


**Defending Philadelphians
in Debt Collection Lawsuits**


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- Overview
- Initial Considerations
- Plaintiff's Burden - basics
- Defendant's Case - basics
- Appeals from MC
- Post-Judgment Cases: Petitions to Open
- Settlement?
- MC: Rules and Strategy
- CCP: Rules and Strategy
- Resources



Representing Consumer Defendants

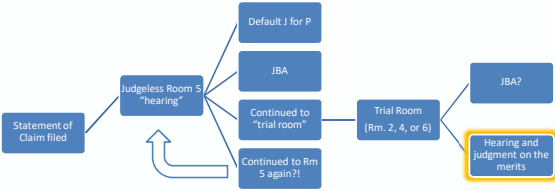
OVERVIEW




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



Journey through Municipal Court



Statement of Claim filed → Judgeless Room 5 "hearing" → [Default J for P, JBA, Continued to "trial room", Continued to Rm 5 again?!] → Trial Room (Rm. 2, 4, or 6) → [JBA?, Hearing and judgment on the merits]



Muni Court Docket and E-filing



THE PHILADELPHIA COURTS FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

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Philadelphia Municipal Courts

Monday, June 24, 2020

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

Case Management System	Case Information	Electronic Attorney / Case Access
Search	Quick Search Case	Search Case
Substantive	Case Information	Case Information
Search & Check	Case Information	Case Information

[CLAIMS log-in](#) – enter appearance with click of a box



Human Rights Watch on Room 5:

Courts in several states have ... create[ed] "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 coercive machinery of the courts in service of their own claims to the detriment of defendants' 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 acridly. 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.

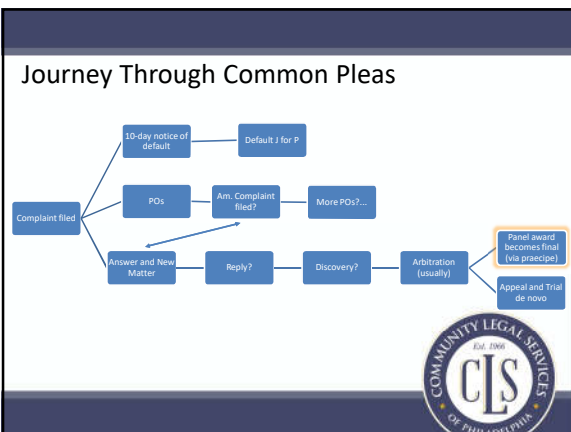
No one gets a trial unless they make it through this gauntlet unscathed. As one Pennsylvania defense attorney complained, for all practical purposes the court is allowing debt buyers to "just use the court as one of their collection tools."



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 you/client completed and mailed Notice to Defend, can insist on same day (bring a book)
- **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






Representing Consumer Defendants

CASE EXAMPLES



Case Examples

- No docs: SC-21-04-09-3560 (Midland)
- Some “media”: SC-21-03-05-3765 (PRA)




Representing Consumer Defendants

INITIAL CONSIDERATIONS




Credit Reports



1. Consider reviewing a client's credit report.


- Do this in your office; tricky security questions!
- www.annualcreditreport.com
- will show
 - current status of the account
 - amount owed
 - history of the account
 - Date of last payment (may not be accurate)



Your Client's Goals


2. What does your client want?

- You need to know this to identify best strategy
- Be realistic; don't promise your client that the case will go away, even though many do.
- Some clients really want to settle; be sensitive to a client's wishes, but educate about defenses and their rights as consumers
- What is achievable given the facts?



3. Know thy adversary.

- **Who is the Plaintiff?**
 - Original creditor or assignee (debt buyer)?
 - Do they settle? If so, what is their framework?
- **Who is Plaintiff's attorney?**
 - Debt collectors are represented by collection law firms; business model of is volume
 - Do they show up at contested hearing?
 - Do they amend complaints after POs?
 - Can they produce documents?
- Don't know? Ask (VIP, CLS)




4. Know thy forum

- 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?



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.



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 seasonal income. At the end of the payment period, most unpaid debts are discharged.



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.



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 st Mortgage:	\$ 75,500.00
- 2 nd 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):	\$ 27,900.00
- Potential Non-exempt equity	\$ 5,470.00



The Chapter 13 Option

- If a prior Chapter 7 case in last 8 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); atty fees (\$3,000 to \$4,500 for basic bankruptcy services)
 - Philadelphia LRIS has list of attorneys that may charge less




Basics of

PLAINTIFF'S BURDEN




Creditors' Theories of Recovery

- 1. Contract**
2. Open Account / Book Account
- 3. Account Stated**
4. 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).




Failure to prove existence of contract:

- Contract claim should be denied
- Collector may 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 Magnestwerke 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




Basics of

DEFENDANT'S CASE




Defenses to Collection Lawsuits

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



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. Giuliani*, 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 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)




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) (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" 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. § 2725; *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. 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); *Martolf v. JBC Legal Group*, 2008 US Dist. Lexis 6876, 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. 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]



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




MC APPEALS



Muni Ct Appeals

- Either side can appeal de novo and creditors seem to be doing so
 - PLEASE consider taking client through the appeal.
 - Notice of Appeal filed in Common Pleas – must be served like original process. You do not have to accept service.
 - Plaintiff's counsel often gets this wrong
 - Appeal must be filed within 30 days after order in Muni Court (unfortunately no way to strike a late appeal, must raise by PO)
 - Complaint must be filed 20 days after Notice of Appeal
 - If not, you can file a Praecipe to Strike Appeal. Phila. R. 1001(h)
 - Creditor must then file motion to reinstate by showing good cause
 - Complaint is almost always attackable through POs



Petitions to Open Default Judgments

POST-JUDGMENT CASES




“The Default Hearing”

- [95% of Ds unreppped; 65% 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




Discovering the Judgment

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




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 the court before it." *Ashton v. Ashton*, 390 A.2d 282, 285 (Pa. Super. 1978).




Pet. 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




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?
 - If denied, can appeal to CCP
- If active garnishment: ask J to order immediate release of account




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) CCP Rule *1001(f)(2)(i)
- Treated as a motion; decided on papers. CCP Rule *1001(g)(2)
- If granted, remanded to MC to be scheduled for merits trial



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



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. Dotey, 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).




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



PtO in Court of Common Pleas

- Determine if there is a basis to strike the default judgment (e.g., no service on the face of the record) because “all grounds for relief, whether to strike or open a default judgment, shall be asserted in a single petition.”
Pa.R.C.P. No. 206.1(b)
- Must attach a copy of the preliminary objections, or answer (or both!) which you seek to file
Pa.R.C.P. No. 237.3(a)
- If filed within 10 days of entry of default judgment, you must only assert a meritorious defense (reasonable explanation for default and prompt filing are presumed)
Pa.R.C.P. No. 237.3(b)(1)




SETTLEMENT CONSIDERATIONS




Consider settlement **ONLY** if:

- (1) The plaintiff proves it actually owns a valid debt; or
- (1) 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.
- 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-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

COURT OF COMMON PLEAS



Approach in Court of Common Pleas

- What you should do depends on the facts, client's objectives, and the law.
- Options:
 - File Preliminary Objections (Pa.R.C.P. 1028.)
 - File Answer
 - Negotiate payment arrangement



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



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.
- Complaint is not verified by the Plaintiff.



Key Case Law

Atlantic Credit & Finance v. Giuliani, 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

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.



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: 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 \$5,709.26)
- Failure to attach material part of contract: the interest rates and fees that were part of the credit card agreement



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



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.



Additional
RESOURCES





- 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=collections>



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