

**How to Defend A Credit Card Case**

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**Poverty Law Conference**  
**April 15, 2009**

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When I mention that I defend debtors in credit card collection suits, most people are surprised. They don't believe that it is possible to win such cases and conclude that I am either crazy or a masochist or both. I experience equal amounts of incredulity from both lawyers and non-lawyers. They seem to believe that banks keep good records and that it will be a cinch for them to march into court and prove a simple debt. They don't understand that credit card debts are not simple and that banks do not keep good records, or if they do, they don't keep them for very long. As a result, my partner and I are able to get over 90% of our credit card cases dismissed, typically by non-suit before trial and typically without any payment by our clients.

As much as I would like to claim that our cases are dismissed on account of our brilliance, there is another reason. The credit card collection industry runs on volume and default judgments. With a few exceptions, the plaintiffs and their lawyers are apparently neither interested in nor equipped for actual litigation of their claims. However, almost all of the plaintiffs and their lawyers will push a lawyer without experience in handling these cases. My purpose in preparing and presenting this paper is to help you to understand the practical and legal issues involved so you can push back.

### **Credit card plaintiffs have problems proving breach of contract claims**

Credit card applications are virtually carpet-bombed into American homes. Despite their ubiquity, credit cards are micro-targeted to individuals using sophisticated direct marketing models based on credit-worthiness, purchasing patterns and even social affiliations. For example, I might receive an offer for a University of Texas logo card with a frequent flyer miles reward program and a high interest rate to pay for all those free miles I will receive. My stay-closer-to-home brother might receive an offer from the same issuer with a Texas A & M University logo<sup>1</sup>, no frills, and a low interest rate.

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<sup>1</sup> Yep, the day after Thanksgiving can be pretty tense around my house.

As a result of their desire to provide a credit card for every possible need, most credit card companies have multiple credit card lines, each with its own form of agreement. Over time, those agreements are amended as credit card issuers typically reserve to themselves the right to change contractual terms at any time and for any reason. In some cases, the amendment takes the form of an entirely new agreement. At other times, it takes the form of an addendum. Sometimes there is an opt-out process that allows the cardholder to decline the new terms by giving some sort of notice to the credit card issuer within a certain period of time. Most of these agreements contain a provision that provides something to the effect of "use of the card constitutes acceptance of the terms of this agreement."

Because of the tremendous variety of credit card pricing, form credit card agreements are typically silent as to the interest rates and fees that will be charged. These important price terms are usually delivered in separate documents, tailored to the terms of the promotional offer that resulted in the credit card application. Moreover, numerous promotions may be offered over the life of the account. As a result, the interest rates applicable to the account may be contained in multiple documents issued over time, separate and apart from the cardholder agreements governing the account.

In addition, credit card companies frequently make oral agreements with their customers. Customer service agents are often authorized to waive or reduce fees and interest rates in response to customer requests. They also promote additional products, such as special rate balance transfers, during their conversations with customers, without making any written offer to the customer.

Finally, many accounts have variable interest rates pegged to a published index, such as the 6 month LIBOR rate as published in the Wall Street Journal, that cannot be determined solely by reference to any document issued by the credit card company.

As a result of this complexity, a credit card plaintiff must often assemble multiple documents, including in many cases, its customer service notes, in order to prove a complete set of the agreements that relate to any

one credit card account. The longer a particular account is open the more difficult this task becomes. This task is made even more difficult because the vast majority of these documents are form documents that contain no account identifying information and that are not signed by the cardholder. In order to meet its burden of proving these agreements are binding on its cardholders, the credit card issuer must maintain additional records to let it determine which of these form agreements apply to a particular class of accounts and whether the applicable agreements were actually offered to the cardholders.

As a result of these complexities several issues seem to be difficult for credit card plaintiffs in proving up the terms of their agreements: 1) identifying the cardholder agreement(s) that applied to the class of accounts that included the defendant's account,<sup>2</sup> 2) assembling the entire set of agreements that applied to the defendant's account during the time period that it was open, 3) identifying the additional documents specifying the interest rate and fees terms applicable to the account, and 4) most importantly, proving that the alleged agreements were actually offered to the defendant.

In addition to these problems with their agreements, many credit card plaintiffs are unable to produce complete account histories for their accounts. The lack of a complete account history can compound the problems that arise from incomplete proof of the credit card agreements.

The failure of a credit card plaintiff to overcome these difficulties can cause problems for the plaintiff's case ranging from reductions in damages to dismissal.

### **A credit card agreement cannot be enforced without evidence that it was actually offered**

In order to prevail on a breach of contract claim, a plaintiff must prove the existence of a valid contract between the parties. *Engelman Irr. Dist. v. Shields Bros., Inc.*, 960 S.W.2d 343, 352 (Tex. App.—Corpus Christi 1997), pet. denied, 989 S.W.2d 360 (Tex. 1998). Parties form a binding contract when the following elements are present: (1) an offer, (2) an acceptance in strict compliance with the terms of the offer, (3) meeting of the minds, (4) each party's consent to the terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding. *Williams v. Unifund CCR Partners Assignee Of Citibank*, 2008 WL 339855 (Tex. App.—Houston [1st Dist.] 2008) (not designated for publication), *Winchek v. American Express Travel Related Services. Co.*, 232 S.W.3d 197, 202 (Tex.App.-Houston [1st Dist.] 2007, no pet.).<sup>3</sup>

In a credit card case, proof that an agreement was offered to the defendant is the key to proving these elements of an enforceable contract. If a particular agreement was never offered to a defendant, then it follows as a matter of simple logic that there can be no acceptance, no meeting of the minds or any of the other requirements for establishing that the agreement contains the terms of an enforceable contract. *Beverick v. Koch Power, Inc.*, 186 S.W.3d 145, 152 (Tex. App.—Houston[1st Dist.] 2005, pet. denied).

In my experience, credit card plaintiffs almost always attempt to prove the existence of an agreement with the defendant by attaching an unsigned form contract, along with whatever other documents they can locate for the account, to a business records affidavit. The business

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<sup>2</sup> Just identifying the class of accounts to which a particular agreement applies is apparently difficult for some credit card plaintiffs. In a recent case, a credit card plaintiff attempted to offer an agreement that by its terms applied to platinum card accounts in connection with an account that was identified in the account statements as a gold card account.

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<sup>3</sup> The *Winchek* opinion is strange in that it correctly recites all of the elements necessary to the formation of a contract, including offer, but finds that a contract existed between the parties while failing to discuss whether the contract was actually offered to the cardholder. The court held that delivery of the contract was unnecessary but its discussion seems directed at the fifth cited element, the post-formation delivery requirement. It is not clear that the court ever considered whether the contract was offered to the defendant. Nothing in its recitation of the evidence suggests that the plaintiff submitted evidence of such an offer.

records affidavit generally recites the required foundational elements and that the attached documents constitute the plaintiff's business records relating to the account. The affiants rarely offer any testimony that shows that the agreement matches the type of account held by the defendant, that addresses the time frame that the agreement applied to the account, or that specifies how and when the agreement was actually offered to the defendant.

It is notable that these essential elements of the credit card plaintiff's case are rarely expressly stated in the plaintiff's evidence.

Except in the unlikely circumstance that the affiant personally handled the defendant's account, the affiant will have no personal knowledge of the facts surrounding the formation of the credit card agreement. Accordingly, the affiant cannot truthfully testify to those facts unless the credit card issuer has maintained and the affiant has reviewed records establishing 1) that the particular agreement applied to the class of accounts that included the defendant's account<sup>4</sup> 2) that the agreement applied to that class of accounts during the time that the defendant's account was open, and 3) that the particular agreement was actually offered to the defendant.

In my firm we routinely request these records in discovery.<sup>5</sup> As of the date of this

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<sup>4</sup> That a particular agreement applied to the class of accounts that included the defendant's account is important because credit card companies do not maintain a "file" for each account. They maintain computerized transaction records. They typically do not image or otherwise maintain a separate copy of their form agreement for each account. The only way they can tell if a particular form of agreement applies to a particular account is if they have a record that the account belongs to a class of accounts associated with that agreement.

<sup>5</sup> We include the following in our standard credit card discovery requests:

### **Offer and Acceptance**

Interrogatory No. 6. For each agreement you contend was offered to and accepted by the defendant, including but not limited to the original account agreement, any amendment to the agreement, any notice of a change in any term of the agreement, or any schedule of interest rates or fees applicable to the account, explain how the agreement was offered to and accepted by the defendant.

Request for Production No. 13. For each agreement, amendment to an agreement, or notice of change to the

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terms of the account you contend was offered to and accepted by the defendant, please produce every document that evidences such offer or acceptance.

### **Delivery of Account Documents**

Interrogatory No. 7. Explain how each document containing the terms of any agreement for the account or reflecting any amount due on the account was delivered to the defendant, including but not limited to, the original account agreement, any amendment to the agreement, any notice of a change in a term of the agreement, any schedule of interest rates or fees applicable to the account, any credit card issued in connection with the account, and any statement of payments, charges, fees or interest for the account. Include in your explanation the date the document was delivered and a description of the manner in which it was delivered, including, if the document was delivered by the Postal Service or other courier, the location to which it was addressed and whether the document was returned undelivered.

Request for Production No. 14. For each document listed below that was delivered to the defendant, please produce all documents indicating the date the document was delivered and the manner in which it was delivered, including, if the document was delivered by the Postal Service or other courier, the location to which it was addressed and whether the document was returned undelivered:

- a. The original account agreement for the account.
- b. Any amendment to the agreement for the account.
- c. Any notice of a change in any term of the account, including but not limited to a change in the rate of interest or amount of any fee applicable to the account.
- d. Any schedule of interest rates or fees applicable to the account.
- e. Any credit card issued in connection with the account.
- f. Any statement of payments, charges, fees or interest for the account.

### **Relevance and Authenticity of Generic Account Documents.**

Interrogatory No. 11. For each document you have produced that you contend applies to the account and that does not contain the defendant's identifying information, such as the defendant's name, social security number, account number, or signature, explain how you know the document applies to the account.

Interrogatory No. 12. For each document you have produced that you contend applies to the account that does not contain the defendant's identifying information, such as the defendant's name, social security number, account number, or signature, and that was created by someone other than you, identify the source of the document by stating the date you obtained the document and identifying the person from whom you obtained the document.

paper, despite asking these questions in well over a hundred cases, we have yet to receive anything other than an objection or an evasive or incomplete response from any credit card plaintiff, including both original creditors and debt buyers. We have never received any record that purports to document the circumstances of an actual offer of an agreement to a cardholder.

Because we have never received these records, we believe that most credit card plaintiffs do not have them. It is not surprising to us then that credit card affidavits are so sketchy on this essential element of proof. Frankly, the fact that so many plaintiffs are willing to submit affidavits in which they state that one of these form agreements governs an account when they have no apparent knowledge of the applicability of the agreement to the defendant's account or the circumstances in which the agreement was actually formed is more than a little disturbing.

Because the typical credit card plaintiff does not have and does not offer any evidence of the actual offer of a specific form of agreement to the defendant, the typical plaintiff falls well short of the standard required under Texas law to prove the terms of an enforceable agreement.

Credit card plaintiffs typically reply that even if they do not have evidence that any specific contract was actually offered to the defendant, the fact of the defendant's use of the card is evidence that there was some sort of agreement between the parties.

However, more is required than evidence of some sort of agreement before a Texas court will enforce a contract. It is essential to the validity of a contract that it be sufficiently certain to define the nature and the extent of its material obligations. *T.O. Stanley Boot Co., Inc. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992). In a loan contract, the interest rate and repayment schedule are material terms of the contract. If those terms are missing the contract is not sufficiently definite to be enforced. A court may

not supply the missing terms. *Id.*, 847 S.W.2d at 222. Accordingly, the mere use of a credit card, while it may well indicate that some sort of understanding existed between the parties, is not sufficient to establish an enforceable agreement between the parties because material terms such as the amount of interest payable on the account, the amount of the fees that the credit card issuer may assess and the terms of repayment cannot be determined from the mere use of the card.<sup>6</sup>

### **A credit card plaintiff cannot recover interest or fees absent proof an agreement to pay interest or fees.**

As discussed above, a variety of interest rates and fees may apply to an account over its lifetime. Interest rates will typically be specified in documents issued separately from the account agreements and tailored to the terms of a particular promotion, whether for a new account or for a new transaction, such as a balance transfer, on an existing account. While fees such as late fees, over-the-limit fees and bounced check fees will more often be specified in the account agreements themselves, it is not uncommon for them to also be specified in separate documents. It is rare that a credit card plaintiff will be able to produce all of the documents establishing these rates. It is even less likely that a credit card plaintiff will produce extrinsic documents such as publications of the index rate upon which some such variable rates are based. Instead, credit card plaintiffs often seek to prove the agreed upon interest rates and fees by introducing statements that state the interest rate.

There is a fundamental problem with this approach. The statements are evidence of the interest rate that was actually charged, not the rate that the parties agreed should be charged. *Tully v. Citibank (South Dakota), N.A.*, 173 S.W.3d 212, 216 (Tex. App.-Texarkana 2005), *Hay v. Citibank (South Dakota) N.A.*, 2006 WL

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Request for Production No. 22. For each document you have produced that you contend applies to the account and that does not contain some piece of the defendant's identifying information, such as the defendant's name, social security number, account number, or signature, please produce every document containing information from which it may be determined whether the document applies to the account.

<sup>6</sup> The formation of a contract by use of the card argument is especially suspect in the context of an arbitration agreement. Without some proof that the card holder was actually presented with a specific arbitration agreement prior to using the card, it is simply too great a reach to conclude that the card holder expected to be subjected to an arbitration agreement merely because he used the card.

2620089, 10 (Tex. App.—Hous. [14 Dist.] 2006)(not designated for publication), *cf.* *Hinojosa v. Citibank (South Dakota), N.A.*, 2008 WL 570601 (Tex. App.—Dallas 2008) (not designated for publication)<sup>7</sup>. Absent proof of the agreed upon rates, a court should not award damages based upon failure to pay the rates demanded in the monthly statements.

### **A credit card case should not be brought based upon an account stated theory**

Because they often cannot prove the terms of their contracts, credit card plaintiffs seek to recover based on a common law suit on account theory, most commonly, account stated. These theories should not be available for credit card plaintiffs because Texas courts have limited use of these theories to situations where there is no express agreement between the parties and where the transactions giving rise to the account are sales of goods.

A few recent court of appeals decisions have reviewed judgments for credit card plaintiffs based on an account stated theory, but with one exception, have not actually ruled that the theory is viable for credit card plaintiffs. In *Magnuson v. Citibank (South Dakota) N.A.*, 2008 WL 426245 (Fort Worth 2008, no pet.) (not designated for publication) and *Dulong v. Citibank (South Dakota) N.A.*, 261 S.W.3d 890 (Tex. App.—Dallas 2008, no pet.) the courts affirmed summary judgments in part based on account stated theories where the appellants failed to challenge the theory as a basis for the judgment.

In *Morrison v. Citibank (South Dakota) N.A.*, 2008 Tex. App. Lexis 1692 (Tex. App.—Fort Worth 2008, no pet.) the court declined to decide whether an credit card plaintiff could prevail on an account stated theory because it concluded that the evidence in that case would not support liability even if the theory were viable. *Morrison* is an important case for any practitioner in this area, because the fact pattern that the court of appeals rejected is very common in credit card cases and because the

court reversed a bench verdict in favor of the creditor on the ground that the evidence was factually insufficient.

The most recent account stated case, *Butler v. Hudson & Keyse*, 2009 Tex. App. Lexis 1108 (Tex. App.—Houston 2009), is the most problematic. It is not clear from the opinion that the appellant challenged the use of the account stated theory. The only challenge by the appellant that the court discussed was a claim that the plaintiff did not own the account. Even so, the court did not, as the *Dulong* court did, expressly reserve the question and affirmed the judgment below on the account stated theory. It did so without explanation or even acknowledgement that it was the first Texas court to so hold. Particularly for practitioners in the Houston area, this opinion will be difficult to deal with.

These cases underscore that when considering whether to appeal a case great consideration should be given to whether error has been properly preserved so that the appellate court can make the correct ruling. While these cases, with the exception of *Morrison*, are certainly negative developments, the account stated issue is not settled. Given the strong arguments against the use of theory based on long-standing Texas case law, there is no reason why cases like *Butler* should carry the day.

### **Suits on an account, including account stated, are implied claims that arise out of a series of transactions, not out of an express agreement.**

An open account is an implied claim that arises from the course of dealing between 2 parties who engage in a series of transactions in which title to goods passes from one to the other. *McCamant v. Batsell*, 59 Tex. 363, 367-369 (Tex. 1883), *Livingston Ford Mercury, Inc. v. Haley*, 997 S.W.2d 425, 427 (Tex. App.—Beaumont 1999, no writ). An account stated is merely an open account that has been closed because the party charged has agreed that the account is correct. *Whittlesey v. Spofford* 47 Tex. 13, (Tex. 1877), *Wroten Grain & Lumber Co. v. Mineola Box Mfg. Co.*, 95 S.W. 744 (Tex. Civ. App.—1906), *Padgitt Bros. Co. v. Dorsey*, 194 S.W. 1124, 1126 (Tex. Civ. App.—El Paso 1917, no writ).

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<sup>7</sup> *Hinojosa* turned on specific language in the cardholder agreement that provided that the agreed upon rate would be specified in the statements.

The classic statements of the elements of the account stated cause of action expressly draw a distinction between suits that grow out of a course of dealing and suits that grow out of an express agreement. For example, in *Central Nat. Bank of San Angelo v. Cox*, 96 S.W.2d 746, 748 (Tex. Civ. App.—Austin 1936, writ dismissed), the court said:

The cases are legion on what constitutes an account stated. In general the essential elements involved are:

Transactions between the parties which give rise to an indebtedness of one to the other; an agreement, express or implied, between them fixing the amount due; and a promise, express or implied, by the one to be charged, to pay such indebtedness. 1 Tex.Jur. p. 371 *et seq.*; 1 C.J. 678; 1 Am.Jur. 272; 1 C.J.S., Account Stated, p. 693.

The first and defining element of the claim is existence of a debtor-creditor relationship that arises from a series of transactions—from a course of dealing, not a contract. This element is identical across all suits on account, whether open, sworn or stated. While the other elements of the claim do reference an agreement, the subject matter of the agreement is not the creation or terms of the debtor-creditor relationship, but the acknowledgement, after the transactions that gave rise to the relationship have occurred, of the amount due and the obligation to pay.

### **Credit card claims do not fall within the scope of the sworn account rule, TRCP 185.**

In Texas practice, Rule 185 provides a streamlined procedural mechanism, commonly referred to as a suit on a sworn account, for asserting open account and account stated claims as well as certain other similar types of claims. Rule 185 does not create any substantive rights; it merely creates a procedure for expediting the claims listed in the rule. *Rizk v. Financial Guardian Ins. Agency, Inc.*, 584 S.W.2d 860, 862 (Tex. 1979), *Panditi v. Apostle*, 180 S.W.3d 924, 925 (Tex. App.—Dallas 2006, no. pet. h.). As a result of the prevalence of the use of Rule 185 (and its predecessors), much of the litigation

concerning the scope of these claims is framed as litigation over suits on sworn accounts, even though the underlying substantive rights are defined in the common law claims enumerated in the rule.

As credit card collection suits proliferated in recent years, credit card plaintiffs sought to use the Rule 185 procedure to expedite their cases. To date, they have been uniformly rebuffed by the courts of appeals because a suit on a sworn account must be based upon the sale of goods or because a suit on a sworn account cannot be based upon breach of a special contract. *Williams v. Unifund CCR Partners Assignee Of Citibank*, 264 S.W.3d 231 (Tex. App.—Houston [1 Dist.] 2008, no. pet.), *Tully v. Citibank, N.A.*, 173 S.W.3d 212, 216 (Tex. App.—Texarkana 2005, no. pet.), *Bird v. First Deposit Nat'l Bank*, 994 S.W.2d 280, 282 (Tex. App.—El Paso 1999, pet. denied)<sup>8</sup>

### **To the extent the common law account theories extend beyond the scope of Rule 185, they do not extend to credit card cases.**

As a result of the Rule 185 rulings, credit card plaintiffs have sought to argue that suits on open account or account stated theories are somehow distinct from sworn account claims and are still viable despite these adverse decisions. However, the two reasons cited in the sworn account cases for excluding credit card cases from the scope of the rule, the lack of transactions in goods between the plaintiff and defendant and the existence of an express contract governing the relationship between the

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<sup>8</sup> Other similar decisions include: *Landaverde v. Centurion Capital Corporation*, 2007 Tex. App. Lexis 4992, (Tex. App.—Houston[14<sup>th</sup> Dist] 2007, no. pet.) (not designated for publication), *Sherman Acquisition II LP, v. Graham*, 2006 Tex. App. Lexis 9400, 2-3 (Tex. App.—Waco 2006, opinion withdrawn 2007 Tex. App. Lexis 37 (not designated for publication), *EMCC, Inc. v. Johnson*, 2006 Tex. App. Lexis 9277, 4-6 (Tex. App.—Waco 2006, no. pet.) (not designated for publication), *Cavazos v. Citibank*, 2005 Tex. App. Lexis 4484, 4 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2005, no. pet.) (not designated for publication), *Dunham v. Providian National Bank*, 2002 Tex. App. Lexis 1021, 2-3 (Tex. App.—Houston[14<sup>th</sup> Dist.] 2002, no. pet.) (not designated for publication), *Young v. American Express*, 2001 Tex. Lexis 7217, 2 (Tex. App.—Texarkana 2001, no. pet.) (not designated for publication)

parties, have also been historically applied by Texas courts to limit the scope of common law suits on account and preclude the use of these claims in credit card cases.

### **Suits on account are limited to claims arising out of relationships involving the sale of goods without an express contract**

Over a century ago in *McCamant v. Batsell*, 59 Tex. 363, 1883 WL 9175 (Tex. 1883) the Supreme Court construed the word account as it is used in this context as limited to suits arising out of relationships in which title to goods was transferred from the plaintiff to the defendant and excluding suits in which the rights of the parties were defined by a written agreement.

In *McCamant*, a suit on a promissory note, the plaintiff sought to make use of the then existing statute governing suits on account, which like current Rule 185, set up an abbreviated procedure for resolving disputes involving sworn accounts. Unlike the current rule, the statute did not enumerate the kinds of actions that could be brought as suits on account. The Supreme Court construed the meaning of the term “account” in the statute as being consistent with the common law meaning of the term:

As used in the statutes of this state, in the act referred to, we believe that the word “account” is used in its popular sense, rather than in a technical sense, and that it applies to transactions between persons in which, by sale upon the one side and purchase upon the other, the title to personal property passes from the one to the other, and the relation of debtor and creditor is thereby created by general course of dealing.

The Court also ruled that the plaintiff’s suit against the maker of a note and his sureties could not be brought as a suit on account or an open account because it did not arise out of the course of dealings between a buyer and seller, but was based upon a written agreement in which all the terms were fixed and certain. *Id.*, 1883 WL 9175 at 6.

The Supreme Court re-affirmed the holding of *McCamant* in *Meaders v. Biskamp*, 316 S.W.2d 75 (Tex. 1958), in which the court distinguished a suit on an account from a suit based upon an express contract for purposes of awarding attorney’s fees. The then applicable language of Tex. Civ. Stat. Art. 2226, the predecessor to Tex. Civ. Prac. & Rem. Code Ch. 38, permitted an award of attorney’s fees for a suit upon a sworn account but did not include the present language authorizing fees in a breach of contract case. The *Meaders* court, citing *McCamant*, held that a suit founded upon a written contract for the drilling of an oil well was not a suit on account because the relationship of debtor and creditor did not arise from a course of dealing but from a contract. *Id.*, 316 S.W.2d at 78.<sup>9</sup>

### **Texas law does not allow a plaintiff to recover on an implied contractual theory for transactions governed by an express contract.**

More fundamentally, credit card cases cannot be brought on open account or account stated theories because credit card arrangements are governed by express contracts and suits on account are implied or quasi-contractual causes of action. Texas courts will not imply the existence of a contract where an express contract already exists. *Fortune Production Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex. 2000), *Woodard v. Southwest States, Inc.*, 384 S.W.2d 674 (Tex. 1964), *Musick v. Pogue*, 330 S.W.2d 696, 699 (Tex. Civ. App.—San Antonio 1959, writ ref’d n.r.e.). The reason for this rule, as described by the Supreme Court in *Fortune Production*, is that parties should be bound by their express agreements. When a valid agreement addresses the matter, a party should not be able to recover more than is provided for in the agreement. *Id.*, 52 S.W.3d at 684. See e.g. 15 U.S.C. § 1637(c)(1)-(7), 12 C.F.R. 225.5-225.16.

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<sup>9</sup> As the Supreme Court pointed out in *Medical City Dallas, Ltd. v. Carlisle Corp.*, 251 S.W.2d 55 (Tex. 2008), the result in *Meaders* is no longer good law because of changes to the attorney’s fees statute that now permit fees in breach of contract cases. However, the Supreme Court did not overrule the *Meaders* holding that a suit on account cannot arise out of an express contractual relationship.

### **The federal Truth-in-Lending Act requires the material terms of a credit card relationship to set forth in a written agreement.**

The principle that a plaintiff should not be able to use an implied contractual theory to recover more than his contract authorizes is particularly applicable to credit card cases. Credit card fees and interest rates are heavily regulated. Federal law mandates comprehensive disclosures of these terms when the account is opened and when the account is amended.

The federal Truth-in-Lending Act, 15 U.S.C. § 1601 *et seq* imposes a comprehensive scheme for the regulation of credit card accounts. These disclosure requirements are virtually all-encompassing. The precise content and format of the disclosures that must be made in connection with every credit card application is dictated in great detail by § 1637 of the Act and the implementing regulations found at 12 C.F.R. 225.5-225.16. The basic terms for which disclosure is required include: the annual percentage rate applicable to the purchases, cash advances and balance transfers made using the account, the manner in which variable rates are determined, the amounts of annual fees or other fees for the issuance or availability of the card, the amounts of minimum finance charges and transaction charges, the existence and duration of a grace period, if any, the name of the balance calculation method, and the amounts of cash advance fees, late payment fees, over-the-limit fees, and balance transfer fees. 12 C.F.R. 225.5a(b). The Act defines the manner and timing of such disclosures regardless of the manner in which the credit card offer is made, whether it is made by mail, by telephone, in a catalog, magazine or other publication, or over the internet. 15 U.S.C. § 1637(c)(1)-(7). Additional disclosures are required in monthly statements, 12 C.F.R. 226.7, when certain terms of the account agreement are changed, 12 C.F.R. 226.9(c), and before the card renewal date, 12 C.F.R. 226.9(e).

Because these disclosures are required to be in writing and integrated into the account opening process regardless of how the account is opened, the disclosed terms become the defacto terms of the credit card agreement. Furthermore,

§ 1642 prohibits the gratuitous issuance of a credit card. It permits a credit card to be issued only in response to an application or request. Any such application or request is governed by the disclosure provisions of § 1637.

Accordingly, it is impossible to lawfully establish a credit card account without a comprehensive written document setting forth virtually all of the material terms of the account. Using an account stated theory to imply an agreement to pay the interest and fees provided for on a credit card issuer's statements would relieve it from establishing the amount of interest and fees that were disclosed under federal law and that were included in the terms of its express agreement, potentially permitting it an unjustified windfall.

### **A Plaintiff may not abandon a breach of contract claim in order to seek a recovery on an implied contractual theory.**

A plaintiff may not abandon its express contract theory in order to seek greater relief on an implied or quasi-contractual theory. In *Truly v. Austin*, 744 S.W.2d 934, 936 (Tex. 1988), Truly abandoned his breach of contract claim and submitted only his *quantum meruit* claim to the jury. The court of appeals reversed instructed the trial court to limit Truly's recovery to the amount he could plead and prove under the written contract. The Supreme Court affirmed that decision. *Id.*

Implied and quasi-contractual theories are often plead in addition to breach of contract theories, for example, when a plaintiff seeks to recover for additional work not covered by the contract, *Fortune Production Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex. 2000), or when the plaintiff was prevented from performing under the contract by the defendant's breach and seeks recovery for the value of its work, *McFarland v. Sanders*, 932 S.W.2d 640, 644-645 (Tex. App.—Tyler 1996, no writ). But as the *Truly* case makes clear, a plaintiff may not avoid the terms of his express contract by seeking recovery on an implied contractual theory if the damages claimed are covered by the express contract.

### **Credit card plaintiffs cannot recover in *quantum meruit***

*Quantum meruit* is simply not a viable theory for credit card plaintiffs because it is an implied contract theory where an express contract already exists. In addition, in order to establish a *quantum meruit* claim, a plaintiff must establish that it provided services or goods directly to the defendant. *Vortt Exploration Co. v. Chevron U.S.A., Inc.*, 787 S.W.2d 942, 944 (Tex. 1990).

### **A credit card plaintiff must own a credit card account to have standing to sue on it**

A plaintiff must have standing to sue if the court in which the suit is filed is to have subject matter jurisdiction. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993). A person who is not a party to the contract upon which he sues does not have standing to maintain the suit. *Doran v. Clubcorp USA, Inc.*, 2008 WL 451879, 2 (Tex. App.—Dallas 2008, no pet.) (not designated for publication). Standing is determined at the time suit is filed and a suit will be dismissed for want of subject matter jurisdiction if the plaintiff did not have standing at that time. *Id.*, *Kilpatrick v. Kilpatrick*, 205 S.W.3d 690, 703 (Tex. App.—Fort Worth 2006, pet. denied). A plaintiff who seeks to sue based on rights acquired by assignment, must prove up the assignment. *Ceramic Tile International, Inc. v. Balusek*, 137 S.W.3d 722, 724 (Tex. App.—San Antonio 2004, no pet.), *Delaney v. Davis*, 81 S.W.3d 445, 448-49 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

A plea to the jurisdiction is the proper vehicle for raising standing as a jurisdictional issue. *Bland Independent School District v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). While a plea to the jurisdiction will ordinarily be determined by reference to the pleadings, where the underlying jurisdictional facts are put in issue, the Plaintiff must come forward with sufficient evidence in order to demonstrate that there is at least an issue of fact as to the existence of jurisdiction. *Texas Department of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 227-228 (Tex. 2004). The procedure for deciding a plea to the jurisdiction is substantially similar to the

procedure for deciding a no-evidence motion for summary judgment. *Id.*, 133 S.W.3d at 228. If an issue of fact is raised by the Plaintiff, then the jurisdictional issue will be determined by the fact finder at trial. *Id.*

While standing is often considered to be an issue only for debt buyers, that is not necessarily the case. Because most credit card issuers employ securitization schemes to raise capital for their operations, their ownership of the accounts they originated must be scrutinized as well.

For example, a prospectus dated May 22, 2008 issued by Capital One Multi-asset Execution Trust (“COMET”), describes the securitization process used by Capital One Bank (USA) N.A. (“Capital One Bank”), a large credit card issuer.<sup>10</sup> The securitization process involves, in addition to Capital One Bank and COMET, an entity called Capital One Funding, LLC. As part of the process, ownership of selected accounts originated by Capital One Bank is transferred to Capital One Funding, LLC and then in turn transferred to COMET. COMET then issues various classes of securities backed by the value of those accounts. The master trust agreement provides that Capital One Bank will service the accounts in exchange for a servicing fee. When an account goes into default and is charged off as uncollectible, it is automatically transferred from COMET back to Capital One Funding, LLC. It is not clear from this particular document whether such accounts are ever transferred back to Capital One Bank.

As of March 31, 2008, COMET held almost 27 million consumer accounts representing over 43 billion dollars worth of receivables. Given these numbers, there is a fairly significant chance that any particular Capital One consumer credit card account upon which Capital One Bank has sued has been through the securitization process and may no longer be owned by Capital One Bank.

Most other major credit card issuers use similar arrangements. Each should be scrutinized to determine whether the entity in

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<sup>10</sup> The prospectus can be read online at [http://www.sec.gov/Archives/edgar/data/922869/000119312508121344/d424b2.htm#supprom34230\\_4](http://www.sec.gov/Archives/edgar/data/922869/000119312508121344/d424b2.htm#supprom34230_4).

whose name suit is brought is in fact the entity that owns the account.

### **A credit card plaintiff collecting under an assignment may not have the same rights as the originator of the account.**

Credit card plaintiffs rarely produce the full contract of assignment. They prefer to produce bills of sale that reference other agreements as containing the actual terms of the assignment. However, the precise language of the assignment can be important in determining the extent of the plaintiff's rights.

For example, in *Munoz v. Pipestone Financial, LLC*, 397 F.Supp.2<sup>nd</sup> 1129 (D. Minn. 2005) the court determined that the language "all rights, title and interest of Seller in and to those certain receivables, judgments or evidences of debt" when used in connection with an assignment of credit card accounts did not permit the assignee to collect interest or attorneys' fees on the accounts. *Id.*, 397 F.Supp.2<sup>nd</sup> at 1131-32.

### **Limitations Issues**

The statute of limitations for breach of contract is 4 years. *Stine v. Stewart*, 80 S.W.3d 586, 592 (Tex. 2002). Most credit card contracts provide that failure to make the minimum payment when it is due is a default.<sup>11</sup> While it may be possible to cure a default by bringing the account current, the mere fact of a post-default payment within the limitations period, without more, does not revive the period. *Siegel v. McGavock Drilling Co.*, 530 SW2d 894, 896 (Tex.App.—Amarillo, 1975).

Even if a contract contains a choice of law provision selecting the law of another state, Texas will apply its own statute of limitations, notwithstanding the choice-of-law provision, because limitations statutes are procedural and

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<sup>11</sup> Credit card contracts also define other events as default, such as having too many accounts with high balances (commonly referred to as "universal default clauses") that allow imposition of the default rate of interest on an account. For the adventurous advocate, it might be interesting to argue that even if the account was current, it was in default if the credit card issuer imposed its default rate for any reason.

not substantive. *Hill v. Perel*, 923 S.W.2d 636, 639 (Tex. App.—Houston[1st Dist.] 1996, no writ); *Boustany v. Monsanto Co., Inc.*, 6 S.W.3d 596, 601 (Tex. App.—Houston[1st Dist.] 1999, no writ).

The limitations period on a suit on account is also 4 years, but accrues "on the day that the dealings in which the parties were interested together cease" rather than on the date of default. Tex. Civ. Prac. & Rem. Code § 16.004(c). Given the fact that credit card claims should not really be brought as suits on account, this may not be a significant issue, but a credit card plaintiff may attempt to argue this provision, particularly where post-default payments were made within the limitations period.

Other claims frequently brought by credit card plaintiffs can be often be dealt with on a limitations basis. For example, the limitations period for unjust enrichment is 2 years. *Elledge v. Friberg-Cooper Water Supply Corp.*, 240 S.W.3d 869, 869 (Tex. 2007). The limitations period for *quantum meruit* claims is 4 years, *C.M. Asfahl Agency v. Tensor, Inc.*, 135 S.W.3d 768, 778 n. 7 (Tex.App.—Houston [1st Dist.] 2004, no pet.), but the claim accrues when the goods are delivered or the services performed and accrues separately for each transaction unless the transactions are all part of a single job. *Thomason v. Freberg*, 588 S.W.2d 821, 827-828 (Tex. Civ. App.—Corpus Christi 1979, no writ).

### **Summary Judgment Proof Issues**

Because of the difficulties credit card plaintiffs seem to have in obtaining proper proof of the elements of their cases, the evidence submitted in connection with their motions for summary judgment can often be challenged. Two recent cases are particularly instructive for these types of challenges.

The Fort Worth Court of Appeals in *Luke v. Unifund CCR Partners*, 2007 WL 2460327 (Tex.App.—Fort Worth 2007) (not designated for publication) provided a laundry list of defects in summary judgment affidavits that can preclude summary judgment. A summary judgment affidavit must:

Be made from personal knowledge,

Show affirmatively that the affiant is competent to give the testimony contained in the affidavit,

Provide the underlying facts to support its conclusions,

Attach sworn or certified copies of any papers referred to in the affidavit,

In the case of a business records affidavit, accurately use the predicate language in Texas Rules of Evidence 803(6) and 902(10),

Show that the affiant had a proper basis for asserting the accuracy of records obtained from a predecessor in interest, and

Not contain inconsistencies such as attached contracts dated at least 3 years prior to the date the credit card account that is the subject of the affidavit was opened. *Id.*, 2007 WL 2460327 at 5-7.

When a summary judgment affiant seeks to lay a predicate for the admission of the business records of a third party, the affiant must have personal knowledge of the manner in which the records were prepared and be able to testify about the third party's record keeping. *Martinez v. Midland Credit Management*, 250 S.W.3d 481, 485 (Tex. App.—El Paso 2008, no pet.). The affiant must include in the affidavit information that would indicate that he or she is qualified to testify as to the record-keeping practices of the predecessor and that the records are trustworthy. *Id.*

### Arbitration Confirmation Issues

Many credit card cases are initially brought as arbitration cases in the National Arbitration Forum. Even though there are significant limitations on the scrutiny that courts will apply to arbitration award, there are still avenues to resist confirmation of an award.

### Credit card plaintiffs must prove the existence of an agreement to arbitrate in order to obtain confirmation of an award under Federal Arbitration Act.

Arbitration is a creature of contract. An arbitration award is of no effect and cannot be confirmed unless the parties agreed to arbitrate their dispute. As the First Circuit in *MCI Telecommunications Corp. v. Exalon Industries, Inc.*, 138 F.3d 426, (1<sup>st</sup> Cir. 1998) explained, “if there is no such agreement, the actions of the arbitrator have no legal validity.” *Id.*, 138 F.3d at 430. While the *MCI* court made this determination in the context of a motion to vacate in which the burden of proof was on the party challenging the arbitration clause, other courts have determined this to be part of the plaintiff's burden when seeking to confirm an arbitration award. *NCO Portfolio Management, Inc. v. Gougisha*, 985 So.2d 731, 735-736 (La. App. 5<sup>th</sup> Cir. 2008), *Bank of America, N.A. (USA) v. Dalquist*, 152 P.3d 718, 722 (Mont. 2007). In *MBNA America Bank, N.A. v. Credit*, 132 P.2d 898, 900-901 (Kan., 2006), the Kansas Supreme Court held that in an action to confirm an arbitration award where the opponent of confirmation raised the issue of the existence of an agreement to arbitrate, 1) the burden of proving the agreement fell on the proponent of the award and 2) that if the proponent failed to offer such proof, vacation of the award was proper. *Id.*, 132 P.2d. at 901-902.

Whether an arbitration agreement was ever made is to be determined by applying ordinary state-law principles that govern the formation of contracts. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995); see also *Perry v. Thomas*, 482 U.S. 483 (1987).

Accordingly, that means an arbitration confirmation plaintiff must prove all of the elements necessary to the formation of a contract. This requires proof that the parties had a meeting of the minds and that they communicated their consent to the terms of the contract via offer and acceptance. *Engelman Irr. Dist. v. Shields Bros., Inc.*, 960 S.W.2d 343, 352 (Tex. App.—Corpus Christi 1997), pet. denied, 989 S.W.2d 360 (Tex. 1998).

### **The Court, not the arbitrator, must decide whether the parties entered into an arbitration agreement.**

The determination of whether a dispute is subject to arbitration can be made by an arbitrator if the parties have clearly intended to submit the issue of arbitrability to the arbitrator. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942-47 (1995). However, this delegation of authority to the arbitrator extends only to the scope, not the existence of the arbitration agreement. The threshold of question of whether there was an agreement to arbitrate *anything*, which the *MCI* court called “the mother of arbitrability questions”, is therefore to be decided by the court, not the arbitrator, because without that threshold agreement, all of the actions of the arbitrator are null and void. *Id.* 138 F.3d at 429.

### **A credit card defendant is not barred by the 90 day time limit in section 12 of the Federal Arbitration Act from denying the existence of an agreement to arbitrate.**

Section 12 of the Federal Arbitration Act requires that a motion to vacate an award be made within 90 days of the delivery of the award. However, this section does not apply until it has been proven that there was an agreement to arbitrate. The First Circuit Court of Appeals wrote on this issue extensively and concluded:

A party that contends that it is not bound by an agreement to arbitrate can therefore simply abstain from participation in the proceedings, and raise the inexistence of a written contractual agreement to arbitrate as a defense to a proceeding seeking confirmation of the arbitration award, without the limitations contained in section 12, which are only applicable to those bound by a written agreement to arbitrate. *Id.* 138 F.3d at 430.

### **Debt buyers ordinarily must prove that they are assignees of the original creditor’s arbitration agreement.**

A debt buyer plaintiff will rarely be a party to the arbitration agreement upon which the award was based. In order for a debt buyer be entitled to enforce the arbitration agreement, it would have to be an assignee of that agreement. See *Ceramic Tile International, Inc. v. Balusek*, 137 S.W.3d 722, 724 (Tex. App.—San Antonio 2004, no pet.), *Delaney v. Davis*, 81 S.W.3d 445, 448-49 (Tex. App.—Houston [14th Dist.] 2002, no pet.). Accordingly, a debt buyer should ordinarily be required to prove up its assignment as a condition of confirming an arbitration award.

### **The Federal Arbitration Act contains certain procedural requirements for confirmation of an award that credit card plaintiffs frequently ignore.**

Section 13 of the Federal Act requires an application for confirmation to be accompanied certain documents when it is filed with the clerk. Those documents are:

- (a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.
- (b) The award.
- (c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

Many plaintiffs only attach a copy of the award. Until they correct the deficiencies with such a pleading, they are not entitled to confirmation of the award.

**Credit card plaintiffs must prove that the parties agreed that the award could be confirmed in order to obtain confirmation of an award under the Federal Arbitration Act.**

Section 9 of the Federal Act limits confirmation of an arbitration award to situations in which “the parties in their agreement have agreed that a judgment of the court shall be entered upon the award.” This is a separate agreement from the mere agreement to arbitrate, though it can be contained within that agreement. If a plaintiff fails to prove such agreement exists, the Court lacks jurisdiction to confirm the award. *Washington Mutual Bank v. Crest Mortgage Co.*, 418 F.Supp.2d 860, 861 (N.D.T.X. 2006), *See Place St. Charles v. J.A. Jones Construction. Co.*, 823 F.2d 120, 124 (5<sup>th</sup> Cir. 1987).

**Credit card plaintiffs must typically prove that the defendant and the defendant’s attorney signed the arbitration agreement in order to obtain confirmation of an award under the Texas General Arbitration Act.**

The Texas General Arbitration Act, Chapter 171 of the Texas Civil Practice and Remedies Code, does not apply to all claims. In Tex. Civ. Prac. & Rem. Code § 171.002, it exempts 5 categories of claims. The operative language of the statute provides:

- (a) This chapter does not apply to:
- (1) a collective bargaining agreement between an employer and a labor union;
  - (2) an agreement for the acquisition by one or more individuals of property, services, money, or credit in which the total consideration to be furnished by the individual is not more than \$50,000, except as provided by Subsection (b);
  - (3) a claim for personal injury, except as provided by Subsection (c);

- (4) a claim for workers' compensation benefits; or
- (5) an agreement made before January 1, 1966.

(b) An agreement described by Subsection (a)(2) is subject to this chapter if:

- (1) the parties to the agreement agree in writing to arbitrate; and
- (2) the agreement is signed by each party and each party's attorney.

In most credit card cases, § 171.002(a)(2) applies, as the claims typically allege breach of a credit card contract with an individual for an amount less than the \$50,000.00 threshold for the statute. In order to bring an agreement subject to § 171.002(a)(2) within the scope of the chapter, a plaintiff must therefore prove that the arbitration agreement was in writing and signed by each party and by each party’s attorney. *Stewart Title Guaranty Co. v. Mack*, 945 S.W.2d 330, 332 (Tex. App.—Houston[1 Dist.] 1997, writ dismissed w.o.j.).

**Arbitration confirmation is no mere registration process. A plaintiff must establish the elements of confirmation by evidentiary proof.**

The Dallas Court of Appeals firmly rejected the notion that arbitration confirmation is a mere registration process in *Gruber v. CACV of Colorado, LLC*, 2008 WL 867459 (Tex. App.—Dallas 2008, no pet.) (not designated for publication). Instead it held that the proponent of an award must prove the existence of the award by competent evidence. *Id.* at 1.

In *Gruber*, the plaintiff merely attached its award to its petition and asked the trial court to take judicial notice of the award. On appeal, it did not argue that the court was entitled to take judicial notice of the award, instead, it argued that it was not required to offer any evidence in

support of its confirmation request. The Court rejected this contention.<sup>12</sup>

The language of the Texas General Arbitration Act contemplates more than a mere registration process. The Act provides, in § 171.093, that applications shall be heard “in the manner ... required by law or court rule for ... hearing a motion filed in a pending civil action in a district court.”

When questions of fact must be determined in order to rule on a motion in a civil action in a district court, the facts must be established by competent evidence. Moreover, it is a basic principal of law that it is the proponent of a motion who bears the burden of proving those facts. See *Vance v. My Apartment Steak House of San Antonio, Inc.*, 677 S.W.2d 480, 482 (Tex. 1984)

Similarly, the federal courts require proof of the elements of a confirmation claim under the Federal Arbitration Act. Section 6 of the Act provides that “Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.”

### **The statements in NAF awards relating to the existence of an arbitration agreement and the amount of an award are inadmissible hearsay.**

National Arbitration Forum (“NAF”) awards contain out-of-court statements that an arbitration agreement existed between the parties and that an arbitrator made an award in a certain amount. Such statements are inadmissible hearsay under Texas Rules of Evidence 801 and 802 to the extent that they are offered to prove the truth of the matters asserted. See *Domingues v. City of San Antonio*, 985 S.W.2d 505, 507 (Tex.App.—San Antonio 1998 pet. denied). The arbitration award cannot be used as evidence of either the existence of an arbitration agreement

or the amount of an award unless the plaintiff properly proves it up via a business records affidavit or other appropriate foundation.

### **NAF arbitration awards are not self-authenticating.**

Failure to authenticate a document renders it inadmissible even if it is otherwise relevant and admissible. Although Texas Rule of Evidence 902(8) makes documents “executed in the manner prescribed by law by a notary public or other officer authorized by law to take acknowledgements” self-authenticating, NAF awards are not such documents. They bear a seal and what purports to be an acknowledgement, but the acknowledgement does not pass muster under Texas law. It is not acknowledged by the proper officer, and the acknowledgement is not in proper form.

The NAF awards that plaintiffs typically seek to confirm in Texas recite that they were entered and affirmed in Texas. A document acknowledged in this state must be acknowledged by a clerk of a district court, by a clerk or judge of a county court, or a by notary public. Tex. Civ. Prac. & Rem. Code § 121.001(a). Even if an award were signed in another state, it must have been acknowledged by a clerk of a court of record having a seal, a commissioner of deeds appointed under the laws of this state, or a notary public. Tex. Civ. Prac. & Rem. Code § 121.001(b). On its face, NAF acknowledgements do not meet either requirement. They are typically signed by someone designated as a “Director”, presumably of the National Arbitration Forum. The director of the National Arbitration Forum is not an officer authorized to acknowledge a document under the statute.

Moreover the form of the acknowledgement that “this award was duly entered”, does not meet the minimum requirements for an acknowledgement under Tex. Civ. Prac. & Rem. Code § 121.006(b)(1), which provides that the person signing the document must personally appear before the officer taking the acknowledgment and acknowledge executing the instrument for the purposes and consideration expressed in it. Nothing in the acknowledgements indicate that the arbitrators who execute the documents,

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<sup>12</sup> In addition, the court held that the trial court erred in taking judicial notice of the arbitration award and that the award was not self-authenticating. *Id.* at 2. Although the opinion in Gruber does not explain in detail why the award was not self-authenticating, the award in that case was a National Arbitration Forum award.

either did so in the officer's presence or personally acknowledged to the officer that they did so. Without this minimal affirmation, the standard NAF acknowledgement does not meet the requirements of the statute.

### Defense Strategies

1. Serve a discovery request with your answer that focuses on likely weak points:

- Ownership of the debt
- Contract formation
- Identification of the controlling contract
- Calculation of account balance
- Calculation of interest and fees
- Communications with the debtor
- Responses to disputes and validation requests
- Credibility of plaintiff's witnesses
- Limitations

Good discovery requests have multiple benefits. They can make it much easier to challenge a plaintiff's conclusory summary judgment or trial evidence. For example, a plaintiff may simply testify that a particular contract is "part of its records for the defendant's account." If you have propounded discovery on this issue similar to that outlined in footnote 4 above, you can attack the credibility of that statement by pointing out that the plaintiff was asked to provide the underlying basis for any contention that a contract applied to the defendant's account or was actually offered to the defendant and failed to do so.

A good discovery can help prevent the offer of conclusory or misleading evidence. Rule 193.6 allows you to exclude any evidence that was not produced in response to a discovery request. Should a plaintiff bring a live witness to trial, as American Express and Citibank often

do, that witness will not be able to testify about records that were not produced in discovery. So for example, if the plaintiff did not produce any record that a particular contract was mailed to the defendant, the witness cannot testify to that fact once he admits that his only knowledge of the fact is from review of an un-produced record. It is generally much easier to persuade a judge to exclude evidence under Rule 193.6 than it is to attempt to discredit the testimony on cross examination.

Moreover, because Rule 193.6 requires the proponent of un-produced evidence to show 1) good cause for the failure to timely respond to the discovery and 2) that the failure to respond to discovery will not unfairly surprise or unfairly prejudice the other parties, the judge's ordinarily broad discretion to rule on evidentiary matters does not exist unless the plaintiff makes that showing.

Draft the request with an eye to your goals. Focus the request on the likely weak points. Include as many narrow and unobjectionable requests as possible. Fishing expeditions will just draw you into a motion to compel battle and motivate the plaintiff to work harder to develop its case. Simple questions force the plaintiff to answer instead of objecting. Moreover, a Rule 193.6 motion based on straightforward, simple questions practically writes itself. Finally, discovery disputes are expensive and can quickly put you over your client's budget, or if you are proceeding on flat fee basis, suck the profitability right out of your case.

2. If you need discovery to prove up a limitations or other defenses, a subpoena to the original creditor is often more likely to get you the documents you want than a discovery request to a debt buyer plaintiff.

3. Consider responding to a plaintiff's motion for summary judgment with an immediate deposition of the plaintiff's affiant. If the affidavit is in proper form and has no substantive defects, it is important to test every sentence in the plaintiff's affidavit, as the key assertions are often either false or gloss over un-provable facts. Fertile areas of inquiry include how the affiant came to know the facts included in the affidavit, how the affiant knows the documents attached to the affidavit are authentic and/or admissible under the business records

exception to the hearsay rule, whether the plaintiff actually owns the debt, and how and when the contract (if any) was offered to and accepted by the defendant. Of course, by taking this deposition, you create the opportunity for the plaintiff to fix the problems with its affidavit. If the affidavit has significant substantive defects and you believe that they will prevent your judge from granting the motion, you may be better off passing on the deposition.

4. Wait for the discovery period to end. In most cases, the plaintiff will respond to your straightforward discovery requests with scant if any information coupled with a promise to supplement. In my experience, the promised supplementation rarely occurs.

5. Combine your dispositive motions with a Rule 193.6 motion to exclude evidence. This combination punch is hard to beat, as the standard for overcoming a 193.6 motion is very high. If the plaintiff has failed to provide discovery relating to a required element of its response to your dispositive motion, then the case is essentially over. Waiting until the discovery period is over greatly reduces the plaintiff's chance of overcoming the motion to exclude or getting a continuance to supplement its discovery responses.

6. Read *Bland Independent School District v. Blue*, 34 S.W.3d 547 (Tex. 2000) and *Texas Department of Parks and Wildlife v. Miranda*, 133 S.W.3d 217 (Tex. 2004) to learn about the

plea to the jurisdiction procedure for challenging the standing of a debt-buyer plaintiff. In these cases, the Court establishes a simple motion procedure which operates like a no-evidence motion for summary judgment, but without the 21 day notice and other requirements of Rule 166a. A credit card plaintiff must prove that it owns the debt to have standing to sue, whether its ownership is in question under the terms of a securitization agreement or a traditional assignment. A plaintiff who has ignored your discovery requests for documents establishing its ownership of the debt will have a hard time beating a 2 headed Rule 193.6 motion and plea to the jurisdiction set for hearing after the discovery period has ended.

7. In an arbitration case, get a copy of the arbitration claim and the documents submitted to the arbitrator. The plaintiffs who submit claims to arbitration are notoriously sloppy, particularly about the contracts they submit in support of their contention that an arbitration agreement exists. Based on my experience, many such plaintiffs do not even attempt to obtain documents from the original creditor unless the respondent disputes the claim. They may have simply pulled a copy of an account agreement from their own files to submit to the arbitrator without any way of knowing whether it applied to the account or not. You can make the confirmation hearing very uncomfortable for them if they have done this in your case.