REPRESENTING CONSUMERS IN LITIGATION WITH DEBT BUYERS

October 18, 2008

Daniel A. Edelman

EDELMAN, COMBS, LATTURNER & GOODWIN, LLC

I. BACKGROUND OF DEBT BUYING INDUSTRY

A. Debt buying is a fast-growing business. By 2007, the amount of debt sold by the original creditors had risen to $110 billion per year. Eileen Ambrose, "Zombie Debt; Debt Can Come Back to Haunt You Years Later," The Baltimore Sun, May 6, 2007 pg. 1C.

B. Debts are typically sold for less than ten cents on the dollar

> The Court is aware of how the market for the sale of debt currently works, where large sums of defaulted debt are purchased, by a small number of firms, for between .04 and .06 cents on the dollar. . . . The entire industry is a game of odds, and in the end as long as enough awards are confirmed to make up for the initial sale and costs of operation the purchase is deemed a successful business venture. However, during this process mistakes are made, mistakes that may seriously impact consumers and their credit. The petition at bar is a specimen replete with such defects and the Court takes this opportunity to analyze the filing in detail, in hopes to persuade creditors, not simply to take more care in dotting their "i"s and crossing their "t"s in their filings, but to assure a minimum level of due process to the respondents.
>
> Why is this debt sold for such a cheap price? Certainly part of the reason is the poor prospects of payment these creditors expect from the defaulting individuals given their past delinquent payment history, while another part is undoubtably to avoid additional costs associated with debt collection. Further yet, is the simple fact that the proof required to obtain a judgment in the creditor's favor is lacking, usually as a result of poor record keeping on the part of the creditor. . . . .

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

II. COLLECTION ABUSES BY DEBT BUYERS

There are widespread reports of abusive collection practices by debt buyers. The practices complained of include:

A. Reaging debts on credit reports.

In 2004, the FTC recovered a $1.5 million civil penalty from debt buyer NCO. The FTC explained:

> . . . According to the FTC's complaint, defendants NCO Group, Inc.; NCO

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

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

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

B. Ignoring disputes and cease and desist requests

In June 2004, Minnesota's attorney general sued two collection agencies that represent debt buyers, Allied Interstate Inc. and JBC and Associates. The complaint against Allied alleged that the company initiated debt collection over the phone without sending a letter to the consumer. When consumers disputed the debt, the company did not tell consumers that the debt had to be disputed it in writing, nor did Allied inform the consumers of other rights under the law. Allied was also accused of continuing to call innocent consumers after learning that it had the wrong person or that the consumer did not owe the debt. The JBC lawsuit alleged that JBC unlawfully attempted to collect debts with threats of legal action that could not be taken. The complaint stated that JBC ignored timely disputes by consumers and continued collection efforts without providing the necessary verification as required by law and made threats of legal action for debts that are barred by the statute of limitations. "Minnesota Attorney General Sues Firms for Illegal Debt-Collection Tactics," St. Paul Pioneer Press, June 17, 2004,.

C. Collecting time-barred debts and debts discharged in bankruptcy

In January 2007 the Illinois Attorney General sued Arrow Financial Services for attempting to collect debts which were outside the statute of limitations or had been discharged in bankruptcy. The suit also accused Arrow of getting bank account information and withdrawing money without authorization. People v. Arrow Financial Servs LLC, 07 CH 2475 (Cook Co. Cir. Ct., filed 1/25/2007).

D. Collecting from the wrong person

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

> . . . In papers filed with the court, the agency charged that as much as 80 percent of the money CAMCO collects comes from consumers who never owed the original debt in the first place. Many consumers pay the money to get CAMCO to stop threatening and harassing them, their families, their friends, and their co-workers.
>
> According to the FTC, CAMCO buys old debt lists that frequently contain no documentation about the original debt and in many cases no Social Security Number for the original debtor. CAMCO makes efforts to find people with the same name in the same geographic area and tries to collect the debt from them – whether or not they are the actual debtor. In papers filed with the court, the FTC alleges that CAMCO agents told consumers – even consumers who never owed the money – that they were legally obligated to pay. They told consumers that if they did not pay, CAMCO could have them arrested and jailed, seize their property, garnish their wages, and ruin their credit. All of those threats were false, according to the FTC. . . . (http://www.ftc.gov/opa/2004/12/camco.htm)

E. Collecting debts that the "debt buyer" does not own

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

> More collection agencies are turning to the debt resale market as a place to pick up accounts to collect on. Too small to buy portfolios directly from major credit issuers, they look to the secondary market where portfolios are resold in smaller chunks that they can handle.
>
> But what they sometimes find in the secondary market are horror stories: The same portfolio is sold to multiple buyers; the seller

> doesn't actually own the portfolio put up for sale; half the accounts are out of statute; accounts are rife with erroneous information; access to documentation is limited or nonexistent. . . . .

Corinna C. Petry, Do Your Homework; Dangers often lay hidden in secondary market debt portfolio offerings. Here are lessons from the market pros that novices can use to avoid nasty surprises, Collections & Credit Risk, March 2007, pg. 24 Vol. 12 No. 3.

2. Debt buyer American Acceptance filed a lawsuit alleging that a broker of charged-off debts sold it debts to which it did not have title. American Acceptance Co. v. Goldberg, 2:08cv9 (N.D.Ind.).

3. Another debt buyer, Hudson & Keyse, filed suit alleging that the same debt broker obtained information about consumer debts owned by Hudson & Keyse and used the information to try to collect the debts for its own account, even though it didn't own them. Hudson & Keyse, LLC v. Goldberg & Associates, LLC, 07-81047-civ (S.D.Fla., filed Nov. 5, 2007).

4. A similar suit, alleging that the broker resold accounts it did not own, was filed by Old National Bank, Old National Bank v. Goldberg & Associates, 9:08-cv-80078-DMM (S.D.Fla., Jan. 24, 2008).

5. The same debt broker is accused in another complaint of selling 6,521 accounts totaling about $40 million face value which it did not own. RMB Holdings, LLC v. Goldberg & Associates, LLC, 3:07-cv-00406 (E.D.Tenn., filed Oct. 29, 2007). On May 29, 2008, a decision was issued in favor of the plaintiff in that case. RMB Holdings, LLC v. Goldberg & Associates, LLC, 3:07-cv-00406 (E.D.Tenn.), Dkt. # 24. The decision finds (p. 2) that "RMB began making attempts to collect the accounts it purchased from Goldberg," even though "Goldberg never delivered title or ownership of the accounts to RMB."

6. Other debt buyers have voiced similar complaints about defective title to debts. "Florida Broker Faces Multiple Lawsuits," Collections & Credit Risk, April 2008, p. 8.

7. There are reported cases in which debtors have been subjected to litigation because they "settled" with A and then B claimed to own the debt. Smith v. Mallick, 514 F.3d 48 (D.C.Cir. 2008) (commercial debt purchased and resold by debt buyer, debt buyer [possibly fraudulently] settles debt it no longer owns, settlement held binding because notice of assignment not given, but obligor subjected to litigation as result). See also, Miller v. Wolpoff & Abramson, LLP, 1:06-CV-207-TS, 2008 U.S. Dist. LEXIS

12283 (N.D.Ind., Feb. 19, 2008), where a debtor complained he had been sued twice on the same debt; Dornhecker v. Ameritech Corp., 99 F. Supp. 2d 918, 923 (N.D.Ill. 2000), where the debtor claimed he settled with one agency and was then dunned by a second for the same debt, and Northwest Diversified, Inc. v. Desai, 353 Ill.App.3d 378, 818 N.E.2d 753 (1st Dist. 2004), where a commercial debtor paid the creditor only to be subjected to a levy by a purported debt buyer.

8. In Wood v. M&J Recovery LLC,. CV 05-5564, 2007 U.S. Dist. LEXIS 24157 (E.D.N.Y., April 2, 2007), a debtor complained of multiple collection efforts by various debt buyers and collectors on the same debt, and the defendants asserted claims against one another disputing the ownership of the portfolio involved. Shekinah alleged that it sold a portfolio to NLRS, that NLRS was unable to pay, that the sale agreement was modified so that NLRS would only obtain 1/5 of the portfolio, and that the 1/5 did not include the plaintiff's debt. Portfolio claimed that it and not Shekinah is the rightful owner of the portfolio.

9. In Associates Financial Services Co. v. Bowman, Heintz, Boscia & Vician, P.C., IP 99-1725-C-M/S, 2001 U.S. Dist. LEXIS 7874, *9-12 (S.D.Ind., April 25, 2001), later opinion, 2004 U.S. Dist. LEXIS 6520 (S.D. Ind., Mar. 31, 2004), allegations were made that a creditor had continued to collect accounts allegedly sold to a debt buyer.

10. In Overcash v. United Abstract Group, Inc., 549 F. Supp. 2d 193 (N.D.N.Y. 2008), a debt that had been settled was sold and the buyer attempted to collect $40,000 more than the original amount of the debt.

11. Recently, courts have dismissed numerous foreclosure and collection lawsuits to have been filed in the names of entities that do not own the purported debts. In re Foreclosure Cases, 1:07CV2282 and 14 others, 2007 U.S. Dist. LEXIS 84011, 2007 WL 3232430 (N.D. Ohio Oct. 31, 2007). In the Ohio cases, foreclosure complaints alleged that the named plaintiffs were the holders and owners of the notes and mortgages, but they were not the original payees and there was nothing showing that the plaintiffs owned the notes and mortgages at the time suit was filed. Dismissing the cases, the court commented (*8-9):

> There is no doubt every decision made by a financial institution in the foreclosure process is driven by money. And the legal work which flows from winning the financial institution's favor is highly lucrative. There is nothing improper or wrong with financial institutions or law firms making a profit -- to the contrary , they should be rewarded for sound business and legal practices. However, unchallenged by underfinanced opponents, the

> institutions worry less about jurisdictional requirements and more about maximizing returns. Unlike the focus of financial institutions, the federal courts must act as gatekeepers, assuring that only those who meet diversity and standing requirements are allowed to pass through. Counsel for the institutions are not without legal argument to support their position, but their arguments fall woefully short of justifying their premature filings, and utterly fail to satisfy their standing and jurisdictional burdens. The institutions seem to adopt the attitude that since they have been doing this for so long, unchallenged, this practice equates with legal compliance. Finally put to the test, their weak legal arguments compel the Court to stop them at the gate.

Subsequently, dozens of other mortgage cases were thrown out or had show cause orders entered for the same reason. In re Foreclosure Cases, 07-cv-166 and 18 others, 2007 U.S. Dist. LEXIS 90812 (S.D. Ohio Nov. 27, 2007); In re Foreclosure Cases, 521 F. Supp. 2d 650 (S.D.Ohio. 2007); In re Foreclosure Cases, 07-cv-166 and 14 others, 2007 U.S. Dist. LEXIS 95673 (S.D.Ohio, Dec. 27, 2007); NovaStar Mortgage, Inc. v. Riley, 3:07-CV-397, 2007 U.S. Dist. LEXIS 86216 (S.D.Ohio, Nov. 21, 2007); NovaStar Mortgage, Inc. v. Grooms, 3:07-CV-395, 2007 U.S. Dist. LEXIS 86214 (S.D.Ohio., Nov. 21, 2007); HSBC Bank USA v. Rayford, 3:07-CV-428, 2007 U.S. Dist. LEXIS 86215 (S.D.Ohio., Nov. 21, 2007); Everhome Mtge. Co. v. Rowland, 2008 Ohio 1282; 2008 Ohio App. LEXIS 1103 (Ohio App. March 20, 2008) (judgment for plaintiff reversed because it failed to introduce assignment or establish that it was the holder of the note and mortgage); Deutsche Bank National Trust Co. v. Castellanos, 277/07, 2008 NY Slip Op 50033U; 18 Misc. 3d 1115A; 2008 N.Y. Misc. LEXIS 44; 239 N.Y.L.J. 16 (Kings Co., N.Y., Sup. Ct., Jan. 14, 2008) (Justice Arthur M. Schack); HSBC Bank USA, N.A. v. Valentin, 15968/07, 2008 NY Slip Op 50164U; 14 Misc. 3d 1123A; 2008 N.Y. Misc. LEXIS 229 (Kings Co., N.Y., Sup. Ct., January 30, 2008); HSBC Bank USA, N.A., v. Cherry, 21335/07, 2007 NY Slip Op 52378U; 18 Misc. 3d 1102A; 2007 N.Y. Misc. LEXIS 8279; 239 N.Y.L.J. 2 (Kings Co., N.Y. Sup. Ct., Dec. 17, 2007); Deutsche Bank National Trust Co. v. Castellanos, 15 Misc. 3d 1134A; 841 N.Y.S.2d 819 (Kings. Co., N.Y. Sup. Ct. 2007); see also, Deutsche Bank National Trust Co. v. Steele, No. 2:07-cv-886, 2008 U.S. Dist. LEXIS 4937 (S.D.Ohio. January 8, 2008); DLJ Mortgage Capital, Inc. v. Parsons, 2008 Ohio 1177 (7th Dist. Ct. App. March 13, 2008); Washington Mutual Bank, F.A. v. Green, 156 Ohio App.3d 461, 806 N.E.2d 604 (2004).

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

13. In addition to purported debt buyers attempting to collect debts which they do not own, or from the wrong person, many credit card and other consumer debts are "securitized" by the original issuer of credit. This means that the beneficial ownership of the receivables is transferred to a "special purpose entity," typically a trust. The "special purpose entity" sells securities backed by the cash flows from the receivables. Usually, the issuer or an affiliate retains "servicing" of the receivables. E.g., Bank of New York v. FDIC, 508 F.3d 1, 3 (D.C.Cir. 2007); J. P. Morgan Sec., Inc. v. Spiegal Creditor Trust, 03-11540, 06cv13477, 2007 U.S.Dist. LEXIS 45589 (S.D.N.Y., June 19, 2007); In re Spiegel, Inc. Securities Litigation, 02 C 8946, 2005 U.S.Dist. LEXIS 15776 (N.D.Ill., July 29, 2005). It is therefore possible that the party purporting to transfer the debt to the debt buyer did not own that which it purported to transfer.

14. No consumer or attorney representing a consumer should ever rely on a debt buyer's assertion that it owns the debt, without a proper chain of title.

III. DEFENSE OF DEBT BUYER COLLECTION CASES – DO YOU HAVE A PROPER PLAINTIFF

A. The Illinois Collection Agency Act was amended to include debt buyers as "collection agencies" effective 1/1/08. This was done by:

1. Amending 225 ILCS 425/3(d) to provide that "A person, association, partnership, corporation, or other legal entity acts as a collection agency when he or it . . . Buys accounts, bills or other indebtedness and engages in collecting the same." Previously coverage was limited to a person who "Buys accounts, bills or other indebtedness with recourse and engages in collecting the same". By deleting "with recourse," the legislature intended to classify as a "collection agency" persons who buy charged-off debts for their own account.

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

B. This means that debt buyers who file lawsuits have to be licensed. Failure to obtain a license may be grounds for dismissal. LVNV Funding v. Minnick, 2008 AR 000868 (DuPage Co. Cir. Ct.)

C. The amendment may also make applicable the special assignment requirements of 8b of the Collection Agency Act, 225 ILCS 425/8b. Section 8b provides:

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

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

(i) the effective date of the assignment; and

(ii) the consideration for the assignment.

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

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

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

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

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

D. Failure to establish ownership of the debt deprives the debt buyer of standing to

sue. In Unifund CCR Partners v. Cavender, 14 Fla. L. Weekly Supp. 975b (Fla. County Court, Orange County July 20, 2007), the court held :

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

IV. DEFENSE OF DEBT BUYER COLLECTION CASES – ATTACKS ON COLLECTION PLEADINGS

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

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

> **(a) The assignee and owner of a non-negotiable chose in action may sue thereon in his or her own name. Such person shall in his or her pleading on oath allege that he or she is the actual bona fide owner thereof, and set forth how and when he or she acquired title. . . .**

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

of action. N. & G. Taylor Co. v. Anderson, supra. The section is former section 22 of the Civil Practice Act of 1933.

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

735 ILCS 5/2-606 provides:

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

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

At the time the parties' rights are determined, actual assignments sufficient to vest title to the obligation sued upon in the plaintiff must be in the record. Bayview Loan Servicing, L.L.C. v. Nelson, 5-06-0664, 2008 Ill. App. LEXIS 596, 890 N.E.2d 940 (Ill.App., 5th Dist., June 16, 2008).

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

Small claims are governed by Rule 282:

> **(a) Commencement of Actions. An action on a small claim may be commenced by paying to the clerk of the court the required filing fee and filing a short and simple complaint setting forth (1) plaintiff's name, residence address, and telephone number, (2) defendant's name and place of residence, or place of business or regular employment, and (3) the nature and amount of the plaintiff's claim, giving dates and other relevant information. If the claim is based upon a written instrument, a copy thereof or of so much of it as is relevant must be copied in or attached to the original and all copies of the complaint, unless the plaintiff attaches to the complaint an affidavit stating facts showing that the instrument is unavailable to him.**

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

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

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

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

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

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

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

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

V. DEFENSE OF DEBT BUYER COLLECTION CASES – RIGHT TO OBTAIN VERIFICATION OF DEBT UNDER FAIR DEBT COLLECTION PRACTICES ACT/ PROOF OF TITLE UNDER UNIFORM COMMERCIAL CODE

A. The Fair Debt Collection Practices Act entitles the consumer to verification of the debt if requested within 30 days of initial communication from debt collector. 15 U.S.C. §1692g.

B. Cases are unclear as to what is sufficient under the FDCPA. Clark v. Capital Credit & Collection Servs., 460 F.3d 1162 (9th Cir. 2006); Chaudhry v. Gallerizzo, 174 F.3d 394 (4th Cir. 1999); Stonehart v. Rosenthal, 01 Civ. 651, 2001 WL 910771 (S.D.N.Y., Aug. 13, 2001); Erickson v. Johnson, No. 05-427 (MJD/SRN), 2006 U.S. Dist. LEXIS 6979 (D.Minn. Feb. 22, 2006); Recker v. Central Collection Bureau, 1:04-cv-2037- WTL-DFH, 2005 U.S. Dist. LEXIS 24780 (S.D.Ind., October 17, 2005); Monsewicz v. Unterberg & Assocs., P.C., 1:03-CV-01062-JDT-TAB, 2005 U.S. Dist. LEXIS 5435, at *15 (S.D. Ind. Jan. 25, 2005); Semper v. JBC Legal Group, No. C04-2240L, 2005 U.S. Dist. LEXIS 33591 (W.D.Wash. Sept. 6, 2005); Mahon v. Credit Bureau of Placer County Inc., 171 F.3d 1197, 1203 (9th Cir. 1999) (debt collector properly verified debt by contacting the original creditor, verifying the nature and balance of the outstanding debt, reviewing the efforts the original creditor made to obtain payment, and establishing that the balance remained unpaid); Spears v. Brennan, 745 N.E.2d 862, 878-79 (Ind. App. 2001) (a copy of the original debt instrument does not verify that there is an existing unpaid balance and does not satisfy the verification requirement of § 1692g(b)).

C. State law rights are better. In addition to security interests, Article 9 of the Uniform Commercial Code regulates the sale of accounts receivable (because notice of such sales is given using the same recording system as for security interests).

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

2. Section 9-406 is as follows:

§ 810 ILCS 5/9-406. Discharge of account debtor; notification of assignment; identification and proof of assignment; restrictions on

assignment of accounts, chattel paper, payment intangibles, and promissory notes ineffective

Sec. 9-406. Discharge of account debtor; notification of assignment; identification and proof of assignment; restrictions on assignment of accounts, chattel paper, payment intangibles, and promissory notes ineffective.

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

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

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

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

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

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

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

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

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

even if the account debtor has received a notification under subsection (a).

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

> **(1) prohibits, restricts, or requires the consent of the account debtor or person obligated on the promissory note to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, the account, chattel paper, payment intangible, or promissory note; or**
>
> **(2) provides that the assignment or transfer or the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the account, chattel paper, payment intangible, or promissory note.**

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

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

> **(1) prohibits, restricts, or requires the consent of the government, governmental body or official, or account debtor to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in the account or chattel paper; or**
>
> **(2) provides that the assignment or transfer or the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under**

the account or chattel paper.

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

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

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

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

VI. DEFENSE OF DEBT BUYER COLLECTION CASES – SUPREME COURT RULE 222

A. Frequently not complied with

B. Supreme Court Rule 222 applies to all cases subject to mandatory arbitration except small claims cases and all cases where money damages of $50,000 or less are sought. But it does not apply to small claims cases, evictions, family law cases or actions seeking equitable relief. Collection cases seeking between $10,000 and $50,000 are therefore covered.

C. The rule requires both parties to provide a list of case-related information to the opposing party, such as names and addresses of witnesses, factual basis of the claim, the legal theory of each claim or defense, etc., automatically, without request.

D. The disclosures must be made within 120 days of the filing of the responsive pleading to the complaint.

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

a Rule 213 interrogatory response, the failure to file a Rule 222 response will not trigger the exclusion of that evidence.

VII. DEFENSE OF DEBT BUYER COLLECTION CASES – IMPROPER AFFIDAVITS AND TESTIMONY

A. Because debt buyer personnel have no personal knowledge of the underlying transactions or the recordkeeping practices of the original creditor, debt buyers frequently submit affidavits and testimony that are incompetent, if not outright fraudulent.

B. A witness cannot testify that a file or business record shows that the defendant is in default. Such testimony is both hearsay (it is an out of court assertion by whoever prepared the records) and violates the best evidence (original document) rule (since it is an attempt to prove the contents of a document without introducing it). Wahad v. Federal Bureau of Investigation, 179 F.R.D. 429, 438 (S.D.N.Y 1998); In re McLemore, 2004 Ohio 680, 2004 Ohio App. LEXIS 591, *P9 (Ohio App. 2004); Nebraska v. Ward, 510 N.W.2d 320, 324 (Neb. App. 1993).. Nor can such testimony or affidavits be made sufficient by omitting the fact that it is based on a review of loan records, if it appears that the witness or affiant did not personally observe the underlying transactions. Hawaii Community Federal Credit Union v. Keka, 94 Haw. 213, 11 P.3d 1, 10 (2000).

C. If the witness has not personally observed all of the transactions, the only permissible form of testimony is to lay a proper foundation for business records showing the transactions and introduce the business records. It is the business records that constitute the evidence, not the testimony of the witness referring to them. If the records are voluminous, they can be summarized and made available, but under no circumstances is the testimony summarizing the records admissible if the records are not tendered. In re deLarco, 313 Ill.App.3d 107, 728 N.E.2d 1278 (2nd Dist. 2000). See generally, Luke v. Unifund CCR, 2-06-444-CV, 2007 Tex. App. LEXIS 7096 (2d Dist. Ft. Worth Aug. 31, 2007).

D. Similarly, if the plaintiff is suing by virtue of an assignment it must introduce an assignment identifying the particular debt. Oral testimony about the contents of a written assignment is not admissible.

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

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

right to collect this debt.

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

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

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

E. Pertinent cases:

Manufacturers & Traders Trust Co. v. Medina, 01 C 768, 2001 WL 1558278, 2001 U.S. Dist. LEXIS 20409 (N.D.Ill., Dec. 5, 2001) (affidavits by attorneys and others lacking personal knowledge insufficient).

Cole Taylor Bank v. Corrigan, 230 Ill.App.3d 122, 129, 595 N.E.2d 177, 181-82 (2nd Dist. 1992) (where bank officer's "affidavit essentially consisted of a summary of unnamed records at the bank," unaccompanied by records themselves and unsupported by facts establishing basis of officer's knowledge, foundation was lacking for admission of officer's opinion regarding amount due on loan).

In re A.B., 308 Ill.App. 3d 227, 236, 719 N.E.2d 348 (2nd Dist. 1999) ("Under the business records exception . . . it is the business record itself, not the testimony of a witness who makes reference to the record, which is admissible . . . . In other words, a witness is not permitted to testify as to the contents of the document or provide a summary thereof; the document speaks for itself. M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 803.10, at 825 (7th ed. 1999).")

Topps v. Unicorn Ins. Co., 271 Ill. App. 3d 111, 116, 648 N.E.2d 214 (1st Dist. 1995) ("under the business record exception to the hearsay rule, only the business record itself is admissible into evidence rather than the testimony of the witness

who makes reference to the record").

Northern Illinois Gas Co. v. Vincent DiVito Constr., 214 Ill. App. 3d 203, 215, 573 N.E.2d 243, 252 (2nd Dist. 1991) ("The business records exception to the hearsay rule (134 Ill. 2d R. 236) makes it apparent that it is only the business record itself which is admissible, and not the testimony of a witness who makes reference to the record").

"There is no hearsay exception . . . that allows a witness to give hearsay testimony of the content of business records based only upon a review of the records." Grant v. Forgash, 1995 Ohio App. LEXIS 5900, *13 (Ohio App. 1995).

F. Beware of "generic" contracts and account agreements which are not shown by competent testimony to govern the consumer's account. 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), the court held insufficient the offer of "generic" contracts which could not be linked to the defendant's account:

> Plaintiff attempted to introduce into evidence a document entitled "Terms and Conditions" which does not name defendant, contains no specific terms as to this defendant's particular account, and contains no signatures, claiming that AT&T Wireless sent it to defendant with the information regarding defendant's account. Ms. Bergman testified that plaintiff received it from AT&T Wireless along with the electronic transmission. In light of the earlier testimony that the account came to plaintiff via electronic transmission, it was not clear from the testimony how the "Terms and Conditions" document was sent along with the other information.
>
> Defendant examined the document and objected on the grounds that the document was not his contract with AT&T Wireless as it did not contain the terms of his agreement and that he had never received such a document from AT&T Wireless. As plaintiff could not demonstrate that AT&T Wireless ever sent defendant this document, as the document was introduced to prove the truth of its contents, and as plaintiff failed to lay an adequate foundation for its admission as a business record, the objection was sustained. [citation]
>
> Plaintiff again sought to introduce the "Terms and Conditions" document by claiming that AT&T Wireless sent the document to plaintiff as part of the purchase of defendant's account. Defendant again objected on the basis that it was not his contract, and the objection was again sustained. Plaintiff essayed several more times to introduce the "Terms and Conditions" contract, defendant objected, and each time the objection was sustained. Thus, plaintiff was unable to offer evidence of the terms of the agreement between AT&T Wireless and defendant. . . .

Similarly, in MBNA America Bank, N.A. v. Nelson, 15 Misc. 3d 1148A, 841 N.Y.S.2d 826 (N.Y.Civ. Ct. 2007), the court required proof of the actual terms of the agreement with the particular debtor (*7-9)

> Petitioner must tender the *actual* provisions agreed to, including any and all amendments [35], and not simply a photocopy of general terms to which the credit issuer may currently demand debtors agree. For example, Petitioner's Exhibit A which is labeled "Credit Card Agreement and Additional Terms and Conditions" lacks Respondent's signature. Neither does it contain a date indicating when these terms were adopted by MBNA nor how the terms were amended or changed, if at all, over the years appear anywhere on the document. Furthermore, the contract does not contain any name, account number or other identifying statements which would connect the proffered agreement with the Respondent in this action. In fact, petitioners appear to have attached the exact same photocopy, which as noted is not specific to any particular consumer, to many of its confirmation petitions. While on its face there is nothing necessarily unusual about a large commercial entity such as MBNA providing a standard form contract that all credit card consumers agree to, the burden nevertheless remains with MBNA to tie the binding nature of its boiler-plate terms to the user at issue in each particular case and to show that those terms are binding on each Respondent it seeks to hold accountable (the Respondent's intent to be bound *after notice of terms is established* can be shown via card use). The fact that MBNA issues a particular agreement with particular terms with the majority of its customers is of little relevance in determining the actual terms of the alleged agreement before this Court, if not linked directly to respondent in some way shape or form. Just because a petitioner provides a photocopy of a document entitled "Additional Terms and Conditions," certainly does not mean those terms are binding on someone who could have theoretically signed a completely different agreement when they were extended credit. Whether the physical card itself or some solicitation agreement with Respondent's signature referenced the terms and conditions, or whether the terms were made readily accessible to Respondent by e-mail or the internet, and Respondent was in fact aware of this, may all be relevant to an inquiry into constructive notice but such notice must still be established. At bar, MBNA Bank has failed to establish that the provided terms and conditions were the actual terms and conditions agreed to by Nelson. . . . .

G. Beware of “facsimile” records, which are computer-generated, non-image documents. Such records are an attempt to evade the requirements for introducing computer-generated evidence.

H. If records are generated by computer, a person familiar with the computer system who can testify that the output is an accurate reflection of the input must lay a foundation. In re Vinhnee, 336 B.R. 437 (9th Cir. BAP 2005). Among pertinent subjects of inquiry are "system control procedures, including control of access to the pertinent databases, control of access to the pertinent programs, recording and logging of changes to the data, backup practices, and audit procedures utilized to assure the continuing integrity of the records." (336 B.R. at 445) In the Vinhnee case, "The trial court concluded that the declaration in the post-trial submission was doubly defective. First, the declaration did not establish that the declarant was 'qualified' to provide the requisite testimony. Second, the declaration did not contain information sufficient to warrant a conclusion that the 'American Express computers are sufficiently accurate in the retention and retrieval of the information contained in the documents.'" (336 B.R. at 448)

Illinois likewise holds that a "foundation for computer-generated records is established when it is shown that the equipment which produced the record is recognized as standard, the entries were made in the regular course of business at or reasonably near the happening of the event recorded and the sources of information, method and time of preparation were such as to indicate their trustworthiness and to justify their admission." Riley v. Jones Bros. Constr. Co., 198 Ill. App. 3d 822, 829, 556 N.E.2d 602 (1st Dist. 1990).

I. If records are submitted, they must be properly authenticated. Palisades Collection, LLC v. Gonzalez, 10 Misc 3d 1058(A), 809 NYS2d 482, 2005 NY Slip Op 52015(U) (Civ. Ct. NY Co. 2005). Generally, an employee of a debt buyer is not competent to offer testimony concerning the records of an assignor. PRA III, LLC v. MacDowell, 15 Misc. 3d 1135A, 841 N.Y.S.2d 822 (N.Y. Civ. Ct. 2007) ("Elaine F. Lark, a legal specialist of the plaintiff" is " not an employee of the original creditor (Sears) and cannot authenticate documents from another business"). Under Illinois law, if the records are those of business A, they can be treated as records of business B only if A was authorized by B to generate the records on behalf of B as part of B's ordinary business activities. In Argueta v. Baltimore & Ohio, 224 Ill.App.3d 11, 12-14, 586 N.E.2d 386 (1st Dist. 1991), appeal denied, 144 Ill. 2d 631, 591 N.E.2d 20 (1992), the court held:

> A number of Illinois cases have held that documents produced by third parties were inadmissible as business records. In each of these cases, the documents were not commissioned by the business seeking to introduce them into evidence, albeit the documents were retained in the business files. . . .
>
> By contrast, a business report generated by a third party has been held to be admissible when it was commissioned in the regular course of business of the party seeking to introduce it. Birch v. Township of Drummer (1985), 139 Ill. App. 3d 397, 487 N.E.2d 798 (survey of an engineering

> firm commissioned by county admissible as business record of the county).
>
> The key consideration is the authority of the third party to act on the business' behalf. Where a third party is authorized by a business to generate the record at issue, the record is of no use to the business unless it is accurate and, therefore, the record bears sufficient indicia of reliability to qualify as a business record under the hearsay rule. . . .
>
> Accordingly, we find that the trial court erred in its ruling that the ultrasonic test reports were inadmissible. The reports were the business records of B&OCT. Although the reports were generated by Calumet and Conam, the tests were performed at the direction of the railroad in the regular course of its business.

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

K. Secondary evidence of the contents of a document, such as testimony, is not admissible unless the document is unavailable for a reason other than the serious fault of the proponent. Illinois does not allow a plaintiff who has disposed of a document knowing it may be necessary to use it as evidence to introduce secondary evidence of its contents. In Lam v. Northern Illinois Gas Co., 114 Ill. App. 3d 325, 332-32, 449 N.E.2d 1007 (1st Dist. 1983), the court held:

> To introduce secondary evidence of a writing, a party must first prove prior existence of the original, its loss, destruction or unavailability; authenticity of the substitute and his own diligence in attempting to procure the original. . . . Here, NI-Gas established that the original customer service cards did exist. NI-Gas, however, destroyed the cards. If the original document has been destroyed by the party who offers secondary evidence of its contents, the evidence is not admissible unless, by showing that the destruction was accidental or was done in good faith,

> without intention to prevent its use as evidence, he rebuts to the satisfaction of the trial judge, any inference of fraud. . . . In Illinois, "if a party has voluntarily destroyed a written instrument, he cannot prove its contents by secondary evidence unless he repels every inference of a fraudulent design in its destruction." (Blake v. Fash (1867), 44 Ill. 302, 304; accord, Palmer v. Goldsmith (1884), 15 Ill. App. 544, 546.) We note further that the "resolution of loss or destruction issues is a matter necessarily consigned to the sound discretion of the trial judge." Wright v. Farmers Co-Op (8th Cir. 1982), 681 F.2d 549, 553; accord, People v. Baptist (1979), 76 Ill. 2d 19, 27, 389 N.E.2d 1200.

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

Since an assignee steps into the shoes of its assignor, an assignee has exactly the same right as the assignor to enforce an obligation notwithstanding the assignor's destruction or loss of evidence. Atlantic National Trust, LLC v. McNamee, 984 So. 2d 375 (Ala. 2007).

L. The type of evidence necessary to establish the terms of a credit card account was set forth in Citibank (South Dakota), N.A. v. Martin, 11 Misc. 3d 219; 807 N.Y.S.2d 284 (Civ.Ct. 2005):

> As a part of a credit card issuer's presentation of a prima facie case, the motion papers also must include an affidavit sufficient to tender to the court the original agreement, as well as that any revision thereto, and the affidavit must aver that the documents were mailed to the card holder. n4 The same affidavit typically advances copies of credit card statements which serve to evidence a buyer's subsequent use of the credit card and acceptance of the original or revised terms of credit . . . . The affidavit often addresses whether there was any proper protest of any charged purchase within 60 days of a statement (*15 U.S.C. § 1601*; *12 C.F.R § 226.13 [b][1]*, a provision in *12 C.F.R, part 226*, referred to as "Regulation Z" or "Truth in Lending" regulations). . . .
>
> The affidavit must demonstrate personal knowledge of essential facts . . . . An attorney's affirmation generally cannot advance substantive proof . . . .
>
> . . . as to assigned claims, it is essential that an assignee show its standing, which "doctrine embraces several judicially self-imposed limits on the

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

M. A number of decisions illustrate the difficulties debt buyers have in proving a case by competent evidence:

1. Unifund v. Ayhan, No. 36151-5-II, 2008 Wash. App. LEXIS 1922 (August 5, 2008). The consumer in Ayhan contested part of the charges on the ground of identity theft. Reversing a summary judgment for Unifund, the court held that Unifund had failed to establish its ownership of the debt and standing to sue:

> > This breach of contract claim is based on Unifund's alleged purchase or assignment of Ayhan's debt from Providian; therefore, at the threshold, Unifund, as the party moving for summary judgment, had the burden of establishing its standing by proving its right to sue under the contract as a matter of law. . . .
>
> > In support of its motion for default, Unifund attached a document entitled "Affidavit of Indebtedness," a declaration from Unifund "Media Supervisor" Bharati Lengade, who swore that Ayhan's account had been assigned from Providian and that the debt was valid. CP at 12. Ayhan challenged the claimed assignment and Unifund, to support its second motion for summary judgment, offered a document entitled "Bill of Sale," that stated, as of January 27, 2004, Providian transferred to Unifund certain accounts identified in an attached "Account Schedule." But no "Account Schedule" was attached. CP at 206. And Hopkin's affidavit, submitted [*21] at the same time, declared that Unifund purchased the debt from Providian on May 5, 2005, not January 27, 2004, as stated in the "Bill of Sale."
>
> > Thus, to overcome Ayhan's challenge to the claimed assignment and to establish its right to sue and obtain a judgment against Ayhan as a matter of law, Unifund submitted only its own employee's affidavits and a conflicting "Bill of Sale" with no name, account number, or any other information identifying Ayhan's debt as having been sold or assigned to Unifund. This

> evidence is insufficient to establish, under either New Hampshire or Washington law, that Providian assigned the rights and obligations on Ayhan's contract to Unifund. As a result, we are unable to hold, as a matter of law, that Unifund had standing to assert a breach of Providian's contract with Ayhan. Thus, the trial court's grant of summary judgment to Unifund was error.
>
> On remand, Unifund, to prevent summary judgment dismissal of its claim against Ayhan, must present additional evidence relating to its claimed purchase or assignment of Providian's rights under the Ayhan contract.

2. Palisades Collection LLC v. Haque, 2006 N.Y. Misc. LEXIS 4036; 235 N.Y.L.J. 71 (Civ. Ct. Queens Co., April 13, 2006). A debt buyer's case was thrown out even though it had local offices and was able to call a witness, because (a) it could not prove title to the debt, (b) it could not authenticate the contract, (c) it could not show the debtor had failed to pay. The court held that to lay the foundation for a business record it was necessary to have someone testify about the business routine of the entity which generated the records:

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

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

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

defendant bills which defendant did not dispute; and that plaintiff is entitled to sue as AT&T's assignee. Ms. Bergmann's affidavit is not adequate to establish any of these facts.

. . . Even if the Court were to overlook the inaccuracy of Ms. Bergmann's description of the documents attached as Exhibit D, the Court could not rely on them. Since the documents are out-of-court statements offered for their truth, Ms. Bergmann must establish that they fall within an exception to the hearsay rule in order for them to be admissible. . . . Presumably, Ms. Bergmann is asking the Court to treat them as a business record since she describes herself as being familiar with plaintiff's business records . . . . However, the records attached at Exhibit D were created not by plaintiff but by plaintiff's assignor, AT&T. In order to establish a business records foundation, the witness must be familiar with the entity's record keeping practices . . . .Ms. Bergmann does not claim to be familiar with AT&T's record keeping practices, but only with the method by which plaintiff maintains the accounts it purchases from others. The mere fact that plaintiff obtained the records from AT&T and then retained them is an insufficient basis for their introduction into evidence. . . . Therefore, the Court cannot rely on the account statements which Ms. Bergmann proffered to establish defendant's default. . . . This is not a situation where the relationship between the proponent of the record and the maker of the record guarantees the reliability of the records, such as where the maker of the record was acting on behalf of the proponent and in accordance with its requirements when making the records, . . . or where the proponent of the records relies contemporaneously on the accuracy of the other entity's records for the conduct of its own business . . . . Here, there is no evidence that there was any relationship between AT&T and plaintiff at the time that the records were created.

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

The Plaintiff attempts to support its motion with the affidavit of Todd Fabacher, who identifies himself as "an authorized and designated custodian of records for the plaintiff regarding the present matter." (*Fabacher Affidavit* 3/14/07, P 1) Mr. Fabacher describes his duties as including "the obtaining, maintaining and retaining, all in the regular course of plaintiff's business, including obtaining records and documents from or through CITIBANK or [*2] any assignee or transferee previous to plaintiff, any and all records [**3] and documentation regarding the present debt."

(*Fabacher Affidavit* 3/14/07, P 1) While Mr. Fabacher attempts to portray himself as one who is "personally familiar with, and hav[ing] knowledge of, the facts and proceedings relating to the within action" (*Fabacher Affidavit* 3/14/07, P 1), it is readily apparent from a reading of his affidavit that his claimed personal familiarity with this matter is taken from the documents and records ostensibly created by Citibank, and/or assignees who have preceded the Plaintiff, which have now come into the Plaintiff's possession. Clearly, Mr. Fabacher has no personal knowledge of the retail charge account agreement between the Defendant and Citibank. . . .

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

5. Lucas v. MBNA, 23112/2007, 2008 NY Slip Op 50001U; 18 Misc. 3d 1109A; 2008 N.Y. Misc. LEXIS 2 (Kings Co. Sup. Ct., January 2, 2008):

For confirmation of an arbitration award on a credit card debt, the following must be provided: (1) submission of the written contract containing the provision authorizing arbitration; (2) proof that the cardholder agreed to arbitration in writing or by conduct; and (3) a demonstration of proper service of the notice of the arbitration hearing and of the award. . . . Further, the credit card issuer must tender the actual provisions agreed to, including any and all amendments, and not simply a photocopy of general terms to which the credit issuer may currently demand debtors agree. . . . Here as in the Nelson case the Credit Card Agreement lacks the debtor's signature and a date indicating when these terms were

adopted by MBNA, nor does the proffered Agreement contain any account number, name or other identifying statements connecting it to petitioner. . . .

6. Unifund CCR Partners v. Harrell, 2005 Conn. Super. LEXIS 2037 (Aug. 3, 2005): Failure to produce signed agreement or affidavit authenticating purported agreement as that entered into with defendant results in denial of summary judgment. Affidavit of "plaintiff's legal coordinator" that "she has access to the records of Unifund CCR Partners and therefore has personal knowledge of the facts" not sufficient.

7. First Select Corp. v. Grimes, 2003 Tex. App. LEXIS 604 (Ft. Worth, Jan. 23, 2003): summary judgment for debtor affirmed where there was no evidence that the debtor used the credit card after First Select sent out an agreement modification and no copy of the written agreement between the original creditor and the consumer or the consumer's acceptance of such agreement.

8. CACV of Colorado, LLC v. Cassidy, 2005 Conn. Super. LEXIS 2797 (Oct. 19, 2005); CACV of Colorado, LLC v. Acevedo, 2005 Conn. Super. 2796 (Oct. 19, 2005); CACV of Colorado, LLC v. Werner, 2005 Conn. Super. LEXIS 1795 (Oct. 19, 2005); CACV of Colorado, LLC v. McNeil, 2005 Conn. Super. LEXIS 12794 (Oct. 19, 2005); and CACV of Colorado, LLC v. Corda, 2005 Conn. Super. LEXIS 3542 (Dec. 16, 2005): court refused applications to confirm arbitration awards where only document containing arbitration clause was affidavit signed with signature stamp attaching form agreement containing no dates or signatures; court also noted that NAF does not provide that arbitrator find defendant has actual notice of demand for arbitration. Accord, MBNA America Bank, NA v. Straub, 12 Misc. 3d 963; 815 N.Y.S.2d 450 (Civ. Ct. 32 2006).

VIII. DEFENSE OF DEBT BUYER COLLECTION CASES – ILLINOIS CREDIT CARD STATUTES

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

[Accepted credit card; amount of liability]

Sec. 2. (a) Notwithstanding that a person in whose name a credit card has been issued has requested or applied for such card or has indicated his acceptance of an unsolicited credit card, as provided in Section 1 hereof [815 ILCS 145/1], such person shall not be liable to the issuer unless the card issuer has given notice to such person of his potential liability, on the card or within two years preceding such use, and has provided such person with an addressed notification requiring no postage

to be paid by such person which may be mailed in the event of the loss, theft, or possible unauthorized use of the credit card, and such person shall not be liable for any amount in excess of the applicable amount hereinafter set forth, resulting from unauthorized use of that card prior to notification to the card issuer of the loss, theft, or possible unauthorized use of that card:

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

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

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

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

IX. DEFENSE OF DEBT BUYER COLLECTION CASES – SUBSTANTIVE DEFENSES

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

1. Generally, "authorized users" of a credit card are not personally liable, only the cardholder is. Alabran v. Capital One Bank, No. 3:04CV935, 2005 U.S. Dist. LEXIS 34158, *12, 16 (E.D.Va., Dec. 8, 2005); Sears Roebuck & Co. v. Ragucci, 203 N.J. Super. 82, 495 A.2d 923 (N.J. Super. 1985), Cleveland Trust Co. v. Snyder, 55 Ohio App. 2d 168, 380 N.E.2d 354 (Ohio App. 1978); Blaisdell Lumber Co. v. Horton, 242 N.J. Super 98 (App. Div. 1990); Sears, Roebuck & Co. v. Stover, 513 N.E. 2d 361 (Ohio Mun Ct. 1987); First Nat'l Bank of Findlay v. Fulk, 57 Ohio App. 3d 44, 566 N.E.2d 1270 (Ohio App. 1989); FCC Nat'l Bank v. Laursen (In re Laursen), 214 B.R. 378, 381 (Bankr. D.Neb. 1997); Citibank (S.D.), N.A. v. Hauff, 668 N.W.2d 528 (S.D. 2003); Chevy Chase Savings Bank v. Strong, 46 Va. Cir. 422; 1998 Va. Cir. LEXIS 249 (Oct. 21, 1998); Houfek v. First Deposit Nat'l Bank, 126 B.R. 530 (Bankr. S.D. Ohio 1991); Nelson v First Nat'l Bank Omaha, 2004 WL 2711032 (Mn. App. 2004)

2. There are several reasons for this:

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

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

c. The Truth in Lending Act, 15 U.S.C. § 1642, provides that to be liable on a credit card, one must have applied for the card or requested the card. Section 1642 states:

> **No credit card shall be issued except in response to a request or application therefor. This prohibition does not apply to the issuance of a credit card in renewal of, or in substitution for, an accepted credit card.**

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

3. If two names appear on a monthly credit card statement and it is disputed who is a cardholder and who is an authorized user, bank cannot prevail without proving who signed agreement. Banks often have poor records and cannot prove this. Johnson v. MBNA America Bank, N.A., 1:05cv150, 2006 U.S.Dist. LEXIS 10533 (M.D.N.C. March 9, 2006); Scheel-Baggs v. Bank of America, 07-cv-671-bbc, 2008 U.S. Dist. LEXIS 70585 (W.D.Wisc., September 15, 2008). It appears that many banks keep applications or images of applications for not more than 7 years after the account is opened (not after the account is closed).

4. 15 U.S.C. § 1643(b) applies to both original creditor and bad debt buyers and requires them to show that charges were authorized by the accountholder.

B. Statute of frauds

1. Under Illinois law, a promise to answer for the debt of another is within

the statute of frauds whether the debt is incurred before or after the promise. Rosewood Care Ctr., Inc. v. Caterpillar, Inc., 226 Ill. 2d 559, 877 N.E.2d 1091 (2007). However, the statute of frauds does not apply if the "main purpose" or "leading object" of the promise was to benefit the business interests of the promisor. Id. The Court cited section 11 of Restatement (Third) of Suretyship & Guaranty: "A contract that all or part of the duty of the principal obligor to the obligee shall be satisfied by the secondary obligor is not within the Statute of Frauds as a promise to answer for the duty of another if the consideration for the promise is in fact or apparently desired by the secondary obligor mainly for its own economic benefit, rather than the benefit of the principal obligor." Restatement (Third) of Suretyship & Guaranty §11(3)(c), at 42 (1996)."Where the secondary obligor's main purpose is its own pecuniary or business advantage, the gratuitous or sentimental element often present in suretyship is eliminated, the likelihood of disproportion in the values exchanged between secondary obligor and obligee is reduced, and the commercial context commonly provides evidentiary safeguards. Thus, there is less need for cautionary or evidentiary formality than in other secondary obligations." Restatement (Third) Suretyship & Guaranty § 11, Comment to Subsection (3)(c), at 49-50 (1996). It also cited 72 Am. Jur. 2d Statute of Frauds § 134, at 658 (2001) ("Cases sometimes arise in which, although a third party is the primary debtor, the promisor has a personal, immediate, and pecuniary interest in the transaction, and is therefore himself a party to be benefited by the performance of the promisee. In such cases the reason which underlies and which prompted this statutory provision fails, and the courts will give effect to the promise"). The Court held that the purpose of making the promise was a question of fact.

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

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

1. Retail installment contracts, leases of personal property (including cars, deficiencies): 4 years under UCC, 810 ILCS 5/2-725, 5/2A-506. Citizens

National Bank of Decatur v. Farmer, 77 Ill. App. 3d 56; 395 N.E.2d 1121 (4th Dist. 1979); Fallimento C.Op.M.A. v. Fischer Crane Co., 995 F.2d 789 (7th Cir. 1993).

2. Cell phone and interstate landline (federally-regulated) telecom debts: 2 years, 47 U.S.C. §415 (Communications Act).

3. Checks: 3 years from dishonor on check, 810 ILCS 5/3-118(c), 2 years for statutory penalty, 735 ILCS 5/13-202. Note: underlying obligation paid with check may be 5 or 10 years.

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

1. Five years unless a complete agreement signed by both parties and not subject to change on notice without the debtor's signature is attached to the complaint: Parkis v. Arrow Financial Services, 07 C 410, 2008 U.S.Dist. LEXIS 1212 (N.D.Ill., Jan. 8, 2008); Ramirez v. Palisades Collection, LLC, 1:07-cv-3840, 2008 U.S. Dist. LEXIS 48722 (N.D.Ill., June 23, 2008).

2. Dicta in a 1974 Illinois Appellate Court decision has been used by the debt buyers to argue that the limitations period applicable to a bank credit card debt in Illinois is ten years, under what is now 735 ILCS 5/13-206. Harris Trust & Savings Bank v. McCray, 21 Ill.App.3d 605, 316 N.E.2d 209 (1st Dist. 1974). See also, Citizen's National Bank of Decatur v. Farmer, 77 Ill. App. 3d 56; 395 N.E.2d 1121 (4th Dist. 1979).

3. However, the only issue before the Court was whether the applicable period was the four-year period of the Uniform Commercial Code or the ten-year period of what is now 735 ILCS 5/13-206. The Harris Bank court specifically limited its ruling by stating: "[t]he only question presented in this appeal is whether a credit card issuer may commence an action based upon the holder's failure to pay for the purchase of goods more than 4 years after the issuer's cause of action accrued." 21 Ill.App.3d at 606. Neither party argued whether the credit card was based on a "contract in writing" as required by 735 ILCS 5/13-206.

4. Subsequent cases made clear that not every "credit card" or "charge card" is a written contract for limitations purposes. Nicolai v. Mason, 118 Ill. App. 3d 300; 454 N.E.2d 1049 (5th Dist. 1983) (claim based on "charge account" at retail store governed by five year statute); Weniger v. Arrow Financial Services, 03 C 6213, 2004 U.S. Dist. LEXIS 23172 (N.D.Ill., Nov. 18, 2004) (Lefkow, J.) (complaint alleging defendant brought suit on a credit card and that there was no written contract between the parties stated FDCPA claim).

5. The McCray case involved a credit card agreement entered into in the mid-1960s, prior to Truth in Lending. Given the manner in which credit cards were issued at the time – one generally had to apply in writing and sign a receipt each time the card was used – there probably was a contract in writing.

6. But much has changed in the intervening 30 years. Most importantly, the banking industry has persuaded numerous state legislatures to enact statutes authorizing them to change the terms of credit card agreements by simply mailing a notice to the cardholder, with or without an opportunity to close the account and "opt out." These include the legislatures in Delaware and South Dakota, where many credit card issuers are chartered in order to take advantage of federal "exportation" law and the absence of interest rate regulation in those states.

7. The Delaware statute, 5 Del. C. §952 (2005), originally enacted in 1981-1982, currently (2008) provides:

§ 952. Amendment of agreement

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

or rates of periodic interest charged by a bank to a borrower under § 943 or § 944 of this title may become effective as determined by the bank, subject to compliance by the bank with any applicable notice requirements under the Truth in Lending Act *(15 U.S.C. §§ 1601* et seq.), and the regulations promulgated thereunder, as in effect from time to time. Any notice of an amendment sent by the bank may be included in the same envelope with a periodic statement or as part of the periodic statement or in other materials sent to the borrower.

(b)

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

(2) Any amendment that increases the rate or rates of periodic interest charged by a bank to a borrower under § 943 or § 944 of this title may become effective as to a particular borrower if the borrower does not, within 15 days of the earlier of the mailing or delivery of the written notice of the amendment (or such longer period as may be established by the bank), furnish written notice to the bank that the borrower does not agree to accept such amendment. The notice from the bank shall set forth the address to which a borrower may send notice of the borrower's election not to accept the amendment and shall include a statement that, absent the furnishing of notice to the bank of nonacceptance within the referenced 15 day (or longer) time period, the amendment will become effective and apply to such borrower. As a condition to the effectiveness of any notice that a borrower does not accept such amendment, the bank may require the borrower to return to it all credit devices. If, after 15 days from the mailing or delivery by the bank of a notice of an amendment (or such longer period as may have been established by the bank as referenced above), a borrower uses a plan by making a purchase or obtaining a loan, notwithstanding that the borrower has prior to such use furnished the bank notice that the borrower does not accept an amendment, the amendment may be deemed by the bank to have been accepted and may become effective as to the borrower as of the date that such

amendment would have become effective but for the furnishing of notice by the borrower (or as of any later date selected by the bank).

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

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

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

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

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

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

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

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

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

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

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

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

8. The South Dakota statute, S.D. Codified Laws § 54-11-10 (2005), which was enacted in 1983, currently provides:

Change in terms -- Notice

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

(1) Modifying the circumstances under which a finance charge will be imposed;

(2) Altering the method used to calculate finance charges;

(3) Increasing finance charges, fees, and other costs; or

(4) Increasing the required minimum payment.

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

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

9. Recognizing such enactments, Illinois courts now hold that cardholder agreements are not contracts but "standing offers to extend credit," subject to "modification at will," which are accepted "each time the card is used according to the terms of the cardholder agreement at the time of such use". Garber v. Harris Trust & Savings Bank, 104 Ill. App. 3d 675, 679, 432 N.E.2d 1309, 1311 (1st Dist. 1982); accord, Ragan v. AT&T Corp., 355 Ill.App.3d 1143, 1149, 824 N.E.2d 1183 (5th Dist. 2005); Reyes v. Equifax Credit Info. Servs., 03 C 1377, 2003 U.S.Dist. LEXIS 22235

(N.D.Ill., Dec. 10, 2003); Frerichs v. Credential Servs. Int'l, 98 C 3684, 1999 U.S.Dist. LEXIS 22811, *21 (N.D.Ill., Oct. 1, 1999). Other decisions likewise hold that credit card agreements are terminable at will and that their terms may be changed by sending a notice with a monthly statement which is not rejected by the cardholder. Taylor v. First North American National Bank, 325 F.Supp.2d 1304, 1313 (M.D.Ala. 2004); Battels v. Sears National Bank, 365 F.Supp.2d 1205, 1209 (M.D.Ala. 2005); Grasso v. First USA Bank, 713 A.2d 304 (Del. Super. Ct. 1998); Edelist v. MBNA Am. Bank, 790 A.2d 1249 (Del. Super. Ct. 2001); see Banc One Fin. Servs. v. Advanta Mtge. Corp. USA, 00 C 8027, 2002 U.S.Dist. LEXIS 960 (N.D.Ill., Jan. 23, 2002).

10. A necessary consequence of the notion that the terms of a credit card agreement may be changed by mere notice is that a credit card agreement subject to such alteration is not a "written contract" within the meaning of 735 ILCS 5/13-206.

11. Section 13-206 requires that the writing be "complete," in that it identifies the parties, states the date of the agreement; contains the signatures of the parties; and sets forth all terms of the parties' agreement. Brown v. Goodman, 147 Ill.App.3d 935, 940, 498 N.E.2d 854 (1st Dist. 1986); Clark v. Western Union Telegraph Co., 141 Ill.App.3d 174, 176, 490 N.E.2d 36 (1st Dist. 1986); Weaver v. Watson, 130 Ill. App. 3d 563, 567, 474 N.E.2d 759, 762 (5th Dist. 1984); Munsterman v. Illinois Agricultural Auditing Association, 106 Ill.App.3d 237, 238-39, 435 N.E.2d 923, 925 (3d Dist. 1982); Baird & Warner, Inc. v. Addison Industrial Park, Inc., 70 Ill.App.3d 59, 73, 387 N.E.2d 831, 838 (1st Dist. 1979).

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

13. If any essential element of the contract is omitted from the writing, "'then the contract *must* be treated as oral for purposes of the statute of limitations.'" Armstrong v. Guigler, 174 Ill. 2d 281, 288, 673 N.E.2d 290, 295 (1996); accord, Toth v. Mansell, 207 Ill. App. 3d 665, 669, 566 N.E.2d 730, 733 (1st Dist. 1990); Schmidt v. Niedert, 45 Ill. App. 3d 9, 13, 358 N.E.2d 1305 (1st Dist. 1976).

14. "Illinois courts give a strict interpretation to the meaning of a written contract within the statute of limitations. For statute of limitation

purposes, a contract is considered to be written if all the essential terms of the contract are in writing and are ascertainable from the instrument itself." Brown, 147 Ill. App. 3d at 939. If the agreement necessitates resort to parol testimony to make it complete, the law is that in applying the statute of limitations, it must be treated as an oral contract. Toth, 207 Ill. App. 3d at 671.

15. "The law is clear in Illinois that to constitute a written contract under the statute of limitations, the written instrument itself must completely identify the parties to the contract." Brown, 147 Ill. App. 3d at 940 (emphasis added); accord, Railway Passenger & Freight Conductors' Mutual Aid & Benefit Association v. Loomis, 142 Ill. 560, 32 N.E. 424 (1892); Munsterman, 106 Ill. App. 3d at 238-39; Pratl v. Hawthorn-Mellody Farms Dairy, Inc., 53 Ill. App. 3d 344, 347, 368 N.E.2d 767, 770 (1st Dist. 1977); Matzer v. Florsheim Shoe Co., 132 Ill. App. 2d 470, 472, 270 N.E.2d 75 (1st Dist. 1971); Wielander v. Henich, 64 Ill. App. 2d 228, 231-32, 211 N.E.2d 775, 776 (1st Dist. 1965).

16. "[T]he issue is not whether the identity of [the parties] can be readily ascertainable from subsequent writings, the issue is whether the identity of [the parties] can be readily ascertained" from the alleged written contract "so as to avoid the resort to parol evidence." Brown, 147 Ill. App. 3d at 940.

17. If testimony is necessary to establish any of these elements, the contract is treated as oral, and subject to the five-year statute. Wielander v. Henich, 64 Ill.App.2d 228, 231, 211 N.E.2d 775, 776 (1st Dist. 1965); Armstrong, 174 Ill. 2d at 288. "In the parol evidence cases, the dispositive question is whether evidence of oral representation is necessary to establish the existence of a written contract. If such evidence is required, then the contract is treated as oral for purposes of the statute of limitations. In other words, where a party is claiming a breach of written contract, but the existence of that contract or one of its essential terms must be proven by parol evidence, the contract is deemed oral and the five-year statute of limitations applies." *Id*.

18. A credit card agreement that is subject to change upon notice does not contain all essential terms. Even if the debtor signed a written application which set forth all material terms at the time of the application, the "change by notice" provision – whether expressly included in the contract or implied therein by statute – makes it impossible to determine from mere examination of the document that those terms are still in effect. Either the creditor must rely on the fact that a current version of the agreement was sent to the debtor, or establish that no change notices were mailed. In either case, parol testimony is essential, and there is no

document which conclusively establishes the terms of the agreement.

19. In Classified Ventures, Inc. v. Wrenchead, Inc., 06 C 2373, 2006 U.S. Dist. LEXIS 77359 (N.D.Ill., October 11, 2006) (Darrah, J.), the court held that where a contract went through several revisions, the need to use parol evidence to show which of the several versions was in effect made the contract not one wholly in writing. The same logic applies to a credit card agreement that can be changed by notice without a signature.

20. If nothing amounting to a contract wholly in writing is attached to the complaint pursuant to section 2-606 of the Code of Civil Procedure, 735 ILCS 5/2-606, or proven to exist by the evidence at trial, the court must presume that the contract is one not wholly in writing. Barnes v. Peoples Gas Light & Coke Co., 103 Ill.App.2d 425, 428, 243 N.E.2d 855 (1st Dist. 1968) ("The complaint does not purport to be based on a written instrument such as a tariff. If it were, then, of course, the relevant portions of that instrument would have to be recited in, or attached to, the pleading, and, as indicated, they were not."); O.K. Electric Co. v. Fernandes, 111 Ill.App.3d 466, 444 N.E.2d 264, 266-67 (2nd Dist. 1982) ("Unless the complaint purported to be based upon a written instrument, it is assumed to be an oral contract.").

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

A. In Cook County First Municipal cases, for example, you need to file an appearance by 9.30 a.m. on the return date, at which time you are assigned a status date. Because of delays in the Clerk's office, it is best to file the appearance as far in advance of the return date as possible. (Sometimes cases will be placed on the default call if you file the appearance on or shortly before the return date.) If the case is not a small claim ($5,000 if filed before Jan. 1, 2006, $10,000 after) you do not have to file an answer. At the status date you get a trial date.

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

XI. FAIR DEBT COLLECTION PRACTICES ACT ISSUES

A. The Fair Debt Collection Practices Act, 15 U.S.C. §1692 et seq. ("FDCPA"), regulates the conduct of "debt collectors" in collecting "debts" owed or allegedly owed by "consumers." It is designed to protect consumers from unscrupulous collectors, whether or not there is a valid debt. The FDCPA broadly prohibits unfair or unconscionable collection methods; conduct which harasses, oppresses

or abuses any debtor; and any false, deceptive or misleading statements, in connection with the collection of a debt; it also requires debt collectors to give debtors certain information. 15 U.S.C. §§1692d, 1692e, 1692f and 1692g.

B. It also contains a venue provision requiring suit to be brought where the consumer signed a written contract or where the consumer resides at the time suit is filed. 15 U.S.C. 1692i.

C. Debt buyers are covered

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

D. Collection lawyers who “regularly” collect consumer debts are covered. Heintz v. Jenkins, 514 U.S. 291 (1995).

E. Typical violations in connection with collection litigation

1. False statements in complaint, affidavits, etc., e.g., that affiant has personal knowledge of records establishing debt, that plaintiff is holder in due course, etc. A debt collector’s misrepresentation in a pleading that it is a subrogee was held to be actionable in Gearing v. Check Brokerage Corp., 233 F.3d 469 (7th Cir. 2000). See also, Sayyed v. Wolpoff & Abramson, 485 F.3d 226 (4th Cir. 2007). Filing false affidavits in state

court collection litigation is actionable. Todd v. Weltman, Weinberg & Reis Co., L.P.A., 434 F.3d 432 (6th Cir. 2006); Delawder v. Platinum Financial, 443 F. Supp. 2d 942 (S.D.Ohio 2005), later opinion, 1:04-cv-680, 2007 U.S. Dist. LEXIS 31174 (S.D.Ohio, April 27, 2007); Griffith v. Javitch, Block & Rathbone, LLP, 1:04cv238 (S.D.Ohio, July 8, 2004); Hartman v. Asset Acceptance Corp., No. 1:03-cv-113, 2004 U.S. Dist. LEXIS 24845 (S.D.Ohio, Sept. 29, 2004); Gionis v. Javitch, Block & Rathbone, 405 F. Supp. 2d 856 (S.D.Ohio. 2005); Blevins v. Hudson & Keyse, Inc., 395 F. Supp. 2d 655 (S.D.Ohio 2004), later opinion, 395 F.Supp.2d 662 (S.D.Ohio 2004); Stolicker v. Muller, Muller, Richmond, Harms, Meyers & Sgroi, P.C., 1:04cv733 (W.D.Mich., Sept. 8, 2005); Eads v. Wolpoff & Abramson, LLP, EP-07-cv-229-PRM, 2008 U.S.Dist. LEXIS 26309 (W.D.Tex. Feb. 27, 2008).

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

3. Suing or threatening to sue on time barred debts. Kimber v. Federal Financial Corp., 668 F.Supp. 1480 (M.D.Ala. 1987); Goins v. JBC & Assocs., P.C., 352 F. Supp. 2d 262 (D.Conn. 2005).

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

5. Adding unauthorized amounts to debts, e.g., attorney's fees. Shula v. Lawent, 359 F.3d 489 (7th Cir. 2004), aff'g, 01 C 4883, 2002 U.S. Dist. LEXIS 24542 (N.D.Ill., Dec. 23, 2002).

6. Misrepresentation of components of debts. Fields v. Wilber Law Firm, P.C., 383 F.3d 562 (7th Cir. 2004).

7. False allegations of attorney involvement. Rosenau v. Unifund Corp., 539 F.3d 218 (3rd Cir. 2008).

8. Proceeding with collection attempts after verification demanded but not provided. Ramirez v. Apex Fin. Mgmt., 567 F. Supp. 2d 1035 (N.D.Ill. 2008).