

## **Commentary and Support for Delaware Court of Common Pleas Administrative Directive 2011-1 - Consumer Debt Collection Actions.**

### **Introduction**

Legal Services Corporation of Delaware, Inc. is a non-profit legal service provider serving low-income Delawareans with advice and assistance in consumer debt actions.

Administrative Directive 2011-1 as promulgated by the Court of Common Pleas on May 6, 2011 has a sound rational basis, and we fully support its implementation in its original form. Above all, we are pleased the Court has taken the initiative to reform this area of practice, as it confirms our experience that the *status quo* is not meeting or serving the interests of Delaware residents. We are in a unique position to comment on this Directive. As legal representatives to some of Delaware's most indigent clients, we observe firsthand the negative impact and consequences default judgments by debt collectors have upon our clients' creditworthiness and livelihoods.

The reasons we support the Directive are more fully developed below. As a starting point, we addressed some of the concerns brought to the Court's attention by the Creditors' bar while also highlighting issues involving Defendants in such actions which the Creditors' bar overlooked. We are confident the Court will feel more comfortable in implementing the Administrative Directive as is, even after careful consideration of all of the points of view brought to light by all parties who responded.

### **Burden vs. Benefit**

We disagree that the reforms this Court has undertaken will unduly burden legitimate debt collection. We do not dispute that the credit collection industry has established methods and standards for transferring and maintaining information, the goal of which is to preserve the integrity and viability of legal debt collection. However, we question the reliability and efficacy of these

methods, because they were developed to provide the most efficient transfer of information within, and for the sole benefit of, the credit industry. Specifically, the adequacy of such standards is questionable when a debt purchaser is unwilling or unable to prove its standing for the purpose of legally enforcing the debt (and thus not able to meet the one of the most rudimentary requirements necessary to the proof of legal enforceability). While it is not disputed that the Court's proposed reforms may require improvements or revisions to the debt collection industry's standards of record keeping, there is no evidence provided by the Creditors' bar that such changes (in and of themselves) are unduly burdensome.

Further, while compliance with the Directive may be considered burdensome by some with regard to the initiation of the debt action, compliance with the Directive's requirements will ensure the Court feels more confident in the justice of adjudicating these cases on an expedited basis after the requirements have been met. The Creditors' bar is relying on the flawed assumption that the requirement of additional documentation at the outset of a case will be unduly burdensome, while at the same time failing to take into consideration that the compliance with the requirements will lead to a more just, efficient and expedient resolution of debt actions by the Court.

## **Consistency and Predictability**

The Creditor's bar has expressed concerns the Directive may foster an environment of inconsistency, unpredictability, and result in disparate rulings by the Judges (based on unique interpretations of the Directive), as quoted below:

“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 be later 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 activity or otherwise.”

The debt collection industry's concern regarding consistency and predictability is

disingenuous. Their paraphrasing of the Courts' comments is taken out of context. The Court was responding to the debt collectors' concerns that the Administrative Directive was too rigid and inflexible with regard to the required documentation. The Court, in attempting to address that concern, indicated that the language such as "a copy of the assignment or other documentary evidence" could be used to provide some flexibility to the debt collectors as to the exact documentation necessary. To then turn this around to argue that the Administrative Directive as written would not allow finality or predictability is a fallacious argument. Following the clear requirements of the Directive - by attaching a copy of the original contract and copies of all assignments will provide the debt collectors with the clarity and finality that they claim to desire. The Directive is successful in promoting consistency and predictability because it provides Plaintiffs' attorneys with additional motivation to comply with basic evidentiary requirements. Likewise, the Directive does not interfere with the establishment of finality as contemplated by Rule 60(b) and the principles of *res judicata* in the context of properly entered default judgments.

Because one of the primary goals of the Directive is to address the issue of judicial efficiency and the Court's best use of its resources, it is not the Court's intent to use the Directive as a basis for judicial review of properly entered default judgments (and withdrawal of default judgments *sua sponte*) absent other reasons motivating the review. The argument advocated by the Creditors' bar regarding inconsistency and unpredictability is unfounded. The Directive provides the Court with an additional line of inquiry to determine the appropriateness of a judgment within the context of review in accordance with the other grounds enumerated under Rule 60(b). In this sense, the Directive is not introducing a new right or remedy available to Defendants, it is simply enlarging the narrowness of the scope of grounds for the review of an entry of judgment. We are not aware of any other context in which a Judge would single out a debt action for post-judicial review of a

properly entered default judgment and impose Rule 11 sanctions, unless the appropriateness of the judgment was being questioned on another basis. The Creditors' bar concern about predictability is likewise misplaced because adherence to the Directive will prevent erroneously entered default judgments, leading to greater measure of justice for Defendants, and greater efficiency for the Court (as this will avoid a Rule 60 motion back-log in the Court's docket).

As an example, if a Defendant files a motion under Rule 60(b) for whatever reason, the Court only will grant such motion in its discretion, if it decides the order will serve the interests of justice, which is one of the motivating factors for the Directive. It is not unreasonable for the Court at the time of a Rule 60 motion to review the pleadings, factual allegations and documents submitted in support of the entry of default judgment by a Plaintiff to ensure that the Plaintiff has complied with the requirements of the Directive. If the Plaintiff has not complied with the Directive's requirements, it is not unreasonable for the Court to withdraw entry of a default judgment. Arguably, if the requirements of the Directive were not met, the order for default judgment is not properly entered. There is no inconsistency or unpredictability if the default judgments are not properly entered initially. Plaintiff's argument that the Court's results are inconsistent or unpredictable if a default judgment is withdrawn, due to their inability to meet basic evidentiary requirements, is faulty because the Plaintiffs can avoid that result if the Directive's requirements are met.

Conversely, in the case of a Defendant who has been properly served and fails to answer or defend the debt action, the Judges likewise have the discretion to deny a Defendant the opportunity for further review. The Court will not *sua sponte* single out a debt action for review and withdraw the entry of a default judgment that was properly entered, but the Court will only review a default judgment when the Defendant initiates an inquiry into the judgment based on the allowable grounds under Rule 60(b).

We do not dispute the assertion by the Creditors' bar that the Directive will not have the desired impact without a commitment from the Court that it will provide resources for the review of motions for default judgment. While Legal Services is desirous of having the Court dedicate Clerks to review all initial pleadings of all debt actions filed, we recognize that such a request would be unreasonable given the Court's finite resources. However, based on statistics that most debt actions are resolved in the context of a motion for default judgment, the actions being disposed of through the Court of Common Pleas must be reviewed by a Judge or Clerk to effectuate the purpose of the Directive.

On the same line of thought, the Creditors' bar concern that the Clerks will not review any of the debt actions filed, potentially leading to a withdrawal of properly entered default judgments (and the undesired inconsistency and unpredictability accompanying such action) is also unfounded. While the Court has not and will not commit Clerks to review the adequacy of the documentation in support of a debt action, the Clerks are still charged with the task of reviewing the debt action filing to ensure that the supporting documents are submitted with the initial Complaint. If the supporting documents are not submitted at all, the Clerks still have the authority to reject such filing. While we do not speak for the Court, we are confident the Clerks will still be doing a cursory review of debt actions filed along with the supporting documents, and rejecting any non-conforming filings.

Nevertheless, if a Plaintiffs' attorney were to submit a filing that is non-conforming and there then exists a legitimate concern that a default judgment may be withdrawn if its basis cannot be justified (due to the lack of appropriate documentation or inadequacy of appropriate documentation), the solution is to avoid filing the debt action in the first place. The systematic "weeding out" of debt actions, where legal enforceability is questionable, will also promote judicial efficiency with regard to the debt actions already filed that have a justifiable legal basis. If a debt collection attorney's

instincts that a good faith effort to document the basis of debt action may be insufficient to withstand judicial scrutiny (post-default judgment), the most reasonable solution to avoid non-conforming results is to avoid filing such an action. If an action cannot be documented or justified, it is, as a practical matter, initially not a legally enforceable judgment. The end result of the Directive is to put the onus on the Plaintiffs to decide whether they wish to have consistency and predictability, or whether they wish to take the risk of filing an action where a default judgment may be withdrawn at a later time. Plaintiffs' Counsel will have to engage in a decision making process whereby they will directly be responsible for determining consistency and predictability by deciding which debt actions to file in the Delaware Court of Common Pleas.

Moreover, during the Court's unveiling of the Directive on May 6, it became evident that some practitioners in Delaware already comply with the requirements of the Directive. They regularly substantiate initial pleadings by including a redacted version of the assignment of the account to justify the Plaintiffs' standing for filing the debt action. In doing so, some of the Plaintiffs' attorneys already recognize the reasonableness of having such a practice as a standard for the bar, prior to the Court making it mandatory. That being said, we question why the standardization of such documentary evidence would be problematic for the bar if some members have already adopted these practices in their normal course of business.

## **The Affidavit**

One recurring theme throughout the response from Creditors' Counsel was to suggest the use of affidavits to prove their case and/or to adhere to the requirements of the Administrative Directive, instead of document production. For the sake of background, debt collectors often submit affidavits in support of a certain types of motions, the two most common being motions for default judgment and motions for summary judgment. Affidavits should not be used where the affiant lacks personal

knowledge of a fact, or when the affiant is not competent to testify as to the matters stated within the affidavit. As an example, it is clearly inadequate for a debt buyer's employee to state in an affidavit that a billing statement was mailed to a Defendant, if she/she does not have personal knowledge of that fact, and more so if he/she does not have knowledge of the regular business practices of the original creditor. In such a case, the affidavit is based on hearsay and therefore inadmissible.

Likewise, it is also unacceptable for a debt buyer's affidavit to state that billing statements used to support the amounts being sought in a debt action were the types of records kept in the regular course of business, and submit such affidavit with billing statements from the original creditor. Again, unless the affiant has personal knowledge of the original creditor's method of record keeping, and that the records were kept contemporaneously with the facts stated therein, the affidavit contains a false statement, is based on hearsay, and should not be relied on by the Court for the entry of judgment.

Again, we oppose debt collectors' use of affidavits because such documents are inherently not trustworthy and do nothing to further the goals envisioned by the implementation of the Directive. The debt collectors' inability to produce the best evidence of a factual allegation is the primary motivation for the frequent use of the affidavit. The practice of submitting affidavits in support of the entry of default or summary judgments, without supporting documentary evidence, leads to the erosion of credibility, as evidenced the events unfolding around the country involving the debt collection industry. "Currently, Attorneys general in 38 states are currently fighting a proposed class-action settlement because it could make it much harder for state law-enforcement officials to regulate debt collectors...As part of the class-action case, one employee (of a debt collection company) testified in a deposition that he signed 200 to 400 affidavits a day, few of which

were reviewed for accuracy.”<sup>1</sup> The debt collection industry’s use of affidavits containing “false and misleading” information mirrors the “robosigner” issues which recently surfaced in the mortgage industry, leading to foreclosure mistakes, followed by massive probes into the industry’s practices and procedures. The disclosure of information by affidavit is insufficient to prove the elements of a case, and does not assist the Court in meeting the requirement of fairness. In our collective experience, affidavits by the Creditors’ bar, regardless of whether they are used in support of a certain type of motion (or whether they will be used to prove elements of its compliance with the Directive), are usually based on hearsay, and/or contain false or misleading information, rendering such documents unreliable and inadmissible.

### **Elements of Proof**

In addition to the above, we have compiled the following list of comments in response to the Creditor’s bar. Again, we support the Administrative Directive because it will specifically address the following ongoing issues involving the elements of proof in debt actions.

### **Ownership of Account**

If ownership documents cannot be produced, an affidavit detailing ownership from a knowledgeable employee may be attached to the Complaint. Testimony may be introduced at the hearing for default judgment or at the trial on the merits regarding ownership, and such documents as are available may be offered as evidence for scrutiny by the Court. We also support the Directive’s mandate that the original creditor(s) be identified in the Complaint so as to provide the Defendant with knowledge from the outset as to whom the original creditor is. This will help bring to light potential defenses that the Defendant may be able to assert. Early identification of the

---

<sup>1</sup> Jessica Silver-Greenberg, *States to Fight Lawsuit Accord*, WALL ST. J., June 14, 2011, at C5.

account will lead to a more efficient administration of justice and more decisions based on the merits of the case.

### **Charge-off Balance**

The charge-off balance includes “unreimbursed cash advances or transfers and all interest, fees and charges.” The term “charge-off” is very vague, and without more detail, the Court and the consumer are unable to determine whether the “charge-off” complies with the terms and conditions of the contract. The Plaintiff may rely on compilations and computer records, authenticated as evidence, to prove the amounts claimed. The Plaintiff has the burden of proof, and other businesses, such as mortgage lenders, compile records for years. Therefore, with current technology, the argument that it is impossible to maintain these records is ludicrous.

As to the original contract, once again, the Plaintiff has the burden of proving the amounts owed, including the terms and conditions of the contract. The Plaintiff may choose to file an action on each individual “contract” or use of the credit card, or may sue on all of the transactions or contracts on the credit card. The Plaintiff still has the burden of proving the terms and conditions of each contract and may produce the original contract and the subsequent changes in terms and conditions. Of course, the credit card companies have the information in their data banks or they would not know the amount to bill monthly on each transaction. The Plaintiff should produce the original contract, as well as any changes in terms and conditions in whatever form is reliable and authenticated, to assist the consumer and the Court in determining the legal justification for the amounts claimed in the lawsuit.

### **Rule 37**

The credit card companies’ interpretation of Rule 37 is illogical in that all parties are treated the same before the Court, whether they are *pro se* or represented by Counsel. To do otherwise

would be discriminatory and unjust. There is no legal basis for differentiating between *pro se* litigants and litigants represented by attorneys.

As stated by Creditors' Counsel, the Rule 11 provisions and authority to award attorney's fees already are the law in Delaware, and the Court is just in determining whether a *pro se* litigant or represented party or attorney should be sanctioned for impeding the process of justice. Such measures are ordered by the Court rarely, and the Directive merely highlights these options for all who appear before the Court, including *pro se* litigants.

## **Trials**

Of course, it is a waste of the time of the Court and of all of the litigants and of opposing Counsel for a Plaintiff, who has the burden of proof, to be unprepared to proceed at the scheduled hearing. The Plaintiff has the option of a voluntary dismissal if it is unprepared to proceed, and has the responsibility to promptly exercise this option to avoid clogging the Court's docket.

Also, the Plaintiff may exercise common sense planning by scheduling trials with represented parties on the same date. The Court is very understanding about scheduling hearings in order to foster finality in the cases before the Court, as emphasized by Creditors' Counsel.

The scheduling issues are not the focus of the Directive, and should be the topic of a different forum between Counsel and the Court.

## **Conclusion**

We have had quite a few clients who have come to us for representation with regard to debt collection matters. It has been our experience, on quite a few occasions, especially where the debt has been the subject of assignment or multiple assignments, that when we press counsel for the debt collector for documentation proving the existence of the debt and proper ownership of the debt, that

the response has been to voluntarily dismiss the action.

Whether or not the holder of an improperly documented debt collection claim is granted a default judgment should not rest upon a defendant serendipitously finding their way to a legal services program (if they are even eligible for such representation). The number of defendants who are able to reach us for representation are just a tiny percentage of the many defendants who have default judgments entered against them. The implementation of the Administrative Directive will eliminate chance as being the predictor of whether or not a defendant has a default judgment entered against them, and will provide uniformity and certainty to the process. This beneficial outcome will not come at the cost of a great burden to the plaintiffs - no more so than Form 30 Interrogatories create a great burden to personal injury plaintiffs. In summary, the Court's Directive will reinforce the public opinion that the Court of Common Pleas is the benchmark for fair and impartial justice for all Delaware residents.