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Dilatory Tactics in Credit Card Cases: Why Plaintiff-Creditors File Objectionable Complaints & What Can Be Done to Encourage Procedural Compliance

Patrick M. Emery

DILATORY TACTICS IN CREDIT CARD CASES: WHY PLAINTIFF-CREDITORS FILE OBJECTIONABLE COMPLAINTS & WHAT CAN BE DONE TO ENCOURAGE PROCEDURAL COMPLIANCE

*Patrick M. Emery**

"The elimination of a consumer claim against a struggling family can make a difference between a lifetime of debt and the accumulation of real wealth in the form of a home and savings."
- Robert W. Murphy, *Taming the Collection Tempest*[1]

I. Recent Recession, Debtor Default & Credit Card Cases

In the thick of the recession of 2008-2009, ignited in part by a credit crunch and the mortgage foreclosure crisis, consumer lobbyists allied to compose and transmit letters to our national representatives, urging the enactment of several bills that propose to curb aggressive business strategies by credit card companies.[2] One such letter, written in support of the Credit Card Reform Act,[3] presented the following:

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* J.D., University of Pittsburgh School of Law, 2009; History M.A., Emory University, 2005; History B.A., Emory University, 2005. Special thanks to the lawyers and staff at Neighborhood Legal Services Association of Western Pennsylvania's Pittsburgh office, and to my advisers: Edward Van Stevenson, Jr., Esq., Adjunct Professor of Law – University of Pittsburgh School of Law, Attorney – Neighborhood Legal Services Association of Western Pennsylvania; and Martha M. Mannix, Esq., Clinical Associate Professor of Law – University of Pittsburgh School of Law.

[1] Robert W. Murphy, *Taming the Collection Tempest: A Primer on Federal and State Restraints on Consumer Debt Collection*, Volunteer Legal Services Program Lecture, Bar Ass'n of San Francisco, at 26 (March 26, 2009) [hereinafter Murphy].

[2] *See* Nat'l Consumer Law Ctr., Legislation and Agency Activity, *available at* http://www.consumerlaw.org/issues/legislative/index.shtml (follow links relating to bills S. 414) (last visited Oct. 14, 2009).

[3] The Credit Card Reform Act was signed into law by President Obama on May 22, 2009 as the Credit Card Accountability, Responsibility & Disclosure Act of 2009 ("Credit CARD Act"). *See* White House, Press Release, "Reforms

> Undisputed evidence links the rise in bankruptcy in recent years to the increase in consumer credit outstanding. These numbers have moved in lockstep for more than 20 years. For example, revolving credit (most of which is credit card debt) ballooned from $214 billion in January 1990 to $964 billion [in February 2009]. As family debt increases, debt service payments on items such as interest and late fees take an ever-increasing piece of their budget. For some families this contributes to the collapse of their budget, especially if they experience an unexpected financial calamity, like the loss of a job.[4]

More jobs were lost in 2008 than any year since the end of World War II,[5] leaving unemployment at 8.5% in the United States by March of 2009.[6] With job losses soaring, consumer debt from credit card use will continue to balloon. The root causes of credit card debt, however, are the economically hazardous deeds of creditors and debtors alike.

Aggressive and even reckless lending by credit card companies has fueled this rise in credit card debt to record levels. Credit card solicitations have increased five-fold since 1990. In the last decade, credit card issuers have increased the amount of credit they offer more than twice as fast as consumers have taken on debt. At the same time, a growing number of American families have turned to credit cards not for unnecessary expenditures, but to meet basic living expenses as wages have remained stagnant while the cost of necessities like housing, education, gasoline, and health care have risen sharply.[7]

Consequently, "[a]n estimated 50 million households do not pay their credit card bills in full every month," leaving the average household with over $17,000 in debt.[8] With a surfeit of bills to pay and unemployment on the horizon, individuals will

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to Protect American Credit Card Holders," May 22, 2009, available at http://www.whitehouse.gov/the_press_office/Fact-Sheet-Reforms-to-Protect-American-Credit-Card-Holders (last visited Nov. 6, 2009).

[4] Letter from Consumer Federation of America et al. to Senator Robert Menendez, at 1 (Feb. 10, 2009), *available at* http://www.consumersunion.org/pdf/Menendez-group-ltr-2009.pdf (last visited Oct. 14, 2009) [hereinafter Consumer Federation of America].

[5] David Goldman, *Worst Year for Jobs Since '45*, Jan. 9, 2009, *available at* http://money.cnn.com/2009/01/09/news/economy/jobs_december/index.htm (last visited Oct 1, 2009).

[6] U.S. Dep't of Labor, Latest Numbers, http://www.dol.gov. (last visited Oct. 14, 2009).

[7] Consumer Federation of America, *supra* note 4, at 1.

[8] *Id.* at 2.

default on their credit card agreements now more than ever.

Out of this economic quagmire arises a curious procedural issue in credit card collection cases. On an individual level, this confluence of factors commonly leads to a credit default for the consumer. After the default come a suit, a judgment, and a collection. Between default and suit, a debtor's account may be sold at a fraction of its value to a secondary creditor,[9] who may prosecute the claim or sell the account to a tertiary creditor, and so on.[10] Once an action is instituted, the plaintiff-creditor seeks a judgment to satisfy the defendant-debtor's account. However, the process often stalls in the middle because the creditor has filed a complaint that fails to meet the pleading requirements of the procedural rules and case law. This paper considers why plaintiff-creditors utilize this approach to pleadings and what can be done to stop their practices.

The complete impact of dilatory tactics in credit card cases is unknown. Creditors profit from filing incomplete complaints, otherwise, they would not do so. While this pleading practice may be economical for the plaintiff-creditor, it is terribly inefficient for defendant-debtors and the entire legal system. The debtor must bear a long period of motions practice to defeat a creditor's complaint or to force the creditor to prove its case. The court's docket is backlogged with credit card cases that require multiple motion hearings simply to finalize the pleadings for trial; meanwhile, motions that demand immediate attention—e.g., a motion for continuation of an urgent landlord-tenant case that is filed shortly before the arbitration hearing date—cannot be slated for a hearing due to the docket's congestion. Countless lawyers and their clients have had their time and money wasted while they sit in motions court as the judge disposes of credit card case after credit card case each week. Similarly, the resources of public legal services organizations, which would be better spent helping clients to obtain Protection from Abuse Orders, are expended on filing objections to credit card complaints. In addition, although the overall societal impact cannot be determined in a study this

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[9] For the purposes of this paper, the term "secondary creditor" will be used to cover all assignees of original creditors.

[10] Murphy, *supra* note 1, at 12. "Until recently, unsecured debts – namely credit cards and signature loans – were collected by the initial credit guarantor. However, with the rise of information technology the majority of charged-off consumer debts are sold in the secondary market to debt buyers. In 2008, over 123 billion dollars in charged-off debts were sold to third party purchasers." *Id.*

focused, it is doubtless that our system of credit extension and repayment is affected by the creditors' decisions to file improper pleadings. As is explored in §§ V-VI below, original creditors and their assignees have calculated that they can make more money by filing objectionable complaints than by filing proper pleadings. This puts their cases at a high risk of dismissal through preliminary objections by defendant-debtors. Consequently, creditors must recover the costs of debts lost in dismissed credit card cases (and the associated legal fees) by passing those expenses onto credit consumers.

To determine why plaintiff-creditors file complaints incorrectly, this paper focuses on the travails of the Neighborhood Legal Services Association ("NLSA") of Western Pennsylvania, which defends elderly or low-income credit card debtors. This paper derives its evidence from the files of NLSA's Pittsburgh office, my experiences with NLSA clients and discussions with its attorneys, observations made in motions court in Allegheny County, Pennsylvania (from August 2008 to April 2009), and research that uncovered several unreported opinions relating to the topic. Most saliently, this paper includes an evaluation of 98 cases from the past three years, filed by both original and secondary creditors. The quantitative analysis, in § V below, evaluates the success rate of preliminary objections against the creditors' complaints, and reveals previously unimagined results concerning creditor behavior.

Attorneys from multiple jurisdictions will recognize that this microcosmic study, which concentrates on creditor pleading practices in Pennsylvania credit card cases, is pertinent to assessing and altering creditor activity in lawsuits in their home fora. In the end, this article contends that plaintiff-creditors file improper complaints as part of a pecuniary calculus in the collection industry: 1) original and secondary creditors file objectionable complaints (and cannot amend those complaints when challenged) since original creditors do not maintain the credit card debtor's account documents at the outset of the creditor-debtor relationship (which means that secondary creditors cannot receive account records as part of an assignment); and 2) necessary account records are not retained because it is more economically efficient to file many unsupported claims than it is to expend resources in document retention and to file fewer substantiated claims.

To reach these conclusions, this paper covers the following topics: II) what happens in a typical credit card case, the

applicable procedural rules for credit card cases, and how courts apply those rules; III) relevant case law and the standards for pleadings in credit card cases; IV) the widespread nature of dilatory tactics in credit card pleadings; V) who fares better against preliminary objections: original or secondary creditors; and VI) what practical considerations lead to multiple amendments in credit card cases. Finally, in sections VII-VIII, this paper proposes and assesses the merit of several realistic solutions for ending dilatory tactics in credit card cases.

II. A Typical Credit Card Case

A. The Initiation of a Credit Card Case

In a typical credit card case, the defendant-debtor receives a barebones complaint alleging that she had a contract with a lender for a credit card, that she incurred various charges in connection with her use of the card, and that some of her payment obligations are outstanding. The plaintiff listed at the top of the complaint may be the bank or credit card company with which she supposedly formed the contract. Frequently, however, the plaintiff is an assignee of the original creditor who sold the account at a discounted rate on the secondary credit market.[11] Once the defendant-debtor decides whether to proceed pro se or to obtain legal counsel, she has several options: pay or settle the arrears out of court,[12] dispute the debt in court, or

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[11] Assignees of original creditors brought 57 of the 98 cases that one NLSA attorney handled over the past few years. *See* Chart 3, *infra* § V. Debt collection agencies "will buy charged-off accounts from original lenders for pennies on the dollar." Murphy, *supra* note 1, at 12. For example, Unifund CCR Partners, which is a named plaintiff in many credit card cases in Allegheny County, is one of the nation's largest debt portfolio management companies. Unifund CCR Partners, Our History, http://www.unifund.com/aboutunifund/history.aspx; *and* Cal. Ass'n of Collectors, Vendor Member Spotlight, Collector's Ink, May 2002, http://www.unifund.org [hereinafter Vendor Member Spotlight]. Essentially, Unifund purchases "distressed loan portfolios" from banks and retailers, repackages consumer debts into organized portfolios, and sells those bundles to local and national collection agencies in a digestible form. In the end, the creditor who will collect on a credit card account receives it along with grab bag of other consumer accounts. That creditor may seek payment on the account or hire a law firm to handle the matter for it. Unifund claims to add value to the deal by analyzing the behavior and characteristics of account debtors to determine which debtors might pay. *Id.*

[12] This paper will not delve into settlements, payment plans, or other

remain dormant. Often, the defendant-debtor will not challenge the suit, and will permit the credit card company to obtain a default judgment.[13] At other times, due to the skeletal nature of the plaintiff's complaint, the defendant-debtor may not recognize the charges claimed or recall that she ever had a credit card with this plaintiff or its assignor.[14] Consequently, the defendant-debtor may ignore the complaint and suffer a default judgment, or the defendant-debtor must first file preliminary objections to properly answer the complaint.

If the defendant-debtor chooses to respond to the complaint through preliminary objections, the Pennsylvania Rules of Civil Procedure ("Rules") and case law permit her to obtain some clarification of the plaintiff-creditor's vague claim.

B. Procedural Rules for Complaints & Preliminary Objections

Unlike federal courts, which require notice pleading, Pennsylvania courts demand fact specific pleading from both plaintiffs and defendants.[15] At the outset, a pleading must set forth the "material facts" of the cause of action in a "concise and summary form."[16] As in most credit card cases, when a claim is "based upon a written agreement, the pleading shall state specifically if the agreement is oral or written."[17] If the credit card claim is based upon a writing, then the plaintiff must "attach a copy of the writing."[18] Finally, "[a]verments of time, place, and items of special damage," such as credit card charges, must be "specifically stated."[19] Recurrently, credit card companies and

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alternative dispute resolution methods in credit card cases. Furthermore, since the information is not available, this paper will not analyze cases that are filed with local Magisterial District Justices.

[13] Judge R. Stanton Wettick, Pennsylvania Practice Lecture at the University of Pittsburgh School of Law (April 13, 2009) (transcript on file with the author). The "most common cases [of default judgment under Pa. R. CIV. P. 1037(b)(1)] that we have are credit card cases." *Id.*

[14] Certainly, there is a risk that the plaintiff is not who it claims to be. *See infra* § II.B.2. Fraud and identity theft could be perpetrated through the courts in this fashion, but the procedural rules examined in § II.B below are designed to diminish these menaces.

[15] Pa. R. CIV. P. 1019(a); *see also* Landau v. W. Pa. Nat'l Bank, 282 A.2d 335, 339 (Pa. 1971).

[16] Pa. R. CIV. P. 1019(a).

[17] Pa. R. CIV. P. 1019(h).

[18] Pa. R. CIV. P. 1019(i).

[19] Pa. R. CIV. P. 1019.

their assignees file complaints against debtors that do not meet the aforementioned requirements. Those missteps will be investigated in detail in § III below. However, those are not the only mistakes that plaintiffs often make. For instance, the attorney for the plaintiff-creditor might improperly manufacture the complaint's verification. Whatever the faults of the pleading, if a complaint not properly formed, the defendant-debtor can file preliminary objections in response. Under Rule 1028(a), preliminary objections may be filed on grounds including but not limited to: (2) failure of a pleading to conform to law or rule of court; (3) insufficient specificity in a pleading; and (5) lack of capacity to sue. Let us briefly examine each of these objections in the following order: (2), (5), and then (3).

1. Failure of a pleading to conform to law or rule of court

Preliminary objections under Rule 1028(a)(2) typically flow from violations of Rule 1019 either for failure to (h) state whether the contract is written or oral, or for failure to (i) attach the necessary writings to establish a contract claim—usually a copy of the agreement itself.[20] Another type of error, possibly the oddest, is an improper verification of the complaint. To fulfill a pleading's verification requirement, Rule 1024 states:

> (a) Every pleading containing an averment of fact not appearing of record in the action . . . shall state that the averment or denial is true upon the signer's personal knowledge or information and belief and shall be verified . . . .
>
> (c) The verification shall be made by one or more of the parties filing the pleading unless all the parties (1) lack sufficient knowledge or information, or (2) are outside the jurisdiction of the court and the verification of none of them can be obtained within the time allowed for filing the pleading. In such cases, the verification may be made by any person having sufficient knowledge or information and belief and shall set forth the source of the person's information as to matters not stated upon his or her own knowledge and the reason why the verification is not made by a party.

Typically, a verification fails to meet the requirements of

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[20] Pa. R. CIV. P. 1019(h), (i). *See infra* § III.B.

Rule 1024 when it is either: 1) signed by a person who has no personal knowledge of the facts contained within the pleading; 2) missing a statement that the averments within the pleading are true upon the signor's personal knowledge or information and belief; or 3) signed by the party's lawyer when the party is not outside of the jurisdiction or not claimed to be extraterritorial.[21]

2. Lack of capacity to sue

The Rule 1019(i) duty to attach any necessary documentation dovetails with a party's responsibility to prove that it is a real party in interest under Rule 2002(a). Rule 2002(a) "requires the plaintiff to trace in his statement of claim the derivation of his cause of action from his assignor" so that the defendant "may challenge the plaintiff's claim that he is the present owner of the cause of action."[22] To allow otherwise might lead the defendant to "find himself subjected to the same liability to the original owner of the cause of action, in the event that there was no actual assignment."[23] For instance, an NLSA attorney recently received a call from a creditor that wished to settle the debt of an NLSA client and threatened to sue in court. After checking NLSA's files, the attorney discovered that the client's debt had been discharged several years ago when the Allegheny County Court of Common Pleas entered an order against the original creditor dismissing the case with prejudice. Apparently, after the case was dismissed, the original creditor sold the client's account in a portfolio to a secondary creditor, possibly without providing notice that the debt was uncollectible. The account eventually landed in the hands of the creditor who called to offer a settlement. Another attorney attested to the fact that this has happened before to NLSA clients. This is just one example of why courts require that a complaint include a copy of the assignment from the original party in interest to the plaintiff and any intervening assignees so that the defendant can discern if the plaintiff is a real party in interest.[24]

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[21] *See infra* § III.A–B.

[22] Brown v. Esposito, 42 A.2d 93, 94 (Pa. Super. Ct. 1945).

[23] Produce Factors Corp. v. Brown, 179 A.2d 919, 921 (Pa. Super. Ct. 1962) (citing *Brown*, 42 A.2d at 94).

[24] *See infra* § III. A-B.

3. Insufficient specificity in a pleading

Objections to insufficient specificity in a pleading under Rule 1028(3) relate directly to the mandate of Rule 1019(f): failure to specify averments of time, place, and items of special damage. When a plaintiff-creditor seeks damages that are ascertainable based on a contractual relationship, it must plead those damages with specificity.[25] Consequently, courts require a pleading to include facts concerning when the debtor engaged in purchases that led to the debt, the amount of those purchases, and the items purchased.[26]

C. Practice of the Court: Applying the Rules to Objectionable Pleadings

When a court sustains a defendant-debtor's preliminary objections, it will permit the plaintiff-creditor to file an amended complaint, and perhaps more than one. A court may permit as many amendments as it can suffer, and authorize as long a period as it deems necessary for the plaintiff to amend.[27]

January 23, 2009 was billed as a busy day for preliminary objections to credit card complaints in Allegheny County motions court. I was in attendance and charted the action to see what the court would do. Chart 1 represents a sample of my findings on that date:

Chart 1: Disposition of Preliminary Objections at Motions Hearing

No.	Plaintiff	Plaintiff's Counsel	Defendant	Defendant's Counsel	Disposition
1	Capital One	Greg Morris	Bailey	Pro se	Preliminary objections sustained; Complaint stricken; 120 days granted to file an amended complaint; No argument from either party
2	Capital One	Greg Morris	Hardy	Pro se	Petition to open default judgment ($9,930.03) based on failure to file an answer; Defendant admitted that she owes the debt and decided not to contest it further; Petition denied on agreement of the parties

[25] Pa. R. CIV. P. 1019(a).

[26] *See infra* § III.A-B.

[27] Pa. R. CIV. P. 1028(e) permits a court to either grant twenty days from the notice of the order or "such other time as the court shall fix" for submitting an amendment.

No.	Plaintiff	Plaintiff's Counsel	Defendant	Defendant's Counsel	Disposition
3	Dollar Bank	Pro Se	Lambling	Pro se	No show
4	Citibank SD	James Warmbrodt	Cirell	Lawrence Paladin	Preliminary objections sustained; Amended complaint stricken; 30 days granted to file a second amended complaint; No argument from either party
5	Capital One	James Warmbrodt	Brantly	Pro se	Preliminary objections sustained; Complaint stricken; 120 days granted to file an amended complaint; No argument from either party
6	Capital One	James Warmbrodt	Jankovich	Amy Carpenter	Preliminary objections sustained; Amended Complaint stricken; 30 days granted to file a second amend complaint; No argument from either party
7	Capital One	James Warmbrodt	Wilkerson	Pro se	Preliminary objections sustained; Complaint stricken; 120 days granted to file an amended complaint; No argument from either party
8	Worldwide Asset Purchasing	Brit Suttel	Burkhart	Jeff Braun	Preliminary objections sustained; Complaint stricken; 120 days granted to file an amended complaint; both parties consented to the amendment outside of court
9	Citibank SD	Brit Suttel	Bauer	Thomas Dausch	Unknown
10	TA Financial	David Apothaker	Staub	Thomas Dausch	Unknown
11	Velocity Asset Management	Michael Ratchford	Sams	Thomas Dausch	Unknown
12	LVNV	David Apothaker	Whitley	Pro se	Default judgment opened because complaint mailed to wrong address
13	LVNV	David Apothaker	Ruffner	Pro se	Preliminary objections sustained; Complaint stricken; 120 days granted to amend complaint; No argument from either party
14	LVNV	David Apothaker	Dettlinger	Pro se	Preliminary objections sustained for failure to attach necessary documents; Complaint stricken; 120 days granted to file an amend complaint; Pleading process explained to pro se defendant
15	Commonwealth Financial Systems	Michael Ratchford	Griggs	Amy Carpenter	Uncontested; Preliminary objections sustained; Complaint dismissed

As shown in Chart 1, since Rule 1028(e) is flexible, sustained preliminary objections to credit card complaints consistently lead to an order granting 120 days for the plaintiff to amend its complaint and a further twenty days for the defendant to file either a second set of preliminary objections or an answer. If, upon hearing the second set of preliminary objections, the amended complaint fails to satisfy the procedural constraints, then the plaintiff usually is granted another 30 days to reword its amended complaint. If the second amended complaint is objected to and is unsatisfactory, then the judge will dismiss the complaint with prejudice.[28]

At the start of a case, if a pleading can be amended to state a claim upon which relief can be granted, the court must permit the amendment; this is not discretionary but mandatory.[29] However, the judge has discretion over how many amendments are granted and what amount of time is permitted for each amendment period since, as an interlocutory order, an order allotting leave to file an amended complaint is not appealable.[30] Even if a case were to be appealed later, it is highly unlikely that the case would be reversed based on the court's decision to grant an extended amendment period or multiple amendments since it would be impossible to demonstrate a causal link between the

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[28] It bears mentioning that the process I have described thus far ignores the all-too-frequent occurrence of voluntary discontinuances under Pa. R. CIV. P. 229 that inject further delay into credit card cases. Under Rule 229, the plaintiff-creditor has the right to voluntarily discontinue its case without prejudice even if the preliminary objection and amendment process has been going on for several months. Later, if the creditor files the case again, it can voluntarily dismiss the case a second time with virtual impunity; the "costs" of a pro-se defendant-debtor for dealing with the first case, to be paid by the plaintiff-creditor under Pa. R. CIV. P. 231(a), would be a pittance. Oddly, Rule 229 does not have a "one voluntary dismissal" rule similar to Fed. R. Civ. P. 41(a)(1). One method of eliminating the possibility of a voluntary discontinuance is for a defendant-debtor to file an answer and new matter once it receives the complaint. However, this tactic only succeeds when the defendant debtor has a valid defense, such as: a violation of the Fair Debt Collection Practice Act, 15 U.S.C. § 1692 (2006); statute of limitations; accord and satisfaction; or prior dismissal with prejudice on an identical claim for the debt. Alternatively, a defendant-debtor might file a motion to strike a discontinuance under Pa. R. CIV. P. 229(c), which provides that "the court, upon petition and after notice, may strike off a discontinuance in order to protect the rights of any party from unreasonable inconvenience, vexation, harassment, expense, or prejudice."

[29] Framlau Corp. v. County of Del., 299 A.2d 335 (Pa. Super. Ct. 1972).

[30] Pa. R. CIV. P. 311.

ruling and the ultimate verdict.[31] Therefore, the discretion of the court remains unchecked.

From here, we inspect the court's application of the procedural rules and its discretion in paradigmatic credit card cases.

III.Credit Card Cases: Deficient Complaints and Preliminary Objections in Action

Worldwide Asset Purchasing, LLC v. Stern[32] is the leading opinion on preliminary objections to credit card debt complaints in Pennsylvania. In the combined cases of *Worldwide*, the court addressed the "sufficiency of complaints to recover credit card balances."[33] The plaintiff-creditors instituted their actions at the district justice level, but default judgments were entered against the plaintiff-creditors for failure to appear at hearings.[34] Thereafter, the plaintiff-creditors filed appeals and new complaints in the Court of Common Pleas.[35] Astutely, the debtors filed preliminary objections to the creditors' complaints based on: 1) failure to set forth the material facts upon which cause of action is based under Rule 1019(a); 2) failure to specify averments of time, place, and items of special damage under Rule 1019(f); and 3) failure to attach a copy of the writing, or the material part thereof, upon which the claim is based under Rule 1019(i).[36] In considering these preliminary objections, the court founded its dual opinion upon two cases that merit mentioning: *Atlantic Credit* and *St. Hill & Associates, P.C. v. Capital Asset Research Corp.*[37]

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[31] Judge R. Stanton Wettick, Pennsylvania Practice Lecture at the University of Pittsburgh School of Law (January 13, 2009) (transcript on file with the author).

[32] Worldwide Asset Purchasing, LLC v. Stern and Commonwealth Fin. Sys., Inc., 153 Pittsburgh L. J. 111 (2005), *available at* http://www.acba.org/ACBA/Publications/Pittsburgh-Legal-Journal_opinions.asp. *Worldwide* is an unpublished opinion that has reached a higher status and is often cited by defendant debtors and other courts. Otherwise, courts frequently rely on Atlantic Credit & Finance Inc. v. Giuliana, 829 A.2d 340 (Pa. Super. Ct. 2003), and Marine Bank v. Orlando, 25 Pa. D. & C.3d 264 (Erie Ct. Comm. Pl. 1982).

[33] *Worldwide*, 153 Pittsburgh L. J. at 111.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] St. Hill & Assocs., P.C. v. Capital Asset Research Corp., 2000 Phila. Ct. Com. Pl. LEXIS 95 (Phila. Ct. Com. Pl. 2000).

A. Foundational Cases: *Atlantic Credit* and *St. Hill*

In *Atlantic Credit*, the Superior Court vacated an order denying a motion to strike or open a default judgment that was filed by the defendant-appellants, Giuliana and Wilson.[38] In its complaint, plaintiff Atlantic Credit claimed that Giuliana and Wilson were indebted to General Motors Credit Card pursuant to a written contract, for the sum of $9,644.66, plus interest and attorney's fees, but Atlantic Credit failed to attach the original credit card contract.[39] Further, Atlantic Credit alleged that it was the assignee of the GM account, but failed to attach the original credit card contract or the assignment agreement.[40] All that Atlantic Credit attached was a single monthly statement from the debtors' GM Card, which reflected the balance claimed.[41]

Giuliana and Wilson filed two preliminary objections to Atlantic Credit's complaint based on improper verification under Rule 1024 and failure to attach the writing upon which the claim was based.[42] First, the Superior Court held that the verification was deficient and that the judgment had to be overturned since Atlantic Credit's verification was indorsed by a company paralegal who had no personal knowledge of the claims within the complaint and was not a corporate officer.[43] Second, the court held that Atlantic Credit's failure to attach a copy of the writing that served as the basis of the claim was a fatal error.[44] Consequently, the Superior Court remanded the case for the trial court to enter an order sustaining the debtors' preliminary objections, striking the complaint without prejudice, and granting Atlantic Credit 20 days to file an amended complaint.[45]

Similarly, in *St. Hill*, the Philadelphia Court of Common Pleas addressed defendant Capital Asset Research Corporation's ("CARC") preliminary objections[46] to the complaint filed by St. Hill.[47] CARC objected to St. Hill's complaint based on its failure to "set forth sufficient facts as to time, place and items of special

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[38] *Atlantic Credit*, 829 A.2d at 340-41.

[39] *Id.* at 341.

[40] *Id.*

[41] *Id.*

[42] *Id.* at 343-44.

[43] *Atlantic Credit*, 829 A.2d at 343-44 (citing Pa. R. CIV. P. 1024(a),(c)).

[44] *Id.* at 345 (citing Pa. R. CIV. P. 1019(i)).

[45] *Id.*

[46] Only the relevant preliminary objections from *St. Hill* will be discussed herein.

[47] *St. Hill*, 2000 Phila. Ct. Com. Pl. LEXIS at *1.

damages with specificity," as required by Rule 1019(f), and its failure to state how St. Hill computed its damages, as required by Rule 1019(a).[48] While St. Hill alleged that it performed services for CARC and that those services cost $93,000, St. Hill failed to state what services were performed and a detailed breakdown of the costs it incurred.[49]

The *St. Hill* court determined that the plaintiff in a collection case shoulders the burden to plead facts related to the services it performed since the plaintiff would know this information and would be able to aver it effortlessly, while a defendant might need discovery to obtain that information.[50] Therefore, St. Hill had to provide notice to CARC by "synopsizing the facts to support" its claim.[51] To analyze whether St. Hill had provided enough facts, the court examined whether the claim was "sufficiently clear to enable the defendant to prepare his defense."[52] In its pleading, St. Hill simply set forth the start date of the services contract, but failed to allege an end date or when payment was due from CARC.[53] Furthermore, St. Hill failed to assert how it calculated the balance of $93,000 allegedly

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[48] *Id.* at *5.

[49] *Id.*

[50] *Id.* at *6 (citing *Marine Bank*, 25 Pa. D. & C.3d at 267-69). A "defendant is entitled to know the dates on which individual transactions were made, the amounts therefore and the items purchased to be able to answer intelligently and determine what items he can admit and what items he can contest." *Id.* In *Unifund CCR Partners v. Vo*, the Philadelphia Court of Common Pleas added flesh to this pleading requirement: "Regulation Z, promulgated by the Federal Reserve under the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, requires that interest rates, fees, and finance charges applicable to a credit card account be disclosed in the credit card application in a tabular format, commonly known as the 'Schumer Box' . . . . The information contained in the Schumer Box is a material part of the writing upon which the [Unifund's] claim is based; it establishes the agreed-upon contract terms for the interest rates and fees. Without attaching the Schumer Box or setting forth its substance in the complaint, the [Unified] does not adequately plead the basis for the amount of interest, late fees, returned check fees, and over-the-limit fees alleged to be owed." Unifund CCR partners v. Vo, No. 2008-3966, at 6-7 (Philadelphia Ct. Com. Pl. Feb. 17, 2009), *available at* http://www.consumerlaw.org/unreported/content/Vo_Opinion.pdf. Consequently, the Philadelphia Court of Common Pleas held that Unifund's attachment of the card member agreement was insufficient to sustain its claim for the additional damages that could be recouped if it had produced the Schumer Box information. *Id.*

[51] *St. Hill*, 2000 Phila. Ct. Com. Pl. LEXIS at *7.

[52] *Id.* at *5.

[53] *Id.* at *7.

due or state when invoices were sent to CARC for payment.[54] Since St. Hill failed to state specifically the time, place, and items of special damages, and failed to establish a basis for its damages, the court sustained CARC's preliminary objections and granted St. Hill 20 days to amend its complaint.[55]

B. Back to Worldwide

In *Worldwide*, the plaintiff claimed that Bank of America issued a credit card to the defendant and that Worldwide purchased her account from Bank of America.[56] In filing its complaint, Worldwide made four central errors. First, Worldwide failed to attach the agreement showing the assignment of the defendant's account from Bank of America to the plaintiff.[57] This contravened of Rule 1019(i) since an assignment is a "material fact upon which plaintiff's cause of action is based" and the assignment contract must be attached to the complaint to prove that the plaintiff is a real party in interest under Rule 2002(a).[58]

Second, in violation of Rule 1019(i), Worldwide failed to attach a copy of the defendant's signed credit card application.[59] The only writing attached was an undated, unsigned Visa or MasterCard Member Agreement.[60] Typically, the "relationship between the cardholder and issuer begins with a written application signed and submitted by the cardholder," under which the debtor agrees to be bound by the application's provisions and the "terms and conditions that are furnished to the cardholder at the time the card is issued."[61] The application also may provide that the terms and conditions are subject to change through subsequent mailings to the cardholder.[62] Conventionally, the writings that must be attached to the complaint under Rule 1019(i) include the application signed by the cardholder and the terms and conditions that are relevant to the creditor's claims.[63] For instance, if the terms and conditions changed from the original application, then both sets of terms and conditions must

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[54] *Id.* at *7-8.
[55] *Id.* at *5, *9.
[56] *Worldwide*, 153 Pittsburgh L. J. at 112.
[57] *Id.*
[58] *Id.* at 112 (citing *Atlantic Credit*, 829 A.2d 340).
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Worldwide*, 153 Pittsburgh L. J. at 112.
[63] *Id.*

be attached to the complaint and the complaint must state their applicable dates.[64] Worldwide failed to satisfy any of these requirements.

Third, Worldwide's complaint did not "include the amount of the charges . . . the dates of the charges, credits for payments if any, dates and amounts of interest charges," and other charges.[65] Without supplying that information, the defendant could not calculate the total damages alleged by reading the supporting documentation and, in turn, could not respond appropriately in its answer.[66]

Finally, the verification in Worldwide's complaint did not comply with Rule 1024. Rule 1024(a) requires a verification to state that the averments contained in the pleading are true upon the signer's "personal knowledge or information and belief." Worldwide submitted its complaint with a "substitute" verification, signed by its Attorney Relationship Manager, which averred that he "makes this statement on [Worldwide's] behalf as to the truthfulness of the facts set forth in the foregoing Complaint."[67] Since the verification did not contain any statement as to the truthfulness of the factual allegations within the complaint, the court struck the verification.[68]

Analogous preliminary objections were considered and sustained in *Commw. Fin. Sys., Inc. v. Miller*, the companion case to *Worldwide*.[69] Again, the creditor, this time Commonwealth Financial, failed to attach necessary writings, including the original credit card agreement, the assignment agreement from the original creditor to its assignee, and any later assignment agreements.[70] Also, Commonwealth Financial's complaint was bereft of any documentation or justification for the balance it claimed was due.[71] Finally, like Worldwide, the verification of Commonwealth Financial was deficient, but its deficiency was of a different kind. The "relevant portion" of its verification stated:

> 1. I am the attorney for the Plaintiff [Commonwealth Financial];

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[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Worldwide*, 153 Pittsburgh L. J. at 112.
[69] *Id.* at 113.
[70] *Id.*
[71] *Id.*

> 2. Verification by the Plaintiff or an authorized agent of Plaintiff cannot be obtained within the time allowed by law for the filing of pleading;
>
> 3. That the facts set forth in the foregoing Pleading are true and correct to the best of my knowledge, information, and belief, based upon information received from the Plaintiff.[72]

Rule 1024(c) requires that the verification be made by a "party 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."[73] This is not an uncommon situation for the lawyers of creditors. Many lenders own debtor accounts in multiple states, so they must hire local counsel to collect arrearages. However, in this situation, Commonwealth Financial's lawyer did not allege that his client was outside the jurisdiction of the court.[74] Consequently, even though the plaintiff's verification asserted that the averments in the complaint were true—unlike that of Worldwide—the court struck the verification.[75]

The result in both *Worldwide* and *Commonwealth Financial*: the court sustained the defendant-debtor's preliminary objections, struck the creditor's complaint, and allotted the creditor 20 days to amend its complaint, including an amended verification.[76]

C. Clarifying the Law: Creative Pleading Strategies Exhibited Post-Worldwide[77]

Since *Worldwide*, a few opinions have surfaced in

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[72] *Id.*

[73] *See supra* § II.B.1 for the other requirements of Rule 1024.

[74] *Worldwide*, 153 Pittsburgh L. J. at 113.

[75] *Id.*

[76] *Id.*

[77] For treatment of other plaintiff-creditor strategies not analyzed in this paper, *see* H & H Design Builders v. Travelers Indem. Co., 639 So.2d 697, 700 (Fla. Dist. Ct. App. 1994) (rejecting plaintiff-creditor's claim that credit card cases are actions on accounts, not claims based on written contracts), *and* Snyderburn v. Moxley, 652 So.2d 945 (Fla. Dist. Ct. App. 1995) (rejecting plaintiff-creditor's equitable claims, such as unjust enrichment or *quantum meruit*).

Pennsylvania that scrutinized the sufficiency of credit card complaints.[78] For the most part, these cases add little substantive information to the assessment of credit card complaints. However, the *Remit* court announced important clarifications concerning missing documentation of account assignments and the specificity required for proving the balance due on a defendant-debtor's account.

The plaintiff, Remit, was the assignee of The Sagres Company, which it claimed was the successor in interest of the original creditor, Bank of America.[79] True to form, the defendant objected to Remit's lack of attachments to its complaint, including missing copies of the assignments from Bank of America to Sagres and from Sagres to Remit.[80] Remit contested that it had satisfied its obligation under Rule 1019(i) by attaching an affidavit from the VP/CIO of Sagres, which suggested that Remit was the successor in interest to Sagres.[81] The affidavit, "while appearing on its surface to satisfy the requirements of [Rule 1019(i)] for lost or unavailable writings," did not "clearly establish" the chain of ownership from the original account holder.[82] Consequently, although Remit cleverly attempted to overcome a problem that almost all assignor creditors face in collecting credit card debt, its gambit was insufficient to convince the court that it was the real party in interest.[83]

To bolster its argument that it sufficiently plead the credit card charges amassed by the defendant, Remit cited *Delligatti v. Mt. Pleasant Borough*,[84] which held that "the requirement that time and place be averred specifically does not require exact precision."[85] For that reason, Remit maintained that its pleading obligation was satisfied by providing a general time frame (Dec. 31, 2002 through April 3, 2004) as the period in which the card

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[78] *See* e.g. Palisades Collection, LLC v. Grassmyer, 2007 GN 2840, (Blair Ct. Com. Pl. Jan. 15, 2008); Remit Corp. v. Miller, 5 Pa. D. & C.5th 43 (Pa. Ct. Com. Pl. 2008); *and* Cach, LLC v. Myers, 2007 GN 5427, (Pa. Ct. Com. Pl. Oct. 6, 2008). The National Consumer Law Center maintains a repository for unpublished consumer credit opinions, *available at* http://www.consumerlaw.org/unreported/content/.

[79] *Remit*, 5 Pa. D. & C.5th at 45-46.

[80] *Id.* at 46.

[81] *Id.*

[82] *Id.*

[83] *Id.* at 47.

[84] Delligatti et al. v. Mt. Pleasant Borough, 76 Pa. D & C. 200 (Pa. Com. Pl. 1951).

[85] *Remit*, 5 Pa. D. & C.5th at 48 (quoting *Delligatti*, 76 Pa. D & C. at 202).

was issued and the balance incurred, claiming that this accurately identified the time of the agreement and resulting charges.[86] The court distinguished *Delligatti*, which involved a trespass action resulting from an "injury sustained by a minor who fell in the street."[87] The preliminary objection in *Delligatti* concerned the plaintiff's failure to state what part of the street was in disrepair, how long it had been in bad condition prior to the fall, where the fall occurred, etc.[88] The court in *Delligatti* did not require the plaintiff to add these facts to its complaint since the defendant "would know exactly what was being alleged and where it was alleged to have occurred."[89] On the contrary, the defendant in *Remit* was faced with a bare allegation that it owed "$4,679.06, and nothing more."[90] Even though Remit attached several account statements, these statements did not "detail any specific charges" or "accounting information" to permit the court or defendant to ascertain for what purchases the balanced was owed.[91] The plaintiff argued that a creditor must "provide a breakdown of charges, payments, items purchased, and interest such that [the defendant] can formulate a response or assert a counterclaim or a defense."[92] The court sustained the defendant-debtor's preliminary objections, and granted Remit 20 days to patch up its complaint.[93] However, not all creditors fail in their attempts to amend their complaints.

The plaintiff in *FIA Card Services N.A. v. Kirasic*[94] was the incarnation of the adage, "I did the best I could with what I had." Like most creditor plaintiffs, FIA's original complaint did not meet the expectations of *Worldwide* since it only attached a "five-page writing which it identified as a true and correct copy of the credit card agreement."[95] Then, FIA filed an amended complaint with appended monthly statements but without "any writings showing the terms and conditions of the amended credit card agreements applicable to defendant during the relevant

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[86] *Id.* at 49.
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Remit*, 5 Pa. D. & C.5th at 49.
[92] *Id.* at 48.
[93] *Id.* at 50.
[94] FIA Card Servs. N.A. v. Kirasic, No. AR06-009360, (Pa. Ct. Com. Pl. 2007) *available at* http://www.consumerlaw.org/unreported/content/Kirasic_Order.pdf.
[95] *Id.* at 1.

times."[96] On its third attempt, FIA stated that it was "unable to attach a copy of the applicable governing interest rates and fees."[97] Since FIA could not provide the writings upon which its claim was based, the defendant sought dismissal of the second amended complaint.[98] However, FIA also truncated its claims—only seeking cash advances and purchase, and no longer seeking "finance charges, late fees, over limit fees, and the like"—making its second amended complaint unobjectionable.[99] Since FIA did not have the documents to prove its right to claim interest and fees, FIA astutely dropped its claims to those items of damage. By only requesting damages for cash advances and purchases made by the defendant-debtor, FIA could substantiate its claim by providing significantly less information. All FIA needed to maintain its second amended complaint were the documents that it provided as attachments to its first two filings. After all, *Worldwide* held that, to satisfy Rule 1019, "the complaint must contain sufficient documents and allegations to permit a defendant to calculate the total amount of damages that are sought by reading the documents attached to the complaint and the allegations" therein.[100] Since it was not disputed that the defendant received a credit card in 1990, a fact finder might "assume that any writing governing defendant's obligations to plaintiff from 1990 to August 2006 would include the obligation to pay the cash advances and the purchases shown on the invoices," which were already provided in the first two complaints.[101] Therefore, the lack of proof concerning the terms and conditions of the credit card agreement was moot.[102] This was an innovative solution for a plaintiff-creditor: if you cannot prove an averment of damages, cut it and take what you can get.

Today, the directives of *Worldwide* for following procedural rules in credit card cases remain unheeded, even though they are well known to all attorneys for plaintiff-creditors. Problems in complaints occur multiple times within a single case, appear in cases filed by creditors who have filed objectionable complaints before, and surface all over the country.

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[96] *Id.* at 2.
[97] *Id.* at 2-3
[98] *Id.*
[99] *Id.* at 3-4.
[100] *FIA Card Servs.*, No. AR06-009360, at 3.
[101] *Id.*
[102] *Id.* at 3-4.

IV. Recurring Errors and Widespread Mistakes in Credit Card Complaints

Dilatory tactics in credit card filings can be found in several states, not just Pennsylvania. Within each jurisdiction, plaintiff-creditors make identical filing mistakes over and over. Some plaintiff-creditors, even though they have been notified previously of their erroneous ways, ignore those warnings and file barebones complaints in their ensuing cases. Others file original complaints without the account records and, once notified of their oversight, cannot properly correct their complaints even if they are granted two, three, or four opportunities to amend. The common thread between these repetitive missteps is that they are found almost everywhere.

A. Common Mistakes by Repeat Claimants

Rule 1028(c)(1) permits a party to amend its pleading as of course within 20 days of the filing of the opposing party's preliminary objections.[103] While this is a matter of convenience for the courts and should stir self-initiative within complainants, the results are often curious and wearisome. In *Belmont Financial Services Group, Inc. v. Hawkins*,[104] the court confronted a fourth complaint.[105] Scan the case's timetable in Chart 2[106]:

Chart 2: Timetable of *Belmont*

Date	*Action*	*Result*
Sept. 24, 2007	First complaint filed	
N/A	Preliminary objections filed to first complaint	
Oct. 9, 2007	Second complaint filed as of course	
N/A	Preliminary objections filed to second complaint	
Nov. 16, 2007	Motion considered; Preliminary objections sustained	Second complaint dismissed; 90 days granted to file amended complaint
Jan. 31, 2008	Third complaint filed	

[103] Pa. R. CIV. P. 1028(c)(1).

[104] Belmont Fin. Servs. Group, Inc. v. Hawkins, No. AR07-010035 (Pa. Ct. Com. Pl. 2008), *available at* http://www.consumerlaw.org/unreported/content/Belmont.pdf.

[105] *Id.* at 1-4.

[106] *Id.*

Date	*Action*	*Result*
N/A	Preliminary objections filed to third complaint	
Apr. 25, 2008	Motion considered; Preliminary objections sustained	Third complaint struck; 30 days granted to file amended complaint
May 21, 2008	Fourth complaint filed	
N/A	Preliminary objections filed to fourth complaint	
July 24, 2008	Motion considered; Preliminary objections sustained	Case dismissed with prejudice (11 mo. after first complaint filed)

The interstitial discussion in *Belmont* matters little, save for the fact that common errors (failure to append terms and conditions, insufficient account summaries, etc.) and common parties (The Sagres Company) are present.[107] Importantly, *Belmont* confirms the suspicion that collection companies, when suing as plaintiffs, typically do not have all of the documents required to exact their claim. In the creditor line of succession, Fleet Bank beget Bank of America, which beget The Sagres Company, which beget Global Acceptance Credit Company, which beget Belmont Financial Services.[108] The account statements, contracts, and other records were lost in this tangle of assignors and assignees. To overcome its lack of proof, Belmont relied upon the "latter provision of Rule 1019(i)": "if the writing or copy is not accessible to the pleader, it is sufficient so to state, together with the reason, and to set forth the substance in writing."[109] The purpose of Rule 1019(i) is to "permit a party to proceed where the writing is in the possession of an opposing party . . . or to proceed with a claim where the writing is unavailable if the party can state the contents of the writing from his or her own recollection."[110] However, Belmont neither saw nor had any recollection of the relevant writings, so it could not describe the terms and conditions; thus, rendering the latter portion of Rule 1019(i) inapposite.[111] Unable to locate and submit the proper papers, Belmont's case was dismissed with prejudice.[112] The value to the defendant-debtor: a savings of $10,731.73.[113]

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[107] *Belmont*, No. AR07-010035, at 1-6.
[108] *Id.*
[109] *Id.* at 6-7.
[110] *Id.* at 7.
[111] *Id.*
[112] *Belmont*, No. AR07-010035, at 8.
[113] *Id.*

B. Amendments and Repeat Errors

Partly, *Belmont* is a germane case because it shows that plaintiff-creditors usually cannot correct their initial complaint, even after three tries, but the case is also important because it contains repeat parties. Recall *Remit*, in which we first met The Sagres Company, which reappeared in *Belmont*. Or, more obviously, Worldwide Asset Purchasing, the plaintiff the case discussed in detail in § III above that bears the same name, which files objectionable complaints to this day—e.g., case 8 in Chart 1 above. Not only is the cast of creditors repetitive in Allegheny County, where the courthouse sees the same lawyers representing the same collection agencies, but also some of those creditors have filed objectionable complaints in other counties and states. For example, counsel for LVNV has filed incomplete pleadings in Allegheny County and Lebanon County in Pennsylvania, and in courts as far away as Florida.[114] Even if the plaintiff is not a usual suspect, the pleading errors in pleading that it makes are often comparable. Philadelphia County debtors experience the same problems with creditor filings that Pittsburgh debtors do.[115]

C. Frequency of Objectionable Pleadings

How many motions regarding credit card pleadings are considered in Pennsylvania each year? That number may be inestimable because many cases end at the district justice level, NLSA handles only a portion of all credit card cases, and the necessary docket searches are well beyond the scope of this paper. However, consider these numbers: approximately 15 credit card

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[114] *See* cases 12-14 in Chart 1, *supra* § II.C; LVNV Funding LCC v. Theurer, No. 2008-01509 (Pa. Ct. Com. Pl. Feb. 2, 2009) *available at* http://www.consumerlaw.org/unreported/content/Theurer_Opinion.pdf (order granting leave to file a third amended complaint); LVNV Funding L.L.C. v. Matthews, No. 2007-SC-006135 (Fla. Duval County Ct. 2007) *available at* http://www.consumerlaw.org/unreported/content/Matthews.pdf; *and* LVNV Funding L.L.C. v. Moehrlin, No. 2006-10917-CODL (Fla. Volusia County Ct. 2006) *available at* http://www.consumerlaw.org/unreported/content/Moehrlin.pdf. Several other cases from Florida can be found in Murphy, *supra* note 1, at 13. Also, note that Murphy's lecture originally was presented to Volunteer Legal Services in California. Surely, this procedural problem in credit card cases vexes defendant-debtors on both coasts.

[115] *See* Unifund CCR Partners, No. 2008-3966, at 7-8 (third amended complaint dismissed without further leave to amend).

motions are considered in motions court each Friday in Allegheny County[116], there are about 45 Fridays per year on which motions are heard, 1.2 million people live in Allegheny County, and 12.5 million people live in Pennsylvania.[117] Ignoring the fact that Allegheny County has a large student and elderly population, which means that the county's population might experience a higher rate of credit card default than other counties, Allegheny County represents roughly 10% of Pennsylvania's population. Is it possible that, based on the numbers from Allegheny County, Pennsylvania courts entertain at least 6,750 credit card motions each year? Maybe so: two lawyers at NLSA claim to have handled approximately 200 credit card cases in the past three years, and each of those cases required 2 or 3 motions apiece to resolve. When you consider the fact that, 6,750 means that only .054% of the population will go through a credit card motion each year, it does not seem like an outrageous number in terms of magnitude. But when you contemplate the effect on the state's dockets, 6,750 motions per year is a significant figure—and those are only the credit card cases in which preliminary objections are filed.

Perhaps it would be salient to illustrate the incidence of preliminary objections to credit card complaints with an anecdote.[118] In Allegheny County, objectionable pleadings are filed so often in credit card cases that the lawyers for NLSA and plaintiff-creditors know exactly what will happen when preliminary objections are filed. They have been through this process before with countless objectionable complaints. When their case is called at the motions hearing on Fridays, the judge stares at the order attached to the defendant-debtor's preliminary objections and asks: "Is 120 days alright for both of you?" Without argument, the opponents nod or state their agreement, part ways, and wait to receive a copy of the order granting an amendment, so that they can return and perform the same dance a few months later. The improper pleading strategy of plaintiff-creditors has become pedestrian to all because of its frequency,

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[116] More than 15 motions might be heard in Allegheny County each Friday if NLSA could handle more cases or if pro se or represented defendants filed preliminary objections more frequently.

[117] U.S. Census Bureau, State & County Quick Facts, http://quickfacts.census.gov/qfd/states/42/42003.html. (last visited Oct. 18, 2009).

[118] I personally experienced this phenomenon as a Certified Legal Intern for NLSA in my first appearance in court in the fall of 2008.

much to the shock of law students who are drilled in pleadings practice and instructed to never file a useless piece of paper in a court.

After reflecting upon the ubiquity and frequency of problem pleadings in credit card cases, we are left with the following: the same lawyers and creditors repeatedly make identical errors in every county, in numerous states, and even in the same litigation. Before we can determine why this happens, we must ascertain who is filing objectionable complaints and what the outcomes are for their cases.

V. Quantifying the Pleadings: Who Fares Better, Original or Secondary Creditors?

I analyzed a sample of 98 credit card cases, which transpired between March 2006 and April 2009, from the files of an NLSA lawyer.[119] The results, for the most part, were unforeseen. Not surprising, however, was the fact that, once NLSA or a pro-se defendant filed an appropriate set of preliminary objections in a credit card case, the creditor usually obtained nothing. Examine Chart 3[120]:

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[119] The complete list of cases is attached as Appendix A.

[120] Here is a list of the terms used in the charts with their definitions: 1) "Amendment to come": preliminary objections sustained and court granted an amendment that has yet to be filed; 2) "Preliminary Objections to be Decided": preliminary objections were filed, but have not been decided yet; 3) "Voluntarily Discontinued without Prejudice": plaintiff-creditor discontinued the case and has not re-filed yet; 4) "Judgment of Non Pros": court dismissed case for failure to file a complaint or for two years of inactivity in the case; 5) "Dismissed with Prejudice": court dismissed the claim and it cannot be re-filed; 6) "Award for Defendant": court granted the defendant-debtor an award on its counterclaim against the plaintiff-creditor; 7) "Settled": the case settled outside of court; and 8) "Creditor's Attorney Withdrew": this particular case stalled when the creditor's attorney withdrew from the case, and the case has not been decided.

Chart 3: Results of an NLSA Attorney's Preliminary Objections (Mar. 2006 – Apr. 2009)

Result of Preliminary Objections	Total
Amendment to come	23
Judgment of Non Pros	1
Voluntarily Discontinued without Prejudice	30
Award for Defendant	1
Preliminary Objections to be Decided	2
Dismissed with Prejudice	37
Settled	3
Creditor's Attorney Withdrew	1
Sum	98

In terms of overall performance, only 3 (3.06%) cases ended in settlement (2 for original creditors and 1 for a secondary creditor); 55 (56.12%) of the cases are in the preliminary objection (2) or amendment phase (23) or were voluntarily discontinued without prejudice (30); 39 (39.8%) of the cases ended in final decisions against the creditor with prejudice.[121] If we assume that the creditors will win all of the cases currently pending, and we assume that the voluntarily discontinued cases will not be re-filed before the statute of limitations runs, then creditors will have failed in 70.4% (69) of the cases. However, given the record of the cases that have gone through rounds of preliminary objections, it unlikely that a high percentage of the remaining 55 cases will ever result in victory for the creditors. The numbers become more striking when you compare the results of cases filed by original creditors against those filed by secondary creditors. Look at Chart 4:

Chart 4: Original Creditors Versus Secondary Creditors

Results	Original Creditors	Secondary Creditors
Amendment to come	11	12
Judgment of Non Pros	0	1
Voluntarily Discontinued without Prejudice	9	21
Award for Defendant	1	0
Preliminary Objections to be Decided	1	1
Dismissed with Prejudice	16	21
Settled	2	1
Creditor's Attorney Withdrew	1	0
Sum	41	57

[121] These numbers do not include the single case in which the creditor's attorney withdrew.

On the whole, original creditors,[122] filed a lower percentage of cases, 41.84% (41), but those cases resulted in a higher percentage of dismissals, 39.02% (16); cases filed by secondary creditors resulted in dismissals 36.84% (21) of the time. If we eliminate the cases that are still active (11 for original creditors; 12 for secondary creditors), original creditors had 53.33% of their cases dismissed, and secondary creditors had 46.67% of their cases dismissed. These percentages suggest that original creditors are more likely to have their case dismissed than secondary creditors.

When we examine voluntary discontinuances, secondary creditors are more likely to select that route: secondary creditors have discontinued 36.84% (21) of the cases so far; while original creditor have discontinued only 21.95% (9) of their cases so far. These numbers might suggest that original creditors are more confident about their cases going forward, and believe that they can succeed with the information that they have; however, their higher rate of dismissals should convince them otherwise.

In total, 63.41% (26) of the original creditors' cases are out of court or ended in "losses," either through dismissals (16), voluntary discontinuances (9), or awards for the defendant-debtor (1) (one lawyer's withdrawal from the case was not considered). Only 2 (4.88%) cases ended in settlement, only 1 (2.44%) case's preliminary objections have not been decided, and 11 (26.83%) pleadings are left for original creditors to amend. As for secondary creditors, 75.43% (43) are out of court or ended in "losses," either through dismissals (21), voluntary discontinuances (21), or judgments of non pros (1). Only 1 (1.75%) case ended in settlement, only 1 (1.75%) case's preliminary objections have not been decided, and 12 (21.05%) pleadings are left for secondary creditors to amend.

It may appear that secondary creditors have a lower success rate overall, given that 75.43% of their cases are "out of court" and 63.41% of original creditors' cases are "out of court," but it is crucial to distinguish between terminations that result in prejudice and those that do not. When we count the cases that are "final loses," meaning that no future filings will be permitted, 41.46% (16 dismissals + 1 award for defendant-debtor) of original creditors' cases and 38.6% (21 dismissals + 1 judgment of non pros) of secondary creditor's cases fall into this category. Stated

[122] Capital One filed 31.63% (31) of the cases overall, which represented 75.61% of the original creditor cases.

otherwise, 59.65% (21 discontinuances + 12 amendments + 1 in preliminary objections) of the secondary creditors' cases may still succeed, but only 51.23% (9 discontinuances + 11 amendments + 1 in preliminary objections, not including one attorney's withdrawal) of original creditors still have hope for their cases.

It is debatable whether the "out of court" analysis or the "final losses" analysis is the better indicator of which type of creditor, original or secondary, is better prepared. One could suggest that the "out of court" figure, which seems to favor original creditors, is the stronger indicator because, once a case is voluntarily dismissed, it is not likely to be filed again—at least not successfully. On the other hand, one could argue that the "final losses" figure, which seems to favor secondary creditors, is the stronger indicator since secondary creditors have more cases that they conceivably could win in the future. Regardless of these overall numbers, the fact that a higher percentage of outright dismissals have occurred in original creditor filings suggests that original creditors are just as likely, if not more likely, to file improper pleadings and to be unable to cure the defects of their pleadings.

These results are shocking in the sense that practitioners universally hypothesized that secondary creditors would experience more dismissals because they would not have as easy a time rounding up the documents necessary to file unobjectionable complaints. To the contrary, these percentages indicate that all creditors file objectionable pleadings at the outset and that original creditors are just as likely, if not more likely, to have their case dismissed as secondary creditors.

Granted, all of these numbers could be skewed because we have no knowledge of how many cases are resolved at the magisterial level and never make it to the trial court level, nor do we know how often debtors consent to their debts or settle outside of court. But what we do know is that creditors are unsuccessful overall against preliminary objections. So, why do plaintiff-creditors continue to file objectionable complaints? And why do original creditors, who presumably generated the documents necessary to override defendant-debtors' preliminary objections, fail just as often as secondary creditors in amending their complaints?

The answers to those queries must be analyzed at two different steps: 1) at the time the creditor files its initial complaint; and 2) after preliminary objections and the first opportunity to amend the complaint.

VI. Practical Considerations: Why do Plaintiff-Creditors File Improper Complaints?

There are three key reasons why plaintiff-creditors file improper complaints: A) it is more profitable to file hundreds of improper, form complaints than it is to take the time to gather the proper documents and file acceptable complaints; B) amendments are liberally granted, both in number and period; and C) neither the original nor secondary creditors have access to the documents required to file a proper complaint.[123]

A. Initial Complaints: the Economics of Filing a Credit Card Case

At first glance, it appears as if credit card cases are filed hastily—everything that is required to overrule a typical set of preliminary objections is missing. It is likely that plaintiff and counsel determine together that it is not worth the time to gather and append the defendant's account records if it is possible to obtain a default judgment or if the defendant will not contest the debt. Indeed, many lawyers for plaintiff-creditors file complaints based on forms that they have drafted for credit card cases. We know this because NLSA lawyers utilize their own preliminary objection forms that they specially tailor to the form complaints of individual lawyers. A plausible reason for the form filings is that it is more profitable to file hundreds of improper complaints than to spend the time to gather the proper documents and file unobjectionable complaints in fewer cases.[124]

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[123] It is possible that other factors might be present, but it is doubtful. One might argue that plaintiffs-creditors, which own debtor accounts in multiple jurisdictions, cannot be expected to know how to properly plead or what documents will be required in each state. However, this factor is mitigated by the fact that creditors usually hire local counsel, who presumably understand local practice, to file their claims, and those practitioners can be charged with knowing how to draft a passable claim with supporting documentation. After all, most plaintiff-creditors are repeat customers of our local courts. In addition, it is unlikely that the statute of limitations drives these incomplete filings. In the cases cited in this paper, nearly all of the claims were filed within two to three years of the debtors' default—well within the four-year statute of limitations for contractual claims. 42 PA. CONS. STAT. ANN. § 5525(a)(1) (2002).

[124] The consistent pleading practices of plaintiff-creditors must be economically efficient or they would not act as they do. As mentioned earlier, Unifund CCR Partners believes that the "collection agency industry is extremely efficient at soliciting payment from debtors. *See* Vendor Member Spotlight, *supra* note 11. Unifund "considers itself a researcher of debtor data

If creditors are unsuccessful against preliminary objections at a high rate, then they must be successful outside of the preliminary objection process: settlements, consented debts, default judgments, cases won at the magisterial level that are not appealed, cases won against debtors who do not file preliminary objections, or cases that NLSA never handles because the person is not within their representation limits or never calls for assistance. Otherwise, it would not be worth the time and expense of going to court so often if they lost every time on preliminary objections, especially if they could increase the number of judgments obtained by filing a proper complaint initially. Consequently, the original creditor's calculation must be incredibly complicated, tabulating, among other factors:

1. the cost of retaining, organizing, and storing the debtor's account files;
2. what percentage of accounts will end up in default;
3. what percentage of debts will be settled;
4. what percentage of debts will be consented to;
5. what percentage of cases will be won at the magisterial level and not appealed;
6. the cost to determine if a debt is collectable prior to instituting a lawsuit;
7. what percentage of all account debts can be recouped through sales to secondary creditors;

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for the benefit of the creditor... [o]nly with this additional information does [Unifund] believe the collection opportunity is enhanced...Unifund's buyers are mindful of the fact that acquired portfolios have a much longer life than collection agency placements. Buyers use this time-enhancement to affect collection on broader scope of accounts by incorporating a wider array of liquidation strategies. These strategies range from standard telephonic collections to legal departments, refinance departments, coordination with credit counselors and consolidators, to spending more money and time reviewing the nature of the debtors within a given portfolio. *These principles of purchasing debt allow greater recovery than is otherwise attainable through normal collection channels* by virtue of controlling the account. Debt purchasing allows the collector to become the creditor and act on all the ideas collectors would implement if they owned their accounts or were the original creditor." *Id.* (emphasis added). Since secondary creditors purchase debt portfolios that are designed to maximize the efficiency of collecting on debtor accounts, it is likely that creditors strive to maximize the efficiency of the collection process through other means. If that is true, then it is likely that creditors file barebones complaints because it is more profitable than filing unobjectionable complaints.

8. the potential costs associated with and income from transferring account documents to secondary creditors;
9. the cost of filing claims with proper documentation versus the cost of filing claims without proper documentation;
10. the success rate of cases in which preliminary objections are filed;
11. the percentage of cases in which preliminary objections are filed;
12. the amount of time courts grant for amendment and the number of amendments permitted;
13. the chance that the creditor can locate the proper documentation within the bounds of the amendment period(s);
14. the percentage of debtors who are eligible for assistance from NLSA or other legal services organizations;
15. the cost of collecting a debt after a judgment is obtained;
16. what are the chances that a particular debt is collectable.[125]

So far, the creditors' calculation has led them to believe that it is more profitable to continue to file objectionable complaints and ignore procedural rules and case law.

B. Amendments are Liberally Granted in both Number and Period

Courts must brook a certain amount of amendments as a matter of law.[126] By liberally granting amendments, courts provide incentive to plaintiff-creditors to file skeletal amendments on their first try, allowing them to save money on lawyer's fees and locating and reproducing the account documents. Furthermore, since courts do not mandate that a creditor file with the account documents at the outset, creditors can file an objectionable complaint in hopes that the debtor is not procedurally savvy enough to file preliminary objections within 20 days and either files an answer or allows a default judgment.

If a defendant-debtor files preliminary objections, the court will permit the plaintiff-creditor to amend its filing at least two times, making for a veritable three-strikes-and-you're-out

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[125] For instance, while a creditor can file a lien against marital property owned jointly by a husband who defaulted on a credit card and had a judgment entered against him, the creditor cannot execute on the judgment against the property. *See* Klebach v. Mellon Bank, N.A., 565 A.2d 448, 450 (Pa. Super. Ct. 1989). Or, the debtor may be collection-proof because his economic status makes him exempt from execution on a judgment or he has the ability to file for bankruptcy.

[126] *See Framlau Corp.*, 299 A.2d at 337.

policy.[127] The creditor can tolerate an objection-amendment war of attrition; the debtor may not be able to or want to wade through a year of motions practice to succeed on her preliminary objections. The court's exercise of discretion to grant multiple amendments has merit and is required by case law and the procedural rules, but it has the unintended consequence of playing into the hands of creditors.

Courts grant long periods for each amendment because they believe that they should give creditors and their lawyers sufficient time to gather the account records. This decision is based on two assumptions: 1) most cases are filed by secondary creditors that do not receive the records when they buy the account; and 2) that creditors, original or secondary, can gather the documents if they are granted long periods for amending. The first assumption is true, but the second is false. In fact, once you recognize that the second assumption is false, the reason for the first assumption becomes self-evident. As discussed in § VI.C below, no one has the papers related to the debtor's account. Consequently, there is no reason to grant protracted amendment periods. All the 120-day order does is incentivize creditors to file objectionable complaints at the outset. And though it seems like an equitable grant of an extension to creditors, it ignores the fact that plaintiff-creditors are on notice of their pleading obligations through the procedural rules and case law. As shown in Appendix A below, many creditors are repeat customers of the courts and should not need long amendment periods to correct mistakes that they have made numerous times.

C. Failure to Amend: Where are the Debtor's Account Documents?

Unlike most plaintiffs who typically can reformulate their pleadings within 20 or 30 days, credit card plaintiffs are given 90 or 120 days to amend their initial complaint. Courts do this because they (correctly) assume that the plaintiff-creditor, who often is not the original creditor (58.16% of cases were filed by secondary creditors), usually do no obtain the defendant's files at the time of the account transfer, which is also true.[128] The

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[127] Fortunately, most courts will permit a defendant to stand on its preliminary objections if the defects of the last complaint are not cured in the next iteration.

[128] "In a typical debt purchase, the credit will sell only 'information' – e.g., the name and address of the debtor, the account number and the account

problem is that secondary creditors cannot obtain the account files from original creditors and frequently have their case dismissed (36.84%) or voluntarily discontinue their case (36.84%). Ironically, as Chart 4 evinces, original creditors have their cases dismissed at an even higher rate (39.02%). The only explanation for this previously unpredicted evidence is that the original creditors do not have the debtor's account records either. Secondary creditors and original creditors alike cannot amend their complaints to survive preliminary objections because no one retains the proper documents after the credit card application is signed and accepted.

In the end, the answer to both questions at the end of § V above: "why do creditors file improper complaints" and "why do creditors fail to amend their complaints," is the same. The original creditor does not have the account documents at the outset, which means that it would be impossible for either the original or the secondary creditor to locate the required documents during the amendment period. But the answer in § VI.A above—that creditors perform a cost-benefit analysis before filing complaints and determine that it is more cost-effective to file a barebones complaint than to gather the account documents—is partly correct. Certainly, the source of the problem is that creditors do not retain the account documents, but that occurs because either the original creditors know that they can profit on debt collections without retaining the records or that the cost of retaining the documents is too high (or some combination thereof). So, when debtor accounts are sold to assignees, the costs of the account transfers are lower without the records. The unavailability of the documents is of no importance to assignees because they, like assignors, understand that they can earn greater profits in collections by not wasting finances on document retention. Therefore, original creditors must have determined that it is more cost effective to not keep thorough records and collect on some debts than to utilize meticulous recordkeeping and ensure that all debts are repaid.

Now that we understand the causes of dilatory tactics in credit card cases, what can be done to stop plaintiff-creditors from filing objectionable complaints?

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balance." Murphy, *supra* note 1, at 13. Formerly, "information was sold with the debt package in electronic form such as a C.D. or magnetic tape." *Id.* Now, "the information is typically downloaded by DSL directly into the computer system of the debt buyer," who "does not acquire any back-up documentation, including account agreements, account statements and the like." *Id.*

VII. Proposed Solutions

The following suggestions, if utilized separately or in any combination, could transform the landscape of credit card cases in Pennsylvania and other jurisdictions. It is essential to determine what can be done legislatively and procedurally statewide, locally in the courts, and within the parameters of individual cases. Accordingly, I have made proposals from soup to nuts.[129]

A. Legislation

In Pennsylvania, the Supreme Court prescribes the rules of procedure, but the substantive law can be affected by the legislature. Legislation, just like procedural rules, can be utilized to: 1) decrease the number of credit card cases that are filed by plaintiffs who do not have the requisite proof of default or account ownership; and 2) expedite these cases. To realize these goals, the legislation would have to target the fountainhead of the improperly filed complaints: the decision of original creditors to not retain important debtor account documents and the inability of assignees to obtain those records when the account is purchased on the secondary credit market.

The reason that plaintiff-creditors file improper complaints at the outset of a lawsuit and need months to amend their complaint is that they do not have the necessary proof. As discussed in § V-VI above, when the original owner of a credit card consumer's account sells its interest in the account to a secondary creditor, the original creditor probably does not have the account records and, therefore, likely will not transfer those records to the secondary creditor when the account is sold.[130] To combat this problem, any legislation would need to regulate the initial creditor-debtor relationship, to ensure that the account documents are kept, and to control the sales of debtor accounts on the secondary credit market.

One proposal could be as simple as this: 1) require that all

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[129] Some of these proposals were generated during brainstorming sessions with NLSA attorneys.

[130] This problem also occurs in mortgage foreclosure proceedings since the secondary mortgage market is possibly more convoluted than the secondary credit market. *See* Greg Allen, *All Things Considered: Missing Mortgage Notes Delay Some Foreclosures*, NPR, Mar. 10, 2009, *available at* http://www.npr.org/templates/story/story.php?storyId=101665800.

original creditors retain and store each debtor's account documents (a copy of the original signed credit card application, the applicable terms and conditions, any changes in terms and conditions, dates/amounts of charges made by debtor, and dates/amounts of interest/fees accrued) upon formation of the credit extension relationship; 2) require that all documents related to: a) credit card contract/application, b) original and later terms and conditions, and c) the assignment of the account must be transferred with any debtor account sale; 3) require written notice to be sent by U.S. Mail to any debtor whose account is sold within 30 days of the transfer; and 4) require that, if a creditor fails to obtain all of the necessary documents, then the transfer is ineffective and the assignee has no right to sue for the debt.

Indeed, creditors would raise Cain over any such proposal and lobby strongly against it. Nevertheless, our federal and state governments compel document retention in many sectors of business and these laws have been effective in the past. This policy might ensure that plaintiff-creditors could file proper complaints at the outset of a case, which would relieve some of the strain that credit card cases place on our dockets. Possibly, the document retention plan would increase the costs for creditors initially, but those costs would be offset by more victories for them in the courtroom. Regrettably, however, this legislation would lead to fewer dismissals in favor of the clients of NLSA. All things considered, legislation is not the best-laid plan.

B. Mandatory Arbitration for Credit Card Cases with Strict Filing Requirements

Ideally, with the multitude of credit card cases being filed—and there is no doubt that this number will increase steadily in and beyond this recession—the best answer is to streamline the judicial system to dispose of these claims rapidly and fairly. The flood of credit card cases could be diverted from its traditional course through the courts and sluiced into a specially-created arbitration pool. A law could be enacted or procedural rule could be adopted to require that credit card cases must be filed with a special board of arbitrators, which would consider cases once per week in each county. Instead of allowing cases to be filed with the local magistrate or in the Court of Common Pleas, mandatory arbitration would act as a filter, hearing meritorious claims and dismissing claims that do not have supporting documentation. As a prerequisite, a creditor

would have to file the proper documentation with its claim at the outset or its case would not be considered by the arbitrators and would be dismissed without prejudice. Of course, once the case was decided by the arbitrators, each party would have a right to appeal to the Court of Common Pleas, and a new complaint would have to be filed.[131] However, by demanding that creditors file the proper paperwork before their case is even considered by the arbitrators, the Court of Common Pleas would not have to worry about a year-long period of preliminary objections and amendments, and could concentrate on the evidence and legal arguments presented at trial. This simple restructuring would decrease the demand on the judicial resources of the central court system and bar collection cases brought against debtors without proper documentation.

C. Local and Statewide Procedural Rules for Credit Card Cases

The easiest solution of all would be for local judges to change their practice, which is a three-strikes-and-you're-out policy.[132] Arguably, the attorneys for creditor plaintiffs should know the requirements for filing a valid complaint in a credit card case and repeat filers should know what documents are required to avoid objection—yet they continue to file objectionable complaints. If courts want to deter improper filings that waste everyone's time, they could limit the number of amended complaints permitted or the length of time granted for amendments. Since parties generally have a right to amend at least two times in any case, and since a court cannot keep track of which plaintiff-creditors or lawyers repeatedly file unsubstantiated claims, the best action for the court would be to decrease the period permitted to file amended complaints: cut the first amendment period from 120 days to 90 days and the second amendment period from 30 to 20 days.

Another possibility is to issue a local rule, similar to those found in Ohio,[133] mandating that plaintiff-creditors cannot file

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[131] A provision could be included to permit cases over a certain value, perhaps $25,000, to be filed originally in the Court of Common Pleas.

[132] One original complaint plus two court-sanctioned amended complaints (plus any number of self-amended complaints or voluntary discontinuances, which do not count against the total).

[133] For example, the local rules adopted for Ohio R. CIV. P. 10(D) in Circleville, Ohio. *See* Circleville Municipal Court, *Case Management in Civil*

their cases without the account documents. So far, Pennsylvania judges have decided against adding a gate-keeping measure out of fairness to creditors, who, like all plaintiffs, have a right to amend under the Pennsylvania procedural rules. However, if creditors were forced to file passing pleadings at the outset, it might force them to reconsider their approach to document retention and pleadings practice.

Commensurately, the Supreme Court could promulgate similar rules specifically targeting credit card cases. It is unlikely that the problem of vexatious credit card filings, although prevalent, would draw the attention of the highest court or its rules committees without a significant amount of lobbying. Therefore, any procedural change should be implemented at the local level until a higher court checks their activity.

D. Sanctions for Dilatory Filings and Repeat Offenders Within Each Case[134]

Even though NLSA cannot seek sanctions against an opponent, this does not limit pro se plaintiffs from seeking sanctions[135] or the court from meting out penalties.[136] Sanctions could deter an individual plaintiff-creditor and its attorney from repeating their actions and could convince plaintiff-creditors and their attorneys that courts will no longer tolerate their dilatory practices.

Every pleading must be "signed by at least one attorney of record . . . or, if the party is not represented by an attorney, [it] shall be signed by the party."[137] The signature "constitutes a certificate that the signatory has read the pleading."[138] "By signing, filing, submitting, or later advocating such a document, the attorney or pro se party certifies that, to the best of that person's knowledge, information and belief" the pleading "is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of

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Cases, Aug. 27, 2008, *available at* http://www.circlevillecourt.com/PDFDirectory/casemgmtcivil.pdf.

[134] Published cases concerning sanctions for dilatory tactics are rare in Pennsylvania, and not one of those cases relates in any way to credit card cases in specific or dilatory pleading tactics in general.

[135] Pa. R. CIV. P. 1023(2).

[136] Pa. R. CIV. P. 1023(3).

[137] Pa. R. CIV. P. 1023.1(b).

[138] Pa. R. CIV. P. 1023.1(c).

litigation."[139] In credit card cases, the sanctionable effect of objectionable pleadings is that they inject unnecessary delay into the proceedings since plaintiff-creditors could file passable complaints on the first or second try. "If, after notice and a reasonable opportunity to respond, the court determines that [1023.1(c)(1)] has been violated," by a party filing a pleading to cause unnecessary delay, "the court may . . . impose an appropriate sanction upon any attorneys, law firms and [parties].[140] The sanctions imposed could include: striking the pleading (dismissal) or a portion of the pleading (claims for interest or payment of costs or attorney's fees).[141] Alternatively, utilizing 42 Pa.C.S. § 2305(7) "empowers courts to require a party to pay another participant's counsel fees when a party's conduct during the pendency of the action is vexatious, obdurate or dilatory."[142]

It is unlikely that sanctions are available after a defendant-debtor succeeds on its preliminary objections to a plaintiff-creditor's complaint. The comments to Rule 1023.1(d) make it clear that the "grant or denial of relief," for example the "grant or denial of preliminary objections," "does not, of itself, ordinarily warrant the imposition of sanctions against the party opposing or seeking the relief." Moreover, courts cannot be expected to log plaintiff-creditors that repeatedly file unsubstantiated credit card complaints, and defendant-debtors, who are often unrepresented, cannot be expected to know how to file for sanctions. Therefore, it is unlikely that sanctions can be utilized to deter dilatory tactics in credit card cases.[143]

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[139] Pa. R. CIV. P. 1023.1(c)(1).

[140] Pa. R. CIV. P. 1023.1(d).

[141] Pa. R. CIV. P. 1023.4.

[142] Kulp v. Hrivnak, 765 A.2d 796, 799 (Pa. Super. Ct. 2000) ("Any award of counsel fees pursuant to [§ 2503(7)], however, must be supported by a trial court's specific finding of such conduct.").

[143] Without providing any further detail, NLSA lawyers assured me that defendant-debtors and their attorneys have tried to obtain sanctions against plaintiff-creditors and their counsel in similar cases and have failed. Rather than seeking sanctions, NLSA suggested filing a class action lawsuit to a federal court enjoin plaintiff-creditors from violating the due process rights of defendant-debtors. This proposal likely would be rejected since federal courts dislike telling state courts what to do unless there is a clear procedural due process violation.

E. Disciplinary Action for Contraventions of the Rules of Professional Conduct

Like all states, the Pennsylvania Rules of Professional Conduct demand that "[a] lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."[144] Rule 3.2's comment is insightful:

> Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

In credit card cases, attorneys for plaintiff-creditors routinely fail to expedite litigation solely for the purpose of financial gain or other benefit from delay tactics. Plaintiff-creditors and their attorneys regularly file incomplete complaints to save their own time and money, while wasting the time and money of the opposing party, its lawyer, and the county's other lawyers whose arbitration and motion dockets are swollen with credit card cases. Therefore, the Disciplinary Board of the Pennsylvania Supreme Court might consider complaints against repeat offenders lodged by parties, lawyers, or courts for Rule 3.2 violations.

In the mortgage foreclosure context, which is similar to the credit card case milieu, Ralph W. Thorne was suspended for one year and one day because he filed 87 unverified answers for clients whom he had not met.[145] He obtained his cases in this manner: clients retained Foreclosure Solutions, LLC at $995, to attempt to negotiate a settlement of or refinancing for their mortgages; these cases were referred to Mortgage Helpers, Inc., which was paid $150, who then turned the case over to Thorne,

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[144] Pa.R. Prof. Conduct 3.2.

[145] In re Thorne, No. 155 DB 2006, at 1, 17 (Pa. 2007), *available at* http://www.aopc.org/OpPosting/disciplinaryboard/dboardopinions/155DB2006-Thorne.pdf.

who was paid $100 per case.[146] Thorne readily admitted that his job was to delay the foreclosure process for as long as possible so that "mortgagors could attempt to negotiate with the mortgagees, obtain alternative financing, or seek the protection of bankruptcy actions through other counsel."[147]

It is unlikely that a creditor's lawyer would follow Thorne's lead by divulging his or her dilatory intent in filing incomplete credit card pleadings; however, that should not dissuade others involved from alerting disciplinary authorities to this behavior. As *Thorne* demonstrates, disciplinary action for dilatory tactics under Rule 3.2 is possible and can be used to trip up the most egregious creditors' lawyers in the credit card pleadings dance.[148] Appendix A shows that that some firms file objectionable complaints so frequently that their dilatory actions arise to the level of *Thorne*. Unless some step is taken deter creditors' lawyers from engaging in or assisting in dilatory tactics, credit card cases will continue to be filed inappropriately. One public censure, ethics opinion, or suspension could capture the attention of the entire collection community.

F. A Website on How-To File Preliminary Objections to a Credit Card Complaint

A "how-to" website could aid pro se defendant-debtors, especially those that cannot turn to a free legal service organization. The website would have to be facile to navigate and located effortlessly by using a search phrase like: "what do I do if I received a complaint against me for credit card debt?" The website would have to be divided into jurisdictions, by state and then by county. For each jurisdiction and county, the website would list the deadlines for filings and how to proceed through the case, step-by-step. Additionally, for each jurisdiction and county, links could be posted to forms that include previously successful preliminary objections and motions to dismiss. Debtors could download the forms for printing, or fill out the forms online and print them, and be on their way to a successful defense.

Building a how-to website would take a lot of knowledge, preparation, and effort, but such a website could be a boon to

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[146] *Id.* at 2-4, 7.

[147] *Id.* at 17.

[148] Possibly, lawyers for creditors violate Rule of Professional Conduct 3.1, relating to meritorious claims and contentions, but Comment 2 to Rule 3.1 eliminates that theory.

defendant-debtors across the country, especially since the information could be accessed by anyone at a public library or home computer.

G. Do Nothing

Although improper pleadings in credit card cases are frustrating to defendant-debtors and dumfounding to judges, the current system does have some benefits: as seen in Chart 3, NLSA clients, often benefit from their creditor's inability to plead its case properly. The status quo has some merit, but it will not save our economy or prevent future credit consumers and courts from enduring interminable pleading periods.

With all of these suggestions in mind, where do we go from here?

VIII. Pragmatic Conclusions for the Future

Since concerns of job security, mortgage foreclosure, paying for indispensable food and utilities, and finding affordable healthcare weigh heavily on the mind of the average credit consumer, unsecured debt may not seem like a big-ticket issue. What consumers fail to recognize early enough (as many people who have lost a job have discovered recently) is that responsible spending is essential because the accumulation of credit card debt can be the fast track to a bankruptcy filing, home foreclosure, and the depletion of their life's savings. Knowing the spending habits of consumers, creditors capitalize on their inattentiveness and irresponsibility by charging exorbitant interest rates and late fees—the cost of doing business with high-risk clients, they claim. It is unlikely that these near-predatory business practices will change any time soon, even with the recent passage of the Credit CARD Act. If nothing will change at the front-end of the creditor-debtor relationship and if the market continues to flounder, then creditors are sure to file an increasing number of complaints against credit card debtors in the coming months, if not years. Therefore, something must be done to protect the procedural rights of defendant-debtors and reduce the pressure on our dockets at the back end.

As consumer debt inflates, most will be unable to hire a lawyer and the number of pro se plaintiffs will increase. Simultaneously, the demands on NLSA attorneys will rise,

leading to more individuals unrepresented in credit card cases.[149] Further exacerbating the problem is the fact that many of the judges who have been bastions of reform in credit card cases may be stepping aside within the coming years, and there is no telling whether future judges will stay the course. Someone will have to be there to shield defendant-debtors from dilatory tactics in the future, or someone must intercede to end these unethical pleadings practices now.

This paper reveals that undocumented creditor claims, which occur frequently all over the country, spring from a lack of record keeping. Contrary to what has been assumed for years, creditors do not need long amendment periods or multiple amendments to fix their complaints and track down debtor account records. In fact, creditors cannot fix their complaints by locating debtor account records at all because the records required to satisfy the procedural rules and case law are not kept at the outset. Consequently, original creditors are just as likely as a secondary creditor to fail in their collection claims when a debtor files preliminary objections. Unless something is done to make this collection method unprofitable in litigation, plaintiff-creditors will continue to vex defendant-debtors and our courts with dilatory tactics.

In assessing the solutions in § VII above, the best solution is multifaceted. In the short run, it may be possible to design a website that assists pro se defendant-debtors with filing preliminary objections, and to change the local practices of courts by limiting the length of amendment periods and the number of amendments. In the long run, we should establish a mandatory arbitration system in each county for credit card cases, requiring all credit card complainants to come to court with the correct records at the outset. That modification would alleviate the burdens on our judicial resources, decrease the demands on public legal services organizations, and, most importantly, ensure that defendant-debtors are protected from unsubstantiated claims, do not waste their time with a year's worth of motions

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[149] The only benefit to debtors in this recession is that creditors are becoming more amenable to settlement discussions. According to NLSA attorneys, creditors rarely offered to settle debts two or three years ago; now, they want to settle. Since NLSA has a high success rate on its preliminary objections, it has become harder for creditors to win cases and collect. Before they wanted 50% of the debt repaid up front or 75% repaid at a rate of $200 per month; presently, creditors willingly surrender interest and fees if they recoup the charges made on the credit card account.

practice to dismiss a lawsuit, and are not confounded by barebones complaints, which often lead to default judgments. The other institutional or societal responses suggested in § VII above, have downsides or roadblocks to their realization. State legislation is not likely to be enacted because the strong creditor lobby would overpower the weak public fervor for credit card case reform. Sanctions are disfavored, and ethics reproofs are rarely used to deter dilatory tactics. Therefore, we should: 1) develop a website to assist pro se defendant-debtors in filing preliminary objections; 2) seek ethical sanctions for attorneys that frequently file objectionable complaints; 3) abridge the number and length of amendments for credit card complainants; and 4) institute an arbitration system for credit card cases that requires claims to be filed initially with the requisite account records.

A decision not to change the current situation will be too taxing on our judicial and legal services organizations in the future. The status quo will benefit plaintiff-creditors (and their lawyers) and the handful of individuals who file preliminary objections, but few others. Without transforming in way that credit card cases are plead, countless consumers will be pushed one step closer to filing for bankruptcy because of the actions of plaintiff-creditors.

APPENDIX A:

Complete List of NLSA Attorney's Preliminary Objections Cases (Mar. 2007 – Apr. 2009)

Plaintiff	Original Creditor	Law Firm	Result
American Express	American Express	Marinos	Amendment to come
American Express Centurion Bank	American Express	Abrahamsen	Amendment to come
Applied Card Services	Cross Country Bank	Marinos	Voluntarily Discontinued without Prejudice
Arrow Financial	GE Capital Credit Corp.	Blatt, Hasenmiller, Leibsker & Moore	Voluntarily Discontinued without Prejudice
Arrow Financial	Oreck	Apothaker	Voluntarily Discontinued without Prejudice
Arrow Financial	Providian	Apothaker	Dismissed with Prejudice
Arrow Financial	Providian	Blatt, Hasenmiller, Leibsker & Moore	Voluntarily Discontinued without Prejudice
Arrow Financial	Sears	Mann Bracken	Amendment to come
Arrow Financial	Washington Mutual	Apothaker	Dismissed with Prejudice
Arrow Financial	Washington Mutual	Apothaker	Amendment to come
Arrow Financial	Wells Fargo Bank	Bracken	Preliminary objections to be decided

Plaintiff	Original Creditor	Law Firm	Result
Asset Acceptance	National City Bank	G&W	Amendment to come
Asset Acceptance	Kawasaki-HSBC	Abrahamsen	Dismissed with Prejudice
Atlantic Credit	Citibank	G&W	Dismissed with Prejudice
Atlantic Credit	HSBC	G&W	Dismissed with Prejudice
CACH	Providian	Reibstein	Dismissed with Prejudice
CACV	Chase	WWR	Voluntarily Discontinued without Prejudice
CACV	Chase	WWR	Voluntarily Discontinued without Prejudice
Capital One	Capital One	Apothaker	Dismissed with Prejudice
Capital One	Capital One	Apothaker	Voluntarily Discontinued without Prejudice
Capital One	Capital One	Apothaker	Dismissed with Prejudice
Capital One	Capital One	Apothaker	Dismissed with Prejudice
Capital One	Capital One	Apothaker	Voluntarily Discontinued without Prejudice
Capital One	Capital One	Apothaker	Amendment to come
Capital One	Capital One	Patenaude & Felix	Amendment to come
Capital One	Capital One	Patenaude & Felix	Voluntarily Discontinued without Prejudice

Plaintiff	Original Creditor	Law Firm	Result
Capital One	Capital One	Patenaude & Felix	Voluntarily Discontinued without Prejudice
Capital One	Capital One	Patenaude & Felix	Voluntarily Discontinued without Prejudice
Capital One	Capital One	WWR	Dismissed with Prejudice
Capital One	Capital One	WWR	Dismissed with Prejudice
Capital One	Capital One	WWR	Dismissed with Prejudice
Capital One	Capital One	WWR	Dismissed with Prejudice
Capital One	Capital One	WWR	Amendment to come
Capital One	Capital One	WWR	Amendment to come
Capital One	Capital One	WWR	Dismissed with Prejudice
Capital One	Capital One	WWR	Settled
Capital One	Capital One	WWR	Amendment to come
Capital One	Capital One	WWR	Dismissed with Prejudice
Capital One	Capital One	WWR	Dismissed with Prejudice
Capital One	Capital One	WWR	Dismissed with Prejudice
Capital One	Capital One	WWR	Dismissed with Prejudice
Capital One	Capital One	WWR	Amendment to come
Capital One	Capital One	WWR	Dismissed with Prejudice
Capital One	Capital One	WWR	Settled

Plaintiff	Original Creditor	Law Firm	Result
Capital One	Capital One	**WWR**	Amendment to come
Capital One	Capital One	**WWR**	Dismissed with Prejudice
Capital One	Capital One	**WWR**	Dismissed with Prejudice
Capital One	Capital One	**WWR**	Preliminary objections to be decided
Capital One	Capital One	**WWR**	Amendment to come
Citibank	Choice Gold	**Neil**	Voluntarily Discontinued without Prejudice
Citibank	Citibank	**Neil**	Voluntarily Discontinued without Prejudice
Colonial Credit Corporation	Metris Bank	**W&A**	Voluntarily Discontinued without Prejudice
Commonwealth Financial	Chase Manhattan	**Apple & Apple**	Dismissed with Prejudice
Commonwealth Financial	First USA Bank	**Abrahamsen**	Amendment to come
Commonwealth Financial	Metris Companies	**Apple & Apple**	Dismissed with Prejudice
CSGA	Household Card Services	**Bronson & Migliaccio**	Dismissed with Prejudice
Discover Bank	Discover Bank	**Apothaker**	Award for Defendant
Discover Bank	Discover Bank	**Berman**	Creditor's attorney withdrew from case
Discover Bank	Discover Bank	**WWR**	Amendment to come

Plaintiff	Original Creditor	Law Firm	Result
Discover Bank	Discover Bank	WWR	Voluntarily Discontinued without Prejudice
Elite Recovery Services	Capital One	Apothaker	Voluntarily Discontinued without Prejudice
Harvest Credit Management	Metris Bank	G&W	Dismissed with Prejudice
Hilco Receivables	Unknown	W&A	Settled
Homeq Servicing	Harvard Buildings, Inc.	Squire	Dismissed with Prejudice
Inovision	Chase Manhattan	G&W	Amendment to come
LVNV	Citibank	Apothaker	Dismissed with Prejudice
LVNV	Citi-Sears	Apothaker	Voluntarily Discontinued without Prejudice
LVNV	Citi-Sears	Apothaker	Dismissed with Prejudice
LVNV	Sears	Abrahamsen	Dismissed with Prejudice
LVNV	Sears	Apothaker	Amendment to come
LVNV	Sears	Apothaker	Dismissed with Prejudice
LVNV	Sears	Apothaker	Voluntarily Discontinued without Prejudice
LVNV	Sears	Apothaker	Amendment to come
LVNV	Sears	Apothaker	Amendment to come

Plaintiff	Original Creditor	Law Firm	Result
LVNV	Sears	**W&A**	Voluntarily Discontinued without Prejudice
LVNV	Sears	**Mann Bracken**	Voluntarily Discontinued without Prejudice
MBNA America Bank	MBNA America Bank, NA	**W&A**	Dismissed with Prejudice
Michaels, Louis, & Assoc.	Unknown	**Unknown**	Judgment of non pros
Midland	Aspire	**Apothaker**	Amendment to come
Midland Funding	Aspire	**Apothaker**	Dismissed with Prejudice
Midland Funding	Aspire	**Mann Bracken**	Amendment to come
National City Bank	National City Bank	**WWR**	Voluntarily Discontinued without Prejudice
Newportbury Capital	Metris	**Apothaker**	Voluntarily Discontinued without Prejudice
North Star	Capital One	**Apothaker**	Dismissed with Prejudice
North Star	Capital One	**Apothaker**	Voluntarily Discontinued without Prejudice
Palisades	Bank One	**W&A**	Voluntarily Discontinued without Prejudice
Palisades	Providian	**Apothaker**	Voluntarily Discontinued without Prejudice

Plaintiff	Original Creditor	Law Firm	Result
Palisades	Bank One	W&A	Voluntarily Discontinued without Prejudice
Pinnacle Credit Services	Sears	Apothaker	Voluntarily Discontinued without Prejudice
Platinum Financial Services	Direct Merchants	W&A	Voluntarily Discontinued without Prejudice
Portfolio Acquisitions	Household Card Services	Apothaker	Dismissed with Prejudice
Portfolio Recovery	Providian	Apothaker	Dismissed with Prejudice
Portfolio Recovery	Washington Mutual	Apothaker	Voluntarily Discontinued without Prejudice
RJM Acquisitions	Target National Bank Visa	Apothaker	Amendment to come
Target National Bank	Target National Bank	Patenaude & Felix	Voluntarily Discontinued without Prejudice
Unifund CCR Partners	Citibank	Abrahamsen	Dismissed with Prejudice
Unifund CCR Partners	Bank One Arizona NA	Abrahamsen	Dismissed with Prejudice
Unifund CCR Partners	Citibank	Abrahamsen	Amendment to come