

**DEFENSE OF DEBT BUYER AND OTHER COLLECTION
CASES**

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I. WHO IS BRINGING CASE: CREDITOR OR DEBT BUYER

- A. Creditors can sometimes prove their case; debt buyers usually cannot
- B. Debt buying is a fast-growing business. According to an industry group, the Debt Buyers Association: "The face value of all such debt sold in 1993 was \$1.3 billion. By 1997, that number had grown to \$15 billion and sales reached approximately \$25 billion in 2000. The Debt Buyers Association estimates that the amount of debt to be sold by the original creditors in 2002 will exceed \$60 billion." By 2007 the amount had risen to \$110 billion per year. Eileen Ambrose, "Zombie Debt; Debt Can Come Back to Haunt You Years Later," The Baltimore Sun, May 6, 2007 pg. 1C.

The Court is aware of how the market for the sale of debt currently works, where large sums of defaulted debt are purchased, by a small number of firms, for between .04 and .06 cents on the dollar. . . . The entire industry is a game of odds, and in the end as long as enough awards are confirmed to make up for the initial sale and costs of operation the purchase is deemed a successful business venture. However, during this process mistakes are made, mistakes that may seriously impact consumers and their credit. The petition at bar is a specimen replete with such defects and the Court takes this opportunity to analyze the filing in detail, in hopes to persuade creditors, not simply to take more care in dotting their "i"s and crossing their "t"s in their filings, but to assure a minimum level of due process to the respondents.

Why is this debt sold for such a cheap price? Certainly part of the reason is the poor prospects of payment these creditors expect from the defaulting individuals given their past delinquent payment history, while another part is undoubtedly to avoid additional costs associated with debt collection. Further yet, is the simple fact that the proof required to obtain a judgment in the creditor's favor is lacking, usually as a result of poor record keeping on the part of the creditor. .

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MBNA America Bank, N.A. v. Nelson, 15 Misc. 3d 1148A; 841 N.Y.S.2d 826 (N.Y.Civ. Ct. 2007).

Debt buyers purchase old debts, generally for pennies on the dollar (in some cases, for less than a penny on the dollar). They then try to enforce them against the consumer. Some of the larger debt buyers are:

Arrow Financial Services
Asset Acceptance
Asta Funding/ Palisades
Bureaus
CACV/ CACH/ Collect America
Cavalry
Credigy

Erin Capital Management
Fourscore Resource Capital
Great Seneca
Harris & Harris, Ltd.
Hilco Receivables, LLC
Hudson Keyse
Midland (Midland Credit Management, Midland Funding, etc.)
NCO
Oliphant Financial Corporation
OSI
Portfolio Recovery Associates/ PRA
PRS Assets
Resurgence
RJM Acquisitions
Sherman Financial Group (does business as LVNV Funding,
Resurgent Capital Services)
Unifund/ National Check Bureau
World Credit Fund

Some of these firms do their own debt collection, some use third party debt collectors, and some do both.

Several of these firms (Arrow, Asset, Asta, NCO, Portfolio Recovery) are publicly-traded companies, or subsidiaries of public companies.

C. Many debt buyers are abusive

1. In 2004, the Federal Trade Commission shut down a debt buyer called CAMCO headquartered in Illinois. The following is from a press release issued by the FTC in connection with that case.

. . . In papers filed with the court, the agency charged that as much as 80 percent of the money CAMCO collects comes from consumers who never owed the original debt in the first place. Many consumers pay the money to get CAMCO to stop threatening and harassing them, their families, their friends, and their co-workers.

According to the FTC, CAMCO buys old debt lists that frequently contain no documentation about the original debt and in many cases no Social Security Number for the original debtor. CAMCO makes efforts to find people with the same name in the same geographic area and tries to collect the debt from them – whether or not they are the actual debtor. In papers filed with the court, the FTC alleges that CAMCO agents told consumers – even consumers who never owed the money – that they were legally obligated to pay. They told consumers that if they did not pay, CAMCO could have them arrested and jailed, seize their property, garnish their wages, and ruin their credit. All of those threats were false, according to the FTC. . . . (<http://www.ftc.gov/opa/2004/12/camco.htm>)

2. Also in 2004, the FTC recovered a \$1.5 million civil penalty from debt buyer NCO. The FTC explained:

. . . According to the FTC's complaint, defendants NCO Group, Inc.; NCO Financial Systems, Inc.; and NCO Portfolio Management, Inc. violated Section 623(a)(5) of the FCRA [Fair Credit Reporting Act], which specifies that any entity that reports information to credit bureaus about a delinquent consumer account that has been placed for collection or written off must report the actual month and year the account first became delinquent. In turn, this date is used by the credit bureaus to measure the maximum seven-year reporting period the FCRA mandates. The provision helps ensure that outdated debts – debts that are beyond this seven-year reporting period – do not appear on a consumer's credit report. Violations of this provision of the FCRA are subject to civil penalties of \$2,500 per violation.

The FTC charges that NCO reported accounts using later-than-actual delinquency dates. Reporting later-than-actual dates may cause negative information to remain in a consumer's credit file beyond the seven-year reporting period permitted by the FCRA for most information. When this occurs, consumers' credit scores may be lowered, possibly resulting in their rejection for credit or their having to pay a higher interest rate.

The proposed consent decree orders the defendants to pay civil penalties of \$1.5 million and permanently bars them from reporting later-than-actual delinquency dates to credit bureaus in the future. Additionally, NCO is required to implement a program to monitor all complaints received to ensure that reporting errors are corrected quickly. The consent agreement also contains standard recordkeeping and other requirements to assist the FTC in monitoring the defendants' compliance.
(<http://www.ftc.gov/opa/2004/05/ncogroup.htm>)

3. In June 2004, Minnesota's attorney general sued two collection agencies that represent debt buyers, claiming that the companies used illegal tactics to coerce consumers into paying invalid debts. One repeatedly called innocent consumers despite requests to stop, while the other ignored written disputes filed by consumers.

D. The possibility that a debt buyer is suing on a debt it does not own is very real.

1. An article that appeared in the trade press shortly before the 2007 extension of the Illinois Collection Agency Act to debt buyers stated:

More collection agencies are turning to the debt resale market as a place to pick up accounts to collect on. Too small to buy portfolios directly from major credit issuers, they look to the secondary market where portfolios are resold in smaller chunks that they can handle. But what they sometimes find in the secondary market are horror stories: The same portfolio is sold to multiple buyers; the seller doesn't actually own the portfolio put up for sale; half the accounts are out of statute;

accounts are rife with erroneous information; access to documentation is limited or nonexistent.

Corinna C. Petry, *Do Your Homework; Dangers often lay hidden in secondary market debt portfolio offerings. Here are lessons from the market pros that novices can use to avoid nasty surprises*, *Collections & Credit Risk*, Mar. 2007, at 24.

2. Debt buyer American Acceptance filed a lawsuit alleging that a broker of charged-off debts sold it debts to which it did not have title. *American Acceptance Co. v. Goldberg*, No. 2:08-CV-9 JVB, 2008 U.S. Dist. LEXIS 39418 (N.D.Ind. May 14, 2008). Another debt buyer, Hudson & Keyse, filed suit alleging that the same debt broker obtained information about consumer debts owned by Hudson & Keyse and used the information to try to collect the debts for its own account, even though it did not own them. *Hudson & Keyse, LLC v. Goldberg & Associates, LLC*, No. 9:2007cv81047 (S.D.Fla. Nov. 5, 2007). A similar suit, alleging that the broker resold accounts it did not own, was filed by Old National Bank. *Old National Bank v. Goldberg & Associates, LLC*, No. 9:2008cv80078 (S.D.Fla. Jan. 24, 2008). The same debt broker is accused in another complaint of selling 6,521 accounts totaling about \$40 million face value which it did not own. *RMB Holdings, LLC v. Goldberg & Associates, LLC*, No. 3:2007cv00406 (E.D.Tenn. Oct. 30, 2007). On May 29, 2008, a decision was issued in favor of the plaintiff in that case. *RMB Holdings, LLC v. Goldberg & Associates, LLC*, No. 3:07-cv-406 (E.D.Tenn.). The decision finds that “RMB began making attempts to collect the accounts it purchased from Goldberg” even though “Goldberg never delivered title or ownership of the accounts to RMB.” Why was RMB attempting to collect debts as to which it never received title?
3. Other debt buyers have voiced similar complaints about defective title to debts. *Florida Broker Faces Multiple Lawsuits*, *Collections & Credit Risk*, Apr. 2008, at 8.
4. There are reported cases in which debtors have been subjected to litigation because they settled with A, and then B claimed to own the debt. *Smith v. Mallick*, 514 F.3d 48 (D.C.Cir. 2008) (commercial debt purchased and resold by debt buyer, debt buyer (possibly fraudulently) settles debt it no longer owns, settlement held binding because notice of assignment not given, but obligor subjected to litigation as result). See also *Miller v. Wolpoff & Abramson, LLP*, No. 1:06-CV-207-TS, 2008 U.S. Dist. LEXIS 12283 (N.D.Ind. Feb. 19, 2008), in which a debtor complained he had been sued twice on the same debt; *Dornhecker v. Ameritech Corp.*, 99 F.Supp.2d 918, 923 (N.D.Ill. 2000), in which the debtor claimed he settled with one agency and was then dunned by a second for the same debt; and *Northwest Diversified, Inc. v. Desai*, 353 Ill.App.3d 378, 818 N.E.2d 753 (1st Dist. 2004), in which a commercial debtor paid the creditor only to be subjected to a levy by a purported debt buyer.
5. In *Wood v. M&J Recovery LLC*, No. CV 05-5564, 2007 U.S. Dist. LEXIS 24157 (E.D.N.Y. Apr. 2, 2007), a debtor complained of multiple collection efforts by various debt buyers and collectors on the same debt, and the

defendants asserted claims against one another disputing the ownership of the portfolio involved. Shekinah alleged that it sold a portfolio to NLRS, that NLRS was unable to pay, that the sale agreement was modified so that NLRS would only obtain one fifth of the portfolio, and that the one fifth did not include the plaintiff's debt. Portfolio Partners claimed that it, and not Shekinah, was the rightful owner of the portfolio.

6. *In Associates Financial Services Co. v. Bowman, Heintz, Boscia & Vician, P.C.*, IP 99-1725-C-M/S, 2001 U.S. Dist. LEXIS 7874 at **9 – 12 (Apr. 25, 2001), *later opinion*, No. IP 99-1725-C-M/S, 2004 U.S. Dist. LEXIS 6520 (S.D. Ind. Mar. 31, 2004), allegations were made that a creditor had continued to collect accounts allegedly sold to a debt buyer.
7. Recently, courts have dismissed numerous foreclosure and collection lawsuits to have been filed in the names of entities that do not own the purported debts. *In re Foreclosure Cases*, No. 1:07CV2282, 2007 U.S. Dist. LEXIS 84011 (N.D. Ohio Oct. 31, 2007) (15 foreclosure cases combined). In the Ohio cases, foreclosure complaints alleged that the named plaintiffs were the holders and owners of the notes and mortgages, but they were not the original payees, and there was nothing showing that the plaintiffs owned the notes and mortgages at the time suit was filed. Dismissing the cases, the court commented:

There is no doubt every decision made by a financial institution in the foreclosure process is driven by money. And the legal work which flows from winning the financial institution's favor is highly lucrative. There is nothing improper or wrong with financial institutions or law firms making a profit — to the contrary, they should be rewarded for sound business and legal practices. However, unchallenged by underfinanced opponents, the institutions worry less about jurisdictional requirements and more about maximizing returns. Unlike the focus of financial institutions, the federal courts must act as gatekeepers, assuring that only those who meet diversity and standing requirements are allowed to pass through. Counsel for the institutions are not without legal argument to support their position, but their arguments fall woefully short of justifying their premature filings, and utterly fail to satisfy their standing and jurisdictional burdens. The institutions seem to adopt the attitude that since they have been doing this for so long, unchallenged, this practice equates with legal compliance. Finally put to the test, their weak legal arguments compel the Court to stop them at the gate. 2007 U.S. Dist. LEXIS 84011 at **8 – 9.

Subsequently, dozens of other mortgage cases were thrown out or had show-cause orders entered for the same reason. *In re Foreclosure Cases*, No. 07-cv-166, 2007 U.S. Dist. LEXIS 90812 (S.D. Ohio Nov. 27, 2007) (19 foreclosure cases combined); *In re Foreclosure Cases*, 521 F. Supp.2d 650 (S.D. Ohio 2007); *In re Foreclosure Cases*, No. 07-cv-166, 2007 U.S. Dist. LEXIS 95673 (S.D. Ohio, Dec. 27, 2007) (15 foreclosure cases

combined); *NovaStar Mortgage, Inc. v. Riley*, No. 3:07-CV-397, 2007 U.S. Dist. LEXIS 86216 (S.D. Ohio Nov. 21, 2007); *NovaStar Mortgage, Inc. v. Grooms*, No. 3:07-CV-395, 2007 U.S. Dist. LEXIS 86214 (S.D. Ohio Nov. 21, 2007); *HBC Bank USA v. Rayford*, No. 3:07-CV-428, 2007 U.S. Dist. LEXIS 86215 (S.D. Ohio Nov. 21, 2007); *Everhome Mortgage Co. v. Rowland*, 2008 Ohio 1282, 2008 Ohio App. LEXIS 1103 (2008) (judgment for plaintiff reversed because it failed to introduce assignment or establish that it was holder of note and mortgage); *Deutsche Bank National Trust Co. v. Castellanos*, 18 Misc.3d 1115A, 856 N.Y.S.2d 497 (2008) (Schack, J.); *HSBC Bank USA, N.A. v. Valentin*, 14 Misc.3d 1123A, 859 N.Y.S.2d 895 (2008); *HSBC Bank USA, N.A., v. Cherry*, 18 Misc.3d 1102A, 856 N.Y.S.2d 24 (2007); *Deutsche Bank National Trust Co. v. Castellanos*, 15 Misc.3d 1134A, 841 N.Y.S.2d 819 (2007). See also *Deutsche Bank National Trust Co. v. Steele*, No. 2:07-cv-886, 2008 U.S. Dist. LEXIS 4937 (S.D. Ohio Jan. 8, 2008); *DLJ Mortgage Capital, Inc. v. Parsons*, 2008 Ohio 1177, 2008 Ohio App. LEXIS 990 (2008); *Washington Mutual Bank, F.A. v. Green*, 156 Ohio App.3d 461, 806 N.E.2d 604 (2004).

8. The author has encountered several cases in which debts were paid or settled to one entity, after which another tried to collect the entire debt or the remaining portion.
9. Clearly, a consumer cannot know, and should not assume, that a debt buyer actually owns the debt or that a debt collector is authorized to act by the true owner of the debt. As is evident from the above cases, this is not necessarily the case. As noted above, there are many instances when a consumer pays the debt only to receive a call two months later from another debt collector about the same debt. A consumer has the right to receive proof that the debt collector owns the debt. Even if the consumer recognizes the debt and believes he or she owes it, the consumer should request, at a minimum, some proof of ownership. Many consumer debts are “securitized,” or transferred to third parties or trustees for the purpose of permitting investment, with “servicing” retained by the originator. The actual ownership of the debt should be inquired into in all cases.

- E. The possibility that the consumer does not owe the debt or that the amount is incorrect or that the debt buyer cannot substantiate its claim is also very real. A February 2009 FTC report, “Collecting Consumer Debts: The Challenges of Change: A Federal Trade Commission Workshop Report (February 2009),” noted (p. 22) that “A leading association of debt buyers, DBA International (“DBA”), acknowledged that it is common for a debt buyer to receive only a computerized summary of the creditor’s business records when it purchases a portfolio”

II. KNOW PROCEDURE OF COURT YOU ARE IN AND MAKE SURE YOU COMPLY WITH ALL DEADLINES

- A. In Cook County First Municipal cases, for example, you need to file an appearance by 9.30 a.m. on the return date, at which time you are assigned a status date. If the case is not a small claim (\$10,000 if filed after Jan. 1, 2006) you do not have to file an answer. At the status date you get a trial date.

- B. If you are in another court, call and find out exactly what is to take place on each date.

III. DO YOU HAVE A PROPER PLAINTIFF

- A. Is plaintiff original creditor or debt buyer? If it is a debt buyer, does it comply with the licensing requirements of the Illinois Collection Agency Act, 225 ILCS 425/1 et seq.? Noncompliance results in dismissal. *Business Service Bureau, Inc. v. Webster*, 298 Ill. App. 3d 257; 698 N.E.2d 702 (4th Dist. 1998); *LVNV v. Minnick*, 08 AR 868 (Cir. Ct. of the 18th Judicial Cir., Du Page Cty.) (attached); *CACH v. Moore*, 08 M1 101518 (Cir. Ct. Cook Co., Dec. 1, 2008).
- B. The Illinois Collection Agency Act was amended to include debt buyers as “collection agencies” effective January 1, 2008. Section 425/3(d), as amended effective Jan. 1, 2008, brings debt buyers within its purview by providing that “A person, association, partnership, corporation, or other legal entity acts as a collection agency when he or it . . . Buys accounts, bills or other indebtedness and engages in collecting the same.” Previously coverage was limited to a person who “Buys accounts, bills or other indebtedness with recourse and engages in collecting the same”. By deleting “with recourse,” the legislature intended to classify as a “collection agency” persons who buy charged-off debts for their own account.

In addition, the 2007 amendments repealed the definition of “collection agency” contained in former §425/2.02 and provided a more expansive set of definitions which, among other things, now define a “collection agency” as “any person who, in the ordinary course of business, regularly, on behalf of himself or herself or others, engages in debt collection.” 225 ILCS 425/2 (emphasis added). Thus, one who purchases delinquent debt for himself and engages in any acts defined as “debt collection” is covered.

- C. The amendment enacts some provisions tracking FDCPA §§1692c, 1692g, and FCRA identity theft provisions. In addition, punitive damages are available under the Collection Agency Act, but not the FDCPA.
- D. Section 8b of the Collection Agency Act contains a special assignment requirement. The only case construing it holds that it only applies if the assignment is one for collection, as opposed to an absolute assignment. *King v. Resurgence Financial, LLC*, 08 C 3306 (N.D.Ill., Nov. 3, 2008 [minute order]). Section 8b provides:

Sec. 8b. An account may be assigned to a collection agency for collection with title passing to the collection agency to enable collection of the account in the agency's name as assignee for the creditor provided:

(a) The assignment is manifested by a written agreement, separate from and in addition to any document intended for the purpose of listing a debt with a collection agency. The document manifesting the assignment shall specifically state and include:

(i) the effective date of the assignment; and

(ii) the consideration for the assignment.

(b) The consideration for the assignment may be paid or given either before or after the effective date of the assignment. The consideration may be contingent upon the settlement or outcome of litigation and if the claim being assigned has been listed with the collection agency as an account for collection, the consideration for assignment may be the same as the fee for collection.

(c) All assignments shall be voluntary and properly executed and acknowledged by the corporate authority or individual transferring title to the collection agency before any action can be taken in the name of the collection agency.

(d) No assignment shall be required by any agreement to list a debt with a collection agency as an account for collection.

(e) No litigation shall commence in the name of the licensee as plaintiff unless: (i) there is an assignment of the account that satisfies the requirements of this Section and (ii) the licensee is represented by a licensed attorney at law.

(f) If a collection agency takes assignments of accounts from 2 or more creditors against the same debtor and commences litigation against that debtor in a single action, in the name of the collection agency, then (i) the complaint must be stated in separate counts for each assignment and (ii) the debtor has an absolute right to have any count severed from the rest of the action.

- E. Must an out-of-state debt collector register to do business under the Business Corporation Act (805 ILCS 5/13.70) or Limited Liability Company Act before filing suit? *Compare Berg v. Blatt, Hasenmiller*, 07 C 4887, 2009 U.S. Dist. LEXIS 26808 (N.D.Ill., March 31, 2009); and *Guevara v. Midland Funding NCC-2 Corp.*, 07 C 5858, 2008 U.S. Dist. LEXIS 47767 (N.D.Ill., June 20, 2008). Note that courts are much more willing to find “door-closing” statutes inapplicable than statutes requiring registration or licensing as part of a regulatory scheme. *Silver v Woolf*, 694 F.2d 8 (2nd Cir. 1982). “Door-closing” statutes that require only foreign entities to register with the Secretary of State and pay franchise taxes are considered to be “a naked restriction on interstate firms” that have no regulatory objective.” (*Silver*, 694 F.2d at 11).

IV. MANY COLLECTION PLEADINGS ARE DEFECTIVE

A. Is there compliance with 735 ILCS 5/2-403?

Section 2-403 of the Code of Civil Procedure provides:

(a) The assignee and owner of a non-negotiable chose in action may

sue thereon in his or her own name. Such person shall in his or her pleading on oath allege that he or she is the actual bona fide owner thereof, and set forth how and when he or she acquired title. . . .

At common law in Illinois, an assignee of a nonnegotiable chose in action could not sue. *N. & G. Taylor Co. v. Anderson*, 275 U.S. 431 (1928). The assignee “must, therefore, set out the facts showing in what manner he obtained possession and ownership thereof. It is not a sufficient allegation in such a case to allege that the plaintiff is the actual bona fide owner for value . . . A declaration in a suit by an assignee of a chose in action does not state a cause of action in favor of the plaintiff unless it contains the allegations required by [this section] . . . showing the assignment of the chose in action, the actual ownership thereof by him, and setting forth how and when he acquired title.” *Ray v. Moll*, 336 Ill. App. 360, 84 N.E.2d 163 (4th Dist. 1949). In the absence of compliance with § 2-403, the complaint of an assignee of a nonnegotiable chose in action does not state a cause of action. *N. & G. Taylor Co. v. Anderson*, 275 U.S. 431 (1928). The section is former section 22 of the Civil Practice Act of 1933.

B. Is contract and assignment attached to complaint as required by §2-606 of Code of Civil Procedure?

735 ILCS 5/2-606. Exhibits

Sec. 2-606. Exhibits. If a claim or defense is founded upon a written instrument, a copy thereof, or of so much of the same as is relevant, must be attached to the pleading as an exhibit or recited therein, unless the pleader attaches to his or her pleading an affidavit stating facts showing that the instrument is not accessible to him or her. In pleading any written instrument a copy thereof may be attached to the pleading as an exhibit. In either case the exhibit constitutes a part of the pleading for all purposes.

Both the contract and the assignment(s) showing that plaintiff has title to the claim are documents on which the action is founded. With respect to assignments, see *Candice Co. v. Ricketts*, 281 Ill.App.3d 359, 362, 666 N.E.2d 722 (1st Dist. 1996), *V.W. Credit, Inc. v. Alexandrescu*, 13 Misc. 3d 1207A; 824 N.Y.S.2d 759 (N.Y.Civ.Ct. 2006), and *MBNA America Bank, N.A. v. Nelson*, 15 Misc. 3d 1148A; 841 N.Y.S.2d 826 (N.Y.Civ. Ct. 2007).

At the time the parties’ rights are determined, actual assignments sufficient to vest title to the obligation sued upon in the plaintiff must be in the record. *Bayview Loan Servicing, L.L.C. v. Nelson*, 382 Ill. App. 3d 1184; 890 N.E.2d 940 (5th Dist. 2008).

C. If the Complaint Is For Less than \$10,000 (after 1/1/06) or \$5,000 (prior to 1/1/06), Does It Comply With Rule 282.

Small claims are governed by Rule 282:

(a) Commencement of Actions. An action on a small claim may be commenced by paying to the clerk of the court the required filing fee and filing a short and simple complaint setting forth (1) plaintiff's name, residence

address, and telephone number, (2) defendant's name and place of residence, or place of business or regular employment, and (3) the nature and amount of the plaintiff's claim, giving dates and other relevant information. If the claim is based upon a written instrument, a copy thereof or of so much of it as is relevant must be copied in or attached to the original and all copies of the complaint, unless the plaintiff attaches to the complaint an affidavit stating facts showing that the instrument is unavailable to him.

(b) Representation of Corporations. No corporation may appear as claimant, assignee, subrogee or counterclaimant in a small claims proceeding, unless represented by counsel. When the amount claimed does not exceed the jurisdictional limit for small claims, a corporation may defend as defendant any small claims proceeding in any court of this State through any officer, director, manager, department manager or supervisor of the corporation, as though such corporation were appearing in its proper person. For the purposes of this rule, the term "officer" means the president, vice-president, registered agent or other person vested with the responsibility of managing the affairs of the corporation.

Thus, a copy of any written instrument and dates must be provided.

D. If Account Stated Is Alleged, Both the Underlying Contract and the Statement of Account Are Necessary Documents

"An account stated has been defined as an agreement between parties who have had previous transactions that the account representing those transactions is true and that the balance stated is correct, together with a promise, express or implied, for the payment of such balance." *McHugh v. Olsen*, 189 Ill.App.3d 508, 514, 545 N.E.2d 379 (1st Dist. 1989).

"An account stated is merely a form of proving damages for the breach of a promise to pay on a contract." *Dreyer Medical Clinic, S.C. v. Corral*, 227 Ill.App.3d 221, 226, 591 N.E.2d 111 (2d Dist. 1992).

A cause of action for an account stated therefore requires allegation and proof that (1) there was a contract between the parties, such as a credit card agreement or a contract for the sales of goods or services, *Dreyer*, 227 Ill.App.3d at 226-27, (2) a statement of account was sent to the party sought to be held liable, and (3) the statement was agreed to, expressly or by implication. *Thomas Steel Corp. v. Ameri-Forge Corp.*, 91 C 2356, 1991 U.S. Dist. LEXIS 18110, 1991 WL 280085 (N.D.Ill., Dec. 27, 1991). Agreement may be inferred from payment or retention for a substantial period without objection.

However, both the basic agreement and the rendition of an account must be proven. "[T]he rule that an account rendered and not objected to within a reasonable time is to be regarded as correct assumes that there was an original indebtedness, but there can be no liability on an account stated if no liability in fact exists, and the mere presentation of a claim, although not objected to, cannot of itself create liability. . . . In other words, an account stated cannot create original liability where none exists; it is merely a final determination of the amount of an existing debt." *Motive Parts Co. of America, Inc. v. Robinson*, 53 Ill.App.3d 935, 940, 369 N.E.2d 119 (1st Dist. 1977).

Thus, a cause of action for an account stated is founded on both (a) the underlying contract and (b) the statement of account sent to the debtor and agreed to by the debtor. Both must be attached.

V. DO NOT ASSUME THAT A DEBT BUYER ACTUALLY OWNS THE DEBT

A consumer cannot know, and should not assume, that a debt buyer actually owns the debt or that a debt collector is authorized to act by the true owner of the debt. As is evident from the CAMCO case above (<http://www.ftc.gov/opa/2004/12/camco.htm>), this is not necessarily the case. There are many instances where a consumer pays the debt only to receive a call two months later from another debt collector about the same debt.

A consumer has the right to receive proof that the debt collector owns the debt. Even if the consumer recognizes the debt and believes he or she owes it, they should request, at a minimum, some proof of ownership.

Many consumer debts are “securitized,” or transferred to third parties or trustees for the purpose of permitting investment, with “servicing” retained by the originator.

The actual ownership of the debt should be inquired into in all cases.

VI. RIGHT TO OBTAIN VERIFICATION OF DEBT UNDER FAIR DEBT COLLECTION PRACTICES ACT/ PROOF OF TITLE UNDER UNIFORM COMMERCIAL CODE

- A. The Fair Debt Collection Practices Act entitles the consumer to verification of the debt if requested within 30 days of initial communication from debt collector. 15 U.S.C. §1692g.
- B. Cases are unclear as to what is sufficient under the FDCPA. *Clark v. Capital Credit & Collection Servs.*, 460 F.3d 1162 (9th Cir. 2006); *Chaudhry v. Gallerizzo*, 174 F.3d 394 (4th Cir. 1999); *Stonehart v. Rosenthal*, 01 Civ. 651, 2001 WL 910771 (S.D.N.Y., Aug. 13, 2001); *Erickson v. Johnson*, No. 05-427 (MJD/SRN), 2006 U.S. Dist. LEXIS 6979 (D.Minn. Feb. 22, 2006); *Recker v. Central Collection Bureau*, 1:04-cv-2037, 2005 U.S. Dist. LEXIS 24780 (S.D.Ind., October 17, 2005); *Monsewicz v. Unterberg & Assocs., P.C.*, 1:03-CV-01062-JDT-TAB, 2005 U.S. Dist. LEXIS 5435, at *15 (S.D. Ind. Jan. 25, 2005); *Semper v. JBC Legal Group*, No. C04-2240L, 2005 U.S. Dist. LEXIS 33591 (W.D.Wash. September 6, 2005); *Mahon v. Credit Bureau of Placer County Inc.*, 171 F.3d 1197, 1203 (9th Cir. 1999) (debt collector properly verified debt by contacting the original creditor, verifying the nature and balance of the outstanding debt, reviewing the efforts the original creditor made to obtain payment, and establishing that the balance remained unpaid); *Sambor v. Omnia Credit Servs., Inc.*, 183 F. Supp. 2d 1234, 1233 (D. Hawaii 2002) (stating by way of example that a debt collector seeking to collect amounts owed to a credit card company would have to cease attempts to collect the debt if a fire destroyed the credit card company's records, thereby precluding verification of the debt); *Spears v. Brennan*, 745 N.E.2d 862, 878-79 (Ind. App. 2001) (a copy of the original debt instrument does not verify that there is an existing unpaid balance and does not satisfy the verification requirement of § 1692g(b)).
- C. State law rights are better. The sale of accounts receivable is regulated by Article

9 of the Uniform Commercial Code. Although Article 9 basically deals with secured transactions, sales of receivables have to be recorded to be effective against third parties, and Article 9 confers certain rights on the account debtors.

1. Send a certified or faxed letter requesting assignment or assignments necessary to show title in plaintiff under UCC §9-406, 810 ILCS 5/9-406. The way §9-406 is written the debt buyer is not entitled to payment unless it provides a copy of the assignment(s). Wait about 10 days after receipt and then move to dismiss on the ground that there is no obligation to pay.
2. Section 9-406 provides:

Discharge of account debtor; notification of assignment; identification and proof of assignment; restrictions on assignment of accounts, chattel paper, payment intangibles, and promissory notes ineffective. (a) Discharge of account debtor; effect of notification. Subject to subsections (b) through (i), an account debtor on an account, chattel paper, or a payment intangible may discharge its obligation by paying the assignor until, but not after, the account debtor receives a notification, authenticated by the assignor or the assignee, that the amount due or to become due has been assigned and that payment is to be made to the assignee. After receipt of the notification, the account debtor may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor.

(b) When notification ineffective. Subject to subsection (h), notification is ineffective under subsection (a):

(1) if it does not reasonably identify the rights assigned;

(2) to the extent that an agreement between an account debtor and a seller of a payment intangible limits the account debtor's duty to pay a person other than the seller and the limitation is effective under law other than this Article; or

(3) at the option of an account debtor, if the notification notifies the account debtor to make less than the full amount of any installment or other periodic payment to the assignee, even if:

(A) only a portion of the account, chattel paper, or payment intangible has been assigned to that assignee;

(B) a portion has been assigned to another assignee; or

(C) the account debtor knows that the assignment to that assignee is limited.

(c) Proof of assignment. Subject to subsection (h), if requested by the account debtor, an assignee shall seasonably furnish reasonable proof that the assignment has been made. Unless the assignee complies, the account debtor may discharge its obligation by paying the assignor, even if the account debtor has received a notification under subsection (a).

(d) Term restricting assignment generally ineffective. Except as otherwise provided in subsection (e) and Sections 2A-303 and 9-407 [810 ILCS 5/2A-303 and 810 ILCS 5/9-407], and subject to subsection (h), a term in an agreement between an account debtor and an assignor or in a promissory note is ineffective to the extent that it:

(1) prohibits, restricts, or requires the consent of the account debtor or person obligated on the promissory note to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, the account, chattel paper, payment intangible, or promissory note; or

(2) provides that the assignment or transfer or the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the account, chattel paper, payment intangible, or promissory note.

(e) Inapplicability of subsection (d) to certain sales. Subsection (d) does not apply to the sale of a payment intangible or promissory note.

(f) Legal restrictions on assignment generally ineffective. Except as otherwise provided in Sections 2A-303 and 9-407 [810 ILCS 5/2A-303 and 810 ILCS 5/9-407] and subject to subsections (h) and (I), a rule of law, statute, or regulation that prohibits, restricts, or requires the consent of a government, governmental body or official, or account debtor to the assignment or transfer of, or creation of a security interest in, an account or chattel paper is ineffective to the extent that the rule of law, statute, or regulation:

(1) prohibits, restricts, or requires the consent of the government, governmental body or official, or account debtor to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in the account or chattel paper; or

(2) provides that the assignment or transfer or the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the account or chattel paper.

(g) Subsection (b)(3) not waivable. Subject to subsection (h), an account debtor may not waive or vary its option under subsection (b)(3).

(h) Rule for individual under other law. This Section is subject to law other than this Article which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.

(I) Inapplicability to health-care-insurance receivable. This Section does not apply to an assignment of a health-care-insurance receivable.

3. Section 9-210 of the Uniform Commercial Code gives right to accounting, defined as breakdown of what debt consists of. Debt buyer does not have option to cease collection. There is \$500 statutory damages for noncompliance, albeit only individually.

VII. SUPREME COURT RULE 222

- A. Frequently not complied with
- B. Supreme Court Rule 222 went into effect ten years ago. It applies to all cases subject to mandatory arbitration (except small claims cases) and all cases where money damages of \$50,000 or less are sought. But it does not apply to small claims cases, evictions, family law cases or actions seeking equitable relief.
- C. The rule requires both parties to provide a list of case-related information to the opposing party, such as names and addresses of witnesses, factual basis of the claim, the legal theory of each claim or defense, etc., automatically, without request.
- D. The disclosures must be made within 120 days of the filing of the responsive pleading to the Complaint. Rule 222 has been ignored in Cook County but two recent articles, including one in the February 2006 Illinois Bar Journal, suggest this rule can no longer be disregarded.
- E. Rule 222(g) states that “the court shall exclude at trial any evidence offered by a party that was not timely disclosed as required by this rule, except by leave of court for good cause shown. If a defendant moves, on the day of trial, to exclude all evidence given the plaintiff’s failure to file a Rule 222 disclosure statement, a court is likely to grant the request, dooming the plaintiff’s action. One case, *Kapsouris v. Rivera*, 319 Ill. App. 3d 844, 747 N.E.2d 427 (2nd Dist. 2001) suggests (but does not hold) that if specific information is provided through other discovery, such as a Rule 213 interrogatory response, the failure to file a Rule 222 response will not trigger the exclusion of that evidence.

VIII. COLLECTION PLAINTIFFS, PARTICULARLY DEBT BUYERS, OFTEN CANNOT PROVE ANYTHING

- A. Absent an account stated, it is difficult for the collection plaintiff, particularly a bad debt buyer, to prove anything is due.
- B. Debt buyer affidavits cannot purport to summarize account documents
 1. Affidavits are often submitted to prove default that are conclusory and insufficient. *Manufacturers & Traders Trust Co. v. Medina*, 01 C 768, 2001 WL 1558278, 2001 U.S. Dist. LEXIS 20409 (N.D.Ill., Dec. 5, 2001); *Cole Taylor Bank v. Corrigan*, 230 Ill.App.3d 122, 129, 595 N.E.2d 177, 181-82 (2nd Dist. 1992) (where bank officer’s “affidavit essentially consisted of a summary of unnamed records at the bank,” unaccompanied by records themselves and unsupported by facts establishing basis of officer’s knowledge, foundation was lacking for admission of officer’s opinion regarding amount due on loan); *Asset Acceptance Corp. v. Proctor*, 156 Ohio App. 3d 60; 804 N.E.2d 975 (2004). Computer-generated bank

records or testimony based thereon are often offered without proper foundation, or are summarized without being introduced. *Manufacturers & Traders Trust Co. v. Medina, supra*; *FDIC v. Carabetta*, 55 Conn.App. 369, 739 A.2d 301 (1999), leave to appeal denied, 251 Conn. 927; 742 A.2d 362 (1999).

2. Testimony, whether live or in the form of an affidavit, to the effect that the witness has reviewed a loan file and that the loan file shows that the debtor is in default is hearsay and incompetent; rather, the records must be introduced after a proper foundation is provided. *New England Savings Bank v. Bedford Realty Corp.*, 238 Conn. 745, 680 A.2d 301, 308-09 (1996), later opinion, 246 Conn. 594, 717 A.2d 713 (1998); *Cole Taylor Bank v. Corrigan, supra*, 230 Ill.App.3d 122, 129, 595 N.E.2d 177, 181 (2nd Dist. 1992) (bank officer's affidavit summarizing bank records insufficient where it did not show the officer's familiarity with the amounts disbursed or collected or provide the documents upon which he relied as to his conclusion as to the amount due); *Hawai'i Cmty. Fed. Credit Union v. Keka*, 94 Haw. 213, 222, 11 P.3d 1 (2000) (following *Corrigan*). It is the business records that constitute the evidence, not the testimony of the witness referring to them. *In re A.B.*, 308 Ill.App. 3d 227, 236, 719 N.E.2d 348 (2nd Dist. 1999) (“Under the business records exception . . . it is the business record itself, not the testimony of a witness who makes reference to the record, which is admissible In other words, a witness is not permitted to testify as to the contents of the document or provide a summary thereof; the document speaks for itself. M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 803.10, at 825 (7th ed. 1999).”); *Topps v. Unicorn Ins. Co.*, 271 Ill. App. 3d 111, 116, 648 N.E.2d 214 (1st Dist. 1995) (“under the business record exception to the hearsay rule, only the business record itself is admissible into evidence rather than the testimony of the witness who makes reference to the record”); *Northern Illinois Gas Co. v. Vincent DiVito Constr.*, 214 Ill. App. 3d 203, 215, 573 N.E.2d 243, 252 (2nd Dist. 1991) (“The business records exception to the hearsay rule (134 Ill. 2d R. 236) makes it apparent that it is only the business record itself which is admissible, and not the testimony of a witness who makes reference to the record”).
3. A witness cannot “testify” by regurgitating the content of business records that a witness has reviewed when the witness has not seen or heard the events in question. Such regurgitation is hearsay, plain and simple. *Wahad v. Federal Bureau of Investigation*, 179 F.R.D. 429, 438 (S.D.N.Y 1998); *In re McLemore*, 2004 Ohio 680, 2004 Ohio App. LEXIS 591, *P9 (Ohio App. 2004); *Nebraska v. Ward*, 510 N.W.2d 320, 324 (Neb. App. 1993).. “There is no hearsay exception . . . that allows a witness to give hearsay testimony of the content of business records based only upon a review of the records.” *Grant v. Forgash*, 1995 Ohio App. LEXIS 5900, *13 (Ohio App. 1995). See generally, *Trujillo v. Apple Computer*, 578 F. Supp. 2d 979 (N.D.Ill. 2008), condemning the inclusion in an affidavit of information supplied by others.
4. Nor is such an affidavit made sufficient by omitting the fact that it is based on a review of loan records, if it appears that the affiant did not personally receive or observe the reception of all of the borrower’s payments. *Hawaii*

Community Federal Credit Union v. Keka, *supra*, 94 Haw. 213, 11 P.3d 1, 10 (2000). If the underlying records are voluminous, a person who has extracted the necessary information may testify to that fact, but the underlying records must be made available to the court and opposing party. *In re deLarco*, 313 Ill.App.3d 107, 728 N.E.2d 1278 (2nd Dist. 2000).

5. A good case (from the debtor's perspective) involving debt buyer affidavits is *Luke v. Unifund CCR Partners*, No. 2-06-444-CV, 2007 Tex.App. LEXIS 7096 (2nd Dist. Ft. Worth Aug. 31, 2007).

C. "Assignment" documents must show transfer of particular account

1. In *Unifund CCR Partners v. Cavender*, No. 2007-CC-3040, 14 Fla.L. Weekly Supp. 975b (Orange Cty. July 20, 2007), the court held that a debt buyer "assignment" that does not refer to specific accounts does not establish ownership by the plaintiff, nor is testimony based on a computer screen sufficient:

The Court has reviewed the documents presented by the Plaintiff, Bill of Sale and the Assignment, and finds that they fail to sufficiently identify the accounts that were assigned or sold to the Plaintiff. Neither the Bill of Sale nor the Assignment indicate the account numbers or names of account holders. They do not provide any information that would allow the Court to determine if the alleged account of Defendant was one of the accounts sold or assigned to the Plaintiff. Without any indicia of ownership that would sufficiently identify the true owner of the account at the time that Plaintiff filed this action, the Plaintiff is unable to prove that it had standing to bring the action. An assignment is the basis of the Plaintiff's standing to invoke the processes of the Court in the first place and is therefore an essential element of proof. *Progressive Express Ins. Co. v. McGrath Community Chiropractic*, 913 So. 2d 1281, 1285 (Fla. 2nd DCA 2005); *Oglesby v. State Farm Mutual Automobile Ins. Co.*, 781 So. 2d 469 (Fla. 5th DCA 2001). "Only the insured or medical provider 'owns' the cause of action against the insurer at any one time." *Id.* at 470.

2. *Citibank (South Dakota), N.A. v. Martin*, 11 Misc. 3d 219; 807 N.Y.S.2d 284 (Civ.Ct. 2005):

. . . as to assigned claims, it is essential that an assignee show its standing, which "doctrine embraces several judicially self-imposed limits on the exercise of ... jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights" . . . A lack of standing renders the litigation a nullity, subject to dismissal without prejudice . . . It is the assignee's burden to prove the assignment . . . Given that courts are reluctant to credit a naked conclusory affidavit on a matter exclusively within a moving party's knowledge . . . an assignee must tender proof of assignment of a particular account or, if there were an oral assignment, evidence of consideration paid

and delivery of the assignment

3. *Palisades Collection LLC v. Haque*, 2006 N.Y. Misc. LEXIS 4036; 235 N.Y.L.J. 71 (Civ. Ct. Queens Co., April 13, 2006) (Pineda-Kirwin, J.).

Ms. Bergman testified that plaintiff is authorized to perform any and all acts relating to certain accounts assigned to plaintiff by AT&T Wireless pursuant to a limited power of attorney and a bill of sale and assignment of benefits. These two documents, both dated July 2004, were admitted into evidence as plaintiff's Exhibit 1A and 1B. These documents, however, name, as the assignee, an entity which is a Delaware limited liability company, not a New Jersey Corporation, as this plaintiff alleges itself to be. Nor do the documents contain an indication that consideration was paid for the assignment and neither document is executed by plaintiff as the assignee. Further the assignment refers to a "Purchase and Sale Agreement" and indicates that an "Account Schedule" is attached to that agreement. Plaintiff did not seek to introduce the "Purchase and Sale Agreement" with its annexed schedule into evidence.

In contrast to the wording of the assignment which references the "Purchase and Sale Agreement" and its annexed schedule of accounts, the witness testified that the purchased accounts came to plaintiff by electronic transmission. Ms. Bergman testified credibly that the electronic statements were received on December 13, 2005. Ms. Bergman testified that defendant's account was included in those purchased by plaintiff. Plaintiff then sought to introduce into evidence a document, dated January 9, 2006, that the witness testified was the hard copy of the account summary generated by AT&T Wireless and electronically sent to plaintiff pertaining to this defendant. The witness testified that plaintiff did not have copies of any statements from AT&T Wireless that were allegedly sent to defendant. . . .

Further, in light of the dearth of evidence presented at trial regarding the assignment and the infirmities therein, plaintiff did not prove by a preponderance of the evidence that defendant's account was in fact assigned to plaintiff. . . . Had plaintiff been able to prove that much, as it is undisputed that defendant did not pay the monthly charge of \$24.99 for August and September, plaintiff would have been entitled to a judgment for those amounts.

4. *Palisades Collection, LLC a/p/o AT&T Wireless v. Gonzalez*, 10 Misc.3d 1058A; 809 N.Y.S.2d 482 (N.Y. County Civ. Ct. 2005) (Ellen Gesmer, J.).

Finally, Ms. Bergmann claims that plaintiff is entitled to sue because of an assignment to it from AT&T. However, she does not attach a copy of the alleged assignment. In the absence of

the document on which her statement is based, her statement is of no probative value . . . Consequently, Ms. Bergmann has failed to establish that plaintiff has the right to collect this debt.

5. *Rushmore Recoveries X, LLC v. Skolnick*, 15 Misc. 3d 1139A; 841 N.Y.S.2d 823 (Nassau Co. Dist. Ct. 2007):

. . . the documents upon which the Plaintiff relies do not support the Plaintiff's claim. While the Plaintiff alleges that it is the assignee of this account, the Plaintiff fails to provide proper proof of the alleged assignment sufficient to establish its standing herein. The Plaintiff has made no effort to authenticate the alleged assignments, *NYCTL 1998-2 Trust v. Santiago*, 30 AD3d 572, 817 N.Y.S.2d 368 (2nd Dept. 2006); [9] and, there is a break in the chain of the assignments from Citibank down to the Plaintiff. The purported assignment from NCOP Capital, Inc. to New Century Financial Services, Inc., Plaintiff's alleged assignor, is not signed at all on behalf of NCOP Capital, Inc. There being no competent proof that the assignment to New Century Financial Services, Inc. was valid, the Plaintiff cannot establish the validity of the assignment from New Century Financial Services, Inc. to the Plaintiff, preventing [*4] the granting of summary judgment for this reason as well. . . .**

6. *MBNA America Bank, N.A. v. Nelson*, 13777/06, 2007 NY Slip Op 51200U; 2007 N.Y. Misc. LEXIS 4317 (N.Y.Civ. Ct. May 24, 2007).

It is imperative that an assignee establish its standing before a court, since "lack of standing renders the litigation a nullity." ²⁰ It is the "assignee's burden to prove the assignment" and "an assignee must tender proof of assignment of a particular account or, if there were an oral assignment, evidence of consideration paid and delivery of the assignment." ²¹ Such assignment must clearly establish that Respondent's account was included in the assignment. A general assignment of accounts will not satisfy this standard and the full chain of valid assignments must be provided, beginning with the assignor where the debt originated and concluding with the Petitioner. . . .

²⁰ *Citibank (South Dakota), N.A. v. Martin*, 11 Misc 3d 219, 226, 807 N.Y.S.2d 284 [Civ. Ct. New York County 2005].

²¹ *Id* at 227 (collecting cases) (internal citations omitted) (emphasis added).

Because multiple creditors may make collection efforts for the same underlying debt even after [*6] assignment, for any variety of reasons (i.e. mis-communication or clerical error) failure to give notice of an assignment may result in the debtor having to pay the same debt more than once or ignoring a

notice because the debtor believes he or she has previously settled the claim. Further, debtors are often left befuddled as they get the run-around from a panoply of potential creditors when inquiring about their defaulted accounts, [16] during which time they lose the ability to negotiate payments with the current debt owner (whoever that may be at the time) and therefore incur additional fees and penalties. Courts in other states, reviewing general principles of assignment, have noted that notice to the debtor is an explicit requirement to a valid assignment.** ²² . . .

7. In *In re Leverett*, 378 B.R. 793, 800 (Bkrcty., E.D.Tex. 2007), the court held that a bankruptcy proof of claim submitted by an assignee must include a “signed copy of the assignment and sufficient information to identify the original credit card account.” There must be a chain of title from a creditor listed on the debtor’s schedules to the claimant.

D. Debt buyer attempts to introduce business records of original creditor are often deficient

1. If records are submitted, they must be properly authenticated. *Kleet Lbr. Co., Inc. v. Lucchese*, 2007 NY Slip Op 51928U, 2007 NY Slip Op 51928U, 17 Misc. 3d 1111A, 2007 N.Y. Misc. LEXIS 6909 (Dist. Ct., Nassau County, Oct. 10, 2007) (“these documents are not submitted in admissible form. Simply annexing documents to the moving papers, without a proper evidentiary foundation is inadequate. *Higen Associates v. Serge Elevator Co., Inc.*, 190 AD2d 712, 593 NYS2d 319 (2nd Dept. 1993); *Palisades Collection, LLC v. Gonzalez*, 10 Misc 3d 1058(A), 809 NYS2d 482, 2005 NY Slip Op 52015(U) (Civ. Ct. NY Co. 2005).”)
2. Generally, an employee of a debt buyer is not competent to offer testimony concerning the records of an assignor. *PRA III, LLC v. Mac Dowell*, 2007 NY Slip Op 50990U at *2, 15 Misc.3d 1135A, 841 N.Y.S.2d 822 (2007) (“Elaine F. Lark, a legal specialist of the plaintiff . . . is not an employee of the original creditor (Sears) and cannot authenticate documents from another business”).
3. *Citibank (South Dakota), N.A. v. Martin*, 11 Misc. 3d 219; 807 N.Y.S.2d 284 (Civ.Ct. 2005):

As a part of a credit card issuer's presentation of a prima facie case, the motion papers also must include an affidavit sufficient to tender to the court the original agreement, as well as that any revision thereto, and the affidavit must aver that the documents were mailed to the card holder. n4 The same affidavit typically advances copies of credit card statements which serve to evidence a buyer's subsequent use of the credit card and acceptance of the original or revised terms of credit The affidavit often addresses whether there was any proper protest of any charged purchase within 60 days of a statement (15 U.S.C. § 1601; 12 C.F.R § 226.13 [b][1]), a provision in 12

C.F.R., part 226, referred to as "Regulation Z" or "Truth in Lending" regulations). . . .

The affidavit must demonstrate personal knowledge of essential facts An attorney's affirmation generally cannot advance substantive proof

4. *Palisades Collection LLC v. Haque*, 2006 N.Y. Misc. LEXIS 4036; 235 N.Y.L.J. 71 (Civ. Ct. Queens Co., April 13, 2006) (Pineda-Kirwin, J.).

Inasmuch as the "mere filing of papers received from other entities, even if they are retained in the regular course of business," is insufficient to lay a foundation for the business records exception to hearsay rule, the objections were sustained and the documents were not admitted. [citations] Ms. Bergman testified that she was not familiar with AT&T's billing practices and data entry. Thus, she could not lay a proper foundation for the admission of these documents. [citations]

5. *Palisades Collection, LLC a/p/o AT&T Wireless v. Gonzalez*, 10 Misc. 3d 1058A; 809 N.Y.S.2d 482 (N.Y. County Civ. Ct. 2005) (Ellen Gesmer, J.),

Plaintiff now moves for entry of summary judgment in its favor. Plaintiff relies exclusively on an affidavit executed by one of its employees, and various documents which appear to have been created by AT&T. Since the affiant neither has personal knowledge of the facts nor can attest to the genuineness or authenticity of the documents, plaintiff has not made out its prima facie case. Therefore, even though defendant did not appear in opposition to this motion, it must be denied.

CPLR § 3212(b) requires that a motion for summary judgment be supported by an affidavit of a person with requisite knowledge of the facts, together with a copy of the pleadings and by other available proof . . . The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment" . . . "Failure to make such showing requires the denial of the motion, regardless of the sufficiency of the opposing papers." . . . A conclusory affidavit, or an affidavit by a person who has no personal knowledge of the facts, cannot establish a prima facie case. . . . When the affiant relies on documents, the documents relied upon must be annexed . . . and the affiant must establish an adequate evidentiary basis for them. Mere submission of documents without any identification or authentication is inadequate. . . . When the movant seeks to have the Court consider a business record, the proponent must establish that it meets the evidentiary requirements for a business record, by, [*2]for example, having a corporate officer swear to the authenticity

and genuineness of the document. . . .

The court held that affidavits based on “books and records” but not executed by someone familiar with the manner in which the entity that engaged in the transactions prepared and maintained the books and records are insufficient:

Plaintiff relies on an affidavit executed by Joanne Bergmann, ^[FN2] who identifies herself as the Vice President of plaintiff's Legal Department. She does not claim to have any personal knowledge of the transaction underlying this complaint but rather states that she is making the affidavit "based upon the books and records in my possession." She claims that she is familiar with plaintiff's methods for creating and maintaining its business records, including records of the accounts purchased by plaintiff. She then annexes and discusses various records. Through her affidavit, she seeks to establish four facts on which to ground plaintiff's claim: that defendant executed a contract with AT&T; that defendant defaulted in making payments under the contract; that AT&T sent defendant bills which defendant did not dispute; and that plaintiff is entitled to sue as AT&T's assignee. Ms. Bergmann's affidavit is not adequate to establish any of these facts.

To establish the contract, Ms. Bergmann asserts that defendant entered into a contract with AT&T, and alleges that it is attached as Exhibit A. Her bald statement that defendant entered into a contract is not probative, since Ms. Bergmann acknowledges that she is simply relying on the documents in her possession. Moreover, the document attached as Exhibit A is equally ineffective to establish that defendant signed a contract, since it is merely an unsigned 9-page form, headed "Terms and Conditions for Wireless Service." Putting aside the question of whether Ms. Bergmann could properly authenticate a contract which appeared to be signed by defendant, her proffer of an unexecuted document certainly does not establish that defendant signed a contract with AT&T.

Next, Ms. Bergmann seeks to establish that defendant is in default by making various conclusory statements to that effect and then attaching, as Exhibit D, documents she refers to as account statements which allegedly reflect the activity on defendant's account. On the simplest level, the Court cannot rely on Ms. Bergmann's description of the documents annexed as Exhibit D because her description is inconsistent with the documents themselves and with her own prior statements as to defendant's obligation to plaintiff. Specifically, she describes the documents as "account statements that reflect purchases made by defendant along with periodic payments. The statements reflect the finance charges on the balance as provided in the retail installment credit agreement." However, the account statements do not, on their face, reflect "purchases" but rather

monthly charges for cell phone usage. Similarly, the account statements do not appear to be based on charges on a "retail installment credit agreement," but rather on a cell phone service plan. Consequently, since Ms. Bergmann has described incorrectly the document she claims to [*3]rely on, the Court will not credit the statements she makes based on it.[FN3]

Even if the Court were to overlook the inaccuracy of Ms. Bergmann's description of the documents attached as Exhibit D, the Court could not rely on them. Since the documents are out-of-court statements offered for their truth, Ms. Bergmann must establish that they fall within an exception to the hearsay rule in order for them to be admissible. . . . Presumably, Ms. Bergmann is asking the Court to treat them as a business record since she describes herself as being familiar with plaintiff's business records . . . However, the records attached at Exhibit D were created not by plaintiff but by plaintiff's assignor, AT&T. In order to establish a business records foundation, the witness must be familiar with the entity's record keeping practices . . . Ms. Bergmann does not claim to be familiar with AT&T's record keeping practices, but only with the method by which plaintiff maintains the accounts it purchases from others. The mere fact that plaintiff obtained the records from AT&T and then retained them is an insufficient basis for their introduction into evidence. . . . [FN4] Therefore, the Court cannot rely on the account statements which Ms. Bergmann proffered to establish defendant's default.

Footnote 4: This is not a situation where the relationship between the proponent of the record and the maker of the record guarantees the reliability of the records, such as where the maker of the record was acting on behalf of the proponent and in accordance with its requirements when making the records, (*People v Cratsley*, 86 NY2d 81, 89-91 [1995]) or where the proponent of the records relies contemporaneously on the accuracy of the other entity's records for the conduct of its own business (*People v DiSalvo*, 284 AD2d 547, 548-9 [2d 2001]; *Plymouth Rock Fuel Corp. v Leucadia, Inc.*, 117 AD2d 727, 728 [2d Dept 1986]). Here, there is no evidence that there was any relationship between AT&T and plaintiff at the time that the records were created.

The court also held insufficient affidavits that documents had been mailed when the affiant neither mailed them nor was able to testify on personal knowledge that a routine practice of mailing such documents existed within the business. The court also found that a reproduction of the document mailed was required and that a later printout prepared using data in the system would not do:

Ms. Bergmann also asserts that the account statements were mailed to defendant and the statements were neither returned nor disputed. Presumably, Ms. Bergmann is making this

statement in order to support a claim for an account stated. However, plaintiff's complaint does not include a cause of action for an account stated, so these statements by Ms. Bergmann are irrelevant.

Even if plaintiff were asserting a claim for an account stated, Ms. Bergmann's statement [*4] would be totally inadequate to support it. Ms. Bergmann does not even assert whether she claims that the documents were sent by AT&T or by plaintiff, but, either way, her statements are not sufficient to establish mailing. As stated above, Ms. Bergmann does not claim to have personal knowledge of this account. Certainly, she does not claim to have mailed these statements herself. Where an affiant does not have personal knowledge that a particular document was mailed, she can establish that it was mailed by describing a regular office practice for mailing documents of that type. . . . However, Ms. Bergmann did not do that in this case. ^[FN5] Consequently, plaintiff has failed to prove that the account statements were in fact mailed to defendant.

Footnote 5: Moreover, the account statements could not be a true copy of the documents allegedly mailed to defendant since they indicate, on their face, that they were printed out on June 29, 2005, after this action was commenced.

6. *Rushmore Recoveries X, LLC v. Skolnick*, 15 Misc. 3d 1139A; 841 N.Y.S.2d 823 (Nassau Co. Dist. Ct. 2007):

The Plaintiff attempts to support its motion with the affidavit of Todd Fabacher, who identifies himself as "an authorized and designated custodian of records for the plaintiff regarding the present matter." (*Fabacher Affidavit 3/14/07*, P 1) Mr. Fabacher describes his duties as including "the obtaining, maintaining and retaining, all in the regular course of plaintiff's business, including obtaining records and documents from or through CITIBANK or [*2] any assignee or transferee previous to plaintiff, any and all records ^[**3] and documentation regarding the present debt." (*Fabacher Affidavit 3/14/07*, P 1) While Mr. Fabacher attempts to portray himself as one who is "personally familiar with, and hav[ing] knowledge of, the facts and proceedings relating to the within action" (*Fabacher Affidavit 3/14/07*, P 1), it is readily apparent from a reading of his affidavit that his claimed personal familiarity with this matter is taken from the documents and records ostensibly created by Citibank, and/or assignees who have preceded the Plaintiff, which have now come into the Plaintiff's possession. Clearly, Mr. Fabacher has no personal knowledge of the retail charge account agreement between the Defendant and Citibank. . . .

The Plaintiff's reliance upon the documents it submits is insufficient to make out a *prima facie* case entitling the Plaintiff

to summary judgment. Simply annexing documents to the moving papers, without a proper evidentiary foundation [**4] is inadequate. . . .

The documents the Plaintiff attempts to submit, specifically the purported account statements and assignments, are being offered for the truth of the statements contained therein and are, by definition, hearsay. . . . They may be considered only if they fall within one of the recognized exceptions to the hearsay rule. . . . The Plaintiff attempts to rely upon the business records exception to the hearsay rule in its effort to establish a *prima facie* case.

. . . the proponent of the offered evidence must establish three general elements, by someone familiar with the habits and customary practices and procedures for the making of the documents, before they will be accepted in admissible form: (1) that the documents were made in the regular course of business; (2) that it was the regular course of the subject business to make the documents; and, (3) that the documents were made contemporaneous with, or within a reasonable time after, the act, transaction, occurrence or event recorded. . . .

The repetitive statements of Mr. Fabacher, the Plaintiff's custodian of records, to the effect that he collects and maintains the records and documents of Citibank and/or any other prior assignees, "in the regular course of plaintiff's business" (*Fabacher Affidavit 3/14/07, P 1*), as if they were magic words, does not satisfy the business records exception to the hearsay rule. That phrase, standing alone, does not establish that the records upon which the Plaintiff relies were made in the regular course of the Plaintiff's business, that it was part of the regular course of the Plaintiff's business to make such records, or that the records were made at or about the time of the transactions recorded. Contrary to the misconception under which the Plaintiff labors, "the mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient [**8] to qualify the documents as business records (citation omitted)." . . . The statements of Mr. Fabacher, "who merely obtained the records from another entity that actually generated them, was an insufficient foundation for their introduction into evidence . . .

Finally, "The Plaintiff has also failed to submit any competent proof of an agreement between Citibank and the Defendant."

The Plaintiff's reliance on *Chase Manhattan Bank (National Association), Bank Americard Division v. Hobbs, 94 Misc 2d 780, 405 N.Y.S.2d 967 (Civ. Ct. Kings Co. 1978)* is misplaced. The plaintiff therein was not an assignee, but the party with which the defendant had entered into a retail charge account agreement and could properly lay a business record foundation

for [**10] the entry of the documents necessary to prove the existence of same. Additionally, the plaintiff therein provided proper proof of mailing of the subject account statements, along with copies of the retail charge account agreement, and demonstrated the defendant's use of the credit card in question, thereby accepting the terms of use of that card.

In the matter *sub judice*, the account statements upon which the Plaintiff relies do not show any usage of the credit card in question by the Defendant. The four (4) statements submitted show only an alleged open balance, with the accrual of fees and finance charges thereon. The Plaintiff also fails to submit any proof that a copy of the retail installment credit agreement or the statements upon which it relies were ever mailed to the Defendant. Neither Mr. Fabacher nor Plaintiff's counsel mailed these documents or have personal knowledge of their mailing; nor does the Plaintiff even attempt to describe a regular office practice and procedure for the mailing of the documents designed to insure that they are always properly addressed and mailed. . . .

- E. Beware of “generic” contracts that cannot be identified as pertaining to the specific account sued upon
1. *MBNA America Bank, N.A. v. Nelson*, 13777/06, 2007 NY Slip Op 51200U; 2007 N.Y. Misc. LEXIS 4317 (N.Y.Civ. Ct. May 24, 2007). The court required proof of the actual terms of the agreement with the particular debtor (*7-9)

. . . The notion that the terms of a valid offer be communicated to the offeree, regardless of whether the contract is unilateral, bilateral or otherwise, before they can become binding is well settled law.³² Therefore, absent a definite and certain offer outlining the terms and conditions of credit card use with the user's *actual signature*, the Petitioner . . . has the burden of establishing the binding nature of the underlying contract, including any allegedly applicable arbitration clauses, which entails proof, at a most basic level, that the debtor was provided with notice of the terms and conditions³³ to which Petitioner now [*8] seeks to hold [**23] Respondent.³⁴

Petitioner must tender the *actual* provisions agreed to, including any and all amendments³⁵, and not simply a photocopy of general terms to which the credit issuer may currently demand debtors agree. For example, Petitioner's Exhibit A which is labeled "Credit Card Agreement and Additional Terms and Conditions" lacks Respondent's signature. Neither does it contain a date indicating when these terms were adopted by MBNA nor how the terms were amended or changed, if at all, over the years appear anywhere on the document. Furthermore, the contract does not contain any name, account number or other identifying statements

which would connect the proffered agreement with the Respondent in this action. In fact, petitioners [**25] appear to have attached the exact same photocopy, which as noted is not specific to any particular consumer, to many of its confirmation petitions. While on its face there is nothing necessarily unusual about a large commercial entity such as MBNA providing a standard form contract that all credit card consumers agree to, the burden nevertheless remains with MBNA to tie the binding nature of its boiler-plate terms to the user at issue in each particular case and to show that those terms are binding on each Respondent it seeks to hold accountable³⁶ (the Respondent's intent to be bound *after notice of terms is established* can be shown via card use³⁷).³⁸ The fact that MBNA issues a particular agreement with particular terms with the majority of its customers is of little relevance in determining the actual terms of the alleged agreement before this Court, if not linked directly to respondent in some way shape or form. Just because a petitioner provides a photocopy of a document entitled "Additional Terms and Conditions," certainly does not mean those terms are binding on someone who could have theoretically signed a completely different agreement when they were extended credit. Whether [**26] the physical card itself or some solicitation agreement with Respondent's signature referenced the terms and conditions³⁹, or whether the terms were made readily accessible to Respondent by e-mail or the internet, and Respondent was in fact aware of this, may all be relevant to an inquiry into constructive notice but such notice must still be established. At bar, MBNA Bank has failed to establish that the provided terms and conditions were the actual terms and conditions agreed to by Nelson. As such, applying *Kaplan*, the Court does not find objective intent on the part of the Respondent to be bound to the contractual statements proffered by MBNA requiring the question of arbitrability to be decided by the arbitrator or that arbitration is the required forum for either party to bring claims against the other.

35 State law often outlines the acceptable procedures for amendments to retail credit agreements, and courts may treat as a nullity any amendment that did not follow proper [*17] notification, opt out or other relevant amendment procedures (see for e.g. *Kurz v. Chase Manhattan Bank USA, N.A.*, 319 F. Supp. 2d 457, 465 [2d Cir. 2004]) (under Delaware law "a credit card issuer seeking [**27] unilaterally to add an arbitration clause to the agreement must provide notice and an opt out provision"). However, in order to make such a determination the evolution of the contractual agreement from birth to litigation must be outlined for the court's scrutiny. Without the original agreement provided and its history made available, the court is effectively impinged from exercising its limited review function.

While these deficiencies of proof are fatal to Petitioner's claim,

such a problem is not without a solution. Since the credit card issuer is the party in the best position to maintain records of notification it may provide an affidavit from someone with knowledge of the policies, procedures and practices of its organization affirming (1) when and how the notification of the original terms and conditions was provided ⁴⁰, including any solicitations or applications containing the Respondent's signature, (2) what those terms and conditions were *at the time of the notification*, (3) whether the mandatory arbitration clause, and any **[**29]** other additional provisions Petitioner now treats as binding, were included in the terms and conditions of card use at the time Respondent entered into the retail credit agreement, and if they were not, then when they were added, as well as a statement certifying that (a) such addition was made pursuant to the applicable **[*9]** law chosen by the parties to apply to the agreement, not limited to but especially including mandatory opt-out requirements, and (b) a statement indicating that upon reasonable and diligent inspection of the records maintained by the Petitioner, and to the best of Petitioners' knowledge Respondent never opted out of said clause, and the basis for this determination. The use of such affidavits to support confirmation of arbitration awards is not novel. ⁴¹

Accord In re Lucas, 2008 NY Slip Op 50001U, 18 Misc.3d 1109A, 856 N.Y.S.2d 499 (2008).

2. *Palisades Collection LLC v. Haque*, 2006 N.Y. Misc. LEXIS 4036; 235 N.Y.L.J. 71 (Civ. Ct. Queens Co., April 13, 2006) (Pineda-Kirwin, J.).

Plaintiff attempted to introduce into evidence a document entitled "Terms and Conditions" which does not name defendant, contains no specific terms as to this defendant's particular account, and contains no signatures, claiming that AT&T Wireless sent it to defendant with the information regarding defendant's account. Ms. Bergman testified that plaintiff received it from AT&T Wireless along with the electronic transmission. In light of the earlier testimony that the account came to plaintiff via electronic transmission, it was not clear from the testimony how the "Terms and Conditions" document was sent along with the other information.

Defendant examined the document and objected on the grounds that the document was not his contract with AT&T Wireless as it did not contain the terms of his agreement and that he had never received such a document from AT&T Wireless. As plaintiff could not demonstrate that AT&T Wireless ever sent defendant this document, as the document was introduced to prove the truth of its contents, and as plaintiff failed to lay an adequate foundation for its admission as a business record, the objection was sustained. [citation]

Plaintiff again sought to introduce the "Terms and Conditions" document by claiming that AT&T Wireless sent the document to plaintiff as part of the purchase of defendant's account. Defendant again objected on the basis that it was not his contract, and the objection was again sustained. Plaintiff essayed several more times to introduce the "Terms and Conditions" contract, defendant objected, and each time the objection was sustained. Thus, plaintiff was unable to offer evidence of the terms of the agreement between AT&T Wireless and defendant. . . .

While it is well settled that the absence of an underlying agreement, if established, does not relieve a defendant of his obligation to pay for goods and services received on credit, (Citibank (SD) NA v. Roberts, 304 AD2d 901 [3rd Dept 2003],) that is not the sole impediment to this plaintiff's case. Here, without any admissible evidence from its alleged assignor, plaintiff was unable to establish that AT&T Wireless and defendant entered into a contract pursuant to which defendant was obligated to pay for the additional charges for which defendant now sues.

3. *Unifund CCR Partners v. Harrell*, 2005 Conn. Super. LEXIS 2037 (Aug. 3, 2005): Failure to produce signed agreement or affidavit authenticating purported agreement as that entered into with defendant results in denial of summary judgment. Affidavit of "plaintiff's legal coordinator" that "she has access to the records of Unifund CCR Partners and therefore has personal knowledge of the facts" not sufficient.
4. *First Select Corp. v. Grimes*, 2003 Tex. App. LEXIS 604 (Jan. 23, 2003): summary judgment for debtor affirmed where there was no evidence that the debtor used the credit card after First Select sent out an agreement modification and no copy of the written agreement between the original creditor and the consumer or the consumer's acceptance of such agreement.
5. *CACV of Colorado, LLC v. Cassidy*, 2005 Conn. Super. LEXIS 2797 (Oct. 19, 2005); *CACV of Colorado, LLC v. Acevedo*, 2005 Conn. Super. 2796 (Oct. 19, 2005); *CACV of Colorado, LLC v. Werner*, 2005 Conn. Super. LEXIS 1795 (Oct. 19, 2005); *CACV of Colorado, LLC v. McNeil*, 2005 Conn. Super. LEXIS 12794 (Oct. 19, 2005); and *CACV of Colorado, LLC v. Corda*, 2005 Conn. Super. LEXIS 3542 (Dec. 16, 2005): court refused applications to confirm arbitration awards where only document containing arbitration clause was affidavit signed with signature stamp attaching form agreement containing no dates or signatures; court also noted that NAF does not provide that arbitrator find defendant has actual notice of demand for arbitration. *Accord, MBNA America Bank, NA v. Straub*, 12 Misc. 3d 963; 815 N.Y.S.2d 450 (Civ. Ct. 32 2006).

F. Facsimile statements

1. Beware of "facsimile" statements, which are computer-generated, non-image documents. If the records are generated by computer, a person

familiar with the computer system who can testify that the output is an accurate reflection of the input must lay a foundation. *American Express Travel Related Services Co. v. Vinhnee (In re Vinhnee)*, 336 B.R. 437 (B.A.P. 9th Cir. 2005). Among pertinent subjects of inquiry are “system control procedures, including control of access to the pertinent databases, control of access to the pertinent programs, recording and logging of changes to the data, backup practices, and audit procedures utilized to assure the continuing integrity of the records.” 336 B.R. at 449. In *Vinhnee*, “The trial court concluded that the declaration in the post-trial submission was doubly defective. First, the declaration did not establish that the declarant was ‘qualified’ to provide the requisite testimony. Second, the declaration did not contain information sufficient to warrant a conclusion that the ‘American Express computers are sufficiently accurate in the retention and retrieval of the information contained in the documents.’ ” 336 B.R. at 448.

G. “Business records” must be prepared in the regular course of business, where there is little or no motive to falsify. Documents prepared after the event for litigation purposes are not admissible as business records. *People v. Smith*, 141 Ill. 2d 40, 72, 565 N.E.2d 900, 914 (1990) (prison incident reports are not admissible under the business records exception to the hearsay rule when offered to prove the truth of the disciplinary infractions or confrontations between prison employees or law enforcement personnel or prison inmates); *Kelly v. NCI Heinz Construc. Co.*, 282 Ill.App.3d 36, 668 N.E.2d 596 (1996); *People ex rel. Schacht v. Main Ins. Co.*, 114 Ill. App. 3d 334, 344, 448 N.E.2d 950, 957 (1st Dist. 1983) (“since the probability of trustworthiness is the rationale for the business records rule, records prepared for litigation are not normally admissible even if it is a part of the regular course of business to make such records”); *Palmer v. Hoffman*, 318 U.S. 109 (1943). No document prepared by a debt buyer regarding a charged-off account as a predicate for suing the consumer should be a business record.

H. Secondary evidence of documents should be objected to:

1. Most of the major credit card issuers do not retain applications for more than six years after the account is opened (not six years after the account is closed out with nothing more owing).
2. Illinois does not allow plaintiff who has disposed of document knowing it may be necessary to use it as evidence from introducing secondary evidence. *Lam v. Northern Illinois Gas Co.*, 114 Ill. App. 3d 325, 332-32, 449 N.E.2d 1007 (1st Dist. 1983):

To introduce secondary evidence of a writing, a party must first prove prior existence of the original, its loss, destruction or unavailability; authenticity of the substitute and his own diligence in attempting to procure the original. (*Gillson v. Gulf, Mobile & Ohio R.R. Co.* (1969), 42 Ill. 2d 193, 199, 246 N.E.2d 269.) Here, NI-Gas established that the original customer service cards did exist. NI-Gas, however, destroyed the cards. If the original document has been destroyed by the party who offers secondary evidence of its contents, the evidence is not admissible unless, by showing that the destruction was

accidental or was done in good faith, without intention to prevent its use as evidence, he rebuts to the satisfaction of the trial judge, any inference of fraud. (McCormick, Evidence sec. 237, at 571 (2d ed. 1972); 29 Am. Jur. 2d Evidence secs. 454, 463 (1967); 32A C.J.S. Evidence sec. 824 (1964).) In Illinois, "if a party has voluntarily destroyed a written instrument, he cannot prove its contents by secondary evidence unless he repels every inference of a fraudulent design in its destruction." (Blake v. Fash (1867), 44 Ill. 302, 304; accord, Palmer v. Goldsmith (1884), 15 Ill. App. 544, 546.) We note further that the "resolution of loss or destruction issues is a matter necessarily consigned to the sound discretion of the trial judge." Wright v. Farmers Co-Op (8th Cir. 1982), 681 F.2d 549, 553; accord, People v. Baptist (1979), 76 Ill. 2d 19, 27, 389 N.E.2d 1200.

Accord, Sears, Roebuck and Co. v. Seneca Insurance Co., 254 Ill. App. 3d 686; 627 N.E.2d 173, 176-77 (1st Dist. 1993) ("The best or secondary evidence rule provides that in order to establish the terms of a writing, the original must be produced unless it is shown to be unavailable for some reason other than the serious fault of the proponent"); *Zurich Insurance Co. v. Northbrook Excess & Surplus Insurance Co.*, 145 Ill. App. 3d 175, 203, 494 N.E.2d 634, 652 (1st Dist. 1986), *aff'd*, 118 Ill. 2d 23, 514 N.E.2d 150 (1987).

I. Illinois cases re foundation for business records

1. Illinois courts hold that "A sufficient foundation for admitting business records may be established through the testimony of the custodian of the records or another person familiar with the business and its mode of operation." *In re Estate of Weiland*, 338 Ill. App. 3d 585, 600, 788 N.E.2d 811 (2nd Dist. 2003). Under Illinois law:

Anyone familiar with the business and its procedures may testify as to the manner in which records are prepared and the general procedures for maintaining such records in the ordinary course of business. *Raiihel v. Dustcutter, Inc.*, 261 Ill. App. 3d 904, 909, 634 N.E.2d 1163 (1994) (Cook, J., specially concurring). The foundation requirements for admission of documents under this exception are that it is a writing or record made as memorandum of the event made in the ordinary course of business and it was the regular course of the business to make such a record at that time. *In re Estate of Weiland*, 338 Ill. App. 3d 585, 600, 788 N.E.2d 811 (2003).

City of Chicago v. Old Colony Partners, L.P., 364 Ill. App. 3d 806, 819, 847 N.E.2d 565 (1st Dist. 2006).

2. Debt buyers often try to introduce the business records of the original, pre-default creditor through the testimony of an employee of the debt buyer on the theory that they have become the records of the debt buyer. See attached memo from the National Association of Retail Collection Attorneys.

3. Under Illinois law, if the records are those of business A, they can be treated as records of business B only if A was authorized by B to generate the records on behalf of B as part of B's ordinary business activities. In *Argueta v. Baltimore & Ohio*, 224 Ill.App.3d 11, 12-14, 586 N.E.2d 386 (1st Dist. 1991), appeal denied, 144 Ill. 2d 631, 591 N.E.2d 20 (1992), the court held:

A number of Illinois cases have held that documents produced by third parties were inadmissible as business records. In each of these cases, the documents were not commissioned by the business seeking to introduce them into evidence, albeit the documents were retained in the business files. *International Harvester Credit Corp. v. Helland* (1986), 151 Ill. App. 3d 848, 503 N.E.2d 548 (minutes of board of director's meeting of a company were not the business records of a second company); *Pell v. Victor J. Andrew High School* (1984), 123 Ill. App. 3d 423, 462 N.E.2d 858 (letter from a manufacturer was not the business record of a second manufacturer); *Benford v. Chicago Transit Authority* (1973), 9 Ill. App. 3d 875, 293 N.E.2d 496 (a note made by employee's private physician was not the business record of employer).

By contrast, a business report generated by a third party has been held to be admissible when it was commissioned in the regular course of business of the party seeking to introduce it. *Birch v. Township of Drummer* (1985), 139 Ill. App. 3d 397, 487 N.E.2d 798 (survey of an engineering firm commissioned by county admissible as business record of the county).

The key consideration is the authority of the third party to act on the business' behalf. Where a third party is authorized by a business to generate the record at issue, the record is of no use to the business unless it is accurate and, therefore, the record bears sufficient indicia of reliability to qualify as a business record under the hearsay rule. See also *N.L.R.B. v. First Termite Control Co., Inc.* (9th Cir. 1981), 646 F.2d 424; Fed. R. Evid. 803(6); M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 803.10, at 647 (5th ed. 1990).

Accordingly, we find that the trial court erred in its ruling that the ultrasonic test reports were inadmissible. The reports were the business records of B&OCT. Although the reports were generated by Calumet and Conam, the tests were performed at the direction of the railroad in the regular course of its business..

Accord, Kimble v. Earle M. Jorgenson Co., 358 Ill. App. 3d 400; 830 N.E.2d 814 (1st Dist. 2005).

4. On this issue, debt buyers rely on *Krawczyk v. Centurion Capital Corp.*, 06 C 6273, 2009 U.S. Dist. LEXIS 12204 (N.D.Ill., February 18, 2009), an

FDCPA case applying the Federal Rules of Evidence and not the more restrictive requirements of Illinois law. After concluding that certain affidavits were admissible because they showed the state of mind of the defendant (relevant to a bona fide error defense), the court went on to state:

The Court also is persuaded by Defendants' argument that the records of Centurion and Palisades fall under the business records exception to the hearsay rule. Rule 803(6) provides that regularly kept business records may be admitted to prove the truth of the matters asserted therein because they are presumed to be exceptionally reliable. Fed. R. Evid. 803(6); *U.S. v. Emenogha*, 1 F.3d 473, 483-484 (7th Cir. 1993). To qualify as business records under Rule 803(6), "1) the document must be prepared in the normal course of business; 2) it must be made at or near the time of the events it records; and 3) it must be based on the personal knowledge of the entrant or on the personal knowledge of an informant having a business duty to transmit the information to the entrant." *Datamatic Servs., Inc. v. United States*, 909 F.2d 1029, 1032 (7th Cir. 1990). [*11] "The admissibility of business records is entrusted to the broad discretion of the trial court, and the court's ruling will not be disturbed absent an abuse of that discretion." *Id.*

As recognized by the Massachusetts Supreme Judicial Court in *Beal Bank, SSB v. Eurich*, "[t]he problem of proving a debt that has been assigned several times is of great importance to mortgage lenders and financial institutions." 831 N.E.2d 909, 914 (Mass. 2005) (citing *New England Sav. Bank v. Bedford Realty Corp.*, 717 A.2d 713 (1998)). Given the common practice of financial institutions buying and selling loans, the court in *Beal* determined that it is normal business practice to maintain accurate business records regarding such loans and to provide them to those acquiring the loan. *Id.*; see also *Federal Deposit Ins. Corp. v. Staudinger*, 797 F.2d 908, 910 (10th Cir. 1986) ("foundation for admissibility may at times be predicated on judicial notice of the nature of the business and the nature of the records * * * particularly in the case of bank and similar statements"). The court concluded that the bank was not required to provide testimony from a witness with personal knowledge regarding the maintenance [*12] of the predecessors' business records because the bank's reliance on this type of record keeping by others rendered the records the equivalent of the bank's own records. See also *U.S. v. Adefehinti*, 510 F.3d 319, 326 (D.C. Cir. 2007) (finding that pursuant to "the rule of incorporation," the record of which a business takes custody is thereby "made" by the business within the meaning of the rule); *Matter of Ollag Construction Equipment Corp.*, 665 F.2d 43, 46 (2d Cir. 1981) (finding that "business records are admissible if witnesses testify that the records are integrated into a company's records and relied upon in its day-to-day operations"); *U.S. v. Carranco*, 551 F.2d 1197, 1200 (10th Cir. 1977) (holding that freight bills, though

drafted by other companies, were business records of a shipping company because they were "adopted and relied upon by" the shipping company). The *Beal* court also stated that "to hold otherwise would severely impair the ability of assignees of debt to collect the debt due because the assignee's business records of the debt are necessarily premised on the payment records of its predecessors." 831 N.E.2d at 914. . . .

Relying on the previously set forth principles as well as those espoused by the court in *Beal*, this Court finds that Centurion integrated the Capital One records [*15] into its own records and relied upon them in its daily operations. Centurion relied upon the information provided by Capital One when attempting to collect on Plaintiff's defaulted debt. Centurion, as a debt collector, was aware of the penalties for attempting to collect bogus debts; therefore, its reliance on the records provides another assurance of reliability. Kavanagh's affidavit attests that she has personal knowledge of Centurion's record-keeping, she is competent to testify to those matters, and she has reviewed and is familiar with the records relating to Plaintiff's debt. She further explains how Centurion's automated collection system database created the record of Plaintiff's alleged defaulted debt on December 8, 2005, the same day Centurion purchased the debt from Capital One as part of a portfolio of defaults. As soon as Centurion had the information available to it, it created a record containing Plaintiff's credit card number, the amount of the debt, the last date of payment, and the debtor's last known address and social security number. Additionally, the record was transferred from Capital One to Centurion's automated collection system database without alteration. [*16] Although Kavanagh did not author the record in question, the business record exception does not impose any such requirement. See *Duncan*, 919 F.2d at 986. Kavanagh's affidavit, testifying to the records that Centurion received from Capital One, is reliable and can be relied upon in support of summary judgment. And, for the same reasons, the affidavit of Peter Fish is deemed reliable and also can be used in support of Defendants' motion for summary judgment. ⁵

5. The author submits that the above-quoted statement is wrong even under federal law. *Beal Bank* and similar cases do not involve situations where the records pertain entirely to defaulted debts. They involve cases where one business takes over accounts of another, most or all of which are *not* in default. In the latter situation, the acquiring business makes use of the acquired records in the ordinary course of its business, subjecting them to normal accounting and auditing procedures. In addition, it is dealing with non-defaulted customers whose good will and business it wants to preserve. These facts furnish circumstantial guarantees of reliability equivalent to those that exist when the business is offering records which it generated itself.
6. According to the Advisory Committee, Rule 803(6) is based on the premise

that the reliability of business records is "supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon, or by a duty to make an accurate record as part of a continuing job or occupation." The same circumstantial guarantee of trustworthiness is not present when a debt buyer or debt collector acquires a portfolio of defaulted accounts. The debt collector is not interested in the good will of the defaulted debtors, or in avoiding overcharges, but in collecting as much money as possible. If a debt buyer's records do not satisfy the normal standard of admissibility, and it does not produce someone who can testify that the recordkeeping procedures of the pre-default creditor meet this standard, the records should not be admitted. The fact that an out of court declarant was aware that there are penalties for making false statements has never been considered a basis for allowing testimony that does not otherwise satisfy the requirements of a hearsay exception; if it did, any affidavit would be competent evidence.

7. The *Krawczyk* court's conclusion is basically inconsistent with the distinction made in the FDCPA between persons who acquire current debts and persons who acquire defaulted debts; the latter are covered by the FDCPA because the need to preserve customer good will does not exist and requires that they be regulated. On the state level, it is inconsistent with the decision of the Illinois legislature, in amending the ICAA effective Jan. 1, 2008, to classify debt buyers with collection agencies rather than original creditors.
8. In this regard, the FTC does not share the view of the *Krawczyk* court regarding the accuracy of debt collector records. "Collecting Consumer Debts: The Challenges of Change: A Federal Trade Commission Workshop Report (February 2009)," pp. iii-iv, states:

The FTC believes that there are currently two major problems in the flow of information in the debt collection system. The first major problem is that debt collectors have inadequate information when they seek to collect from consumers. This increases the likelihood that collectors will reach the incorrect consumer, try to collect the wrong amount, or both. . . .

A related information problem is that the limited information debt collectors obtain in verifying debts is unlikely to dissuade them from continuing their attempts to collect from the wrong consumer or the wrong amount. If a consumer disputes a debt, the collector is required to obtain verification of the debt and provide it to the consumer before renewing its collection efforts. Many collectors currently do little more to verify debts than confirm that their information accurately reflects what they received from the creditor. This is not likely to reveal whether collectors are trying to collect from the wrong consumer or collect the wrong amount. The FTC therefore concludes that collectors need to do more to increase the likelihood that the information they acquire during the verification process will correct errors. . . .

9. The literature offering debts for sale often shows that the purchaser cannot rely on the records as accurate and that the parties contemplate litigation. Literature advertising the portfolios may refer to them as “litigation ready.” The agreements for the sale of charged-off debts often provide that the debts are sold without representation or warranty. If the seller of a debt is not willing to warrant the accuracy of its records to the purchaser, the purchaser should not without more be allowed to present them as accurate to a court.
- J. Note that Illinois requires that “the sufficiency of an affidavit must be tested by a motion to strike the affidavit (or by a motion to strike the motion for summary judgment setting forth the objections to the affidavit).” *Duffy v. Midlothian Country Club*, 92 Ill. App. 3d 193, 199, 415 N.E.2d 1099 (1st Dist. 1980).

IX. ARBITRATION CLAIMS

- A. Many debt buyers attempt to enforce arbitration awards, mostly issued by the National Arbitration Forum.
- B. Illinois law requires the party seeking to enforce an arbitration award to prove to the court by competent evidence that the consumer agreed to arbitrate. *Salsitz v. Kreiss*, 198 Ill.2d 1, 761 N.E.2d 724 (2001). Because “an agreement to arbitrate is a matter of contract,” “[i]t follows that, where the arbitrator decides the question of arbitrability in the first instance, the circuit court must review the arbitrator’s decision de novo. . . . Were it not so, a party would be bound by the arbitration of disputes he had not agreed to arbitrate and would be left with only a court’s deferential review of the arbitrator’s decision on a question of arbitrability” (198 Ill.2d at 13-14)
- C. Generally, what is submitted in support of an NAF arbitration award is **not** sufficient to prove an agreement to arbitrate.
 1. *MBNA America Bank, N.A. v. Nelson*, 13777/06, 2007 NY Slip Op 51200U; 2007 N.Y. Misc. LEXIS 4317 (N.Y.Civ. Ct. May 24, 2007).
 2. *Lucas v. MBNA*, 18 Misc.3d 1109A, 856 N.Y.S.2d 499 (N.Y. Sup. Ct. 2008).
 3. *MBNA America Bank, N.A. v. Credit*, 281 Kan. 655, 132 P.3d 898 (2006) (collecting cases).
 4. *MBNA America Bank, N.A. v. Christianson*, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008).
 5. *FIA Card Services v. Thompson*, 18 Misc.3d 1146A, 859 N.Y.S.2d 894 (D.Ct. 2008).
- D. Participation in the arbitration without raising the issue may constitute waiver, as one can always agree to arbitrate a dispute after it has arisen. *Salsitz v. Kreiss*, 198 Ill.2d 1, 16-18, 761 N.E.2d 724 (2001).

X. ILLINOIS CREDIT CARD STATUTES

Illinois credit card statutes authorize award of attorneys fees for successfully defending all or part of suit on credit card debt 815 ILCS 145/2 provides:

[Accepted credit card; amount of liability]

Sec. 2. (a) Notwithstanding that a person in whose name a credit card has been issued has requested or applied for such card or has indicated his acceptance of an unsolicited credit card, as provided in Section 1 hereof [815 ILCS 145/1], such person shall not be liable to the issuer unless the card issuer has given notice to such person of his potential liability, on the card or within two years preceding such use, and has provided such person with an addressed notification requiring no postage to be paid by such person which may be mailed in the event of the loss, theft, or possible unauthorized use of the credit card, and such person shall not be liable for any amount in excess of the applicable amount hereinafter set forth, resulting from unauthorized use of that card prior to notification to the card issuer of the loss, theft, or possible unauthorized use of that card:

Card without a signature panel.....\$ 25.00

Card with a signature panel.....\$ 50.00

After the holder of the credit card gives notice to the issuer that a credit card is lost or stolen he is not liable for any amount resulting from unauthorized use of the card.

(b) When an action is brought by an issuer against the person named on a card, issuance of which has been requested, applied for, solicited or accepted and defendant puts in issue any transaction arising from the use of such card, the burden of proving benefit, authorization, use or permission by defendant as to such transaction shall be upon plaintiff. In the event defendant prevails with respect to any transaction so put in issue, the court may enter as a credit against any judgment for plaintiff, or as a judgment for defendant, a reasonable attorney's fee for services in connection with the transaction in respect of which the defendant prevails.

XI. SUBSTANTIVE DEFENSES

A. In credit card cases, is the defendant personally liable?

1. Generally, “authorized users” of a credit card are not personally liable; only the cardholder is. *Alabran v. Capital One Bank*, Civ. Action No. 3:04CV935, 2005 U.S. Dist. LEXIS 34158 at **12, 16 (E.D.Va. Dec. 8, 2005); *Sears Roebuck & Co. v. Ragucci*, 203 N.J. Super. 82, 495 A.2d 923 (1985); *Cleveland Trust Co. v. Snyder*, 55 Ohio App.2d 168, 380 N.E.2d 354 (1978); *Blaisdell Lumber Co. v. Horton*, 242 N.J. Super 98, 575 A.2d 1386 (1990); *Sears, Roebuck & Co v. Stover*, 32 Ohio Misc.2d 1, 513 N.E.2d 361 (1987); *First National Bank of Findlay v. Fulk*, 57 Ohio App.3d 44, 566 N.E.2d 1270 (1989); *FCC National Bank v. Laursen (In re Laursen)*, 214 B.R. 378, 381 (Bankr. D.Neb. 1997); *Citibank (S.D.), N.A. v. Hauff*, 2003 SD 99, 668 N.W.2d 528 (2003); *Chevy Chase Savings Bank v. Strong*, 46 Va. Cir. 422 (1998); *Houfek v. First Deposit National Bank (In re Houfek)*, 126 B.R. 530 (Bankr. S.D. Ohio 1991); *Nelson v. First*

National Bank Omaha, No. A04-579, 2004 WL 2711032 (Mn.App. Nov. 30, 2004).

2. There are several reasons for this:
 - a. Under the common law of agency, only the principal is liable on the principal's account. Agents, such as authorized users, who purchase for a principal are not liable for the principal's account.
 - b. By making a purchase using the obligor's contract, the authorized user does not have an opportunity to see or read the alleged contract. It is unfair to hold a person to a contract he or she has not read nor had any opportunity to read and that was created earlier between the company and the cardholder.
 - c. The Truth in Lending Act, 15 U.S.C. §1601, *et seq.*, provides that to be liable on a credit card, one must have applied for the card or requested the card. The Act states:

No credit card shall be issued except in response to a request or application therefor. This prohibition does not apply to the issuance of a credit card in renewal of, or in substitution for, an accepted credit card. 15 U.S.C. §1642.

The Federal Reserve Board Official Staff Commentary to 12 C.F.R. §226.2(a)(8) (definition of "cardholder") excludes "authorized user." 12 C.F.R. pt. 226, Supplement I. Thus, only person(s) who sign the "application" or "request" credit under 15 U.S.C. §1642 should be "cardholders" and liable as obligors.

3. If two names appear on a monthly credit card statement and it is disputed who is signatory and who is authorized user, bank cannot prevail without proving who signed agreement. Banks often have poor records and cannot prove this. *Johnson v. MBNA America Bank, N.A.*, 1:05cv150, 2006 U.S. Dist. LEXIS 10533 (M.D.N.C. March 9, 2006). It appears that many banks keep applications or images of applications for not more than seven years after the account is opened (not after the account is closed).
4. 15 U.S.C. § 1643(b) applies to both original creditor and bad debt buyers and requires them to show "authorized use" for charges.
5. Under Illinois law, a promise to answer for the debt of another is within the statute of frauds whether the debt is incurred before or after the promise. *Rosewood Care Center, Inc. v. Caterpillar, Inc.*, 226 Ill.2d 559, 877 N.E.2d 1091 (2007). However, the statute of frauds does not apply if the "main purpose" or "leading object" of the promise was to benefit the business interests of the promisor. *Id.* The Court cited section 11 of Restatement (Third) of Suretyship & Guaranty: "A contract that all or part of the duty of the principal obligor to the obligee shall be satisfied by the secondary obligor is not within the Statute of Frauds as a promise to answer for the

duty of another if the consideration for the promise is in fact or apparently desired by the secondary obligor mainly for its own economic benefit, rather than the benefit of the principal obligor." Restatement (Third) of Suretyship & Guaranty §11(3)(c), at 42 (1996)."Where the secondary obligor's main purpose is its own pecuniary or business advantage, the gratuitous or sentimental element often present in suretyship is eliminated, the likelihood of disproportion in the values exchanged between secondary obligor and obligee is reduced, and the commercial context commonly provides evidentiary safeguards. Thus, there is less need for cautionary or evidentiary formality than in other secondary obligations." Restatement (Third) Suretyship & Guaranty § 11, Comment to Subsection (3)(c), at 49-50 (1996). It also cited 72 Am. Jur. 2d Statute of Frauds § 134, at 658 (2001) ("Cases sometimes arise in which, although a third party is the primary debtor, the promisor has a personal, immediate, and pecuniary interest in the transaction, and is therefore himself a party to be benefited by the performance of the promisee. In such cases the reason which underlies and which prompted this statutory provision fails, and the courts will give effect to the promise"). The Court held that the purpose of making the promise was a question of fact.

6. It is unclear whether the promise of one family member to pay debts incurred by another would qualify. If there is a duty to support (spousal, parental) the promisor's duty may be fulfilled by paying a credit card or other credit obligation; however, this would not constitute a "commercial context" or eliminate the "gratuitous or sentimental element." Rosewood involved an employer's promise to pay for medical services to be provided to an injured employee, where there is an obvious business interest in having experienced and medically qualified personnel negotiate with the provider rather than leaving negotiations up to the patient, and so was commercial.

B. Statutes of limitations: these are habitually ignored by debt buyers, collection attorneys

1. Retail installment contracts, leases of personal property (including cars, deficiencies): 4 years under UCC 2-725, 2A-506. *Citizens National Bank of Decatur v. Farmer*, 77 Ill. App. 3d 56; 395 N.E.2d 1121 (4th Dist. 1979); *Fallimento C.Op.M.A. v. Fischer Crane Co.*, 995 F.2d 789 (7th Cir. 1993);
2. Checks — three years from dishonor on check (810 ILCS 5/3-118(c)), two years for statutory penalty (735 ILCS 5/13-202) (NOTE: Underlying obligation paid with check may be five or ten years.)
3. Cell phone and other federally-regulated telecom debts: 2 years, 47 U.S.C. §415 (Communications Act). *Castro v. Collecto, Inc.*, EP-08-CA-215-FM, 2009 U.S. Dist. LEXIS 20324 (W.D.Tex. March 4, 2009).

C. Statute of limitations on credit cards: five years or ten years?

1. The statute of limitations on credit cards is five years unless a complete agreement signed by both parties and not subject to change on notice

without the debtor's signature is attached to the complaint. *Nicolai v. Mason*, 118 Ill.App.3d 300, 454 N.E.2d 1049 (5th Dist. 1983); *Parkis v. Arrow Financial Services*, No. 07 C 410, 2008 U.S. Dist. LEXIS 1212 (N.D.Ill. Jan. 8, 2008); *Ramirez v. Palisades Collection LLC*, No. 07 C 3840, 2008 U.S. Dist. LEXIS 48722 (N.D.Ill. June 23, 2008); *Asset Acceptance v. Babbar*, 07 M1 179759 (Cir. Ct. Cook Co., Jan. 31, 2008).

2. Dicta in a 1974 Illinois Appellate Court decision is cited by debt collectors for the proposition that the limitations period applicable to a bank credit card debt in Illinois is ten years, under what is now 735 ILCS 5/13-206. *Harris Trust & Savings Bank v. McCray*, 21 Ill.App.3d 605, 316 N.E.2d 209 (1st Dist. 1974). See also, *Citizen's National Bank of Decatur v. Farmer*, 77 Ill. App. 3d 56; 395 N.E.2d 1121 (4th Dist. 1979).
3. The statement is dicta because the only issue before the Court was whether the applicable period was the four-year period of the Uniform Commercial Code or the ten-year period of what is now 735 ILCS 5/13-206. *The Harris Bank* court specifically limited its ruling by stating: “[t]he only question presented in this appeal is whether a credit card issuer may commence an action based upon the holder's failure to pay for the purchase of goods more than 4 years after the issuer's cause of action accrued.” 21 Ill.App.3d at 606. Neither party argued whether the credit card was based on a “contract in writing” as required by 735 ILCS 5/13-206.
4. Subsequent cases made clear that not every “credit card” or “charge card” is a written contract for limitations purposes. *Nicolai v. Mason*, 118 Ill.App.3d 300, 454 N.E.2d 1049 (5th Dist. 1983) (claim based on “charge account” at retail store governed by five-year statute); *Weniger v. Arrow Financial Services LLC*, No. 03 C 6213, 2004 U.S. Dist. LEXIS 23172 (N.D.Ill. Nov. 18, 2004) (Lefkow, J.) (complaint alleging defendant brought suit on credit card and that there was no written contract between parties stated FDCPA claim).
5. Given the manner in which credit cards were issued in 1974 – one generally had to apply in writing and sign a receipt each time the card was used – there probably was a contract in writing.
6. But much has changed in the intervening 30 years. Most importantly, the banking industry has persuaded numerous state legislatures to enact statutes authorizing them to change the terms of credit card agreements by simply mailing a notice to the cardholder, with or without an opportunity to close the account and “opt out.” These include the legislatures in Delaware and South Dakota, where many credit card issuers are chartered in order to take advantage of federal “exportation” law and the absence of interest rate regulation in those states.
7. Delaware statute, 5 Del. C. §952 (2005) provides:

§ 952. Amendment of agreement

(a) Unless the agreement governing a revolving credit plan otherwise

provides, a bank may at any time and from time to time amend such agreement in any respect, whether or not the amendment or the subject of the amendment was originally contemplated or addressed by the parties or is integral to the relationship between the parties. Without limiting the foregoing, such amendment may change terms by the addition of new terms or by the deletion or modification of existing terms, whether relating to plan benefits or features, the rate or rates of periodic interest, the manner of calculating periodic interest or outstanding unpaid indebtedness, variable schedules or formulas, interest charges, fees, collateral requirements, methods for obtaining or repaying extensions of credit, attorney's fees, plan termination, the manner for amending the terms of the agreement, arbitration or other alternative dispute resolution mechanisms, or other matters of any kind whatsoever. Unless the agreement governing a revolving credit plan otherwise expressly provides, any amendment may, on and after the date upon which it becomes effective as to a particular borrower, apply to all then outstanding unpaid indebtedness in the borrower's account under the plan, including any such indebtedness that arose prior to the effective date of the amendment. An agreement governing a revolving credit plan may be amended pursuant to this section regardless of whether the plan is active or inactive or whether additional borrowings are available thereunder. Any amendment that does not increase the rate or rates of periodic interest charged by a bank to a borrower under § 943 or § 944 of this title may become effective as determined by the bank, subject to compliance by the bank with any applicable notice requirements under the Truth in Lending Act (15 U.S.C. §§ 1601 et seq.), and the regulations promulgated thereunder, as in effect from time to time. Any notice of an amendment sent by the bank may be included in the same envelope with a periodic statement or as part of the periodic statement or in other materials sent to the borrower.

(b)

(1) If an amendment increases the rate or rates of periodic interest charged by a bank to a borrower under § 943 or § 944 of this title, the bank shall mail or deliver to the borrower, at least 15 days before the effective date of the amendment, a clear and conspicuous written notice that shall describe the amendment and shall also set forth the effective date thereof and any applicable information required to be disclosed pursuant to the following provisions of this section.

(2) Any amendment that increases the rate or rates of periodic interest charged by a bank to a borrower under § 943 or § 944 of this title may become effective as to a particular borrower if the borrower does not, within 15 days of the earlier of the mailing or delivery of the written notice of the amendment (or such longer period as may be established by the bank), furnish written notice to the bank that the borrower does not agree to accept such amendment. The notice from the bank shall set forth the address to which a borrower may send notice of the

borrower's election not to accept the amendment and shall include a statement that, absent the furnishing of notice to the bank of nonacceptance within the referenced 15 day (or longer) time period, the amendment will become effective and apply to such borrower. As a condition to the effectiveness of any notice that a borrower does not accept such amendment, the bank may require the borrower to return to it all credit devices. If, after 15 days from the mailing or delivery by the bank of a notice of an amendment (or such longer period as may have been established by the bank as referenced above), a borrower uses a plan by making a purchase or obtaining a loan, notwithstanding that the borrower has prior to such use furnished the bank notice that the borrower does not accept an amendment, the amendment may be deemed by the bank to have been accepted and may become effective as to the borrower as of the date that such amendment would have become effective but for the furnishing of notice by the borrower (or as of any later date selected by the bank).

(3) Any amendment that increases the rate or rates of periodic interest charged by a bank to a borrower under § 943 or §944 of this title may, in lieu of the procedure referenced in paragraph (2) of this subsection, become effective as to a particular borrower if the borrower uses the plan after a date specified in the written notice of the amendment that is at least 15 days after the mailing or delivery of the notice (but that need not be the date the amendment becomes effective) by making a purchase or obtaining a loan; provided, that the notice from the bank includes a statement that the described usage after the referenced date will constitute the borrower's acceptance of the amendment.

(4) Any borrower who furnishes timely notice electing not to accept an amendment in accordance with the procedures referenced in paragraph (2) of this subsection and who does not subsequently use the plan, or who fails to use such borrower's plan as referenced in paragraph (3) of this subsection, shall be permitted to pay the outstanding unpaid indebtedness in such borrower's account under the plan in accordance with the rate or rates of periodic interest charged by a bank to a borrower under § 943 or § 944 of this title without giving effect to the amendment; provided however, that the bank may convert the borrower's account to a closed end credit account as governed by subchapter III of this chapter, on credit terms substantially similar to those set forth in the then-existing agreement governing the borrower's plan.

(5) Notwithstanding the other provisions of this subsection, no notice required by this subsection of an amendment of an agreement governing a revolving credit plan shall be required, and any amendment may become effective as of any date agreed upon between a bank and a borrower, with respect to any amendment that is agreed upon between the bank and the

borrower, either orally or in writing.

(c) For purposes of this section, the following are examples of amendments that shall not be deemed to increase the rate or rates of periodic interest charged by a bank to a borrower under § 943 or § 944 of this title:

(1) A decrease or increase in the required number or amount of periodic installment payments;

(2) Any change to a plan that increases the rate or rates in effect immediately prior to the change by less than 1/4 of 1 percentage point per annum; provided that a bank may not make more than one such change in reliance on this paragraph with respect to a plan within any 12-month period;

(3) a. A change in the schedule or formula used under a variable rate plan under § 944 of this title that varies the determination date of the applicable rate, the time period for which the applicable rate will apply or the effective date of any variation of the rate, or any other similar change, or

b. Any other change in the schedule or formula used under a variable rate plan under § 944 of this title; provided, that the initial interest rate that would result from any such change under this paragraph (3), as determined on the effective date of the change or, if notice of the change is mailed or delivered to the borrower prior to the effective date, as of any date within 60 days before mailing or delivery of such notice, will not be an increase from the rate in effect on such date under the existing schedule or formula;

(4) A change from a variable rate plan to a fixed rate, or from a fixed rate to a variable rate plan so long as the initial rate that would result from such a change, as determined on the effective date of the change, or if the notice of the change is mailed or delivered to the borrower prior to the effective date, as of any date within 60 days before mailing or delivery of such notice, will not be an increase from the rate in effect on such date under the existing plan;

(5) A change from a daily periodic rate to a periodic rate other than daily or from a periodic rate other than daily to a daily periodic rate; and

(6) A change in the method of determining the outstanding unpaid indebtedness upon which periodic interest is calculated (including, without limitation, a change with respect to the date by which or the time period within which a new balance or any portion thereof must be paid to avoid additional periodic interest).

(d) The procedures for amendment by a bank of the terms of a plan to which a borrower other than an individual borrower is a party may, in lieu of the foregoing provisions of this section, be as the agreement

governing the plan may otherwise provide.

8. South Dakota statute, S.D. Codified Laws § 54-11-10 (2005), provides:

Change in terms -- Notice

Upon written notice, a credit card issuer may change the terms of any credit card agreement, if such right of amendment has been reserved. However, the following changes to the credit card agreement, effective as to existing balances, do not become binding on the parties if the card holder, within twenty-five days of the effective date of the change, furnishes written notice to the issuer, at the address designated by the issuer, that the card holder does not agree to abide by such changes:

- (1) Modifying the circumstances under which a finance charge will be imposed;**
- (2) Altering the method used to calculate finance charges;**
- (3) Increasing finance charges, fees, and other costs; or**
- (4) Increasing the required minimum payment.**

Any other change to the credit card agreement modifying the manner in which the issuer and card holder resolve disputes arising out of their relationship do not become binding on the parties if the card holder, within twenty-five days of the effective date of the change, furnishes written notice to the issuer, at the address designated by the issuer, that the card holder does not agree to abide by such changes.

Use of the card after the effective date of the change of terms is deemed to be an acceptance of the new terms, even if the twenty-five-day period has not expired. Unless otherwise required by 12 C.F.R. § 226, in effect on January 1, 2005, a written change of terms notice is not required if the proposed change in terms has been communicated by the issuer to the card holder and the card holder agrees.

9. Recognizing such enactments, Illinois courts now hold that cardholder agreements are not contracts but “standing offers to extend credit,” subject to “modification at will,” which are accepted “each time the card is used according to the terms of the cardholder agreement at the time of such use”. *Garber v. Harris Trust & Savings Bank*, 104 Ill. App. 3d 675, 679, 432 N.E.2d 1309, 1311 (1st Dist. 1982); accord, *Ragan v. AT&T Corp.*, 355 Ill.App.3d 1143, 1149, 824 N.E.2d 1183 (5th Dist. 2005); *Reyes v. Equifax Credit Info. Servs.*, 03 C 1377, 2003 U.S. Dist. LEXIS 22235 (N.D.Ill., Dec. 10, 2003); *Frerichs v. Credential Servs. Int’l*, 98 C 3684, 1999 U.S. Dist. LEXIS 22811, *21 (N.D.Ill., Oct. 1, 1999). Other decisions likewise hold that credit card agreements are terminable at will and that their terms may be changed by sending a notice with a monthly statement which is not rejected by the cardholder. *Taylor v. First North American National Bank*, 325 F.Supp.2d 1304, 1313 (M.D.Ala. 2004); *Battels v. Sears National Bank*, 365 F.Supp.2d 1205, 1209 (M.D.Ala. 2005); *Grasso v. First USA*

Bank, 713 A.2d 304 (Del. Super. Ct. 1998); *Edelist v. MBNA Am. Bank*, 790 A.2d 1249 (Del. Super. Ct. 2001); see *Banc One Fin. Servs. v. Advanta Mtge. Corp. USA*, 00 C 8027, 2002 U.S. Dist. LEXIS 960 (N.D.Ill., Jan. 23, 2002).

10. A necessary consequence of the notion that the terms of a credit card agreement may be changed by mere notice is that a credit card agreement subject to such alteration is not a “written contract” within the meaning of 735 ILCS 5/13-206.
11. Section 13-206 requires that the writing be “complete,” in that it identifies the parties, states the date of the agreement; contains the signatures of the parties; and sets forth all terms of the parties’ agreement. *Brown v. Goodman*, 147 Ill.App.3d 935, 940, 498 N.E.2d 854 (1st Dist. 1986); *Clark v. Western Union Telegraph Co.*, 141 Ill.App.3d 174, 176, 490 N.E.2d 36 (1st Dist. 1986); *Weaver v. Watson*, 130 Ill. App. 3d 563, 567, 474 N.E.2d 759, 762 (5th Dist. 1984); *Munsterman v. Illinois Agricultural Auditing Association*, 106 Ill.App.3d 237, 238-39, 435 N.E.2d 923, 925 (3d Dist. 1982); *Baird & Warner, Inc. v. Addison Industrial Park, Inc.*, 70 Ill.App.3d 59, 73, 387 N.E.2d 831, 838 (1st Dist. 1979).
12. “The test for whether a contract is written under the statute of limitations in Illinois is not whether the contract meets the requirements of the Statute of Frauds, but whether all essential terms of the contract, including the identity of the parties, are in writing and can be ascertained from the written instrument itself.” *Brown v. Goodman, supra*, 147 Ill. App. 3d at 940-41 (emphasis added).
13. If any essential element of the contract is omitted from the writing, ““then the contract *must* be treated as oral for purposes of the statute of limitations.”” *Armstrong v. Guigler*, 174 Ill. 2d 281, 288, 673 N.E.2d 290, 295 (1996); *accord, Toth v. Mansell*, 207 Ill. App. 3d 665, 669, 566 N.E.2d 730, 733 (1st Dist. 1990); *Schmidt v. Niedert*, 45 Ill. App. 3d 9, 13, 358 N.E.2d 1305 (1st Dist. 1976).
14. “Illinois courts give a strict interpretation to the meaning of a written contract within the statute of limitations. For statute of limitation purposes, a contract is considered to be written if all the essential terms of the contract are in writing and are ascertainable from the instrument itself.” *Brown*, 147 Ill. App. 3d at 939. If the agreement necessitates resort to parol testimony to make it complete, the law is that in applying the statute of limitations, it must be treated as an oral contract. *Toth*, 207 Ill. App. 3d at 671.
15. “The law is clear in Illinois that to constitute a written contract under the statute of limitations, the written instrument itself must completely identify the parties to the contract.” *Brown*, 147 Ill. App. 3d at 940 (emphasis added); *accord, Railway Passenger & Freight Conductors’ Mutual Aid & Benefit Association v. Loomis*, 142 Ill. 560, 32 N.E. 424 (1892); *Munsterman*, 106 Ill. App. 3d at 238-39; *Pratl v. Hawthorn-Mellody Farms Dairy, Inc.*, 53 Ill. App. 3d 344, 347, 368 N.E.2d 767, 770 (1st Dist. 1977); *Matzer v. Florsheim Shoe Co.*, 132 Ill. App. 2d 470, 472, 270 N.E.2d 75

(1st Dist. 1971); *Wielander v. Henich*, 64 Ill. App. 2d 228, 231-32, 211 N.E.2d 775, 776 (1st Dist. 1965).

16. “[T]he issue is not whether the identity of [the parties] can be readily ascertainable from subsequent writings, the issue is whether the identity of [the parties] can be readily ascertained” from the alleged written contract “so as to avoid the resort to parol evidence.” *Brown*, 147 Ill. App. 3d at 940.
17. If testimony is necessary to establish any of these elements, the contract is treated as oral, and subject to the five-year statute. *Wielander v. Henich*, 64 Ill.App.2d 228, 231, 211 N.E.2d 775, 776 (1st Dist. 1965); *Armstrong*, 174 Ill. 2d at 288. “In the parol evidence cases, the dispositive question is whether evidence of oral representation is necessary to establish the existence of a written contract. If such evidence is required, then the contract is treated as oral for purposes of the statute of limitations. In other words, where a party is claiming a breach of written contract, but the existence of that contract or one of its essential terms must be proven by parol evidence, the contract is deemed oral and the five-year statute of limitations applies.” *Id.*
18. A credit card agreement that is subject to change upon notice does not contain all essential terms. Even if the debtor signed a written application which set forth all material terms at the time of the application, the “change by notice” provision – whether expressly included in the contract or implied therein by statute – makes it impossible to determine from mere examination of the document that those terms are still in effect. Either the creditor must rely on the fact that a current version of the agreement was sent to the debtor, or establish that no change notices were mailed. In either case, parol testimony is essential, and there is no document which conclusively establishes the terms of the agreement.
19. In *Classified Ventures, Inc. v. Wrenthead, Inc.*, 06 C 2373, 2006 U.S. Dist. LEXIS 77359 (N.D.Ill., October 11, 2006) (Darrah, J.), the court held that where a contract went through several revisions, the need to use parol evidence to show which of the several versions was in effect made the contract not one wholly in writing. The same logic applies to a credit card agreement that can be changed by notice without a signature.
20. If nothing amounting to a contract wholly in writing is attached to the complaint pursuant to section 2-606 of the Code of Civil Procedure, 735 ILCS 5/2-606, or proven to exist by the evidence at trial, the court must presume that the contract is one not wholly in writing. *Barnes v. Peoples Gas Light & Coke Co.*, 103 Ill.App.2d 425, 428, 243 N.E.2d 855 (1st Dist. 1968) (“The complaint does not purport to be based on a written instrument such as a tariff. If it were, then, of course, the relevant portions of that instrument would have to be recited in, or attached to, the pleading, and, as indicated, they were not.”); *O.K. Electric Co. v. Fernandes*, 111 Ill.App.3d 466, 444 N.E.2d 264, 266-67 (2nd Dist. 1982) (“Unless the complaint purported to be based upon a written instrument, it is assumed to be an oral contract.”).

21. This issue is currently awaiting decision in the First District. *Portfolio Acquisitions v. Feltman*, 07-3004.

XII. FAIR DEBT COLLECTION PRACTICES ACT ISSUES

- A. The Fair Debt Collection Practices Act, 15 U.S.C. §1692 et seq. ("FDCPA"), regulates the conduct of "debt collectors" in collecting "debts" owed or allegedly owed by "consumers." It is designed to protect consumers from unscrupulous collectors, whether or not there is a valid debt. The FDCPA broadly prohibits unfair or unconscionable collection methods; conduct which harasses, oppresses or abuses any debtor; and any false, deceptive or misleading statements, in connection with the collection of a debt; it also requires debt collectors to give debtors certain information. 15 U.S.C. §§1692d, 1692e, 1692f and 1692g.
- B. It also contains a venue provision requiring suit to be brought where the consumer signed a written contract or where the consumer resides at the time suit is filed. 15 U.S.C. 1692i.
- C. Purchasers of delinquent debts are covered

A company that regularly purchases delinquent debts is a "debt collector" within the meaning of the FDCPA with respect to the delinquent debts. *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534 (7th Cir. 2003); *McKinney v. Cadleway Props., Inc.*, 548 F.3d 496 (7th Cir. 2008); *FTC v. Check Investors, Inc.*, 502 F.3d 159 (3rd Cir. 2007); *Pollice v. Nat'l Tax Funding*, 225 F.3d 379 (3rd Cir. 2000); *Ballard v. Equifax Check Services*, 27 F.Supp.2d 1201 (E.D. Cal. 1998); *Kimber v. Federal Financial Corp.*, 668 F.Supp. 1480 (M.D.Ala. 1987); *Durkin v. Equifax Check Servs.*, 00 C 4832, 2002 U.S. Dist. LEXIS 20742 (N.D.Ill., October 24, 2002); *Cirkot v. Diversified Systems*, 839 F.Supp. 941 (D.Conn. 1993); *Ruble v. Madison Capital, Inc.*, C-1-96-1693, 1998 U.S. Dist. LEXIS 4926 (N.D. Ohio 1998); *Holmes v. Telecredit Service Corp.*, 736 F.Supp. 1289, 1292 (D.Del. 1990); *Farber v. NP Funding II, LP*, 96 CV 4322, 1997 WL 913335, *3, 1997 U.S. Dist. LEXIS 21245 (E.D.N.Y. Dec. 9, 1997) ("those who are assigned a defaulted debt are not exempt from the FDCPA if their principal purpose is the collection of debts or if they regularly engage in debt collection"); *Stepney v. Outsourcing Solutions, Inc.*, 1997 U.S. Dist. LEXIS 18264 (N.D.Ill. 1997); *Coppola v. Connecticut Student Loan Found.*, Civ. A. N-87-398 (JAC), 1989 WL 47419, 1989 U.S. Dist. LEXIS 3415 (D.Conn. March 22, 1989); *Commercial Service of Perry v. Fitzgerald*, 856 P.2d 58, 62 (Colo.App. 1993) ("[A] company which takes an assignment of a debt in default, and is a business the principal purpose of which is to collect debts, may be subject to the Act, even if the assignment is permanent and without any further rights in the assignor"). As long as the purchaser asserts that the debt was in default when acquired, the FDCPA applies, even if the assertion proves to be false. *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534 (7th Cir. 2003)

- D. Collection lawyers who "regularly" collect consumer debts are covered. *Heintz v. Jenkins*, 514 U.S. 291 (1995).
- E. The FTC has stated that it "may take law enforcement action to address conduct related to debt collection litigation and arbitration to the extent that such conduct violates the FDCPA, the FTC Act, or other laws the Commission enforces." "Collecting Consumer Debts: The Challenges of Change: A Federal Trade

Commission Workshop Report (February 2009),” p. 66.

F. Typical violations in connection with collection litigation

1. False statements in complaint, affidavits, etc., e.g., that affiant has personal knowledge of records establishing debt, that plaintiff is holder in due course, etc. A debt collector’s misrepresentation in a pleading that it is a subrogee was held to be actionable in *Gearing v. Check Brokerage Corp.*, 233 F.3d 469 (7th Cir. 2000). Filing false affidavits in state court collection litigation is actionable. *Todd v. Weltman, Weinberg & Reis Co., L.P.A.*, 434 F.3d 432 (6th Cir. 2006); *Delawder v. Platinum Financial*, 1:04-cv-680, 2005 U.S. Dist. LEXIS 40139 (S.D.Ohio March 1, 2005); *Griffith v. Javitch, Block & Rathbone, LLP*, 1:04cv238 (S.D.Ohio, July 8, 2004); *Hartman v. Asset Acceptance Corp.*, No. 1:03-cv-113, 2004 U.S. Dist. LEXIS 24845 (S.D.Ohio, Sept. 29, 2004); *Gionis v. Javitch, Block & Rathbone*, 405 F. Supp. 2d 856 (S.D.Ohio. 2005); *Blevins v. Hudson & Keyse, Inc.*, 395 F. Supp. 2d 655 (S.D.Ohio 2004), later opinion, 395 F.Supp.2d 662 (S.D.Ohio 2004); *Stolicker v. Muller, Muller, Richmond, Harms, Meyers & Sgroi, P.C.*, 1:04cv733 (W.D.Mich., Sept. 8, 2005).
2. Suing or threatening to sue on time barred debts. *Kimber v. Federal Financial Corp.*, 668 F.Supp. 1480 (M.D.Ala. 1987); *Goins v. JBC & Assocs., P.C.*, 352 F. Supp. 2d 262 (D.Conn. 2005). It should be noted that the February 2009 FTC report, “Collecting Consumer Debts: The Challenges of Change: A Federal Trade Commission Workshop Report (February 2009),” states (pp. 63-64) that “It thus is a violation of the FDCPA to sue or threaten to sue consumers to recover on time-barred debt.”
3. Filing a single lawsuit without having in hand the means of proving it is not a violation (*Harvey v. Great Seneca Financial Corp.*, 453 F.3d 324, 330 (6th Cir. 2006)), but a practice of filing lawsuits with the intent of dismissing them if they are contested may be a violation (*Mello v. Great Seneca Financial Corp.*, 526 F.Supp.2d 1020 (C.D.Cal. 2007)).
4. Failure to provide validation notice, 15 U.S.C. §1692g:
5. Adding unauthorized amounts to debts, e.g., attorney’s fees. *Shula v. Lawent*, 359 F.3d 489 (7th Cir. 2004), aff’g, 01 C 4883, 2002 U.S. Dist. LEXIS 24542 (N.D.Ill., Dec. 23, 2002).
6. Proceeding with collection attempts after verification demanded if not provided

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