

DEFENSE OF 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. . . .

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

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>)

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>)

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.

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 (\$5,000 if filed before Jan. 1, 2006, \$10,000 after) 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 real party in interest (beneficial owner of debt) or collection agency suing without assignment in the form required by § 8b of the Collection Agency Act, 225 ILCS 425/8b? An assignment that does not comply is not valid. Business Service Bureau, Inc. v. Webster, 298 Ill. App. 3d 257; 698 N.E.2d 702 (4th Dist. 1998).

- B. Section 8b:

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.

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).

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

1. What is an account stated?

“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 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 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); Guerrero v. RJM Acquisitions, LLC, 03-00038 HG-LEK, 2004 U.S. Dist. LEXIS 15416 (D.Haw., July 9, 2004); 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-WTL-DFH, 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.
 - 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 9-210 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. The Rule has a “gotcha” provision, Rule 222(g), which 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, 747 N.E.2d 427 (2d 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. Bottom line: Another article, <http://www.isba.org/Sections/Tortlaw/11-05.html#Anchor-Rule-11481>, calls Rule 222 a “ticking time bomb.”

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. 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).
- C. 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”).

- D. 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).
- E. 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).”)
- F. A good case involving debt buyer affidavits is Luke v. Unifund CCR, 2-06-444-CV, 2007 Tex. App. LEXIS 7096 (2d Dist. Ft. Worth Aug. 31, 2007).
- G. 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).
- H. Beware of “facsimile” records, 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. In re Vinhnee, 336 B.R. 437, 2005 Bankr. LEXIS 2602, 2005 WL 3609376 (9th Cir. BAP, Dec. 16, 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.” (Id., *25-26) In the Vihnee case, “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.’” (*22-23)

- I. “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.
- J. Secondary evidence of documents should be objected to:
 1. 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).

- K. For an illustration of the problem, see *Citibank (South Dakota), N.A. v. Martin*, 11 Misc. 3d 219; 807 N.Y.S.2d 284 (Civ.Ct. 2005), which sets forth the applicable proof requirements. These should apply with equal force in Illinois.

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

. . . 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

- L. Also illustrative of the problem is 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.), where a debt buyer's case was thrown out even though it had local offices and was able to call a witness, because (a) it could not prove title to the debt, (b) it could not authenticate the contract, (c) it could not show the debtor had failed to pay.

Plaintiff's witness, Joanne Bergman testified that she is employed by plaintiff as its vice-president of legal affairs and is the custodian of plaintiff's books and records. Ms. Bergman further testified that plaintiff is a wholly owned subsidiary of Ast[a] Funding, Inc. On the second day of testimony, the witness stated that she was "affiliated" with plaintiff. While it was not clear from the witness' testimony whether she is employed by plaintiff or by Ast[a] Funding, Inc., defendant did not object to her testimony. Ms. Bergman testified that plaintiff is in the business of purchasing original debts from creditors. According to the witness' testimony, and in contradiction to the allegations in the complaint, AT&T Wireless, not plaintiff, and defendant entered into a contract for cellular telephone service.

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.

Defendant Mohammad Haque objected stating that the document was not plaintiff's document but was created from other sources including his bill which he showed to plaintiff at an earlier court conference.

Plaintiff then sought to admit spreadsheets as proof of the transaction between plaintiff and AT&T Wireless, and again defendant objected.

The court held that to lay the foundation for a business record it was necessary to have someone testify about the business routine of the entity which generated the records:

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]

The Haque court also held insufficient the offer of "generic" contracts which could not be linked to the defendant's account:

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.

The court also held a claim of assignment insufficient without proof of the assignment:

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. (See *Copelco Capital, Inc v. Packaging Plus Services, Inc*, 243 AD2d 534 [2d Dept. 1997]; *Citibank (SD), NA v. Martin*, 2005 NY Slip Op 25536 [Civ Ct NY County].) 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.

Similarly, plaintiff, as an alleged assignor, failed to establish the

requisite elements for recovery on a theory of account stated. (*Heelan Realty & Dev Corp v. Ocskasy*, 2006 NY Slip Op 2166 [2d Dept 2006].) There was no evidence before the Court that defendant assented, expressly or impliedly, that he was indebted to plaintiff, or, for that matter, AT&T Wireless, in the sum claimed, and undertook, by express or implied promise, to pay it. (*Tridee Assoc, Inc v. Bd of Educ of City of New York*, 22 AD3d 833 [2d Dept 2005].) . . .

- M. In *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.), much the same thing happened on a motion for summary judgment. The court first set forth the basic requirements for summary judgment affidavits, which appear to be the same as those in Illinois:

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 (*Spearmon v Times Square Stores Corp.*, 96 AD2d 552, 553 [2d Dept 1981]) 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" (*see* CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Failure to make such showing requires the denial of the motion, regardless of the sufficiency of the opposing papers." (*Winegrad v New York Univ Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] *Vitiello v Mayrich Constr. Corp.*, 255 AD2d 182, 184 [1st Dept 1998]). A conclusory affidavit, or an affidavit by a person who has no personal knowledge of the facts, cannot establish a prima facie case. (*JMD Holding Corp. v Cong. Fin. Corp.*, 4 NY3d 373, 385 [2005]; *Castro v NY Univ.*, 5 AD3d 135, 136 [1st Dept 2004]) A mere conclusory assertion of a fact, without any evidentiary basis, is insufficient. (*Grullon v City of New York*, 297 AD2d 261, 263 [1st Dept 2002]). When the affiant relies on documents, the documents relied upon must be annexed (*Vermette v Kenworth Truck Co., Div. of Paccar, Inc.*, 68 NY2d 714, 717 [1986]; *Afco Credit Corp. v Mohr*, 156 AD2d

287, 288 [1st Dept 1989]), and the affiant must establish an adequate evidentiary basis for them. Mere submission of documents without any identification or authentication is inadequate. (*Higen Assocs. v Serge Elevator Co.*, 190 AD2d 712, 713 [2d Dept 1993]). 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. (CPLR 4518[a]; *First Interstate Credit Alliance, Inc. v Sokol*, 179 AD2d 583, 584 [1st Dept 1992]; *Bowers v Merchants Mut. Ins. Co.*, 248 AD2d 1005, 1006 [4th Dept 1998]; *A.B. Med. Servs., PLLC v Travelers Prop. Cas. Corp.*, 5 Misc 3d 214 [Civ Ct, Kings County 2004]).

The court then 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. (*Nucci v Proper*, 95 NY2d 597, 602 [2001]). 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 (CPLR 4518[a]; see *Kraus Mgt., Inc. v State Div. of Housing & Community Renewal, Office of Rent Admin.*, 137 AD2d 689, 691 [2d Dept 1988]). 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 (*W. Valley Fire Dist. No. 1 v Vill. of Springville*, 294 AD2d 949, 950 [4th Dept 2002]). 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. (*Insurance Co. of North America v Gottlieb*, 186 AD2d 471, 471 [1st Dept 1992]; *Standard Textile Co. v National Equipment Rental, Ltd.*, 80 AD2d 911 [2d Dept 1981]; *W. Valley Fire Dist. No. 1 v Vill. of Springville*, 294 AD2d 949, 950 [4th Dept 2002]; see also *United Bldg. Maint. Assocs. v 510 Fifth Ave. LLC*, 18 AD3d 333, 334 [1st Dept 2005]).[\[FN4\]](#) 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. (*Badio v Liberty Mut. Fire Ins. Co.*, 5 AD3d at 171; 8112-24 18th Ave. Realty Corp. v Aetna Cas. & Sur. Co., 240 AD2d 287, 288 [1st Dept 1997]; *Residential Holding Corp v Scottsdale*, 286 AD2d 679, 680 [2d Dept 2001]). However, Ms. Bergmann did not do that in this case. [\[ENS\]](#) 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.

Finally, the court held insufficient an affidavit that an assignment had occurred without production of the document:

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 (*Vermette v Kenworth Truck Co., Div. of Paccar, Inc.*, 68 NY2d at 717; *Afco Credit Corp. v Mohr*, 156 AD2d at 288). Consequently, Ms. Bergmann has failed to establish that plaintiff has the right to collect this debt.

N. To the same effect is *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)." *Standard Textile Co., Inc. v. National Equipment Rental, Ltd.*, 80 A.D.2d 911, 437 N.Y.S.2d 398 (2nd Dept. 1981); see also: *Romanian American Interests, Inc. v. Scher*, 94 A.D.2d 549, 464 N.Y.S.2d 821 (2nd Dept. 1983); *Lodato v. Greyhawk North America, LLC*, 39 AD3d 494, ___, 2007 WL 1017759 (2nd Dept. 2007) 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 [citing *Standard Textile Co., Inc. v. National Equipment Rental, Ltd., supra.*]" *Insurance Company of North America v. Gottlieb*, 186 A.D.2d 470, 588 N.Y.S.2d 571 (1st Dept.**

1992)

The Court also required production of the actual assignment of the particular debt:

The above notwithstanding, 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. . . .

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. . . .

- O. Another New York court was presented with similar documentation in the context of a motion to confirm an arbitration award, in 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 first required proof that the plaintiff was the owner of the particular debt:

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 . . .**

Next, 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 provided⁴⁰, 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.

P. Other decisions holding debt buyer affidavits and related documents insufficient:

1. 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.
2. 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.
3. 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).

Q. Illinois likewise holds 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. Raithel 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).

- R. 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).

- S. 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).
- T. Beware of complaints with “generic” documents attached. See Palisades v. Gonzales, supra. What is required is the agreement between plaintiff and defendant.

IX. 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.

X. SUBSTANTIVE DEFENSES

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

1. 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 (N.D.Ill. March 9, 2006).
2. 15 U.S.C. § 1643(b) applies to both original creditor and bad debt buyers and requires them to show "authorized use" for charges.
3. 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 Ctr., Inc. v. Caterpillar, Inc., No. 103212., 2007 Ill. LEXIS 1695 (November 1, 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.

4. 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
2. Cell phone and other federally-regulated telecom debts: 2 years, 47 U.S.C. 415 (Communications Act).
3. Checks: 3 years on check, 2 years for statutory penalty. Note: underlying obligation paid with check may be 5 or 10 years. UCC.

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

1. Dicta in a 1974 Illinois Appellate Court decision states 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).
2. 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.

3. 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.
4. 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.
5. 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.

6. 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.

7. 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).

8. 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.
9. 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).
10. “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).
11. 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).
12. “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.

13. “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).
14. “[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.
15. 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.*
16. 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.

17. 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.
18. 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.”).

XI. 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. Debt buyers 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); 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. 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).
 3. Failure to provide validation notice, 15 U.S.C. §1692g:

4. 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).
5. Misrepresentation of components of debts
6. Proceeding with collection attempts after verification demanded if not provided

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