# DEBT BUYER AND COLLECTION LITIGATION

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## I. WHO IS BRINGING CASE: CREDITOR OR DEBT BUYER

1. Creditors can sometimes prove their case; debt buyers usually cannot

2. 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." 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.
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> 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 undoubtably 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 for pennies on the dollar. For example, the 10-K filing for Asset Acceptance for the year ending December 31, 2008 states that "From January 1, 1999 through December 31, 2008, we have purchased 1,018 consumer debt portfolios, with an original charged-off face value of $36.5 billion for an aggregate purchase price of $890.2 million, or 2.44% of face value, net of buybacks." The 10-K filing for Encore Capital Group, Inc., parent of various Midland entities, for the same date states the "From our inception through December 31, 2008, we have invested approximately $1.2 billion to acquire 25.5 million consumer accounts with a face value of approximately $39.3 billion," or 3.05 % of face value.

They then try to enforce them against the consumer at 100 cents on the

dollar.

Some of the larger debt buyers are:

Asset Acceptance
Asta Funding/ Palisades Collection / Palisades Acquisition
B-Line LLC
Bureaus
CACV/ CACH/ Collect America/ SquareTwo Financial
Cavalry
Credigy
eCast Settlement Corp. / Max Recovery
Equable Ascent, formerly Hilco Receivables
Erin Capital Management
Harris & Harris, Ltd.
Midland / Encore (Midland Credit Mgmt., Midland Funding, etc.)
NCO
Oliphant Financial Corporation
Portfolio Recovery Associates/ PRA
Resurgence
RJM Acquisitions
Sherman Financial Group (does business as LVNV Funding, Resurgent Capital Services, PYOD)
Unifund/ National Check Bureau
Velocity Investments, LLC/ Velocity Portfolio Group, Inc.

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

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

A majority of the debts are credit cards. Others include second mortgages, mortgage deficiencies, automobile paper, telecom debts, health club debts, and medical debts.

3. 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)

4. Sonja Ryst, "'Debt tagging' by collection agencies a growing problem," Washington Post, Business section, Sunday, August 8, 2010, p. G01 ("Sometimes, as in the case of Hughes, they [debt collectors] go after people with the same names as those who owe money. They might also relentlessly call wrong phone numbers, hoping to pry information out of whoever answers. Some finagle enough identifying information to make people seem liable for debts they never owed.").

5. 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)

6. 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.

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

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

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

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

8. In 2009, a debt buyer was charged with a scheme to sell 86,000 accounts that he did not own. He had actually sold over 10,000 at the time he was caught. *United States v. Goldberg*, 09-80030-CR (S.D.Fla.). One of the purchasers filed a lawsuit complaining that it had purchased 6,521 of the accounts. *RMB Holdings, LLC v. Goldberg & Associates, LLC,* No. 3:2007cv00406 (E.D.Tenn. Oct. 30, 2007). On May 29, 2008, a decision was issued in favor of the plaintiff in that case. *RMB Holdings, LLC v. Goldberg & Associates, LLC,* No. 3:07-cv-406 (E.D.Tenn.). The decision finds that "RMB began making attempts to collect the accounts it purchased from Goldberg" even though "Goldberg never delivered title or ownership of the accounts to RMB." *See also, Old National Bank v. Goldberg & Associates, LLC*, 08-80078, 2008 U.S.Dist. LEXIS 114408 (S.D.Fla., Sept. 4, 2008).

9. There are reported cases in which debtors have been subjected to litigation because they settled with *A,* and then *B* claimed to own the debt. *Smith v. Mallick,* 514 F.3d 48 (D.C.Cir. 2008) (commercial debt purchased and resold by debt buyer, debt buyer (possibly fraudulently) settles debt it no longer owns, settlement held binding because notice of assignment not given, but obligor subjected to litigation as result). *See also Miller v. Wolpoff & Abramson, LLP,* No. 1:06-CV-207-TS, 2008 U.S.Dist. LEXIS 12283 (N.D.Ind. Feb. 19, 2008), in which a debtor complained he had been sued twice on the same debt; *Dornhecker v. Ameritech Corp.,* 99

F.Supp.2d 918, 923 (N.D.Ill. 2000), in which the debtor claimed he settled with one agency and was then dunned by a second for the same debt; and *Northwest Diversified, Inc. v. Desai,* 353 Ill.App.3d 378, 818 N.E.2d 753 (1st Dist. 2004), in which a commercial debtor paid the creditor only to be subjected to a levy by a purported debt buyer.

10. *Chase Bank USA, N.A. v. Cardello*, 2010 NY Slip Op. 20090, 27 Misc. 3d 791, 896 N.Y.S.2d 856, 857, 2010 N.Y. Misc. LEXIS 513, 243 N.Y.L.J. 48 (Richmond Co. Civ. Ct. 2010): "[O]n a regular basis this court encounters defendants being sued on the same debt by more than one creditor alleging they are the assignee of the original credit card obligation. Often these consumers have already entered into stipulations to pay off the outstanding balance due the credit card issuer and find themselves filing an order to show cause to vacate a default judgment from an unknown debt purchaser for the same obligation."

11. *Overcash v. United Abstract Group, Inc.*, 549 F.Supp. 193, 195 (N.D.N.Y. 2008) (debtor paid collection agency, after which debt was resold and another agency demanded an additional $40,000 from the debtor).

12. *Chiverton v. Federal Fin. Group, Inc.*, 399 F.Supp.2d 96, 99 (D.Conn. 2005) (debtor paid one collection agency but another later claimed they bought the debt and attempted to coerce payment).

13. In *Wood v. M&J Recovery LLC,* No. CV 05-5564, 2007 U.S.Dist. LEXIS 24157 (E.D.N.Y. Apr. 2, 2007), a debtor complained of multiple collection efforts by various debt buyers and collectors on the same debt, and the defendants asserted claims against one another disputing the ownership of the portfolio involved. Shekinah alleged that it sold a portfolio to NLRS, that NLRS was unable to pay, that the sale agreement was modified so that NLRS would only obtain one fifth of the portfolio, and that the one fifth did not include the plaintiff's debt. Portfolio Partners claimed that it, and not Shekinah, was the rightful owner of the portfolio.

14. In *Associates Financial Services Co. v. Bowman, Heintz, Boscia & Vician, P.C.,* IP 99-1725-C-M/S, 2001 U.S.Dist. LEXIS 7874 at **9 – 12 (Apr. 25, 2001), *later opinion,* No. IP 99-1725-C-M/S, 2004 U.S.Dist. LEXIS 6520 (S.D.Ind. Mar. 31, 2004), allegations were made that a creditor had continued to collect accounts allegedly sold to a debt buyer.

15. In *Capital Credit & Collection Service, Inc. v. Armani*, 227 Ore. App. 574, 206 P.3d 1114 (2009), a debt collector was found to have settled a debt and then instituted litigation on it.

16. *McCammon v. Bibler, Newman & Reynolds, P.A.,* 493 F.Supp. 2d 1166 (D.Kan. 2007) (collection agency obtained judgment against consumer knowing that consumer had paid original creditor).

17. *Grimsley v. Messerli & Kramer, P.A.*, 08-548 (JRT/RLE), 2009 U.S. Dist. LEXIS 26652 (D.Minn., March 31, 2000) (account paid to original creditor).

18. *Sweatt v. Sunkidd Venture, Inc.*, No. C05-5406FDB, 2006 WL 1418652, at *1 (W.D. Wash. May 18, 2006) (noting firm collecting on debt already paid).

19. *Hooper v. Capital Credit & Collection Services, Inc.*, No. CV 03-793-JE, 2004 WL 825619 (D. Or. Apr. 13, 2004) (finding attempted collection on debt already paid to original creditor potentially due to original creditor's bookkeeping errors).

20. *McHugh v. Check Investors, Inc.*, No. Civ.A. 5:02CV00106, 2003 WL 21283288, at *2 (W.D. Va. May 21, 2003) (finding that former debtor had paid debt before collection agency ever began collection attempts).

21. In *David J. Gold, P.C. v. H&K Investigations, Inc.*, 2010 NY Slip Op 30538U, 2010 N.Y. Misc. LEXIS 2548 (N.Y. Co. Sup. Ct., March 11, 2010), a debt collector sued another claiming that it had, without authority, assigned its account to a second debt collector who had misidentified the judgment creditor and inflated the judgment amount.

22. The author has encountered several cases in which debts were paid or settled to one entity, after which another tried to collect the entire debt or the remaining portion.

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

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

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

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

2006) you do not have to file an answer. At the status date you get a trial date.

2. In other Illinois counties, a personal appearance by the defendant or counsel is required on the return date.

3. 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

1. Is plaintiff original creditor or debt buyer? If it is a debt buyer, does it comply with the licensing requirements of the Illinois Collection Agency Act, 225 ILCS 425/1 et seq.? Noncompliance results in dismissal. *Business Service Bureau, Inc. v. Webster,* 298 Ill. App. 3d 257; 698 N.E.2d 702 (4th Dist. 1998); *LVNV Funding LLC v. Trice*, 2011 IL App (1st) 092773, 952 N.E.2d 1232, 2011 Ill. App. LEXIS 228 (1st Dist. 2011), leave to appeal denied, 2011 Ill. LEXIS 1886 (Nov. 30, 2011). If the debt buyer does not have a collection agency license, the proceedings and any judgment are void. *LVNV Funding LLC v. Trice, supra*..

2. The Illinois Collection Agency Act was amended to include debt buyers as "collection agencies" effective January 1, 2008. Section 425/3(d), as amended effective Jan. 1, 2008, brings debt buyers within its purview by providing that "A person, association, partnership, corporation, or other legal entity acts as a collection agency when he or it . . . Buys accounts, bills or other indebtedness and engages in collecting the same." Previously coverage was limited to a person who "Buys accounts, bills or other indebtedness with recourse and engages in collecting the same". By deleting "with recourse," the legislature intended to classify as a "collection agency" persons who buy charged-off debts for their own account.

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

3. The amendment enacts some provisions tracking FDCPA §§1692c, 1692g, and FCRA identity theft provisions. In addition, punitive damages are available under the Collection Agency Act, but not the FDCPA.

4. Section 8b of the Collection Agency Act contains a special assignment requirement:

**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.**

5. Section 8b was construed in *Unifund CCR Partners v. Shah*, 407 Ill. App. 3d 737; 946 N.E.2d 885 (1st Dist. 2011). The court there held that (1) an assignee for collection has standing to bring a suit in its own name in order to collect a debt that is owned by a party who retains beneficial ownership and (2) an assignment for collection may consist of multiple incorporated documents, the documents must clearly refer to one another, without the need for affidavits or testimony to show what has been assigned, the effective date, or the consideration. *See also, Mutual Mgmt. Servs. v. Swalve,* 956 N.E.2d 594, 2011 Ill. App. LEXIS 961, 2011 IL App (2d) 100778 (2nd Dist 2011).

6. *Shah* involved a series of absolute assignments followed by two assignments for collection, and imposed these requirements on each transfer in the chain of title, including the absolute assignments.

7. *Shah* also indicates that a debt buyer needs to prove each step in the chain of title leading up to the plaintiff.

8. See Lake County standing order implementing *Shah*: http://www.illinoislegalaid.org/calendarUploads/Debt%20Buyers%20Lake%20County%20Standing%20Order.pdf

9. Must an out-of-state debt collector register to do business under the Business Corporation Act (805 ILCS 5/13.70) or Limited Liability Company Act before filing suit? *Compare Berg v. Blatt, Hasenmiller*, 07 C 4887, 2009 U.S.Dist. LEXIS 26808 (N.D.Ill., March 31, 2009); and *Guevara v. Midland Funding NCC-2 Corp.*, 07 C 5858, 2008 U.S.Dist. LEXIS 47767 (N.D.Ill., June 20, 2008). *See also, Landmark Capital Investments, Inc. v Wang*, 2012 N.Y. App. Div. LEXIS 2385; 2012 NY Slip Op 2430 (1st Dept. April 3, 2012). Note that courts are much more willing to find "door-closing" statutes inapplicable than statutes requiring registration or licensing as part of a regulatory scheme. *Silver v Woolf*, 694 F.2d 8 (2nd Cir. 1982). "Door-closing" statutes that require only foreign entities to register with the Secretary of State and pay franchise taxes are considered to be "a naked restriction on interstate firms" that have no regulatory objective." (*Silver*, 694 F.2d at 11).

10. If the statute does apply, it is not clear that a company that files hundreds of lawsuits as a regular part of its business (or only business) is within an exemption. *Centurion Capital Corp. v. Guarino*, No. 11117/05, 35 Misc.3d 1219(A), 2012 WL 1543286, 2012 N.Y. Slip Op. 50749(U) (N.Y.City Civ.Ct., April 30, 2012) ("There is also case law which holds that a single, isolated transaction will not subject a foreign corporation to the registration requirements of the Business Corporation Law . . . Far from being an isolated transaction, it is undisputed that Centurion Capital Corporation was taking seriously its corporate purpose of purchasing accounts receivable and then attempting to collect these receivables by using the court system").

## IV. MANY COLLECTION PLEADINGS ARE DEFECTIVE

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

Section 2-403 of the Code of Civil Procedure presently 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, 437 (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, 437-438 (1928). The section is former section 22 of the Civil Practice Act of 1933.

**2. Is chain of title (assignments starting with original creditor and ending with plaintiff) 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.**

The assignment(s) showing that plaintiff has title to the claim are documents on which the action is founded. In *Razor Capital v. Antaal*, 2012 Ill. App. LEXIS 571, 2012 IL App (2d) 110904, 972 N.E.2d 1238 (July 11, 2012), Razor Capital, "final transferee" of an alleged credit card debt, sued to collect it. The Appellate Court held:

a. Standing is an affirmative defense which must be affirmatively raised in a non-small-claims case. 2012 IL App (2d) 110904, ¶ 23.

b. Section 2-606 of the Code requires a plaintiff to attach chain-of-title documents to its complaint. *Candice Co. v. Ricketts*, 281 Ill. App. 3d 359, 362 [666 N.E.2d 722] ([1st Dist.] 1996) (in addition to an underlying contract, an assignment reflecting that the plaintiff has title to the claim is a document upon which the action is founded and must be attached). 2012 IL App (2d) 110904, ¶ 24.

See also *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).

3. In *Midland Funding LLC v. Wallace*, 34 Misc. 3d 1206A; 946 N.Y.S.2d 67; 2012 N.Y. Misc. LEXIS 12; 2012 NY Slip Op 50008U, *12-13 (City Ct. Mt. Vernon, January 5, 2012), the court stated: "Clearly, plaintiff's counsel knows that under New York law, a full chain of assignment in addition to documentary proof of the contract and debt is required in order to prove a prima facie case in a consumer debt action where the plaintiff is an assignee of the original creditor. See, Citibank v. Martin, 11 Misc 3d

219, 807 N.Y.S.2d 284 (Civ. Ct. NYC 2005); Palisades Collection, LLC v. Gonzalez, 10 Misc 3d 1058A, 809 N.Y.S.2d 482 (Civ. Ct. NYC 2005); DNS Equity Group, Inc. v. Lavalle, 26 Misc. 3d 1228[A], 907 N.Y.S.2d 436, 2010 NY Slip Op 50298[U] (Dist. Ct. Nassau Cty. 2010). Without proof of the chain of assignment plaintiff is unable to show its standing to sue the defendant and a lack of standing renders a litigation a nullity, subject to dismissal without prejudice. Citibank v. Martin, 11 Misc 3d 219, 807 N.Y.S.2d 284 (Civ. Ct. NYC 2005). . . ."

4. The full asset sale agreement must be produced. *Osk II, LLC v. Creek*, No. 12-2145, 2012 U.S. Dist. LEXIS 157029 (C.D.Ill., Nov. 1, 2012). "Busey Bank's orders to pay Plaintiff the Senior and Junior Notes are conditional; they are "without recourse, representations or warranties or any kind, except as provided in that Asset Sale Agreement." (#14-1, pp. 18, 42 (emphasis added).) The Court agrees with Defendants that the Asset Sale Agreement could limit Plaintiff's rights in the Notes, a possibility that cannot be confirmed or denied without seeing the actual agreement."

5. The statement in *Razor Capital* that standing is an affirmative defense may be anomalous. The Illinois Supreme Court has held that an assignee must prove the assignment. *McFarland v. Dey*, 69 Ill. 419, 422 (1873) ("We are unable to perceive how the complainant has any interest in this property, save that which he has as assignee of the debt. That interest being denied, it was incumbent on him to prove it"). *Accord, Board of Managers of the Medinah on the Lake Homeowners Ass'n v. Bank of Ravenswood*, 295 Ill. App. 3d 131, 135, 692 N.E.2d 402 (3rd Dist. 1998) ("Once established, an assignment places the assignee into the shoes of the assignor"). At the time the parties' rights are determined, actual assignments sufficient to vest title to the obligation sued upon in the plaintiff must be in the record. *Bayview Loan Servicing, L.L.C. v. Nelson,* 382 Ill. App. 3d 1184; 890 N.E.2d 940 (5th Dist. 2008).

   735 ILCS 5/2-403 requires allegation and proof of how the debt was assigned. The general rule is that a plaintiff must prove all material allegations of the complaint. *Bell v. School Dist*., 407 Ill. 406, 416, 95 N.E.2d 496 (1950) ("It is incumbent upon a plaintiff on the trial of the cause to prove all the material allegations contained in his complaint by a preponderance of the evidence."); *Casanas v. Nelson*, 140 Ill. App. 3d 341, 346, 489 N.E.2d 358 (2nd Dist. 1986) ("A plaintiff must prove at trial all the material allegations contained in his complaint.").

   There are nevertheless Illinois cases which hold that lack of standing is affirmative matter which the defendant must plead. They do not purport to overrule the decisions holding that an assignee must prove the assignment. One possible reconciliation is that the plaintiff must allege a chain of title, but any defects in it are waived unless the matter is raised by the defendant. The author suggests that defendant send a request to plaintiff or plaintiff's counsel (as appropriate) under §9-406 of the Uniform Commercial Code, 810 ILCS 5/9-406, discussed below. If the plaintiff is not able to provide reasonable proof that it is an assignee or otherwise entitled to enforce the obligation, that should satisfy any burden of proof that the defendant may

have.

6. **If the Complaint Is For Less than $10,000, 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.

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

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

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

A cause of action for an account stated therefore requires allegation and proof that (1) there was a contract between the parties, such as a credit card agreement or a contract for the sales of goods or services, *Dreyer,* 227

Ill.App.3d at 226-27, (2) a statement of account was sent to the party sought to be held liable, and (3) the statement was agreed to, expressly or by implication. *Thomas Steel Corp. v. Ameri-Forge Corp*., 91 C 2356, 1991 U.S.Dist. LEXIS 18110, 1991 WL 280085 (N.D.Ill., Dec. 27, 1991). Agreement may be inferred from payment or retention for a substantial period without objection.

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

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

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

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

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

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

## VI. SECURITIZATION

Many consumer debts are "securitized" by the original creditor, or transferred to third parties or trustees for the purpose of permitting investment, with "servicing" retained by the originator. See description of credit card securitization in *Bank of N.Y. v. FDIC*, 508 F.3d 1; 390 U.S. App. D.C. 1 (2007). This takes place with respect to a substantial number and in some cases all credit card receivables issued by the major card issuers.

In *Tostado v. Citibank (South Dakota), N.A.*, Civil Action No. SA-09-CV-549-XR, 2010 U.S. Dist. LEXIS 228 (W.D.Tex., January 4, 2010), the court held that while Citibank transferred credit card receivables to a securitization trust, the accounts themselves continued to be owned by Citibank and Citibank had the right to enforce them. *See also, Shade v. Bank of America*, No. 2:08-cv-1069 LKK JFM PS, 2009 U.S. Dist. LEXIS 119320 (E.D.Cal., December 23, 2009), *aff'd mem., Shade v. Bank of Am. Corp*., 2011 U.S. App. LEXIS 4535 (9th Cir. Mar. 8, 2011).

In *Citibank (South Dakota), N.A., v. Carroll*, 148 Idaho 254; 220 P.3d 1073 (2009), the court also held, in a pro se appeal, that Citibank had the right to enforce credit card receivables notwithstanding securitization.

Securitization agreements typically provide that after a debt is charged off, the related receivables revert back to the card issuer.

Debt buyers may also engage in securitization. This was done on a widespread basis by Commercial Financial Services, Inc., now defunct, and is conducted by other debt buyers. The debt buyer creates a trust, which sells notes or other securities to investors. The proceeds of the notes are used to buy portfolios of charged-off debts, which the debt buyer "services."

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

1. 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.

2. Cases are unclear as to what is sufficient under the FDCPA. *Clark v. Capital Credit & Collection Servs*., 460 F.3d 1162 (9th Cir. 2006); *Chaudhry v. Gallerizzo,* 174 F.3d 394 (4th Cir. 1999); *Stonehart v. Rosenthal*, 01 Civ. 651, 2001 WL 910771 (S.D.N.Y., Aug. 13, 2001); *Erickson v. Johnson*, No. 05-427 (MJD/SRN), 2006 U.S. Dist. LEXIS 6979 (D.Minn. Feb. 22, 2006); *Recker v. Central Collection Bureau*, 1:04-cv-2037, 2005 U.S. Dist. LEXIS 24780 (S.D.Ind., Oct. 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)).

3. State law rights are better. The sale of accounts receivable is regulated by Article 9 of the Uniform Commercial Code. Although Article 9 basically deals with secured transactions, it also covers sales of receivables. See UCC 9-109 (". . . this Article applies to: (1) a transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract; . . . (3) a sale of accounts, chattel paper, payment intangibles, or promissory notes . . . ."). Article 9 confers certain rights on the account

debtors. "Article 9 of the Uniform Commercial Code applies to both security interests in accounts and to outright sales of accounts. See U.C.C. §9-102 (1978), comment 2." *Tradex, Inc. v. Modern Merchandising, Inc.*, 386 N.W.2d 800, 802 (Minn. App. 1986).

4. 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 the assignee. *See DNS Equity Group Inc. v. Lavallee*, 26 Misc. 3d 1228A, 907 N.Y.S.2d 436, 2010 NY Slip Op 50298U, 2010 N.Y. Misc. LEXIS 365 (Dist. Ct. Feb. 22, 2010).

5. Section 9-406 and its predecessor 9-318 apply to both assignments for security and absolute assignments. *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1190 (7th Cir. 1990)

6. Section 9-406 provides:

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

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

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

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

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

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

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

**(C) the account debtor knows that the assignment to that**

**assignee is limited.**

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

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

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

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

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

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

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

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

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

**(h) Rule for individual under other law. This Section is subject to law other**

**than this Article which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.**

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

7. In light of the extensive problem with debt collectors suing without valid title, "reasonable proof" of an assignment should require a photostat of an assignment of the particular account, or at least a document signed by each transferor and identifying the account. Analogous requirements are imposed upon the transfer of servicing of a mortgage by the Real Estate Procedures Act, 12 U.S.C. §2605, and were imposed for the same reason – scammers would send people letters telling them to send their mortgage payments to a new servicer. RESPA requires "matching" letters from both the transferor and transferee or a joint letter.

8. *Wyatt v. Capital One Auto Financing*, 03-08-00019-CV, 2010 Tex. App. LEXIS 563; 71 U.C.C. Rep. Serv. 2d (Callaghan) 8 (Tex. App. Austin, Jan. 29, 2010) (a signed statement on the assignor's letterhead is appropriate proof of assignment).

9. *Chase Bank USA, N.A. v. Cardello*, 27 Misc. 3d 791, 896 N.Y.S.2d 856, 857-58 (Richmond Co. Civ. Ct., March 4, 2010):

> The attempt of Chase to execute these bulk assignments to an unlicensed out-of-state debt collector requires the court to articulate a firm policy in regard to service of a notice of assignment on the debtor. It is clear however, that due process requires that notice of the assignment be given to the debtor by the assignor and not by the assignee. The credit card holder had his or her agreement with credit card issuer and not with the unknown third-party debt purchaser so that receipt of notice from the third-party debt purchaser does not satisfy due process standards.
>
> Allowing the assignee to give notice would enable dishonest debt collectors to search the court records, obtain the names of judgment debtors and send the debtor a letter stating they have purchased the debt from credit card issuers such as Chase and should make all payments to the third party. Requiring the assignor-credit card issuer to serve the notice would reduce the incidents of fraud in this regard. The federal Fair Debt Collection Practices Act (FDCPA) lists sixteen "false, deceptive or misleading" practices some of which would not be available by requiring a notice of assignment to be given by the assignor to the debtor. The trend in consumer protection law is to require such notice (see Uniform Consumer Credit Code § 3.204) especially in dealing with consumer credit debt where the vast majority of defendants are unrepresented, unsophisticated individuals. As the Court of Appeals stated in *Tri City Roofers, Inc. v Northeastern Industrial Park*, 61 NY2d 779, 781, 461 N.E.2d 298, 473 N.Y.S.2d 161 (1984): "A judgment debtor is not called upon to search the county's records every time he is served with an execution or desires to make a payment on his debt." The failure to establish that notice of the assignment was given to the debtor

makes the assignment ineffective.

10. Section 9-210 of the Uniform Commercial Code gives right to accounting, defined as breakdown of what debt consists of. May apply only where underlying consumer transaction is secured transaction. There is $500 statutory damages for noncompliance, albeit only individually.

## VIII. SUPREME COURT RULE 222

1. Frequently not complied with

2. 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.

3. 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.

4. 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.

5. Rule 222(g) states that "the court shall exclude at trial any evidence offered by a party that was not timely disclosed as required by this rule, except by leave of court for good cause shown. If a defendant moves, on the day of trial, to exclude all evidence given the plaintiff's failure to file a Rule 222 disclosure statement, a court is likely to grant the request, dooming the plaintiff's action. One case, *Kapsouris v. Rivera*, 319 Ill. App. 3d 844, 747 N.E.2d 427 (2nd Dist. 2001) suggests (but does not hold) that if specific information is provided through other discovery, such as a Rule 213 interrogatory response, the failure to file a Rule 222 response will not trigger the exclusion of that evidence.

## IX. COLLECTION PLAINTIFFS, PARTICULARLY DEBT BUYERS, OFTEN CANNOT PROVE ANYTHING

1. In *Razor Capital v. Antaal*, 2012 Ill. App. LEXIS 571, 2012 IL App (2d) 110904, 972 N.E.2d 1238 (July 11, 2012), Razor Capital, "final transferee" of an alleged credit card debt, sued to collect it. The Appellate Court held that even though a credit card is technically an unwritten contract, it is necessary for the plaintiff to allege and prove the terms of the contract and that they apply to the particular account. 2012 IL App (2d) 110904, ¶ 29-32. "To properly plead that the generic agreement attached to the complaint applied to defendant's account when she used the card, plaintiff must, at a minimum, allege facts reflecting that those terms were *communicated* to defendant, via mail to defendant's most recent billing address or in another similar manner by which it would be reasonable to presume that defendant received them, and that defendant accepted those terms by subsequently using the card." 2012 IL App

(2d) 110904, ¶ 32. "Nevertheless, to pursue even an unwritten-contract claim, a plaintiff must both plead or attach the terms of the agreement allegedly breached and tie those terms to the defendant. Further, in the absence of allegations or affidavits explaining when and how an attached agreement was communicated to the defendant *and showing that the defendant used the card thereafter*, thereby accepting the agreement's terms, a plaintiff cannot recover pursuant to those terms." 2012 IL App (2d) 110904, ¶ 33. "While it might very well be true that the generic agreement attached to plaintiff's complaint accurately reflects the terms of their unwritten contract and that defendant accepted those terms when she used the card after the agreement was communicated to her, the complaint includes no allegations or documents reflecting as such." 2012 IL App (2d) 110904, ¶ 34. "To plead the cause of action, there must be allegations or documents reflecting the terms of the agreement between defendant and plaintiff (or plaintiff's predecessor), that the terms pertained to defendant's account, and that she received or was mailed the agreement, and that she agreed to those terms when she used the card thereafter. . . . We further note that plaintiff must plead that the terms alleged are those under which it seeks to recover. For example, it is theoretically possible, under *Garber* [*v. Harris Trust & Savings Bank*, 104 Ill. App. 3d 675, 679, 432 N.E.2d 1309, 1311 (1st Dist. 1982)], that several versions of terms applied to defendant's account, if the terms were modified between defendant's credit card transactions. If so, and to the extent that plaintiff seeks to recover for charges defendant incurred under different versions of terms of the unwritten agreement, those terms, the communication of those terms to defendant, and defendant's subsequent use of the card will need to be separately pleaded for each version of terms under which plaintiff seeks to recover." 2012 IL App (2d) 110904, ¶ 34.

2. Similarly, in *Velocity Investments, LLC v. Alston*, 397 Ill. App. 3d 296, 922 N.E.2d 538 (2nd Dist. 2010), the court held that a debt buyer must prove "that defendant agreed to be bound by these terms or that these terms were even applied to this particular account." (p. 5)

3. Absent an account stated, it is difficult for the collection plaintiff, particularly a bad debt buyer, to prove anything is due. Debt buyers rarely possess the basic legal documentation required to make out a *prima facie* case. *See*, *e.g.*, *PRA III, LLC v. Gonzalez*, 54 A.D.3d 917, 864 N.Y.S.2d 140 (2nd Dep't 2008); *CACV of Colorado v. Santiago* 10/29/09 NYLJ 25:1 (Civ. Ct. N.Y. Co.); *Colorado Capital Investments, Inc. v. Villar*, 6/18/09 N.Y.L.J. 27: 2 (Civ. Ct. N.Y. Co.); *Colorado Capital Investments v. Pierog*, Index No. 64449/05 (Civ. Ct. N.Y. Co. 9/2/08); *CACV of Colorado, LLC v. Chowdhury*, Index No. 94642/07 (Civ. Ct. Bronx Co. 2/19/09); *CACH, LLC v. Cummings*, Index No. 22747/07 (Civ. Ct. N.Y. Co. 11/10/08 ); *Rushmore Recoveries X, LLC v. Skolnick*, 15 Misc.3d 1139(A), 841 N.Y.S.2d 823, No. 21161/05, 2007 WL 1501643 (Dist. Ct. Nassau Co); *Palisades Collection, LLC v. Haque*, 4/13/06 N.Y.L.J. 20 (Civ. Ct. Queens Co.); *Palisades Collection, LLC v. Gonzalez*, 10 Misc.3d 1058(A), 809 N.Y.S.2d 482, No. 58564/04, 2005 WL 3372971 (Civ. Ct. N.Y. Co.); *CACH LLC v. Fatima*, 2011 NY Slip Op 51510U; 32 Misc. 3d 1231A; 2011 N.Y. Misc. LEXIS 3974 (Dist. Ct. Nassau Co., August 3, 2011); *Palisades Collection LLC v. Kalal*, 2010 WI App 38, 324 Wis. 2d 180, 781 N.W.2d 503, 2010 Wisc. App. LEXIS 105 (2010).

4. In *Collins Financial Services v. Vigilante*, 915 N.Y.S.2d 912, 2011 N.Y. Slip Op. 21008 (N.Y.City Civ.Ct. Jan 06, 2011), the court stated:

> For entry of default judgment in civil court or judgment after inquest, in consumer credit case, the following information must be included in every affidavit of facts to allow determination of sum certain: (1) date of consumer credit agreement, (2) name of original creditor, (3) complete history of assignment of account, (4) date of defendant's last payment, (5) amount of last payment, (6) date of last purchase or cash advance, (7) original credit card number and history of account numbers if numbers changed, (8) outstanding balance on date of last payment, (9) calculation of outstanding balance on date of last payment setting forth amount of purchases, interest charged, and late, over-the-limit and other fees assessed, (10) **statement of how interest rate was calculated along with copies of all documents that changed agreement, interest rate, and fees,** (11) statement that address set forth in summons and complaint is defendant's current address and that good faith effort was made to determine current address, and (12) copies of all extrinsic documents referred to in agreement and, i**f extrinsic index was used to calculate interest rate, proof of rate in that index on date calculation was made.** McKinney's CPLR 3215.

5. The quality of information that debt buyers obtain is often extremely poor. "Collecting Consumer Debts: The Challenges of Change: A Federal Trade Commission Workshop Report (February 2009)," pp. iii-iv, states:

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

6. *Worldwide Asset Purchasing, LLC v. Akrofi*, 2009 NY Slip Op 29343; 25 Misc. 3d 768; 884 N.Y.S.2d 631; 2009 N.Y. Misc. LEXIS 2166 (Ithaca City Court, August 18, 2009). Collection attorney sanctioned for verifying complaint based solely on debt buyer's representations, where no documentation or evidence

supporting the claim was provided.

## X. DEBT BUYER AFFIDAVITS CANNOT PURPORT TO SUMMARIZE ACCOUNT DOCUMENTS

1. Affidavits are often submitted to prove default that are conclusory and insufficient. *Manufacturers & Traders Trust Co. v. Medina*, 01 C 768, 2001 WL 1558278, 2001 U.S. Dist. LEXIS 20409 (N.D.Ill., Dec. 5, 2001); *Cole Taylor Bank v. Corrigan*, 230 Ill.App.3d 122, 129, 595 N.E.2d 177, 181-82 (2nd Dist. 1992) (where bank officer's "affidavit essentially consisted of a summary of unnamed records at the bank," unaccompanied by records themselves and unsupported by facts establishing basis of officer's knowledge, foundation was lacking for admission of officer's opinion regarding amount due on loan); *Asset Acceptance Corp. v. Proctor*, 156 Ohio App. 3d 60; 804 N.E.2d 975 (2004). Computer-generated bank records or testimony based thereon are often offered without proper foundation, or are summarized without being introduced. *Manufacturers & Traders Trust Co. v. Medina, supra*; *FDIC v. Carabetta*, 55 Conn.App. 369, 739 A.2d 301 (1999), leave to appeal denied, 251 Conn. 927; 742 A.2d 362 (1999); *American Express Centurion Bank v. Badalamenti*, 30 Misc.3d 1201A, 2010 N.Y. Misc. LEXIS 6178, 2010 NY Slip Op 52238U (NY Dist. Ct., Nassau Co., Dec. 21, 2010).

2. Testimony, whether live or in the form of an affidavit, to the effect that the witness has reviewed a loan file and that the loan file shows that the debtor is in default is hearsay and incompetent; rather, the records must be introduced after a proper foundation is provided. *Nyankojo v. North Star Capital Acquisition*, 298 Ga. App. 6; 679 S.E.2d 57 (2009); *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"); *Yee v. Ventus Capital Servs.*, C 05-03097 RS, 2006 U.S. Dist. LEXIS 32180, *10 (N.D. Cal. May 12, 2006) ("[T]he business records exception to the hearsay rule makes the

notes themselves admissible, [but] the custodian's attempt to explain and interpret what those notes mean is not competent evidence.").

3. A witness cannot "testify" by regurgitating the content of business records that a witness has reviewed when the witness has not seen or heard the events in question. Such regurgitation is hearsay, plain and simple. *Wahad v. Federal Bureau of Investigation*, 179 F.R.D. 429, 438 (S.D.N.Y 1998); *In re McLemore*, 2004 Ohio 680, 2004 Ohio App. LEXIS 591, *P9 (Ohio App. 2004); *State v. Ward*, 1 Neb. App. 558, 510 N.W.2d 320, 324 (1993). "There is no hearsay exception . . . that allows a witness to give hearsay testimony of the content of business records based only upon a review of the records." *Grant v. Forgash*, 1995 Ohio App. LEXIS 5900, *13 (Ohio App. 1995). *See generally, Trujillo v. Apple Computer,* 578 F. Supp. 2d 979 (N.D.Ill. 2008), condemning the inclusion in an affidavit of information supplied by others.

4. *Asset Acceptance, LLC v. Tyler*, 2012 IL App (1st) 093559, 966 N.E.2d 1039; 2012 Ill. App. LEXIS 139 (March 5, 2012). Court found that Asset had failed to prove that the unsigned cardmember agreement it offered was in fact part of the contract between the consumer and the original creditor. Asset could not prove the contents of an agreement by submitting an affidavit. "Nor do we agree with any suggestion that the affidavit attached to Asset's complaint was an adequate substitute for the requisite documentary showing under section 13 to confirm the arbitration award. See *Velocity*, 397 Ill. App. 3d at 299 (citing 735 ILCS 5/2-606 (West 2006)) (affidavit in record did not satisfy the requirement that the written contract be presented)."Under this decision, the use of generic "credit card agreements" and affidavits by debt buyers is plainly insufficient to prove the terms of a contract.

5. *Deutsche Bank National Trust Co., etc., v. Gilbert*, 2012 IL App (2d) 120164, 2012 Ill. App. LEXIS 795 (Sept. 25, 2012). Affidavit/ testimony that debt was assigned is not competent proof; proponent must lay foundation for and introduce actual assignment.

> ¶ 18 . . . Deutsche Bank now relies solely on the Loch affidavit to refute the lack of standing shown by the note and the mortgage. Deutsche Bank points to Loch's statement that the assignment occurred on November 1, 2005, and contends that his statement must be taken as true in the absence of contrary evidence. This legal principle applies only to admissible evidence, however. *Complete Conference Coordinators, Inc. v. Kumon North America, Inc.*, 394 Ill. App. 3d 105, 108 (2009) (only admissible evidence may be considered in support of or opposition to summary judgment). Loch's statement about the date of the assignment was not admissible, because it was unsupported by any foundation.
>
> ¶ 19 The use of affidavits on motions for summary judgment is governed by Illinois Supreme Court Rule 191(a) (eff. July 1, 2002). Under that rule, affidavits must set out the facts on which the affiant's claims are based, and attach all documents upon which the affiant relies. Loch, however, did not state how he knew that the assignment took place on November 1, 2005, and he failed to attach any documents supporting his assertion. (As we noted, the Assignment itself provides no support for

> Loch's assertion.) Accordingly, Loch's statement about the date of the assignment does not comply with Rule 191(a) and may be disregarded. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 132 (1992) (unsupported conclusions and opinions were insufficient to raise an issue of fact); *Madden v. Paschen/S.N. Nielson, Inc.*, 395 Ill. App. 3d 362, 388 (2009) (legal conclusions and unsupported statements were properly stricken). Disregarding Loch's unsupported statement, the sole evidence that Deutsche Bank ever became the holder of the indebtedness was the Assignment and, as Deutsche Bank concedes, that document does not establish *when* Deutsche Bank became the holder.

6. In *Deutsche Bank National Trust Co. v. Hansen*, No. 2010 CA 00001, 2011 Ohio 1223; 2011 Ohio App. LEXIS 1056 (Ohio App. 5th Dist. March 10, 2011), an employee of a mortgage servicer testified that she saw a computer screen shot of the balance due, but could not explain how that figure was arrived at. The court reversed the grant of summary judgment based on such testimony, holding it incompetent because the witness could not"testify as to the regularity and reliability of the business activity involved in the creation of the record." "Hopkins testified in her deposition that she did not know who entered the information into the computer to generate the amount owed, nor did she know how such information was collected and compiled. The court erred in admitting the screen shot as evidence of the amount due on the account."

7. 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).

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

## XI. "ASSIGNMENT" DOCUMENTS MUST SHOW TRANSFER OF PARTICULAR ACCOUNT

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

> The Court has reviewed the documents presented by the Plaintiff, Bill of Sale and the Assignment, and finds that they fail to sufficiently identify the accounts that were assigned or sold to the Plaintiff. Neither the Bill of Sale nor the Assignment indicate the account numbers or names of account holders. They do not provide any information that would allow the Court to determine if the alleged account of Defendant was one of

the accounts sold or assigned to the Plaintiff. Without any indicia of ownership that would sufficiently identify the true owner of the account at the time that Plaintiff filed this action, the Plaintiff is unable to prove that it had standing to bring the action. An assignment is the basis of the Plaintiff's standing to invoke the processes of the Court in the first place and is therefore an essential element of proof. *Progressive Express Ins. Co. v. McGrath Community Chiropractic,* 913 So. 2d 1281, 1285 (Fla. 2nd DCA 2005); *Oglesby v. State Farm Mutual Automobile Ins. Co.,* 781 So. 2d 469 (Fla. 5th DCA 2001). "Only the insured or medical provider 'owns' the cause of action against the insurer at any one time." *Id*. at 470.

2. *Nyankojo v. North Star Capital Acquisition*, 298 Ga. App. 6; 679 S.E.2d 57 (2009) ("Through competent and admissible evidence, North Star showed nothing more than that, under a revolving charge agreement, Nyankojo was indebted in the amount of $2,621.83 on an account to Leather World identified by number; that Leather World assigned an unidentified revolving charge agreement to an unidentified entity; and that Wells Fargo assigned to North Star an unidentified account on which Nyankojo owed $1,132.62. This evidence, even together with the reasonable inferences from it, was insufficient to establish all essential elements of North Star's case").

3. *Midland Funding LLC v. Loreto,* 34 Misc. 3d 1232A; 950 N.Y.S.2d 492; 2012 N.Y. Misc. LEXIS 803; 2012 NY Slip Op 50338U (Richmond Co. Sup. Ct., February 23, 2012).

> The complaint alleges the underlying consumer credit account was sold by Citibank to Midland Funding LLC. Attached **[**3]** as an exhibit to the motion is a "Bill of Sale and Assignment" from Citibank (South Dakota), NA and an "Asset Schedule" alleging that this account was one of many included in a Bill of Sale and Assignment dated August 20, 2010 and packaged with an undisclosed number of other accounts in a Purchase and Sale Agreement between Buyer and Bank with the date "*redacted*" (emphasis added). Likewise the "Asset Schedule" states: "The individual Accounts transferred are described in the final electronic file delivered by the Bank to Buyer on or around August 18, 2010 the same deemed attached here to by reference." The remainder of this document is also "*redacted*" (emphasis added). Neither document contains any reference to this specific account nor discloses how many "accounts" were included in the transfer. Neither exhibit discloses the amount of consideration, if any, tendered by Midland to Citibank. This confirms that plaintiff has adopted "Guys & Dolls" character Big Jule's "spotless dice" logic to consumer credit transactions.[1] Additionally the Bill of Sale and Assignment refers to "the terms and conditions of a Purchase and Sale Agreement" which is not included as an exhibit in this litigation **[**4]** and may set forth rights and defenses available to defendant herein. The court must question why it has been omitted.
>
> Submission of a document in this form absent even a modicum of proof that the defendant's account was included in the transaction, would be acceptable if the person signing the paper was Mammy Yokum of "Lil

> Abner" fame because when she said "I has spoken" the validity of her conclusion was received without question by the inhabitants of **[***3]** the town of "Dogpatch, USA.[2]"
>
> Perhaps plaintiff is asserting the "Yul Brynner Character" Rule of Evidence. For instance, in his role as Pharaoh Rameses (spelling in film) in Cecil B. DeMille's epic "The Ten Commandments" he said "So let it be written. So let it be done"[3] thereby indicating the infallibility of his pronouncement. There is also the statement in the musical "The King and I" when Brynner's royal character says "When I sit, you sit. When I kneel, you kneel. Et cetera, et cetera, et cetera!"[4] **[**5]** Again making the issuance of the statement not subject to challenge. What do these quotes have in common with plaintiff's submission? They are "bald" statements by a "bald" actor playing "bald" characters while plaintiff's submission is also "bald" but with the added factor of being "unsubstantiated."

However, because we **[**6]** are neither in Dogpatch nor the 6th Dynasty of Egypt's Old Kingdom, nor 19th Century Siam, the document cannot be accepted to establish the assignment of the defendant's account to the plaintiff. Neither the Bill of Sale and Assignment nor the Asset Schedule specifically refer to the defendant's account. Further, **[***4]** there is no affidavit from someone with personal knowledge of the account to verify as to the accuracy of this information. The document is merely signed by an employee of Citibank (South Dakota), NA. There is no indication that Midland Funding LLC accepted the assignment.

The documentation is legally insufficient to establish the proper assignment of the account and cannot be the basis of a judgment whether on default, by motion, inquest or trial.

4. *Hutto v. CACV of Colorado, LLC*, 308 Ga. App. 469, 707 S.E.2d 872 (2011). "Bill of sale" which refers to list of accounts without attaching it is not sufficient to show ownership of debt.

5. *Wirth v. CACH, LLC*, 300 Ga. App. 488, 490-491, 685 S.E.2d 433, 435-436 (2009):

> Moreover, there is no contract or Appendix A appended to the Bill of Sale which identifies Wirth's account number as one of the accounts Washington Mutual assigned to Cach. The record is also devoid of any evidence which reflects that Washington Mutual purchased Providian to support the chain of assignment to Cach. See Ponder v. CACV of Colorado, LLC, 289 Ga. App. 858, 859 (658 SE2d 469) (2008) (record was devoid of evidence supporting CACV's allegation that it was the successor in interest to Fleet Bank's right to recover any outstanding debt from Ponder).
>
> Given the foregoing, we conclude that "[t]his evidence, even together with the reasonable inferences from it, was insufficient to establish all

essential elements of [Cach's] case." Nyankojo, supra, 298 Ga. App. at 10. We therefore reverse the trial court's order granting summary judgment in favor of Cach.

6. *Norfolk Financial Corp. v. Mazard*, 2009 Mass. App. Div. 255, 2009 Mass App. Div. LEXIS 54, *10-11 (Nov. 12, 2009):

> Nor, finally, do the business records attached to the Medeiros affidavit establish Norfolk's status as the valid assignee of Mazard's alleged Household account. By the ten bills of sale attached to the affidavit, Norfolk showed only that, between April, 2001 and March, 2005, multiple accounts were assigned from Bank of America, N.A. ("BOA") to Worldwide Asset Purchasing, L.L.C. ("Worldwide"), from Worldwide to Seller and Risk Management Alternatives Portfolio Services, LLC ("SRMAPS"), from SRMAPS to North Star Capital Acquisition, LLC ("North Star"), from North Star to Global Acceptance Credit Corporation ("Global"), and finally, in March, 2005, from Global to Norfolk. Norfolk failed, however, to present any evidence of an assignment of Mazard's account from Household to BOA. Further, although the attached exhibits were admissible under the business records exception to the hearsay rule, see G.L. c. 233, § 78; Beal Bank, SSB v. Eurich, 444 Mass. 813, 817, 831 N.E.2d 909 (2005), not one makes any reference to Mazard's Household account. Mazard's account is not identified in any of the ten bills of sale. And although each bill of sale states that the accounts being assigned are listed in respectively attached schedules, none of those schedules were provided by Norfolk in support of its motion.

7. *Kimhow Corp. v. Rawji,* 2012 Mass. App. Div. 48; 2012 Mass. App. Div. LEXIS 13 (March 19, 2012): “It was Kimhow's burden to establish that it was properly assigned the debt owed by Rawji to Chase Bank. Norfolk Fin. Corp. v. Mazard, 2009 Mass. App. Div. 255, 258-259. From the opening statements, Kimhow was on notice that Rawji disputed that it had any right in any debt he owed to Chase Bank. There was no evidence offered on what accounts Chase Bank assigned to Dodeka, LLC/Turtle Creek Asset LTD. More importantly, there was no evidence that Rawji's account was listed as one of the accounts assigned in the attachment to that bill of sale, i.e., ‘Exhibit I.’"

8. *Cuda & Associates, LLC v. Lumpkin*, NNHCV095031901, 2011 Conn. Super. LEXIS 3025, *9-10 (November 29, 2011) (“The plaintiff's other evidence consists of a bill of sale describing an assignment of "certain" accounts from Hudson & Keyse to the plaintiff, an attached spreadsheet entry with the defendant's name, address, social security number and certain information purporting to pertain to a Bank of America account, as well as Garamella's testimony that the information contained in the entry was provided to the plaintiff by Hudson & Keyse at the time of sale. This evidence, however, proves only that the plaintiff purchased information purporting to be an account and debt from an entity with no relationship with the defendant. In other words, it does not prove that the defendant ever entered into a credit card agreement with Bank of America, that the defendant incurred an outstanding credit card debt or that Bank of America ever sold an account and debt of the defendant to the intermediary, Hudson & Keyse.”).

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

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

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

> Ms. Bergman testified that plaintiff is authorized to perform any and all acts relating to certain accounts assigned to plaintiff by AT&T Wireless pursuant to a limited power of attorney and a bill of sale and assignment of benefits. These two documents, both dated July 2004, were admitted into evidence as plaintiff's Exhibit 1A and 1B. These documents, however, name, as the assignee, an entity which is a Delaware limited liability company, not a New Jersey Corporation, as this plaintiff alleges itself to be. Nor do the documents contain an indication that consideration was paid for the assignment and neither document is executed by plaintiff as the assignee. Further the assignment refers to a "Purchase and Sale Agreement" and indicates that an "Account Schedule" is attached to that agreement. Plaintiff did not seek to introduce the "Purchase and Sale Agreement" with its annexed schedule into evidence.
>
> In contrast to the wording of the assignment which references the "Purchase and Sale Agreement" and its annexed schedule of accounts, the witness testified that the purchased accounts came to plaintiff by electronic transmission. Ms. Bergman testified credibly that the electronic statements were received on December 13, 2005. Ms. Bergman testified that defendant's account was included in those purchased by plaintiff. Plaintiff then sought to introduce into evidence a document, dated January 9, 2006, that the witness testified was the hard copy of the account summary generated by AT&T Wireless and electronically sent to plaintiff pertaining to this defendant. The witness testified that plaintiff did not have copies of any statements from AT&T Wireless that were allegedly sent to defendant. . . .
>
> Further, in light of the dearth of evidence presented at trial regarding the assignment and the infirmities therein, plaintiff did not prove by a preponderance of the evidence that defendant's account was in fact assigned to plaintiff. . . . Had plaintiff been able to prove that much,

as it is undisputed that defendant did not pay the monthly charge of $24.99 for August and September, plaintiff would have been entitled to a judgment for those amounts.

11. *Palisades Collection, LLC a/p/o AT&T Wireless v. Gonzalez*, 10 Misc. 3d 1058A; 809 N.Y.S.2d 482, 2005 WL 3372971, *3 (N.Y.County Civ. Ct. 2005) (Ellen Gesmer, J.).

> Finally, Ms. Bergmann claims that plaintiff is entitled to sue because of an assignment to it from AT&T. However, she does not attach a copy of the alleged assignment. In the absence of the document on which her statement is based, her statement is of no probative value . . . Consequently, Ms. Bergmann has failed to establish that plaintiff has the right to collect this debt.

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

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

13. *MBNA America Bank, N.A. v. Nelson,* 2007 NY Slip Op 51200U; 15 Misc. 3d 1148A; 841 N.Y.S.2d 826; 2007 N.Y. Misc. LEXIS 4317; 237 N.Y.L.J. 120 (N.Y.Civ. Ct. May 24, 2007).

> It is imperative that an assignee establish its standing before a court, since "lack of standing renders the litigation a nullity." [20] It is the "assignee's burden to prove the assignment" and "an assignee must tender proof of assignment of *a particular account* or, if there were an oral assignment, evidence of consideration paid and delivery of the assignment." [21] Such assignment must clearly establish that Respondent's account was included in the assignment. A general assignment of accounts will not satisfy this standard and the full chain of valid assignments must be provided, beginning with the assignor where the debt originated and concluding with the Petitioner. . . .
>
> 20 *Citibank (South Dakota), N.A. v. Martin , 11 Misc 3d 219, 226, 807 N.Y.S.2d 284 [Civ. Ct. New York County 2005].*

> 21 *Id at 227* (collecting cases) (internal citations omitted) (emphasis added).
>
> Because multiple creditors may make collection efforts for the same underlying debt even after [*6] assignment, for any variety of reasons (i.e. mis-communication or clerical error) failure to give notice of an assignment may result in the debtor having to pay the same debt more than once or ignoring a notice because the debtor believes he or she has previously settled the claim. Further, debtors are often left befuddled as they get the run-around from a panoply of potential creditors when inquiring about their defaulted accounts, [**16] during which time they lose the ability to negotiate payments with the current debt owner (whoever that may be at the time) and therefore incur additional fees and penalties. Courts in other states, reviewing general principles of assignment, have noted that notice to the debtor is an explicit requirement to a valid assignment. [22]. . .

14. *Colorado Capital Investments, Inc. v. Villar*, 5894/2005, 2009 N.Y. Misc. LEXIS 2693; 241 N.Y.L.J. 116 (N.Y. Civ. Ct., June 4, 2009) ("None of these assignments, however, contain a list of the accounts which were included in the transfer . . . Thus on their face, these assignments and bills of sale do not specify that defendant's account was included in any transfer, and cannot support movant's contention that defendant's account was so transferred").

15. *National Check Bureau v. Ruth*, No. 24241, 2009 Ohio 4171, 2009 Ohio App. LEXIS 3506 (Ct. App., 9th Dist., Aug. 19, 2009) (document referring to transfer of accounts on Exhibit 1, without Exhibit 1, not sufficient to "prove the assignment").

16. *Unifund CCR Partners v. Hemm*, 08-CA-36, 2009 Ohio 3522; 2009 Ohio App. LEXIS 3009 (Ohio App., 2nd Dist., July 17, 2009) (affidavit and bill of sale that did not refer to specific account not enough).

17. *Unifund CCR Partners v. Laco,* No. 05-08-01575-CV, 2009 Tex. App. LEXIS 9642, *12 (Tex. App. Dec. 17, 2009). Must refer to specific account.

> Assuming without deciding that Unifund's affidavit of account is legally sufficient, the affidavit fails to offer any proof Unifund was the original creditor. Nor does the affidavit of account or the "Bill of Sale" offer proof Unifund is an "assignee' of the original creditor; at best, the affidavit of account and "Bill of Sale" suggest Unifund acquired unspecified "receivables" from Chase Bank and that a principal balance of $ 12,897.56 is somehow "due and payable" by Laco to Unifund. We therefore conclude Unifund has failed to offer a scintilla of evidence that it is the assignee of a creditor "to whom [Laco] incurred a debt," and the trial court did not err in granting summary judgment in favor of Laco.

18. *Rab Performance Recoveries LLC v. Scorsonelli*, 3442/2008, 2009 N.Y. Misc. LEXIS 2512; 242 N.Y.L.J. 16 (Richmond Co. Sup. Ct., June 25, 2009) ("For plaintiff to establish standing it must provide a complete chain of assignments from the original creditor to itself. . . . In opposition to the motion plaintiff's counsel concludes it has standing to sue and offers 'schedule A' which it claims establishes defendant's account was transferred. A review of Schedule A is nothing more than a computer print out with defendants name, address, social security number and general information about the alleged account. . . . It does not establish defendant's account was one assigned to it or that plaintiff has standing to sue. The other documents plaintiff produced as proof of assignment are ambiguous and refer to terms and accounts in other documents. . . . Plaintiff cannot show that this particular account was assigned.").

19. *DNS Equity Group Inc. v. Lavallee*, 26 Misc. 3d 1228A, 907 N.Y.S.2d 436, 2010 NY Slip Op 50298U, 2010 N.Y. Misc. LEXIS 365 (Dist. Ct. Feb. 22, 2010):

> [T]he other affidavits submitted in support of plaintiff's motion contain a series of contradictory assertions by individuals who claim, without documentary proof, that they have some form of "personal knowledge" of facts relating to the chain of assignment. One affidavit, from an "authorized representative" of a non-party company named Dodeka, LLC, asserts that the latter company "has made a complete assignment of said debt and that DNS Equity Group, Inc is the owner thereof. . ." But that affidavit, sworn to on May 11, 2009, is silent as to when the assignment was made. It, too, appears to have been made on "information and belief." And the assignment, itself, is not annexed or otherwise specifically described. Nor does the affidavit disclose what position the affiant holds at Dodeka. Nor does the affidavit describe her authority [**5] or describe what records she has relied upon in making the subject assertions. Such conclusory allegations, on their face, are insufficient to prove plaintiff's entitlement to judgment as an assignee. See Cach, LLC v. Davidson, 21 Misc 3d 1106(A), 873 N.Y.S.2d 232, 2008 NY Slip Op 51987(U) (Civ Ct NY Co).
>
> Moreover, in contradiction to plaintiff's claim in this lawsuit, a second affidavit, from a Chase Bank USA "Team Leader," swears "that Dodeka, L.L.C. is now the owner [*3] of said account. . ." (emphasis added). A third affidavit, from an "authorized agent" of DNS Equity Group, Inc., claims that Chase sold the account to Dodeka, which sold it to DNS, but that "[b]y valid assignment" "CACV of Colorado, LLC," "as the successor in interest, is contractually entitled to collect the amount owed on the Account," (emphasis added).
>
> Do these affidavits constitute prima facie proof, in evidentiary form, sufficient to prove that plaintiff, DNS Equity Group, Inc., is entitled to judgment against defendant as the lawful assignee

of defendant's alleged debt to Chase? The answer is obvious. The deficiencies and contradictions, identified above, are more that enough to require denial of plaintiff's motion. Cf Palisades Collection, LLC v. Kedik, supra; [**6] Rushmore Recoveries, X, LLC v. Skolnick, supra.

20. *LVNV Funding LLC v. Guest*, 35 Misc. 3d 1232A; 2012 N.Y. Misc. LEXIS 2575; 2012 NY Slip Op 50974U (N.Y. City Ct., May 29, 2012). Court imposed sanctions where debt collector could not provide the entire chain of assignments of the alleged debt, the credit card agreement and other documentary proof. "Mr. Torres, who is an employee of Resurgent Capitol Services, LP, the servicing agent for plaintiff, acknowledged that he had no personal knowledge of the assignment of the alleged debt between any of the parties. Rather, Mr. Torres' testimony relied solely upon the documents that were provided after the assignment took place. Mr. Torres' testimony regarding the electronically transferred documents highlights the fact that there is no evidentiary proof that defendant's account was actually assigned by or to any party." "The Court further notes that consumer debt actions are not akin to negligence actions where extensive discovery may need to be had before a plaintiff can prove a prima facie case. Rather, consumer debt actions are primarily document driven and thus, in general, a plaintiff should be able to establish a prima facie case without any discovery whatsoever. In the instant matter, plaintiff's counsel commenced an action without having sufficient documentary proof to establish its prima facie case and did so, this Court believes, in bad faith, fully knowing what proof was required to prove a case, that it was not in possession of such proof, and, most significantly, that, in all likelihood, it could never obtain and produce the requisite proof."

## XII. AN ASSIGNMENT EXECUTED AFTER THE DATE OF THE PURPORTED TRANSFER MAY NOT BE EFFECTIVE

1. In *LaSalle National Association v. Ahearn*, 59 A.D.3d 911, 875 N.Y.S.2d 595, 597 (3rd Dept. 2009), the court held that a purported assignment of a note and mortgage executed subsequent to the commencement of the action was insufficient to confer standing on the plaintiff. "An assignment of a mortgage does not have to be in writing and can be effective through physical delivery of the mortgage . . . However, if it is in writing, the execution date is generally controlling and a written assignment claiming an earlier effective date is deficient unless it is accompanied by proof that the physical delivery of the note and mortgage was, in fact, previously effectuated . . . . Here, the written assignment submitted by plaintiff was indisputably written subsequent to the commencement of this action and the record contains no other proof demonstrating that there was a physical delivery of the mortgage prior to bringing the foreclosure action . . . Here, the written assignment submitted by plaintiff was indisputably written subsequent to the commencement of this action and the record contains no other proof demonstrating that there was a physical delivery of the mortgage prior to bringing the foreclosure action . . . ."

2. "[A]ssignment's language purporting to give it retroactive effect prior to the date of the commencement of the action is insufficient to establish the plaintiff's requisite standing." *Washington Mutual Bank v. Patterson*, 21 Misc. 3d 1145A, 875 N.Y.S.2d 824 (Kings Co. Sup. Ct. 2008); *Countywide Home Loans, Inc. v. Hovanec*, 15 Misc 3d 1115A, 839 N.Y.S.2d 432 (Sup Ct, Suffolk County 2007); *Countrywide Home Loans v. Taylor*, 17 Misc 3d 595, 843 N.Y.S.2d 495, 497 (Sup. Ct., Suffolk Co. 2007); *U.S. Bank v. Kosak*, 16 Misc. 3d 1133A, 847 N.Y.S.2d 905 (N.Y. Sup. 2007) ("although language in the purported assignment states that the assignment is effective as of July 14, 2006 such attempt at retroactivity is insufficient to establish the plaintiff's ownership interest at the time the action was commenced. Indeed, foreclosure of a mortgage may not be brought by one who has no title to it and absent an effective transfer of the debt, the assignment of the mortgage is a nullity").

## XIII. DEBT BUYER ATTEMPTS TO INTRODUCE BUSINESS RECORDS OF ORIGINAL CREDITOR ARE OFTEN DEFICIENT

1. If records are submitted, they must be properly authenticated. *Kleet Lbr. Co., Inc. v. Lucchese,* 2007 NY Slip Op 51928U, 2007 NY Slip Op 51928U, 17 Misc. 3d 1111A, 2007 N.Y. Misc. LEXIS 6909 (Dist. Ct., Nassau County, Oct. 10, 2007) ("these documents are not submitted in admissible form. Simply annexing documents to the moving papers, without a proper evidentiary foundation is inadequate. *Higen Associates v. Serge Elevator Co., Inc.*, 190 AD2d 712, 593 NYS2d 319 (2nd Dept. 1993); *Palisades Collection, LLC v. Gonzalez*, 10 Misc 3d 1058(A), 809 NYS2d 482, 2005 NY Slip Op 52015(U) (Civ. Ct. NY Co. 2005).")

2. Generally, an employee of a debt buyer is not competent to offer testimony concerning the records of an assign*or. PRA III, LLC v. Mac Dowell,* 2007 NY Slip Op 50990U at *2, 15 Misc. 3d 1135A; 841 N.Y.S.2d 822; 2007 N.Y. Misc. LEXIS 3528; 237 N.Y.L.J. 65 (2007) ("Elaine F. Lark, a legal specialist of the plaintiff . . . is not an employee of the original creditor (Sears) and cannot authenticate documents from another business"); *CACH LLC v. Marshall*, 4381/11, 2011 NY Slip Op. 51510U, 32 Misc.3d 1231A, 2011 N.Y. Misc. LEXIS 29074 (Nassau Co. Dist. Ct. Aug. 3, 2011); *South Shore Adjustment Co. v. Pierre*, 2011 NY Slip Op 51436U, 32 Misc.3d 1227A, 2011 N.Y. Misc. LEXIS 3767 (N.Y.C. Civ. Ct., July 27, 2011); *Martinez v Midland Credit Management*, 250 SW3d 481 (Tex. App. 2008); *Asset Acceptance v Lodge*, 325 SW3d 525 (Mo. App. 2010); *CACH v Askew*, 2011 Mo. App. LEXIS 429 (Mo App 2011); *Commonwealth Financial Systems, Inc. v. Smith*, 3435 EDA 2009, 2011 PA Super 30; 15 A.3d 492, 2011 Pa. Super. LEXIS 35 (Feb. 14, 2011).

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

> As a part of a credit card issuer's presentation of a prima facie case, the motion papers also must include an affidavit sufficient to tender to the court the original agreement, as well as that any

> revision thereto, and the affidavit must aver that the documents were mailed to the card holder. n4 The same affidavit typically advances copies of credit card statements which serve to evidence a buyer's subsequent use of the credit card and acceptance of the original or revised terms of credit . . . . The affidavit often addresses whether there was any proper protest of any charged purchase within 60 days of a statement (*15 U.S.C. § 1601*; *12 C.F.R § 226.13 [b][1]*, a provision in *12 C.F.R, part 226*, referred to as "Regulation Z" or "Truth in Lending" regulations). . . .
>
> The affidavit must demonstrate personal knowledge of essential facts . . . . An attorney's affirmation generally cannot advance substantive proof . . . .

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

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

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

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

CPLR § 3212(b) requires that a motion for summary judgment be supported by an affidavit of a person with requisite knowledge of the facts, together with a copy of the pleadings and by other available proof . . . The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment" . . . "Failure to make such showing requires the denial of the motion, regardless of the sufficiency of the opposing papers." . . . A conclusory affidavit, or an affidavit by a person who has no personal knowledge of the facts, cannot establish a prima facie case. . . . When the affiant relies on documents, the documents relied upon must be annexed . . . and the

affiant must establish an adequate evidentiary basis for them. Mere submission of documents without any identification or authentication is inadequate. . . . When the movant seeks to have the Court consider a business record, the proponent must establish that it meets the evidentiary requirements for a business record, by, [*2]for example, having a corporate officer swear to the authenticity and genuineness of the document. . . .

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

> Plaintiff relies on an affidavit executed by Joanne Bergmann, [FN2] who identifies herself as the Vice President of plaintiff's Legal Department. She does not claim to have any personal knowledge of the transaction underlying this complaint but rather states that she is making the affidavit "based upon the books and records in my possession." She claims that she is familiar with plaintiff's methods for creating and maintaining its business records, including records of the accounts purchased by plaintiff. She then annexes and discusses various records. Through her affidavit, she seeks to establish four facts on which to ground plaintiff's claim: that defendant executed a contract with AT&T; that defendant defaulted in making payments under the contract; that AT&T sent defendant bills which defendant did not dispute; and that plaintiff is entitled to sue as AT&T's assignee. Ms. Bergmann's affidavit is not adequate to establish any of these facts.
>
> To establish the contract, Ms. Bergmann asserts that defendant entered into a contract with AT&T, and alleges that it is attached as Exhibit A. Her bald statement that defendant entered into a contract is not probative, since Ms. Bergmann acknowledges that she is simply relying on the documents in her possession. Moreover, the document attached as Exhibit A is equally ineffective to establish that defendant signed a contract, since it is merely an unsigned 9-page form, headed "Terms and Conditions for Wireless Service." Putting aside the question of whether Ms. Bergmann could properly authenticate a contract which appeared to be signed by defendant, her proffer of an unexecuted document certainly does not establish that defendant signed a contract with AT&T.
>
> Next, Ms. Bergmann seeks to establish that defendant is in default by making various conclusory statements to that effect and then attaching, as Exhibit D, documents she refers to as account statements which allegedly reflect the activity on defendant's account. On the simplest level, the Court cannot rely on Ms. Bergmann's description of the documents annexed as Exhibit D because her description is inconsistent with the documents themselves and with her own prior statements as to

> defendant's obligation to plaintiff. Specifically, she describes the documents as "account statements that reflect purchases made by defendant along with periodic payments. The statements reflect the finance charges on the balance as provided in the retail installment credit agreement." However, the account statements do not, on their face, reflect "purchases" but rather monthly charges for cell phone usage. Similarly, the account statements do not appear to be based on charges on a "retail installment credit agreement," but rather on a cell phone service plan. Consequently, since Ms. Bergmann has described incorrectly the document she claims to [*3]rely on, the Court will not credit the statements she makes based on it.[FN3]
>
> Even if the Court were to overlook the inaccuracy of Ms. Bergmann's description of the documents attached as Exhibit D, the Court could not rely on them. Since the documents are out-of-court statements offered for their truth, Ms. Bergmann must establish that they fall within an exception to the hearsay rule in order for them to be admissible. . . . Presumably, Ms. Bergmann is asking the Court to treat them as a business record since she describes herself as being familiar with plaintiff's business records . . . However, the records attached at Exhibit D were created not by plaintiff but by plaintiff's assignor, AT&T. In order to establish a business records foundation, the witness must be familiar with the entity's record keeping practices . . . Ms. Bergmann does not claim to be familiar with AT&T's record keeping practices, but only with the method by which plaintiff maintains the accounts it purchases from others. The mere fact that plaintiff obtained the records from AT&T and then retained them is an insufficient basis for their introduction into evidence. . . .[FN4] Therefore, the Court cannot rely on the account statements which Ms. Bergmann proffered to establish defendant's default.
>
> Footnote 4: This is not a situation where the relationship between the proponent of the record and the maker of the record guarantees the reliability of the records, such as where the maker of the record was acting on behalf of the proponent and in accordance with its requirements when making the records, (*People v Cratsley*, 86 NY2d 81, 89-91 [1995]) or where the proponent of the records relies contemporaneously on the accuracy of the other entity's records for the conduct of its own business (*People v DiSalvo*, 284 AD2d 547, 548-9 [2d 2001]; *Plymouth Rock Fuel Corp. v Leucadia, Inc.,* 117 AD2d 727, 728 [2d Dept 1986]). Here, there is no evidence that there was any relationship between AT&T and plaintiff at the time that the records were created.

The court also held insufficient affidavits that documents had been mailed when the affiant neither mailed them nor was able to testify on personal knowledge that a routine practice of mailing such documents existed within the business. The court also found that a reproduction

of the document mailed was required and that a later printout prepared using data in the system would not do:

> Ms. Bergmann also asserts that the account statements were mailed to defendant and the statements were neither returned nor disputed. Presumably, Ms. Bergmann is making this statement in order to support a claim for an account stated. However, plaintiff's complaint does not include a cause of action for an account stated, so these statements by Ms. Bergmann are irrelevant.
>
> Even if plaintiff were asserting a claim for an account stated, Ms. Bergmann's statement [*4]would be totally inadequate to support it. Ms. Bergmann does not even assert whether she claims that the documents were sent by AT&T or by plaintiff, but, either way, her statements are not sufficient to establish mailing. As stated above, Ms. Bergmann does not claim to have personal knowledge of this account. Certainly, she does not claim to have mailed these statements herself. Where an affiant does not have personal knowledge that a particular document was mailed, she can establish that it was mailed by describing a regular office practice for mailing documents of that type. . . . However, Ms. Bergmann did not do that in this case. [FN5] Consequently, plaintiff has failed to prove that the account statements were in fact mailed to defendant.

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

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

> The Plaintiff attempts to support its motion with the affidavit of Todd Fabacher, who identifies himself as "an authorized and designated custodian of records for the plaintiff regarding the present matter." (*Fabacher Affidavit* 3/14/07, P 1) Mr. Fabacher describes his duties as including "the obtaining, maintaining and retaining, all in the regular course of plaintiff's business, including obtaining records and documents from or through CITIBANK or [*2] any assignee or transferee previous to plaintiff, any and all records [**3] and documentation regarding the present debt." (*Fabacher Affidavit* 3/14/07, P 1) While Mr. Fabacher attempts to portray himself as one who is "personally familiar with, and hav[ing] knowledge of, the facts and proceedings relating to the within action" (*Fabacher Affidavit* 3/14/07, P 1), it is readily apparent from a reading of his affidavit that his claimed personal familiarity with this matter is taken from the documents and records ostensibly created by Citibank, and/or assignees who have preceded the Plaintiff, which have now come into the Plaintiff's possession.

> Clearly, Mr. Fabacher has no personal knowledge of the retail charge account agreement between the Defendant and Citibank. . . .
>
> The Plaintiff's reliance upon the documents it submits is insufficient to make out a *prima facie* case entitling the Plaintiff to summary judgment. Simply annexing documents to the moving papers, without a proper evidentiary foundation [**4] is inadequate. . . .
>
> The documents the Plaintiff attempts to submit, specifically the purported account statements and assignments, are being offered for the truth of the statements contained therein and are, by definition, hearsay. . . . They may be considered only if they fall within one of the recognized exceptions to the hearsay rule. . . .The Plaintiff attempts to rely upon the business records exception to the hearsay rule in its effort to establish a *prima facie* case.
>
> . . . the proponent of the offered evidence must establish three general elements, by someone familiar with the habits and customary practices and procedures for the making of the documents, before they will be accepted in admissible form: (1) that the documents were made in the regular course of business; (2) that it was the regular course of the subject business to make the documents; and, (3) that the documents were made contemporaneous with, or within a reasonable time after, the act, transaction, occurrence or event recorded. . . .
>
> The repetitive statements of Mr. Fabacher, the Plaintiff's custodian of records, to the effect that he collects and maintains the records and documents of Citibank and/or any other prior assignees, "in the regular course of plaintiff's business" (*Fabacher Affidavit* 3/14/07, P 1), as if they were magic words, does not satisfy the business records exception to the hearsay rule. That phrase, standing alone, does not establish that the records upon which the Plaintiff relies were made in the regular course of the Plaintiff's business, that it was part of the regular course of the Plaintiff's business to make such records, or that the records were made at or about the time of the transactions recorded. Contrary to the misconception under which the Plaintiff labors, "the mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient [**8] to qualify the documents as business records (citation omitted)." . . . The statements of Mr. Fabacher, "who merely obtained the records from another entity that actually generated them, was an insufficient foundation for their introduction into evidence . . .

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

> The Plaintiff's reliance on *Chase Manhattan Bank (National Association), Bank Americard Division v. Hobbs, 94 Misc 2d 780, 405 N.Y.S.2d 967 (Civ. Ct. Kings Co. 1978)* is misplaced. The plaintiff therein was not an assignee, but the party with which the defendant had entered into a retail charge account agreement and could properly lay a business record foundation for [**10] the entry of the documents necessary to prove the existence of same. Additionally, the plaintiff therein provided proper proof of mailing of the subject account statements, along with copies of the retail charge account agreement, and demonstrated the defendant's use of the credit card in question, thereby accepting the terms of use of that card.
>
> In the matter *sub judice*, the account statements upon which the Plaintiff relies do not show any usage of the credit card in question by the Defendant. The four (4) statements submitted show only an alleged open balance, with the accrual of fees and finance charges thereon. The Plaintiff also fails to submit any proof that a copy of the retail installment credit agreement or the statements upon which it relies were ever mailed to the Defendant. Neither Mr. Fabacher nor Plaintiff's counsel mailed these documents or have personal knowledge of their mailing; nor does the Plaintiff even attempt to describe a regular office practice and procedure for the mailing of the documents designed to insure that they are always properly addressed and mailed. . . .

## XIV. BEWARE OF "GENERIC" CONTRACTS THAT CANNOT BE IDENTIFIED AS PERTAINING TO THE SPECIFIC ACCOUNT SUED UPON

1. *Razor Capital v. Antaal*, 2012 IL App (2d) 110904, 972 N.E.2d 1238 (July 11, 2012). Even though a credit card is technically an unwritten contract, it is necessary for the plaintiff to allege and prove the terms of the contract and that they apply to the particular account. 2012 IL App (2d) 110904, ¶ 29-32. "To properly plead that the generic agreement attached to the complaint applied to defendant's account when she used the card, plaintiff must, at a minimum, allege facts reflecting that those terms were *communicated* to defendant, via mail to defendant's most recent billing address or in another similar manner by which it would be reasonable to presume that defendant received them, and that defendant accepted those terms by subsequently using the card." 2012 IL App (2d) 110904, ¶ 32. "Nevertheless, to pursue even an unwritten-contract claim, a plaintiff must both plead or attach the terms of the agreement allegedly breached and tie those terms to the defendant. Further, in the absence of allegations or affidavits explaining when and how an attached agreement was communicated to the defendant *and showing that the defendant used the card thereafter*, thereby accepting the agreement's terms, a plaintiff cannot recover pursuant to those terms." 2012 IL App (2d) 110904, ¶ 33. "While it might very well be true that the generic agreement attached to plaintiff's complaint accurately reflects the terms of their unwritten contract and that

defendant accepted those terms when she used the card after the agreement was communicated to her, the complaint includes no allegations or documents reflecting as such." 2012 IL App (2d) 110904, ¶ 34. "To plead the cause of action, there must be allegations or documents reflecting the terms of the agreement between defendant and plaintiff (or plaintiff's predecessor), that the terms pertained to defendant's account, and that she received or was mailed the agreement, and that she agreed to those terms when she used the card thereafter. . . . We further note that plaintiff must plead that the terms alleged are those under which it seeks to recover. For example, it is theoretically possible, under *Garber* [*v. Harris Trust & Savings Bank*, 104 Ill. App. 3d 675, 679, 432 N.E.2d 1309, 1311 (1st Dist. 1982)], that several versions of terms applied to defendant's account, if the terms were modified between defendant's credit card transactions. If so, and to the extent that plaintiff seeks to recover for charges defendant incurred under different versions of terms of the unwritten agreement, those terms, the communication of those terms to defendant, and defendant's subsequent use of the card will need to be separately pleaded for each version of terms under which plaintiff seeks to recover." 2012 IL App (2d) 110904, ¶ 34.

2. *Velocity Investments, LLC v. Alston*, 397 Ill. App. 3d 296, 922 N.E.2d 538 (2nd Dist. 2010).

3. *Asset Acceptance, LLC v. Tyler*, 2012 IL App (1st) 093559, 966 N.E.2d 1039; 2012 Ill. App. LEXIS 139 (2012). Asset sought to confirm one of the arbitration awards entered by National Arbitration Forum before it was enjoined from hearing consumer cases in lawsuit brought by Minnesota Attorney General. However, the decision is important for credit card cases generally. The court found that Asset had failed to prove that the unsigned cardmember agreement it offered was in fact part of the contract between the consumer and the original creditor:

> (¶48) . . . We take the papers containing an arbitration clause Asset filed below to suggest that the dispute between MBNA (hence Asset) and Tyler regarding his credit card debt was subject to arbitration. Problematic for Asset, however, is that the papers provide no evidence that they pertain to Tyler's account; or that Tyler received the papers; or that Tyler agreed to the terms set forth in the papers by making a credit purchase after he was mailed the attached papers. See *FIA Card Services, N.A. v. Weaver*, 2010-1372, at 15 (La. 3/15/11); 62 So. 3d 709, 718 (where no credit card contract containing an arbitration clause was ever signed, credit card issuer had burden to demonstrate modifications to the terms of the credit agreement were sent to cardholder and cardholder "made at least one purchase after this date"). In fact, the papers do not support the conclusion that Tyler and MBNA entered into a contract to arbitrate their disputes. *MCI Telecommunications Corp.*, 138 F.3d at 428 (arbitration agreements are "embodied in whatever contract [the parties] may have entered into"). Under Illinois

law, similar documents have been deemed insufficient to establish a contract. *Velocity Investments, LLC v. Alston*, 397 Ill. App. 3d 296, 299 (2010) (the bank's " 'Cardmember Agreement and Disclosure Statement' " was legally insufficient to collect on a credit card debt because the "Statement" was "not the written contract, as it offers no evidence that defendant agreed to be bound by these terms or that these terms even applied to this particular account").

(¶49) Nor does Asset provide us with information as to when the attached papers became part of any credit card agreement by Tyler's use of the MBNA credit card. In fact, Asset failed to make any showing that the "arbitration clause" reflected in each of the papers predated Tyler's receipt of the initial offer of credit by MBNA. It could be that the attached papers came into existence after Tyler's last use of the MBNA credit card. See *FIA Card Services*, 2010-1372, at 14 (La 3/15/11); 62 So. 3d 709, 718 ("It is undisputed that the original agreement between [credit card holder] and MBNA contains no arbitration clause."). Asset failed to provide the information necessary to uphold the "arbitration clause" papers, spread of record, as the equivalent of the underlying agreement to arbitrate between the parties as required by section 13 of the FAA. *Id.*; see also *Velocity*, 397 Ill. App. 3d at 299 (the absence of the underlying written contract not sufficiently explained (citing 735 ILCS 5/2-606 (West 2006))).

(¶50) Nor do the allegations in Asset's complaint fill in the gaps in the credit-offer-and-acceptance dates. Asset alleged that MBNA issued Tyler a credit card with a specific number, but failed to state when the credit card was issued. Asset alleged the "Defendant incurred charges by the use of the credit card," but failed to state the date of the last charge on the credit card. While Asset alleged that "[o]n or about January 15, 2007, the plaintiff (Asset) filed a Demand for arbitration with the National Arbitration Forum," the complaint does not state when Asset became the assignee of Tyler's credit card debt initially held by MBNA.

(¶51) The written arbitration decision also leaves unanswered the question of when the purported arbitration agreement became incorporated in the credit agreement between MBNA and Tyler. The written arbitration decision from the NAF, which Asset properly submitted under section 13 of the FAA with its motion to confirm before the circuit court, states in paragraph 4 of the decision that "[o]n or before 01/15/2007 the Parties entered into a written agreement to arbitrate their dispute." While the "before" portion is undoubtedly accurate, it does nothing to confirm that an "agreement" to arbitrate between the parties existed prior to Tyler's last use of the MBNA credit card. See *FIA Card Services*, 2010-1372, at 14 (La. 3/15/11); 62 So. 3d 709, 718 ("It is undisputed that the

> original agreement between [credit card holder] and MBNA contains no arbitration clause."). Further, the allegation that Asset purchased Tyler's credit card debt from MBNA supports the conclusion that no written agreement to arbitrate ever existed between Asset and Tyler, contrary to the assertion in paragraph 4 of the written arbitration decision. Rather, to the extent a written agreement to arbitrate existed, the agreement must have been between MBNA and Tyler, and it is reasonable to conclude that MBNA never appeared before the NAF to provide information regarding when the arbitration agreement was entered into. It is also reasonable to conclude that Asset's demand for arbitration, which it filed on January 15, 2007, means Asset was assigned Tyler's MBNA credit card debt sometime before that date, rendering meaningless the assertion in the award that the parties entered into an agreement to arbitrate on or before January 15, 2007.

Under this decision, the use of generic "credit card agreements" and affidavits by debt buyers is plainly insufficient to prove the terms of a contract.

4. *MBNA America Bank, N.A. v. Nelson*, 2007 NY Slip Op 51200U; 15 Misc. 3d 1148A; 841 N.Y.S.2d 826; 2007 N.Y. Misc. LEXIS 4317; 237 N.Y.L.J. 120 (N.Y.Civ. Ct. May 24, 2007). The court required proof of the actual terms of the agreement with the particular debtor (*7-9)

> . . . The notion that the terms of a valid offer be communicated to the offeree, regardless of whether the contract is unilateral, bilateral or otherwise, before they can become binding is well settled law. [32] Therefore, absent a definite and certain offer outlining the terms and conditions of credit card use with the user's *actual signature*, the Petitioner . . . has the burden of establishing the binding nature of the underlying contract, including any allegedly applicable arbitration clauses, which entails proof, at a most basic level, that the debtor was provided with notice of the terms and conditions [33] to which Petitioner now [*8] seeks to hold [**23] Respondent. [34]
>
> Petitioner must tender the *actual* provisions agreed to, including any and all amendments [35], 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 accountable [36] (the Respondent's intent to be bound *after notice of terms is established* can be shown via card use [37]). [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 conditions [39], or whether the terms were made readily accessible to Respondent by e-mail or the internet, and Respondent was in fact aware of this, may all be relevant to an inquiry into constructive notice but such notice must still be established. At bar, MBNA Bank has failed to establish that the provided terms and conditions were the actual terms and conditions agreed to by Nelson. As such, applying *Kaplan*, the Court does not find objective intent on the part of the Respondent to be bound to the contractual statements proffered by MBNA requiring the question of arbitrability to be decided by the arbitrator or that arbitration is the required forum for either party to bring claims against the other.

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

While these deficiencies of proof are fatal to Petitioner's claim, such a problem is not without a solution. Since the credit card issuer is the party in the best position to maintain records of notification it may provide an affidavit from someone with

knowledge of the policies, procedures and practices of its organization affirming (1) when and how the notification of the original terms and conditions was provided [40], including any solicitations or applications containing the Respondent's signature, (2) what those terms and conditions were *at the time of the notification*, (3) whether the mandatory arbitration clause, and any [**29] other additional provisions Petitioner now treats as binding, were included in the terms and conditions of card use at the time Respondent entered into the retail credit agreement, and if they were not, then when they were added, as well as a statement certifying that (a) such addition was made pursuant to the applicable [*9] law chosen by the parties to apply to the agreement, not limited to but especially including mandatory opt-out requirements, and (b) a statement indicating that upon reasonable and diligent inspection of the records maintained by the Petitioner, and to the best of Petitioners' knowledge Respondent never opted out of said clause, and the basis for this determination. The use of such affidavits to support confirmation of arbitration awards is not novel. [41]

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

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

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

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

Plaintiff again sought to introduce the "Terms and Conditions" document by claiming that AT&T Wireless sent the document to plaintiff as part of the purchase of defendant's account. Defendant again objected on the basis that it was not his

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

6. *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.

7. *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.

8. *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).

## XV. FACSIMILE STATEMENTS

1. Beware of "facsimile" statements, which are computer-generated, non-image documents. If the records are generated by computer, a person familiar with the computer system who can testify that the output is an

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

2. Illinois law likewise holds that a "foundation for computer-generated records is established when it is shown that the equipment which produced the record is recognized as standard, the entries were made in the regular course of business at or reasonably near the happening of the event recorded and the sources of information, method and time of preparation were such as to indicate their trustworthiness and to justify their admission." *Riley v. Jones Bros. Constr. Co.*, 198 Ill.App.3d 822, 829, 556 N.E.2d 602 (1st Dist. 1990); *accord, In re Estate of Zander*, 242 Ill.App.3d 774, 779-780; 611 N.E.2d 86, 90 (4th Dist. 1993); *People v. Johnson*, 376 Ill.App.3d 175, 180; 875 N.E.2d 1256, 1260-1261 (1st Dist. 2007).

## XVI. "BUSINESS RECORDS" MUST BE PREPARED IN THE REGULAR COURSE OF A BUSINESS OTHER THAN LITIGATION, WHERE THERE IS LITTLE OR NO MOTIVE TO FALSIFY.

1. 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")*; People v. Davis*, 322 Ill. App. 3d 762, 766, 751 N.E.2d 65 (1st Dist. 2001); *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.

2. In *Liberty Acquisitions, LLC v. Daley,* 2007C64040 (Adams Co., Colorado, County Court), the court held that a summary of a debt prepared by a debt buyer is not within the business records exception.

3. In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 328 (2009), the United States Supreme Court held:

> Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. See Fed. Rule Evid. 803(6). But that is not the case if the regularly conducted business activity is the production of evidence for use at trial. Our decision in *Palmer* v. *Hoffman*, 318 U.S. 109 (1943), made that distinction clear. There we held that an accident report provided by an employee of a railroad company did not qualify as a business record because, although kept in the regular course of the railroad's operations, it was "calculated for use essentially in the court, not in the business." *Id.*, at 114. The analysts' certificates – like police reports generated by law enforcement officials – do not qualify as business or public records for precisely the same reason. See Rule 803(8) (defining public records as "excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel").

4. *LVNV Funding, LLC v. Mastaw*, No. M2011-00990-COA-R3-CV, 2012 Tenn. App. LEXIS 282, *22-23 (April 30, 2012). Debt buyer records not admissible as business records because prepared for litigation. ("In the case at bar, the affidavits executed by Griffin were clearly prepared specifically for the instant litigation, to trace the assignments of Mastaw's [*23] debt, establish LVNV's ownership of the debt and the amount due from Mastaw. They do not incorporate by reference or otherwise summarize or interpret documents that are prepared in the normal course of regularly conducted business activity. We must conclude that Exhibits 4 and 5 do not properly fit within Rule 803(6), the business records exception to the hearsay rule, and that the trial court erred in admitting them into evidence pursuant to this exception.").

## XVII. SECONDARY EVIDENCE OF DOCUMENTS SHOULD BE OBJECTED TO:

1. Most of the major credit card issuers do not retain applications for more than six years after the account is opened (not six years after the account is closed out with nothing more owing).

2. This violates federal regulations requiring preservation of all documents necessary to make loans legally enforceable. 12 C.F.R. part 30, Appendix A, the Interagency Guidelines Establishing Standards for Safety and Soundness adopted by all of the federal banking regulators, provides (II.C.):

> **C. Loan documentation. An institution should establish and maintain loan documentation practices that: . . .**
>
> **3. Ensure that any claim against a borrower is**

**legally enforceable . . . .**

These were issued at 60 FR 35682, July 10, 1995 and revised at 61 FR 43948, 43950, Aug. 27, 1996.

3. Debt buyers generally do not routinely get any of the original creditor's documents, with the result that the original creditor may dispose of it by the time the debt buyer has to prove its case in court. *LHR, Inc. v. T-Mobile USA, Inc.*, 88 A.D.3d 1301, 930 N.Y.S.2d 731 (4th Dept. 2011) (debt buyer sued original creditor for failing to keep original documents; "plaintiff alleged that T-Mobile . . . breached those agreements by failing to provide plaintiff with documents necessary to verify its debt"). This should be treated the same as destroying the documents.

4. 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).

## XVIII. ILLINOIS CASES RE FOUNDATION FOR BUSINESS RECORDS

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

> Anyone familiar with the business and its procedures may testify as to the manner in which records are prepared and the general procedures for maintaining such records in the ordinary course of business. *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).

2. Debt buyers often try to introduce the business records of the original, pre-default creditor through the testimony of an employee of the debt buyer on the theory that they have become the records of the debt buyer.

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

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

> By contrast, a business report generated by a third party has been held to be admissible when it was commissioned in the regular course of business of the party seeking to introduce it. *Birch v. Township of Drummer* (1985), 139 Ill. App. 3d 397, 487 N.E.2d 798 (survey of an engineering firm commissioned by county admissible as business record of the county).
>
> The key consideration is the authority of the third party to act on the business' behalf. Where a third party is authorized by a business to generate the record at issue, the record is of no use to the business unless it is accurate and, therefore, the record bears sufficient indicia of reliability to qualify as a business record under the hearsay rule. See also *N.L.R.B. v. First Termite Control Co., Inc*. (9th Cir. 1981), 646 F.2d 424; Fed. R. Evid. 803(6); M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 803.10, at 647 (5th ed. 1990).
>
> Accordingly, we find that the trial court erred in its ruling that the ultrasonic test reports were inadmissible. The reports were the business records of B&OCT. Although the reports were generated by Calumet and Conam, the tests were performed at the direction of the railroad in the regular course of its business.

*Accord, Kimble v. Earle M. Jorgenson Co.*, 358 Ill. App. 3d 400; 830 N.E.2d 814 (1st Dist. 2005). *See generally, Asset Acceptance v. Lodge*, 325 S.W.3d 525 (Mo. App. 2010).

4. On this issue, debt buyers rely on *Krawczyk v. Centurion Capital Corp.*, 06 C 6273, 2009 U.S. Dist. LEXIS 12204 (N.D.Ill., Feb. 18, 2009), an FDCPA case applying the Federal Rules of Evidence and not the more restrictive requirements of Illinois law. After concluding that certain affidavits were admissible because they showed the state of mind of the defendant (relevant to a bona fide error defense), the court went on to state:

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

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

Relying on the previously set forth principles as well as those espoused by the court in *Beal,* this Court finds that Centurion integrated the Capital One records [*15] into its own records and relied upon them in its daily operations. Centurion relied upon the information provided by Capital One when attempting to collect on Plaintiff's defaulted debt. Centurion, as a debt collector, was aware of the penalties for attempting to collect bogus debts; therefore, its reliance on the records provides another assurance of reliability. Kavanagh's affidavit attests that she has personal knowledge of Centurion's record-keeping, she is competent to testify to those matters, and she has reviewed and is familiar with the records relating to Plaintiff's debt. She further explains how Centurion's automated collection system database created the record of Plaintiff's alleged defaulted debt

> on December 8, 2005, the same day Centurion purchased the debt from Capital One as part of a portfolio of defaults. As soon as Centurion had the information available to it, it created a record containing Plaintiff's credit card number, the amount of the debt, the last date of payment, and the debtor's last known address and social security number. Additionally, the record was transferred from Capital One to Centurion's automated collection system database without alteration. [*16] Although Kavanagh did not author the record in question, the business record exception does not impose any such requirement. See *Duncan,* 919 F.2d at 986. Kavanagh's affidavit, testifying to the records that Centurion received from Capital One, is reliable and can be relied upon in support of summary judgment. And, for the same reasons, the affidavit of Peter Fish is deemed reliable and also can be used in support of Defendants' motion for summary judgment. [5]

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

6. According to the Advisory Committee, Rule 803(6) is based on the premise that the reliability of business records is "supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon, or by a duty to make an accurate record as part of a continuing job or occupation." The same circumstantial guarantee of trustworthiness is not present when a debt buyer or debt collector acquires a portfolio of defaulted accounts. The debt collector is not interested in the good will of the defaulted debtors, or in avoiding overcharges, but in collecting as much money as possible. If a debt buyer's records do not satisfy the normal standard of admissibility, and it does not produce someone who can testify that the recordkeeping procedures of the pre-default creditor meet this standard, the records should not be admitted. The fact that an out of court declarant was aware that there are penalties for making false statements has never been considered a basis for allowing testimony that does not otherwise satisfy the requirements of a hearsay exception; if it did, any affidavit would be competent evidence.

7. The *Krawczyk* court's conclusion is basically inconsistent with the distinction made in the FDCPA between persons who acquire current debts and persons who acquire defaulted debts; the latter are covered by the FDCPA because the need to preserve customer good will does not exist and requires that they be regulated. On the state level, it is

inconsistent with the decision of the Illinois legislature, in amending the ICAA effective Jan. 1, 2008, to classify debt buyers with collection agencies rather than original creditors.

8. The *Krawczyk* court's conclusion is also inconsistent with *Melendez-Diaz v. Massachusetts, supra,* (U.S., June 25, 2009), at 15-16 and 18, which distinguished between records "calculated for use essentially in the court, not in the business" and inquires whether records were "created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial".

9. In *Webb v. Midland Credit Mgmt*., No. 11 C 5111, 2012 U.S. Dist. LEXIS 80006, 2012 WL 2022013 (N.D.Ill., May 31, 2012), the court refused to allow information from a debt seller to be admitted into evidence based on testimony by the purchaser, where it was clear that the purchaser's witness had no idea how the records were generated or whether they were reliable.

> Minford admits that some of the business records he reviewed "were created by businesses other than Midland Credit," but defendants argue that these third party records are admissible under Rule 803(6) because they have been "incorporated into the business records of Midland Credit and relied upon by Midland Credit in conducting [*12] its business." (Minford Decl. ¶ 3.) Indeed, some courts in this circuit have recognized that "a third party document may qualify as another business entity's record, provided that the entity integrated the third-party document into its records and relied upon it in its day-to-day operations." Cunningham Charter Corp. v. Learjet, Inc., No. 07-CV-233- DRH-DGW, 2012 U.S. Dist. LEXIS 61096, 2012 WL 1565532, at *3 (S.D. Ill. May 2, 2012); accord Makor Issues & Rights, Ltd. v. Tellabs, Inc., 735 F. Supp. 2d 856, 867 n.2 (N.D. Ill. 2010); BP Amoco Chem. Co. v. Flint Hills Res., LLC, 697 F. Supp. 2d 1001, 1021 (N.D. Ill. 2010); see also Krawczyk v. Centurion Cap. Corp., No. 06-C-6273, 2009 U.S. Dist. LEXIS 12204, 2009 WL 395458, at *5 (N.D. Ill. Feb. 18, 2009) (admitting evidence of assignment of debt under Rule 803(6) where collection agency integrated assignor's records into its own and relied on them in conducting its daily operations).
>
> The Seventh Circuit has not directly addressed this issue, but courts applying this approach have held that the proponent of such records must do more than assert that it relied on the third party record in conducting its day-to-day business activities. Rather, "the proponent of the document must demonstrate that the [*13] other requirements of Rule 803(6) are satisfied." Cunningham Charter Corp., 2012 U.S. Dist. LEXIS 61096, 2012 WL 1565532, at *3; see also Datamatic Servs., Inc., 909 F.2d at 1033 ("if the source of the information [contained in the business record] is an outsider, Rule 803(6) does not, by itself, permit the admission of the business record" (internal quotation

marks and citation omitted)); United States v. Borrasi, 639 F.3d 774, 780 (7th Cir. 2011) ("courts may not permit the introduction of hearsay contained within hearsay unless each layer is properly admitted under an exception to Rule 802" (citing Fed. R. Evid. 805)); 2 Kenneth S. Broun, McCormick on Evidence § 290 (6th ed.) ("The common law exception for regularly kept records required that . . . [t]he entrant . . . be acting in the regular course of business, and if the information was supplied by another, that person also was required to be acting in the regular course of business.").

Thus, to admit the third party documents attached as Exhibits A through F to Minford's declaration as business records, defendants must demonstrate that the third party author created such documents on a regular basis and kept the document at issue in the course of its regularly [*14] conducted business activity. See Cunningham Charter Corp., 2012 U.S. Dist. LEXIS 61096, 2012 WL 1565532, at *3. Defendants must satisfy these foundational requirements through the testimony of a qualified witness with knowledge of the process by which the third party created the document, thereby demonstrating that the document is trustworthy. See id.

A review of Minford's declaration demonstrates that defendants have failed to lay the requisite foundation for admission of Exhibits A through F. Minford does not claim to be knowledgeable in the record keeping procedures of any of the non-defendant entities. Moreover, when asked at his deposition whether he had any information about what records Sherman Originator and LVNV maintain and how Sherman Acquisition keeps its records, Minford responded no or that he did not know. (See Minford Dep. 21:11-18; 31:1-25.) Thus, by his own admission, Minford is not qualified to testify as to the process by which Sherman Originator, LVNV, and Sherman Acquisition created and maintained Exhibits A through D. As to Exhibits E and F, which include a bill of sale signed by representatives of Sherman Originator III and Citibank South Dakota and credit card statements issued by Sears, [*15] Minford does not claim to be knowledgeable in the record keeping procedures of either Sherman Originator III or Citibank and admitted under oath that he did not know anything about Citibank's computer system. (Id. 32:13-15.) Based on this record, it is clear that Minford lacks personal knowledge of the procedure used to create and maintain Exhibits A through F, and he is not capable of testifying as a qualified witness under Rule 902(11). See Reese, 666 F.3d at 1017. The court therefore declines to admit Exhibits A through F as records of regularly conducted business activity, and will not consider them in ruling on defendants' motion.

10. In *United States v. Borrasi,* 639 F.3d 774, 780 (7th Cir. 2011), the court held that "courts may not permit the introduction of hearsay

contained within hearsay unless *each* layer is properly admitted under an exception to *Rule 802*" (citing *Fed. R. Evid. 805*). In *Datamatic Servs., Inc. v. United States,* 909 F.2d 1029, 1033 (7th Cir. 1990), the court held:

> Although the Bell letter appears to satisfy the first two elements of the business records exception, the third requirement -- that the information in the record be based on the entrant's personal knowledge -- presents a problem. Bell may have been acting within the regular course of his business in preparing the letter; however, the sources he used were outsiders (albeit clients) with respect to the business. " If the source of the information is an outsider, Rule 803(6) does not, by itself, permit the admission of the business record. The outsider's statement must fall within another hearsay exception. . . ."

11. In *LVNV Funding, LLC v. Mastaw*, No. M2011-00990-COA-R3-CV, 2012 Tenn. App. LEXIS 282, *22-23 (April 30, 2012), debt buyer records were held inadmissible as business records because prepared for litigation. ("In the case at bar, the affidavits executed by Griffin were clearly prepared specifically for the instant litigation, to trace the assignments of Mastaw's [*23] debt, establish LVNV's ownership of the debt and the amount due from Mastaw. They do not incorporate by reference or otherwise summarize or interpret documents that are prepared in the normal course of regularly conducted business activity. We must conclude that Exhibits 4 and 5 do not properly fit within Rule 803(6), the business records exception to the hearsay rule, and that the trial court erred in admitting them into evidence pursuant to this exception.").

12. In this regard, the FTC does not share the view of the *Krawczyk* court regarding the accuracy of debt collector records. "Collecting Consumer Debts: The Challenges of Change: A Federal Trade Commission Workshop Report (February 2009)," pp. iii-iv, supra.

13. The SEC filings of public debt buyers indicate that 30-40% of recoveries are through legal actions and an unknown additional percentage result from the threat of legal action. For example, the annual report on SEC Form 10-K for Asset Acceptance Capital Corporation for the year ending December 31, 2008 states (original p. 46) that 40.9% of revenue came from "legal collections." By the third quarter of 2009, this increased to 42.5%, and was the largest single source of revenue, outstripping traditional collections. (SEC Form 10-Q of Asset Acceptance for quarter ending Sept. 30, 2009, original p. 34) The corresponding figure for the Midland entities (10-K of Encore Capital Group, Inc. for year ending December 31, 2009, original page 26) is 47.7%.

14. The literature offering debts for sale often shows that the purchaser cannot rely on the records as accurate and that the parties contemplate litigation. Literature advertising the portfolios may refer to them as

"litigation ready."

15. The agreements for the sale of charged-off debts often provide that the debts are sold without representation or warranty. If the seller of a debt is not willing to warrant the accuracy of its records to the purchaser, the purchaser should not without more be allowed to present them as accurate to a court.

## XIX. MOTION TO STRIKE

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).

## XX. APPLICABILITY OF HEARSAY RULE IN SMALL CLAIMS PROCEEDINGS.

1. Illinois Supreme Court Rule 286(b) provides that "In any small claims case, the court may, on its own motion or on motion of any party, adjudicate the dispute at an informal hearing. At the informal hearing all relevant evidence shall be admissible and the court may relax the rules of procedure and the rules of evidence. The court may call any person present at the hearing to testify and may conduct or participate in direct and cross-examination of any witness or party. At the conclusion of the hearing the court shall render judgment and explain the reasons therefor to all parties."

2. *Majid v. Stubblefield*, 226 Ill. App. 3d 637; 589 N.E.2d 1045 (3rd Dist. 1992), holds that this permitted the use of hearsay.

3. On the other hand, similar language in statutes relating to administrative proceedings has been held not to permit the introduction of hearsay. In *Eastman v. Department of Public Aid*, 178 Ill. App. 3d 993, 996, 534 N.E.2d 458 (2nd Dist. 1989), the court dealt with Section 11 -- 8.4 of the Public Aid Code, which provides that at administrative hearings the Department "shall not be bound by common law or statutory rules of evidence, or by technical or formal rules of procedure," and Section 3 -- 111(b) of the Administrative Review Law, which provides that "Technical errors in the proceedings before the administrative agency or its failure to observe the technical rules of evidence shall not constitute grounds for the reversal of the administrative decision unless it appears to the court that such error or failure materially affected the rights of any party and resulted in substantial injustice to him or her." The court held that "although certain evidentiary requirements may be relaxed in an administrative proceeding, our courts have held that these statutes do not abrogate the fundamental rules of evidence. . . . The rule against hearsay is a fundamental and not a technical rule. . . . Clearly, the hearsay evidence rule was not eliminated from administrative proceedings by these provisions."

## XXI. ARBITRATION CLAIMS

**1.** Many debt buyers attempt to enforce arbitration awards, mostly issued by the now-discredited National Arbitration Forum.

2. Illinois law requires the party seeking to enforce an arbitration award to prove to the court by competent evidence that the consumer agreed to arbitrate. *Salsitz v. Kreiss*, 198 Ill.2d 1, 761 N.E.2d 724 (2001). Because "an agreement to arbitrate is a matter of contract," "[i]t follows that, where the arbitrator decides the question of arbitrability in the first instance, the circuit court must review the arbitrator's decision de novo. . . . Were it not so, a party would be bound by the arbitration of disputes he had not agreed to arbitrate and would be left with only a court's deferential review of the arbitrator's decision on a question of arbitrability" (198 Ill.2d at 13-14)

3. Generally, what is submitted in support of an NAF arbitration award is **not** sufficient to prove an agreement to arbitrate.

   a. *MBNA America Bank, N.A. v. Nelson,* 2007 NY Slip Op 51200U; 15 Misc. 3d 1148A; 841 N.Y.S.2d 826; 2007 N.Y. Misc. LEXIS 4317; 237 N.Y.L.J. 120 (N.Y.Civ. Ct. May 24, 2007).

   b. *Lucas v. MBNA,* 18 Misc.3d 1109A, 856 N.Y.S.2d 499 (N.Y. Sup. Ct. 2008).

   c. *MBNA America Bank, N.A. v. Credit*, 281 Kan. 655, 132 P.3d 898 (2006) (collecting cases).

   d. *MBNA America Bank, N.A. v. Christianson,* 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008).

   e. *FIA Card Services v. Thompson*, 18 Misc.3d 1146A, 859 N.Y.S.2d 894 (D.Ct. 2008).

4. Participation in the arbitration without raising the issue may constitute waiver, as one can always agree to arbitrate a dispute after it has arisen. *Salsitz v. Kreiss*, 198 Ill.2d 1, 16-18, 761 N.E.2d 724 (2001).

## XXII. 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 145/1 and 2 provide:

**815 ILCS 145/1. [Unsolicited card]**

**Sec. 1. (a) No person in whose name a credit card is issued without his having requested or applied for the card or for the extension of the credit or establishment of a charge account which that card evidences is liable to the issuer of the card for any purchases made or other amounts owing by**

**a use of that card from which he or a member of his family or household derive no benefit unless he has indicated his acceptance of the card by signing or using the card or by permitting or authorizing use of the card by another. A mere failure to destroy or return an unsolicited card is not such an indication. As used in this Act, "credit card" has the meaning ascribed to it in Section 2.03 of the Illinois Credit Card and Debit Card Act [720 ILCS 250/2.03], except that it does not include a card issued by any telephone company that is subject to supervision or regulation by the Illinois Commerce Commission or other public authority.**

**(b) When an action is brought by an issuer against the person named on the card, the burden of proving the request, application, authorization, permission, use or benefit as set forth in Section 1 hereof shall be upon plaintiff if put in issue by defendant. In the event of judgment for defendant, the court shall allow defendant a reasonable attorney's fee, to be taxed as costs.**

**[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.**

## XXIII. SUBSTANTIVE DEFENSES

**1. Liability of various parties on credit card debts.**

**a.** Generally, "authorized users" of a credit card are not personally liable; only the cardholder is. *Alabran v. Capital One Bank,* Civ. Action No. 3:04CV935, 2005 U.S.Dist. LEXIS 34158 at **12, 16 (E.D.Va. Dec. 8, 2005); *Sears Roebuck & Co. v. Ragucci,* 203 N.J.Super. 82, 495 A.2d 923 (1985); *Cleveland Trust Co. v. Snyder,* 55 Ohio App.2d 168, 380 N.E.2d 354 (1978); *Blaisdell Lumber Co. v. Horton,* 242 N.J.Super 98, 575 A.2d 1386 (1990); *Sears, Roebuck & Co v. Stover,* 32 Ohio Misc.2d 1, 513 N.E.2d 361 (1987); *First National Bank of Findlay v. Fulk,* 57 Ohio App.3d 44, 566 N.E.2d 1270 (1989); *FCC National Bank v. Laursen (In re Laursen),* 214 B.R. 378, 381 (Bankr. D.Neb. 1997); *Citibank (S.D.), N.A. v. Hauff,* 2003 SD 99, 668 N.W.2d 528 (2003); *Chevy Chase Savings Bank v. Strong,* 46 Va.Cir. 422 (1998); *Houfek v. First Deposit National Bank (In re Houfek),* 126 B.R. 530 (Bankr. S.D. Ohio 1991); *Nelson v. First National Bank Omaha,* No. A04-579, 2004 WL 2711032 (Mn.App. Nov. 30, 2004); *Cappetta v. GC Servs.*, No. 3:08-CV-288, 2009 U.S. Dist. LEXIS 80619, *25-26 (E.D.Va., September 4, 2009) ("Even if Plaintiff was an "authorized user," that does not amount to obligor status. See Barrer v. Chase Bank USA, Inc., 566 F.3d 883, 885 n.1 (9th Cir. 2009) ("Cheryl Barrer was an "Authorized User," and therefore not legally responsible for the account."); cf. Permissible Purpose for Judgment Creditor - FCRA § 604(a)(3)(A), Staff Op. Ltr., F.T.C. Division of Credit Practices, 1998 WL 34323750 (Aug. 5, 1998) (opining that collection from nonliable spouse not a permissible purpose under FCRA)."

b. There are several reasons for this:

(1) Under the common law of agency, only the principal is liable on the principal's account. Agents, such as authorized users, who purchase for a principal are not liable for the principal's account.

(2) By making a purchase using the obligor's contract, the authorized user does not have an opportunity to see or read the alleged contract. It is unfair to hold a person to a contract he or she has not read nor had any opportunity to read and that was created earlier between the company and the cardholder.

(3) The Truth in Lending Act, 15 U.S.C. §1601, *et seq.,* provides that to be liable on a credit card, one must have applied for the card or requested the card. The Act states:

**No credit card shall be issued except in response to a request or application therefor. This prohibition**

**does not apply to the issuance of a credit card in renewal of, or in substitution for, an accepted credit card.** 15 U.S.C. §1642.

The Official Staff Commentary to the definition of "cardholder" in 12 C.F.R. §226.2(a)(8) / 12 C.F.R. 1026.2(a)(8) excludes "authorized user." 12 C.F.R. pt. 226/ 1026, Supplement I. Thus, only person(s) who sign the "application" or "request" credit under 15 U.S.C. §1642 should be "cardholders" and liable as obligors. (All Regulation Z provisions have been placed in part 1026 pursuant to the transfer of authority from the Federal Reserve Board to the Consumer Financial Protection Bureau, without change.)

c. If two names appear on a monthly credit card statement and it is disputed who is signatory and who is authorized user, bank cannot prevail without proving who signed agreement. Banks often have poor records and cannot prove this. *Johnson v. MBNA America Bank, N.A.,* 1:05cv150, 2006 U.S.Dist. LEXIS 10533 (M.D.N.C. March 9, 2006). It appears that many banks keep applications or images of applications for not more than seven years after the account is opened (not after the account is closed).

d. 15 U.S.C. § 1643(b) applies to both original creditor and bad debt buyers and requires them to show "authorized use" for charges.

**2. Statute of Frauds.** Under Illinois law, a promise to answer for the debt of another is within the statute of frauds, 740 ILCS 80/1, whether the debt is incurred before or after the promise. *Rosewood Care Center, Inc. v. Caterpillar, Inc.,* 226 Ill.2d 559, 877 N.E.2d 1091 (2007). However, the statute of frauds does not apply if the "main purpose" or "leading object" of the promise was to benefit the business interests of the promisor. Id. The Court cited section 11 of Restatement (Third) of Suretyship & Guaranty: "A contract that all or part of the duty of the principal obligor to the obligee shall be satisfied by the secondary obligor is not within the Statute of Frauds as a promise to answer for the duty of another if the consideration for the promise is in fact or apparently desired by the secondary obligor mainly for its own economic benefit, rather than the benefit of the principal obligor." Restatement (Third) of Suretyship & Guaranty §11(3)(c), at 42 (1996)."Where the secondary obligor's main purpose is its own pecuniary or business advantage, the gratuitous or sentimental element often present in suretyship is eliminated, the likelihood of disproportion in the values exchanged between secondary obligor and obligee is reduced, and the commercial context commonly provides evidentiary safeguards. Thus, there is less need for cautionary or evidentiary formality than in other secondary obligations." Restatement (Third) Suretyship & Guaranty § 11, Comment to Subsection (3)(c), at 49-50

(1996). It also cited 72 Am. Jur. 2d Statute of Frauds § 134, at 658 (2001) ("Cases sometimes arise in which, although a third party is the primary debtor, the promisor has a personal, immediate, and pecuniary interest in the transaction, and is therefore himself a party to be benefited by the performance of the promisee. In such cases the reason which underlies and which prompted this statutory provision fails, and the courts will give effect to the promise"). The Court held that the purpose of making the promise was a question of fact.

a. 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. Illinois treats the statute of frauds as procedural, so the Illinois statute applies to litigation filed in the courts of Illinois. *McInerney v. Charter Golf, Inc.,* 176 Ill. 2d 482, 680 N.E.2d 1347, 1351 (1997) ("The [Frauds Act] proceeds from the legislature's sound conclusion that while the technical elements of a contract may exist, certain contracts should not be enforced absent a writing. It functions more as an evidentiary safeguard than as a substantive rule of contract."); *United Potato Co. v. Burghard & Sons, Inc*., 18 F. Supp. 2d 894, 898 (N.D.Ill. 1998).

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

a. Retail installment contracts, leases of personal property (including cars, deficiencies, contracts for the sale of oil and gas): 4 years under UCC 2-725, 2A-506. *Citizens National Bank of Decatur v. Farmer*, 77 Ill. App. 3d 56; 395 N.E.2d 1121 (4th Dist. 1979); *Fallimento C.Op.M.A. v. Fischer Crane Co.,* 995 F.2d 789 (7th Cir. 1993). A store credit or charge card that can only be used at the establishment of a single merchant is also governed by the four year UCC statute. *Asset Acceptance LLC v. Scott*, 2007 WL 3145360, No. A-4021-05T5 (N.J. App. Div. October 30, 2007) (unpublished); *May Co. v. Trusnik*, 54 Ohio App. 2d 71; 375 N.E.2d 72 (1977); *Gimbel Bros., Inc. v. Cohen*, 68-7502, 1969 Pa. Dist. & Cnty. Dec. LEXIS 184; 46 Pa. D. & C.2d 747 (Montgomery Co. C.P. 1969); *Hamid v. Blatt*, 00 C 4511, 2001 U.S. Dist. LEXIS 13918 (N.D.Ill., Sept. 4, 2001); *see Harris Trust & Sav. Bank v. McCray*, 21 Ill. App. 3d 605, 16 N.E.2d 209 (1st Dist. 1974); *Johnson v. Sears Roebuck & Co.*, 14 Ill.App.3d 838, 303 N.E.2d 627 (1st Dist.

1973).

b. Checks — three years from dishonor on check (810 ILCS 5/3-118(c)), two years for statutory penalty (735 ILCS 5/13-202) (NOTE: Underlying obligation paid with check may be five or ten years.)

c. Statute of limitations on general purpose bank credit cards: The statute of limitations on credit cards is five years unless a complete agreement signed by both parties and not subject to change on notice without the debtor's signature is attached to the complaint. *Portfolio Acquisitions, LLC v. Feltman*, 391 Ill. App. 3d 642; 909 N.E.2d 876 (1st Dist. 2009); *Nicolai v. Mason,* 118 Ill.App.3d 300, 454 N.E.2d 1049 (5th Dist. 1983) (claim based on "charge account" at retail store governed by five-year statute); *Parkis v. Arrow Financial Services,* No. 07 C 410, 2008 U.S.Dist. LEXIS 1212 (N.D.Ill. Jan. 8, 2008); *Ramirez v. Palisades Collection LLC,* No. 07 C 3840, 2008 U.S.Dist. LEXIS 48722 (N.D.Ill. June 23, 2008)*; Asset Acceptance v. Babbar,* 07 M1 179759 (Cir. Ct. Cook Co., Jan. 31, 2008).

**d. Tolling of limitations by payment.** An uncorroborated notation of payment on a note or in the records of the creditor is ***not*** sufficient evidence of payment to toll the statute of limitations. *First Nat'l Bank v. Carstens*, 346 Ill. App. 474; 105 N.E.2d 786 (4th Dist. 1952). In that case, the Court held that "the Bank's exhibits consisting of daily note journals, and particularly, the entry or credit in the Bank's note journal of May 2, 1941, coupled with the testimony of the Bank's cashier that the endorsements and entries were original entries made at the time of the transaction and in due course of the Bank's business, and further reinforced by the positive testimony of the cashier that he had an independent recollection of these payments and that all payments, except the payment in November 1939, were made to him, personally, and that the journal entries were made by him, personally, and to the effect that all payments were either made in person by defendant Carstens, or on his behalf by one of his children, was sufficient under the evidence to overcome the plea of the Statute of Limitations." (105 N.E.2d at 788) The court continued: "Nothing contained in this opinion should be interpreted so as to imply that the simple notations of interest payment on the note made by the holder, without showing that the notation was made at such time as to be against the interest of the party making the notation, or without corroboration by other evidence, could operate to avoid the Statute of Limitations." (105 N.E.2d at 788-89)

**4. Issuance of 1099-C.**

a. *Discover Bank v. Shimer*, CV-41195-11, 36 Misc. 3d 1214A; 2012 N.Y. Misc. LEXIS 3354; 2012 NY Slip Op 51316U (Nassau Co. Dist. Ct., July 17, 2012):

> In *Discover Bank v Kivita, supra*, [index no. 15445/10, decision dated March 29, 2011 (Dist Ct Nassau Co.)]; this Court denied a similar summary judgment motion by plaintiff, noting that any such charge-off may have triggered a mandatory duty under IRS regulations to issue a 1099-C form to defendant, with attendant tax consequences for defendant (www.irs.gov/instructions/i1099ac/ar02.html). A debt is deemed cancelled under the IRS regulations when a creditor stops collection activity after a defined period pursuant to an established business practice. *Id*. A creditor typically does so in order to take advantage of IRS rules allowing tax deductions for "bad debts"(www.irs.gov/publications/p535/ch10.html). Such actions by a creditor, in turn, may render it inequitable to allow it to belatedly enforce the alleged debt after it received the tax benefit of the "charge-off." *See, e.g. CACH LLC v Fatima*, 32 Misc. 3d 1231[A], 936 N.Y.S.2d 58, 2011 NY Slip Op 51510[U] (Dist Ct Nassau Co.), **[**4]** *citing In re Welsh*, 2006 Bankr. LEXIS 3756, 2006 WL 3859233 (Bankr Ct ED Pa 2006), *quoting In re Crosby*, 261 BR 470, 474 (Bankr Ct D Kan 2001)["The actual (or at least potential) tax consequences of the form make it inequitableto allow the [creditor] to enforce its claims against the debtors"]; *see also Amtrust Bank v Fossett*, 223 Ariz 438, 224 P3d 935 (App 2009) (issuance of Form 1099-C after debt was written off is "prima facie evidence" that debt had been discharged by creditor, sufficient to create an issue of fact); *Discover Bank v Kivita, supra*.
>
> Notwithstanding these decisions, the issue is not addressed in plaintiff's moving papers. No effort is made to explain why plaintiff should be allowed to bring suit upon the prior balance while it retains the tax benefit of the charge-off, with resultant potential tax consequences to plaintiff under IRS regulations. . . .

5. Claims under the Family Expense Act, 750 ILCS 65/15. The Family Expense Act provides:

**(a) (1) The expenses of the family and of the education of the children shall be chargeable upon the property of both husband and wife, or of either of them, in favor of creditors therefor, and in relation thereto they may be sued jointly or separately.**

**(2) No creditor, who has a claim against a spouse or former spouse for an expense incurred by that spouse or former spouse which is not a family expense, shall maintain an action against the other spouse or**

**former spouse for that expense except:**

**(A) an expense for which the other spouse or former spouse agreed, in writing, to be liable; or**

**(B) an expense for goods or merchandise purchased by or in the possession of the other spouse or former spouse, or for services ordered by the other spouse or former spouse.**

**(3) Any creditor who maintains an action in violation of this subsection (a) for an expense other than a family expense against a spouse or former spouse other than the spouse or former spouse who incurred the expense, shall be liable to the other spouse or former spouse for his or her costs, expenses and attorney's fees incurred in defending the action.**

**(4) No creditor shall, with respect to any claim against a spouse or former spouse for which the creditor is prohibited under this subsection (a) from maintaining an action against the other spouse or former spouse, engage in any collection efforts against the other spouse or former spouse, including, but not limited to, informal or formal collection attempts, referral of the claim to a collector or collection agency for collection from the other spouse or former spouse, or making any representation to a credit reporting agency that the other spouse or former spouse is any way liable for payment of the claim. . . .**

(The remainder contains special provisions relating to abortions.)

a. The language "an expense for goods or merchandise purchased by or in the possession of the other spouse or former spouse, or for services ordered by the other spouse or former spouse" does not extend to general-purpose loans and may not extend to credit cards issued by financial institutions. In *North Shore Community Bank & Trust Co. v. Kollar*, 304 Ill. App. 3d 838, 845, 710 N.E.2d 106 (1st Dist. 1999), the court, after discussing Iowa decisions on the issue (the Illinois statute was copied from that of Iowa), held that a note representing a loan of money cannot be a family expense. "[B]orrowed money does not constitute a family expense", in contrast to "specific goods, articles and services . . . borrowed money has never been held to constitute a family expense." The court left open issues relating to credit cards.

b. A federal decision holds that a note and mortgage used to purchase a family home are a family expense, distinguishing *North Shore* on the ground that tracing of proceeds is not required in the case of a mortgage. *In re Flores*, 345 B.R. 615 (N.D.Ill. 2006). The court did not address the statutory language or the construction given it by the Iowa courts prior to its adoption by Illinois.

c. A charge account which is maintained by a seller of goods or services may qualify. *Saks & Co. v. Brown*, 347 Ill. App. 289, 106 N.E.2d 755 (1st Dist. 1952).

d. The Equal Credit Opportunity Act precludes the use of the Family Expense Act to impose personal liability on a non-contracting spouse where a creditor obtains the obligation of only one spouse on a contract. The ECOA entitles each spouse to contract to purchase goods or services on their own. 15 U.S.C. §1691d and 12 CFR § 202.11. Regulation B provides, at 12 C.F.R. § 202.7/ 1002.7:

**Rules concerning extensions of credit.**

**(a) Individual accounts. A creditor shall not refuse to grant an individual account to a creditworthy applicant on the basis of sex, marital status, or any other prohibited basis. . . .**

**(d) Signature of spouse or other person.**

**(1) Rule for qualified applicant. Except as provided in this paragraph, a creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested.**

**(2) Unsecured credit. If an applicant requests unsecured credit and relies in part upon property that the applicant owns jointly with another person to satisfy the creditor's standards of creditworthiness, the creditor may require the signature of the other person only on the instrument(s) necessary, or reasonably believed by the creditor to be necessary, under the law of the state in which the property is located, to enable the creditor to reach the property being relied upon in the event of the death or default of the applicant. . . .**

**(5) Additional parties. If, under a creditor's standards of creditworthiness, the personal liability of an additional party is necessary to support the extension of the credit requested, a creditor may request a cosigner, guarantor, or the like. The applicant's spouse may serve as an additional party, but the creditor shall not require that the spouse be the additional party.**

**(6) Rights of additional parties. A creditor shall not impose requirements upon an additional party that the creditor is prohibited from imposing upon an applicant under this section. . . .**

(All Regulation B provisions have been placed in part 1002 pursuant to the transfer of authority from the Federal Reserve Board to the Consumer Financial Protection Bureau, without change.)

e. Regulation B further provides, at 12 C.F.R. §202.11/ 1002.11:

**Relation to state law.**

**(a) Inconsistent state laws. Except as otherwise provided in this section, this regulation alters, affects, or preempts only those state laws that are inconsistent with the Act and this regulation and then only to the extent of the inconsistency. A state law is not inconsistent if it is more protective of an applicant.**

**(b) Preempted provisions of state law -- (1) A state law is deemed to be inconsistent with the requirements of the Act and this regulation and less protective of an applicant within the meaning of section 705(f) of the Act to the extent that the law:**

**(i) Requires or permits a practice or act prohibited by the Act or this regulation;**

**(ii) Prohibits the individual extension of consumer credit to both parties to a marriage if each spouse individually and voluntarily applies for such credit; . . .**

**(c) Laws on finance charges, loan ceilings. If married applicants voluntarily apply for and obtain individual accounts with the same creditor, the accounts shall not be aggregated or otherwise combined for purposes of determining permissible finance charges or loan ceilings under any federal or state law. Permissible loan ceiling laws shall be construed to permit each spouse to become individually liable up to the amount of the loan ceilings, less the amount for which the applicant is jointly liable. . . .**

f. The Federal Reserve Board interpreted these provisions to mean that where a creditor extends credit to one spouse, only, the use of family expense statutes to impose liability on the other spouse for that indebtedness is preempted. With reference to what is now §202.11 (then numbered §202.8), the Board held: "This means that in States that have laws prohibiting separate extensions of credit for married persons, this section of the regulation will not only pre-empt such laws but ***also any other provision of State laws which would hold one spouse responsible for the debts contracted by the other, for example, a family expense statute***." 40 Fed. Reg. 49298, at 49304 (Oct. 22, 1975) (Emphasis added).

**6. Other attempts to collect from family members**

a. Particularly common in the case of nursing home debts

b. Generally there is no obligation

c. In the case of nursing homes, there is a prohibition of requiring guarantees from family members in 42 U.S.C. §1396r(c)(5)(A)(ii).

## XXIV. CLAIMS AND DEFENSES GOOD AGAINST CREDITOR

1. The assignee of a nonnegotiable chose in action (such as a credit card debt) takes subject to claims against the creditor prior to assignment. "The rule is that the assignee of a contract takes it subject to the defenses which existed against the assignor at the time of the assignment." *Allis-Chalmers Credit Corp. v. McCormick,* 30 Ill.App.3d 423, 424, 331 N.E.2d 832 (4th Dist. 1975); *accord, Montgomery Ward & Co. v. Wetzel*, 98 Ill.App.3d 243, 423 N.E.2d 1170, 1175 (1st Dist. 1981) ("the assignee thus takes the assignor's interest subject to all legal and equitable defenses existing at the time of assignment").

2. Truth in Lending and other claims against the creditor may be asserted (a) as a setoff or (b) pursuant to 735 ILCS 5/13-207 (“Counterclaim or set-off. A defendant may plead a set-off or counterclaim barred by the statute of limitation, while held and owned by him or her, to any action, the cause of which was owned by the plaintiff or person under whom he or she claims, before such set-off or counterclaim was so barred, and not otherwise. This section shall not affect the right of a bona fide assignee of a negotiable instrument assigned before due.”).

## XXV. FAIR DEBT COLLECTION PRACTICES ACT ISSUES

1. 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.

2. 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.

3. Purchasers of delinquent debts are covered: A company that regularly purchases delinquent debts is a "debt collector" within the meaning of the FDCPA with respect to the delinquent debts. *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534 (7th Cir. 2003); *.McKinney v. Cadleway Props., Inc.*, 548 F.3d 496 (7th Cir. 2008); *FTC v. Check Investors, Inc.*, 502 F.3d 159 (3rd Cir. 2007); *Pollice v. Nat'l Tax Funding*, 225 F.3d 379 (3rd Cir. 2000); *Ballard v. Equifax Check Services*, 27 F.Supp.2d 1201 (E.D. Cal. 1998); *Kimber v. Federal Financial Corp.*, 668 F.Supp. 1480 (M.D.Ala. 1987); *Durkin v. Equifax Check Servs*., 00 C 4832 , 2002 U.S. Dist. LEXIS 20742 (N.D.Ill., October 24, 2002); *Cirkot v. Diversified Systems*, 839

F.Supp. 941 (D.Conn. 1993); *Ruble v. Madison Capital, Inc.,* C-1-96-1693, 1998 U.S.Dist. LEXIS 4926 (N.D.Ohio 1998); *Holmes v. Telecredit Service Corp.*, 736 F.Supp. 1289, 1292 (D.Del. 1990); *Farber v. NP Funding II, LP*, 96 CV 4322, 1997 WL 913335, *3, 1997 U.S.Dist. LEXIS 21245 (E.D.N.Y. Dec. 9, 1997) ("those who are assigned a defaulted debt are not exempt from the FDCPA if their principal purpose is the collection of debts or if they regularly engage in debt collection"); *Stepney v. Outsourcing Solutions, Inc.,* 1997 U.S.Dist. LEXIS 18264 (N.D.Ill. 1997); *Coppola v. Connecticut Student Loan Found.*, Civ. A. N-87-398 (JAC), 1989 WL 47419, 1989 U.S. Dist. LEXIS 3415 (D.Conn. March 22, 1989); *Commercial Service of Perry v. Fitzgerald*, 856 P.2d 58, 62 (Colo.App. 1993) ("[A] company which takes an assignment of a debt in default, and is a business the principal purpose of which is to collect debts, may be subject to the Act, even if the assignment is permanent and without any further rights in the assignor"). As long as the purchaser asserts that the debt was in default when acquired, the FDCPA applies, even if the assertion proves to be false. *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534 (7th Cir. 2003)

4. Collection lawyers who "regularly" collect consumer debts are covered. *Heintz v. Jenkins,* 514 U.S. 291 (1995).

5. The FTC has stated that it "may take law enforcement action to address conduct related to debt collection litigation and arbitration to the extent that such conduct violates the FDCPA, the FTC Act, or other laws the Commission enforces." "Collecting Consumer Debts: The Challenges of Change: A Federal Trade Commission Workshop Report (February 2009)," p. 66.

6. Typical violations in connection with collection litigation.

7. 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); *Hartman v. Great Seneca Financial Corp.*, 569 F.3d 606 (6th Cir. 2009); *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); *Reyes v. Kenosian & Miele, LLP*, 619 F.Supp.2d 796 (N.D.Cal. 2008); *Eckert v. LVNV Funding, LLC,* 4:08cv1802, 2009 U.S.Dist. LEXIS 65295 (E.D.Mo., July 28, 2009).

8. However, in *O'Rourke v. Palisades Acquisition XVI, LLC*, 635 F.3d 938, 941 (7th Cir. 2011), court held that only communications directed to a debtor or someone standing in the shoes of a debtor are covered, and that "fraud on the court" is not a viable theory.

9. Suing or threatening to sue on time barred debts. *Kimber v. Federal Financial Corp.*, 668 F.Supp. 1480 (M.D.Ala. 1987); *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, No. 09-35767, 2011 U.S. App. LEXIS 4072 (9th Cir., March 4, 2011); *Goins v. JBC & Assocs., P.C.,* 352 F. Supp. 2d 262 (D.Conn. 2005). It should be noted that the February 2009 FTC report, "Collecting Consumer Debts: The Challenges of Change: A Federal Trade Commission Workshop Report (February 2009)," states (pp. 63-64) that "It thus is a violation of the FDCPA to sue or threaten to sue consumers to recover on time-barred debt."

In *United States of America (For the Federal Trade Commission) v. Asset Acceptance, LLC*, Case No. 8:12-cv-182-T-27EAJ (M.D.Fla.), the FTC sued a major debt buyer, alleging that Asset Acceptance regularly collects debts that are past the statute of limitations. (Complaint, ¶30) The FTC alleged (¶34) that "Many consumers do not know if the accounts that Asset is attempting to collect are beyond the statute of limitations. Consumers also do not realize that making a partial payment on a debt, or making a written promise to pay will, in many instances, revive the debt. When Asset contacts consumers to collect on a debt, many consumers believe they could experience serious negative consequences, including being sued, if they fail to pay the debt. Similarly, many consumers believe that making a partial payment on a debt in response to Asset's collection efforts is a positive action that can avert the negative consequences of nonpayment. If consumers knew, in connection with a past-statute debt, that Asset had no legal means to enforce collection of the debt, or understood that making a partial payment or a written to promise to pay would revive it, some consumers would likely choose not to make a payment or a written promise to pay."

The FTC alleged that by dunning consumers on time-barred debts without disclosure of the fact, Asset Acceptance violated both §5(a) of the Federal Trade Commission Act, 15 U.S.C. §45(a) ("FTC Act") (¶¶56-58), and the FDCPA (¶¶81-83). Both 15 U.S.C. §45(a) and 15 U.S.C. §1692e prohibit deceptive acts and practices. Indeed, §1692e represents a codification and expansion of precedent relating to FTC actions with respect to debt collection practices under §45(a). *Jeter v. Credit Bureau*, 760 F.2d 1168 (11th Cir. 1985).

The same day as the complaint was filed, Asset Acceptance consented to a judgment in which it was required to disclose (¶IV.A-D), "for any debt that the Defendant knows or should know may be beyond the applicable statute of limitations," that "The law limits how long you can be sued on a debt. Because of the age of your debt, we will not sue you for it." The judgment also required Asset to pay $2.5 million.

10. Filing a single lawsuit without having in hand the means of proving it is not a violation (*Harvey v. Great Seneca Financial Corp.,* 453 F.3d 324, 330 (6th Cir. 2006)), but a practice of filing lawsuits with the intent of dismissing them if they are contested may be a violation (*Mello v. Great Seneca Financial Corp.,* 526 F.Supp.2d 1020 (C.D.Cal. 2007)).

11. Failure to provide validation notice, 15 U.S.C. §1692g.

12. Failure to verify a debt before proceeding with a collection lawsuit may entitle the consumer to damages, but not to dismissal of the collection case. *Midland Funding v. Pipkin*, Case No. 20110788, 2012 UT App 185, 2012 Utah App. LEXIS 191 (July 12, 2012), at n. 1:

> Pipkin also argues that the Fair Debt Collection Practices Act (FDCPA), see generally 15 U.S.C.A. §§ 1692-1692p (2009 & Supp. 2012), precluded Midland from filing a collection action against Pipkin until Pipkin received information that he timely requested from Midland regarding the debt in accordance with the terms of the initial collection letter Midland sent Pipkin. The letter stated that Midland would "suspend [its] efforts to collect the debt (through a lawsuit, arbitration or otherwise) until [it] mail[ed] the requested information to [Pipkin]," pursuant to the FDCPA. See generally id. § 1692g(b) (2009) ("If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector."); id. § 1692k(a) ("[A]ny debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person . . . ."). While Midland's alleged failure to comply with the FDCPA may subject it to liability under the act, such failure is not a defense to liability for the underlying debt. See Balsly v. West Mich. Debt Collections, Inc., No. 3:11cv642-DJN, 2012 WL 628490, at *12 (E.D. Va. Feb. 27, 2012) (mem.) ("Pursuant to the FDCPA, [the alleged debtor] has a right to pursue his claim regardless of whether he is found liable on the debt . . .—the two rights are not coterminous."); United States v. Iwanski, 805 F. Supp. 2d 1355, 1359 (S.D. Fla. 2011) ("[A] violation of th[e FDCPA] does not relieve Defendant of his obligation to pay the underlying debt."); Vitullo v. Mancini, 684 F. Supp. 2d 760, 765 (E.D. Va. 2010) (mem.) ("Nothing in the FDCPA suggests, explicitly or implicitly, that debtors might seek declaratory judgments cancelling or extinguishing accrued debts, in lieu of damages, for FDCPA violations . . . ."); see also Schroyer v. Frankel, 197 F.3d 1170, 1178 (6th Cir. 1999); Keele v. Wexler,

149 F.3d 589, 594 (7th Cir. 1998); McCartney v. First City Bank, 970 F.2d 45, 47 (5th Cir. 1992) ("'The [FDCPA] is designed to protect consumers who have been victimized by unscrupulous debt collectors, regardless of whether a valid debt actually exists.'" (quoting Baker v. G.C. Servs. Corp., 677 F.2d 775, 777 (9th Cir. 1982))); Torres v. ProCollect, Inc., No. 11-cv-02989-LTB, 2012 WL 1969280, at *3 (D. Colo. June 1, 2012) (mem.); Kolker v. Duke City Collection Agency, 750 F. Supp. 468, 471 (D. N.M. 1990) [**4] (mem.). . . .

13. 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).

14. Proceeding with collection attempts after verification demanded if not provided

15. See recent FTC release on collecting debts of decedents, "Statement of Policy Regarding Communications in Connection With the Collection of Decedents' Debts," 76 FR 44915 (Wed., July 27, 2011).