

**Testimony of Claudia Wilner, Senior Staff Attorney  
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**Before the Assembly Standing Committee on Consumer Affairs and Protection  
Assembly Committee on Aging**

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Thank you for the opportunity to comment about how the state can best protect seniors in New York from consumer scams. My name is Claudia Wilner, and I am Senior Staff Attorney at the Neighborhood Economic Development Advocacy Project, or NEDAP, where I direct its Consumer Law Project. NEDAP is a nonprofit resource and advocacy center that provides legal, technical and policy support to community groups in New York City's low income neighborhoods and communities of color. NEDAP promotes economic justice and works to eliminate discriminatory economic practices that harm communities and perpetuate inequality and poverty.

Before I begin, I would like to thank the members of the Committees for their support of the Exempt Income Protection Act, which is critical to protect the limited, fixed incomes of many elderly, disabled, and other low income New Yorkers from abusive debt collectors.

NEDAP runs the NYC Financial Justice Hotline, a consumer hotline that provides free legal information and advice to victims of predatory and discriminatory financial services practices. The vast majority of callers to our hotline live in the lowest income neighborhoods of New York City, including central Brooklyn, upper Manhattan and the South Bronx. In 2007, we received more than 1,700 calls to our hotline. Nearly one-fourth of the callers were seniors.

I will first briefly describe three issues affecting seniors who have called our hotline: (1) abusive debt collection lawsuits; (2) debt settlement scams; and (3) deceptive practices by mainstream financial institutions. I will then describe legislation and other measures that could help to deter these abusive practices and better protect elderly New Yorkers.

**1. Debt Collection Lawsuit Abuse**

Many seniors have called us about abusive debt collection lawsuits, or what we call "lawsuit abuse," a practice perpetrated mostly by debt buyers and debt collection law firms. Debt buyers are companies that buy portfolios of old, defaulted debts from original creditors for pennies on the dollar, and then engage in aggressive efforts to collect these debts. Increasingly, debt buyers are using the courts to try to collect on these debts by suing the consumer. In the Civil Court of the City of New York, where our office practices, it is expected that 300,000 consumer debt cases will have been filed in 2008 alone. The majority of these cases are brought by debt buyers, many of which are based outside of New York State.

Far too many consumers, including many seniors, do not receive any notice that they have been sued. For that reason, they do not appear in court. When the consumer fails to appear, the debt buyer obtains a judgment in the consumer's absence - a "default judgment" - without having to submit any proof that the consumer actually owes the debt. That is because in

the NYC Civil Court, cases where the consumer defaults never go to a judge. Instead, default judgments are simply entered by court clerks, at a rate of tens of thousands of judgments every year. As a result, our courts have become little more than rubber stamps for debt buyers, turning outstanding debts of dubious merit into powerful judgments that can be collected on for 20 years.

MFY Legal Services recently found that the default rate in consumer debt cases approached a shocking 90%, as defendants only rarely received proper service of process. (See “Justice Disserved,” Consumer Rights Project, MFY Legal Services, June, 2008, available at [http://www.mfy.org/Justice\\_Disserved.pdf](http://www.mfy.org/Justice_Disserved.pdf).) In April 2008, the NYC Civil Court began a program of sending an additional notice to defendants in civil court cases; this additional notice has generated a 50-61% increase in answers filed by debtors. (“Administrative Judge Fern A. Fisher Announces New Measures to Assist Debtors in the Civil Court,” Civil Court of the City of New York (November 2008)).

Once a debt buyer has a judgment, it has tremendous power over a consumer. Debt buyers use judgments to freeze bank accounts and garnish wages. They threaten to seize personal property and they place liens on people’s homes. Judgments are reported on credit reports, where they prevent people from obtaining housing and employment, or from refinancing out of a predatory mortgage.

These results are especially appalling given that the vast majority of cases filed by debt buyers would not bear up to scrutiny if challenged in court. Our organization has a 100% success rate in defending lawsuits brought by debt buyers against seniors and low income New Yorkers. Other legal services organizations have similar track records. Additionally, *pro se* defendants who call our hotline for advice and choose to defend themselves rather than enter into a settlement agreement typically prevail in their cases.

We attribute these success stories to the fact that most debt buyers bring these lawsuits without any intention – and sometimes even without any *ability* – to produce actual proof of the debt. In addition, many of these debts are simply invalid. Among the defendants who call our hotline for advice, a shockingly high percentage have been sued for debts that they do not owe because the debts are past the statute of limitations, have already been paid, or result from identity theft or mistaken identity. The invalid nature of the debt undoubtedly accounts for some of the debt buyers’ failure to produce proof of the debt.

Even where the defendant may have incurred a legitimate debt to an original creditor, we have rarely, if ever, seen the debt buyer produce any actual proof of the debt, such as an affidavit from someone with personal knowledge of the facts. The problem may lie in the debt buyer’s business model. When a debt buyer purchases a portfolio of debts, it pays a rock bottom price of three to four cents on the dollar. In exchange, the debt buyer usually obtains a spreadsheet of information about the debts, but not any documents, such as credit card applications, credit card agreements, or credit card statements (often referred to by debt buyers as “media”), that the debt buyer would need to prove the debt in court. Under many of the agreements that govern the purchase and sale of the debt portfolios, the debt buyer is permitted only to obtain such “media” for a very small percentage of the debts in the portfolio. Incredibly, we have even seen purchase-and-sale agreements that preclude the debt buyer from obtaining media for *any* of the debts. (Of course, debt buyers could choose to purchase the right to obtain account statements

and information for *all* debts – but that would raise the price of the debt to more than what most debt buyers wish to pay.)

Seniors are particularly vulnerable to lawsuit abuse by debt buyers. Many seniors have physical or mental disabilities that prevent them from going to court or from standing up for themselves once they are there. They are fearful of debt collectors and afraid to assert themselves in court. Many also feel tremendous guilt about owing money, and they are easily convinced to make monthly payments on debts that they might not even owe, even when making such payments might cause them to fall behind on their rent or utilities. Like other low-income New Yorkers, seniors feel the negative impacts of having judgments on their credit reports. For example, we recently received a call from a senior who was denied an apartment in a government-subsidized senior residence because of debt buyer judgments that appeared on her credit report. We also continue to receive many calls from seniors whose exempt income (Social Security, SSI, pension, etc.) has been frozen and seized by debt collectors, although we hope and expect that the Exempt Income Protection Act will alleviate this problem when it goes into effect on January 1, 2009.

For example, our client George, who is in his mid-60s and works odd jobs to support himself, is a victim of identity theft. He called our hotline because a debt collector had seized \$10,000, his entire life savings, from his bank account. The debt collector had obtained a default judgment against George for a personal loan that the identity thief had taken out in George's name. George had repeatedly informed the debt collector that he was an identity theft victim, but the debt collector never bothered to investigate George's claims. With our assistance, George was able to vacate the default judgment and get his money back. Eventually, the debt collector withdrew from the case because it could not produce any evidence that George owed the debt.

## **2. Debt Settlement and Debt Protection Scams**

Another rising consumer scam affecting seniors is debt settlement. Debt settlement is marketed to consumers as an alternative to bankruptcy that will enable consumers to pay back all their debts at 50 cents on the dollar and be debt free in just a few short years. The idea behind debt settlement is that the consumer stops paying her credit card bills, and instead pays the debt settlement company. The debt settlement company does not disburse payments to creditors, but instead allows the settlement money to accumulate in a bank account. Theoretically, when enough money has accumulated to satisfy the creditor, the debt settlement company negotiates a lump sum settlement on the consumer's behalf, thus eliminating the debt.

The scheme virtually never works. First, most major credit card issuers refuse to negotiate with debt settlement companies. Second, debt settlement companies charge large upfront fees, which the consumer must pay before she can start to accumulate settlement funds. In our experience, it takes the consumer about six months to pay the debt settlement fees and accumulate a small amount of money in the account. During this time, their debts double because of penalty interest rates and fees, and their credit scores take a huge hit. The credit card companies will not deal with the debt settlement companies, and instead often proceed to file lawsuits against the consumers at about the six month mark. The debt settlement company abandons the consumer, leaving her to deal with the lawsuits on her own. Although they fail to provide services, debt settlement companies usually refuse to return their fees.

Debt settlement is already illegal in New York State. Debt settlement companies act as unlicensed budget planners. New York's General Business Law defines budget planning as the making of a contract in which (1) a consumer pays a sum of money, and (2) the budget planning entity distributes, supervises, or coordinates the distribution of the sum to creditors in accordance with an agreed upon plan, (3) in exchange for consideration. Debt settlement falls squarely within this definition. Budget planners must be licensed by the New York State Banking Department in order to operate in this state. Unlicensed budget planning is illegal and may give rise to criminal prosecution. (See New York General Business Law §§ 455-457.)

We have found that seniors are especially susceptible to debt settlement companies. For example, our client Helen, who is 64 years old, was targeted by a debt settlement company that repeatedly cold-called her. Though Helen had credit card balances at the time, she was current in her payments. The debt settlement company nevertheless convinced Helen to default on her credit cards and pay them thousands of dollars to "settle" her debts. The credit card companies refused to deal with the debt settlement company and sued Helen. She eventually reached settlements with her creditors' lawyers, but she now works around the clock, despite her poor health, in order to pay off her debts. She now feels that she is unable to retire because of her debts. In addition, her credit score dropped 200 points. Meanwhile, the debt settlement company refused to refund her money. Unfortunately, mandatory arbitration and foreign venue clauses in Helen's contract with the debt settlement company have severely hampered our ability to obtain relief for her.

Unfortunately, when we report problems with debt settlement companies to the authorities, nobody takes action. For example, with regard to our client Helen, we have been unable to find a government agency to go after the debt settlement company and obtain restitution for our client. The New York City Department of Consumer Affairs and the New York State Attorney General refer our complaints to the State Banking Department. Meanwhile, the Banking Department claims that it has no jurisdiction over unlicensed entities and refuses to take our complaints. The result is that little relief is available to seniors who have been victimized by these scams. Legislative or regulatory reform may be necessary to make clear that debt settlement scams are illegal and will not be tolerated in the State of New York.

A related problem concerns companies that claim to provide protective services to seniors and people with disabilities. These organizations charge seniors an upfront fee of \$200, followed by a monthly fee of \$20-\$35, in order to write "cease communication" letters to debt collectors and credit card companies. Of course, seniors could write these letters themselves, with the same effect, for free, or they could obtain free assistance in writing these letters. The real harm occurs when senior receives actual legal process – an arbitration notice or court summons. Although these companies bill themselves as providing legal representation to clients, they have no attorneys licensed to practice in New York State, and they do not appear in New York courts. These companies instruct their clients to forward all legal papers to them. They then respond to the notices of legal action by sending a letter to the creditor indicating that the client's income is exempt from collection. Of course, the inevitable result is that the creditors enter default judgments against the clients, who must then deal with frozen bank accounts, negative credit reporting, and other types of judgment enforcement, such as threats of property execution. These companies are engaging in the unauthorized practice of law in the State of New York.

### **3. Deceptive Practices by Mainstream Financial Institutions**

In addition to debt buyers and debt settlement companies, mainstream financial institutions prey upon seniors in New York. Specifically, mainstream financial institutions are entrapping our seniors with confusing and misleading credit offers that send them into ever-deepening debt.

For example, our client Thomas, who is in his mid-80s and lives on Social Security and pension benefits, received an unsolicited letter last year from a major national bank inviting him to apply for a loan of up to \$25,000. The letter included a chart listing several loan options available at an APR of 8.99%. Thomas chose one of the options listed on the chart – a \$20,000 loan to be paid back over 48 months in monthly installments of \$530. He applied for the loan over the telephone, specifying the terms that he sought. He was told that the loan was approved, and received the proceeds of the loan. He then made the \$530 monthly payments.

One year later, Thomas called our office, confused and upset. Though he was making monthly payments of \$530, he was not seeing the principal of the loan decrease. Upon reviewing his loan documents, we discovered that the loan Thomas had received looked nothing like the loan for which he had applied. Instead of a fixed rate loan at 8.99% to be paid back over 48 months, Thomas received a loan with a variable interest rate that compounded daily at a rate of almost 20%, and that was amortized over 96 months. Of the nearly \$6,000 that Thomas had paid toward his loan, only about \$600 had gone to the principal.

We believe that the bank violated numerous laws when dealing with Thomas, including the Truth in Lending Act and the Equal Credit Opportunity Act. Unfortunately, the bank insulated itself from liability by inserting a mandatory arbitration clause into its contract with Thomas. Therefore, Thomas was unable to enforce his rights against this bank, and we were unable to discover whether others were subjected to similar deceptive practices.

### **4. Recommendations**

New York State could help George, Helen, Thomas, and other low-income, elderly New Yorkers tremendously by enacting legislation that would better protect them from abusive debt collection lawsuits, debt settlement scams, unfair lending practices, as well as other unfair and deceptive acts and practices. NEDAP submits the following recommendations:

First, New York needs reform to end lawsuit abuse by debt buyers. Our suggested reforms would not only provide significant relief to seniors and other low income New Yorkers who have been harassed by frivolous lawsuits and judgments, but they would save the state money during this severe budget crisis. When debt buyers collect on their thousands of judgments, millions of dollars are pulled out of New York communities and sent to out-of-state debt buyers, all to service debts that might not even be valid. Seniors and low income New Yorkers turn to government and social services because their subsistence income, which could be spent locally for necessities like rent, food, and clothing, has instead been diverted to pay down old debts of spurious merit. Furthermore, New York courts are overwhelmed by debt buyer filings, and the filing fees do not make up for the vast expenditure of administrative and judicial

resources required to process these largely meritless cases. Our proposed reforms would conserve scarce judicial resources by significantly reducing the number of frivolous filings. Legitimate creditors, by contrast, will have no problem meeting the heightened pleading standards we suggest, and will not be prejudiced in their ability to pursue their lawful claims.

- New York should **enact protections to deter frivolous debt collection lawsuits**. At a minimum, these provisions should:
  - Expand the “additional mailing” requirement imposed by NYC Civil Courts so that it applies state-wide.
  - Require that debt collectors plead in the complaint: (1) their state of incorporation and corporate status; (2) whether they have a license and, if so, the name and number of the license; (3) the complete chain of assignments; and (4) the account number on which they are suing (with protections for consumer privacy to deter identity theft).
  - Require that debt collectors attach a copy of the contract to the complaint in the debt collection action or suffer dismissal of the complaint.
  - Establish reasonable time limits within which the debt collector must produce evidence of the debt or suffer dismissal of the complaint.
  - Require that a debt collector submit an affidavit from the original creditor to obtain a default judgment.
  - Reduce the statute of limitations to three years, consistent with the statute of limitations in Delaware and many other states.
  - Award attorney’s fees to defendants who successfully defend debt collection lawsuits.

Second, New York should strengthen its consumer protection law, or Deceptive Acts and Practices Law, which is widely recognized by consumer advocates as one of the weakest consumer protection statutes in the country. A stronger consumer protection law would give seniors a necessary tool to fight back against debt settlement scams, as well as unfair and deceptive practices by mainstream financial institutions.

- New York should **amend § 349 of the General Business Law**:
  - Amend the statute to cover not just deceptive acts and practices, but also unfair and unconscionable acts and practices.
  - Increase punitive damages so as to create a real deterrent effect on those who would perpetrate unfair and deceptive practices against consumers.
  - Make an award of attorney’s fees to the prevailing plaintiff mandatory, and not just discretionary.

Finally, New York should **provide more funding to critical civil legal services that assist senior citizens**, in order to ensure that senior citizens have access to adequate legal advice and representation.

Again, thank you for the opportunity to comment on these matters.