

TABLE OF CONTENTS

Response of Creditors' Counsel Identified to Delaware Court of Common Pleas Administrative Directive 2011-1 – Consumer Debt Collection Actions

	Page No.
Introduction.....	1
A. Burden v. Benefit.....	1
B. Consistency and Predictability.....	2
Specific Issues.....	6
I Proof of Standing/Ownership of Account.....	6
II The Charge-Off Balance.....	10
III Original Contract.....	12
IV Application of Rule 37.....	17
V Rule 11 and Rule 1.5(a).....	18
VI Trials.....	18
Conclusion.....	22

INTRODUCTION

On behalf of the creditors' counsel identified below, we appreciate the opportunity to comment on Administrative Directive 2011-1 Consumer Debt Collection Actions. We would like to state at the outset that we certainly support the goals articulated by the Court at the May 6, 2011 meeting: (a) fairness to all litigants, (b) judicial efficiency, and (c) consistency and predictability of judicial procedure.

We agree the information necessary to enable the defendant to identify the account that is the subject of the action should be included in the Complaint. We agree that proof beyond the bare allegations of the Complaint should be provided to the Court in support of the entry of Judgment in favor of plaintiff.

A. Burden vs. Benefit

At the May 6, 2011 Meeting, the Court stated that the Federal Trade Commission Reports regarding debt collection were among the sources consulted in drafting the Directive. In its July 2010 Report, the FTC stated that reforms should be undertaken to “adequately protect consumers *without unduly burdening legitimate debt collection.*” (Emphasis added.) The FTC noted that “debt collection plays a vitally important role in the consumer credit system...(by helping to keep) credit prices low and (helping to) ensure that consumer credit remains widely available.”

Because we represent the credit side of the collection industry, we are in a unique position to provide information to the Court critical to any evaluation whether particular measures are “unduly burdensome” to creditors. Well established methods and standards for transferring and maintaining information and records have been developed within the credit industry that are designed, in part, to preserve the integrity and viability of legal debt collection.

B. Consistency and Predictability

We are concerned that the Directive in its present form will not provide the “consistency and predictability” to litigants contemplated or avoid disparate rulings among Judges. The Court explained that the Court Clerks will not be charged with implementing the Directive. Only in those instances where cases come before a Judge will the pleadings be evaluated for conformity with the Directive. To that end, paragraph 4 of the Directive states that the Court may “*sua sponte*” withdraw the entry of a Judgment. At the May 6, 2011 Meeting, the Court explained that the Directive is designed to allow flexibility rather than exactitude with regard to the information and proofs required. While we appreciate the flexibility, a good faith attempt to comply with the Directive may be insufficient to establish finality as contemplated by Rule 60(b) and principles of *res judicata*. If an otherwise properly entered default judgment may later be challenged (potentially after funds have been collected and/or post judgment costs have been expended) based on an interpretation of the Directive, plaintiffs will not be able to rely on the validity and enforceability of a judgment in connection with post judgment collection activity or otherwise.

We are concerned that the Directive, in its present form, would have the unintended consequence of increasing the burden on the Court, create an undue burden on fair debt collection, and cause a situation where judgments can be challenged and vacated years after entry (after collection of funds and expenditure of additional costs) for reasons having to do with the adequacy of documentation attached to the Complaint rather than the legitimacy of the claim- where “adequacy of documentation” is subject to dispute and interpretation.

The Court has indicated that Court Clerks will not be asked to review initial pleadings. The question of whether or not a plaintiff has failed to comply with the Directive will apparently arise only in situations where the debtor is represented; a motion hearing or trial is scheduled; judgment by stipulation is submitted for Court

approval; or, a motion to vacate is filed - all of which are exceptions to the typical debt action, which is disposed of by default under Rule 55(b)(1) (upon written direction of the plaintiff and upon affidavit of amount due). Unless the Court undertakes the additional task of reviewing applications for judgment by default, enforcement of the Directive in most cases will rely on the threat of Rule 11 sanctions - a point made loud and clear in the third “whereas” clause of the Directive.

However, Rule 11(b)(3) provides only that “the allegations and other factual contentions have evidentiary support or if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery;” a standard, we submit, that is congruent with notice pleading and much less than that required under the Directive.

We believe the Directive would be of greater assistance to both sides, and to the Court, if instead of requiring the attachment of specific documentation, it required the disclosure of information, perhaps by affidavit, sufficient to inform defendants as to who is making the claim and on what grounds, but without burdening the creditor with potentially voluminous document production where there is no genuine dispute. After all, defendants in debt actions have typically been contacted numerous times, both in writing and by phone, and are almost always very well aware of the debt and would pay it if they had the money. To the extent debtors have questions, the federal Fair Debt Collection Practices Act affords the right to obtain such information well before suit is filed.

In order to promote consistency and predictability, we submit that it is particularly important that the Directive clearly define words and phrases. To that end, we respectfully ask the Court to consider the following:

- (1) The Directive addresses “consumer loan or credit card debt collection actions.”
 - a. It is not clear whether this category is intended to include, for example, indirect loans for the purchase of automobiles and similar items and/or leases of consumer goods. If so, plaintiff would be required to identify the

name of the automobile dealer or other seller of goods in the caption which could violate the assignment to the extent it requires the assignee to sue in its own name without mention of the dealer/seller.

- b. It is not clear whether this category is intended to include business credit cards. Frequently, such accounts will provide for personal liability of the principals of the business. Similarly, “consumer loan” is not defined. It is not uncommon for an extension of credit to an individual to be used for business purposes.

- (2) Reference is made in the Directive to the “original” creditor. If a consumer obtains a store credit card that is issued by a National Bank (e.g. a Sears card issued by Citibank) the creditor is Citibank, but the consumer will likely identify the account as his/her “Sears” account. An account may not have been sold in the conventional sense; however, mergers and/or acquisitions and/or one or more name changes may have caused the name of the holder to be different than what it was when the account was opened. If the goal is to enable the defendant to recognize the account, presumably the name of the creditor at the time of the default will achieve that purpose. Requiring a plaintiff to recite in the Complaint the various name changes that occurred over the life of the account would be burdensome to the creditor with little or no benefit to the defendant.
- (3) Reference is made in the Directive to the “original” account number. Account numbers are commonly changed as a result of bank mergers and acquisitions, at the time of charge off or if the account holder reports the card stolen or lost or upgrades the account to a “gold,” “platinum” or similar status. As a result, the consumer is most likely to recognize the account number that existed at the time of default rather than one that might have been in effect at some earlier point during the life of the account.
- (4) Paragraph 1(e) of the Directive requires the “principal due at the time of default.” As more fully explained below, interest and fees are capitalized into the balance

in a revolving credit account until charge off. The word “principal” has no clear significance in this context prior to charge off. The charge off balance is a highly regulated figure which represents the sum of all unpaid amounts that accrued on the account up to that date. It is impractical and difficult to break down the components of the charged off balance that accrued during the period of time between the default and the charge off date.

- (5) Paragraph 2(a) of the Directive requires “a copy of the original contract or other documentary evidence of the original debt” to be attached to the Complaint. A good faith interpretation of this section could permit the attachment of a credit card statement. However, another interpretation might be that the account Terms and Conditions are required. It is common for multiple Terms and Conditions to be issued over the life of a credit card account. The expectation is that the use of the card, following the issuance of a new set of Terms and Conditions, constitutes acceptance of those new Terms and Conditions. Therefore, the Terms and Conditions available at the time of suit may not be those that were issued when the account was opened.
- (6) Paragraph 2(b) of the Directive requires “a copy of the assignment or other documentary evidence establishing that the plaintiff/creditor is the owner of the debt” (emphasis added) be attached to the Complaint. A reasonable interpretation of this provision could allow for a sworn Affidavit of the plaintiff/creditor stating that the plaintiff/creditor is the assignee and current holder of the account. Another interpretation could allow attachment of an original creditor statement or Terms and Conditions as Evidence of Ownership of the Account.
-

SPECIFIC ISSUES

In the Introduction above, we addressed particular sections of the Directive in an effort to illustrate items subject to interpretation that could result in disparate rulings and unintended consequences. The intention of the “Specific Issues” section is to address certain provisions of the Directive more comprehensively.

I Proof of Standing/Ownership of the Account

Paragraph 2(b) of the Directive requires the entire chain of Assignment, with account level information at each transfer, to be attached to the Complaint in situations where the debt has been assigned more than once. When account level information is available, it is typically contained in lengthy spreadsheet attachments to the Bills of Sale and Assignment. The time, effort and resources required to access, print and redact those attachments is significant. There is a plethora of common law in other jurisdictions to establish that a debt buyer plaintiff should not be required to proffer a full chain of title to establish account ownership absent a genuine dispute raised by defendant regarding that issue. We submit that such a requirement imposes an undue burden on the creditor and that a sworn Affidavit of ownership, along with the most recent Assignment/Bill of Sale should be sufficient to establish standing to sue.

We consulted with Midland Credit Management, Inc., a wholly owned subsidiary of Encore Capital Group, in an effort to provide the Court industry level input why this requirement is overly burdensome to creditors and, in certain instances, impossible to meet. The following information was provided.

OTHER RELIABLE SOURCES OF PROOF OF OWNERSHIP ARE AVAILABLE THAT ARE LESS BURDENSOME TO PROVIDE

Portfolio-level documentation – Presumably, the purpose of the requirement is to ensure that the entity collecting on the account has “actual title” to the account. While account-level detail is one possible way of proving ownership (when that account-level detail is available), portfolio-level documentation also provides a reasonable basis to establish ownership. This has been accepted by various jurisdictions (*e.g.*, NYC's DCA regulations, CT's recent regulations).

Assertion of ownership is reliable indicia of ownership – In addition to establishing a chain of title through a paper trail, a debt collector's assertion of ownership is reliable indicia of ownership. Although it may not on its face seem to be sufficient to the court, the mere assertion of ownership has significant credibility. It is not a mere allegation in connection with a case, which must be proven; in the context of a collection action, a representation of ownership or a demand to collect on an account is an assertion in connection with the collection of a debt. Any misrepresentation of such a claim in connection with collection activity is a violation under the FDCPA and most of its state-law analogues. Such a claim, if inaccurate, gives rise to a strong cause of action under those laws against the party making that claim. (Those laws, too, give consumers significant rights to request validation of the claims.) Even if the consumer were not to assert his or her own rights under those laws, collectors are heavily regulated, and state attorneys general or licensing entities, too, can impose significant penalties for such violations.

Credit reporting is reliable indicia of ownership – Similarly, an account owner who is credit reporting on the account is a reliable demonstration of ownership. Here, too, Federal and state laws dictate significant penalties for inaccurately reporting a

consumer's credit history (i.e., Fair Credit Reporting Act and Fair and Accurate Credit Transactions Act). Those laws, too, give consumers significant rights to challenge information contained in a credit report, and impose legal duties on the credit reporting agency and entities providing information to such reports. By reporting ownership and a collection interest in an account, an account owner subjects itself to civil and regulatory enforcement action if it were to engage in a practice of reporting false information.

Possession of account-level documents is reliable indicia of ownership –

Requirements that the account owner come to the court with account-level media (i.e., billing statements, charge-off statements, etc.) reasonably provide indications of account ownership. Various state and federal laws (i.e., Gramm–Leach–Bliley Act, Regulation P: Privacy of Consumer Financial Information 12 CFR 216) restrict an issuer's ability to share consumer information, especially account/financial information, with non-affiliated third parties. The account owner's possession of and access to detailed account information (including, but not limited to, billing records) provides significant indicia of legitimate account ownership.

SCENARIOS WHERE ACCOUNT-LEVEL DOCUMENTATION DOES NOT EXIST

Joint origination of accounts – Pursuant to special financing agreements, at origination of the accounts, one bank underwrites the accounts while another unaffiliated entity owns the product/receivables. At some point thereafter, as defined in the financing agreement, the entity with rights to the receivables maintains ownership of the accounts, and is free to transfer complete ownership of the accounts to a debt buyer. For example, First North American Bank (“FNANB”) along with CompuCredit Corporation (“CompuCredit”) issued Emerge Visa credit card accounts. Pursuant to the financing agreement, CompuCredit maintained ownership of the accounts, and thereafter rightfully sold/transferred title to the accounts to its

subsidiary, Jefferson Capital Systems, LLC. (“JCAP”). JCAP then sold the accounts to Midland Funding LLC (“MFL”). In this scenario, there exists, and we are able to provide, writings establishing the transfer of ownership from CompuCredit to JCAP to MFL; however, there are no such documents from FNANB to CompuCredit, because a sale did not occur from FNANB to CompuCredit.

Bank merger – Banks often merge with one another during the life of an account. Account-level proof is nearly impossible when Bank A, who originates the account, merges with Bank B, who obtains the account but then charges it off. For example, JPMorgan Chase Bank, NA, doing business as Chase (“Chase”) acquired assets of Washington Mutual Bank, N.A. (“WAMU”) including credit card accounts issued by WAMU. This "transfer" would be the subject of a merger or acquisition agreement, and is very unlikely to have the "account-level" audit trail that the DE directive anticipates.

Complex organizational structure of issuing banks – Account-level documentation is nearly impossible when a bank operates through various entities. For example, Credit One Bank, N.A. originates credit card accounts funded by affiliated entities, MHC Receivables, LLC (“MHC”) and FNBM, LLC (“FNBM”). The credit card receivables are then transferred to MHC and FNBM under the terms of self-executing purchase agreements. The accounts are thereafter sold to a debt buyer. Due to the internal “transfers” and self-executing transactions, it is unlikely to have “account-level” documents detailing those internal “transfers”. It is not until the sale to a third party where such documentation exists.

Transactions structured differently – Each of the scenarios above shows common examples of transactions resulting in an impossible requirement to show account-level detail on the chain of title, although title clearly passed through the entities in the ordinary course of business. That business, however, is not structured in a way

that lends itself easily to showing an account-level audit trail for each step. It's not because title is in question; it's simply because it's not the way the transactions are structured as a practical matter.

II The Charge-Off Balance

Paragraph 1(e) of the Directive requires the Complaint to include the “principal due at the time of default...” As explained below, we submit that charge-off rather than default date is the appropriate starting point for the balance breakdown to be included in the Complaint. We submit that the charge-off balance should be accepted as the “principal” amount and any interest and fees sought following the charge-off date should be itemized separately.

The charge off balance is an inherently reliable number that is pervasively regulated by multiple federal agencies (*e.g.*, Federal Reserve Board, FDIC, Office of the Comptroller of Currency [OCC]) and governed by stringent federal laws. Credit card issuers are subject to the FFIEC (Federal Financial Institutions Examination Council) uniform Retail Credit Classification and Account Management Policy which *requires* charge-off no later than the end of the calendar month in which the account becomes more than 180 days past due. (The timeframe is 120 days for certain consumer credit accounts such as retail installment agreements.)

The charge-off balance consists of all sums that are due and owing as of the charge-off date. It includes the amount actually expended by the cardholder for goods and services, all un-reimbursed cash advances or transfers and all interest, fees and charges. It represents the total of all unpaid activity on the account as of the date of charge-off and this becomes “principal.”

Due to their reliance on federal law, many regulated creditors are unable to itemize pre charge-off balances electronically. Doing so requires manual review which

may be appropriate in particular cases, but is not feasible in every claim. A credit card customer may incur charges over many years, never paying off the balance. Monthly statements are sent, detailing the prior balance, current charges, interest and fees. The consumer may make a minimal payment each month. By the time of default, therefore, there is no straightforward way to segregate the original balance, fees and charges.

The banks have practically no discretion regarding the charge-off date or the amount of the charge-off. Banks must remove the asset from their balance sheets six months after delinquency to avoid “puffing.” The bank’s discretion is limited to charging the account off at the end of the month on which the 180 days occur instead of the 180th day itself and re-aging the account in limited circumstances where the consumer makes at least three consecutive minimum monthly payments or the equivalent cumulative amount.

When an account is charged-off, the credit card issuer absorbs the outstanding balance as a loss and takes the amount of the non-performing receivable as a charge against current earnings. It does not mean the debt is extinguished or forgiven and no longer owed by the account holder.

Credit card issuers send their account holders statements of account each month. Consumers have the right to challenge any item on each statement within sixty days following receipt of the statement. If they fail to challenge or object to any charge, interest or fee within those sixty days, the issuer may presume that the statement was correct. In most cases, the account holder receives six statements following the default. If no payments or arrangements are made during this period, the account is charged-off.

III Original Contract

Paragraph 2(a) of the Directive states that the “*original contract or other documentary evidence of the original debt*” be attached to the Complaint. (Emphasis added.) In addition to the concerns explained above that this provision is subject to varying interpretations, we question the intended meaning of “original” contract.

To be enforceable, it is well settled law that a contract must be supported by consideration given by both parties to the transaction and the mere issuance of a credit card by a bank does not create a contract between the lender and the borrower.

Lacking consideration, the issuance of a credit card by a lender is merely a continuing offer to lend money. As such, the credit card itself is simply the tangible object indicating to merchants or other sellers of commodities that the person who has received the credit card from the issuer thereof has a satisfactory credit rating; and; if credit is extended to the card holder, the issuer of the credit card will pay for the merchandise delivered.

The contract is formed when the borrower makes use of the lender’s offer to extend credit.

By Statute, 6 *Del. C.* §2542, the laws of the State of Delaware recognize

“[u]se of the credit card by the intended recipient shall constitute acceptance [of the terms and conditions stated in the offer¹], but there shall be no liability by the intended recipient prior to the use of same.

¹Explanation and emphasis added.

Delaware's Legislature defines the above "contract" as a "Revolving Credit Plan" and at 5 *Del. C.* §941(4) sets forth the definition:

Revolving credit plan" or "plan" means a plan contemplating the extension of credit under an account governed by an agreement between a bank and a borrower pursuant to which:

- a. The bank permits the borrower and, if the agreement governing the plan so provides, persons acting on behalf of or with authorization from the borrower, from time to time to make purchases and/or to obtain loans by use of a credit device²;
- b. The amounts of such purchases and loans are charged to the borrower's account under the revolving credit plan;
- c. The borrower is required to pay the bank the amounts of all purchases and loans charged to such borrower's account under the plan but has the privilege of paying such amounts outstanding from time to time in full or otherwise in accordance with the agreement governing the plan; and
- d. Interest may be charged and collected by the bank from time to time on the outstanding unpaid indebtedness under such plan.

Evidence of the "Agreement" between a bank and a borrower is commonly

²"Credit Device" [at 5 *Del. C.* §941(7)] means any card, check, identification code or other means of identification contemplated by the agreement governing the plan. (Emphasis added.)

referred to as “Terms and Conditions” for the advancement of credit. Terms and Conditions are sent along with the credit card issuer’s offer to lend and collectively set forth the foundation of the future “loans” to be made between the parties. If the borrower chooses to accept the offer by using the credit device, the borrower accepts the terms and conditions associated with its use. The borrower is free to decline use of the credit device, in which case, the terms and conditions of use would be inapplicable.

A bank is not required to continue the extension of credit at the “original” terms and may, at any time, issue changed terms and conditions. “Each use of the credit card constitutes a separate contract between the parties”, *Garber v. Harris Trust & Savings BK*, 104 Ill. App.3d 675 (1982)³.

³The following cases are only a few, among many, citing *Garber*:

Grasso V. First Usa Bank, 713 A.2d 304 (Del.Super. 1998) (CA No. 97C-10-144JOH)

Portfolio Acquisitions V. Feltman, 391 Ill. App.3d 642 (2009) (No. 1-07-3004)

In re Brown (E.D.Ark. 2009) (Case No. 4:08-bk-13535)

In re Viva (Bky.E.D.Tenn, 2008) (Bankruptcy No. 07-12156, Adversary No. 08-1026)

Jenkins V. General Collection Co. (Neb. 7-29-2008) (No. 8:06CV743)

Ramirez V. Palisades Collection Llc (N.D.Ill, 6-23-2008) (CA No. 07 C 3840)

Jenkins V. General Collection Co (D.Neb. 2008) (No. 8:06CV743)

Parkis V. Arrow Financial Services, Lls (N.D.Ill. 1-8-20)

McMahan V. Rizza Chevrolet, Inc. (N.D.Ill. 8-31-2006) (No. 05-C 705)

Ragan V At&t Corp., 355 Ill. App.3d 1143 (2005) (No. 5-03-0038)

Taylor V. First North American National Bank (M.D.Ala. 2004) (CA No. 2:03CV368-T)

Geary V. Telular Corp., 341 App.3d 694 (2003) (No. 1-02-0951)

Delaware follows the *Garber* principles through *Grasso v. First USA Bank*, 713 A.2d 304 (Del.Super. 1998) (CA No. 97C-10-144JOH)⁴ which stated:

“... (1) use of the credit card meant acceptance of and would subject [Grasso] to the terms of the Agreement, (2) [Grasso] would be responsible for all charges incurred according to the Agreement, and (3) the terms of [Grasso’s] account are subject to change⁵ as provided in the Agreement”.

The Fair Credit Reporting Act, 15 U.S.C. §1666(a) (Correction of billing errors) states:

(a) If a creditor, within sixty days after having transmitted to an obligor a statement of the obligor’s account in connection with an extension of consumer credit, receives at the address disclosed under Section 1637(b)(10) of this title a

Banc One Financial Services, Inc. v. Advanta Mtg. Corp., (N.D.Ill. 2002) (Case No 00 C 8027)

Gaynoe v. First Union Direct Bank, 2001 NCBC 1 (2001) (No. 97 CVS 16536)

In re Caraglior (Conn. 2000) (Case No. 99-32814 DOC. I.D. NOS. 21, 27)

Sharp Electronics V. Dautsche Fin. Svcs., 216 F.3d 388 (4th Cir. 2000) (Case No. 99-1555)

In re Ward, 857 F.2d 1082 (6th Cir. 1988) (No. 87-3525)

⁴Many cases also cite *Grasso*:

EZE v. JP Morgan Chase Bank (E.D.N.Y. 8-10-2010 (No. 09-CV-2722 (ENV) (LB)

Koontz v. Citibank, 01-08-00495-CV (Tex.App.-Houston [1st] 6-24-2010) (No. 01-08-00495-CV)

Bramble Cons. Co. v. Exit Realty, 08C-05-234 WCC (Del.Super. 8-27-2009)

Coleman v. Assurant, Inc. (Nev. 2007) (No. 2:06-cv-00925-RLH-RJJ)

In Re Orion Refining Corp. (Del. 2007) (Bankruptcy No. 03-11483 (MFW), Adversary No. 04-52447)

⁵Emphasis added.

written notice ... from the obligor in which the obligor:

(1) sets forth or otherwise enables the creditor to identify the name and account number, if any, of the obligor,

(2) indicates the obligor's belief that the statement contains a billing error and the amount of such billing error, and

(3) sets forth the reasons for the obligor's belief (to the extent applicable) that the statements contains a billing error,

the creditor shall, unless the obligor has, after giving such written notice and before the expiration of the time limits herein specified agreed that the statement was correct... :

(B)(i) make appropriate corrections in the account of the obligor...

Because the “terms” of a bank’s willingness to lend credit are subject to change; because each use of the credit card constitutes a separate contract pursuant to the terms in force at the time of use; because the obligor is given the opportunity to dispute billing errors; and because credit card holders may use the credit device for the purchase or return of commodities over the course of time, the most applicable evidence with which to validate the enforceability of the revolving credit card contract would be the most recent “terms and conditions” (contract) or other documentary evidence of the debt.

IV Application of Rule 37

Paragraph 3 of the Directive refers to “Motions to Compel Discovery” citing Rules 37(a) and 37(e)(1) concerning the efforts made in an attempt to reach an agreement over discovery issues as a prerequisite to the filing of discovery motions. The first

sentence paraphrases Rule 37 as it currently exists; however, the second sentence appears to expand the Rule to include a “good faith” requirement where “parties are expected to consult” to resolve “discovery dispute[s]”. This expansion and/or modification of the existing Rule is subject to varied interpretation and necessarily requires judicial guidance to counsel prior to its implementation in order to effectuate the Court’s goal of predictability from the Bench.

The typical defendant in a consumer debt collection action is acting pro se. Extensive efforts, via telephone calls (where permissible) and correspondence, are made by our respective offices attempting to resolve issues and claims without the need for Court involvement. If, by the point a discovery motion is filed, we have not been able to make contact with the defendant, it is extremely unlikely that yet another telephone call and/or letter addressing the outstanding discovery will be helpful.

As more fully explained below, motion dates are not readily available and it is not uncommon for trial dates to be scheduled so quickly that the discovery motion practice contemplated by the Rules is impractical. It is submitted that adding another step in the process that will delay the motion process with little, if any, benefit to defendants would be unfair and prejudicial to creditors. Additionally, many accounts are under “cease and desist” restriction. We are not able to call or contact those defendants without risking violation of the federal Fair Debt Collection Practices Act.

V RULE 11 and RULE 1.5(a)

It is respectfully suggested that the third “WHEREAS” clause in the Directive referencing Court of Common Pleas Civil Rule 11 be stricken. An attorney’s Rule 11 obligations relative to the signing of pleadings, motions and other papers are applicable to all actions filed in the Court of Common Pleas. Thus, referencing Rule 11 in an Administrative Directive limited to consumer debt collection actions is both unnecessary and inappropriate.

The expressed purpose of the Directive is to adopt and implement standardized procedural guidelines in consumer debt collection actions to ensure fairness to all litigants and improve efficiency in the administration of justice. By reiterating Rule 11 requirements and sanctions in the Directive, the Court is creating, albeit unintentionally, a perception to the Bar and the general public that attorneys practicing in this area of the law have been engaging in conduct violative of the Rule. The Creditors' Bar considers this misperception offensive and vehemently opposes its dissemination. Accordingly, counsel submits that fairness compels the elimination of references to Rule 11 in the Directive.

Similarly, reference in the Directive to attorneys' fees pursuant to Rule 1.5(a) of the Delaware Lawyers' Rules of Professional Conduct is superfluous and serves no purpose other than to suggest there is widespread non-compliance of the Rule by the Creditors' Bar. Rule 1.5, when read in its entirety, permits attorneys to charge fixed or contingent fees under certain conditions set forth in the Rule.

The Directive's specific reference to Rule 1.5(a), without explanation, and without giving consideration to 5 *Del C.* §951 and 10 *Del C.* 3912 is inexplicable. Thus, it is respectfully suggested that the attorneys' fees provision of the Directive be stricken.

VI Trials

Paragraph 5 of the Directive addresses the ramifications for being unprepared for Trial. To the extent it is the Court's position that a representative of the plaintiff must always be available to testify in order for plaintiff to be considered "prepared for trial," we respectfully disagree. Especially when the representative would be traveling to Delaware from out of state, we submit plaintiff should be entitled to make a strategic decision to base its case on defendant's pleadings, discovery responses and other admissions as well as questioning of the defendant, especially when there appears to be a strong likelihood defendant will not appear for trial based on defendant's conduct throughout the proceedings.

Although the Directive is even handed with regard to sanctions for failure to be prepared for trial, as a practical matter, plaintiff bears a much heavier burden than the defendant since it is not likely an award of sanctions in favor of plaintiff for defendant's failure to appear will be recoverable and, in many instances, plaintiff will have incurred the expense of traveling to DE from out of state.

A related issue is that trial notices frequently generate settlement negotiations. It is not uncommon for negotiations to continue up to the day of trial. The need for plaintiff's representative to make and commit to travel arrangements may require settlement negotiations to terminate prematurely. Based on the balance due, the likelihood of settlement and similar considerations, we submit a plaintiff should be permitted to seek dismissal without prejudice in lieu of sending a representative in the event ongoing settlement negotiations ultimately fail.

When the only issue in dispute is the balance due, we submit plaintiff should be permitted to rely on its Affidavit of amount due, absent admissible evidence from the defendant challenging the reliability of plaintiff's sworn Affidavit. This is especially appropriate where: (a) the Affidavit is supported by account documents, such as monthly billing statements, supporting the amount due; and/or (b) (as more fully addressed below) insufficient time and opportunity has been provided to plaintiff to proceed with a summary judgment Motion.

We believe the Court is aware of some of the scheduling problems we have been experiencing in New Castle County. Available Motion days are frequently limited due to the calendars becoming full, holidays, Judges' conferences and similar events. We are not informed that a particular calendar is full until we receive a rejection notice for a Motion we attempted to file for that date. Often, we have submitted multiple Motions for that date, resulting in numerous rejections.

We must then re-notice those Motions for a different date which is time consuming and may cause confusion on the part of defendants regarding the correct Motion hearing date. Additionally, it is not uncommon for the rejection notice to be received many days after the Motion was submitted for filing. If a trial date has been scheduled, it becomes difficult to re-notice the Motion for another date prior to trial. Scheduling the Motion for the day of trial creates practical difficulties, especially when different Judges are assigned to the Motion and Trial calendars.

The timeframe between the filing of an Answer and scheduling of the trial date has not been consistent. It is difficult to advise our clients concerning their options with regard to settlement and appearances for trial when we cannot predict when a trial date might be scheduled.

Based on our experience in multiple jurisdictions, despite our best efforts to encourage communications, many defendants remain under the impression that they must appear at a Court hearing to resolve the claim. They appear in Court seeking a settlement or payment arrangement which, in most instances, can be negotiated. We submit that it would best serve the interests of the litigants as well as the Court to allow the parties time on the day of trial to attempt to resolve the cases prior to the case being called for Trial.

One method for resolving many of the above issues would be to issue a scheduling Order at the time an Answer is filed. Assuming the calendar issues can be addressed so that sufficient Motion dates will be made available prior to the trial date, the parties will be better able to plan their time and efforts.

CONCLUSION

In this submission, we have attempted to identify what we believe to be problem areas without inundating the Court with exhaustive arguments and alternative proposals for resolving the issues. We urge the Court to consider establishing a formal bench-bar working group, including consumer attorneys, to thoroughly explore ways to reach the goals of the Directive without unduly burdening legitimate debt collection. Such bench-bar working groups have recently been empaneled in MA, CT, MI, CA and MD (to name a few states.) Such collaborative discussions have facilitated the creation of more transparency in the collection litigation process for consumer defendants while also making the process more streamlined for the overburdened Court personnel and ensuring that the legitimate needs of the credit granting community are considered and not unduly compromised.