

## **How to Defend A Credit Card Case**

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**Advanced Consumer Law Course  
August 18, 2011**

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In late 2006, when I joined Craig Jordan's consumer litigation practice, legal representation for a consumer defendant in a suit to collect a debt was rare. The traditional-legal-service model for defensive litigation involves charging clients hourly for attorney fees. Most consumers are not in a position to hire a lawyer on an hourly basis, but legal representation is critical for to preserve a consumer's rights and prevent what essentially amounts to a debtor's prison. Our goal became to bring legal services to the consumer by delivering quality representation on a flat-fee basis. At this time, most collection suits were filed by debt-buyers, not original creditors, and on accounts filed barely within the limitations period. In 2007, Craig first published "How to Defend a Credit Card Case" and began speaking on this topic in an effort to educate the legal community on the nuances of these cases. The article used our collaborative briefing which we used in our cases and became widely read by legal and non-legal professionals. Craig passed away in August of 2010; although I was always one who preferred to stand out of the lime-light, in his absence was asked to continue our educational campaign. Instead of re-inventing the wheel, I have modified and updated Craig's paper while retaining the same framework.

In the beginning when we mentioned that we defended debtors in collection suits, most people were surprised. They didn't believe that it was possible to win such a case and concluded that we were either crazy or masochists. I wondered often if we weren't a little bit of both. My own misplaced belief was that banks and finance companies kept good records and that it would be a cinch for them to march into court and prove a simple debt. If they didn't have good records or couldn't sustain their burden of proof, then surely they would not file the lawsuit in the first place. Sadly, the truth is that most of these cases are filed without much investigation into the evidentiary proof. If a consumer-debtor doesn't retain counsel, then there is no need to investigate. And so began a personal and professional crusade of educating courts and the community of the importance of these cases and the necessity of ensuring that the same law is applied to consumers that is applied to businesses.

Suits concerning a credit card are not simple because the credit card debt itself is sophisticated and involves a myriad of complex transactions. Finance companies don't keep good records, or if they do, they don't keep them for very long, especially with all the acquisitions, mergers, and post-default sales. As a result, after over 500 cases, we have been able to get over 90% of our credit card dismissed.

As much as I would like to claim that our cases are dismissed on account of our brilliance, there is another reason. The credit card collection industry runs on volume and default judgments. In the past, with few exceptions, the plaintiffs and their lawyers are either not interested in or not equipped for actual litigation of their claims. Now that original creditors are suing more often versus selling the debt to a debt-buyer, defending these cases requires more effort and skill and it is incumbent that debt defense attorneys do not merely count on a dismissal. My purpose in preparing and presenting this paper is to help you understand the practical and legal issues involved so you are prepared to defend your client through summary judgment and at trial.

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

Credit card applications are virtually carpet-bombed into American homes. Despite their ubiquity, credit cards are micro-targeted to individuals using sophisticated direct marketing models based on credit-worthiness, purchasing patterns and even social affiliations.

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

provides something to the effect of “use of the card constitutes acceptance of the terms of this agreement.”

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

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

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

As a result of this complexity, a credit card plaintiff must often assemble multiple documents, including in many cases, its customer service notes, in order to prove a complete set of the agreements that relate to any one credit card account. The longer a particular account is open the more difficult this task becomes. This task is made even more difficult because the vast majority of these documents are form documents that contain no account identifying information and that are not signed by the cardholder. In order to meet its burden of proving these agreements are binding on its cardholders, the credit card issuer must maintain additional records to let it determine which of these form agreements apply to a particular class of accounts and whether the applicable agreements were actually offered to the cardholders.

As a result of these complexities several

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

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

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

In recent years, we are seeing original creditors, such as American Express and Citibank, producing more paper in response to production requests and bringing corporate witnesses to trial. However, quantity of documentation does not equal quality. Many times when I review the documentation, I find contradictions between the purported agreements and the monthly billing statements and key pieces of evidence are still missing.

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

In order to prevail on a breach of contract claim, a plaintiff must prove the existence of a valid contract between the parties. *Engelman Irr. Dist. v. Shields Bros., Inc.*, 960 S.W.2d 343, 352

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<sup>1</sup> Just identifying the class of accounts to which a particular agreement applies is apparently difficult for some credit card plaintiffs. In a recent case, a credit card plaintiff attempted to offer an agreement that by its terms applied to platinum card accounts in connection with an account that was identified in the account statements as a gold card account.

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

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

In my experience, credit card plaintiffs almost always attempt to prove the existence of an agreement with the defendant by attaching an unsigned form contract, along with whatever other documents they can locate for the account, to a business records affidavit. The business records affidavit generally recites the required foundational elements and that the attached documents constitute the plaintiff's business records relating to the account. The affiants rarely offer any testimony that shows that the agreement matches the type of account held by the defendant, that addresses the time frame that

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<sup>2</sup> The *Winchek* opinion is strange in that it correctly recites all of the elements necessary to the formation of a contract, including offer, but finds that a contract existed between the parties while failing to discuss whether the contract was actually offered to the cardholder. The court held that delivery of the contract was unnecessary but its discussion seems directed at the fifth cited element, the post-formation delivery requirement. It is not clear that the court ever considered whether the contract was offered to the defendant. Nothing in its recitation of the evidence suggests that the plaintiff submitted evidence of such an offer.

the agreement applied to the account, or that specifies how and when the agreement was actually offered to the defendant.

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

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

In my firm, we routinely request these records in discovery.<sup>3</sup> As of the date of this

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<sup>3</sup> We include the following in our standard credit card discovery requests:

### **Offer and Acceptance**

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

Request for Production No. 13. For each agreement, amendment to an agreement, or notice of change to the terms of the account you contend was offered to and accepted by the defendant, please produce every document that evidences such offer or acceptance.

### **Delivery of Account Documents**

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

paper, despite asking these questions in well over 500 cases, we rarely receive anything other than an objection or an evasive or incomplete response from any credit card plaintiff, including both original creditors and debt buyers. We have never received any record that purports to document the circumstances of an actual offer of an agreement to a cardholder. Plaintiff's merely include a form contract that most of time does not cover the entirety of the account.

Because we rarely receive these records, we believe that most credit card plaintiffs do not have them or do not want to be troubled with actually locating the documents. Thus it is not surprising to us then that credit card affidavits are so sketchy on this essential element of proof. Frankly, the fact that so many plaintiffs are willing to submit affidavits in which they state that one of these form agreements governs an account when they have no apparent knowledge of the applicability of the agreement to the defendant's account or the circumstances in

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was addressed and whether the document was returned undelivered.

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

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

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

which the agreement was actually formed is more than a little disturbing.

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

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

However, more is required than evidence of some sort of agreement before a Texas court will enforce a contract. It is essential to the validity of a contract that it be sufficiently certain to define the nature and the extent of its material obligations. *T.O. Stanley Boot Co., Inc. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992). In a loan contract, the interest rate and repayment schedule are material terms of the contract. If those terms are missing the contract is not sufficiently definite to be enforced. A court may not supply the missing terms. *Id.*, 847 S.W.2d at 222. Accordingly, the mere use of a credit card, while it may well indicate that some sort of understanding existed between the parties, is not sufficient to establish an enforceable agreement between the parties because material terms such as the amount of interest payable on the account, the amount of the fees that the credit card issuer may assess and the terms of repayment cannot be determined from the mere use of the card.

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

As discussed above, a variety of interest rates and fees may apply to an account over its lifetime. Interest rates will typically be specified in documents issued separately from the account agreements and tailored to the terms of a particular promotion, whether for a new account or for a new transaction, such as a balance transfer, on an existing account. While fees such as late fees, over-the-limit fees and bounced check fees will more often be specified in the account agreements themselves, it is not

uncommon for them to also be specified in separate documents. It is rare that a credit card plaintiff will be able to produce all of the documents establishing these rates. It is even less likely that a credit card plaintiff will produce extrinsic documents such as publications of the index rate upon which some such variable rates are based. Instead, credit card plaintiffs often seek to prove the agreed upon interest rates and fees by introducing statements that state the interest rate.

There is a fundamental problem with this approach. The statements are evidence of the interest rate that was actually charged, not the rate that the parties agreed should be charged. *Tully v. Citibank (South Dakota), N.A.*, 173 S.W.3d 212, 216 (Tex. App.-Texarkana 2005), *Hay v. Citibank (South Dakota) N.A.*, 2006 WL 2620089, 10 (Tex. App.—Hous. [14 Dist.] 2006)(not designated for publication), *cf. Hinojosa v. Citibank (South Dakota), N.A.*, 2008 WL 570601 (Tex. App.—Dallas 2008) (not designated for publication).<sup>4</sup> Absent proof of the agreed upon rates, a court should not award damages based upon failure to pay the rates demanded in the monthly statements.

### **The footnote heard around Texas: the rise of the account stated cause of action**

The Dallas court of appeals applied the account stated theory in *Dulong v. Citibank (S.D.)*, N.A., 261 S.W.3d 890 (Tex. App. Dallas 2008) despite the fact that the debtor's issue on appeal concerned whether the creditor had standing to sue on the account. As the court states in a footnote: "At one point in its argument, Dulong characterized the issue as one of "standing." However, we construe the pleadings and brief as arguing Citibank did not establish the elements of the cause of action for account stated." *Dulong* at 892. In another footnote, the court states that "although Dulong asserts that an account stated is not capable of assignment or sale, she does not challenge the viability of the account stated cause of action. The argument concerning assignment has not

been briefed, and is therefore waived." *Dulong* at 894.

In the wake of *Dulong*, the Houston, Waco and El Paso courts of appeals applied the account stated cause of action to credit card lawsuits without significant discussion of the reasoning supporting their holdings or the scope of the account stated cause of action. *Butler v. Hudson & Keyse, L.L.C.*, 2009 Tex. App. LEXIS 1108 (Tex. App.—Houston [14<sup>th</sup> Dist.] Feb. 19, 2009), *McFarland v. Citibank, N.A.*, 293 S.W.3d 759 (Tex. App.—Waco 2009), *Eaves v. Unifund CCR Partners*, 301 S.W.3d 402 (Tex. App.—El Paso 2009), *Budzyn v. Citibank, N.A.*, 2010 Tex. App. LEXIS 2339 (Tex. App.—Houston [1<sup>st</sup> Dist.] Mar. 25, 2010) These cases primarily cite to *Dulong* as authority that the account stated cause of action is a viable, even though *Dulong* clearly stated that the viability of the cause of action was not at issue in that case.

The first case to decide the issue, *Butler v. Hudson & Keyse, L.L.C.*, gives only one sentence for its rationale, citing the cases holding that a credit card claim may not be brought as a suit on a sworn account and opining that account stated is by contrast a proper cause of action "because no title to personal property or services pass from the bank to the credit card holder." *Butler*, 2009 Tex. App. Lexis at 5. The logic of the decision is difficult to understand, as the fact that a sworn account cause of action is so limited does not necessarily mean that an account stated cause of action is not also so limited. The court did not make any examination of the scope of an account stated claim. It does not appear that the appellant challenged the use of the account stated cause of action in the case.

The next case to decide the issue, *McFarland v. Citibank, N.A.*, makes the same logical error, distinguishing an account stated cause of action from a sworn account cause of action, but making no inquiry into the proper scope of the account stated cause of action. *McFarland*, 293 S.W.3d at 764. Ironically, it cites this Court's *Dulong* decision as support for its conclusion even though this Court declined to decide the issue.

The El Paso Court of Appeals in *Eaves v. Unifund CCR Partners* and the Houston 1<sup>st</sup> District Court of Appeals in *Budzyn v. Citibank*,

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<sup>4</sup> *Hinojosa* turned on specific language in the cardholder agreement that provided that the agreed upon rate would be specified in the statements.

*N.A.*, add nothing new to the discussion, as both cases merely cite *Dulong*, *McFarland*, and *Butler*, echoing the distinction from a suit on a sworn account without exploring the scope of the account stated cause of action itself. *Eaves*, 301 S.W.3d 402 at 408, *Budzyn*, 2010 Tex. App. LEXIS 2339 at 4-6.

Before deciding this kind of question, these courts should have inquired into the common law rules governing the scope of the account stated cause of action. That inquiry would have demonstrated that the cause of action is not appropriate for use in a credit card case.

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

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

As credit card collection suits proliferated in recent years, credit card plaintiffs sought to use the Rule 185 procedure to expedite their cases. To date, they have been uniformly

rebuffed by the courts of appeals on the grounds that a suit on a sworn account must be based upon the sale of goods and cannot be based upon a contract. *Williams v. Unifund CCR Partners Assignee Of Citibank*, 264 S.W.3d 231 (Tex. App.—Houston [1 Dist.] 2008, no pet.), *Tully v. Citibank, N.A.*, 173 S.W.3d 212, 216 (Tex. App.—Texarkana 2005, no pet.), *Bird v. First Deposit Nat'l Bank*, 994 S.W.2d 280, 282 (Tex. App.—El Paso 1999, pet. denied)<sup>5</sup>

Having failed to successfully employ the Rule 185 procedure in credit card cases, credit card plaintiffs have turned to the account stated cause of action as an alternative. However, the two reasons cited in the sworn account cases for excluding credit card cases from the scope of rule 185, the lack of transactions in goods between the plaintiff and defendant and the existence of an express contract governing the relationship between the parties, have also been historically applied by Texas courts to limit the scope of common law suits on account and therefore preclude the use of the account stated cause of action in credit card cases.

Over a century ago in *McCamant v. Batsell*, 59 Tex. 363, 1883 WL 9175 (Tex. 1883), a case that has never been overruled, the Supreme Court construed the word account as it is used in this context as limited to suits arising out of relationships in which title to goods was transferred from the plaintiff to the defendant and excluding suits in which the rights of the parties were defined by a written agreement.

In *McCamant*, a suit on a promissory note, the plaintiff sought to make use of the then existing statute governing suits on account, which like current Rule 185, set up an abbreviated procedure for resolving disputes

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<sup>5</sup> Other similar decisions include: *Landaverde v. Centurion Capital Corporation*, 2007 Tex. App. Lexis 4992, (Tex. App.—Houston[14<sup>th</sup> Dist] 2007, no pet.) (not designated for publication), *EMCC, Inc. v. Johnson*, 2006 Tex. App. Lexis 9277, 4-6 (Tex. App.—Waco 2006, no pet.) (not designated for publication), *Cavazos v. Citibank*, 2005 Tex. App. Lexis 4484, 4 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2005, no pet.) (not designated for publication), *Dunham v. Provident National Bank*, 2002 Tex. App. Lexis 1021, 2-3 (Tex. App.—Houston[14<sup>th</sup> Dist.] 2002, no pet.) (not designated for publication), *Young v. American Express*, 2001 Tex. Lexis 7217, 2 (Tex. App.—Texarkana 2001, no. pet.) (not designated for publication)

involving sworn accounts. Unlike the current rule, the statute did not enumerate the kinds of actions that could be brought as suits on account. The Supreme Court construed the meaning of the term “account” in the statute as being consistent with the common law meaning of the term:

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

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

The Supreme Court re-affirmed the holding of *McCamant* in *Meaders v. Biskamp*, 316 S.W.2d 75 (Tex. 1958), in which the court distinguished a suit on an account from a suit based upon an express contract for purposes of awarding attorney’s fees. The then applicable language of Tex. Civ. Stat. Art. 2226, the predecessor to Tex. Civ. Prac. & Rem. Code Ch. 38, permitted an award of attorney’s fees for a suit upon a sworn account but did not include the present language authorizing fees in a breach of contract case. The *Meaders* court, citing *McCamant*, held that a suit founded upon a written contract for the drilling of an oil well was not a suit on account because the relationship of debtor and creditor did not arise from a course of dealing but from a contract. *Id.*, 316 S.W.2d at 78.<sup>6</sup>

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<sup>6</sup> As the Supreme Court pointed out in *Medical City Dallas, Ltd. v. Carlisle Corp.*, 251 S.W.2d 55 (Tex. 2008), the

Credit card suits will almost always run afoul of these two traditional boundaries on the scope of the suit on an account cause of action. Credit card suits rarely involve transactions in goods or services between the card issuer and borrower. Instead, the principal transaction between a credit card issuer and a borrower, the lending of money, is not a service under Texas law. *Riverside Nat’l Bank v. Lewis*, 603 S.W.2d 169, 174-175 (Tex. 1980). More importantly, as discussed extensively below, credit card arrangements, by the nature of the highly regulated regime in which they arise, are always governed by an express contract that fixes the both the debtor-creditor relationship of the parties and the compensation, in interest and fees, to be paid by the debtor to the creditor for the extensions of credit. Both of these characteristics exclude credit card collection suits from the common law scope of the account stated cause of action.

It would be improper to expand the traditional scope of the account stated cause of action to credit card cases. Modern credit card arrangements are invariably creatures of express contract in which the rights and responsibilities of the parties are specified in great detail. There is no need to imply a creditor-debtor relationship in this environment. Nor is there any need to imply assent to interest rate and fee terms that are expressly spelled out in great detail in agreements.

Instead, there is danger in allowing such implications, whether it be from creditors who have not kept detailed records of the account or debt-buyers who purchase only partial account records, because it allows these creditors to substitute their performance for their promise, to recover charges they imposed on the debtor regardless of whether those charges were actually authorized by their contractual agreements.

### **The federal Truth-in-Lending Act requires the material terms of a credit card**

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result in *Meaders* is no longer good law because of changes to the attorney’s fees statute that now permit fees in breach of contract cases. However, the Supreme Court did not overrule the *Meaders* holding that a suit on account cannot arise out of an express contractual relationship.

### **relationship to set forth in a written agreement**

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

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

Because these disclosures are required to be in writing and integrated into the account opening process regardless of how the account is opened, the disclosed terms become the defacto terms of the credit card agreement. Furthermore, § 1642 prohibits the gratuitous issuance of a credit card. It permits a credit card to be issued

only in response to an application or request. Any such application or request is governed by the disclosure provisions of § 1637.

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

### **Even if the account stated theory could be properly employed in collection suits, the Plaintiff must still prove the essential elements of the theory.**

To sustain an action for account stated, Plaintiffs must establish the following elements. (1) transactions between the parties give rise to indebtedness of one to the other; (2) an agreement, express or implied, between the parties fixes an amount due; and (3) the one to be charged makes a promise, express or implied, to pay the indebtedness. If Plaintiff fails to offer evidence of one element then it cannot recover under the theory. It is not necessary for the Defendant to disprove Plaintiff's claim if Plaintiff fails to establish its prima facie case. *Swilley v. Hughes*, 488 S.W.2d 64, 67 (Tex. 1972). Plaintiffs typically argue that there was an agreement between the parties because the debtor received monthly statements, which were sent to the debtor's last known address and the debtor failed to object to the statements; the combination demonstrates his acquiescence. Even without addressing whether such argument is accurate and whether these facts establish agreement or mutual assent, many times the Plaintiffs provide no evidence of these facts: they fail to offer testimony monthly billing statements were sent to the debtor, that the statements were received by the debtor. In debt-buyer cases, the witness can't provide such testimony since the designated witness is not qualified to offer testimony on these facts

because the witness does not have adequate personal knowledge.

The assertion that a debtor forms a new agreement with the creditor through silence is especially puzzling especially as to the finance charges. The debtor, as a party to an express contract setting forth the manner in which these charges are to be assessed, should be entitled to rely on the terms of the contract as the exclusive reference by which the correctness of these charges would be determined. Absent a duty to speak, silence has no meaning and agreement should not be imputed.

*Morrison v. Citibank* (South Dakota) N.A., 2008 Tex. App. Lexis 1692 (Tex. App.—Fort Worth 2008, no pet.) tells us the Plaintiff's summary judgment evidence is insufficient to establish an account stated as a matter of law.

In that case, the Fort Worth Court of Appeals declined to decide whether a credit card plaintiff could recover on an account stated theory because it found that the facts of that case would not support such a recovery if it were available. The case was an appeal from a bench trial in which the trial judge, acting as the trier of fact, found that Citibank should recover on an account stated theory. The Court of Appeals reversed the trial judge's fact determination as factually insufficient because it was clearly wrong and manifestly unjust, *Id.* at 8-9. In *Morrison*, Citibank admitted hundreds of pages of documents relating to 10 credit card accounts, including both account statements and checks that spanned several years. On each of the accounts, Morrison typically paid only the minimum amount due. Citibank's witness testified that it was the regular course of Citibank's business to mail statements to its customers, but did not testify that the statements were actually mailed or received. Citibank's witness testified that Morrison never disputed the accounts. The evidence also showed that the address shown on the statements was the same as the address shown on Morrison's payment checks. The *Morrison* court held that even though Morrison failed to affirmatively dispute the amount due, the lack of evidence that the statements were actually received, combined with the pattern of making only minimum monthly payments, was "fatally weak" on the

issue of whether there was an agreement fixing the amount due on the account.

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

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

A plea to the jurisdiction is the proper vehicle for raising standing as a jurisdictional issue. *Bland Independent School District v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). While a plea to the jurisdiction will ordinarily be determined by reference to the pleadings, where the underlying jurisdictional facts are put in issue, the Plaintiff must come forward with sufficient evidence in order to demonstrate that there is at least an issue of fact as to the existence of jurisdiction. *Texas Department of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 227-228 (Tex. 2004). The procedure for deciding a plea to the jurisdiction is substantially similar to the procedure for deciding a no-evidence motion for summary judgment. *Id.*, 133 S.W.3d at 228. If an issue of fact is raised by the Plaintiff, then the jurisdictional issue will be determined by the fact finder at trial. *Id.*

Credit card plaintiffs rarely produce the full contract of assignment. They prefer to produce bills of sale that reference other agreements as containing the actual terms of the assignment.

However, the precise language of the assignment can be important in determining the extent of the plaintiff's rights.

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

### Summary Judgment Proof Issues

Because of the difficulties credit card plaintiffs seem to have in obtaining proper proof of the elements of their cases, the evidence submitted in connection with their motions for summary judgment can often be challenged.

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

- Be made from personal knowledge,
- Show affirmatively that the affiant is competent to give the testimony contained in the affidavit,
- Provide the underlying facts to support its conclusions,
- Attach sworn or certified copies of any papers referred to in the affidavit,
- In the case of a business records affidavit, accurately use the predicate language in Texas Rules of Evidence 803(6) and 902(10),
- Show that the affiant had a proper basis for asserting the accuracy of records obtained from a predecessor in interest, and

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

When a summary judgment affiant seeks to lay a predicate for the admission of the business records of a third party, the affiant must have personal knowledge of the manner in which the records were prepared and be able to testify about the third party's record keeping. *Martinez v. Midland Credit Management*, 250 S.W.3d 481, 485 (Tex. App.—El Paso 2008, no pet.). The affiant must include in the affidavit information that would indicate that he or she is qualified to testify as to the record-keeping practices of the predecessor and that the records are trustworthy. *Id.* Alternatively, business records prepared by a third party may be admitted if the authenticating witness establishes 1) the records are incorporated and kept in the course of the witness's business, 2) the business typically relies upon the accuracy of the contents of the records, and 3) the circumstances otherwise indicate the trustworthiness of the document. *Simien v. Unifund CCR Partners*, 2010 Tex. App. LEXIS 2687 (Tex. App.—Houston [1<sup>st</sup> Dist] 2010). Most plaintiffs do not have any evidence supporting the manner in which it relied upon the accuracy of the records. For example, testimony that the Plaintiff/Debt Buyer made payments to third parties based upon the accuracy of the records as was the case in *Cockrell v. Republic Mortgage Ins. Co.*, 817 S.W.2d 106, 112 (Tex. App.—Dallas 1991, no writ) or *Duncan Dev., Inc., v. Haney*, 634 S.W.2d 811, 812-13 (Tex. 1982). Plaintiffs also do not offer evidence about how they use these records in their business. Typically, all we know on this subject is that the Plaintiff received some documents from someone and preserved them long enough to offer them in evidence with this lawsuit. If this were the standard for incorporating records into one's business for the purpose of establishing their admissibility under the hearsay rule, then no third party record fails to meet the test, as every litigant acquires documents for use in litigation and retains them

until the opportunity to offer them in evidence arises.

### Defense Strategies

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

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

Good discovery requests have multiple benefits. They can make it much easier to challenge a plaintiff's conclusory summary judgment or trial evidence. For example, a plaintiff may simply testify that a particular contract is "part of its records for the defendant's account." If you have propounded discovery on this issue similar to that outlined in footnote 3 above, you can attack the credibility of that statement by pointing out that the plaintiff was asked to provide the underlying basis for any contention that a contract applied to the defendant's account or was actually offered to the defendant and failed to do so.

A good discovery request can help prevent the offer of conclusory or misleading evidence. Rule 193.6 allows you to exclude any evidence that was not produced in response to a discovery request. Should a plaintiff bring a live witness to trial, as American Express and Citibank often do, that witness will not be able to testify about records that were not produced in discovery. So for example, if the plaintiff did not produce any

record that a particular contract was mailed to the defendant, the witness cannot testify to that fact once he admits that his only knowledge of the fact is from review of an un-produced record. It is generally much easier to persuade a judge to exclude evidence under Rule 193.6 than it is to attempt to discredit the testimony on cross-examination.

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

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

2. Rely on a limitations defense only if you are confident in prevailing on that defense. I find that when I focus my arguments on my client's burden of proof, trial courts will assume that the Plaintiff established its burden. As a result, the case will come down to a single issue. If you need discovery to prove up a limitations or other defenses, a subpoena to the original creditor is often more likely to get you the documents you want than a discovery request to a debt buyer plaintiff. However, be aware that if you are wrong, you just might be doing the Plaintiff's work for them by gathering evidence.

3. Wait for the discovery period to end. In most cases, the plaintiff will respond to your

straightforward discovery requests with scant if any information coupled with a promise to supplement. In my experience, the promised supplementation rarely occurs.

4. Combine your dispositive motions with a Rule 193.6 motion to exclude evidence. This combination punch is hard to beat, as the standard for overcoming a 193.6 motion is very high. If the plaintiff has failed to provide discovery relating to a required element of its response to your dispositive motion, then the case is essentially over. Waiting until the discovery period is over greatly reduces the plaintiff's chance of overcoming the motion to exclude or getting a continuance to supplement its discovery responses.
5. Set up a Plea to the Jurisdiction by requesting discovery on the issue of standing. Read *Bland Independent School District v. Blue*, 34 S.W.3d 547 (Tex. 2000) and Texas Department of Parks and Wildlife v. Miranda, 133 S.W.3d 217 (Tex. 2004) to learn about the plea to the jurisdiction procedure for challenging the standing of a debt-buyer plaintiff. A plaintiff who has ignored your discovery requests for documents establishing its ownership of the debt will have a hard time beating a 2 headed Rule 193.6 motion and plea to the jurisdiction set for hearing after the discovery period has ended.
6. Make cogent and accurate arguments that address the deficiency in their proof versus the accuracy of the argument. For example, does the debt buyer have standing on the account? In most cases, yes, they own the debt. Unless you secure discovery, which demonstrates the hole in the chain of title, don't beat your fist too much on the table. Did your client use the credit card that is the subject of the account? Yes, unless you have an issue of identity theft or the client is merely an authorized user on the account. I find that when lawyers split the hairs of a case a little too fine and argue semantics then courts are less likely to be objective in the application of law to a highly complex situation. For example, having your client execute an affidavit for use in responding to a Motion for Summary Judgment that states that he didn't have a card issued by Citibank (S.D.) N.A. because the card is an

AT&T Universal card is, in my opinion, bad practice. Credibility is extremely important in persuading a court especially at trial. Most cases are not about whether your client owes money, but rather whether the Plaintiff has offered sufficient proof of each element of their cause of action to establish that it is entitled to a judgment.

7. Provide clients with realistic and accurate advice concerning the uncertainty of success. Litigation by its nature involves uncertainty. I tell each client that I have won cases that maybe I shouldn't have won and I most certainly have lost cases that I don't believe I should have lost. I pride myself on providing clients with good information so they can make decisions concerning the case. By defending these actions, they have more options than if they did not, but paying me to defend does not give them a "get out of debt" free card.

8. Understand that what worked yesterday, may not work today. The law on these cases is constantly changing. Courts naturally tire of hearing the same ole arguments day in and day out. Over time, arguments become stale. As a result, I am constantly thinking of a new approach or a new spin on the same argument. I defend my cases the hard way, which means I conduct discovery; I tailor my summary judgment responses to the specific evidence and discovery applicable to each case; and I routinely file discovery motions if necessary for the case.

9. In trial, use voir dire to demonstrate the witness' lack of personal knowledge as to the facts of the case.

10. Make careful and calculated decisions on whether to appeal. We all know the adage: bad facts make bad law. No more has such a statement been true than in debt defense cases. Not every case that is lost should be appealed. Just because you lose one at trial, does not mean that you are doomed in that trial court forever. Instead of appealing, review your strategy and make strategic trial changes. It is difficult as a trial attorney to see the potential negative outcomes on appeal. We are too close to the

merits to be objective. Before deciding to go down the appellate path, seek the counsel of your colleagues and an experienced appellate

lawyer. Advances in debt defense law at the appellate level are far easier if you are defending your trial result.