IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

07-3004

PORTFOLIO ACQUISITIONS, LLC,	)	
	)	On appeal from the
Plaintiff-Appellant,	)	Circuit Court of Cook
	)	County, Municipal
vs.	)	Department, First District
	)	05 M1 138683
RANDY FELTMAN,	)	Hon. Dennis McGuire
	)	
Defendant-Appellee.	)	

BRIEF OF *AMICI CURIAE* LEGAL ASSISTANCE FOUNDATION OF METROPOLITAN CHICAGO, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, AND AARP IN SUPPORT OF DEFENDANT-APPELLEE

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INTEREST OF *AMICI CURIAE*

The Legal Assistance Foundation of Metropolitan Chicago ("LAF") is the principal provider in Cook County of free legal services in civil law matters to low-income and disadvantaged individuals. The mission of LAF is to provide the poor with access to justice in civil legal matters, to protect their homes, their employment, their public benefits, and their constitutional and statutory rights. With approximately ninety attorneys in six service offices and a number of special projects including those specifically devoted to seniors and consumers, LAF serves 30,000- 40,000 people each year. LAF is dedicated to helping those who cannot afford legal counsel navigate the legal system and understand and safeguard their rights as a step toward achieving economic self-sufficiency for themselves and their families. LAF counsels and represents numerous individuals in financial distress, including many who are being sued on old credit card debts.

The National Association of Consumer Advocates ("NACA") is a non-profit membership organization of private and public sector attorneys, legal services attorneys, law professors, and students, whose primary practice involves the protection and representation of consumers. Its mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and to serve as a voice for its members, as well as for consumers, in the ongoing struggle to curb unfair and abusive business practices. From its inception, NACA has focused primarily on issues which concern predatory and fraudulent business practices affecting consumers.

AARP is a non-profit, non-partisan organization with nearly 40 million members, more than 1.75 million of whom live in Illinois. As the leading organization representing the interests of people aged 50 and older, AARP is greatly concerned about the growing level of debt, including credit card debt, being incurred by older people.

Credit cards have become a fixture of U.S. economic life. They provide a tremendous convenience for many consumers, including older consumers, who increasingly use

credit cards to pay for a range of products and services. For consumers who use a credit card simply for convenience and pay off the balance in full each month, the cards generally work well. The main problems occur when a consumer cannot pay off the full amount due, carries forward a balance, and gets caught in a downward spiral of exorbitant interest rates, fees and penalties, and other billing practices that simply wring more fees out of consumers, driving them further into debt.

A growing number of older Americans find themselves deep in credit card debt – even filing for bankruptcy. Although older households long have been considered among the most frugal and resistant to consumer debt, changing economic conditions -- particularly declining pension and investment income and rising costs for basic expenses such as prescription drugs, health care, and utilities -- have made credit card debt a more serious financial issue for older Americans. According to the Employee Benefit Research Institute (EBRI), a growing number of older families in America are incurring debt, and debt levels are growing most significantly among the oldest families. In 2004, 61% of American families headed by people aged 55 or older had debt, almost five percentage points higher than in 2001 (56%) and up nearly seven percentage points from the 1992 level of 53.8%. More troubling is the fact that the oldest consumers incurred sharply higher debt; families headed by someone aged 75 years or older with debt increased substantially in 2004, to 40.3% from 29% in 2001.[1]

Much of this increased debt among older Americans is attributable to credit cards. A 2004 study by the public policy research group Demos found that between 1992 and 2001, Americans over age 65 saw their credit card debt nearly double, on average, from $2,143 to more than $4,000. Older consumers between the ages of 65 and 69, presumably the newly-retired, saw the most staggering rise in credit card debt – 217% – to an average balance of

[1] Employee Benefit Research Institute, Debt of the Elderly and Near Elderly 1992-2004, September 2006.

$5,844.[2] Other warning signs also are evident. The proportion of income spent to pay off debts by households headed by individuals aged 65 to 74 years of age has risen steadily during the past decade.[3] Among older people with incomes under $50,000 (about 70% of all older people), an estimated one in five families with credit card debt is in what is considered "debt hardship," spending more than 40% of their income on debt payments, including mortgage debt.[4]

Of great concern to AARP is not just that older consumers carry more credit card debt than before, but that more of them are being buried in what may be considered *unaffordable* debt. In a May 2008 survey, AARP found that of those members who have been stressed by their financial situation in the prior six months, a full 44% consider credit card debt to be a "major concern." The survey also found that 27% of AARP members reported having difficulty paying off their credit card debt.[5] It is clear that unmanageable debt is forcing some older people to delay retirement, and it is nudging those already out of the workforce back in. And, it is causing a record number of older people to seek bankruptcy-court protection. A

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[2] Tamara Draut & Heather McGhee, Demos, "Retiring in the Red: The Growth of Debt Among Older Americans," February 2004, *available at* http://www.demos.org/pubs/Retiring_2ed.pdf.

[3] According to the Federal Reserve Survey of Consumer Finances, the median debt services ratio for households aged 65-74 grew by 54% from 9.8% in 1992 to 1.5% in 2001 and the debt services ratio for households 75 and older grew 169%, from 2.6% to 7% during the same period.

[4] Demos, "Retiring in the Red."

[5] AARP Member Insights from GfK Roper, May 2008.

recent study conducted for AARP found that in 2007 more than one in five debtors were over the age of 55, compared with one in 10 back in 1991. The study also found that the rate of personal bankruptcy filings among those aged 45 to 54 had jumped by more than 48% from 1991 to 2007. For those aged 55 to 64, the rate rose by 150% — and for those aged 75 to 84, by 433%.[6] It is reported that credit card debt is one of the top reasons older consumers file for bankruptcy.

These disturbing data make *amici* particularly concerned about the abusive practices perpetrated by the debt collection industry, especially by debt buyers, to which many older people are especially vulnerable.[7] Many collectors have become so aggressive that they completely disregard whether the purported debtor is judgment-proof and, with the explosion of debt buyer cases filed in the Circuit Court of Cook County, *amicus* LAF has seen a huge increase in the number of debt collectors attempting to collect from and even garnish the exempt income of older and low-income consumers. LAF also has seen more judgment creditors foreclosing on older peoples' homes for old credit card debts.

These factors combine to create a climate that requires greater, not more lax, oversight of the debt collection industry, and the lower court's ruling will help achieve that goal.

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[6] Deborah Thorne, Elizabeth Warren, and Teresa A Sullivan, "Generations of Struggle," published by AARP's Public Policy Institute, June 2008, http://www.aarp.org/research/credit-debt/debt/2008_11_debt.html.

[7] *See* Donna S. Harkness, When Over-The-Limit is Over The Top: Addressing The Adverse Impact of Unconscionable Consumer-Credit Practices on the Elderly, 16 The Elder L.J. 1, 3-4 (2008), and Matthew W. Ludwig, Abuse, Harassment, and Deception: How the FDCPA is Failing America's Elderly Debtors, 1 Elder L.J. 135, 135-37, 151-56 (2008).

Amici believe that this Court's affirmance of that decision will maintain high standards in court proceedings that will protect vulnerable consumers subject to debt collection actions.

SUMMARY OF ARGUMENT

This appeal does not involve whether a credit card account creates a legal obligation, as the parties agree that it does. Rather, the issue before the Court concerns what kind of contract the modern credit card account creates for purposes of the statute of limitations. *Amici* assert that where a credit card account agreement contains a clause allowing the creditor to change the terms of agreement by mailing a notice to the card holder, which the card holder accepts through use of the card, the contract is subject to the five-year statute of limitations applicable to oral contracts. Under these circumstances, the only way to establish the contract terms, rate of interest, and the accurate account balance, is through oral testimony relating to the timing and sending of notice and the cardholder's subsequent use of the card.

The plaintiff debt collector in this case failed to establish the original terms of the agreement, alleging that the written contract was attached to the complaint when, in fact, the attached documents were contradictory and totally incapable of being read together as a single contract. Plaintiff alleged that a contract was formed in 1994, but the boilerplate terms of agreement attached to the complaint are dated 1998 and 1999 and bear the names of several different financial institutions. While a court should be able to rely on an affidavit which states that a written contract is attached to a complaint, in this case the affidavit is plainly false, and plaintiff has repeatedly misrepresented the nature of the exhibits to the complaint.

Contrary to plaintiff's contention, billing statements sent to a consumer cannot be deemed "written evidence" of a debt because they do not manifest the card holder's assent. Payment of a portion of an account does not necessarily indicate agreement that the balance or interest rate is correct. The Court should not countenance a rule which would allow a creditor or party seeking to collect a purported debt to create a legal obligation to pay any amount claimed at any interest rate set forth, merely by sending billing statements to the card holder.

Strong policy reasons militate in favor of applying the shorter statute of limitations to collection efforts of the type presented here, because the sheer number of accounts, frequent changes in terms over the life of a credit card account, the often-numerous transfers of accounts from creditor to creditor and to a series of debt buyers prior to suit, and the lengthy delay common before suit, all increase the risk of accounting errors, mistaken identities, and the likelihood that the consumer will no longer have records or proof of payment. Contrary to the argument of plaintiff and its *amici*, the use of computers does not prevent or eliminate errors, and rampant inaccuracies abound in the world of credit card accounts. The policy behind statutes of limitations is to discourage stale claims – yet in this case, the debt was assigned four times, as the original creditor and a series of debt collectors determined it was uncollectable. Suit was not filed until six years after the last payment was allegedly made. Indeed, the claim in this case was so stale the plaintiff could not even locate the original terms of agreement. For these reasons, and those discussed below, the trial court correctly found that the shorter statute of limitations applied and barred plaintiff's lawsuit.

ARGUMENT

I. THE STATUTE OF LIMITATIONS FOR ORAL CONTRACTS MUST APPLY BECAUSE A CREDIT CARD AGREEMENT ALONE CANNOT ESTABLISH THE EXISTENCE OF A CONTRACT WITHOUT EXTRINSIC EVIDENCE.

A. PLAINTIFF'S DOCUMENTATION FALLS FAR SHORT OF ESTABLISHING A WRITTEN CONTRACT

Plaintiff purported to attach a written contract to the Second Amended Complaint, along with a signed credit card application. However, the "contract," Exhibit B to the Second Amended Complaint, is a mish-mash of boilerplate language from different years, containing conflicting and inconsistent terms, bearing the names of different financial institutions whose connection to the account remains a mystery. No document in the record demonstrates that the defendant agreed to the alleged contract terms or the balance allegedly owed. While the Second Amended Complaint describes three pages of the exhibit as "the agreement" (2nd Am. Comp., ¶ 6), unless one assumes that Direct Merchants Bank prepared a printed form agreement with two page 5s, two page 6s, and two page 1s, containing inconsistent terms relating to the same subjects, the only reasonable inference is that Exhibit B to the Second Amended Complaint consists of pages from two or more different agreements that, through carelessness or design, were presented to the trial court as constituting a single document.

The Second Amended Complaint asserts that "the agreement" came from "GE Capital Consumer Card Company," however, each of the three pages contains at least one reference to Direct Merchants Bank, so this allegation is simply not true. Furthermore, the "Defendant's signed application" for the card, Second Amended Complaint Exhibit A, bears the printed name "The Prudential Bank," leaving no doubt as to the inaccuracy of plaintiff's assertion.

The last column on the second page of Exhibit B, numbered (4), provides that Direct Merchants Bank, N.A. "may change or terminate any term of this agreement or add new terms at any time, without limitation, including adding or increasing fees, increasing your

monthly minimum payment and increasing the rate or amount of finance charges, or changing the method of computing the balance upon which finance charges are assessed." It states further that such changes can be effected by "prior written notice . . . when required by applicable law," without the signature of the cardholder.

Although plaintiff never established the original 1994 contract terms, and has not established that the 1994 contract is lost or unavailable, or that it even contained a change in terms clause (and the case should be dismissed on this ground alone), *amici* assume for the sake of argument that it contained a similar change in terms clause. However, had plaintiff attached the 1994 agreement, the only way for it to establish the applicable contract terms is through oral evidence as to the subsequent changes, thus making the agreement subject to the five-year statute of limitations for oral contracts.

B. SEVERAL REASONS EXIST FOR DEFECTIVE DOCUMENTATION

1. Economics of The Debt Buyer Industry

In 2007, the amount of bad debt purchased by debt buyers was $110 billion. Eileen Ambrose, "Zombie Debt; Debt Can Come Back to Haunt You Years Later," The Baltimore Sun, May 6, 2007 pg. 1C. Most of these debts were purchased for minimal amounts, between 4 and 6 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." MBNA America Bank, N.A. v. Nelson, 15 Misc. 3d 1148A, 841 N.Y.S.2d 826 (N.Y. Civ. Ct. 2007).

Several principal debt buyers are public companies. One of the largest, Asset Acceptance, states in its most recent annual report (for the year ending Dec. 31, 2007),[8] that it

[8] http://www.sec.gov/Archives/edgar/data/1264707/000095012408001195/k24615e10vk.htm.

owns 1,660,000 accounts of Illinois residents. (SEC Form 10-K, original page 8) The same report discloses that "From January 1, 1998 through December 31, 2007, we have purchased 853 consumer debt portfolios, with an original charged-off face value of $32.1 billion for an aggregate purchase price of $746.0 million, or 2.32% of face value, net of buybacks." (10-K, original page 3).

Another public debt buyer, Portfolio Recovery Associates, discloses that it holds 645,103 accounts allegedly owed by Illinois residents. (SEC 10-K for year ending Dec. 31, 2007, original page 8).[9] It has purchased $35,332,844,704 face value of debts for $791,626,362, or about 2.2 cents on the dollar. Id.

Thus, these two debt buyers alone hold over 2.3 million debts purportedly owed by Illinois residents. And, according to industry statistics, they account for only 1/6 of the top ten debt buyers by revenue.[10] The adult population of Illinois is only 9.5 million. U. S. Census press release, Mar. 10, 2005.[11] Thus, these two debt buyers conceivably hold accounts amounting to twenty-five percent of the population of the state of Illinois.

In most debt buyer transactions, no documentation is provided to the assignee which would constitute admissible evidence to prove the debtor in fact opened the account, used the credit card, or agreed to the terms and interest rates imposed and added to the purported balances due. Typically, only electronic information regarding the alleged account is provided to the debt buyer. Foreman v. PRA III, LLC, 05 C 3372, 2007 U.S. Dist. LEXIS 15640, at *9 (N.D .Ill., March 5, 2007). Indeed, there are numerous instances on record where

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[9] http://www.sec.gov/Archives/edgar/data/1185348/000095013308000867/w50458e10vk.htm.

[10] http://www.creditcollectionsworld.com/pagedisplay.html?pagename=topdebtbuyers.

[11] http://www.census.gov/Press-Release/www/releases/archives/population/004083.html.

debt buyers filed suit without even owning the debts they claim to purchase. "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, March 2007, pg. 24, Vol. 12, No. 3 (quoting officer of Illinois debt buyer who had purchased, or ostensibly purchased, bad paper). In such circumstances, it is not surprising that, as in this case, debt collectors cannot produce sufficient evidence of a contract or its terms.

2. The Volume of Debt Buyer Lawsuits

More than 150,000 collection lawsuits are filed in Cook County Circuit Court each year. Contract cases in the Municipal Department, First District (excluding forcible entry and detainer, landlord-tenant, replevin and some pro se cases) are numbered consecutively in a series beginning with 100,000, i.e., [20]07 M1 100,000 and up. The highest number reached during 2007 was 258,152, i.e., [20]07 M1 258152, making 158,152 collection lawsuits.[12] The volume filed in other counties is similar in proportion to their smaller population.

It appears that more than half of these cases were brought by debt buyers rather than original creditors. For example, examination of the list of cases filed in the Municipal Department of the Cook County Circuit Court on December 29, 2007 discloses 266 new contract case filings by debt buyers and only 240 by original creditors. Similarly, on March 30, 2007, there were 384 new contract cases filed by debt buyers and 313 by original creditors. Moreover, the original creditor cases included medical debts, business debts, student loans, payday loans, and other debts which are not usually purchased by debt buyers, whereas the debt

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[12] http://198.173.15.34/?section=CASEINFOPage&CASEINFOPage=2400.

buyer filings primarily involve credit card debts.

All of the Cook County cases are assigned to seven judges on the 11th floor of the Daley Center (1102, 1104, 1106, 1108, 1110, 1112, and 1101). This amounts to an average of 22,593 contract cases per judge during 2007 (158,152 divided by 7). This is about 100 new contract cases per judge per court day, and the same judges also are assigned some subrogation and tort claims. This creates a huge burden on the court to process such a large volume of cases with a limited amount of time to review each file.

The judges should be able to, but currently cannot, rely on the plaintiff to supply adequate documentation of the defendant's obligation in each case. The typical documentation and accuracy of the collection complaints are comparable to what was presented in this case. (One can assume that Portfolio Acquisitions, LLC did not choose to appeal the case with the worst facts.) Indeed, a LEXIS search reveals that Portfolio Acquisitions, LLC, which is not one of the major debt buyers, has itself filed hundreds of cases against Illinois debtors throughout the state, including Cook, DuPage, Will, Kendall, Winnebago, Lake, McHenry, St. Clair, Sangamon, Peoria, Ogle, Boone, and Kankakee Counties. However, the problem in Cook County is particularly acute because the volume of cases precludes careful examination of files for the sort of inconsistencies and incongruities set forth above.

II. THE QUESTIONABLE DOCUMENTS SUBMITTED BY PLAINTIFF DO NOT MEET ILLINOIS' STRINGENT TEST FOR A "WRITTEN CONTRACT" WITHIN THE MEANING OF 735 ILCS 5/13-206.

Under the accepted standard pursuant to 735 ILCS 5/13-206, for there to be "written contract" the writing must be "complete," in that it identifies the parties, states the date of the agreement, contains the signatures of the parties, and sets forth all terms of the parties' agreement. Brown v. Goodman, 147 Ill. App. 3d 935, 940, 498 N.E.2d 854 (1st Dist. 1986); Clark v. Western Union Telegraph Co., 141 Ill. App. 3d 174, 176, 490 N.E.2d 36 (1st Dist. 1986); Weaver v. Watson, 130 Ill. App. 3d 563, 567, 474 N.E.2d 759, 762 (5th Dist. 1984); Munsterman v. Illinois Agricultural Auditing Association, 106 Ill. App. 3d 237, 238-39, 435 N.E.2d 923, 925

(3rd Dist. 1982); Baird & Warner, Inc. v. Addison Industrial Park, Inc., 70 Ill. App. 3d 59, 73, 387 N.E.2d 831, 838 (1st Dist. 1979).

"The test for whether a contract is written under the statute of limitations in Illinois is not whether the contract meets the requirements of the Statute of Frauds, but whether all essential terms of the contract, including the identity of the parties, are in writing and can be ascertained from the written instrument itself." Brown v. Goodman, 147 Ill. App. 3d at 940-41 (emphasis added). Our Supreme Court has made it clear that if any essential element of the contract is omitted from the writing, "'then the contract must be treated as oral for purposes of the statute of limitations.'" Armstrong v. Guigler, 174 Ill. 2d 281, 288, 673 N.E.2d 290, 295 (1996); accord, Toth v. Mansell, 207 Ill. App. 3d 665, 669, 566 N.E.2d 730, 733 (1st Dist. 1990); Schmidt v. Niedert, 45 Ill. App. 3d 9, 13, 358 N.E.2d 1305 (1st Dist. 1976).

"Illinois courts give a strict interpretation to the meaning of a written contract within the statute of limitations. For statute of limitations purposes, a contract is considered to be written if all the essential terms of the contract are in writing and are ascertainable from the instrument itself." Brown, 147 Ill. App. 3d at 939 (emphasis added). If the agreement necessitates resort to parol testimony to make it complete then, for statute of limitations purposes, it must be treated as an oral contract. Toth, 207 Ill. App. 3d at 671. In addition, the "law is clear in Illinois that to constitute a written contract under the statute of limitations, the written instrument itself must completely identify the parties to the contract." Brown, 147 Ill. App. 3d at 940 (emphasis added); accord Munsterman, 106 Ill. App. 3d at 238-39; Pratl v. Hawthorn-Mellody Farms Dairy, Inc., 53 Ill. App. 3d 344, 347, 368 N.E.2d 767, 770 (1st Dist. 1977); Matzer v. Florsheim Shoe Co., 132 Ill. App. 2d 470, 472, 270 N.E.2d 75 (1st Dist. 1971); Wielander v. Henich, 64 Ill. App. 2d 228, 231-32, 211 N.E.2d 775, 776 (1st Dist. 1965). "The issue is not whether the identity of [the parties] can be readily ascertainable from subsequent writings, the issue is whether the identity of [the parties] can be readily ascertained" from the alleged written contract "itself so as to avoid the resort to parol evidence." Brown, 147 Ill. App.

3d at 940.

If testimony is necessary to establish any of these elements, the contract is treated as oral, and subject to the five-year statute. Wielander v. Henich, 64 Ill.App.2d 228, 231, 211 N.E.2d 775, 776 (1st Dist. 1965); Armstrong, 174 Ill. 2d at 288.

> In the parol evidence cases, the dispositive question is whether evidence of oral representation is necessary to establish the existence of a written contract. If such evidence is required, then the contract is treated as oral for purposes of the statute of limitations. In other words, where a party is claiming a breach of written contract, but the existence of that contract or one of its essential terms must be proven by parol evidence, the contract is deemed oral and the five-year statute of limitations applies.

Id.

A. WHETHER A CREDIT CARD AGREEMENT MEETS THE ILLINOIS SUPREME COURT'S TEST FOR A WRITTEN CONTRACT DEPENDS ON THE DOCUMENTATION ALLEGED AND PROVEN IN THE PARTICULAR CASE.

The issue presented in this case was recently addressed in Parkis v. Arrow Financial Services, 07 C 410, 2008 U.S. Dist. LEXIS 1212, 2008 WL 94798 (N.D. Ill. Jan. 8, 2008), and Ramirez v. Palisades Collection, LLC, 07 C 3840, 2008 U.S. Dist. LEXIS 48722, 2008 WL 2512679 (N.D. Ill. June 23, 2008). These cases alleged violations of the federal Fair Debt Collection Practices Act based on the attempted collection through suit of time-barred debts, a recognized violation of that statute. See, e.g. , Kimber v. Federal Financial Corp., 668 F. Supp. 1480 (M.D.Ala. 1987).

The Parkis court first noted that "[t]he existence of a contract between Plaintiff and Fleet Visa is undisputed, but the question remains whether the contract was written or unwritten" for limitations purposes. 2008 U.S. Dist. LEXIS 1212, at *15) In other words, it is entirely possible for there to be a binding contract without there also being a "written contract" for statute of limitations purposes. Judge Coar held that under the ordinary Illinois

standard for determining whether a "written contract" exists for limitations purposes, it was necessary that the party claiming the existence of such a contract allege and prove it.

> Illinois law requires that when "a claim is founded upon a written instrument, a copy thereof must be attached to the pleading as an exhibit or recited therein." Ill. Rev. Stat. 1981, ch. 110, par. 36; O.K. Electric Co. v. Fernandes, 444 N.E.2d 264, 267 (Ill. App. Ct. 1982); Plocar v. Dunkin' Donuts of America, Inc., 103 Ill. App. 3d 740, 748 (Ill. App. Ct. 1981). Defendants did not provide a copy of a written credit card contract in their October 14, 2005 debt-collection complaint. Although the "Charge Agreement" was alluded to in the debt-collection complaint, the complaint did not include a recitation of the contract terms. Illinois statute also allows the pleader to include an affidavit stating facts showing that the instrument was not accessible to him or her, in which case the written contract would not be required to be attached. 735 ILCS 5/2-606. Defendants did not satisfy this provision either. Instead, Defendants attached an "Affidavit of Indebtedness," stating that the Plaintiff's account balance was $ 8,218.87, consisting of $ 5561.52 principal and $ 2657.35 in interest owed to Arrow on his Fleet Services account, and signed by an agent of Arrow. This document clearly does not constitute a written contract, as stating the amount owed by the Plaintiff falls far short of stating all the essential terms of a contract. See Brown v. Goodman, 147 Ill. App. 3d 935 (Ill. App. Ct. 1986).

Parkis, 2008 U.S. Dist. LEXIS 1212, at *15-16.

Judge Coar also relied on the fact that Arrow, like Portfolio Acquisitions in the case at bar, relied on the notion that the periodic provision of terms, coupled with use of the card, creates a contract:

> Both Plaintiff and Defendants agree that many card issuers can change the terms of the original contract at will, by simply sending notice to the

consumer, where the use of the card without objection constitutes acceptance of the new terms. Defendants cite to Garber v. Harris Trust & Sav. Bank, where the Illinois appellate court ruled that "a contract is not formed at the time of issuance of the credit card . . . a separate contract is created each time the card is used according to the terms of the card holder agreement at the time of such use." 104 Ill. App. 3d 675, 678 (Ill. App. Ct. 1982). Accordingly, it is unclear that even if an original credit card contract were available in writing, whether parol evidence would still be needed in order make the contract complete.

Id. at *16-17. The court concluded that "because a written contract was not attached to the debt-collection complaint nor has any evidence been offered that a written contract exists, the contract must be considered 'unwritten' under Illinois law. As such, the five year statute of limitation applies under Illinois law." Id. at *17.

Judge Coar discussed at length Arrow's contention, repeated by Portfolio Acquisitions and its *amici* in this case (NARCA/DBA Brief pp. 5-8), that Harris Trust & Savings Bank v. McCray, 21 Ill.App.3d 605, 316 N.E.2d 209 (1st Dist. 1974), supports the somewhat remarkable proposition that "all credit card agreements are considered written contracts" regardless of what documentation if any exists in a particular case.

This is not a correct reading of Harris Trust. In that case, the Illinois court of appeals found that a credit card agreement constituted a contract for the loan of money, rather than a contract for the sale of goods. An action based on a contract for the loan of money has a statutory period of 10 years if it is found to be "written," whereas an action based on a contract for the sale of goods has a statutory period of four years under Illinois law. The court's analysis centered on whether a credit card agreement was a loan contract or a sales contract, not whether the agreement was written or unwritten. Thus, the reasoning and analysis in Harris Trust does not apply to the present case, where

> the issue is whether the Defendants sued on a written or unwritten contract.

2008 U.S. Dist. LEXIS 1212, at *17-18.

Similarly, in Ramirez, Judge Conlon concluded that the five-year statute applied because there was no evidence of the existence of either an integrated written credit card agreement or an integrated writing transferring the original creditor's rights to the debt buyer.

> The existence of a contract between Ramirez and Household Bank is undisputed, but the question remains whether the contract was written or unwritten for statute of limitations purposes. There has been no evidence presented of a written contract, stating all the essential terms of an agreement. Indeed, Illinois law requires that a plaintiff suing for violation of a written contract must attach that contract to its complaint; if it does not, the contract is considered unwritten. 735 ILCS 5/2-606; Barnes v. Peoples Gas Light and Coke Co., 103 Ill. App. 2d 425, 428, 243 N.E.2d 855, 857 (Ill. App. Ct. 1968); O.K. Elec. Co. v. Fernandes, 111 Ill. App. 3d 466, 444 N.E.2d 264, 267 (Ill. App. Ct. 1982); Plocar v. Dunkin' Donuts of Am., Inc., 103 Ill. App. 3d 740, 749, 431 N.E.2d 1175 (Ill. App. Ct. 1981).
>
> Palisades did not attach a copy of a written credit card contract to its November 20, 2006 debt-collection complaint. The complaint did not include a recitation of the contract terms. Illinois permits a pleader to include an affidavit explaining the absence of the written contract. 735 ILCS 5/2-606. Palisades did not satisfy this provision either. Instead, Palisades attached an "Affidavit in Support of Plaintiff's Claim," stating that Ramirez owed Palisades $ 2,425.95 on her Household Bank account. The affidavit clearly does not constitute a written contract, and fails to state all the essential terms of a contract. See, e.g., Parkis v. Arrow Fin. Servs., No. 07 C 410, 2008 WL 94798, at *5 (N.D. Ill. Jan. 8, 2008) (Coar, J.) (citation omitted).

*   *   *

> The parties agree that many card issuers can change the terms of the original contract at will, by simply sending notice to the consumer, where the use of the card without objection constitutes acceptance of the new terms. Palisades cites Garber v. Harris Trust & Sav. Bank, 104 Ill. App. 3d 675, 678, 432 N.E.2d 1309 (Ill. App. Ct. 1982). The Illinois appellate court ruled that "a contract is not formed at the time of issuance of the credit card . . . a separate contract is created each time the card is used according to the terms of the card holder agreement at the time of such use." Id. Under this holding, even if an original written credit card contract existed and was attached to the collection complaint, parol evidence would still be needed to make the contract complete. See Parkis, 2008 WL 94798, at *5. In any event, because a written contract was not attached to the debt-collection complaint and no evidence has been proffered that a written contract exists, the contract must be considered "unwritten" under Illinois law. Id. The five-year statute of limitation plainly applies under Illinois law.

Ramirez, 2008 U.S. Dist. LEXIS 48722, at *8-10.

Judge Conlon agreed with Judge Coar that Harris Trust & Savings Bank v. McCray was not on point.

> Palisades relies on Harris Trust & Sav. Bank v. McCray, 21 Ill. App. 3d 605, 316 N.E.2d 209 (Ill. App. Ct. 1974) in arguing that all credit card agreements are considered written contracts. The Harris Trust court found that a credit card agreement constituted a loan contract rather than a sales contract. The appellate court's analysis did not address whether the credit card agreement was written or unwritten for statute of limitations purposes. The reasoning in Harris Trust does not apply to the present case, where the issue is whether

> Palisades sued on a written or unwritten contract. See, e.g., Parkis, 2008 WL 94798, at *6 (distinguishing Harris Trust from a similar set of facts).

Id. at 10-11.

The transaction at issue in McCray had occurred between four and five years prior to the filing of suit. The debtor did not argue for the application of the five-year statute because Harris Bank would have prevailed whether the five-year or the ten-year statute applied. Only application of the four-year Uniform Commercial Code statute of limitations for the sale of goods would have done McCray any good.

Recognizing the limited issue before it, the McCray court stated: "[t]he only question presented in this appeal is whether a credit card issuer may commence an action based upon the holder's failure to pay for the purchase of goods more than 4 years after the issuer's cause of action accrued." 21 Ill.App.3d at 606. To the extent it referred to the ten-year statute, the McCray court expressly noted the signed documents that existed in that case, including charge slips which expressly incorporated the account agreement.

Much has changed in credit card documentation in the 40 years since the McCray transactions occurred. At that time, banks generally required signed agreements and did not employ a practice of sending new terms to the consumer from time to time which were "accepted" by subsequent use of the card or failure to object. Certainly, no such theory is referred to as creating a contract in McCray. Since that time, the credit card industry has found it desirable to adopt the practice of changing the terms of agreements simply by mailing a notice to the cardholder. Legislatures in Delaware, South Dakota, and Virginia, where many credit card issuers are chartered in order to take advantage of the absence of state interest rate regulation, were persuaded to expressly authorize the practice by statute. 5 Del. C. §952; S.D. Codified Laws § 54-11-10; VA Code 6.1-330.63(D).

Recognizing such enactments, Illinois courts now hold that cardholder agreements are not contracts but "standing offers to extend credit," subject to "modification

at will," which are accepted "each time the card is used according to the terms of the cardholder agreement at the time of such use." Garber v. Harris Trust & Savings Bank, 104 Ill. App. 3d 675, 679, 432 N.E.2d 1309, 1311 (1st Dist. 1982); *accord* Ragan v. AT&T Corp., 355 Ill.App.3d 1143, 1149, 824 N.E.2d 1183 (5th Dist. 2005); Reyes v. Equifax Credit Info. Servs., 03 C 1377, 2003 U.S. Dist. LEXIS 22235 (N.D. Ill. Dec. 10, 2003); Frerichs v. Credential Servs. Int'l, 98 C 3684, 1999 U.S. Dist. LEXIS 22811, at *21 (N.D. Ill., Oct. 1, 1999). Other decisions likewise hold that credit card agreements are terminable at will and that their terms may be changed by sending a notice with a monthly statement which the cardholder does not reject. Taylor v. First North American National Bank, 325 F. Supp. 2d 1304, 1313 (M.D. Ala. 2004); Battels v. Sears National Bank, 365 F. Supp. 2d 1205, 1209 (M.D. Ala. 2005); Grasso v. First USA Bank, 713 A.2d 304 (Del. Super. Ct. 1998); Edelist v. MBNA Am. Bank, 790 A.2d 1249 (Del. Super. Ct. 2001); see Banc One Fin. Servs. v. Advanta Mtge. Corp. USA, 00 C 8027, 2002 U.S. Dist. LEXIS 960 (N.D. Ill. Jan. 23, 2002).

As discussed below, a necessary consequence of the practice of changing the terms of a credit card agreement by mere notice is that a credit card agreement subject to such alteration is not a "written contract" within the meaning of 735 ILCS 5/13-206. In addition, many credit card issuers (e.g., American Express) invite consumers to apply for cards by telephone. And, all credit card issuers authorize "card not present" transactions in which information is supplied by telephone or Internet without the cardholder signing for a transaction. Rules for Visa Merchants, Card Acceptance and Chargeback Management Guidelines, pp. 39-51 (discussing "card not present" transactions).[13] If the card is issued following a telephone conversation, there is no signed application, and if it is used in a "card not present" transaction, there is no sales slip to be signed. Indeed, sales slips often are not even signed in "card present" transactions, particularly for charges of modest amounts.

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13 http://usa.visa.com/download/merchants/card_acceptance_guide.pdf.

Illinois decisions since McCray leave no doubt that not every "credit card" or "charge card" is a written contract for limitations purposes. In addition to Parkis, the Fifth District of this Court held in Nicolai v. Mason, 118 Ill. App. 3d 300; 454 N.E.2d 1049 (5th Dist. 1983), that a claim based on a "charge account" at a retail store (the debt had been purchased by a debt buyer) was governed by the five-year statute, affirming the trial court's conclusion that

> [A]lthough the defendant Richard Mason had made a written application for credit, there was no evidence adduced that each of the purchases in question was made pursuant to a written contract. Accordingly, the court concluded that, since all of defendants' purchases at Schermer's were made more than five years prior to the commencement of suit, the instant action was barred by the five-year statute of limitations applicable to oral contracts. Ill. Rev. Stat. 1981, ch. 83, par. 16, current version at Ill. Rev. Stat. 1981, ch. 110, par. 13 -- 205.

Id. at 301.

In addition, in Weniger v. Arrow Financial Services, 03 C 6213, 2004 U.S. Dist. LEXIS 23172, 2004 WL 2609192 (N.D. Ill. Nov. 18, 2004), Foreman v. PRA III, LLC, 05 C 3372, 2007 U.S. Dist. LEXIS 15640 (N.D. Ill. March 5, 2007); and Rawson v. Credigy Receivables, 05 C 6032, 2006 U.S. Dist. LEXIS 6450, 2006 WL 418665 (N.D. Ill. Feb. 16, 2006), all of which also arose under the FDCPA, the Court found that complaints stated a cause of action where plaintiffs alleged that defendants brought suit on a credit card and that there was no written contract between the parties.

The notion that the law is settled in a manner contrary to the trial court's decision in this matter, or that all credit cards are governed by the ten-year statute regardless of the factual existence of a "written contract" in the particular case, is unsupportable. Furthermore, the notion that all credit cards are governed by the ten-year statute regardless of the documentation that is proven in a particular case is logically absurd. If the arguments of Portfolio Acquisitions and its *amici* are accepted, a credit card issued in response to a telephone

solicitation and used solely in "card not present" transactions would constitute a "written contract," even though the putative debtor never signed anything and parol evidence is essential to establish liability.

B. A CONTRACT FORMED WITHOUT SIGNATURES, BY ONE PARTY PERIODICALLY SENDING THE OTHER TERMS THAT ARE THEREAFTER USED AS THE BASIS FOR TRANSACTIONS, DOES NOT MEET THE SUPREME COURT'S TEST FOR A "WRITTEN CONTRACT" BECAUSE PAROL EVIDENCE IS REQUIRED TO PROVE BOTH THE TERMS IN EFFECT AT ANY TIME AND THEIR ADOPTION BY CONDUCT.

Portfolio Acquisitions acknowledges that it is proceeding on the theory that "[w]hen the customer uses the card it is acceptance of" the current terms and "[a] separate contract is formed each time the consumer uses the card." (Appellant's brief, p. 17). A necessary consequence of the fact that the terms of a credit card agreement may be changed by mere notice is that an agreement subject to such alteration is not a "written contract" within the meaning of 735 ILCS 5/13-206. The essence of a "written contract" within the meaning of §13-206 is that there is a single document that identifies the parties, states the date of the agreement; contains the signatures of the parties, and sets forth all terms of the parties' agreement, so that upon authentication of the document there is no issue as to the terms of the deal. Brown v. Goodman, 147 Ill.App.3d 935, 940, 498 N.E.2d 854 (1st Dist. 1986). This is never the case where the writing provides it can be changed by notice without a signature.

Apart from the multiple inconsistencies and misrepresentations demonstrated in this case, a court can never conclude that a contract that provides for change upon notice reflects the terms in effect at any particular time without parol testimony concerning what change notices were (or were not) sent to the cardholder from time to time and establishing the cardholder's acceptance of the terms through use of the card. Since the essence of a "written contract" is that the court can "avoid the resort to parol evidence," Brown, 147 Ill. App. 3d at 940, a contract expressly providing for change by notice and continued dealings is not a "written contract."

> In the parol evidence cases, the dispositive question is whether evidence of oral representation is necessary to establish the existence of a written contract. If such evidence is required, then the contract is treated as oral for purposes of the statute of limitations. In other words, where a party is claiming a breach of written contract, but the existence of that contract or one of its essential terms must be proven by parol evidence, the contract is deemed oral and the five-year statute of limitations applies.

Armstrong, 174 Ill. 2d at 288.

In Toth this Court held that periodic statements that one party sent to the other and which were accepted, either expressly or by failure to object, did not create a "written contract" or other "evidences of indebtedness in writing" for purposes of 13-206. 207 Ill.App.3d at 669-670 A credit card issuer's sending notices is no different. Portfolio Acquisitions' discussion of Toth at pp. 22-22 of its brief is unpersuasive. The Court reasoned that in order to "even attempt to establish defendant's alleged promise to pay, plaintiff must introduce some parol evidence, whether it be plaintiff's rendering of statements to defendant, defendant's lack of objection or the prior dealings between the parties." 207 Ill.App.3d at 670. And this discussion in Toth was cited with approval by the Supreme Court in Armstrong v. Guigler, 174 Ill. 2d at 288. Similarly, in Classified Ventures, Inc. v. Wrenchead, Inc., 06 C 2373, 2006 U.S. Dist. LEXIS 77359 (N.D. Ill. Oct. 11, 2006), the court held that the need to use parol evidence to show which of several versions of a contract was in effect made the contract not one wholly in writing.

The same reasoning applies to the hodgepodge of questionable, contradictory papers attached to the Second Amended Complaint in the case at bar which, for the same reasons, cannot establish the existence of a written contract.

C. A CONTRACT MAY EXIST IN THIS CASE, BUT IT CERTAINLY IS NOT A "WRITTEN CONTRACT."

The contention that the Second Amended Complaint in this matter alleges a "written contract" under the standards enunciated by the Illinois Supreme Court cannot be given serious consideration. There is no single, integrated document from which "all essential terms of the contract, including the identity of the parties, are in writing and can be ascertained from the written instrument itself." Brown v. Goodman, 147 Ill. App. 3d at 940-41. The Second Amended Complaint, the exhibits thereto, and Portfolio Acquisitions' brief are hopelessly inconsistent with respect to (1) who originally issued the credit card – was it The Prudential Bank, Direct Merchants Bank, or GE Capital Consumer Card Company? and (2) the actual terms of the credit card agreement. None of the pages of the purported Cardholder Agreement refers to the cardholder by name or account number, and close examination of the three pages of the exhibit show that the purported "Cardholder Agreement" is a composite of pages from two or three different agreements that have been presented to this Court and the trial court as a single document. Furthermore, one of the pages of the "Cardholder Agreement" indicates that it is intended for use when a card is first issued, and Portfolio Acquisitions states in its brief (Appellant's Br., p. 9) that the account was not initially created by Direct Merchants Bank but was transferred to Direct Merchants Bank as an existing account by GE Select.

The only thing that is clear from the exhibits is that Direct Merchants Bank did exercise its right (last column on the second page of Cmplt., Exhibit B, numbered (4)) to "change or terminate any term of this agreement or add new terms at any time, without limitation, including adding or increasing fees, increasing your monthly minimum payment and increasing the rate or amount of finance charges, or changing the method of computing the balance upon which finance charges are assessed," by "prior written notice . . . when required by applicable law," without the signature of the cardholder.

The complaint and appellant's arguments are similarly inconsistent with respect to the purported account billing statements. The nine statements are from two different banks

with two different addresses, contain two different account numbers, and provide for two different rates of interest. Parol evidence is clearly needed to show whether they pertain to the same account and, even if they do, what rate of interest applied from time to time. Compare Ramirez, 2008 U.S. Dist. LEXIS 48722. Certainly, nothing in these documents establishes that they actually were sent, retained without objection, or that the defendant agreed to the terms or the balances claimed due. Portfolio Acquisitions' contention that the billing statements attached as Exhibit C to the Second Amended Complaint "clearly indicate all of the essential terms of the promise to pay money," including "the names of the party, the amount owed, the interest rate on the unpaid portion of the debt, who and where to make payment to . . . ." (Appellant's Brief, p. 20), has absolutely no basis in fact.

Literally tens of thousands of cases are filed by Illinois debt buyers each year, generally based on the sort of careless, if not outright fraudulent, "documentation" and "affidavits" exemplified by the "evidence" in this case. To allow debt buyers to do this for ten years instead of five will result in Illinois residents being subjected to fraudulent lawsuits by debt buyers, and being potentially subjected to multiple claims for the same debts. For example, a cardholder might be sued four years after default, then again nine years after default, when a subsequent debt buyer purchases the account with inadequate documentation relating to the first suit.

In addition, even if the debts are genuine and owed to the plaintiffs bringing the suits, people are entitled to put their economic problems behind them after a reasonable period of time and try to get on with their lives. Illinois does "not tolerate a principle which will allow a man of litigious disposition to go about the community, hunting up stale claims, or even meritorious ones, against his neighbors, either for the purpose of harassing them, or for speculation." Birner v. General Motors Corp., 06-1148, 2007 U.S.Dist. LEXIS 5709, at *4-5 (C.D.Ill., Jan. 26, 2007), citing McGoon v. Ankeny, 11 Ill. 558 (1850), and Puckett v. Empire Stove Co., 183 Ill.App.3d 181, 539 N.E.2d 420 (5th Dist. 1989). Allowing a professional debt

buyer litigant to buy 9-year old debts for two to six cents on the dollar and bring suit on them violates this principle, while serving no socially beneficial purpose.

Plaintiff's *amici* DBA and NARCA suggest that they will be able to pay creditors more for stale debts if they have a longer time in which to sue. However, the amounts paid for these old debts are so minimal that it is inconceivable that it makes any difference to major financial institutions. Further, DBA and NARCA (DBA/ NARCA Br., pp. 8-11) cite cases from other states for propositions for which they do not stand. For example, the trial court decision in Manufacturers & Traders Trust Co. v. Lindauer, 513 N.Y.S.2d 629 (Sup. Ct. 1987), simply holds that a credit card is a contract – a proposition not disputed here – not that it is a written contract for purposes of any statute of limitations distinguishing between written and unwritten contracts (New York does not make such a distinction). Generally, the statutes of limitations of the various states are unique, and decisions under one are not persuasive with respect to the meaning of another.

In this regard, it bears noting that, unlike Illinois, most large states allow four to six years in which to bring suit on a contract, usually without distinction between written and non-written contracts:

State	Period	Citation
California	2-4 years	Code of Civil Proc., §§337, 339
Florida	4-5 years	Fla. Stats. 95.11
Georgia	4-6 years	Ga. Code §§9-3-24 to 9-3-26
Indiana	6 years	IC §34-11-2-9 (shortened from 10 in 1982)
Massachusetts	6 years	Mass. G.L., ch. 260 §2
New Jersey	6 years	N.J.S.A. §2A:14-1
New York	6 years	NY Civ. Prac. Law and Rules §213
Pennsylvania	4 years	Pa. Stat. Ann., Tit. 42, §5525

Texas	4 years	Tex. Civ. Prac. & Remed. Code §16.004
Wisconsin	6 years	Wisc. Stats. §893.43

The ten years allowed by 735 ILCS 5/13-206 is significantly longer than average. Accordingly, in evaluating cases from other jurisdictions, it must be kept in mind that the policy considerations involved in allowing suit on incomplete documentation for, e.g., four years instead of two years do not necessarily apply where the question is ten years instead of five.

"The purpose of a statute of limitation is to discourage the presentation of stale claims and to encourage diligence in the bringing of actions." Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc., 61 Ill. 2d 129, 137, 334 N.E.2d 160 (1975). Here, the claimed failure to pay occurred in 1999 or 2000. Apparently nothing was done until the supposed debt was purportedly sold to Portfolio Acquisitions five years later, presumably for a couple of cents on the dollar. Suit was not filed until three months later, on June 28, 2005, and Ms. Feltman was not served until December 10, 2005, at which time she discovered that she had been sued based on questionable and facially inconsistent documentation concerning events that supposedly had occurred six years earlier. This is exactly what statutes of limitation are intended to protect against, and the notion that debt buyers can file 100,000 lawsuits per year against Illinois residents on this basis shocks the conscience.

D. THE "COMPOSITE DOCUMENT THEORY" HAS BEEN REJECTED AS A BASIS FOR FINDING A "WRITTEN CONTRACT" WITHIN THE MEANING OF 735 ILCS 5/13-206

Portfolio Acquisitions acknowledges that "Currently, Illinois gives a strict interpretation of a written contract for the purposes of the statute of limitations," but argues that the Court nevertheless should adopt the more liberal "composite document theory" applicable to security agreements and the statute of frauds. (Appellant's Br., p. 23) This argument already has been rejected, because the two tests serve different purposes. The security agreement/statute of frauds test requires sufficient written indicia of a contract, using parol

evidence if necessary, without undue danger of fraud. The test for determining whether the five-year or ten-year statute of limitations applies inquires into whether there is an integrated writing, so that parol evidence is totally unnecessary to establish the terms of the deal. The Legislature clearly intended to require different degrees of certainty, depending on how long after the event suit is brought.

Accordingly, "[t]he test for whether a contract is written under the statute of limitations in Illinois is not whether the contract meets the requirements of the Statute of Frauds, but whether all essential terms of the contract, including the identity of the parties, are in writing and can be ascertained from the written instrument itself." Brown v. Goodman, 147 Ill. App. 3d at 940-41 (emphasis added).

The danger of fraud or error is exemplified by the "documentation" in the case at bar, where the "cardholder agreement" attached to the Second Amended Complaint is a composite that was pieced together from two or more original documents. Documents frequently are attached to collection complaints that appear to be either similar composites or "generic" documents that have no connection to the particular account. *See, e.g.*, complaint in Preto v. HBLC, 08cv1728 (N.D. Ill.), documenting a similar attempt by another debt buyer. Likewise, in Palisades Collection LLC v. Haque, 2006 N.Y. Misc. LEXIS 4036; 235 N.Y.L.J. 71 (Civ. Ct. Queens Co., April 13, 2006), a debt buyer's claim was thrown out based on its use of "generic" documents.

> 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. . . .
>
> 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. . .
>
> . . . . 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.

Id. Therefore, this Court should reject the "composite document" theory in this case.

CONCLUSION

Allowing debt buyers to purchase debts for two to six cents on the dollar, hunt down the supposed debtors, and file suit for the full amount plus interest at high rates up to 10 years after the fact, based on the sort of questionable "documentation" and "affidavits" offered

in the case at bar, is nothing short of unconscionable. Five years is an ample period within which to bring suit on legitimate debts, and is the period the General Assembly determined to allow fair disposition of claims which depend in part on memory and parol evidence.

The record in this case does not establish that Portfolio Acquistions' cause of action is based on a "written contract" or any other sort of integrated written document justifying application of the ten-year statute of limitations. Neither the underlying credit card agreement nor the contracts transferring rights in that agreement to plaintiff is a complete, integrated written document of the sort required for the ten-year statute. On the contrary, it illustrates the sort of abusive debt buyer litigation practices that require application of the shorter, five-year statute, so that Illinois residents are not subjected to unfounded lawsuits between five and ten years after the events complained of, when it is no longer possible "to afford a defendant a fair opportunity to investigate the circumstances upon which liability against him is predicated while the facts are accessible." Porter v. Decatur Mem. Hosp., 227 Ill. 2d 343, 358, 882 N.E.2d 583, 591 (2008) (quoting Zeh v. Wheeler, 111 Ill. 2d 266, 489 N.E.2d 1342 (1986)).

Amici respectfully urge the Court to affirm the decision below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Daniel A. Edelman, certify that this brief complies with the requirements of Supreme Court Rules 341(a) and (b). The length of this brief is 30 pages.

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