

**Defending Consumer Debt  
Collection Lawsuits  
in Philadelphia**

*Presented by*

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Community Legal Services of Philadelphia

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June 10, 2020

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**Agenda**

1. Debt Collection Context & Essentials
2. Initial Considerations
3. Plaintiff's Burdens
4. Defendant's Case
5. Post-Judgment Cases
6. Settlement Negotiations
7. Municipal Court & Court of Common Pleas
8. Resources

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Essential Background

**THE DEBT COLLECTION CONTEXT**

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### Preamble to the FDCPA, 15 U.S.C. § 1692

**(a) Abusive practices**  
There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

**(b) Inadequacy of laws**  
Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

**(c) Available non-abusive collection methods**  
Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

**(d) Interstate commerce**  
Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

**(e) Purposes**  
It is the purpose of this title to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

§ 802. Congressional findings and declaration of purpose (1977).



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### Debt Collection: The Big Picture

Debt collection is a \$13.7 billion dollar industry affecting 70 million consumers. We surveyed consumers regarding their views and experiences in debt collection and have released a report on our findings.\*

Of consumers who reported being contacted about a debt in collections:

More than half report being incorrectly contacted for at least one debt.



27% of consumers reported threatening contact.



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### Debt Collection: The Big Picture

1 in 7 consumers report being sued over a debt.



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### Debt Buyers & Collection Lawsuits

In today's marketplace,  
**consumers often have complete defenses** in collection cases.




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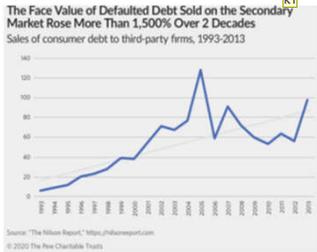
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### Marketplace Changes & Consumer Defenses

**The Face Value of Defaulted Debt Sold on the Secondary Market Rose More Than 1,500% Over 2 Decades**  
Sales of consumer debt to third-party firms, 1993-2013



Source: "The Nilson Report," <http://nilsonreport.com>  
© 2010 The Fee Charitable Trusts

**Explosive Growth In Debt Buying**

- In early 90's, debt buying was minimal
- The face value of defaulted debt purchased by debt buyers increased from \$10 billion in 1993 to \$98 billion in 2013




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### Marketplace Changes & Consumer Defenses

***DIRTY DEBTS SOLD DIRT CHEAP\****

- Debts determined to be uncollectible by creditor
- Sold for pennies on the dollar
  - 15 cents "fresh debt" after charge off
  - 7.9 cents if less than 3 years
  - 3.1 cents if 3-6 years old
- Sold "as is" - no representations or warranties of accuracy or collectability



\*Dalié Jiménez, Harvard Journal on Legislation, Vol. 52 (Winter 2014).

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**Slide 8**

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**K1**

Kerry, 06/09/2020

Marketplace Changes & Consumer Defenses

***DIRTY DEBTS SOLD DIRT CHEAP\****

**Debt Buyers receive minimal information on the account:**

- Often cannot even prove they own the debt, let alone prove the validity of charges and interest claimed
- May have no information about billing error disputes that may have caused the original creditor to stop collection

\*Dalié Jiménez, Harvard Journal on Legislation, Vol. 52 (Winter 2014).



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Marketplace Changes & Consumer Defenses

***DIRTY DEBTS SOLD DIRT CHEAP\****

**Debt Buyers receive minimal information on the account:**

- Leads to lawsuits being filed beyond the statute of limitations
- FTC study: 65% of the accounts it examined were missing the date when the consumer became delinquent.

\*Dalié Jiménez, Harvard Journal on Legislation, Vol. 52 (Winter 2014).



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Marketplace Changes & Consumer Defenses

***DIRTY DEBTS SOLD DIRT CHEAP\****

**Debt Buyers often purchase old debt:**

- Leads to “mistaken identity” as debt buyers rely on credit reports-- which are riddled with errors and contain “merged files”-- to locate consumers
- Can increase the risk of default judgments, if consumers are served at old addresses

\*Dalié Jiménez, Harvard Journal on Legislation, Vol. 52 (Winter 2014).



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Marketplace Changes & Consumer Defenses

**DIRTY DEBTS SOLD DIRT CHEAP\***

**Risk of multiple collection actions for same debt:**

- Debt buyers have sold debts without title.
- Debt buyers have sold the same debt to multiple debt buyers.

\*Dalié Jiménez, Harvard Journal on Legislation, Vol. 52 (Winter 2014).




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Marketplace Changes & Consumer Defenses

**Identity Theft on the Rise.**

- Been called one of fastest growing crimes

**Predatory Credit Practices.**

- Creditors aggressively offer credit.
- Engage in practices designed to load up enormous interest charges and fees.
- Sell useless add-on products.




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Marketplace Changes & Consumer Defenses

**Ruth Owens's Story**

**May 1997**

- o Had \$1,963 balance; stopped using credit card.

**May 1997 – May 2003**

- o Made \$3,492 in payments.

**May 2003**

- o Sued for \$5,564.

**How could this be?**

Fees and interest accumulated.

Over-limit Fees	\$1,518.00
+ Late Fees	\$1,160.00
+ Credit Insurance	\$369.62
+ Interest & Fees	\$6,008.66
<b>Total</b>	<b>\$9,056.28</b>

**“This court is all too aware of the widespread financial exploitation of the urban poor by overbearing credit-card companies. [Ms. Owens] has clearly been the victim of plaintiff’s unreasonable, unconscionable and unjust business practices.”**

Discover v. Owens, 822 N.E.2d 869 (Ohio Mun. 2004).




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**How to Collect *DIRTY DEBTS SOLD DIRT CHEAP?***

Debt Claims More Than Doubled Over 20 Years  
Consumer debt lawsuits in real terms and as a share of civil caseloads, 1993 and 2013

**Use the courts:**



Year	Total Civil Cases	Debt Claims Filed (Count)	Debt Claims Filed (%)
1993	14.6M	~1.7M	<12%
2013	16.9M	4M	24%

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**How to Collect *DIRTY DEBTS SOLD DIRT CHEAP?***

**They chose the forum, but don't follow the rules:**

- Business model relies on default judgments or judgments by agreement.
- Robo-signed affidavits.
- Triple hearsay.

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**How to Collect *DIRTY DEBTS SOLD DIRT CHEAP?***

**Compounding the Problem:**

- Limited access to representation.
- "Rocket Dockets"

**AMERICAN BANKER.**

**Courthouse 'Rocket Dockets' Give Debt Collectors Edge Over Debtors**  
By Maria Assan  
February 11, 2014  
Early on a chilly Friday in January, Franklyn Williamson walked into courtroom 264B of the Prince George's County, Md., district courthouse. An athletic 55-year-old realtor in Silver Spring, Williamson had canceled a Florida trip to appear in court that day. He wasn't there for a trial or an official hearing, however. Like the 169 other people on the docket that morning, Williamson had received an official court summons for a one-on-one meeting with a debt collector.

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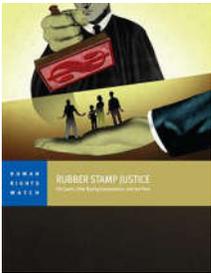
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How to Collect **DIRTY DEBTS SOLD DIRT CHEAP?**



“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 to a judge.”

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**What are the harms?**

- Far too often, collectors obtain judgments for the **wrong amount**, or against the **wrong person**, for a debt that is **already paid or discharged** or for which the **statute of limitations has expired**.
- Judgments extend the life of a debt, leading to garnishment of bank accounts, equity stripping of real property.
- “Collection proof” clients can be targets for collection abuse; scared into signing judgments by agreement.

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**What are the harms?**

- Unnecessary bankruptcies.
- Paying questionable claims already abandoned by original creditor harms legitimate creditors.
- Multiple liability for same debt.
- Systemic abuse of justice system.

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**What are the harms?**

- Disproportionate impact on communities of color.



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**FTC “Repairing a Broken System Report” (2010)**

“Based on its extensive analysis, the Federal Trade Commission...concludes that neither litigation nor arbitration currently provide adequate protection for consumers. ***The system for resolving disputes about consumer debts is broken.***”

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**Recommended Reforms:**

While creditors have a right to collect what is legally owed to them, reforms are needed to stop abusive debt collection litigation:

- **Require more detailed and accurate evidence of the debt, including ownership of the debt, when creditors and collectors file lawsuits.**
- **Enhance judicial review of consumer credit collection claims.**
- **Prohibit the collection of debt beyond the statute of limitations, and require plaintiffs and attorneys to certify that the debt is not time-barred.**
- **Increase access to representation for consumer debt defendants.**

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**Debt Collection and the Pandemic**

- All in person civil trials, hearings and conferences scheduled through July 6, 2020 are administratively canceled and will be rescheduled. (Admin. Order No. 33 of 2020)
- No default judgments may be entered in Phila. Common Pleas Court until June 15, with a new 10-day notice of intent to enter a default judgment required if sent prior to May 11. (Admin. Order No. 33 of 2020)

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**Debt Collection and the Pandemic**

- E-filing is available in Phila. Common Pleas Court.
- Small claims/consumer purchase (“SC/CP”) cases may not be filed in Municipal Court until a larger space is obtained for those cases, with exception to toll statute of limitations. (Admin. Order No. 33 of 2020 and Municipal Court Notice.)
- No writs of execution on personal property until further notice, with emergency hearings for existing garnishments. (Admin. Order No. 17 of 2020.)

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**CASE EXAMPLE**

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Initial Considerations:

## REPRESENTING CONSUMER DEFENDANTS



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### Initial Considerations



**1. Consider reviewing a client's credit report.**

- Do this in your office; clients make too many mistakes
- [www.annualcreditreport.com](http://www.annualcreditreport.com)
- It will show the current status of the account
- The amount owed
- The history of the account
- Date of last payment (may not be accurate)



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### Initial Considerations

**2. What does your client want?**

- You need to know this before you decide what strategy to use.
- Be realistic – don't promise your client that the case will go away, even though many of them do.
- Some clients do want to settle these cases – be sensitive to a client's wishes.
- What is achievable given the facts?



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**Initial Considerations**

**3. Know thy adversary.**

- Who is the Plaintiff?
  - Original creditor or assignee?
  - Do they make settlements? If so, what is their framework?
- Who is Plaintiff's attorney?
  - Debt collectors are represented by debt collection law firms; both of these entities' business model is volume
  - Do they show up at hearing?
  - Do they amend?
  - Can they produce documents?

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**Initial Considerations**

**4. Know thy forum**

- Was the complaint filed in Court of Common Pleas or Municipal Court?

**5. Don't forget about bankruptcy**

- Always determine whether client would be better served by a bankruptcy.
- Is this the tip of the iceberg or one of a few debts?

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**Bankruptcy Analysis**

**Chapter 7**

A "straight bankruptcy" in which assets of a debtor are theoretically liquidated by a Chapter 7 trustee. Creditors who file claims are then paid off with the proceeds on a pro rata basis. In reality, most individual Chapter 7 cases are declared "no-asset" cases, with no distribution made to creditors.

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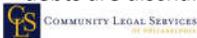
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## Bankruptcy Analysis

### Chapter 13

A reorganization in which a debtor with "regular income" may present a good faith plan to make payments to creditors over a period of time (five years maximum). Income can be from any source, including unemployment compensation, public benefits, and contributions from friends/family. "Regular" does not preclude seasonable income. At the end of the payment period, most unpaid debts are discharged.




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## Bankruptcy Analysis

- **The Total Amount of Debt.** Bankruptcy is a powerful tool, hence the availability of a Chapter 7 discharge only once every 8 years. Client should consider whether the amount of debt is worth using bankruptcy to address.
- **Is Your Client "Collection Proof"?** In Pennsylvania, wages cannot be directly garnished for most judgment debts. However, money in a bank account can be garnished unless it is Social Security benefits or retirement income. Unless the client owns real estate, a judgment against them may not have much of a consequence.
- **Can Your Client Handle the Stress of Collection Activity?** Sometimes the emotional relief of the automatic stay and discharge injunction may be enough reason to file.




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## Chapter 7 Asset Liquidation Analysis.

Property value minus liens and exemption

- Value of the Property:	\$140,000.00
- Costs of sale (10% in Philly):	\$ 14,000.00
- 1 <sup>st</sup> Mortgage:	\$ 75,500.00
- 2 <sup>nd</sup> Mortgage:	\$ 14,000.00
- Water liens:	\$ 2,135.00
- Gas liens:	\$ 750.00
- LVNV Judgment lien:	\$ 1,245.00
- Equity:	\$ 32,370.00
- Minus Bankruptcy exemption (per debtor):	\$ 25,150.00
- Potential Non-exempt equity	<b>\$ 7,220.00</b>




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**The Chapter 13 Option.**

- If a prior Chapter 7 case in last eight years
- A way to get discharge of the majority of unsecured debt where a small amount of non-exempt equity is an issue.
- Free representation generally not an option.
- Costs: Filing fee (\$310); credit counseling courses (\$25- \$50 ave); attorney fees (anywhere between \$3,000 to \$4,500 for basic bankruptcy services)
  - Philadelphia bar association referral service has list of attorneys that may charge less

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**PLAINTIFF'S BURDENS**

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**Creditors' Theories of Recovery**

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

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**Contract**

- Relatively straightforward in closed-end credit transactions

Collector must prove:

- Standing/Real Party in Interest
- Existence of a Binding Contract/Terms of Contract
- Breach: the consumer's default
- Collector's Damages

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**Contract**

- More complex in open-end transactions where indebtedness varies over time (i.e., credit cards, phone service, cable, etc.)

Must show both:

- The contract, *and*
- Proof of the balance (by showing the charges and credits that resulted in balance due)

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**Contract**

*Proof of Contract Terms:*

- Debt Buyers may be unwilling or unable to obtain documentation from the original creditor
- Original Creditor also may not retain documentation
- Both may have trouble linking form contract document, and amendments, to the consumer

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**Contract**

*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 amendments to the contract sent after account closed

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**Contract**

*Failure to prove existence of contract:*

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

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**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 defendants of the nature of the bank's implied contract claim where bank did not have a copy of the credit application or credit card agreement signed by defendants, but bank had an unsigned copy of the agreement and asserted course of conduct established defendants' acceptance).

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**Open Account / Book Account**

An “open account” or “current account” merely signifies an account between two parties having an unfinished series of money transactions.

*Pennsylvania Law Encyclopedia*



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**Open Account / Book Account**

Appears to not require proof of a contract, but only proof of entitlement to the unpaid balance of an open-end account through the account books/ledger

Where a complaint on a book account sets forth the invoices and ledger sheets of items sold and rented to defendant, it need not set forth the consideration agreed upon, the terms of the contract or rental, the dates when the articles were requested and furnished, the circumstances under which the agreement was reached or the terms of the oral contract resulting in the delivery of the goods.

*I-R Equipment Corp. v. Wesex Corp.*,  
50 Pa.D. & C.2d 746, 1970 WL 8982 (C.P. Mercer 1970)  
(surveying cases).



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**Open Account / Book Account**

Proper pleading in an action on a book account requires that the attached account be more than an unintelligible list of figures, and must be clear, definite charges, not lumped but itemized, showing the nature of the transactions.

*C-Glass v. Ryan*,  
70 D.&C. 2d 251, 1975 WL 16632 (C.P. Beaver 1975).



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### Open Account / Book Account

- In order to adequately plead and prove an open account / book account:  

“(A)n account must show the name of the party charged. It begins with a balance, preferably at 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.”

*Worldwide Asset Purchasing, LLC v. Stern*, 153-MAY Pittsburg Legal J. 111 (C.P. Allegheny 2004), quoting *Asset Acceptance Corp. v. Proctor*, 804 N.E.2d 975 (Ohio Ct. App. 2004).



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### Open Account / Book Account

- Remember, collectors/creditors must prove the existence of a contract in order to collect contractual finance charges and fees
- Without proof of contract, they are not entitled to recover finance charges or other fees as part of the balance due



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### Open Account / Book Account

- Fia Card Services v. Kirasic (in materials)
  - Amended Complaint sought payment of the amount of the cash advances and purchases identified in the account statements attached to the complaint, less payments made to the plaintiff as set forth in the statements
  - Account statements started with a \$0 balance
  - Pleading is proper when all statements supporting the amount claimed in the complaint are attached thereto.



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**Open Account / Book Account**

*Query: Is this cause of action appropriate for credit card debt?*

- Historically the cause of action involved a merchant and a consumer engaging in a series of transactions

"An action on a book account is for goods sold and delivered or for work and labor performed. Policies of insurance are not goods, they are contracts."  
Reed v. Schumacher, 27 Pa. D. & C. 247, 1936 WL 5572 (Schuylkill Cnty. Ct. Com. Pl. 1936).

- Appropriate for credit card debt where third party finances purchases for a series of merchants?

Citibank v. Whitely, 149 S.W.3d. 599 (Mo. Ct. App. 2004)(recognizing but not reaching the issue).



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**Account Stated**

A cause of action for an “account stated” is often 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



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**Account Stated**

In Pennsylvania:  
 “An account stated has been defined as an account in writing, examined and expressly or impliedly accepted by both parties thereto, as distinguished from a simple claim or a mere summary of account”

13 P.L.E.2d. Contracts § 512



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### Account Stated

The Pennsylvania Supreme Court has explained:

*“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).



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### Account Stated

An account stated is an independent cause of action, superseding a cause of action based on the credit agreement and individual charges

“The idea behind an action upon account stated is that a preceding contract has been discharged and merged into a stated account which is based upon the earlier contract.”

Rush’s Service Center v Genareo  
10 Pa. D. & C.4<sup>th</sup> 445, 1991 WL 338317 (C.P. Laurence 1991).



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### Account Stated

To produce an account stated:

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



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### Account Stated

**What constitutes implied consent of the consumer to pay the amount found in the statement?**

“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



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### Account Stated

- In many cases, the collector’s position will be that the consumer’s silence after receipt of a statement signifies consent to the amount due.
- Split of authority among PA trial courts



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### Account Stated

- Majority conclude that silence after receiving an account statement does not constitute acceptance.

*Target Nat'l v. Samanez*, No. AR07-09777 (C.P. Allegheny 2007), 2007 Pa. Dist. & Cnty. Dec. LEXIS 433, published in Pittsburgh Legal Journal, Vol. 156 No. 7 (March 28, 2008)

*Citibank (S.D.), N.A. v. Rhinees*, 30 Pa. D. & C.5th 402 (C.P. Lancaster 2013).

*Citibank, N.A. v. Hull*, 26 Pa. D. & C.5th 188 (C.P. Clinton 2012)

*Target Nat'l Bank v. Greiner*, No. CI-09—03069 (C.P. Lancaster 2009), *aff'd in unpublished opinion*, 43 A.3d 515 (Pa. Super. Ct. 2012)

*Citibank (S.D.), N.A. v. Knepp*, 19 Pa. D. & C.5th 332 (C.P. Clearfield 2010)

*Target Nat'l Bank v. Kilbride*, 10 Pa. D. & C.5th 489 (C.P. Centre 2010)

*Capital One Bank v. Clevensline*, 7 Pa. D. & C.5th 153, 157 (C.P. Center 2009)

*C.E. Glass v. Ryan*, 70 Pa. D.&C. 2d 251 (C.P. Beaver 1975)



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### Account Stated

- Contrary authority, but often does not have an analysis of the factual circumstances to justify the finding of implied acceptance

*Citibank v. King*, 2 Pa. D. & C. 5<sup>th</sup> 60 (C.P. Centre Cty. 2007) (overruling preliminary objections to account stated claim regarding credit card account)

*Citibank v. Ambrose*, 13 Pa. D. & C. 5<sup>th</sup> 402 (C.P. Adams Cty 2010) (same).




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### Account Stated

*Defeating silence = implied consent:*

- The Truth in Lending Act provides that the credit card issuer has the burden of proof to show that the charges are authorized. 15 U.S.C. § 1643(b)
- The Fair Debt Collection Practices Act provides that a court may not treat a consumer's failure to request verification of a debt as an admission of liability.<sup>15</sup> U.S.C. § 1692g(c)




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### Account Stated

*Defeating silence = implied consent*

*C-E Glass v. Ryan*, 70 Pa. D. & C.2d. 251 (Beaver Cnty. Ct. Com. Pl. 1975):

"[S]omething more than mere acquiescence by failure to take exception to a series of statements of account received in the mail is required. A "statement of account" in business dealings and an "account stated" in law are not synonymous."

"Where assent is inferred from the mere lapse of time, the cases indicate that there has also been shown a course of dealing, where the rendering of accounts is an accepted method of adjustment over a period of time and involving an extended series of transactions between the two parties to the suit."




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### Account Stated

*Defeating silence = implied consent:*

*Target National Bank v. Samanez, supra*

Judge Wettick found, in essence, that account stated is inappropriate in the context of complicated credit transactions:

"While the credit cardholder, looking at the statement, can see the amount of the charges that were imposed, he or she is unlikely to know whether the charges are consistent with the writings governing the cardholder's obligations. Consequently, he or she is not in a position to either agree or disagree with the amount of the balance in any monthly statement that does not begin with a \$0.00 balance." p. 11



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### Account Stated

*Defeating silence = implied consent:*

Account Stated claims should not be applicable to debt buyers

*"Since the function of an account stated is to resolve or consolidate prior transactions, the parties to the account stated must be the same as the parties to the underlying transactions or original account."*  
C.J.S., Account Stated § 3



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### Account Stated

*Remember:*

- Account Stated cause of action is 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 see Samanez opinion)
- But there will be no right to contractual finance charges or fees assessed *after* the agreed-upon statement of account



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**Quantum Meruit / 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?



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**Quantum Meruit / Unjust Enrichment**

Because almost all consumer credit transactions are based on an express contract, and because there is no unjust enrichment claim where an express contract exists, Coldwell Banker Philly Rubin Real Estate v Romano, 422 Pa. Super. 319, 329-30, 619 A.2d 376, 381-382 (1993), a creditor generally has no claim for unjust enrichment in a consumer credit transaction.

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



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**Creditor's Perversion of FCBA**

- Billing error rights provided by the Truth in Lending Act, Part D, referred to as the Fair Credit Billing Act (FCPB) impose liability on creditors if they do not comply with billing error procedures if a consumer disputes a bill within 60 days of receipt of the statement.
- Creditors have tried to use it as sword.



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**Creditor's Perversion of FCBA**

Arguments to counter:

- Failure to raise billing error dispute only affects right to invoke procedural protections under FCBA § 1666.
- If failure to file FCBA dispute does not affect right to assert claims & defenses or unauthorized use, it should not affect defense in collection action.
- TILA is a consumer protection statute. No remedy for creditors or third parties.

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**Creditor's Perversion of FDCPA**

- The Fair Debt Collection Practices Act allows consumers to dispute the validity of the debt within 30 days of a first communication.
- FDCPA expressly provides that a court may not treat a consumer's failure to dispute the validity of a debt as an admission of liability. <sup>15</sup> U.S.C. § 1692g(c)

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**DEFENDANT'S CASE**

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### Defenses to Debt Lawsuits

<p><b>"This is not my debt."</b></p> <ul style="list-style-type: none"> <li>• Identity Theft or Unauthorized Use</li> <li>• Mistaken Identity</li> <li>• Authorized User of Account</li> </ul> <p><b>"I don't owe anymore money."</b></p> <ul style="list-style-type: none"> <li>• Paid-in-full or Settled</li> <li>• Discharged in Bankruptcy</li> <li>• Credit Protection</li> </ul> <p><b>"I don't owe this much money."</b></p> <ul style="list-style-type: none"> <li>• Disputed Debt</li> <li>• Usury</li> </ul>	<p><b>"I don't have to repay the money."</b></p> <ul style="list-style-type: none"> <li>• Incapacity / Minority</li> <li>• Duress</li> <li>• Commercially Unreasonable Resale of Collateral</li> <li>• Statute of Limitations Has Run</li> </ul> <p><b>"I don't owe money to the company that sued me."</b></p> <ul style="list-style-type: none"> <li>• Lack of Verification of the Debt</li> <li>• No Proof of Assignment</li> <li>• No Standing to Sue</li> </ul>
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### Defense: No Standing / Not Real Party in Interest

In Pennsylvania, 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 **bears burden to prove its right to enforce the contract.**

Atlantic Credit & Finance v. Giuliani, 829 A.2d 340, 344-45 (Pa. Super. Ct. 2003); Fourtees Co. v Sterling Equipment Corp., 363 A.2d 1229, 1232-33 (Pa. Super. Ct. 1976).




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### Defense: No Standing *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. Ct. 1975).




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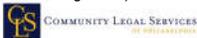
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**Defense: No Standing**  
***Risk of Liability to Multiple Parties***

The threat that defendants 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)




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**Defense: No Standing**  
***Risk of Liability to Multiple Parties***

Selling debt without proper title:

See, e.g., *Am. Acceptance Co., LLC v. Goldberg*, 2008 WL 2074128 (N.D. Ind. 2008) (finding that the defendant Goldberg never had title to the debts he sold to plaintiff debt buyer); *Hudson Keyse, LLC v. Goldberg & Assocs., LLC*, 07-cv-81047 (S.D. Fla., filed Nov. 5, 2007) (plaintiff debt buyer alleging that the same debt broker, Goldberg, obtained information about consumer debts owned by the plaintiff and used that information to try to collect the debts for its own account, even though it did not own them); *Old Nat'l Bank v. Goldberg & Assocs.*, 08-cv-8007 (S.D. Fla., Jan. 24, 2008) (similar facts as *Hudson Keyse* case); *RMB Holdings, LLC v. Goldberg & Assocs., LLC*, 07-cv-406 (E.D. Tenn., filed Oct. 29, 2007) (accusing debt broker of selling 6,521 accounts totaling about \$40 million face value that it did not own).




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**Defense: No Standing**  
***Risk of Liability to Multiple Parties***

Selling same debt to multiple parties:

See, e.g., *Chase Bank USA, N.A. v. Cardello*, 896 N.Y.S.2d 856, 857 (Civ. Ct. 2010) ("[O]n a regular basis this court encounters defendants being sued on the same debt by more than one creditor alleging they are the assignee..."); *Dornhecker v. Ameritech Corp.*, 99 F. Supp. 2d 918, 923 (N.D. Ill. 2000) (debtor claimed he settled with one agency and was then dunned by a second for the same debt); *Nw. Diversified, Inc. v. Desai*, 353 Ill. App. 3d 378 (1st Dist. 2004) (commercial debtor paid the creditor only to be subjected to a levy by a purported debt buyer); *Wood v. M&J Recovery LLC*, 05-cv-5564, 2007 U.S. Dist. LEXIS 24157 (E.D.N.Y. Apr. 2, 2007) (at least two collectors claim to own the same debt); *Assocs. Fin. Servs. Co. v. Bowman, Heintz, Boscia & Vicari, P.C.*, 2001 U.S. Dist. LEXIS 7874, \*9-12 (S.D. Ind. Apr. 25, 2001), later opinion, 2004 U.S. Dist. LEXIS 6520 (S.D. Ind. Mar. 31, 2004) (creditor continued to collect accounts allegedly sold to debt buyer); *Overcash v. United Abstract Group, Inc.*, 549 F. Supp. 2d 193 (N.D.N.Y. 2008) (after settled debt was sold, debt buyer attempted to collect \$40,000 more than the original debt); *Miller v. Wolpoff & Abramson, LLP*, 06-cv-207, 2008 U.S. Dist. LEXIS 12283 (N.D. Ind. Feb. 19, 2008) (debtor alleged being sued twice on the same debt).




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### Defense: Statute of Limitations

- **General Rule:** Contract actions must be commenced within four (4) years. 42 Pa.C.S. § 5525.
  - Richburg v. Palisades Collection, 247 F.R.D. 47 (E.D. Pa. 2008) (Daizell, J.) (holding that 4 year limitation period applies to account stated).
- **Exception:** Action on an instrument in writing under seal must be commenced within twenty (20) years. 42 Pa.C.S. § 5529.
  - “Instrument” is not defined in the statute, so the 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 the contract under seal is for the sale of goods, then UCC trumps Judicial Code and UCC only provides four (4) year SOL. See 13 Pa.C.S. § 2725; *First Nat'l Bank v. Keefer*, 76 Pa. D. & C.4th 233 (Fayette Cnty. Ct. Com. Pl. Nov. 30, 2005).




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### Defense: Statute of Limitations

- **General Rule:** The date of default/breach/missed payment is when the cause of action accrues.
  - “The time within which a matter must be commenced under this chapter shall be computed, except as otherwise provided by subsection (b) or by any other provision of this chapter, from the time the cause of action accrued...” 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).
- **For notes payable on demand:** The cause of action accrues from the demand or last payment.
  - “An action upon a negotiable or nonnegotiable bond, note or other similar instrument in writing. Where such an instrument is payable upon demand, the time within which an action on it must be commenced shall be computed from the later of either demand or any payment of principal of or interest on the instrument.” 42 Pa.C.S. § 5525 (7).




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### Defense: Statute of Limitations

#### Tips for Determining Date of Default

- Examine collector’s documents; sometimes affidavits and other documents 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.
  - Caution: Collectors have been known to “re-age” a debt by reporting incorrect date of first delinquency.




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**Defense: Statute of Limitations**  
**“Acknowledgement Doctrine”**

Certain actions by consumer may revive statute of limitations.

- Need unequivocal acknowledgment of debt.
- Examples: Partial payment or explicit promise.
  - 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. Ct. 1995).




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**Defense: Statute of Limitations**

Filing a complaint to collect a time-barred debt may violate the Unfair Trade Practices Consumer Protection Law and the Pennsylvania Fair Credit Extension Uniformity Act and Fair Debt Collection Practices Act.

15 U.S.C. 1692e(2)(A); 73 P.S. 201-1 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); *Martsoff v. JBC Legal Group*, 2008 US Dist. Lexis 6876, at \*16 (M.D. Pa. 2008); *Ehsanuddin v. Wolgoff & 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).




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**Defense: Statute of Limitations**

All of the above, of course, assumes that Pennsylvania law applies.

- Many credit card agreements are governed by Delaware law which has a 3-year statute of limitations. *Resurgence Financial v. Chambers*, 2009 WL 1143097 (Ca. App. 4th, Jan. 12, 2009)(applying DE law for collection action filed in CA with longer SOL).
- Restatement (Second) Conflicts of Law:
  - Forum state's limitations when that SOL period is shorter.
  - Flexible standard when forum state is longer.




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**Defense: Statute of Limitations**

- PA's Borrowing Statute: Use the 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) ("The period of limitation applicable to a claim accruing outside this Commonwealth shall be either that provided or prescribed by the law of the place where the claim accrued or by the law of this Commonwealth, whichever first bars the claim.")
- A federal court found that Delaware's shorter three-year statute of limitations applied in a collection action brought in Pennsylvania because the cause of action accrued in Delaware, 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).




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**Defense: Usury**

Generally, banks don't have to comply with our state interest rate caps

What about non-bank debt buyers?

Madden v. Midland Funding, LLC  
786 F.3d 246 (2d Cir. 2015)

-debt buyer who purchased charged-off debt from a national bank was not entitled to preemption under the National Bank Act




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**Defense: Usury**

PA Statutes:

*Loan Interest and Protection Law (LIPL)*

- General usury cap of 6% for loans under \$50k, 41 P.S. § 201.
- Unless the lender is authorized by another law to charge a higher rate, 41 P.S. § 601.




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### Defense: Usury

PA Statutes:

*Consumer Discount Company Act:*

Lenders licensed by the PA Banking Dept. can charge interest at a discount rate that roughly translates into 24-28% APR (9.50 per \$100 borrowed for first 48 months, plus a service charge; 6 per \$100 borrowed for remaining months)



7 P.S. § 6231

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### Defense: Usury

PA Statutes:

*Consumer Credit Code (formerly Goods and Services Installment Sales)*

- Retail credit cards for goods and services, **not cash advances**  
12 Pa.C.S.A. § 6304
- Interest is whatever parties contract for  
12 Pa.C.S.A. § 6345



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### Defense: Usury

Defense would NOT apply to national banks because federal banking law preempts state interest rate restrictions

BUT a PA Banking Dept. interpretive letter regarding the CDCA suggests that PA's interest rate caps will apply to debt buyers



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### Defense: Usury

- Non-bank assignee of credit card account will have to have its own independent authority to charge and receive the interest and fees

Question #6, pp 17-20 at 19-20 and Question #8 at 20-21



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### Defense: Usury

- Debt Buyer cannot get around these requirements by simply charging no more than 6% on a loan balance.
- If the loan balance includes interest and other fees that exceed six percent per year, the debt buyer needs to have its own independent authority to collect.



(Question #9, p. 21-22 at 22).

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### Defense: Usury

#### A cautionary note!

- Some case law in the 7th Cir. and Indiana and Minnesota state courts that held that debt buyers enjoy the same preemption as national banks when they buy debts made by national banks (NCLC Collections Actions § 5.4.3.2).
- Those cases appear to be specific to the states' usury laws, although Judge Posner's economic argument in Olvera v. Blitt & Gaines could be persuasive here.



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**Defense: Unauthorized Post Charge-Off Interest**

- Creditors cannot charge fees and additional interest on account if not sending periodic statements.  
TILA, 12 C.F.R. § 1026.5(b)(2).
- Debt buyers may not assess post charge-off interest if original creditor did not:  
*McDonald v. Asset Acceptance, LLC*, 296 F.R.D. 513 (E.D. Mich. 2013).



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**Playing Defense:  
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.



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**Playing Defense:  
Look for Affirmative Claims**

- Debt buyers are subject to the FDCPA
- Debt buyers may claim they are not, citing *Henson v Santander*, 137 S. Ct. 1718 (2017)



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**Playing Defense:  
Look for Affirmative Claims**

- But the Third 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 3<sup>rd</sup> 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)




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**Playing Defense:  
Challenge “Business Records”**

**There is no doctrine of incorporation of business records in Pennsylvania.**

The Superior Court has ruled that debt buyers are not entitled to rely upon the business records of their predecessors in interest without proving the circumstantial trustworthiness of the records, including the chain of custody.

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




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**Playing Defense:  
Challenge “Business Records”**

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-excepted, hearsay.

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




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Petitions to Open Default Judgments

## POST-JUDGMENT CASES



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### “The Default Hearing”

- [95% of Ds unreppeped; 90% lose by default]
- Widespread service defects
  - “adult in charge of residence” with no ID info
  - No court review of affidavits of service
- Even with notice, other challenges:
  - Logistics: lost wages, transportation, childcare
  - Fear of court without rep
  - No clear directions with S of C



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### Discovering the Judgment

- Bank account garnishment
- Seeking a loan modification
- Contacted by bankruptcy attorney
- Theoretically, via Court’s Notice of Judgment



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### Grounds for Opening Default Judgment

- **3 factors in Pet to Open:** *Balk v. Ford Motor Co.*, 285 A.2d 128, 130-31 (Pa. 1971)
  - **Failure to appear can be excused (reasonable)**
    - Where “failure to answer was due to an oversight, an unintentional omission to act, or a mistake of the rights and duties of the appellant,” rather than a conscious decision not to defend.  
*Campbell v. Heilman Homes*, 335 A.2d 371, 373 (Pa. Super. 1975).
  - **Petition promptly filed (from date judgment is discovered)**
    - “. . . where equitable circumstances exist, a default judgment may be opened regardless of the time that may have elapsed between entry of the judgment and filing of the petition to open.”  
*Queen City Elec. Supply Co. v. Soltis Elec. Co.*, 421 A.2d 174, 177 (Pa. 1980).
  - **State meritorious defenses (need not prove)**
    - “requirement . . . is only that a defense must be pleaded that if proved at trial would justify relief”  
*Provident Credit Corp. v. Young*, 446 A.2d 257, 263 (1982).
- **Equitable analysis**
  - “. . .the exercise of equitable powers implies the obligation for the court to consider equities which militate in favor of opening a default judgment and to act with the conscience of a court of equity.”  
*Ashton v. Ashton*, 390 A.2d 282, 285 (Pa. Super. 1978).




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### Petition to Open: Process

- Consider asking P atty to open voluntarily first
- File PtO through CLAIMS system
  - Short form with 2 murky prompts:
    - “Petitioner failed to appear at the hearing for reasons that: \_\_\_\_\_”
    - “Petitioner has good reason to proceed in that: \_\_\_\_\_”
  - No service req’d yet; can email OC
- Court either grants hearing or denies w/o hearing
- If hearing granted, must call court right away to schedule then serve P via same method as original process. MC Rule 111(E)
  - “Petition to be voided 5 days from the date of this notice . . . if a hearing is not secured. [Call] Judgments and Petitions @215-686-7950 to obtain your hearing date.”
- Hearing usually scheduled ~2-4 weeks out
- NOTE: Emergency Process for COVID shutdown




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### The PtO Hearing

- Client needs to be there to testify
- Ruling on petition to open judgment should be separate from merits determination
  - Be clear about what phase of hearing you’re in; D needn’t prove defenses to open J
  - Different standards of review; easier to overturn merits loss than denial of PtO (abuse of discretion/error of law v. de novo)
- Judge rules from bench
  - If granted, rules say trial “shall” proceed immediately. MC Rule 117(F). Rare in practice. Can argue for immediate trial, but consider:
    - Your client is there to provide evidence for P
    - Annoy the judge?
    - Give P time to prepare and send Rule 121 notice?
  - Note: emergency petitions – be ready for trial and settlement pressure
  - If denied, can appeal to CCP
- If active garnishment: ask J to order immediate release of account




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### Appealing PtO Denial to CCP

- Appeal by filing simple, 1-page “Notice of Appeal” form with CCP w/in 30 days. See MC Rule 124(a); CCP Rule \*1001(a)(3)-(b), (c)(5).
- Within 20 days from filing Notice of Appeal, file Motion and Memo of Law with:
  - S of C and all other, relevant case docs
  - stenographic record if one exists (i.e., if denied after hearing)
- Treated as a motion; decided on papers. CCP Rule \*1001(g)(2)
- If granted, remanded to MC to be scheduled for merits trial


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### Tips for Appeal of PtO

- Treat any element MC order doesn't cite as grounds for denial as an element that is met
- Defenses that MC deems “not meritorious” often meet that definition easily when reviewed by CCP (e.g., standing)
- Be ready for denial of PtO based on Court's presumption that Notice of Judgment was mailed and received – usually goes to promptness


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### Notice of Judgment + Double Presumptions

- When default judgment is entered, auto-generated Notice of Judgment appears on docket
- MC sometimes relies on this to deny petitions as “not timely filed” (promptness)
  - “The Court mailed a notice of the default judgment to the petitioner. It was not returned and, therefore, it is presumed that the notice was delivered and received by the petitioner.”
- But strong case law to cite on appeal that this is an improper presumption:
  - “A presumption that a letter was received cannot be based on a presumption that the letter was mailed. A presumption cannot be based on a presumption.” To trigger a presumption of receipt (i.e., the mailbox rule), there must be “evidentiary proof that the letter was signed in the usual course of business and placed in the regular place of mailing.”
  - Szymanski v. Dotley*, 52 A.3d 289, 293 (Pa. Super. 2012) (holding that court notice could not be presumed received—even when the record included the notice and Court Administrator testified that she wrote it—due to a lack of documentary evidence corroborating that the notice had been mailed).
- [Note: in drafting initial PtO, should aver that D did not receive the Notice.]


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**PtO as Negotiating Tool**

- P attys traffic in default Js and JBAs; aren't used to litigating these cases
- May agree to vacate/settle in exchange for agreeing not to file PtO (or appeal its denial)
  - Either as walk-away or for token settlement payment

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**SETTLEMENT CONSIDERATIONS**

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**Settlement**

Consider settlement only if:

- (1) The plaintiff proves it actually owns a valid debt; or
- (2) Your client wants to settle the matter.

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**Settlement**

- Ensure the consumer has the ability to pay the settlement; advise the consumer to obtain budget counseling (Financial Empowerment Centers in Philadelphia)
- Avoid open-ended payment plans with interest continuing to accrue; negotiate a lump-sum settlement, broken up into payments if necessary

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**Settlement**

- For payment plans, negotiate a stipulation in lieu of judgment
- Ensure the collector will provide notice of default and a grace period to cure before the collector may obtain a judgment
- Preserve consumer's right to assert a defense that payments have been made

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**Settlement**

- Consider requiring the collector to warrant that it is the holder of the debt and that the debt has not been assigned; consider an indemnification clause in the event the consumer is pursued later by a valid holder of the debt
- Avoid general releases for unrelated claims

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### Settlement

- Be aware of possible tax implications of cancellation of debt (1099C)
- Ensure disputed debts will no longer be reported to the credit reporting agencies (“hard delete”)



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Procedures and Strategies for  
**MUNICIPAL COURT**



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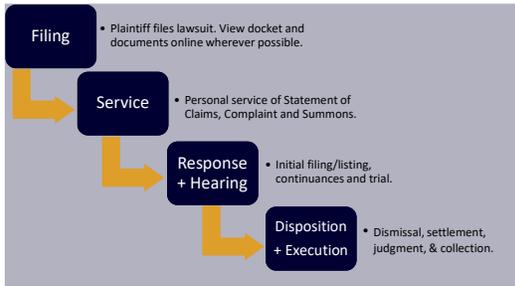
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### Stages of a Debt Collection Lawsuit



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graph TD; A[Filing] --> B[Service]; B --> C[Response + Hearing]; C --> D[Disposition + Execution];
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- Filing** • Plaintiff files lawsuit. View docket and documents online wherever possible.
- Service** • Personal service of Statement of Claims, Complaint and Summons.
- Response + Hearing** • Initial filing/listing, continuances and trial.
- Disposition + Execution** • Dismissal, settlement, judgment, & collection.



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**Strategies in Municipal Court**

1. Show up and defend the case without your client present.
2. Debt collector will be unlikely to prove case because they will not bring witnesses, will not have all of the required documents – such as proof of the agreement between the parties, proof of the amount of the debt, proof of any assignment, etc.
3. If you return the Notice of Intent to Defend, you have a right to a hearing that day, even if case is in Courtroom 5.
4. 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.
5. If you lose, you have the right to a *de novo* appeal to Court of Common Pleas; of course, so does the other side.




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**Municipal Court: Know the Rules**

**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




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**Municipal Court: Know the Rules**

**Rule 121 and Business Records**

- Except as prescribed by this Rule, the Rules of Evidence shall be applied at trials.
- 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:
  - \* \* \*
- a bill, estimate, receipt, statement of account or other records which appear to have been made in the regular course of business.




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**Municipal Court: Know the Rules**

1. Rule 121 requires that a record appear to be made in the ordinary course of business.
2. While it relaxes the Pa.R.Evid. business records exception by not requiring custodian of the record to testify, the party offering the record still has to show the record was made in the regular course of business.
  - a. 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); Ganster v. Western Pa. Water, 504 A.2d 186, 190 (Pa. Super.Ct. 1985).
  - b. A record prepared in anticipation of litigation (for example, by an attorney or collection firm) is not made in the regular course of business.




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**Municipal Court: Know the Rules**

*Pre-Trial Procedures for Breach of Contract Actions*

Effective: February 23, 2009  
pg. 85




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**Municipal Court: Know the Rules**

**Pre-Trial Procedures Memo**

**If defendant is served but does not appear, the trial commissioner is to review complaint and attachments:**

- Case dismissed without prejudice if it does not have the required documents.
- No attorney-generated, made-to-order documents, other than verifications attached to the memo.
- If interest or attorney fees requested, supporting documentation must be attached to complaint.

If disagreement between trial commissioner and plaintiff, the case goes to a judge.




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### Municipal Court – Samples Recap

- No assignment documents.
- No itemization of sums owed.
- No contract showing right to interest or fees.
- “Statement of Account”- attorney-generated, made-to-order doc:
  - Inadmissible because not prepared in the ordinary course of business, but instead by attorney in anticipation of litigation. M.C.R. Civ. P. No. 121(c); In re Indyk, 413 A.2d 371, 373 (Pa. 1979); Ganster v. Western Pa. Water, 504 A.2d 186, 190 (Pa. Super. Ct. 1985).
  - Even if admissible, statement does not prove a contract or account (no proof that defendant examined and accepted the balance as due).
    - Also: statement sent by debt buyer, not a party to the initial contract.



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Procedures and Strategies

## COURT OF COMMON PLEAS



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### Approach in Court of Common Pleas

- You need to decide how you want to tackle the case.
- What you should do depends on the facts, client’s objectives, and the law.
- Your options are:
  - File Preliminary Objections. (Pa.R.C.P. 1028.)
  - File Answer.
  - Negotiate payment arrangement.



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### 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




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#### Pa.R.C.P. 1024 Verification (in relevant part)

- (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 or information and belief and shall set forth the source of the person's information as to matters not stated upon his or her own knowledge and the reason why the verification is not made by a party.




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### Key Court Rules

#### Verification Requirements

“Any act other than verification required or authorized by this chapter to be done by a party may be done by the party’s attorney”

– Pa. R.C.P. 1002 Authority of Attorney




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**Key Case Law**

**Atlantic Credit & Finance v. Giuliana,**  
829 A.2d 340 (Pa. Super 2003)

- Preliminary objections 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 the claims were based- both the original contract and the assignment
- Improper Verification



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**Key Case Law**

**Atlantic Credit & Finance v. Giuliana,**

“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.”



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**Key Case Law**

**The Judge Wettick trifecta . . .**

1. **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.



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### Key Case Law

To satisfy pleading requirements, the underlying contract between Defendant credit card holder and credit card company must be attached to the complaint along with the contract between the credit card company and assignee to establish the assignees' contractual right to maintain suit against Defendants.



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### Key Case Law

- Where Plaintiff sues for alleged credit card balances due, it must set forth the dates and amounts of the charges due as part of the duty imposed by the Rules of Civil Procedure to attach all documents which form the foundation of the cause of action and to give the defendants sufficient notice of the charges.
- Verification must comply with requirements of Pa.R.C.P. 1024



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### Key Case Law

2. 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.



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### Key Case Law

- 3. Target National Bank v. Samanez, AR06-009418 (Allegheny Cnty. Ct. of Com. Pl. December 26, 2007).
  - Account stated case; account stated is inappropriate in the context of complicated credit transactions.




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### Key Case Law: Phila. C.P.

Unifund v. Vo, Docket No. 080403966, (C.P. Phila. Cty. 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 pleading: to plead and prove an account must show a running or developing balance with dates of charges, 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)
- Failure to attach material part of contract: the interest rates and fees that were part of the credit card agreement




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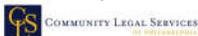
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### Responding to the Complaint

**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.
- Complaint is not verified by the Plaintiff.




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### Responding to the Complaint

**You may want to file POs when:**

- No billing statements are attached to an open account cause of action.
- Account stated claim does not allege facts to show acceptance .
- Unjust enrichment claim includes claim for attorney fees.



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### Responding to the Complaint

**Filing an Answer and Discovery**

- Review 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



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### CCP Arbitration

Generally, the rules of evidence apply in arbitration hearings. There are special, relaxed rules regarding the admissibility of certain documents—such as bills evidencing charges—for arbitration if they are provided to the other party 20 days prior to the hearing, as set out in Pa. R.C.P. No. 1305 and the Philadelphia Civil Rule \*1305.



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### CCP Arbitration

But note: there is no automatic right of admissibility of documents in a Philadelphia arbitration. Documents containing inadmissible hearsay, for example, should not be admitted if an appropriate objection is made to their introduction at the hearing. The explanatory comment makes it clear that **the relaxed standard is for authentication only**:

*It is not necessary to produce a witness to identify or authenticate a bill, record or report of a hospital, a doctor, a nurse, a therapist or some other licensed health provider. 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.*



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### CCP Arbitration

Use the rules of evidence to your advantage:

Debt buyers often do not have admissible evidence because documents that they do have do not meet the business records exception to hearsay.

- Documents are not made contemporaneously, as regular course of business activity, with no indication that they are trustworthy.



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### The rules are your friend.

- The business model that the debt buyers use makes it difficult for them to comply with the Rules of Civil Procedure and Evidence.
- They could do it a different way, but they choose this method because it is cost effective, the result is that 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.



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Overview of Additional  
**RESOURCES**



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### Consumer Law Manual



- National Consumer Law Center's

*Collection Actions:  
Defending Consumers  
and Their Assets*

[www.nclc.org](http://www.nclc.org)



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