

Defending Philadelphians in Debt Collection Lawsuits

Hosted by Philadelphia VIP

Presented by:

Bethany R. Nikitenko, Esq.

Feldman, Shepherd, Wohlgelernter, Tanner, Weinstock,
Dodig, LLP

June 24, 2025

- ❖ Overview
- ❖ Plaintiff's Burden - basics
- ❖ Defendant's Defenses - basics
- ❖ Appeals from MC
- ❖ Post-Judgment Cases
- ❖ Settlement
- ❖ MC: Rules and Strategy
- ❖ CCP: Rules and Strategy
- ❖ Case Examples
- ❖ Resources

Representing Consumer Defendants

OVERVIEW

In today's marketplace,
**consumers often have complete
 defenses** to collection claims.

Debt Buyers' Use of the Courts

Majority of filings are by debt buyers

Plaintiff Name	Cases Filed	Share of All Cases
Midland Funding	15,489	26%
Portfolio Recovery Associates	7,915	13%
HRW Funding	5,630	9%
Capital One Bank (USA)	5,580	9%
Caverty SPV I	4,624	8%
Discover Bank	4,281	7%
Philadelphia Federal Credit Union	2,266	4%
TD Bank	1,971	3%
Barclays Bank Delaware	1,835	3%
Synchrony Bank	746	1%
All other Plaintiffs	9,281	16%

Reinvestment
Fund (2021)

"Debt buyers do not always receive meaningful evidence in support of their claims when they purchase a debt, and in some cases the sellers explicitly refuse to warrant that any of the information they passed on is accurate or even that the debts are legally enforceable." Human Rights Watch (2016)

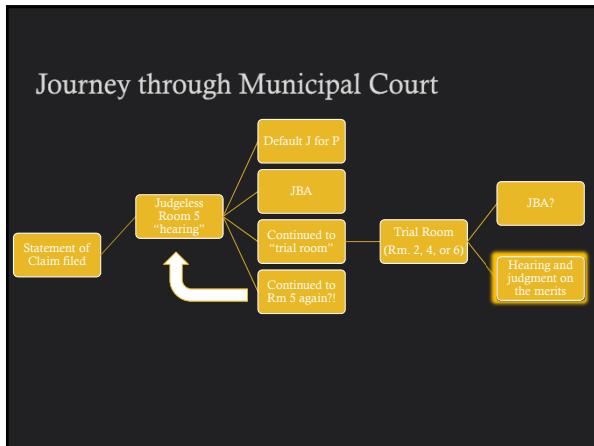
Debt Buyers' Use of the Courts

FTC in 2010: "The system for resolving disputes about consumer debts is broken."
 ◇ Citing collection lawsuits based on insufficient evidence/docs, lack of proper notice to consumers, high rate of default judgments, suits on time-barred debts, improper garnishments of exempt funds

HRW in 2016: "The predictable result of all this is that debt buyer lawsuits are sometimes riddled with fundamental errors. Debt buyers have sued the wrong people, sued debtors for the wrong amounts, or sued to collect debts that had already been paid. ... [T]hey have filed lawsuits that were barred by the applicable statutes of limitations or were otherwise legally deficient. ... [S]ome debt buyer attorneys fail to serve defendants notice of the suits against them in order to obtain large volumes of uncontested judgments."

CFPB: 2015 enforcement action against 2 largest debt buyers (Midland and Asset Acceptance); sued again in 2020 for violating 2015 consent order re: same conduct

Pew in 2021: "In the decade since [the FTC sounded the alarm], this problem has not abated and if anything has become more acute."



Muni Court Docket and E-filing

THE PHILADELPHIA COURTS FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

HOME HEARING LIST CASE SEARCH LOGOUT

PHILADELPHIA MUNICIPAL COURT

Tuesday, June 29, 2021

Attention: CLAIMS will be down for maintenance on Sunday, March 28, 2021. Normal operations will resume on Monday, March 29, 2021.

Private Attorney / Non Attorney

CMS (Case Management System)	Case Initiations
Search	Quick Parallel List
Schedule/ Private or Non Attorney - File Proceedings	Reports
Service Packs	Scan Processing Queue
Attorney Service Packs Pending Printing	Billing Report
Attorney Service Pack Printed Report	
	Miscellaneous
	User Preferences
	File Return of Service
	File Notice of Intent to Defend
	File Notice of Appearance
	Saved Mass Actions
	Enter Satisfaction, (DE, WAP) - Single Case
	Enter Satisfaction, (DE, WAP) - Bulk
	Enter Crossfile Satisfaction (Private attorney or non attorney file)
	Attorney Biographical PDFs
	Print Case Histories List
	Print Case Histories Log

CLAIMS log-in – enter appearance with click of a box

Human Rights Watch on Room 5:

Courts in several states have ... created "judgeless courtrooms" where alleged debtors are summoned to court for the sole purpose of forcing them to participate in unsupervised discussions with debt buyer and other creditor attorneys. In theory, these are resolution conferences that give both parties the opportunity to explore possibilities for compromise. In reality, such proceedings are nothing more than a crudely disguised opportunity for creditor attorneys to pressure defendants into giving up their right to a hearing. Some courts—like the municipal court in Philadelphia—actually allow creditor attorneys to run these proceedings themselves, calling defendants one by one into hallways or back rooms where the large majority is persuaded to give up without ever going in front of a judge. This allows plaintiffs to commandeer the裁判 machinery of the courts in service of their own claims to the detriment of debtors, due process rights and the courts' own neutrality and integrity.

Human Rights Watch, "Rubber Stamp Justice: Us Courts, Debt Buying Corporations, and the Poor" (Jan. 2016).

Human Rights Watch on Room 5:

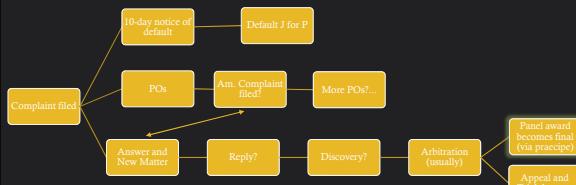
The attorneys began working their way down the sign-in sheet, taking the defendants one-by-one into a small meeting room at the back of the court, out of the trial commissioner's earshot. From the corridor outside the courtroom it was possible to listen in on some of these conversations. "You have been summoned here because you owe a debt that you failed to repay," one debt buyer attorney sternly admonished an elderly man. "You can have a trial if you want one but believe me, it will be better for you if you just agree to a payment plan with me right now." The man stammered that he did once have the credit card at issue in the case, but that the amount of the alleged debt struck him as impossibly high. "It's called compound interest," the attorney replied acidly. He produced no evidence in support of his claim. The defendant agreed to pay the full amount he allegedly owed, in installments of \$50 per month.

No one gets a trial unless they make it through this gauntlet unscaathed. As one Pennsylvania defense attorney complained, for all practical purposes the court is allowing debt buyers to "just use the court as one of their collection tools.

Room 5

- ❖ First listing usually in Room 5 (not really a courtroom)
- ❖ **Getting out of Room 5 (if you're there)**
 - ❖ Ask (tell, nicely) court staffer to continue to a trial room
 - ❖ If client received a Notice to Defend and you/client do not complete and mail it, Plaintiff can request a continuance.
- ❖ **Avoiding Room 5**
 - ❖ Send letter to P's counsel (ideally 10 days before hrg) asking for continuance to a trial room and to consider withdrawing based on client's financial situation
 - ❖ Upload letter as a continuance request attaching a "certificate of compliance"
 - ❖ Always sign correspondence with name and "Pro Bono counsel through Philadelphia Volunteers for the Indigent Program" (subliminal advocacy)
 - ❖ Plaintiff's counsel should agree but if they aren't responsive court should do it anyway as "administrative continuance"
 - ❖ Court Administration phone # = 215.686.2910

Journey Through Common Pleas



Basics of
PLAINTIFF'S BURDEN

Creditors' Theories of Recovery

1. Contract
2. Account Stated
3. Quantum Meruit / Unjust Enrichment

Contract

- ❖ Relatively straightforward in closed-end credit transactions
- ❖ Collector must prove:
 - ❖ Standing/Real Party in Interest
 - ❖ Existence of a Binding Contract and its Terms
 - ❖ Breach: the consumer's default
 - ❖ Collector's Damages

Contract

- ◊ More complex in open-end transactions where indebtedness varies over time (credit cards, phone plans, etc.)
- ◊ Must show both:
 - ◊ The contract, *and*
 - ◊ Proof of the balance (the charges and credits that resulted in the balance due)

Proof of Contract Terms

- ◊ Debt buyers may be unwilling/unable to obtain docs from original creditor
- ◊ Original creditor may not retain documentation
- ◊ Both may have trouble linking form contract document (and any amendments) to the consumer; look for signs of a sample/model doc

Proof of Assent

- ◊ Proof that consumer agreed to initial contract and any subsequent amendments
- ◊ Once consumer stops using a service or a service is discontinued, collector won't be able to prove assent to any contract amendments

Implied Contract

PA law recognizes contracts that are formed by agreement where *the intention of the parties is inferred from their acts in light of the circumstances rather than expressed in words.*

Discover Bank v. Stucka, 2011 Pa. Super 241, 33 A.3d 82 (2011) (allegations in complaint sufficient to apprise Ds of the nature of the bank's implied contract claim where bank did not have a signed copy of the credit application or signed credit card agreement but had an unsigned copy of the CC agreement and asserted course of conduct established Ds' acceptance of card and payments).

Failure to prove existence of contract:

- ◊ Contract claim should be denied
- ◊ Collector may try to prevail on alternative legal theories if those have been pled
- ◊ But contract cannot be the basis for the collector to seek attorney fees or interest

Account Stated

- ◊ A cause of action sometimes used by collectors suing on credit card or “open account” debts because it does not require proof of the written contract between the parties or an itemization of each individual charge in an open-end account
- ◊ “The gist of [an account stated] consists in an agreement to, or acquiescence in, the correctness of the account, so that in proving the account stated, it is not necessary to show the nature of the original transaction, or indebtedness, or to set forth the items entering into the account.”
David v. Veitscher Magnesitwerke AG, 348 Pa 335 (1944).

To prove an account stated:

- ◊ account must be in writing
- ◊ account must be rendered, and
- ◊ the other party must accept, agree or acquiesce in the correctness of the account; need not be manifested expressly but can be implied from the circumstances

Implied consent to correctness of an account?

- ◊ “Where the debtor has the opportunity to scrutinize the account, his silence is *prima facie* evidence of acquiescence, but the rule is otherwise if the debtor makes a timely objection. *Something more than a mere acquiescence by failing to take exception to a series of statements of account in the mail is required to create an account stated.*”

13 P.L.E.2d. Contracts § 513 (emphasis added)

Implied Consent in Accounts Stated

- ◊ Collector may argue that consumer's silence after receipt of a statement signifies consent to the amount due.
- ◊ Split of authority among PA trial courts, but majority conclude that silence after receiving account statement does not constitute acceptance

Account Stated Recap

- ◊ an independent cause of action
- ◊ If collector can prove that a consumer agreed to a statement of account, then any finance charges and fees will be included
- ◊ But there will be no right to contractual finance charges or fees assessed *after* the agreed-upon statement of account

Unjust Enrichment

A quantum meruit claim is made out where one person has been unjustly enriched at the expense of another.

1. Plaintiff conferred a benefit on defendant,
2. Defendant accepted and retained the benefit, and
3. It would be unjust for defendant to retain the benefit without payment. *Wiernik v. PHH U.S. Mortg. Corp.*, 736 A.2d 616, 622 (Pa. Super. Ct. 1999).

Query: Should a debt buyer who has paid pennies on the dollar for the debt be entitled to claim unjust enrichment as a means of collecting the entire amount on the account?

Unjust Enrichment

A cause of action for unjust enrichment arises only when a transaction is not subject to a written or express contract.

Coldwell Banker Philly Rubin Real Estate v Romano, 422 Pa. Super. 319, 329-30, (1993).

The fact that a collector cannot prove the terms of the contact does not alter the fact that a contract exists.

But see, Discover Bank v. Stucka, 2011 Pa. Super 241, 33 A.3d 82 (2011) (allowing unjust enrichment alternative theory at pleading stage).

Basics of DEFENDANT'S DEFENSES

Defenses to Collection Lawsuits

"This is not my debt."

- Identity Theft or Unauthorized Use
- Mistaken Identity
- Authorized User of Account

"I don't owe anymore money."

- Paid-in-full or Settled
- Discharged in Bankruptcy
- Credit Protection

"I don't owe this much money."

- Disputed Debt
- Usury

"I don't have to repay the money."

- Incapacity / Minority
- Duress
- Commercially Unreasonable Resale of Collateral
- Statute of Limitations Has Run

"I don't owe money to the company that sued me."

- Lack of Verification of the Debt
- No Proof of Assignment
- No Standing to Sue

No Standing/Not Real Party in Interest

- ❖ In PA, lawsuits must be filed by the real party in interest. Pa.R.C.P. 2002(a).
- ❖ A party filing suit on a contract to which it is not an original party **must prove its right to enforce the contract.**

Atl. Credit & Fin. v. Giuliana, 829 A.2d 340, 344-45 (Pa. Super. 2003)

No standing

Real consequences: risk of liability to multiple parties

- "When suit is brought against the defendant by a stranger to his contract, he is entitled to proof that plaintiff is the owner of the claim against him. Otherwise, the defendant might find himself subjected to the same liability to the original owner of the cause of action, in the event there was no actual assignment." *Hillbrook Apts. v. Nyce Crete Co.*, 352 A.2d. 148, 155 (Pa. Super. 1975).
- The threat that debtors will be subjected to liability to multiple parties for the same debt is particularly acute in today's debt buying marketplace, which is plagued by companies that sell debts to which they did not have proper title or sell the same debt to multiple debt buyers.

^{See Peter Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 Maryland J. Bus. & Tech. L. 259, 270-1 (2011) (highlighting abuses in the debt buyer industry that subject consumers to duplicative collection actions or judgments on a single debt).}

Defense: Statute of Limitations

General Rule:

Contract actions must be commenced within four (4) years.
42 Pa.C.S.85525.

Exception: Action on an instrument in writing under seal must be commenced within twenty (20) years. 42 Pa.C.S. § 5529.

- ◊ “Instrument” not defined in the statute, so PA courts defer to the dictionary. *See Osprey Portfolio, LLC v. Izett*, 67 A.3d 749 (Pa. 2013) (using dictionary definition “a written document defining rights, duties, entitlements, or liabilities, such as a contract, will, promissory note, or share certificate”).
- ◊ If contract under seal is for the sale of goods, then UCC trumps Judicial Code and UCC only provides 4-year SOL. *See* 13 Pa.C.S.§82725; *First Nat'l Bank v. Keefer*, 76 Pa. D. & C.4th 233 (Fayette Cnty., Nov. 30, 2005).
- ◊ BUT validity of seal hinges on signor's intent. *Collins v. Tracy*

Grill & Bar Corp., 144 Pa. Super. 440, 443 (1941).

SOL: Claim Accrual

- ◊ Generally the date of default/breach/missed payment is when the cause of action accrues and SOL begins running.

42 Pa.C.S. § 5502 (a).

- ◊ Generally, the right to institute an action based on a contract arises at the time of breach, i.e., the date the defendant ceased making payments under the agreement.

Packer Soc. Hill Travel Agency v. Presbyterian Univ. of Pa. Medical, 430 Pa. Super. 625, 631 (1993)

- ◊ Determining date default:

- ◊ Examine collector's docs; sometimes will indicate earlier date than pleading.
- ◊ Infer from charge-off date (180 days prior)
- ◊ Check credit report for date of last payment, but do not confuse with charge-off date. But beware of "re-aging"

SOL: Acknowledgement Doctrine

- ◊ Certain actions by consumer may revive statute of limitations.
- ◊ Need unequivocal acknowledgment of debt. E.g., explicit promise or partial payment (maybe)
 - ◊ Must be directed at debt at issue.
 - ◊ Must be equivalent of promise to pay on demand, not indicating a mere willingness to pay in the future.
 - ◊ If payment was intended by consumer to be the final amount even if collector believes more is due, SOL continues to run for balance collector is seeking.
 - ◊ Payment of principal does not revive SOL for disputed interest charges.

Huntingdon Fin. Corp. v Newton Artesian Water Co.,
659 A.2d 1052 (Pa. Super. 1995).

SOL: Consumer Abuse

Suing to collect a time-barred debt may violate PA's Unfair Trade Practices Consumer Protection Law and the Pennsylvania Fair Credit Extension Uniformity Act and federal FDCPA

15 U.S.C. 1692g(2)(A); 73 P.S. 201-J, et seq.; 73 P.S. § 2270.4(b)(5)(ii); See *Hamid v. Stock & Grimes*, 2012 U.S. Dist. LEXIS 81796 (E.D. Pa. June 12, 2012) (holding that collector violated the Fair Debt Collection Practices Act by filing the Pennsylvania collection action after Delaware's three-year statute of limitations elapsed); *Martisoff v. JBC Legal Group*, 2008 US Dist. LEXIS 68776, at *16 (M.D. Pa. 2008); *Ehsanuddin v. Wolpoff & Abramson*, 2007 US Dist. LEXIS 543052 (W.D. Pa. 2007); *Kimber v. Federal Fin. Corp.*, 668 F.Supp. 1480, 1488 (M.D. Ala. 1987); *Fisher v. Cole*, 709 A.2d 994 (Pa. Commw. Ct. 1998).

SOL: Choice of Law

- ◊ All of the above assumes that PA law applies—but many CC agreements are governed by DE law, which has a 3-year SOL.
- ◊ Restatement (Second) Conflicts of Law:
 - ◊ Forum state's limitations when that SOL period is shorter; flexible standard when forum state is longer.
- ◊ PA's Borrowing Statute: use shorter limitations period if cause of action accrued in another state and the parties have not specifically agreed to a different limitations period.
 - ◊ Uniform Statute of Limitations on Foreign Claims Act, 42 Pa.C.S. § 5521 (b)
- ◊ DE's shorter 3 yr SOL applied in a collection action brought in PA because the cause of action accrued in DE, the location where the credit card issuer failed to receive payment. *See Hamid v. Stock & Grimes*, 2011 U.S. Dist. LEXIS 96245 (E.D. Pa. Aug. 26, 2011).

Look for Affirmative Claims

- ◊ There are strong consumer protection laws at the FEDERAL and STATE levels.
- ◊ These protect consumers from harassment by prohibiting certain debt collection tactics, including:
 - ◊ Calling after 9 pm or before 8 am.
 - ◊ Contacting others about the debt.
 - ◊ Demanding payment in excess of what is owed.

Debt buyers are subject to the FDCPA

- ◊ Debt buyers may claim they are not, citing *Henson v. Santander*, 137 S. Ct. 1718 (2017)
- ◊ But 3rd Circuit has twice affirmed that debt buyers are subject to the FDCPA, because their “principal purpose” is the collection of the debts they purchased—even if they outsource 100% of their “actual collection” to a 3rd party. *Tepper v. Amos Fin. LLC*, 898 F.3d 364 (3d Cir. 2018); *Barbato v. Greystone Alliance, LLC*, 2019 WL 847920 (3d Cir. Feb. 22, 2019)

Challenge “Business Records”

- ◊ There is **no doctrine of incorporation** of business records in Pennsylvania.
- ◊ Superior Court: debt buyers are not entitled to rely upon the business records of their predecessors in interest without proving the trustworthiness of the records, including the chain of custody.

Commw. Fin. Sys. v. Smith,
15 A.3d 492, 499-501 (Pa. Super. 2011).

“Business Records” in Muni Ct

MC Local Rule 121

- a. Except as prescribed by this Rule, the Rules of Evidence shall be applied at trials.
- b. If at least **ten (10) days written notice** of intention to offer the following documents in evidence was given to every other party, accompanied by a copy of the document, a party may offer in evidence **without further proof** the following:

* * *

7. a bill, estimate, receipt, statement of account or other records which appear to have been made in the regular course of business.

- ◊ Rule 121 requires that a record **appear to be made in the ordinary course of business**.
- ◊ While it relaxes the Pa. R. Evid. business records hearsay exception by not requiring custodian of the record to testify, party offering the record still has to show it was *made in the regular course of business*.
 - ◊ Hallmark of business records exception is **trustworthiness** of the records: business record of a transaction made systematically at or near the same time the transaction takes place tends to be trustworthy. *In re Indyk*, 413 A.2d 371, 373 (Pa. 1979)
 - ◊ A record prepared in anticipation of litigation (for example, by an attorney or collection firm) is not made in the regular course of business.

“Business Records” in CCP Arbitration

- ❖ Generally, the rules of evidence apply in arbitration hearings.
- ❖ But relaxed rules regarding the admissibility of certain documents—including bills evidencing charges—if they are provided to the other party 20 days prior to the hearing AND would otherwise be admissible if they were authenticated by a custodian, as set out in Pa. R.C.P. No. 1305 and the Philadelphia Civil Rule *1305.
- ❖ [Counterpart to Muni Ct's Rule 121]

◆ [Counterpart to Muni Ct's Rule 121]

“Business Records” in CCP Arbitration

NO automatic right of admissibility of documents in a Philadelphia arbitration. Documents that are/contain inadmissible hearsay should not be admitted if an appropriate objection is made to their introduction at the hearing. The explanatory comment makes clear that the **relaxed standard is for authentication only**:

It is not necessary to produce a witness to identify or authenticate a bill [or] record. . . . The document will speak for itself as to its authenticity, subject of course to objection to its relevance or any other objection to its admissibility other than authenticity.

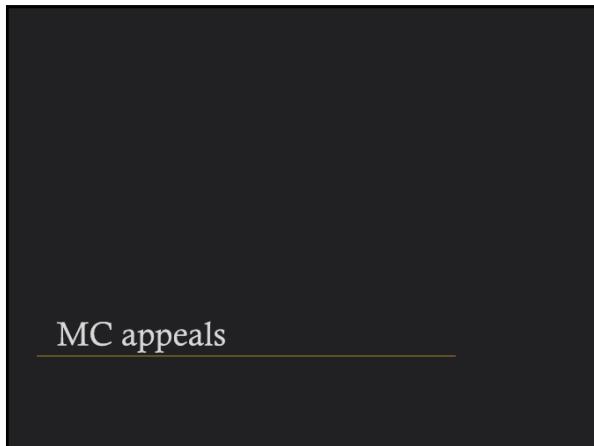
[Helpful clarifying language that's absent from Muni Ct rules]

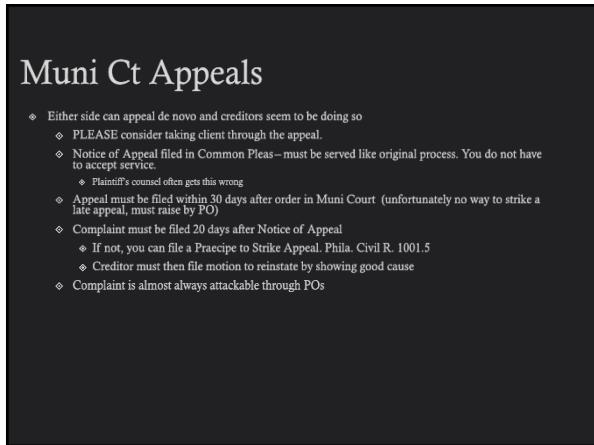
Object!

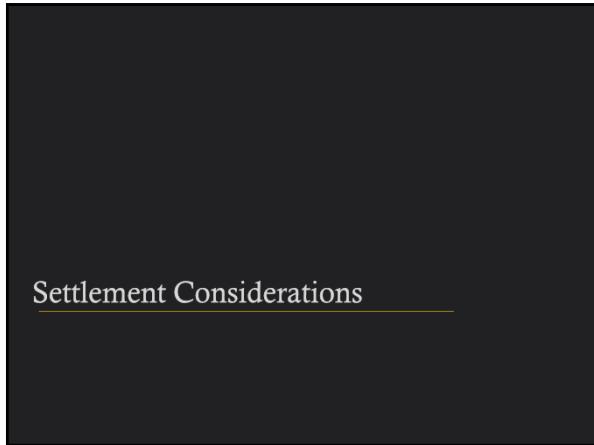
1. Not contemporaneous.
2. Not kept in the ordinary course of the company's business.
3. Not the regular practice of the business to keep or maintain the record.
4. Not demonstrated that the person who made the record possessed sufficient knowledge. (Someone should be able to testify that he or she made the entries or knows them to be correct.)
5. Qualifying witness was not a true custodian or was otherwise unqualified.
6. Circumstances surrounding the document generally lack trustworthiness.
7. Document prepared in anticipation of litigation or for use during litigation.
8. Document is not original.
9. Document has erasures, deletions, or alterations that cannot adequately be explained.
10. Document's entries are vague, illegible, or otherwise cannot be read.
11. Even if the document itself were to qualify as a business record, the material entries are either irrelevant or they consist of inadmissible hearsay.
12. Information contained in the document came from scattered sources, or the writing otherwise consists of multiple, non-expected, hearsay.

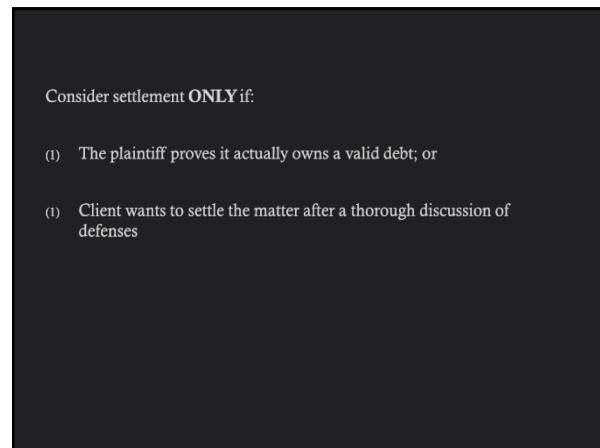
◊ Adapted from Ashley S. Lipson, *Is It Admissible?*, James Publishing (2008).

❖ Adapted from Ashley S. Lipson, *Is It Admissible?*, James Publishing (2008).



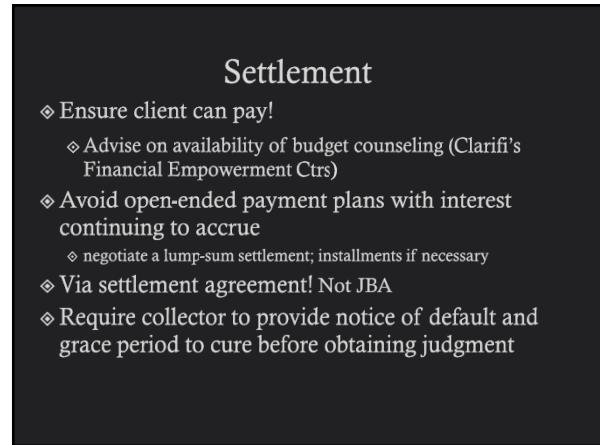






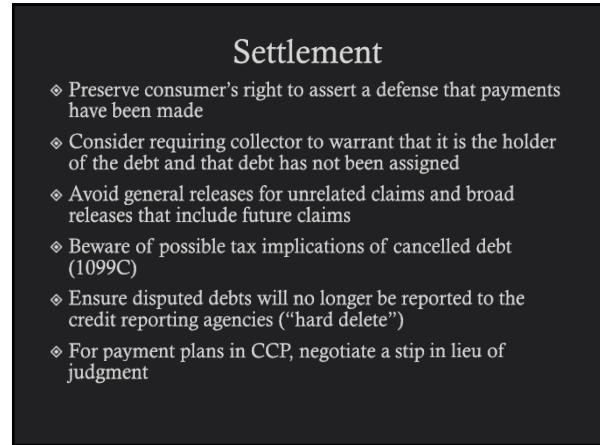
Consider settlement **ONLY** if:

- (i) The plaintiff proves it actually owns a valid debt; or
- (ii) Client wants to settle the matter after a thorough discussion of defenses



Settlement

- ◊ Ensure client can pay!
 - ◊ Advise on availability of budget counseling (Clarifi's Financial Empowerment Ctrs)
- ◊ Avoid open-ended payment plans with interest continuing to accrue
 - ◊ negotiate a lump-sum settlement; installments if necessary
- ◊ Via settlement agreement! Not JBA
- ◊ Require collector to provide notice of default and grace period to cure before obtaining judgment



Settlement

- ◊ Preserve consumer's right to assert a defense that payments have been made
- ◊ Consider requiring collector to warrant that it is the holder of the debt and that debt has not been assigned
- ◊ Avoid general releases for unrelated claims and broad releases that include future claims
- ◊ Beware of possible tax implications of cancelled debt (1099C)
- ◊ Ensure disputed debts will no longer be reported to the credit reporting agencies ("hard delete")
- ◊ For payment plans in CCP, negotiate a stip in lieu of judgment

Procedures and Strategies for
Municipal Court

MC Strategies

- ◊ Show up and defend the case *without* your client present. Plaintiffs generally will not be present. Yet, some judges raise concerns if a defendant is not present.
- ◊ Collector will be unlikely to prove case because they will not bring witnesses, will not have all of the required docs (proof of the agreement between the parties, proof of amount of debt, of the debt, proof of assignment(s), etc.)
- ◊ If Notice of Intent to Defend is returned, have a right to a hearing that day, even if case is in Courtroom 5.
- ◊ Make sure, if you win, that there is a judgment entered for your client *and* against debt collector rather than merely a dismissal of the case.
- ◊ If you lose, you have the right to a *de novo* appeal to CCP; of course, so does the other side.

MC: Use the Rules

MC Local Rules:

<https://www.courts.phila.gov/pdf/rules/MC-Civil-Division-C-Compiled-rules.pdf>

Rule 109: Contents of Complaints

- ◊ Itemization of sums owed with attached copy of invoice or statement of account
- ◊ Copy of writing on which any claims are based
 - ◊ Copy of contract or law authorizing any fee claimed other than court costs.
- ◊ Brief statement of facts including relevant dates, times and places

Procedures and Strategies for Court of Common Pleas

Approach in Court of Common Pleas

- ◊ Approach will depend on the facts, client's objectives, and the law.
- ◊ Options:
 - ◊ File Preliminary Objections (Pa.R.C.P. 1028.)
 - ◊ File Answer
 - ◊ Negotiate payment arrangement

Common Grounds for Preliminary Objections in Debt Buyer Cases

- ◊ Failure of a pleading to conform to law or rule of court
Pa.R.C.P. 1028(a)(2).
- ◊ Insufficient specificity in a pleading
Pa.R.C.P. 1028(a)(3).

Key Court Rules

Pa.R.C.P. 1019

(h) When a claim or defense is based upon an agreement, the pleading shall state specifically if the agreement is oral or written.

(i) When a claim or defense is based upon a writing, the pleader **shall attach a copy of the writing**, or the material part thereof, but if the writing or copy is not accessible to the pleader, it is sufficient to so state, together with the reason, and to set forth the substance in writing

(f) Averments of time, place and items of special damage shall be specifically stated.

Key Court Rules

Pa.R.C.P. 1024 Verification

(a) Every pleading containing an averment of fact not appearing of record in the action or containing a denial of fact shall state that the averment or denial is true upon the signer's personal knowledge or information and belief and shall be verified. . . .

(b) . . .

(c) The verification shall be **made by** one or more of the **parties filing the pleading** unless all of the parties (1) lack sufficient knowledge or information, or (2) are outside the jurisdiction of the court **and** the verification of none of them can be obtained within the time allowed for filing the pleading. In such cases, the verification may be made by any person having sufficient knowledge . . . and shall set forth . . . the reason why the verification is not made by a party.

Responding to the Complaint

You may want to file POs when:

- ◊ Insufficient documentation of chain of title.
- ◊ Generic bill of sale of a group of debts
- ◊ Affidavit rather than assignments
- ◊ Contract or account "terms and conditions" are not attached.
- ◊ Insufficiency of the pleading regarding amount claimed.
- ◊ Complaint is not verified by the Plaintiff.

Key Case Law

Atlantic Credit & Finance v. Giuliana,

829 A.2d 340 (Pa. Super 2003)

- ❖ POs can be sufficient to establish a meritorious defense as element of opening default judgment
- ❖ Complaint did not satisfy the requirement of providing the writings on which claims were based: original contract and assignment
 - ❖ "We find that the failure to attach the writings which assertedly establish appellee's right to a judgment against appellants in the amount of \$17,496.27, based on an alleged debt it allegedly purchased for substantially less than \$9,644.66, is fatal to the claims set forth in appellee's complaint. Thus, the preliminary objection of appellants based on failure to produce a cardholder agreement and statement of account, as well as evidence of the assignment, establishes a meritorious defense."
- ❖ Improper Verification

Key Case Law

Worldwide Asset Purchasing v. Stern,

153-MAY Pittsburgh Legal J. 111

For complaints to satisfy the pleading requirements of Pa.R.C.P. 1019, the plaintiffs need to plead facts on which a cause of action is based, including averments of time, place and items of special damage and must also attach copies of writings when the claim is based on a writing.

Key Case Law

Worldwide Asset Purchasing v. Stern,

153-MAY Pittsburgh Legal J. 111

"An account must show the name of the party charged. It begins with a balance, preferably zero, or with a sum recited that can qualify as an account stated, but at least the balance should be a provable sum. Following the balance, the item or items, dated and identifiable by number or otherwise, representing charges, or debits and credits should appear. Summarization is necessary showing a running or developing balance or an arrangement which permits the calculation of the balance claimed to be due."

Key Case Law: Philadelphia CCP

Unifund CCR Partners v. Vo, 2009 WL 964955
Docket No. 080403966, (C.P. Phila. Feb. 17, 2009) (Fox, J.)

Dismissed third amended complaint without further leave to amend:

- ❖ **Failed to adequately plead the assignment:** documents attached do not mention Defendant's account as included among those assigned, and complaint did not plead chain of assignment
- ❖ **Insufficient specificity:** Plaintiff must show a running or developing balance with dates of charges; there was nothing in complaint to show basis of an account balance prior to statement that started with a \$5,738.33 balance (noting Plaintiff changed the amount owed from \$14,237.78 to \$6,417.62, and finally \$5,703.26) (adopted *Stern*)
- ❖ **Failure to attach material part of contract:** the interest rates and fees that were part of the credit card agreement were not attached ("Schumer Box")

Key Case Law: Philadelphia CCP

Oliphant Financial LLC v. Glover,
Docket No. 210401210, (C.P. Phila. Jun. 9, 2022) (Lane, J.)

Dismissed second amended complaint without further leave to amend:

- ❖ **Failed to adequately plead the assignment:** documents attached do not mention Defendant's account as included among those assigned, and "Bill of Sale" of assignment was not sufficient where Plaintiff did not attach the "Asset Purchase Agreement" and "Receivable Sales Agreement"
- ❖ **Insufficient specificity:** Plaintiff must show a running or developing balance with dates of charges (insufficient where the first statement attached shows a previous balance of \$2,430.85) (adopted *Stern*)
- ❖ **Failure to attach material part of contract:** the interest rates and fees that were part of the credit card agreement ("Schumer Box")

Key Case Law: Philadelphia CCP

National Collegiate Trust 2007-A v. Johnson,
Docket No. 220800196, (C.P. Phila. Sept. 20, 2023) (Lane, J.)

Dismissed second amended complaint without further leave to amend:

- ❖ **Failed to adequately plead the assignment:** "Pool Supplement" was insufficient documentation of assignment where the full "Amended and Restated Consolidated Note Purchase" agreement was not attached
- ❖ **Insufficient specificity:** applying *Stern*, *Vo* and *Glover* to private student loan collection action where there was insufficient documentation of how the loan balance was calculated
- ❖ Verification by attorney was improper

Key Case Law: Philadelphia CCP

Vo, Glover and Johnson are binding precedent in Philadelphia C.C.P.

The Pennsylvania Supreme Court instructs: “[I]t is well-settled that, absent the most compelling circumstances, a judge should follow the decision of a colleague on the same court when based on the same set of facts.” *Yudacufski v. Com., Dept. of Transp.*, 499 Pa. 605, 612, 454 A.2d 923, 926 (1982); *see Butterfield v. Giuntoli*, 448 Pa. Super. 1, 24 n. 14 (1995); *see also Schmid Motor Vehicle Operator License Case*, 173 A.2d 758, 758 (Pa. Super. 1961) (holding that a Common Pleas judge properly concluded that the law of the judicial district had been established, and that they had a duty to follow it, when their attention was called to a similar case recently decided by another judge of the same court).

Key Case Law

FIA Card Servs. N.A. v. Kirasic,

No. AR06-009360 (Allegheny Cnty. Ct. Com. Pl. 2007), published in *Pittsburgh Legal Journal*, Vol. 156, No. 4 (Feb. 15, 2008).

- ◊ Amended Complaint seeking value of credit card charges is proper when all statements supporting the amount claimed in the complaint are attached thereto.
- ◊ Where Plaintiff does not seek interest, attorneys' fees or other charges and only seeks repayment of the amounts shown on statements attached to the complaint, the credit card agreement is not needed.

Key Case Law

Discover v Booker,

259 A.2d 493 (Pa. Super 2021)

- ◊ Defendant appealed judgment award in favor of Plaintiff in part on the basis that Plaintiff had failed to provide the original contract and only provided a subsequent version operative at the time of default
- ◊ Superior Court held that a signed application, an updated card agreement, and Defendant's broad stipulations that she applied for, received and used the card and did not object to any statements, were sufficient to prove the existence of a contract at trial
- ◊ Facts distinguishable from most debt buyer cases (and many original creditor cases)

Filing an Answer and Discovery

- ❖ Review with client common defenses to raise in new matter.
- ❖ Be prepared to go to arbitration.
- ❖ Litigation tactics: does discovery help Plaintiff prepare? Additional discovery period if arbitration order is appealed

The rules are your friend

- ❖ Know them! Review Muni Ct- and Arb-specific rules every time.
- ❖ Debt buyers' business model makes it difficult for them to comply with the Rules of Civil Procedure and Evidence.
- ❖ They could do things differently, but they choose to collect through litigation because it is cost effective; they have to live with the losses.
- ❖ They are being held to no higher standard than anyone else and we should not permit them to use the court as a collection agency if they can't prove their case.

Representing Consumer Defendants

CASE EXAMPLES

Resources

Additional



- ❖ National Consumer Law Center's *Collection Actions: Defending Consumers and Their Assets* (www.nclc.org)
- ❖ Materials from VIP's June 2020 training: Debt Collection Defense slides, video, and manual (with pleading samples!)

<https://www.phillyvip.org/volunteer/resources/?area-of-interest=collection>

❖ Updated manual will be emailed to you

*Information in this presentation previously compiled by attorneys Kerry Smith and Laura Smith of Community Legal Services in collaboration with Philadelphia VIP.

Contact Info

Bethany R. Nikitenko, Esq.
 Feldman, Shepherd, Wohlgemert, Tanner, Weinstock, Dodig, LLP
 215.567.8300
bnikitenko@feldmanshepherd.com

Denise E. Lynch, Esq.
 Philadelphia VIP
 Supervising Attorney
 (215) 522-9563
dlynch@phillyvip.org
