Everything You Need to Know About Defending Suits by Debt Buyers*

Why a Debt Buyer Article?

Debt buyers are often large corporations that collect consumer debt on an enormous scale, seeking hundreds of billions of dollars each year on credit card, cell phone, medical, and other unsecured consumer debts. Debt buyers such as Sherman Financial, Unifund, Asset Acceptance, Firstcity Financial, Encore Capital, Portfolio Recovery and Asta Funding have revenues over $100 million. These debt buyers are responsible throughout the country for much of the litigation in state court—approximately 300,000 cases a year filed in New York City alone! A handful of law firms will be filing most of these cases in any given court, most resulting in default judgments.

Legal services and private consumer attorneys are increasingly discovering the importance of consumer representation to defend this torrent of collection lawsuits. Consumers often have dispositive defenses, the litigation often involves systematic abuse of the justice system, and counterclaims can lead to recovery of damages and attorney fees. Prevailing in a collection lawsuit not only protects the consumer from bank account freezes, wage garnishment, and other loss of assets, but can improve a consumer's credit record and alleviate a huge amount of emotional distress that particularly older consumers feel when hauled into court.

Defense #1: The Statute of Limitations

Debt buyers by definition sue on old debt. Creditors do not sell their accounts for pennies on the dollar until they have ex-

hausted their own collection efforts. Sometimes, debt buyers, counting on a default judgment, bring actions even if it is obvious that the limitations period has expired. More often, the consumer successfully raises the limitations defense through a five step process:

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1. Match a Particular Claim with the Applicable Limitations Period

Determine the limitations periods for different legal claims for your state. Typically, one period will apply to actions based on a written contract, although that period will vary from 3 or 4 years in some states to 6 or even 10 or 15 years in other states.[1] Often a different, shorter period will apply for actions based upon a non-written contract, in some states as short as two or three years.[2] An action for breach of contract in the sale of goods (a store credit card, an auto deficiency, etc.) or default on a lease will be governed by the UCC, not the period for a written contract, and will have a four year limitations period.[3] The UCC also provides a three-year period for a suit on a dishonored check, and a six-year period for an action on a promissory note.[4]

Next determine, for each separate cause of action brought by the debt buyer, which limitations period is applicable to that cause of action. For example, if a claim is for breach of contract on a bank-issued credit card, then the state's limitation period for breach of a written contract will apply. Of course, this will require the collector to produce the written contract. There is even an argument that a credit card contract that is not signed by the consumer and that is unilaterally amended by the card issuer from time to time is not even a "written contract" within the meaning of a state statute of limitations.

If the debt buyer brings a claim for account stated, money had, or quantum meruit, or some other cause of action not based upon a written contract, then a different limitations period will apply—in many states a far shorter period. If the action is for a deficiency on an auto loan or a defaulted auto lease, then the UCC's four-year period will apply, even if this is an action for breach of a written contract.[5] If a consumer purchases goods and pays with a dishonored check, then the three-year period applies for a cause of action based upon the check and a four-year period for an action based upon failure to pay for the goods.

2. Check Whether the State Law Chosen by the Contract Has a Shorter Limitations Period

Many consumer contracts will specify a choice of law, such as Delaware. Surprisingly, the state chosen in a contract often will have a shorter limitations period than that of the forum state. Although the limitations period will have critical importance to a debt buyer, it will be less relevant to the originating creditor, who may have good reason to select Delaware law even though it has only a four-year limitations period for written contracts. Of course, that the contractually selected state has a shorter limitations period is of great value to the consumer.

Jurisdictions differ whether to use the forum state's limitations period or that of the state selected in the credit agreement.[6] The more modern view seems to be to use whichever limitations period is shorter. Forum states have an interest in not hearing stale cases, so should not use an out-of-state period that is longer, but have no such aversion to using a shorter out-of-state period agreed to by the parties. Moreover, for a debt buyer to use a longer out-of-state period, it must prove the existence of a binding agreement that specifies that state's law something debt buyers often have difficulty proving. The consumer, on the other hand, can deny the existence of a binding contract, but can argue that, if the contract exists as asserted by the debt buyer, then that contract requires use of the out-of-state limitations period.

3. Look for Borrowing Statutes if the Consumer Has Moved to a Different State

If a consumer enters into a credit contract in one state, and then moves and is sued in a second state with a longer limitations period, the consumer may be able to take advantage of the first state's shorter limitations period. A number of states have borrowing statutes that require use of the limitations period where the action arose, if that period is shorter.[7]

4. Do Not Accept the Debt Buyer's Date of Default

Typically a limitations period begins running from the date of the consumer's default, but debt buyers use some highly questionable dates to keep a lawsuit within the applicable period. Some even claim the date of default is when the debt buyer purchases the debt! More commonly, they use a date where the creditor unilaterally decides it has accelerated the debt. Instead, most credit contracts clearly specify that the consumer is in default when a minimum payment is not made by a specified date.

Another common date alleged to trigger the limitations period is the "charge off" date. This is a date dictated by banking regulators to indicate the solvency of a bank, because it shows how many accounts are non-performing. Usually it is 180 days after default.

As a result, the consumer must make an independent judgment as to the date of default and not rely on the date specified by the debt buyer. Because of the age of the debt, it is usually not easy for either the consumer or the debt buyer to determine the actual date. A good starting place is the debt buyer's own pleadings and attached documents, which are often very sloppily drafted. See if the debt buyer's own documents list a default date earlier than the charge-off date used in the complaint. Alternatively, estimate the default date as at least 180 days before the charge-off date.[8] Another clue is the consumer's own credit report. See when is the last date that it indicates a payment was made, but again do not confuse a credit report's charge-off date with the date of default.

5. Overcoming Tolling/Reviving of the Limitations Period

When a debt is beyond the applicable limitations period, the debt buyer may argue that the consumer's actions either tolled or revived the limitations period. While there are a number of grounds to toll or revive a limitations period, there are also many applicable exceptions or limitations to these grounds.

Time in military service does not count toward a limitations

period (although those in the military do have special protections against collection lawsuits[9]), but this tolling does not apply to the service member's spouse or co-signer, thus allowing that person to defend on the debt.

Time spent out of state can toll the limitations period, but the burden is on the debt buyer to prove the dates the consumer was out-of-state. Courts are also increasingly narrowing this ground. It may not apply where service is available out-of-state, and courts have found this unconstitutional where the consumer goes out of state for employment or to change residences.[10]

Part payment can re-start the limitations period running from the very beginning. But the consumer's intent, in making part payment, must be to acknowledge that the remainder is also due. If the consumer believes that the remainder of the debt is not owed, then the limitations period for that remainder began running from when the consumer defaulted on that amount and continues to run despite the part payment.[11] There must also be proof that the payment was made. The debt buyer cannot revive the limitations period simply by alleging it received a payment recently or by showing a notation in its books. Moreover, payment by one debtor does not revive the limitations period against a co-debtor. The debt buyer has the burden of proof to show that a payment was made, that the consumer being sued made that payment, that the payment was directed to the account in question, and that the payment was made with the intent to acknowledge the remainder of the debt.

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Similarly, a consumer acknowledging a debt can revive the limitations period. But typically an oral statement is not enough. Some states require the acknowledgment be in writing and signed. Others require more than mere recognition of the debt. The consumer must admit liability and agree to pay the remainder due. Acknowledgment that the principal is due may not acknowledge that the interest charges and fees are owed. Acknowledgment by one co-debtor should not be binding on another.

Defense #2: Buyer Doesn't Own the Debt

To an astonishing degree, debt buyers do not produce credible evidence that they own the debt they are suing upon. This in part is caused by sloppy record-keeping and litigation preparation, but also by the fact that debt buyers purchase large portfolios of debt, divide them up and resell them to others who in turn do the same. As tens of thousands of accounts are being transferred to multiple buyers, no one is paying much attention to an individual account.

In one case, the successor company to Providian assigned a debt to Vision Management Services, which then assigned it three days later to Great Seneca Financial Corp., which a month later assigned it to Account Management Services. Four months later, Account Management Services (which shortly thereafter changed its name) assigned the account to Madison Street Investments, which then assigned the account five months later to Jackson Capital which, on that same day, assigned the account to Centurion Capital. Three weeks later Centurion hired Wolpoff and Abramson as their attorneys to collect on the debt. After the transfer to Jackson Capital, but before the transfer to Centurion Capital, the consumer was sued on the account by Melville Acquisitions Group (which appears nowhere in the above chain of ownership).[12]

1. Debt Buyers Must Prove a Whole Chain of Ownership, Not Just the Last Transfer

A debt buyer cannot show ownership just by proving the debt was sold to it. The debt buyer must also prove that the seller owned the debt. There must be proof of the complete chain of ownership from the original creditor all the way to the debt buyer. If there is a break in the chain, the debt buyer has not proven ownership.

At each link, the entity assigned the debt must be identical to the entity that subsequently assigns the debt down the chain. There is a break in the chain where Discover Bank transfers a debt to Vision Nevada, Inc., and where the next transfer is from Vision Management Services to the debt buyer. The debt buyer must provide evidence that the two Vision entities are the same or that Vision Nevada assigned the debt to Vision Management.

2. Debt Buyers Must Show That the Debt at Issue Was Assigned, Not Just a Portfolio of Thousands

The debt buyer must show through tender of proper documentation that the particular debt at issue was assigned to it. The collector cannot produce an affidavit stating that the account was assigned; it must produce the actual assignment, with that document being authenticated by an affidavit.

Debt buyers usually can produce a quite detailed contract or bill of sale delineating the relationship between its assignor and the debt buyer. But the document will reference only generally thousands of accounts being purchased at the same time, and will not identify the consumer's account. This is not sufficient to prove that the particular account at issue was one of those thousands. Nor is it enough to allege that the particular account is on a computer tape, appendix, or schedule, where that tape or document is not entered into evidence. And, of course, the debt buyer must present this proof for each transfer in the chain of ownership.

Similarly, carefully scrutinize any other document allegedly showing a transfer to see if it actually evidences a transfer, properly describes the transfer, is properly authenticated, and is dated properly. Of course, a business record or affidavit from the assignee that it has received an assignment is not evidence that there in fact was an assignment.

Defeating Debt Buyer Dirty Trick #1: The Overreaching Request for Admissions

Debt buyers often have insufficient evidence to prove their case, and use a dirty trick to accomplish this—they request the consumer to admit to every possible element of the collector's case. When the consumer does not timely respond, the requests

are deemed admitted. The collector then seeks summary judgment based on nothing more than the requests for admissions sent but not answered by the consumer.

1. Steps to Take After Time Period to Respond Has Expired

Even after a consumer fails to respond timely to a request for admission (thus admitting to the requests), there are steps to take to withdraw or limit the admissions. Do not assume the admissions were sent or sent on a given date as represented by the debt buyer. Collection actions work on volume, not on precision. Require proof of proper service.

Once it is discovered a deadline is missed, immediately ask the collector's attorney for additional time. If this is denied, *promptly* seek relief from the court under the state analog to Federal Rule of Civil Procedure 36(b), which is preferable to Rule 6(b), that relates generally to missed deadlines. Rule 36(b) deals with withdrawal of admissions, and it is applicable to an admission based upon the failure to answer.

Rule 36(b) places the burden on the consumer to show that withdrawal will promote the presentation of the merits of the action. The collector has the burden of showing prejudice by the withdrawal. Where the consumer's, but not the collector's burden is met, then the court *must* allow withdrawal. The collector's prejudice is not that it now has to present evidence, but only that the consumer's delay prevented the presentation of evidence. Courts have also said that the consumer's burden is met where upholding the admissions would practically eliminate any presentation of the merits of the case.[13] The Eleventh Circuit required withdrawal where the admission request was made "with the wild-eyed hope that the other side will fail to answer and therefore admit essential elements."[14]

Emphasize reasons why the consumer did not respond—the consumer contested the debt and was waiting for more information, the consumer assumed a response was unnecessary because the consumer had disputed the debt, or the fact that the consumer was unrepresented at the time.

When the admissions are withdrawn, the consumer is still faced with responding to the request. Tactics and factors to consider at this stage are examined in NCLC's *Collection Actions* § 4.2.2.2 (2008).

Defeating Dirty Trick #2: Asking for More Relief Than Allowed Under Plead Claims

Debt buyers often find it difficult to produce proof as to the existence of a contract (debt buyers may have little more than a spreadsheet identifying the consumer and the amount owed), and seek recovery on alternative claims to breach of contract. But then they seek recovery as if they had proven the existence of a binding contract.

A favorite claim is "account stated" that is not based on a credit agreement, but on the consumer's silence after receiving a billing statement. NCLC's *Collection Actions* presents a number of defenses to this cause of action.[15] But, even if proven, this entitles the collector to the amount stated, and not to contractual attorney fees or contractual fees or interest from the time after the statement of the account.[16]

Similarly, a quantum meruit or unjust enrichment claim should not entitle the debt buyer to contractual attorney fees, or any fees or interest based upon the contract. In fact, a defense to quantum meruit or unjust enrichment is that the collector alleges the existence of an explicit contract.[17] The same is the case with any other theory not based upon the existence of a contract, such as "materials and services supplied" or "money lent." Attorney fees, finance charges, and other fees should only be allowed if provided by statute—since the collector has not proven a contract.

Conversely, it is not enough to simply claim a breach of contract when collecting on an open-end account, such as a credit card or cell phone account. There must be more than just proof of a binding contract. The collector must prove the balance due, which may require a showing of a series of billing statements or other evidence as to the amount charged to the account and the amount paid.[18] If the debt buyer cannot justify the amount it is seeking, it cannot recover.

* The following article first appeared in the NCLC Reports, published by the National Consumer Law Center (NCLC). It is reprinted with permission. NCLC has just released a practice manual with a companion website to aid representation of consumers sued by debt buyers: *Collections Actions, Defending Consumers and Their Assets* (2008). It is available at *www.consumerlaw.org*

1. *See* NCLC's Collection Actions § 3.7.3.1 (2008) (listing of each state's period for actions on a written contract).
2. *Id*. (listing of each state's limitation period for non-written contracts).
3. Eight states have variations to this U.C.C. provision. *Id.* §7.3.2.
4. *Id.* § 3.7.3.3. Again, there are some state variations.
5. *Id.* § 3.7.5.2.
6. *Id.* § 3.7.2.1.
7. *Id.* § 3.7.2.3.
8. *Id.* § 3.7.6.2.
9. *Id.* Ch. 7.
10. *Id.* § 3.7.7.2.3.
11. *Id.* § 3.7.7.3.1.
12. Miller v. Wolpoff & Abramson, L.L.P., 2007 WL 2694607 (N.D. Ind. Sept. 7, 2007).
13. NCLC's Collection Actions § 4.2.2 (2008).
14. Perez v. Miami-Dade County, 297 F.3d 1255 (11th Cir. 2002).
15. *See* NCLC's Collection Actions §4.7.
16. *Id.*
17. *Id.* § 4.8.
18. *Id.* § 4.6.