular repayment of debt, but from the piling on of disproportionate fees and penalties. See Government Accountability Office, *Credit Cards: Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers*, GAO-06-929, at 20-21 (Sept. 2006). See also *In re Blair, Amended Order Overruling Objection to Claims*, Civ. No. 02-1140, (W.D.N.C. Feb. 10, 2004) (finding that on average, 57% of debts in claims against 31 different individuals by major credit card

⁵ See Center For Responsible Lending, *The Plastic Safety Net: The Reality Behind Debt In America: Findings From A National Household Survey Of Credit Card Debt Among Low-And Middle-Income Households 20-21* (2005); Jose A. Garcia, Demos, *Borrowing to Make Ends Meet: The Rapid Growth of Credit Card Debt in America* (2007); see Jose Garcia, Tamara Draut, Demos, *The Plastic Safety Net: How Households are Coping in a Fragile Economy* (2009) (finding that medical debt and unemployment were significant contributors to household credit card debt loads); Deanne Loonin, *Life and Debt Cycle*, Pt. I and II, Nat’l. Cons. Law Center, (2006).

company in bankruptcy court consisted of interest and fees). Indeed, “[a] debtor could pay nearly 100% of what she owed every year for the rest of her life, and thanks to the traps built into her credit card, she would keep paying until she died—and still not pay off her card.” *Examining The Billing, Marketing, And Disclosure Practices Of The Credit Card Industry And Their Impact On Consumers, Before the S. Comm. on Banking, Housing & Urban Affairs*, 110th Cong. 3 (Jan. 25, 2007) (statement of Prof. Elizabeth Warren).

Acknowledging the significant harm caused by such punitive credit card practices, Congress enacted the Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. 111-24, Title I, § 108, 123 Stat. 1743 (May 22, 2009) (15 U.S.C. § 1602) to curb some of the most blatantly unfair billing practices and rein in the most abusive fees. But it did not eliminate the enormous levels of unaffordable debt amassed by consumers and exacerbated by the high fees and interest penalties built into their cards. In 2009 alone, \$83.2 billion in credit card debt was charged off by banks. An additional \$75.1 billion was charged off in 2010. Cardhub.com, *2011 Credit Card Debt Study*, available at <http://education.cardhub.com/q1-2011-credit-card-debt-study/> (accessed Jan. 6, 2012). This enormous volume of charged-off debt will be subject to judicial collection attempts for years to come.

3. Assertion of Valid Legal Defenses

Asserting valid legal defenses, such as the expiration of the statute of limitations, does not make an alleged debtor a deadbeat. The United States Supreme Court repeatedly has pointed out that “[s]tatutes of limitations are not simply technicalities. On the contrary, they have been long respected as fundamental to a well-ordered judicial system.” *Bd. of Regents v Tomanio*, 446 U.S. 478, 487 (1980). Indeed, “it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.” *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (quoting *R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944)).

When a collector pursues a stale claim, “the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.” *Kubrick*, 444 U.S. at 117. Nevertheless, judicial collection is used increasingly by debt buyers to collect and “re-age” stale debt, resulting in extending the statute of limitations, often indefinitely.⁶ *Kimber v. Federal Fin. Corp.*, 668 F. Supp. 1480, 1487 (M.D.Ala. 1987). *Kimber* explained that

⁶ Securing even a minimal payment from a debtor will extend the statute of limitations. Obtaining a judgment permits collectors in nearly every state to pursue

“[T]he unfairness of [filing suit on a time-barred debt] is particularly clear in the consumer context where courts have imposed a heightened standard of care — that sufficient to protect the least sophisticated consumer. Because few unsophisticated consumers would be aware that a statute of limitations could be used to defend against lawsuits based on stale debts, such consumers would unwittingly acquiesce to such lawsuits.”

Id.

B. Older People Are Particularly Vulnerable To Abusive Collections

As distressing as abusive debt collection practices are for everyone, they are particularly problematic for older people. They are more easily upset by an abusive telephone call and the stress from harassing tactics can actually threaten their health. The effects of abusive debt collection practices are more keenly felt by people on fixed or limited incomes, such as retirees and low income people. Recognizing the vulnerability of low income older people to collection abuses, the Department of Treasury recently promulgated new bank procedures to protect exempt federal benefits from judgment creditors. *See Garnishment of Accounts Containing Federal Benefit Payments*, 76 F.R. 9939 (Feb. 23, 2011).

Debt buyers know that older people, 80 percent of whom are homeowners but many of whom have low income, are susceptible to threats that they may lose their homes or may be sued, which many believe means they will have to go to jail.

debt collection indefinitely. *See William Houston Brown*, 1 *The Law of Debtors and Creditors* § 6:79 (rev. ed. Supp. 2007).

See Donna S. Harkness, *When Over-The-Limit is Over The Top: Addressing The Adverse Impact of Unconscionable Consumer-Credit Practices on the Elderly*, 16 *Elder L.J.* 1, 3-4 (2008); Matthew W. Ludwig, *Abuse, Harassment, and Deception: How the FDCPA is Failing America's Elderly Debtors*, 1 *Elder L.J.* 135, 135-37, 151-56 (2008).

Older consumers living alone are often targets of abusive tactics because they may be socially isolated; in addition, because they are at home during daytime hours, they are more accessible to collectors. See, e.g., Charles Duhigg, “*Bilking the Elderly with a Corporate Assist*,” *N.Y. Times*, A1 (May 20, 2007). Moreover, the ability of some older people to make financial decisions or to remember the details of stale debts may be impaired by cognitive decline. As a result, older people sometimes agree to pay on debts they had already paid in full or never owed in the first place, such as debts of a deceased loved one.

Debt collectors take advantage of the fact that older people are particularly vulnerable after the death of a spouse. See Sid Kirchheimer, *A Dead Debt? Bill collectors prey on grieving families*, *AARP Bulletin* (Mar. 2, 2009), available at http://www.aarp.org/money/scams-fraud/info-02-2009/a_dead_debt_.html (accessed Jan. 6, 2012). Because the death of a spouse can have a significant adverse impact on household wealth, surviving unobligated spouses may be unable to meet even their basic food, shelter, and medical needs, let alone pay debts they

are not obligated to pay. *See* David Streitfeld, *You're Dead? That Won't Stop the Debt Collector*, N.Y. Times (March 3, 2009), available at <http://www.nytimes.com/2009/03/04/business/04dead.html?adxnnl=1&adxnnlx=1323162908-t/xHxtmJBMvZy1Od6vWF1w> (accessed Jan. 6, 2012).

Specialized debt collection agencies with a focus on the collection of decedents' debts have sprung up in the last few decades. *Id.* *See* Chris Serres, *Death Won't Stop These Debt Collectors*, Star Tribune (Sept. 22, 2010), available at <http://www.startribune.com/investigators/103211324.html> (accessed Jan. 6, 2012). Databases and tracking systems of probate cases have been specially developed to serve creditors. *See e.g.* Probate Finder OnDemand, www.probatefinder.com; Phillips and Cohen, www.phillips-cohen.com/; DCM Services, www.dcm services.com. Collectors encourage decedent's creditors to use the time of grieving to establish a customer relationship with the decedent's survivors in order to recover on the debt from the estate. *See* DCM Services.com, *Solutions: empathic active recovery*, available at http://www.dcmservices.com/solutions_empathic_active.php (accessed Jan. 6, 2012).

Bullying a person to pay an invalid or discharged debt does not make an abusive collection valid or defensible. Debt buyers have intentionally designed a business model that predictably results in collection abuses. They use fraud to manipulate the power of the courts to force consumers to pay debts whether or not

they owe the debt. This Court should not permit the courts to be used as instrumentalities of such abuse.

IV. CONCLUSION

AARP urges this Court to reverse the District Court approval of the settlement, which rewards debt collectors for business practices that rely upon rampant fraud and abusive collection practices while providing meaningless relief to millions of alleged debtors.

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CERTIFICATION OF COMPLIANCE

I certify pursuant to Fed. R. App. P. 32(a)(7)(C) and Sixth Circuit Rule 32-(a) that the attached Brief *Amicus Curiae* of AARP In Support of Intervenor-Appellant complies with the type-volume limitation of Fed. R. App. P. 32(a)(5) and (6) as it is proportionately spaced, has a typeface of 14 points, and contains 6,986 words excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of January, 2012, I electronically filed the foregoing Brief *Amicus Curiae* of AARP with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit, which will send a notice of electronic filing to counsel for all parties in this case using the appellate CM/ECF system.

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