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State Bar and Other Activities

Greater Denton County Young Lawyers Association, 2006-2009

Member - Denton County Bar Association, 2005 - 2009

Member - Tarrant County Bar Association, 2009 - present
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CREDIT CARD DEBT COLLECTION

I. INTRODUCTION

Anyone attempting to collect a credit card debt should carefully review the Fair Debt Collection Practices Act, 15 U.S.C. §1692 et seq. (hereinafter “FDCPA” or the “Act”) as well as the Texas Debt Collections Act, TEXAS FINANCE CODE Section 392.001 et seq. (hereinafter “TDCA”). Both the FDCPA and the TDCA contain numerous provisions which are applicable to the collection of consumer debt. Unfortunately, it is not possible to cover all of the applicable provisions in this paper. Rather, it is the purpose of this paper to provide a general outline of some of the steps taken to collect credit card debt as well as some of the more common issues that arise.

This paper should not be considered an exhaustive compilation of all one needs to know about the FDCPA or the TDCA. Both Acts are riddled with ambiguities. Each act uses broad language which makes it practically impossible to avoid allegations of wrong doing. Accordingly, this author disclaims any warranties whatsoever with regard to the information and forms set forth herein.¹

II. GENERAL OVERVIEW OF THE FDCPA AND THE TDCA

A. Who is a Debt Collector?

Under the FDCPA: A “Debt Collector” is any person, other than the creditor, who regularly collects debts owed to another. The term also includes any creditor who, in the process of collecting its own debts, uses any name other than its own which would indicate that a third person is collecting or attempting to collect the debt.²

Under the TDCA: A “Debt Collector” is anyone engaging directly, or indirectly, in debt collection (this would include the creditor) and includes any person who sells, or offers to sale, forms represented to be a collection system, device or scheme intended or calculated to be used to collect consumer debts.³ Accordingly, the definition of “Debt Collector” under the TDCA is much broader than the definition under the FDCPA.

B. What type of debts are protected?

Under the FDCPA: The term “debt” means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.⁴

Under the TDCA: A “consumer debt” is any obligation, or an alleged obligation, primarily for personal, family or household purposes and arising from a transaction or alleged transaction.⁵

In light of the foregoing, it should be apparent to the careful practitioner that actions taken in pursuit of any credit card debt should comply with both the FDCPA and the TDCA. It is highly likely that any consumer credit card debt will fall within the definition of a consumer debt.

III. COMPLIANCE WITH THE FDCPA AND THE TDCA

A. Communicating with a Debtor

1. 15 U.S.C. §1692a Definitions

It is critically important to understand the requirements of the FDCPA concerning communications with debtors. Under the FDCPA, the terms “communication” and “debt” are defined as follows:

(2) The term “communication” means the conveying of information regarding a debt directly or indirectly to any person through any medium.

(5) The term “debt” means any obligation or alleged obligation of the consumer to pay money arising out

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¹Much of this paper was compiled from notes and briefing accumulated over a number of years. As a result, it is possible that we have failed to properly credit an original source. We sincerely apologize for any such error and would ask that anyone noticing anything of this nature please let us know so that we may make the appropriate corrections and give credit to those to whom it is due.

²15 U.S.C. §1692a(6).

³TEX. FIN. CODE § 392.001(6).

⁴15 U.S.C. §1692a(5).

⁵TEX. FIN. CODE § 392.001(2).
of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family or household purposes, whether or not such obligation has been reduced to judgment.⁶

2. **15 U.S.C. §1692c(a) Prohibited Communications**

Prohibited Communications: The FDCPA provides a list of prohibited communications. Section 1692c(a) provides that a Debt Collector should not communicate with a debtor, absent prior consent of the consumer given directly to the Debt Collector:

(1) at any usual time or place or a time or place known or which should be known to be inconvenient to the consumer. . . . [any time before 8:00 a.m. or after 9:00 p.m. local time at the consumer’s location];

(2) if the Debt Collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain such attorney’s name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the Debt Collector or unless the attorney consents to direct communication with the consumer; or

(3) at the consumer’s place of employment if the Debt Collector knows or has reason to know that the consumer’s employer prohibits the consumer from receiving such communication.⁷

3. **15 U.S.C. §1692g Notice Letter a/k/a Validation of Debt Notice**

The FDCPA specifically provides that a Debt Collector has an affirmative duty to communicate with a debtor as follows pursuant to 15 U.S.C. §1692g:

Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing—

(1) the amount of the debt;

(2) the name of the creditor to whom the debt is owed;

(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.⁸

Attached hereto as Exhibit 1 is an example of a 1692g Notice Letter.⁹ To ensure compliance with §1692g, it is probably the safest course of action to make sure the “initial communication” with the debtor is the §1692g Notice Letter. Thus, prior to any telephone calls or any other type of attempt to contact the debtor, it would be a good idea to send the 1692g Notice Letter to the debtor. The prudent practitioner would want to carefully examine the 1692g Notice Letter to make sure that all of the elements set forth in 1692g are indeed covered.

⁶15 U.S.C . §1692a.
⁷15 U.S.C. §1692c(a).
⁸15 USCS § 1692g
⁹See Appendix I, Exhibit 1.
4. Additional points with regard to the §1692g Notice Letter:

a. The §1692g Notice Letter must be written in a manner which effectively communicates its contents to the least sophisticated consumer. Thus, keep the §1692g Notice Letter simple and direct. The required language must be large enough to read and sufficiently prominent within the letter to be noticed. The required language should not be buried at the bottom of the document or dwarfed by bold typing which dominates the required language.10

b. Be cautious to avoid overshadowing. The §1692g Notice Letter should not contain any language which contradicts the debtor’s right to dispute the debt within thirty days of receipt of the letter. For an example, see Crowder v. Kelly,11 wherein an attorney’s §1692g Notice Letter, which advised the debtor to contact the attorney within thirty days to make arrangements to pay the debt, was held likely to confuse an unsophisticated consumer and improperly overshadowed the validation notice. The §1692g Notice Letter should not demand immediate payment.

c. The validation notice should be on the front of the §1692g Notice Letter.12

d. Validation notice should not be obscured by color or positioning of the document. In the case of Colmon v. Payco-G.A.C. Inc.,13 the court noted that even though a notice may contain the requisite statutory language, the strident demand for payment through the use of format, type, size, juxtaposition, of position, conspicuousness, color and background may negate and overshadow the effective communication of the debtor’s rights.

B. Verification of the Debt.

1. The FDCPA’s Statutory Verification Requirement

15 U.S.C. §1692g(b) specifically provides as follows:

(b) If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or any copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector. Collection activities and communications that do not otherwise violate this title may continue during the 30-day period referred to in subsection (a) unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor. Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer’s right to dispute the debt or request the name and address of the original creditor.14

2. Practical Applications of the FDCPA’s Statutory Verification Requirement:

a. A debt collector is not required to provide validation of the debt pursuant to §1692g, if the debtor did not request verification within thirty days after the debtor's receipt of the communication containing the validation notice.15

b. Oral Dispute: A debtor may orally dispute a debt

10 See Swanson v. Southern Oregon Credit Svs, 869 F.2d 122 (9th Cir. 1988).
14 15 U.S.C. §1692g(b)
and, if the debtor does so, the debt collector must note the dispute in any report that it makes to a credit reporting agency.16

c. A debt collector must cease collecting the debt from the time of the receipt of the request for verification until the time the debt is verified.17

d. A request for validation of the debt made by the debtor more than 30 days after the debtor’s receipt of the 1692g Notice Letter does not require that the collector cease collecting the debt.18

e. Verification of a debt involves nothing more than the debt collector confirming in writing that the amount being demanded is what the creditor is claiming is owed.19 In *Chaudry v. Vallerizzo*, the court specifically stated:

[V]erification of a debt involves nothing more than the debt collector confirming in writing that the amount being demanded is what the creditor is claiming is owed; the debt collector is not required to keep detailed files of the alleged debt. See *Azar v. Hayter*, 874 F.Supp. 1314, 1317 (N.D. Fla.), aff’d, 66 F.3d 342 (11th Cir. 1995), cert. Denied, 516 U.S. 1048, 116 S. Ct. 712, 133 L. Ed. 2d 666 (1996). Consistent with the legislative history, verification is only intended to “eliminate the . . . problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid.” S. Rep. No. 95-382, at 4 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1699. There is no concomitant obligation to forward copies of bills or other detailed evidence of the debt.

f. Exhibit 2 attached hereto is an example of a Verification Letter that a Debt Collector could send in response to debtor disputing a debt or a request for validation.20 Verification is provided by confirming that the disputed information is correct and advising the debtor of the denial of any inaccuracy regarding the account information.21 There is legal authority that supports the position that verifying a debt in this manner is valid. However, contravening authority exists, and some debtors will not be satisfied with a response of this nature. Rather, they would like to see, and may demand, copies of documents.

g. Exhibit 3 attached hereto is an example of a follow up verification letter which can be sent to the debtor along with documents evidencing the debt.22 The purpose of this verification letter is to provide the debtor with copies of documents responsive to the dispute such as: (1) an affidavit from the creditor as to the amount due; (2) account statements; (3) card agreement; (4) copies of payments; and/or (5) the application from the debtor.

3. Typical Debtor Disputes and Requests for Verification

Unfortunately, there are many unscrupulous websites and companies which are willing to provide debtors with false hope that they can escape liability for valid debts. As a result, it is very common for debt collectors to receive completely unreasonable requests for verification. It has been my experience that debtors often believe a creditor cannot proceed with collections unless they comply with these unreasonable requests. The following are examples of the most commonly seen unreasonable requests in the credit card context:

a. Demand for a correct copy of the wet ink contract between the creditor and the debtor. This request demands the actual contract signed by the debtor.

b. Copies of all charge slips, with signatures, that constitute the amount alleged owed.

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19 See Clark v. Capital Credit & Collection Services, Inc., 460 F.3d 1162 (9th Cir. 2006), adopting the verification standard set forth by the 4th Circuit in *Chaudry v. Vallerizzo*, 174 F.3d 394 (4th Cir. 1999).
20 See Appendix I, Exhibit 2.
21 See also TEX. FIN. CODE §392.202.
22 See Appendix I, Exhibit 3.
C. Ceasing Communications

1. The FDCPA Requirements Regarding Ceasing Communication

15 U.S.C. §1692c(c), specifically provides as follows:

(c) Ceasing Communication. If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except –

(1) to advise the consumer that the debt collector’s further efforts are being terminated;

(2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or

(3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy. If such notice from the consumer is made by mail, notification shall be complete upon receipt.

(d) For the purpose of this section, the term ‘consumer’ includes the consumer’s spouse, parent (if the consumer is a minor), guardian, executor, or administrator.23

2. Practical Applications of the FDCPA Requirements Regarding Ceasing Communication:

a. Once a debtor has advised you that they “refuse to pay the debt, or do not want to communicate with you further,” you should no longer contact the debtor with regard to collection of the debt.

b. A refusal to pay the debt or a written request to cease communications does not prevent a collector from invoking legal process against the non-consenting consumer.24

c. A consumer/debtor must notify the “debt collector” in writing of the refusal to pay or a requests that communications cease. Such communications to the creditor that are not in writing are insufficient to invoke §1692c(c).25

d. In many situations, a debtor requests verification and also notifies the debt collector to cease communications. In this scenario, a debt collector may provide verification of the debt without violating §1692c(c).26

e. Providing verification of the debt and filing suit after a written request to cease communications,

D. Texas Bond Requirement

1. TEXAS FINANCE CODE § 392.101

Under Texas law, third-party debt collectors are required to have a bond.\(^{28}\)

(a) A third-party debt collector or credit bureau may not engage in debt collection unless the third-party debt collector or credit bureau has obtained a surety bond issued by a surety company authorized to do business in this state as prescribed by this section. A copy of the bond must be filed with the secretary of state.

(b) The bond must be in favor of:

1. any person who is damaged by a violation of this chapter; and
2. this state for the benefit of any person who is damaged by a violation of this chapter.

(c) The bond must be in the amount of $10,000.\(^{29}\)

2. TEXAS FINANCE CODE§ 392.001(7)

For purposes of Texas law, a third-party debt collector is defined as follows:

“Third-party debt collector” means a debt collector, as defined by 15 U.S.C. Section 1692a(6), but does not include an attorney collecting a debt as an attorney on behalf of and in the name of a client unless the attorney has nonattorney employees who:

1. are regularly engaged to solicit debts for collection; or
2. regularly make contact with debtors for the purpose of collection or adjustment of debts.\(^{30}\)

IV. Presuit Settlement

A. Lump Sum Settlement

In the best case scenario, you will be able to work out a lump sum settlement with the debtor prior to filing suit. In this instance, you want to avoid any ambiguity with regard to the terms of the agreement and therefore, it is best to send a settlement confirmation letter to the debtor outlining the terms of the agreement. It is best to specifically state the account number, the amount claimed, the amount of the settlement, as well as the deadline for payment. Attached hereto as Exhibit 4 is a sample settlement confirmation letter.\(^{31}\)

B. Settlement Installment Payments

In the event a debtor is not able to work out a lump sum settlement, it may be possible to work out a settlement where payments can be made over a period of time. In this scenario, it is important to document the agreement so that there is no confusion with regard to how the parties are proceeding. Attached hereto as Exhibit 5 is a sample of a letter reflecting an installment payment agreement.\(^{32}\) When taking payments over time, it is in the best interest to protect your client from any future arguments regarding the statute of limitations by addressing the application of the statute of limitations within the payment agreement. Accordingly, the payment agreement letter should contain a valid limitations waiver as well as a waiver of presentment, notice of default and notice of intent to accelerate, as well as notice of acceleration.

V. Filing Suit - Credit Card Debt

There are several factors to consider when filing suit on a credit card debt. A few of the key factors are venue, limitations and cause of action.

A. Venue

The FDCPA addresses the appropriate venue in a credit card collection action. 15 U.S.C. § 1692i specifically provides the following:

\[^{27}\] See Clark v. Capital Credit & Collection Services, Inc., 460 F.3d 1162 (9th Cir. 2006).
\[^{28}\] TEX. FIN. CODE § 392.101.
\[^{29}\] Id.
\[^{30}\] Id. § 392.001(7).
\[^{31}\] See Appendix 1, Exhibit 4.
\[^{32}\] See Appendix 1, Exhibit 5.
(a) Any debt collector who brings any legal action on a debt against any consumer shall—

* * *

(2) . . . bring such an action only in the judicial district or similar legal entity—

(A) in which such consumer signed the contract sued upon; or

(B) in which such consumer resides at the commencement of the action.33

B. Statute of Limitations

1. Choice of Law

With credit cards, there is often a card agreement which has a choice of law provision which specifically provides that the law of another state (other than Texas) is controlling. The question of the controlling law can have a significant impact on the statute of limitations and the determination of whether Texas law or the law of another state applies with regard to limitations. The following analysis can be used to determine whether Texas law or the law of another state will govern for purposes of the statute of limitations:

If the statute of limitations is procedural, the statute of limitations for the state where the suit was filed (Texas) will apply. However, if the statute of limitations is substantive law: in the choice of law state, the statute of limitations for the state with the controlling law (the other state) will apply.

As a general rule, questions of substantive law are controlled by the laws of the state where the cause of action arose, but matters of remedy and procedure are governed by the laws of the state where the cause of action is sought to be maintained (in our situation, Texas). However, when the statute that creates a right of action incorporates an express limitation upon the time within which the suit may be brought, the statute of limitations is considered “substantive law.”34 Therefore, if the choice of law state (Nebraska, for example), has a statute which creates a cause of action for failure to pay a credit card debt, and the same statute sets forth a statute of limitations (such as ten years), the ten year statute of limitations from the foreign state would apply because it would be considered “substantive law.” Generally speaking, however, courts have held that statutes of limitations are procedural and, therefore, Texas law typically controls.35

2. Charge-Off Date

As a general rule, do not use the “charge off date” for purposes of determining limitations on a credit card debt. Actual default on the account may have occurred long before the date of charge off. Under the Uniform Retail Credit Classification and Account Management Policy (the “Uniform Policy”)36 the Office of the Comptroller of the Currency (the “OCC”), requires that banks charge off any “open-end retail loans that become past due 180 cumulative days from the contractual due date. . . .”37 The OCC’s Uniform Policy is intended to further the rationale for accounting charge offs which is to reflect the real value of accounts receivables on a bank’s books, given that a credit card debt that is over six-months delinquent may not be repaid.

3. Suit on a Debt: Four-Year Statute of Limitations

Suit must be brought not later than four years after the day the cause of action accrues.38

3315 U.S.C. § 1692i.


37Id. at 36904. See also OCC Bulletin 2000-20.

38TEX. CIV. PRAC. & REM.§16.004(a)(3). See Elledge v. Friberg-Cooper Water Supply Corp., 240 SW 3d 869, 870 (Tex. 2007), (“The most logical reading of sections 16.003 and 16.004 is to treat “debt” actions under section 16.004 as breach-of-contract actions that fall under the four-year statute of limitations for such claims. . . .”)
4. **Stated Account: Four-Year Statute of Limitations.**

Suits must be filed “not later than four years after the date the cause of action accrues. For purposes of this subsection, the cause of action accrues on the day the dealings in which the parties were interested together ceased.” In Livingston Ford v. Haley, a radio station brought suit on sworn account (not account stated) against Livingston Ford for failure to pay for radio advertising. In response, Livingston asserted the 4 year statute of limitations found in section 16.004(a) of the TEXAS CIVIL PRACTICE AND REMEDIES CODE, but the court noted that section 16.004(c) is the proper section for a suit on an account. In its analysis, the court specifically noted the only evidence before the court was the “account” attached to the radio station’s summary judgment motion. The court noted that this evidence “reflects monthly dealings between the parties from 1989 through March 1996. . . . February 1996 was the last month in which the radio station actually advertised for the dealership. The date the last ‘dealings in which the parties were interested together ceased’ was March 29, 1996; on that date, an entry on the account shows the receipt of a $250 payment from [Livingston Ford].”

It is often argued that the Livingston Ford case stands for the proposition that the “date of last payment” on a suit on an account is always the date the “dealings in which the parties were interested together ceased.” Thus, it is argued that a suit on an account must be brought within four years of the date of the last payment. However, this position is not always correct. It is possible that a creditor would be able to show that the dealings between the parties continued beyond the date of the last payment. For example: a debtor may continue to use a credit card beyond the date of the last payment. In this situation, it would be inconsistent with the analysis in Livingston Ford as well as the plain language of section 16.004(c), to look to the last payment as the date the cause of action accrued.

While the date of the last payment is not always “the day the dealings in which the parties were interested together ceased,” calculating limitations from the date of the last payment reduces the likelihood of arguments over when the action actually accrued.

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40. 997 S.W.2d 425 (Tex. App.—Beaumont 1999, no pet.).
41. Id. at 429.

5. **Breach of Contract. Four-Year Statute of Limitations.**

When suit is brought based upon a breach of contract cause of action, suit must be brought not later than four years after the date the cause of action accrues. A cause of action for failure to pay a debt accrues when the payment is not made as required by the agreement. This rule is simple to apply when there is only one payment due date for the entire amount due. If the one payment is not made on the date it is due, the cause of action on the entire debt will accrue when the payment is not timely made.

However, most credit card agreements allow the cardholder (debtor) to repay the debt in a series of installment payments in a required amount on a specific date each month. A debtor may miss payments over a period of time before the account is closed and the creditor demands payment for the full amount. In this situation, a debtor may assert that the claim accrued on the entire account balance at the time the first payment was missed. This is not correct.

There are several Texas cases which provide that when periodic payments are contractually required, the statute of limitations will bar only those payments due more than four years before the filing of the suit, even though the original breach may have occurred years before suit was filed. The Texas Litigation Guide discusses this issue as follows:

> [W]hen a contract requires fixed, periodic payments, a separate cause of action arises for each missed payment. The cause of action on each payment accrues when the payment is due, and the limitation period begins then. Thus, a suit for the breach of a contract requiring payment in periodic installments may include all payments due within the four-year statute of limitation period, even if the initial breach was beyond the limitation period. Recovery of any payments due before the four-year limit is barred.

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42. TEX. CIV. PRAC. & REM. CODE § 16.004(a), (c) or § 16.051.
44. See Haliburton v. City of San Antonio, 974 S.W.2d 779 (Tex. App.—San Antonio 1988, no pet.).
45. Dorosanee, TEXAS LITIGATION GUIDE § 72.03 (citations omitted).
6. **Unjust Enrichment: Two Year Statute of Limitations.**

The recent case of Elledge v. Friberg-Cooper Water Supply Corp.,
held that unjust enrichment claims are governed by the two year statute of limitations found in section 16.003 of the TEXAS CIVIL PRACTICE AND REMEDIES CODE. In this case, Elledge invoiced Friberg-Cooper for insurance and equipment that was not responsible for. Friberg-Cooper paid the invoices and later, when the error was discovered, filed suit seeking recovery based upon an unjust enrichment theory. The Court of Appeals determined that Friberg-Cooper’s claim was a suit on “debt” and thereby governed by the four-year statute of limitations found in section 16.004, however, the Supreme Court did not agree. In overruling the lower court, the Supreme Court stated: “we declare categorically today what we have indicated twice previously: Unjust enrichment claims are governed by the two-year statute of limitations in section 16.003 of the Civil Practice and Remedies Code.” The Supreme Court also stated: “The most logical reading of sections 16.003 and 16.004 is to treat “debt” actions under section 16.004 as breach-of-contract actions that fall under the four-year statute of limitations for such claims.”

**b. Formacion of a Credit Card Contract**

Two recent cases clearly address the formation of credit card contract. These cases, Carolyn Jones v. Citibank (South Dakota), N.A., and, Hector Hinojosa, Jr. v. Citibank (South Dakota) N.A., demonstrate that there are a number of ways an enforceable credit card agreement can be proven.

In the recent case of Carolyn Jones v. Citibank (South Dakota), N.A.,
argues that she had no contract with the Citibank because the agreement was “unsigned, unilateral [and] disputed.” In rejecting this defense to Citibank’s contract claim, the Fort Worth Court of Appeals held that a contract was formed pursuant to Federal law, Texas law and the law of South Dakota. The court in Jones found that a binding contract was formed in the following ways:

Under Federal Law: Extension of credit and use of credit to incur debt.

Regardless of whether we apply federal, Texas, or South Dakota law, a contract exists between Hinojosa and Citibank. Under federal law, the issuance of a credit card constitutes a credit offer, and the use of the card constitutes acceptance. Jones, 235 S.W.3d at 339. Under Texas law, if one party signs a contract, the other may accept by his acts, conduct, or acquiescence to the terms of the contract, making it binding on both parties. Id.; see also Benser v. Citibank (South Dakota), N.A., No. 08-99-00242-CV, 2000 WL 1231386, at *5 (Tex. App.–El Paso Aug. 31, 2000, no pet.) (not designated for publication) (concluding appellant's use of credit card and payments to account showed he understood obligation to bank and contract had been formed). Finally, under South Dakota law "the use of an accepted credit card or the issuance of a credit card agreement and the expiration of thirty days from the date of issuance without written notice from a card holder to cancel" creates a binding contract. See S.D. CODIFIED LAWS § 54-11-9 (1983). Citibank established Hinojosa accepted the card and used it; therefore, it established the existence of a contract as a matter of law. Hinojosa, 2008 Tex. App. LEXIS 1532.

C. **Cause of Action**

There are several causes of action that can be asserted in a suit to recover a debt including, but not limited to, breach of contract (implied in fact and quasi-contract) as well as common law remedies such as: suit on debt, account stated and money counts (money had and received, money lent, and money paid), as well as claims for unjust enrichment at law and in equity. The three most basic causes of action are breach of contract, account stated, and suit on debt.

1. **Breach of Contract**

   a. **Elements**

   The elements of a valid credit card contract are: “(1) an offer, (2) an acceptance in strict compliance with the terms of the offer, (3) a meeting of the minds, (4) a communication that each party consented to the terms of the contract, (5) execution and delivery of the contract with an intent it become mutual and binding on both parties, and (6) consideration.”

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46 240 SW 3d 869 (Tex. 2007),
47 See TEX. CIV. PRAC. & REM. CODE § 16.004(a)(3).
48 Elledge, 240 S.W.3d at 871.
Under federal law, the term “credit” means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment. 15 U.S.C.A §1602(e) (West 1998). Thus, a credit card company extends credit to an individual when it opens or renews an account, as well as when the cardholder actually uses the credit card to make purchases. Am. Exp. Co. v. Koerner, 452 U.S. 233, 241, 101 s. Ct. 2281, 2286, 68 L. Ed. 2d 803 (1981). When the account is opened, the creditor has granted a right “to incur debt and defer its payment,” and when the account is used, the creditor has allowed the cardholder “to defer payment of debt.” Id.; Riethman v. Berry, 287 F.3d 274, 279 (3rd Cir. 2002) (construing “creditor” to mean someone who enters into an agreement with another party who uses credit to incur debt). The issuance of a credit card constitutes a credit offer, and the use of the card constitutes acceptance of the offer. Bank of Am. v. Jarczyk, 268 B.R. 17, 22 (Bankr. W.D.N.Y. 2001). Thus, a contract was formed here under federal law.54

Under Texas Law: Agreement signed by creditor & benefits accepted.

Under Texas law, if one party signs a contract, the other may accept by her acts, conduct, or acquiescence to the terms of the contract, making it a binding agreement on both parties. See MG Bldg. Materials, Ltd. v. Moses Lopez Custom Homes, Inc., 179 S.W.3d 51, 61-62 (Tex. App.–San Antonio 2005, pet. Denied); Hearthshire Braeswood Plaza Ltd. P'ship v. Bill Kelly Co., 849 S.W.2d 380, 392 (Tex. App.–Houston [14th Dist.] 1993, writ denied); see also Benser v. Citibank (South Dakota), N.A., No. 08-99-00242-CV, 2000 WL 1231386, at *5 (Tex. App.–El Paso Aug. 31, 2000, no pet.) (not designated for publication) (concluding that appellant’s use of credit card and payments to account showed he understood obligation to bank and that contract had been formed).55

Under South Dakota Law: Use of Credit or failure to cancel within 30 days of issuance

Further, a contract existed under South Dakota law. Appellee is a national bank located in South Dakota and organized under the National Bank Act. See Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 744, 116 S. Ct. 1730, 1735, 135 L. Ed. 2d 25 (1996). Although neither party motioned the trial court to take judicial notice of the laws of South Dakota, appellant noted in her pleadings that the card agreement contained the language that it “shall be governed by federal law and the law of South Dakota, where [appellee is] located.” Under South Dakota law,

[S.D. Codified Laws § 54-11-9 (1983). Again, appellant does not dispute that she obtained and used the credit card account, and she presented no evidence that she did not use the account or that she cancelled the account within thirty days of issuance. Thus, by using the credit card that appellee issued to her, appellant entered into a binding contract with appellee under South Dakota law.56

2. Account Stated.

Both South Dakota and Texas recognize the common law account stated cause of action.57 Some Texas Court of Appeal decisions indicate an account stated cause of action cannot be filed as a Rule 185 sworn account proceeding when collecting credit card debt. Therefore, creditors should rely upon the account stated cause of action independent of Rule 185.58

a. Account Stated Elements

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54 Jones, 235 S.W.3d at 338.
55 Id. at 338-39 (citations in original).
56 Id. at 339.
58 See the discussion of Rule 185 in this article.
The court in *Glasco v. Frazer* said of the account stated cause of action:

Transactions between the parties which give rise to an indebtedness of one to the other; an agreement, express or implied, *[**5]** between them fixing the amount due; and a promise, express or implied, by the one to be charged, to pay such indebtedness.*59*

**b. Account Stated Cause of Action Applies to Credit Card Statements**

The Account stated cause of action is recognized as appropriate to collect credit card debt. In *Citibank (South Dakota), N.A. v. Jones*,60 the court, in a proceeding to collect credit card debt, said:

The common law doctrine of account stated is one rooted in medieval England . . . It is widely accepted, not only in New York, but in most jurisdictions, as a basic legal doctrine… An account stated is an agreement between the parties to the account, based on prior transactions between them, with respect to the correctness of the account items and the balance due… The agreement may be implied by the retention of the account rendered for an unreasonable period of time without objection and from the surrounding circumstances.*61*

**c. Restatement (Second), Contracts**

The rule set out in the above quote that retention of the account statement for an unreasonable period of time results in assent to the amount of the debt is set out in Section 282 of the *Restatement (Second), Contracts*, as follows:

An account stated is a manifestation of assent by the debtor and creditor to a stated sum as an accurate computation of an amount due the creditor. A party’s retention without objection for an unreasonably long time of a statement of account rendered by the other party is a manifestation of assent.*62*

The statement of account referred to is the final, or last, statement of account setting out the total balance as a sum certain that is due and owing.

**d. Burden of Proof Shifts to Defendant**

At common law, as explained by the court in *Derius v. Allstate Indem. Co.*,63 once the creditor proves the elements of account stated the burden shifts to the debtor to produce evidence to show the amount shown as owing on the statement is incorrect: “… if a provider sues on an account stated and establishes the necessary elements of the cause of action, the burden shifts to the defendant to show that the account is incorrect due to fraud, mistake or error.”*64* In that regard, the court in *Mercado v. Lion’s Enterprises, Inc.*,65 said: “The action is premised on a sum certain, and after it is proven, the account stated may be attacked only by proof of fraud, mistake or other grounds cognizable in equity for the avoidance of an instrument.” And in *Darby & Darby v. VSI International, Inc.*,66 the court said: “The receipt and retention of Plaintiff’s accounts ‘without objection within a reasonable amount of time and agreement to pay a portion of the indebtedness [gives] rise to an actionable account stated, thereby entitling Plaintiff to summary judgment in its favor.’”*67*

It is clear that at common law the creditor is entitled to a summary judgment if the debtor does not produce admissible evidence the agreement should be avoided or that the amount owing on the account is incorrect. As such, whenever a creditor on a credit card account proves a final statement setting the total balance due as a sum certain that the debtor has not disputed or objected to in a reasonable

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*59* *Glasco*, 225 S.W.2d at 635; *see also* Morrison v. Citibank (South Dakota) N.A, 2008 Tex. App. LEXIS 1692 (Tex.App. - Ft. Worth February 28, 2008).

*60* 706 N.Y.S. 2d 301 (DC N.Y. 2000)

*61* *Id.*


*63* 723 So. 2d. 271 (Fla. App. 1998).

*64* *Id.* Texas law is the same: *see* Dodson v. Watson, 110 Tex. 355 (Tex. 1920).

*65* 800 So. 2d 753 (Fla. App. 5 Dist. 2001).

*66* 678 N.Y.S. 2d 482 (NY Sup. 1998).

*67* *Id.*
period of time, the creditor has presented an actionable, or *prima facie*, account stated cause of action. Upon establishing a *prima facie* case for an account stated action on motion for summary judgment, the burden shifts to the debtor to submit admissible evidence sufficient to create a genuine issue of material fact as to the validity of the debt or the correctness of the amount owing or summary judgment must be granted for the creditor.

e. Federal Law

The Federal Truth in Lending Act (hereinafter” TILA”), requires, among other things, that certain disclosures be provided to consumers involved in a credit card transaction. A fundamental requirement imposed on creditors by TILA at 15 U.S.C. 1637(b) is to provide periodic/monthly statements to debtors setting out the following information: (1) the outstanding balance at the beginning of the statement period; (2) the outstanding balance at the end of the statement period; (3) the amount and date of each extension of credit during the statement period; (4) the total amount credited during the statement period; (5) the amount of any finance charge added to the account during the statement period; (6) the rate used to compute the finance charge and the range of balances to which it is applicable; (7) the total finance charge expressed as an annual percentage rate; (8) the balance on which the finance charge was computed; (9) the date by which the payment must be made; (10) the address where consumers may send billing error dispute notices. These periodic statements qualify as the type of statement of account appropriate for a common law account stated cause of action.

f. Use of Card Creates A Loan and an Obligation to Repay Loan

Per the ruling by the Texas Supreme Court in Glasco v. Fraser, either an express or implied promise to repay the debt is sufficient to support an account stated cause of action. As a general rule, each use of a credit card creates a promise or agreement to repay that specific extension of credit. In *City Stores Co. v. Henderson*, the court said the issuance of a credit card is but an offer to extend a line of open account credit . . . use of the card by the offeree makes a contract between the parties according to its terms. In *Anastas v. American Sav.Bank*, (*In re Anastas*), the court said each card use forms a unilateral contract: the holder “promises to repay the debt . . .” In *Bank of Am. v. Jarczyk*, the court said acceptance or use of the card by the offeree makes a contract between the parties according to the terms . . . Because it is the use of the credit card, and not the issuance, that creates an enforceable contract, each time a cardholder uses his credit card, he accepts the offer by tendering his promise to perform i.e. to repay the debt upon the terms set forth in the credit card agreement.

In a case directly on point, *Feder v. Fortunoff, Inc. et al.*, the Court addressed the law in regard to the relationship between terms and conditions and an underlying credit agreement and an account stated. The plaintiff was issued a Citicorp MasterCard. When he attempted to purchase goods at Fortunoff, the card was seized. The plaintiff sued for damages. The parties agreed the account was approximately 15 years old. Citicorp asserted it sent Plaintiff periodic terms and conditions including the one produced to the Court with a clause that stated “. . . [Citicorp] can cancel or suspend your card at any time without prior notice or reissue a different one at any time . . .” Citicorp asserted the sum of $2,218.92 in charges was outstanding on the account. The plaintiff denied he owed anything to Citicorp. The plaintiff also denied ever receiving any terms and conditions at any time during the 15 years he had the account. The Court found it need not determine any of the issues on the terms and conditions or agreement. In the absence of any binding agreement, the issuance of the credit card itself is an offer of credit and the use constitutes acceptance. Citicorp could therefore withdraw any offer of credit at any time. While plaintiff opposed the counterclaim, he did not allege or show to the Court he disputed or objected to the account stated as rendered by Citicorp and the absence of any underlying actual contract or agreement would not relieve his obligation to pay for the credit extended. The Court granted judgment to Citicorp on the cross motion.

Even if a court determines a creditor has not proven the existence of an express agreement, a creditor would be entitled as a matter of law to prevail on an account stated

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6994 F.3d 1280, 1285 (9th Cir. 1996)

70123 Misc.2d 857 (N.Y. Sup. Ct. 1984)

71See CORBIN ON CONTRACTS, Revised Ed., §1.23 (promisor to a unilateral contract can either be an offeror or an offeree).

72123 Misc.2d 857 (N.Y. Sup. Ct. 1984)

73123 Misc.2d at 859.
cause of action, as per the Texas Court of Appeals in Glasco v. Frazer, on either an express or implied agreement to repay the debt.

VI. SUMMARY JUDGMENT

It is common to receive a Summary Judgment in a credit card collection case. It is also common that the defendant will attempt to defend against the Summary Judgment by asserting a multitude of legal and factual arguments. There are several common challenges raised by defendants in response to summary judgment. It is rare to receive a counter-affidavit which specifically provides the factual information needed to raise a fact issue. For example, a defendant in debt collection law suit will generally assert they did not get proper credit for payments (which statement is conclusory and does not raise a fact issue). I do not believe I have ever seen a response to a summary judgment where the debtor provided an affidavit stating: “I did not get credit for the 200.00 I paid on March 1, 2005, as evidence by the cancelled check attached hereto.” Most debtors simply do not have such a defense and, as a result, are left with nothing to respond with other than vague allegations.

There is a long list of common, vague responses to summary judgment motions. For example:

- The balance is wrong.
- I didn’t get credit for my payments.
- You don’t own the account.
- You did not prove I used the account.
- We don’t have a signed contract.
- Your witness does not have personal knowledge.

There are many others. However, the common thread is that these vague responses are insufficient to raise a genuine issue of fact in response to a motion for summary judgment.

A. Establishing Liability and Damages

In the recent case of Ghia v. American Express, American Express successfully filed a Motion for Summary Judgment based upon its breach of contract claim. On appeal, Ghia generally asserted that American Express failed to conclusively establish liability and damages. Ghia supported her general challenges to the summary judgment with approximately twenty specific challenges. The Appellate court reviewed each of these challenges and ultimately affirmed the judgment. A detailed review of the Appellate Court’s analysis is instructive. Accordingly, each challenge to the summary judgment, as well as a paraphrase of the court’s analysis, is outlined below:

1. Ghia’s General Complaints Regarding American Express’ Summary Judgment Affidavit:

   a. American Express did not provide sworn or certified copies of the documents;
   b. The affiant did not state the foundation for his opinions;
   c. The affidavit contains legal conclusions unsupported by any facts; and
   d. The affiant failed to show how he became familiar with the facts.

In addressing the above-listed complaints that Ghia raised regarding the affidavit supporting American Express’ summary judgment motion, the Court of Appeals stated that the records custodian properly authenticated the referenced documents as "business records" pursuant to TEXAS RULE OF EVIDENCE 902(10). The Court also noted that the did not contain any opinions or legal conclusions, but merely statements of fact. Finally, the records custodian averred that the statements were based on his personal knowledge, and as custodian of records, he testified regarding pertinent information based on the account agreement and monthly statements authenticated as business records and he described the regular business practices of American Express relative to the account agreement and monthly statements. Based upon this analysis, the Court rejected the general challenges listed above.

2. Ghia’s Argument That American Express Did Not Establish the Written Agreement

Ghia raised the argument before the Court of Appeals that American Express failed to establish that the written agreement supporting the summary judgment applied to her. The Court of Appeals addressed this argument by noting that, although Ghia was not specifically identified as a party on form agreement that was provided as evidence, the agreement did include the following language, “Agreement

74 2007 Tex. App. LEXIS 8194.
75 See id.
Between Platinum Card Member and American Express Travel Related Services Company, Inc.” The Court noted that the evidence demonstrated that Ghia was a “Platinum Card” holder. The Court also noted that the records custodian testified in his affidavit that the agreement applied to Ghia’s account. Based upon this analysis, the Court rejected Ghia’s argument that the evidence failed to establish that the agreement applied to her.76

3. **Ghia’s Argument that American Express Did Not Prove it Owns the Account**

Ghia raised the argument that American Express failed to prove that it owned the account at issue. The Court of Appeals rejected this argument based upon the testimony of the records custodian and the written agreement provided as evidence.

4. **Ghia’s Argument That American Express Did Not Prove Ghia Accepted the Account.**

Ghia argued that American Express failed to prove that she accepted the account. The Court of Appeals also rejected this argument, relying upon the agreement, which provided: “Please read this Agreement thoroughly, because when you keep, use or sign the enclosed Platinum Card (or any renewal or replacement Card issued to you) you agree to the terms of the Agreement.” The Court stated that “because Ghia retained and used her card, she accepted the terms of the agreement.”77

5. **Ghia’s Argument that American Express Did Not Prove Delivery of the Agreement**

Ghia also attempted to argue that American Express failed to prove that the agreement was delivered. The Court of Appeals rejected this argument, based upon the testimony of the records custodian that it was American Express’ regular business practice “to send a copy of the applicable terms and conditions to the Cardmember at the address to which the card and statements of account are sent . . . .” Because Ghia failed to present evidence in response to the summary judgment motion that negated this testimony or receipt of the agreement, this argument failed. In addition, the Court noted that by manifesting, through her actions (use of the card, payments toward the account) the intent that the agreement become effective through her actions, “manual delivery is immaterial to contract validity.”78 

6. **Ghia’s Argument that the The Card Agreement did not have language indicating it covered the relevant “time frame that relief is sought.”**

Ghia also argued that the summary judgment should be reversed on the grounds that the agreement at issue did not contain language that it covered the relevant “time frame that relief is sought.” The Court rejected this argument, because the agreement at issue was not a contract that was to be performed within a certain time frame. In addition, the Court cited to the fact that the Defendant was required to pay all the charges on the account regardless of when they were incurred.

7. **Ghia’s Argument that the Agreement is Not Definite**

Ghia attempted to argue that the contract at issue was not definite. The Court rejected this argument and instead stated that the agreement was actually lengthy and quite specific as to the obligations of the parties.

8. **Ghia’s Assertion that American Express failed to establish “an amount that is owed and due.”**

While the Court stated that Ghia’s assertion that American Express failed to establish the amount due and owing, the Court pointed to the most recent account statement produced as evidence and the amount that it showed to be due --$ 21,781.75. This amount matched the amount of the judgment. Therefore, the Court recognized

76Id.
77The Ghia Court cited the following opinions in support of this discussion: Winchek v. Am. Express Travel Related Servs. Co., Inc., 232 SW3d 197 (Tex. App.--Houston [1st Dist.] 2007, no pet.) (concluding account holder's use of credit card established her acceptance of account agreement where it provided that use constituted acceptance of terms).
79See Ghia, at *7-8.
that there was evidence of an amount due and owing and rejected this argument.

9. Ghia’s Argument that the Amount Due was Required to be Proved by Expert Testimony.

Ghia raised the argument that American Express was required to prove the amount due by expert testimony. The Court held that proving a balance as reflected on an account statement does not require expert testimony.

10. Ghia’s Argument that the Account Statements are Hearsay

While Ghia attempted to argue that the account statements are hearsay, the Court rejected this argument because the statements are clearly admissible under the business records exception of the hearsay rule. The records custodian had properly authenticated the statements, pursuant to Rule 803(6) of the TEXAS RULES OF EVIDENCE (providing that business records proved by affidavit complying with Rule 902(10) are admissible as exceptions to hearsay rule, unless the source of information or method or circumstances of preparation indicate lack of trustworthiness).

11. Ghia’s Argument That American Express Failed to Establish All Just and Lawful Offsets Were Allowed.

Ghia argued that American Express failed to prove that all just and lawful offsets to the account were allowed. The Court rejected this argument based upon evidence that the last payment to the account was made on September 3, 2004, the statements and demand letter set forth the amount due, and the records custodian testified that "all lawful offsets, payments, and credits have been allowed." In addition, the Court noted that Ghia failed to present any evidence of payments that were not credited to her account. Therefore, the Court concluded that American Express had proved the balance after all payments were credited.


Ghia attempted to argue that American Express failed to prove that it had the right to assess finance charges on the account. The Court rejected this argument, because the affidavit of the records custodian proved up the Card Agreement, which addressed the assessment of such charges.

13. Ghia’s Argument that the American Express “Sign & Travel” Agreement Requires Notice that there is No Proof She Received

Ghia argued that the American Express “Sign & Travel” Agreement at issue stated that it was unavailable to the cardmember until notice was received from American Express and that there was no proof that she had received the required notice. The Court disagreed with this argument and noted that the testimony of the records custodian established that American Express typically sends the terms and conditions comprising the applicable agreement to the card member. Ghia failed to produce evidence negating receipt of such an agreement. The Court also noted that the “Sign & Travel” agreement provides for acceptance of the terms by electing to use the feature. Therefore, the Court reasoned that Ghia had agreed to pay finance charges on the amounts subject to this feature by using the option.

14. Ghia’s Argument That American Express Was Required to Present Evidence of Each Transaction to Prove it Was Properly Billed and Was Subject to Finance Charges.

Ghia argued that American Express was required to present evidence of each transaction in order to prove that it was billed properly and was subject to the finance charges assessed. The Court concluded that American Express was not required to outline each transaction comprising this balance.

AE’s record custodian testified that it is the regular business practice of American Express to send monthly statements to the card member. The agreement requires the card member to contact American Express regarding any errors on a statement within sixty days after the statement is issued. The card member is not obligated to pay a disputed amount during American Express's investigation of the alleged error. However, the card member is obligated to pay the parts of the bill that are not questioned.

Ghia did not present evidence negating that she received any monthly statements or that she timely disputed any transactions comprising the balance, or in particular, notified American Express a transaction was improperly billed. Accordingly, by demonstrating the balance...
16. **Ghia’s Argument That American Express Presented Insufficient Evidence to Support the Amount of Finance Charges Included in the Balance.**

Ghia raised the argument that the evidence presented by American Express was insufficient to support the amount of the finance charges included in the balance due. The Court, in rejecting this argument, pointed to the agreement presented that prescribes the method for calculating finance charges. The Court stated that that evidence, along with evidence presented with the account statements, and the fact that Ghia did not dispute the calculation of any finance charges was sufficient to establish American Express’ entitlement to the finance charges included in the balance due.

17. **Ghia’s Argument That American Express Offered No Evidence Regarding the Applicable Prime Rate Used to Determine the APR.**

Ghia also argued that the evidence was insufficient because American Express did not produce evidence of the Applicable Prime Rate used to determine the APR. The Court noted that the agreement at issue specifically states that the Prime Rate is to be determined from The Wall Street Journal. The Court also noted that the statements provided included a detailed explanation regarding American Express’ calculation of finance charges. This evidence, in combination with the fact that Ghia offered no evidence that she had timely disputed the calculation of any finance charges on her monthly statements led to the conclusion that American Express sufficiently proved its right to recover the finance charges.

18. **Ghia’s Argument That American Express Assessed a "Default" APR in Excess of the Rate Authorized by the Agreement.**

Ghia also argued that American Express charge a default rate in excess of the rate authorized by the Agreement. In rejecting this argument, the Court noted that the Agreement provided that “American Express may change the terms, including finance charge rates, at any time and will notify the card member of the changes.” The Court pointed to a notice in the record regarding a change to the agreement as to the default finance charge rate. The Court also noted that the evidence established how that rate would be calculated. Based upon that evidence, the Court concluded that the rate charged was, in fact, authorized by the terms of the agreement.

19. **Ghia’s Argument That American Express Failed to Prove its Right to Recover “Service Charges,” “Late Fees,” and “Other Charges.”**

Ghia raised the argument that American Express failed to prove that it was authorized to recover “service charges,” “late fees,” and “other charges.” The Court rejected this argument, and noted that the agreement that was in evidence specifically authorized American Express to assess the charges and fees at issue.

20. **Ghia’s Argument That American Express Failed to Establish its Right to Recover Attorney's Fees.**

Ghia argued that American Express failed to prove that it was entitled to recover attorney’s fees. The Court soundly rejected this argument, based upon the Texas Civil Practice and Remedies Code. Because American Express prevailed on its breach of contract claim, it was entitled to recover fees.

The arguments raised in the Ghia case are illustrative of many common arguments seen from defendants in response to summary judgment motions. The Court’s discussion of these arguments is helpful to understand the evidentiary issues is debt collection cases.

### VII. COMMON DEFENSES & ISSUES

There are a multitude of common defenses and/or issues that repeatedly surface when collecting credit card debt. Some of the more common defense and issues, as well as
some of the applicable law, are outlined below.\textsuperscript{82}

A. No Signed Contract, or Demands for The “Wet Ink”

\textbf{Contract Signed by the Debtor.}  

A debtor does not have to sign a credit card agreement for the agreement to be binding.\textsuperscript{83} In \textit{Jones v. Citibank (South Dakota), N.A.}, the appellant argued that she had no contract with the appellee because the agreement was “unsigned, unilateral [and] disputed”. In its analysis, the Fort Worth Court of Appeals held that a contract was formed pursuant to \textit{Federal law}, \textit{Texas law} and the law of \textit{South Dakota}. In order to have a valid, binding agreement between a credit card company and a credit card user, there is no requirement that the credit card user sign a contract. \textit{TEXAS FINANCE CODE} section 246.003(a)(2) specifically provides that a revolving credit account can be established by a creditor or a customer under a written agreement between the creditor and the customer which the customer accepts by using the account. Likewise, other states have similar laws. For instance, \textit{SOUTH DAKOTA CIVIL STATUTE} 54-11-9 specifically provides that the use of an accepted credit card or the issuance of a credit card agreement and the expiration of thirty days from the date of issuance without written notice from a cardholder to cancel the account, creates a binding contract between the cardholder and the card issuer with reference to any accepted credit card, and any charges made with the authorization of a primary cardholder.

B. Bogus Arbitration Awards.

There was a time when it was common for a debtor in a credit card debt collection case to respond to a demand letter, or suit, by providing a copy of a bogus Arbitration Award. In fact, it was common that the Arbitration Award actually awarded the debtor the amount sought by the creditor. While less prevalent today, bogus arbitration awards still shows up every now and then. The following are some of the organizations that were issuing bogus arbitration awards:

- Arbitration Forum of Americia, Inc.

\textbf{C. Accord and Satisfaction.}  

Debtors often attempt to argue accord and satisfaction, based upon an attempt to send a check for less than what is owed on an account with a restrictive endorsement on the check. However, even if the check is cashed by the creditor, these facts alone will not create an Accord and Satisfaction.

1. \textbf{Good Faith Settlement Payment \& Bona Fide Dispute.}  

Under the applicable provisions of the Uniform Commercial Code (UCC), a check tendered in full satisfaction of a claim will create an accord and satisfaction only if a party asserting the defense proves that:

- (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim;
- (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and
- (iii) the claimant obtained payment of the instrument.\textsuperscript{85}

The party seeking accord and satisfaction must prove that the above listed requirements are met.\textsuperscript{86} Therefore, if a debtor wishes to plead and prove the defense of “accord & satisfaction,” the debtor must show that she tendered an instrument in good faith on a claim that is either unliquidated or is subject to a bona fide dispute.

2. \textbf{New Contract requires Consideration.}  

Accord and satisfaction requires a new contract.\textsuperscript{87} Because it is a new contract, it must be supported by new consideration.\textsuperscript{88} Acceptance of a sum less than the

\textsuperscript{82} See Appendix II, Exhibit 1, OCC Alert 2007-55: Fraudulent Schemes to Eliminate Mortgage, Credit Card, or Small Business Debt.
\textsuperscript{85} TEX. BUS. & COM. CODE § 3.311(a).
\textsuperscript{86} \textit{Id.} n. 4.
\textsuperscript{87} See Industrial Life Ins. Co. v. Finley, 382 S.W.2d 100, 104 (Tex. 1964); see Hycarbex, Inc. v. Anglo-Suisse, 927 S.W.2d 103, 108 (Tex.App. – Houston [14th Dist] 1996, no writ).
liquidated amount of indebtedness owing, even if viewed by both parties as full payment of the debt, is inadequate as consideration and generally will not bar a subsequent suit by a creditor to recover the remaining balance.\(^{89}\)

It is true that sufficient consideration for accord may arise out of a dispute as to liability upon a liquidated claim.\(^{90}\) However, this presupposes that the denial of liability, in whole or in part, is not made in bad faith.\(^{91}\)

In Petty v. Citibank (South Dakota) N.A.,\(^{92}\) Citibank filed a motion for summary judgment seeking to recover over $11,000.00 in credit card debt. In response, Petty provided an affidavit stating that he told Citibank he could not pay the debt, and he sent a check for $5,900.00 in full settlement of the debt which, he alleged, Citibank agreed to. He further testified that he placed a restrictive endorsement on the front and back of the check. On the front of the check was written “Paid in Full” and on the back of the check was written “Do not deposit unless for the full settlement amount.” Citibank accepted the check and sued for the balance due on the account. The trial court granted Citibank’s summary judgment, and the Court of Appeals affirmed. In its analysis, the Court of Appeals provided, in part, the following:

The defense of accord and satisfaction rests upon a new contract, express or implied, in which the parties agree to the discharge of an existing obligation by means of a lesser payment being tendered and accepted. Lopez v. Munoz, Hockema & Reed, L.L.P., 22 S.W.3d 857, 865, 43 Tex. Sup. Ct. J. 806 (Tex. 2000); Jenkins v. Henry C. Beck Co., 449 S.W.2d 454, 455, 13 Tex. Sup. Ct. J. 100 (Tex. 1969). The evidence must establish an assent of the parties to an agreement that the lesser amount paid by the debtor to the creditor was in full satisfaction of the entire claim. Jenkins, 449 S.W.2d at 455. There must be an unmistakable communication to the creditor that tender of the lesser sum is upon the

condition that acceptance will constitute satisfaction of the underlying obligation.\(^{93}\)

Failure of consideration was the primary reason Petty’s accord and satisfaction argument failed. The Petty court cited Prather v. Citizens Nat’l Bank of Dallas,\(^{94}\) as follows:

The old common law rule which has been followed in Texas since early times is as follows: The mere payment of part of a debt which is undisputed is not a sufficient consideration to support a promise to accept the same in full payment of the debt, and does not bar the creditor’s suit to recover the balance.\(^{95}\)

The court in Petty ultimately held that “\textit{Since there was no dispute regarding the amount that Petty originally owed to Citibank on the account, there was no consideration to support the agreement he reached with Citibank’s representative as a matter of law}”.\(^{96}\)

D. Burden of Proof - Affirmative Defenses

Many Courts wrongfully deny summary judgment because a defendant has done nothing more that “assert” an affirmative defense in response. I have personally witnessed several judges who have taken the position that it is the Plaintiff who has to negate an affirmative defense - even when the defendant has completely failed to provide any evidence in support of the affirmative defense. This is not the correct standard. A party relying on an affirmative defense to defeat summary judgment must come forward with summary judgment evidence establishing a fact issue on each element of the affirmative defense.\(^{97}\)

E. The Divorce Decree Ordered my Spouse to pay this Debt.

As a general rule, a divorce decree does not alter liability for a debt between a creditor and the debtor. Regardless of what the decree of divorce states regarding the

\(^{89}\)DeLuca v. Munzel, 673 S.W.2d 373, 375 (Tex.App. – Houston [14th Dist.] 1984, writ ref’d n.r.e.).


\(^{92}\)218 S.W.3d 242 (Tex. App. - Eastland 2007, no pet.).

\(^{93}\)Id.

\(^{94}\)882 S.W.2d 903, 906 (Tex. Civ. App.-- Waco 1979, writ ref’d n.r.e.).

\(^{95}\)Petty, 218 S.W.3d at 247.

\(^{96}\)Petty, 218 S.W.3d at 247 (emphasis added).

\(^{97}\)See Petty, 218 S.W.3d at 244 citing Am. Petrofina, Inc. v. Allen, 887 S.W.2d 829, 830 (Tex. 1994); Brownlee v. Brownlee, 665 S.W.2d 111, 112 (Tex. 1984).
responsibility for a debt, Texas law is clear that the debtor remains obligated to repay the debt in question.

Unless there is evidence that a creditor has agreed to look only to the separate property of one of the spouses of a marriage, there is a long-standing presumption under Texas law that debts that are incurred during a marriage are obligations of the community.\(^98\) The fact that a decree of divorce awards responsibility for a community debt to one party has no legal effect on the rights of a creditor to collect that debt.\(^99\) A recitation in a divorce decree that a debt should be paid by one party “does not lift the responsibility off [the other party] for its payment.”\(^100\) In fact, the ruling Court in a divorce action has no power to prejudice a creditor’s right to recover a community debt.\(^101\) Therefore, the assignment of a specific debt to the husband in a divorce decree does not release the wife from liability for the community debt, or vice versa.\(^102\)

F. **The Computer Generated Statements Are Not “True and Correct Copies of the Originals.”**

Debtors often respond to summary judgment motions by objecting that the computer generated account statements are not “true and correct copies of the originals.” This objection may arise in response to a summary judgment affidavit proving up the credit card statements or, in response a business record affidavit. Regardless, the argument lacks merit. In the recent case of *Hinojosa v. Citibank (South Dakota) N.A.*,\(^103\) the Dallas Court of Appeals specifically held that the argument objecting to computer generated account statements was without merit, based upon established authority in Texas that computer generated records are business records and that no additional or different requirements apply to business records that are electronically produced.\(^104\)

G. **The Record Custodian’s Affidavit Does Not Use the Phrase “Personal Knowledge.”**

The failure to include these exact words in an affidavit does not make the affidavit of the business records custodian defective provided there is sufficient information in the affidavit to make it apparent the affiant has “actual knowledge”. In *Hinojosa*, the Dallas Court of Appeals specifically addressed this issue and held that “…[the record custodian] explained the content of the three attachments in later paragraphs of her affidavit; therefore, her statement is not conclusory. The Court also noted that the records custodian’s personal knowledge of the records provided actual factual support for her testimony.\(^80\)

H. **Bogus Billing Error Disputes**

While there are probably many types of bogus form billing error letters\(^81\), this section only discusses two basic types of form billing error disputes letters. The first is the North American Educational Services\(^82\) (“NAES”) “vapor

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\(^{102}\) *Pape*, 35 S.W. at 481.

\(^{103}\) *Hinojosa*, 2008 Tex. App. LEXIS 1532 at *2; see e.g., *Voss v. Sw. Bell Tel. Co.*, 610 S.W.2d 537, 538 (Tex. Civ. App.--Houston [1st Dist.] 1980, writ ref'd n.r.e.) (noting legislature did not see any necessity for additional requirements where the records sought to be introduced into evidence were electronically produced); see also *Finn v. Finn*, 658 S.W.2d 735, 754 (Tex. App.--Dallas 1983, writ ref'd n.r.e.) (recognizing computer printouts as business records).”


\(^{80}\) Attached in Appendix II, as Exhibit 3 is an March 6, 2008 article: *Chase Bank Accuses Florida Law Firms of Running Debt-Relief Scam*. The attorneys, Laura Hess & Edward Kennedy, are accused of running a scam which encourages debtors to make false billing error disputes. On February 21, 2008, the Florida Attorney General filed suit claiming Hess Kennedy bilked consumers out of thousands of dollars. The North Carolina Attorney General has also filed suit and the Virginia Attorney General’s office has obtained an injunction while Hess Kennedy is investigated. This article can be found at: http://biz.yahoo.com/law/080306/db42bef784086fb33ff9384f5c2919c.html?v=1

\(^{82}\) The Complaint on file in *Chase Bank USA, N.A. v. NAES, INC and Michael Fitzpatrick*; Cause No.: 2:07-CV-00975-ECR-GWF, US Dist. Court, District of Nevada; is an excellent source of information regarding NAES and the bogus billing error dispute scam. A copy of
1. What is a billing error?

In Esquible v. Chase Manhattan Bank USA, N.A., the court noted that in order “To trigger the creditor’s obligations to investigate and verify its billing, the debtor must provide the creditor with written notice, within sixty days of the challenged statement date, in which the debtor: (1) identifies her name and account number; (2) “indicates the obligor’s belief that the statement contains a billing error and the amount of such billing error;” and (3) explains the obligor’s belief that the statement contains a billing error.84

2. Vapor Money Billing Error Letter.

A debtor attempting to assert a bogus billing error defense will typically send a letter which does not comply with the foregoing requirements. Rather, the debtor’s letter will make vague assertions of an error without ever pointing out a specific problem. The following is language from a typical letter:

I am disputing the above amount because I believe that you failed to credit my account for prepayments you agreed to credit on the statement dated July 25, 2005. It was my understanding that when I entered into the agreement with you that you would accept my signed note(s) or other similar instruments as money, credit or payment for previous account transactions, and then reflect those credits in the statement dated July 25, 2005. They do not appear in the statement and I am wondering why. The amount of the credits on the prepayment of money or credit accepted by you should be the approximate amount that I list above.

As the foregoing illustrates, the debtor’s letter is asserting (well after 60 days) that the debtor did not receive “credit” for alleged “prepayments” that date back to the opening of the account. This purported “error” is vague, unclear and does not set forth the reasons that the debtor supposedly has a belief that a billing error occurred.86 The debtor’s letter impermissibly fails to refer to a specific payment, the nature of the payment, the date of the payment, or the amount of the payment, except for referring to the entire amount owed on the Account. These vague assertions do not amount to notice of a billing error. Indeed, courts reviewing such letters have concluded the letters are fatally non-specific and do not constitute notices of a billing error under the FCBA.

Note that in the letter the debtor asserts the creditor agreed to “accept my signed note(s) or other similar instruments as money, credit or payment for previous account transactions, and then reflect those credits in the statement dated July 25, 2005.” What the debtor is trying to assert here is that the creditor supposedly accepted a promissory note as money (which it did not), deposited into the Account (which it did not) and essentially lent the debtor the debtor’s own money. This patently ludicrous theory has been repeatedly rejected by courts across country.87

this Complaint can be obtained on PACER. The Complaint seeks a permanent Injunction as well as damages for Intentional Interference with Contractual Relations; Defamation and Civil Conspiracy.

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83 Excerpts from a form NAES billing error letter.
85 See Alcord v. Washington Mutual Bank, 111 S.W.3D 264 (Tex. App. - Texarkana 2003, no writ) (rejecting debtor’s argument that he did not have to repay his mortgage because the money for the loan was “created” by the debtor’s signature so the money was the debtor’s from the inception of the account.); Wells Fargo Bank v. Ward, 2006 WL 3718337 (Ohio App. 10 Dist. 2006) (rejecting debtor’s “absence of legal tender” and “vapor money” theories); Demmler v. Bank One, Case No. 2:05-CV-00322 (S.D. Ohio 2006); Frances Kenny Family Trust v. World Savings Bank, No. C04-03724 WHA, 2005 WL 106792 (N.D. Cal. 2005) (sanctioning plaintiffs and rejecting their “vapor money” theory); Carrington v. Federal Nat’l Mortgage Ass’n, No. 05-CV-73429-DT, 2005 WL 3216226 at #3 (E.D. Mich. Nov. 29, 2005) (finding “fundamentally absurd and obviously frivolous” plaintiff’s claim that the lender unlawfully “created money” through its ledger.

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In the recent case of Esquible v. Chase Manhattan Bank USA, N.A., the court analyzed a series of billing error dispute letters the debtor mailed to Chase. The first letter contained the account number as well as the debtor’s name and read as follows (with emphasis added):

**FIRST NOTICE OF BILLING ERRORS**

Pursuant to 15 U.S.C. [§] 1666, I am writing you at the address on my billing statements to be used for billing inquiries within sixty days of receiving a statement of my account dated 11/12/2004 in connection with extensions of consumer credit. I hereby provide you notice that I believe said statement contains errors in the total amount you allege to be due, and other more specific items, as laid out more completely below. My belief that the statement contains billing errors under 15 U.S.C. [§] 1666(b)(1), (2) and (5) is based upon my belief that you failed to give all the proper disclosures required by law to me prior to opening this account, and additional disclosures since then. Because you failed to provide these disclosures, the account could not legally be opened and I should not be responsible for the payment of interest, fees or other finance charges. While I understand I will likely still be responsible for the repayment of purchases and cash advances, I do not believe I should be responsible for interest, finance charges and other fees. As I have made payments [sic] on this account that have been applied to these improper charges the items I claim are billing errors are improperly reflected on the statements in the incorrect amount and/or inaccurate due to a computational or accounting error.

Because I believe I should not have been charged finance charges or fees for the history of this account, I dispute the accuracy of the following items on my statements which have been calculated based on the inclusion of those charges: the current balance, the amounts and payments due and all finance charges and other fees charged since the account was opened. The exact amount of all such previous finance charges and fees hereby disputed will be determined after you provide the documentary evidence requested below.

Because your claim as to my indebtedness rests on the existence of the alleged account and cardholder agreement, if the account was not able to be opened properly because of your failure to give the disclosures, then the amount of the indebtedness is called into question. Therefore, I request the documentary evidence of indebtedness detailed below. The statement contains billing errors under 15 U.S.C. [§] 1666(b)(2) in that the statements reflect inaccuracies through their individual items, the entire balance due, finance charges and all extensions of consumer credit for which you claim I am indebted to you, and I request additional clarification regarding all such extensions of consumer credit, including all documentary evidence thereof you possess or are able to obtain, specifically including, but not limited to the following [the debtor then requests a long list of documents].

In summarizing this letter, the court adopted the Plaintiff’s position that the errors asserted were as to the accuracy of the finance charges, fees, minimum payment, and total amount due and, that it was Chase’s failure to make the required disclosures which lead to the error.

The court concluded the proper way to determine if Plaintiff’s letters should be considered valid notices of billing errors would be to determine whether finance charges...
and fees are extensions of credit under the billing error provision. In a detailed analysis, the court concluded that over-the-limit fees and late fees were penalties, not extensions of credit. The court’s analysis can be summarized as follows:

a. “Credit means the right to defer payment of debt or to incur debt and defer its payment.” 12 C.F.R. § 226.2(a)(14). The court held that “The assessment of a penalty for exceeding the authorized credit limit or for failing to make a timely payment is not a purchase to which the right to defer payment attaches.”

b. Plaintiff relied upon 15 U.S.C. § 1666(b)(1), (2) which requires an “extension of credit” be the subject of the dispute. However, Plaintiff’s challenge of interest and finance charges does not meet this requirement.

c. “Finance charge” is defined by the statute as “the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit.”

d. “Over-the-limit fees” are like finance charges in that they are something other than extensions of credit. They are assessed in connection with extensions of credit.

e. “Late fees” are not defined anywhere in the statute in relation to extensions of credit, but, more simply, as fees imposed for late payments.

f. The court held the “Plaintiff's third alleged billing error of the computational variety is wholly meritless. Plaintiff claimed that, because amounts she was disputing had been added to the total amount owed and the amount due had been calculated from that total, the entire balance was in dispute. Having identified no computation error or accounting error, Plaintiff's assertion did not qualify as a billing error.” Allowing Plaintiff's argument would suggest that every challenge, even ones that do not qualify as billing errors (as here), could be transformed into a billing error because the challenged amount was added into the account total from which the minimum payment was calculated.

In Eicken v. USAA Federal Savings Bank and USAA Savings Bank, the court analyzed a series of nine letters similar to the letters in Esquible. In Eicken, the court also found that the letters failed to qualify as a valid billing error disputes because the disputes were not made within 60 days of the statement date.

While this ruling alone was sufficient to deny relief to Eicken, the court went on to rule that the disputes were not valid because the creditor was able to produce significant compelling evidence of the absence of belief by debtor that a billing error actually existed. With respect to this second ruling, the court specifically stated that “In short, the Court's ruling as to Plaintiff's lack of belief should be limited to a very narrow set of circumstances, in which a creditor uncover substantial evidence demonstrating an obligor's lack of belief that a billing error actually exists, and the obligor is unable to produce competent summary judgment evidence to the contrary.” In summary, USAA was able to show, in part, the following:

a. Eicken used a series of letters purchased from Debt Relief Services (“DRS”).

b. Eicken began using DRS-authored materials in an attempt to escape his debt in July 2004. He admitted during his deposition that he had “no previous notion or thought about disclosures” until DRS began to promote the new billing error notice scheme in October 2004.

c. Eicken admitted he did not know what disclosures

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89 Id at 829.
90 Id.
91 Id. at 828.
93 Id.
95 Id. at 829.
97 487 F. Supp. 2d 818.
98 Eicken, 498 F. Supp. 2d at 962.
99 Id. at 965-968.
100 Id. at 968.
101 Id. at 967.
he had received from USAA SB, and he had never re-examined his account statements to determine whether the finance charges were not being calculated correctly.102

d. Eicken listed all of his credit accounts on his initial DRS Client Data Form, intending to challenge each account “regardless of the knowledge that [he] did or didn’t have about what [he] did or didn’t receive” when he first opened his accounts.103

e. Eicken admitted numerous times during his deposition that he did not know what disclosures he may or may not have received.104

f. Eicken was also unable, although he was asked repeatedly at deposition, to point to a specific billing error on any of his USAA account statements.105

g. Eicken simply printed, signed, and mailed the DRS-authored form letters to his creditors, including USAA SB, without any alteration, and without any assurance from DRS that they had inspected his accounts for errors.103

h. Finally, Eicken admitted that the letters were designed to lead creditors, including USAA SB, into committing violations of the TILA and FCBA.104

I. Usury

Section 30 of the NATIONAL BANK ACT provides that a national bank may charge its loan customers “interest at the rate allowed by the laws of the State. . . . where the bank is located.”105 The National Bank Act of 1864 preempts state law.106

Therefore, when determining whether the interest and fees charged by a bank are usurious, the Court must consider the laws of the state where the bank is located, not the TEXAS FINANCE CODE.107 For example, the usury laws of South Dakota, contained in S.D. CODIFIED LAWS 54-3-13 state that “regulated lenders” are not subject to South Dakota usury laws, and S.D. CODIFIED LAW 54-3-14 (2) defines a national bank as a regulated lender that is exempt from South Dakota’s usury laws. Therefore, the interest rates charged by a National Bank located in South Dakota, such as Citibank (South Dakota), N.A., do not violate South Dakota usury laws and do not raise an issue as to usury which can preclude summary judgment.

J. The Creditor Is Not Registered with the Secretary of State.

This is a common issue raised by debtors. In essence the debtor argues that the creditor cannot maintain an action in state court because the creditor is a foreign corporation not registered with the secretary of state and therefore, cannot do business in Texas. However, this is an invalid argument when you are dealing with a national bank. National banks are organized under federal law108 and they are regulated by the Office of the Comptroller of Currency in Washington, D.C.109 National banks are instrumentalities of the federal government and, as such are protected from state regulation (except to the extent permitted by the United States Congress) by virtue of the Supremacy Clause of the United States Constitution as interpreted judicially by the rules comprising the preemption doctrine.110 Therefore, a national bank may bring a collection action in state court without complying with that state’s law requiring “foreign corporations” to be registered with the Secretary of State as a condition precedent to being able to bring suit in state court.111

K. Creditor must establish that the Charges were “Authorized” per 15 U.S.C. § 1643.

Like many defenses, this defense can be legitimately

102 Id.
103 Id.
104 Id.
105 Id.
106 Id.
109 Smiley, 517 U.S. at 737.
asserted; however, §1643 is only applicable as a defense if the debtor is asserting the charges are the result of unauthorized use. Yet, without ever asserting the charges were the result of the debtor being the victim of “unauthorized use”, some debtors inappropriately argue that 15 U.S.C. § 1643 requires, in every case, that the creditor prove the charges were not the result of theft, loss, or fraud. There is no such requirement. A review of the full text of 15 U.S.C. § 1643 makes this clear.\footnote{112}\footref{15 USC § 1643. Liability of holder of credit card (Emphasis Added)}

\begin{itemize}
\item[(a)] Limits on liability.
\begin{itemize}
\item[(A)] The card is an accepted credit card;
\item[(B)] The liability is not in excess of $50;
\item[(C)] The card issuer gives adequate notice to the cardholder of the potential liability;
\item[(D)] The card issuer has provided the cardholder with a description of a means by which the card issuer may be notified of loss or theft of the card, which description may be provided on the face or reverse side of the statement required by section 127(b) [15 USCS 1637(b)] or on a separate notice accompanying such statement;
\item[(E)] The unauthorized use occurs before the card issuer has been notified that an unauthorized use of the credit card has occurred or may occur as the result of theft, loss, or fraud;
\item[(F)] The card issuer has provided a method whereby the user of such card can be identified as the person authorized to use it.
\end{itemize}
\end{itemize}

(b) Burden of proof. In any action by a card issuer to enforce liability for the use of a credit card, the burden of proof is upon the cardholder to show that the use was unauthorized, as in cases involving theft, loss, or fraud. In \textit{Towers World Airways, Inc. v PHH Aviation Systems, Inc.}\footnote{114} the court held that a credit card holder’s failure to examine credit card statements that would reveal fraudulent use of the credit card constitutes negligent omissions which create apparent authority for charges. The court held in \textit{Minskoff} that the TILA “clearly precludes a finding of apparent authority where the transfer of the card was without the cardholder’s consent, as in cases involving theft, loss, or fraud.”\footnote{116} Thus, absent an event of this nature, the charges are not the result of unauthorized use.

In \textit{Citibank (S.D.) N.A. v. Poynton},\footnote{117} the court held “The cause of action . . . for an account stated \textbf{is not} an action by a card issuer to enforce liability for the use of the credit card as defined under the Federal Truth in Lending Act.”\footnote{118}

\section*{L. Conclusory Statements Such as “My Account Balance Is Not Correct” Or, “I Didn’t Get Credit for Payments.”}

It is very common for a defendant in a credit card debt collection case to make conclusory statements in response to a summary judgment. However, the law is clear that conclusory statements such as: “I didn’t get credit for payments,” or “My account balance is not correct,” are not

\begin{itemize}
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\item[(B)] the liability is not in excess of $50;
\item[(C)] the card issuer gives adequate notice to the cardholder of the potential liability;
\item[(D)] the card issuer has provided the cardholder with a description of a means by which the card issuer may be notified of loss or theft of the card, which description may be provided on the face or reverse side of the statement required by section 127(b) [15 USCS 1637(b)] or on a separate notice accompanying such statement;
\item[(E)] the unauthorized use occurs before the card issuer has been notified that an unauthorized use of the credit card has occurred or may occur as the result of theft, loss, or fraud;
\item[(F)] the card issuer has provided a method whereby the user of such card can be identified as the person authorized to use it.
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In \textit{Citibank (S.D.) N.A. v. Poynton},\footnote{117} the court held “The cause of action . . . for an account stated \textbf{is not} an action by a card issuer to enforce liability for the use of the credit card as defined under the Federal Truth in Lending Act.”\footnote{118}

\section*{L. Conclusory Statements Such as “My Account Balance Is Not Correct” Or, “I Didn’t Get Credit for Payments.”}

It is very common for a defendant in a credit card debt collection case to make conclusory statements in response to a summary judgment. However, the law is clear that conclusory statements such as: “I didn’t get credit for payments,” or “My account balance is not correct,” are not

\begin{itemize}
\item[(A)] the card is an accepted credit card;
\item[(B)] the liability is not in excess of $50;
\item[(C)] the card issuer gives adequate notice to the cardholder of the potential liability;
\item[(D)] the card issuer has provided the cardholder with a description of a means by which the card issuer may be notified of loss or theft of the card, which description may be provided on the face or reverse side of the statement required by section 127(b) [15 USCS 1637(b)] or on a separate notice accompanying such statement;
\item[(E)] the unauthorized use occurs before the card issuer has been notified that an unauthorized use of the credit card has occurred or may occur as the result of theft, loss, or fraud;
\item[(F)] the card issuer has provided a method whereby the user of such card can be identified as the person authorized to use it.
\end{itemize}

(b) Burden of proof. In any action by a card issuer to enforce liability for the use of a credit card, the burden of proof is upon the cardholder to show that the use was unauthorized, as in cases involving theft, loss, or fraud. In \textit{Towers World Airways, Inc. v PHH Aviation Systems, Inc.}\footnote{114} the court held that a credit card holder’s failure to examine credit card statements that would reveal fraudulent use of the credit card constitutes negligent omissions which create apparent authority for charges. The court held in \textit{Minskoff} that the TILA “clearly precludes a finding of apparent authority where the transfer of the card was without the cardholder’s consent, as in cases involving theft, loss, or fraud.”\footnote{116} Thus, absent an event of this nature, the charges are not the result of unauthorized use.

In \textit{Citibank (S.D.) N.A. v. Poynton},\footnote{117} the court held “The cause of action . . . for an account stated \textbf{is not} an action by a card issuer to enforce liability for the use of the credit card as defined under the Federal Truth in Lending Act.”\footnote{118}
sufficient to raise a genuine issue of material fact in response to a summary judgment motion. The case law regarding the attempt to use conclusory statements in controverting affidavits at the summary judgment stage is well settled. The Supreme Court of Texas, in *Life Ins. Co. of Virginia v. Gar-Dal, Inc.*, held:

> . . . the statement in the opposing affidavit of defendant Jones that all offsets and payments had not been credited to the note is a conclusion and is insufficient to raise an issue of fact that plaintiff failed to credit all offsets and payments to the note.\[120]\n
This holding confirmed the opinion of the Houston Court of Appeals in *Smith v. Crockett*, wherein that Court considered a similar question, and held:

We are of the view that the plea in appellant Smith’s affidavit, there being nothing more, stating that all offsets and credits have not been allowed, is but a conclusion. It should have gone further and specified what such credits and offsets were. If this had been a trial on the merits and the only thing stated by appellant was that all offsets and payments had not been credited, the court would have been required to instruct a verdict against appellant. His testimony in such a trial, that all payments and offsets had not been allowed, without more, would be pure conclusion.\[122]\n
**M. Objection to Record Custodian’s Affidavit**

When moving for summary judgment or filing business records, you will be relying upon the testimony of the records custodian and, in response, you will probably receive many invalid objections. Generally, the invalid objections stem from a lack of understanding (or wishful thinking) regarding the requirements of Texas Rules of Evidence 803(6). The invalid objections tend to generally assert that the records custodian does not have personal knowledge of the information in the records; and/or that the records custodian is not an employee of the company who recorded the records.

1. **Requirements of a Business Record Affidavit per Texas Rule of Evidence 803(6).**

Texas Rule of Evidence 803(6), provides the following predicate for the business records exception to the hearsay rule:

a. The record was made and kept in the course of a regularly conducted business activity.
b. It was the regular practice of the business activity to make the record.
c. The record was made at or near the time of the act, event, or condition recorded.
d. The person making the record or submitting the information have personal knowledge of the act, event, or condition recorded.

2. **The Records Custodian Need Only Have Personal Knowledge of How the Records Are Kept**

Affidavits by record custodians in credit card debt collection cases will generally be attacked on the basis that the affiant is not competent because he is not personally involved in recording the information in the account records. However, these types of arguments fail because such detailed knowledge is not required by the Texas Rules of Evidence. Well respected commentary on the Texas Rules of Evidence provides the following with regard to who is competent to sign a business record affidavit:

The sponsoring witness who testifies to the facts establishing the predicate (for a business record) must be either the custodian or other qualified witness. A “qualified witness” includes the person who prepared or created the record, and any person who has personal knowledge of the method or mode of its creation and the ability to attest to the foundational requirements of the Rule. Although it is required that either the preparer of the record, or the supplier of the information recorded have personal knowledge of the information, the...
sponsoring witness need have personal knowledge of only the record keeping system.\textsuperscript{123}

Likewise, in \textit{Reyes vs. State},\textsuperscript{124} the Court held that the predicate witness for a business record affidavit need not be the creator of the record or have personal knowledge of its content; rather, the witness need only have personal knowledge of the manner in which the records were prepared. In \textit{United States vs. Salgado},\textsuperscript{125} the Court held that the custodian of records need not be in control of or have individual knowledge of the records, but need only be familiar with the company’s record-keeping practices. In \textit{United States vs. Dixon},\textsuperscript{126} the Court held that a custodian’s testimony, that he did not personally create the records, and did not personally know if the records were true or accurate, did not preclude the records admissibility.

“Texas Rule 803(6) provides for the familiar business record exception and is substantially the same as the Federal Rule.”\textsuperscript{127} Weinstein’s \textit{FEDERAL EVIDENCE}, provides the following with regard to Federal Rule 803(6):

\begin{quote}
A records custodian or other qualified witness can testify that computer based records were made and retained in compliance with the requirements of the business record hearsay exception. Although the trustworthiness of a business record is enhanced, if the record-keeper has personal knowledge of its contents in preparation, maintaining this level of authentication in all cases would effectively eviscerate the underlying policy of Rule 803(6). A records custodian need not have first-hand knowledge of the contents of the record or of the manner in which the record was compiled and kept. Only a general understanding of the records, and how they are prepared is necessary to comply with Rule 803(6).

Rule 803(6) expressly permits a qualified witness other than the records custodian to lay the foundation for the hearsay exception. Thus, the foundation witness need not have actual control of the records. All that is required is a general familiarity with the practice of the business concerning the type of record. In fact, the witness need not be a current employee of the particular business involved.”\textsuperscript{128}
\end{quote}

3. \textbf{TEXAS RULE OF EVIDENCE 803(6) does not require Records be compiled by employees of the Creditor}

The \textit{TEXAS RULES OF EVIDENCE MANUAL}, specifically provides the following explanation regarding the requirements of the rule:

Rule 803 (6) does not require that the person who has personal knowledge of the information be an “employee” of the entity that makes the record. It is sufficient that the supplier of the information had a business duty to report it, and reported it in the regular course of business, even though that person was an employee or representative of another business.\textsuperscript{129}

Likewise, Weinstein’s \textit{FEDERAL EVIDENCE}, specifically provides that “Rule 803(6) expressly permits a qualified witness other than the records custodian to lay the foundation for the hearsay exception. Thus, the foundation witness need not have actual control of the records. All that is required is a general familiarity with the practice of the business concerning the type of record. In fact, the witness need not be a current employee of the particular business involved.”\textsuperscript{130}

\textbf{N. Records Retention by Creditor: the Argument That “I’m Not Paying Because You Do Not Have All the Records.”}

In the face of this argument, the refusal of a debtor to pay because the creditor cannot produce or has not maintained all the records regarding the account, it is helpful to know the creditor’s obligation to retain records and information. The creditor is not required to retain all documents that the debtor may request.

\begin{itemize}
\item \textsuperscript{123} \textit{TEXAS RULES OF EVIDENCE MANUAL, 7th Ed.}, § 803.02 [7][k] p. 992.
\item \textsuperscript{124} 48 S.W. 3d 917, 921 (Tex. App.- Fort Worth 2001, no pet).
\item \textsuperscript{125} 250 F.3d 428, 452 (6th Cir. (KY) 2001).
\item \textsuperscript{126} 132 F. 3d. 192, 197-98 (5th Cir. (MS) 1997).
\item \textsuperscript{127} \textit{TEXAS RULES OF EVIDENCE MANUAL §803.02 [7][b]}, p. 980.
\item \textsuperscript{128} Weinstein’s \textit{FEDERAL EVIDENCE}, Sec. 900.07[1][d] p. 975-76.
\item \textsuperscript{129} \textit{TEXAS RULES OF EVIDENCE MANUAL §803.02[7][b]} p. 988-89.
\item \textsuperscript{130} Weinstein’s \textit{FEDERAL EVIDENCE}, Sec. 900.07[1][d] p. 975-76.
\end{itemize}
The primary source of record retention requirements regarding credit card accounts is found in Regulation Z, specifically 12 C.F.R. §226.25, which requires the creditor to maintain records for two years “after the date disclosures are required to be made or action is required to be taken.” This is construed to apply principally to statements of account (i.e. two (2) years from the opening of the account and each statement). Applications for credit are covered by Regulation B, specifically 12 C.F.R. §202.13, which requires the creditor keep applications for 25 months from the date of the application.

Based upon these record retention regulations, it is possible that the documents a defendant/debtor may request are no longer required to be available. Additionally, it is important to note that, in most cases, the information a defendant/debtor will request was previously provided to the defendant.

O. Account Stated Cause of Action Does Not Apply to Credit Card Debts.

In situations where the account stated cause of action is used to attempt to recover a credit card debt, many defendants argue that the account stated cause of action does not apply to credit card debt. This argument is based on the false assertion that there is not an account stated claim outside of Texas Rule of Civil Procedure 185 (Rule 185). Several cases have held that suit on a sworn account pursuant to Rule 185 does not apply to credit card debt.131 In an attempt to apply the same limitations132 to the ancient common law account stated cause of action, some have attempted to argue that there is simply no common law account stated remedy outside of Rule 185.133 This analysis is not valid as outlined below.

Those who assert there is no common law account stated claim independent of Rule 185, rely primarily upon language contained in the case of Hollingsworth v. Northwestern National Insurance Co.,134 wherein the court notes the Texas legislature specifically changed the language of Rule 185 to include the “account stated” cause of action. In an amendment to the statute that preceded Rule 185, language was added that included account stated as an action which may be brought under Rule 185.135 However, Hollingsworth does not stand for the proposition that the common law account stated action no longer exists in Texas. Rather, the Court merely recognized that Rule 185 can be utilized in an account stated action as long as the transaction at issue involves the passing of personal property from one party to another.136

Furthermore, Rule 185 “is not a rule of substantive law but is a rule of procedure with regard to evidence necessary to establish a prima facie right of recovery or defense, and is not the basis of any cause or causes of action.”137 Therefore, procedural Rule 185 could not have abrogated the substantive common-law account stated action.

In addition, nowhere in the Hollingsworth opinion does the court state that Rule 185 abrogated the common law account stated action. However, a case that was decided two

132An account stated claim can be filed as a suit on a sworn account under Rule 185, if the underlying debt is based upon the sale of goods, wares, and merchandise, whereby title to personal property passes from one party to another. Bird, 994 S.W.2d at 282. As stated in Bird, a credit card evidences a line of credit extended by the bank which can be used to make purchases of good and service from a third party. In this situation, no title passes from the bank to the cardholder. Thus, a credit card does not create the sort of debtor-creditor relationship required to bring a suit on a sworn account under Rule 185. Id at 282. Accordingly, one should not bring a Rule 185 suit on a sworn account on a credit card issued by a financial institution. However, this analysis does not effect a creditor’s right to bring a common law account stated claim.
133Some argue that there is no distinction between a rule 185 suit on a sworn account and an account stated claim. This argument is simply not valid as evidenced by the Houston 1st District Court of Appeal’s withdrawal of its opinion in Wincheck v. American Express Travel Related Services, Inc. 2007, 2007 Tex. App. LEXIS 3017,(Tex. App. -- Houston [1st Dist.] Apr. 19, 2007). When the court issued its opinion on April 19, 2007, it included a comment in footnote 1 which equated suit on sworn account with an account stated claim. In part, the footnote provided: “The petition reflects that Amex advanced a claim for ‘account stated’ (or suit on a sworn account) ...” The court withdrew its April 19, 2007 Opinion and, on May 17, 2007 issued a new opinion. Wincheck v. American Express Travel Related Services, Inc, 232 S.W. 3d 197 (Tex. App. -- Houston [1st Dist.] 2007, no pet.). In the new opinion, the court deleted the language equating a suit on a sworn account with an account stated claim.
134Hollingsworth v. Northwestern National Insurance Co., 522 S.W.2d 242, 244.
135See id. at 245; see also Glasco v. Frazer, 225 S.W.2d 633, 635 (Tex. Civ. App.-Dallas 1949, writ dism’d).
136See Hollingsworth, 522 S.W.2d at 244.
137See id. at 245; see also Meaders v. Biskamp, 316 S.W.2d 75, 78 (Tex. 1958) (emphasis added).
years after the Hollingsworth case - Eastern Development and Investment Corp. v. City of San Antonino138 - permits the Court to infer that Rule 185 did not abrogate the common law account stated action, in as much as the Eastern Development court recognized an action on a “stated account,” but made no reference whatsoever to Rule 185. Further, the Eastern Development and Investment Corp. court cited with approval a case which predates the inclusion of an account stated action in Rule 185, and another case which came after the amendment to the rule – a clear indication that the court recognized that the common-law account stated cause of action survived the amendment of the rule.139

Moreover, since 1949, when the Glasco court recognized an account stated action under Rule 185, several subsequent opinions have recognized an account stated action outside of Rule 185 (implicitly if not explicitly), including Eastern Development and Investment Corp., Magic Carpet Co. v. Pharr,140 Arnold D. Kamen & Co. v. Young,141 and Continental Casualty Co. v. Dr. Pepper Bottling Co. Of Texas, Inc.,142 and Morrison v. Citibank (South Dakota), N.A.143

P. Pro Se Defendants - No Special Standards

Many defendants who are acting in their own defense expect and ask for special treatment due to the fact they are not represented by counsel. Texas law does not permit such accommodation. Pro se litigants are held to the same standards as a licensed attorney and are required to comply with the applicable laws and rules of procedure.144 Further, if pro se litigants were not required to comply with applicable rules of procedure, they would be given an unfair advantage over those parties which are represented by counsel, and accordingly, no allowance is made because a litigant is not an attorney.145

Q. You Can’t Collect this Debt Because it Has Charged Off.

Defendants frequently argue that a bank is not permitted to recover a credit card debt that has been charged off. This position is incorrect.

1. Plaintiff is Entitled to Collect a Charged Off Debt

Debtors often believe( or claim to believe ) that once their debt is “charged off” they have no further obligation to pay the debt. In fact, they may try to defend a suit by claiming the debt has been “charged off,” and therefore, the debtor has no legal obligation to pay and that the creditor and/or debt collector faces liability for attempting to collect the debt. Often times this argument is accompanied by a claim that the creditor benefitted from the charge off because the creditor received a tax write off. The debtor may request that the debt be considered completely satisfied or, that s/he receive credit to the extent of the tax benefit allegedly received by the creditor. Such arguments are completely without merit.

A “charge off” is an accounting term and function that is required by federal regulators and Generally Accepted Accounting Principles (“GAAP”) so that a company’s worth is not inflated by delinquent receivables.146 Furthermore, to the extent a creditor is able to collect on a charged off debt, such amounts would be income, thereby negating any alleged tax benefits. Likewise, any argument that a creditor may face liability, or have some responsibility to account for tax advantages that result from charging off a debt is misplaced and is not supported by authority or logic.

138 Eastern Development and Investment Corp. v. City of San Antonio, 557 S.W.2d 823 (Tex. Civ. App. - San Antonio 1977, writ ref’d n.r.e.).
141 466 S.W. 2d 381 (Tex. Civ. App.-Dallas 1971, writ ref’d n.r.e.).
146 The accounting entry of a “charge off” on a company’s books is not an agreement between a creditor and debtor to eliminate, write off or otherwise compromise a debt. Instead, it is an accounting function so that uncollectible receivables are not listed as assets, which would violate accounting principles, inflate a company’s worth and mislead investors. See Alaska Electrical Pension Fund v. Adecco, 434 F. Supp. 2d 815, 818-819 (S.D. Cal. 2006).
2. “Charging Off” a Debt Is an Accounting Function That Does Not Eliminate the Debt or Prevent Collection of the Debt

“Charging off” debt is merely an accounting function that has no effect on a creditor’s ability to collect the debt. GAAP accounting principles require companies to devalue delinquent accounts on their books:

Accounts receivable are reported in the financial statements at net realizable value. Net realizable value is equal to the gross amount of receivables less an estimated allowance for uncollectible accounts. 147

The purpose of “charging off” debt is to make sure that the company’s financial statements paint an accurate picture of the company’s financial status, including the true value of outstanding debts owed the creditor. Failing to make proper charge offs may result in inaccurate financial statements, overstating a company’s financial health, and has been a feature of some accounting frauds. 148

3. Federal Regulations.

Recognizing the importance of accurately reflecting the value of a bank’s assets on its books, the Office of the Comptroller of the Currency (the “OCC”), requires banks to charge off delinquent credit card debts after 180 days. Under the Uniform Retail Credit Classification and Account Management Policy (the “Uniform Policy”), the OCC requires that banks charge off any “open-end retail loans that become past due 180 cumulative days from the contractual due date.” 149 The OCC’s Uniform Policy thus furthers the rationale for accounting charge offs – to reflect the real value of accounts receivables on a bank’s books, given that a credit card debt that is over six-months delinquent may not ever be repaid.

4. “Charge Off” a Credit Card Debt Does Not Prevent Collection of the Debt

Because a charge off is an accounting and regulatory issue, it does not change the underlying contractual and legal relationship between the creditor and debtor on the underlying debt. A charge off also does not mean that the creditor has forgiven the debt, or agreed to forego its right to collect:

It is probably the policy of the bank to recognize loan losses as they become apparent. However, the charge-off of a loan should not diminish reasonable collection and work-out efforts. 151

Courts have also recognized that creditors continue to have the right to collect loans, even after charge off. In SEC v. Kahn, 152 the defendants, charged with securities law violations for (among other things) failing to properly charge off loans, argued that they delayed charge offs “because once an account was charged off, no further collection activity would take place.” 153 The court flatly rejected this argument, stating that “The Defendants never explain why no follow up collection activity could occur, nor does a reason come to mind. . . . They could have just as easily decreed that collection efforts would continue after an account was charged off. . . .” 154

Consequently, any argument by a debtor that a creditor’s right to collect an account is affected by its “charge off” status is inaccurate. This is purely an accounting matter, not a change in the legal status of the debt or a settlement of the debt by the creditor.

5. Collection of Charged off Debt must be Included as Income

A debtor may argue that a creditor realizes tax and other favorable economic benefits as the result of a charge off. This argument reflects a fundamental misunderstanding of federal tax law. Under the federal tax code, a deduction is allowed for “any debt which becomes worthless within the taxable year.” 155 However, under Treasury regulations, any

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147 Jan R. Williams & Joseph V. Carcello, Miller GAAP Guide Level A: Restatement and Analysis of Current FASB Standards, at 3.07 (CCH 2005 ed.).
149 65 Fed. Reg. 36903 (June 12, 2000).
150 Id. at 36904.
151 Sample bank lending policy, included at 1-8 Accounting for Banks § 8.01[2][a] (Matthew Bender & Co. 2006) (emphasis added).
153 Id. at *29.
154 Id.
subsequent collection of a debt for which a deduction has previously been claimed must be reported as income in the year of the collection.\textsuperscript{156} As a result, even if a tax benefit is obtained upon charging off a bad debt, that benefit would be lost to the extent the debt is later collected.

Thus, any contention that the debtor is entitled to have the debt reduced by the amount of the tax deduction is absurd. Even if a creditor qualifies for such a deduction, the deduction would be offset if, and to the extent that, the debt subsequently pays some or all of the obligation. There simply is no tax benefit to confer to the debtor.

R. The Argument that \textit{Tully v. Citibank} Establishes That a Bank Cannot Prove its Interest Rate.

Defendants often cite \textit{Tully v. Citibank (South Dakota), N.A.},\textsuperscript{157} for the proposition that a bank cannot prove damages because it cannot produce a contract that identifies the interest rate agreed upon between the parties. \textit{Tully}, however, is limited to its facts. Due to a clerical error, the Card Agreement that was in evidence before the Court of Appeals was missing three pages. The section in the Card Agreement that discusses the interest rate is contained in these missing pages. Therefore, in making its decision that the creditor “failed to prove that the interest rate charged was agreed on by Tully [, because] [t]he contract introduced into evidence does not specify the interest rate that was agreed on,”\textsuperscript{158} the Court did not have the complete agreement between the parties.

In deciding the \textit{Hinojosa} case,\textsuperscript{159} discussed earlier in this paper, the Dallas Court of Appeals reached a different conclusion than the \textit{Tully} court. The \textit{Hinojosa} court had before it in evidence a complete copy of the creditor’s Card Agreement. The Dallas Court distinguished \textit{Tully} as follows:

Hinojosa relies on \textit{Tully v. Citibank (South Dakota), N.A., 173 S.W.3d 212 (Tex. App.– Texarkana 2005, no pet.)} to support his interest rate argument. The facts here are distinguishable. We question whether the interest issue was properly before the court despite the court’s liberal construction of the issue. \textit{Id. at 217 fn.4.} The \textit{Tully} court determined the contract introduced into evidence did not specify the agreed upon interest rate, and the only evidence of the rate was specified on the monthly statements. \textit{Id. at 217.} Here, the contract specifically states the annual percentage rate in effect appears on the monthly statements and such statements are in evidence. Thus, we conclude \textit{Tully} does not support Hinojosa’s argument.\textsuperscript{160}

The Dallas Court looked to the complete Card Agreement and found that the contract did address the annual percentage rate. The findings in \textit{Tully} and \textit{Hinojosa} are consistent considering the pages providing the interest rate were missing from the card agreement in \textit{Tully}.

VIII. JUDGMENT

Once suit is filed, your settlement options will probably be limited. Most creditors are going to require that a debtor make a lump sum settlement to resolve the suit, or demand that any payment agreement be set forth in an Agreed Judgment. Attached here to in Appendix I, Exhibits 6-8, are samples of 3 forms of Agreed Judgment which can be used to accomplish this purpose.

A. Agreed Judgment Without Payments.

This form of the Judgment is useful in the situation where the debtor wants to wants to resolve the suit, but cannot make any type of payment.\textsuperscript{161}

B. Agreed Judgment with Payments Over Time.

This Judgment simply recognizes the Judgment debtor’s right to make payments over time without execution on the Judgment. The Judgment specifically provides that so long as the debtor is making payments as agreed, the Creditor will not seek execution of the Judgment. Obviously, the length of time a debtor will be permitted to make agreed upon payments as reflected in the Judgment is up to you and your client to decide.\textsuperscript{162}

C. Agreed Judgment acknowledging Settlement Payment.

\textsuperscript{156}26 C.F.R. § 1.166-1(f).
\textsuperscript{157}173 S.W.3d 212 (Tex. App.– Texarkana 2005, no pet.).
\textsuperscript{158}\textit{Tully} 173 S.W.3d at 217.
\textsuperscript{159}2008 Tex. App. LEXIS 1532.
\textsuperscript{156}Id. at *9-10 (emphasis added).
\textsuperscript{161}Appendix I, Exhibit 6.
\textsuperscript{162}Appendix I, Exhibit 7.
This form of the Judgment is useful where the Defendant would like to make a significant lump sum settlement, but will not be able to do so for an extended period of time. The debtor agrees to be responsible for the full amount of the debt and the creditor agrees that the defendant can settle for a specific sum on or before a set date. The judgment protects the creditor’s rights, because the debtor will be responsible for the full amount of the debt in the event the settlement payment is not made by the date reflected in the judgment.  

IX. CONCLUSION

This paper is designed to give a generalized overview of the basic procedure for a credit card debt collection case, as well as a demonstration of the various issues, arguments, and concerns that complicate these types of cases. Even a cursory overview of this paper reveals that what may seem to be a simple procedure actually presents complex and challenging issues and arguments.

The successful attorney should be well versed in the applicable laws, and should be on the lookout for new opinions and laws, as the landscape of credit card debt collection is constantly changing and evolving.

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163 Appendix I, Exhibit 8.