# Creditor Causes of Action: Pleadings and Proof

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The University of Texas School of Law
Mastering the Art of Collecting Debts and Judgments
Austin, September 1-2, 2011

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## POP QUIZ

1) (True or False) Debtor's summary judgment response includes an affidavit affirming that all offsets and credits have not been allowed. The affidavit raises a fact issue.

2) Probably the most difficult defense to plead. Defendant must "file with his plea an account." What is the defense? _____

3) Plaintiff serves affidavit as to the amount and necessity of attorney services, and attaches detailed invoices. What must Defendant do to contest fees? _____

4) (True or False) A creditor threatened with a usury claim should consider curing the alleged usury violation.

**Answers:**

1) FALSE. Vague affidavit as to unspecified offsets is conclusory and insufficient. *See Life Ins. Co. of Virginia v. Gar-Dal, Inc.* 570 S.W.2d 378 (Tex. 1978), discussed at page 14.

2) Payment, Rule 95. See pages 11, 12.

3) Promptly file and serve counter-affidavit. Otherwise, plaintiff's affidavit is incontrovertible. Texas Civil Practice & Remedies Code, § 18.001, Affidavit Concerning Cost & Necessity of Services. See page10.

4) TRUE. See Tex. Fin. Code §305.006(c)(pre-suit cure, correct the violation), §305.006(d)(post-suit cure, correct violation and pay obligor's reasonable attorney's fees as determined by court). See also creditor's waiver of cure opportunity in *Walker & Assocs. Surveying v. Roberts*, 306 S.W.3d 839, 853(Tex. App–Texarkana 2010, n.p.h.).

# INTRODUCTION

This article presents a practitioner's view of popular creditor causes of action in Texas. Rule 185, Texas Rules of Civil Procedure, Suit On Account, is examined, with an emphasis on the broad scope of the Rule. Two popular fallacies are considered. Other causes of action discussed include: account stated, quantum meruit, money had and received, promissory note, and guaranty.

Appendices include A) sworn account suit affidavit; B) form discovery, sworn account claim; C) form discovery, guaranty claim. The form discovery includes: interrogatories, requests for admission, requests for production, and requests for disclosure. Serving standard discovery with all collection lawsuits is efficient and often effective. Our returns of citation specifically state that defendant was served by the process server with discovery, as well as the citation and petition. This practice is recommended to overcome the "I didn't get the request for admissions" plea. For the same reason, a notice that requests for admission are also being served, appears at the end of our petitions.

This article is based on a review of Texas case law and is intended as a departure point - - not a destination. The reader is urged to read the original sources of authority. Neither this article, nor the attached forms, constitute legal advice; the reader should verify all statements with original sources. Verify accuracy and applicability of forms. No representations or warranties are given as to forms, except that they are generally used in the authors' practice.

"Rule" refers to Texas Rules of Civil Procedure. Litigants are sometimes referred to as creditor (plaintiff) and debtor (defendant). Other excellent sources include:

Texas Collections Manual, State Bar of Texas
Dorsaneo, Texas Litigation Guide
Dorsaneo and Soules' Texas Codes and Rules
O'Connor's Texas Rules * Civil Trials
O'Connor's Annotated CPRC Plus
O'Connor's Texas Causes of Action
O'Connor's Texas Civil Forms
Texas Pretrial Practice

Acknowledgment: A special thanks to Debra Sims for her assistance with editing and formatting this article.

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## PART ONE: SWORN ACCOUNTS

"Counsel should be aware that there is considerable confusion as to the scope of the sworn account rule." 1-11 Dorsaneo, Tex. Litigation Guide § 11.52.

## I. RULE 185

### A. Broad Rule

Rule 185, Suit On Account states:

> **When any action or defense is founded upon an open account** or other claim for goods wares and merchandise, **including any claim for a liquidated money demand based upon written contract or founded on business dealings between the parties,** or is for personal service rendered, or labor done or labor or materials furnished, **on which a systematic record has been kept**, and is supported by the affidavit of the party, his agent or attorney taken before some officer authorized to administer oaths, to the effect that such claim is, within the knowledge of affiant, just and true, that it is due, and that all just and lawful offsets, payments and credits have been allowed, the same shall be taken as prima facie evidence thereof, unless the party resisting such claim shall file a written denial, under oath. A party resisting such a sworn claim shall comply with the rules of pleading as are required in any other kind of suit, provided, however, that if he does not timely file a written denial, under oath, he shall not be permitted to deny the claim, or any item therein, as the case may be. **No particularization or description of the nature of the component parts of the account or claim is necessary unless the trial court sustains special exceptions to the pleadings.** (emphasis added)

Note the breadth of the rule, as it includes a claim for a liquidated money demand founded on business dealings between the parties on which a systematic record has been kept. What debt is not within this expansive category?

### B. Allows Judgment on the Pleadings

Sworn account is a creditor's preferred cause of action. The rule has numerous advantages. Absent a sworn denial, a proper sworn account is self proving and entitles creditor to judgment on the pleadings: *Airborne Freight Corp. v. CRB Mktg, Inc.*, 566 S.W.2d 573, 574 (Tex. 1978)(trial); *Wilson v. Browning Arms Co.*, 501 S.W. 2d 705, 706 (Tex. Civ. App.–Houston [14th Dist.] 1973 writ ref'd.)(summary judgment); *O'Brian v. Cole,* 532 S.W.2d 151, 152 (Tex. Civ. App.–Dallas 1976, no writ)(default judgment; sworn account is liquidated claim requiring no further proof of damages). A defendant who does not file a sworn denial to a properly filed suit on sworn account cannot dispute the accuracy of the stated charges. *See* Rule 93(10), and Rule185; *Vance v. Holloway,* 689 S.W.2d 403, 404, 28 Tex. Sup. Ct. J. 343 (Tex. 1985); *Huddleston v. Case Power & Equip. Co.* 748 S.W.2d 102, 103 (Tex. App.–Dallas 1988, no writ).

It is a rare creditor's case that should not be pleaded, at least alternatively, as a sworn account. But sworn accounts are the subject of some questionable appellate decisions and fallacies.

## C. Fallacies As to Scope and Required Specificity of Rule 185 Sworn Account

### 1. Fallacy One: That Sale of Personal Property is Required (Meaders v. Biskamp)

Numerous cases purport to require the sale of personal property to constitute a sworn account. These cases generally rely on cases in which the issue is whether the transaction is a sworn account within former Tex. Rev. Civ. Stat. Ann. art. 2226. Article 2226 was the predecessor to Tex. Civ. Prac. & Rem. Code Ann. Chapter 38 and allowed recovery of attorney fees for sworn accounts. But Article 2226 was deemed penal in nature and strictly construed. *See, e.g., Meaders v. Biskamp*, 316 S.W.2d 75,78 (Tex.1958) (sworn account under Article 2226 requires sale and transfer of title to personal property; Article 2226 is penal in nature and strictly construed; contract to drill well not Article 2226 sworn account); *Van Zandt v. Ft. Worth Press,* 359 S.W.2d 893, 895 (Tex.1962)(*citing Meaders*, requires passage of title to personal property to be sworn account within Article 2226); *Langdeau v. Bouknight,*344 S.W.2d 435, 441 (Tex. 1961) (*citing Meaders*, an Article 2226 sworn account does not include special contracts).

Unfortunately, some courts blindly follow these cases even when attorney fees are not the issue. *See Williams v. Unifund CCR Partners*, No. 01-06-00927-CV (Tex. App.–Houston [1st Dist.], February 7, 2008, no pet. (2008 Tex. App. Lexis 931)(credit card debt not basis of sworn account because no title to personal property transferred, *citing Meaders*, supra); *Resurgence Fin, L.L.C. v. Lawrence*, No. 01-08-00341-CV (Tex. App.–Houston [1st Dist.], October 8, 2009, no pet.)(2009 Tex. App. Lexis 7927)(mem. op.)(same); *Tully v. Citibank, N.A.,* 173 S.W.3d 212, 216 (Tex. App.–Texarkana 2005, no pet.)(same); *Hou-Tex Printers v. Marbach*, 862 S.W.2d 188, 190 (Tex. App.–Houston [14th Dist.] 1993) (promissory note is not basis of sworn account because there is no passage of title to personal property, *citing Meaders*); *Superior Derrick Servs. v. Anderson*, 831 S.W.2d 868, 873 (Tex. App.–Houston [14th Dist.] 1992, writ denied); *Young v. Am. Express Co.*, No. 06-01-00035-CV (Tex.App.–Texarkana, October 26, 2001, no pet.)(unpublished, 2001 Tex. App. Lexis 7217)(credit card account not basis of sworn account because no title to personal property is transferred); *EMCC, Inc. v. Johnson*, No. 10-05-00287-CV (Tex. App.–Waco, October 25, 2006, no pet.)(2006 Tex. App. Lexis 9277)(mem. op.)(same).

The fallacy of requiring passage of title to personal property is noted by Justice Mirabel in an excellent concurring opinion in which she discusses a line of cases traced back to *Meaders.* Justice Mirabel notes the breadth of Rule 185, which includes cases in which title to property does not pass. *Schorer v. Box Service Co.*, 927 S.W.2d 132 (Tex. App.–Houston [1st Dist.] 1997, writ denied). See *Seisdata, Inc. v. Compagnie Generale de Geophysique*, 598 S.W.2d 690, 691 (Tex. Civ. App.–Houston [14th Dist.] 1980, writ ref'd n.r.e.)(sworn account includes services; properly distinguishes Meaders as an attorney's fee case).

2. Sale of Personal Property is Not Required; Cases

a. Generally

The clear language of Rule 185 makes it applicable to "personal service rendered," "labor done," "labor or material furnished," and that sweeping category, "business dealings between the parties." Countless cases recognize that sale of personal property is not required for a Rule 185 sworn account. *Griswold v. Carlson*, 249 S.W.2d 58 (Tex. 1952)(assumes without holding, that money owed as a result of fraud and deceit is sworn account; issue was sufficiency of sworn account affidavit); *Novosad v. Cunningham*, 38 S.W.3d 767 (Tex. App.–Houston [14th Dist.], 2001, no pet.)(accounting services); *Nat'l W. Life Ins. Co. v. Acreman*, 425 S.W.2d 815 (Tex. 1968)(labor and materials to build road); *Willie v. Donovan & Watkins, Inc.*, No.01-00-01039-CV (Tex. App.–Houston [1st Dist.], April 11, 2002, no pet.)(unpublished, 2002 Tex. App. Lexis 2655) (employment agency fees); *Boodhwani v. Bartosh*, No. 03-02-0432-CV(Tex. App.–Austin, March 6, 2003, no pet.) (unpublished, 2003 Tex. App. Lexis 1907)(dental services).

b. Texas Supreme Court Cases

The Texas Supreme Court ruled on the following sworn account claims without requiring passage of title to personal property:

*Griswold v. Carlson*, 249 S.W.2d 58 (Tex. 1952)(assumes without holding, that money owed as a result of fraud and deceit is sworn account; issue was sufficiency of sworn account affidavit);

*Rizk v. Financial Guardian Ins. Agency, Inc.*, 584 S.W.2d 860 (Tex. 1979)(sworn account for insurance premiums; summary judgment for creditor reversed because defendant filed a verified denial);

*Harmes v. Arklatex Corp.*, 615 S.W.2d 177 (Tex.1981)(debtor liable in suit on sworn account to recover costs in drilling oil well);

*Vance v. Holloway*, 689 S.W.2d 403 (Tex. 1985)(sworn account for expenses on oil lease; reversed court of appeals and affirmed trial court judgment for creditor, because debtor failed to file a verified denial);

*Midland Western Bldg., L.L.C. v. First Serv. Air Conditioning Contrs., Inc.*, 300 S.W.3d 738, 739 (Tex. 2009)(sworn account for air conditioning services; reversed and remanded as to attorney's fees).

The following is a list of other sworn account cases, grouped by subject, without passage of title to personal property, though the scope of sworn account is not a specific issue in most of the cases.

c. Insurance Premiums

*Bernsen v. Live Oaks Ins. Agency, Inc.*, 52 S.W.3d 306 (Tex. App.–Corpus Christi 2001, no pet.); *Smith v. Cigna Prop. & Cas.*, No. 06-97-00140-CV (Tex. App–Texarkana, October 6, 1998, no pet.)(unpublished, 1998 Tex. App. Lexis 6199); *Webb v. Reynolds Transp.*, 949 S.W.2d 364 (Tex. App.–San Antonio 1997, no pet.)(experience-rated modification premiums).

d. Electrical Utility Service

*Andy's Sunmart # 352, Inc. v. Reliant Energy Retail Servs., L.L.C.*, No. 01-08-00890-CV (Tex. App.–Houston [1st Dist.] Nov. 5, 2009, no pet.)(2009 Tex. App. Lexis 8559)(mem. op.).

e. Freight Services

*Airborne Freight Corp. v. CRB Mktg, Inc.*, 566 S.W.2d 573 (Tex. 1978)(apparently, freight services); *Continental Carbon Co. v. Sea-Land Serv., Inc.*, 27 S.W.3d 184 (Tex. App.–Dallas 2000, pet. denied)(ocean freight services).

f. Telephone Services

*Mincron SBC Corp. v. Worldcom, Inc.* 994 S.W.2d 785 (Tex. App.–Houston [1st Dist.],1999, no pet.)(telephone service terms subject to tariff); *Kanuco Tech. Corp. v. Worldcom Network Servs.*, 979 S.W.2d 368 (Tex. App.–Houston [14th Dist.] 1998, no pet.)(telephone service charges subject to tariff).

g. Mailing Services

*Innovative Mailing Solutions, Inc. v. Label Source, Inc.*, No. 2-09-129-CV (Tex. App.–Fort Worth, Feb. 4, 2010, n.p.h.)(2010 Tex. App. Lexis 834)(mem. op.).

h. Staffing Services

*Myan Mgmt. Group, L.L.C. v. Adam Sparks Family Revocable Trust*, 292 S.W.3d 750 (Tex. App.–Dallas 2009, no pet.).

i. Advertising

*Beltline Antique Mall v. DFW Suburban Newspapers, Inc.,* No. 05-98-00977-CV (Tex.App–Dallas, August 31, 2000, no pet.)(unpublished, 2000 Tex. App. Lexis 5904)(newspaper advertising); *Heap v. Val-Pak,* No. 01-99-00255-CV (Tex. App.–Houston [1st Dist.], November 4, 1999, no pet.)(unpublished, 1999 Tex. App. Lexis 8286)(mailed advertising); *Livingston Ford Mercury, Inc. v. Haley*, 997 S.W.2d 425 (Tex. App.–Beaumont 1999, no pet.)(radio advertising).

j. Attorney's Fees

*Panditi v. Apostle*, 180 S.W.3d 924 (Tex. App.–Dallas 2006, no pet.)(fees due attorney from client); *Pantaze v. Welton,* No. 05-96-00509-CV (Tex. App.–Dallas, August 31, 1999, no pet.)(unpublished, 1999 Tex. App. Lexis 6564)(litigation expenses due attorney from client); *Wimberly v. Fritz, Byrne & Head, L.L.P.*, No. 03-00-00500-CV (Tex. App.–Austin, July 26, 2001, pet. dism'd by agr.)(unpublished, 2001 Tex. App. Lexis 4993); *Kahn v. Carlson*, No. 05-98-01415-CV (Tex. App.–Dallas, April 27, 2001, no pet.) (unpublished, 2001 Tex. App. Lexis 2767); *Wright v. Christian & Smith,* 950 S.W.2d 411(Tex. App.–Houston [1st Dist.] 1997, no pet.).

k. Equipment Repairs

*Smith v. CDI Rental Equip., Ltd.*, 310 S.W.3d 559 (Tex. App.–Tyler 2010, n.p.h.)(equipment repair charges; plaintiff's lack of standing was jurisdictional; reversed and rendered).

l. Personal Property Lease - - Conflicting Cases

The courts disagree as to whether personal property leases are sworn accounts, even though the broad language of Rule 185 appears to include such claims. *Baldwin v. Liberty Leasing Co.*, No.

05-99-00267-CV (Tex. App.–Dallas, June 20, 2000, pet. denied)(unpublished, 2000 Tex. App. Lexis 4097)(personal property lease is basis of sworn account). *But see AKIB Constr., Inc. v. Neff Rental, Inc.*, No. 14-07-00063-CV (Tex. App.–Houston [14th Dist.] April 3, 2008, no pet.)(2008 Tex. App. Lexis 2383)(mem. op.)(personal property lease is not basis for a suit on sworn account), *citing Schorer v. Box Service Co.*, 927 S.W.2d 132 (Tex. App.–Houston [1st Dist.]1997, writ denied).

m. Credit Cards - - Conflicting Cases

The courts disagree as to whether credit cards are the proper subject of sworn account. If the account is based on a merchant-seller's credit card, rather than a bank's credit card, Rule 185 certainly appears to include such claims.

Financial Institution credit cards have been the subject of sworn account actions. *See Phillips v. Capital One Bank,* No. 01-96-01403-CV (Tex. App.–Houston [1st Dist.], August 27, 1998, no pet.)(unpublished, 1998 Tex. App. Lexis 5440)(suit on credit card contract is sworn account); *See also Citicorp Diners Club v. Hewitt*, No. 01-96-00706-CV(Tex. App.–Houston [1st Dist.], October 2, 1997, no pet.) (unpublished, 1997 Tex. App. Lexis 5219)(same); *but see Gellatly v. Unifund CCR Partners*, No. 01-07-00552-CV (Tex. App.–Houston [1st Dist.], July 3, 2008, no pet.)(2008 Tex. App. Lexis 5018)(mem. op.)(Rule 185 does not apply to a suit to recover credit card debt); *Resurgence Fin, L.L.C. v. Lawrence*, No. 01-08-00341-CV (Tex. App.–Houston [1st Dist.], October 8, 2009, no pet.)(2009 Tex. App. Lexis 7927)(mem. op.)(same); *Tully v. Citibank, N.A.*, 173 S.W.3d 212 (Tex. App.–Texarkana 2005, no pet.)(credit card debt not sworn account); *Cavazos v. Citibank*, No. 01-04-00422-CV (Tex. App.–Houston [1st. Dist.] June 9, 2005, no pet.)(unpublished, 2005 Tex. App. Lexis 4484)(credit card account was not proper sworn account); *Young v. Am. Express Co.*, No. 06-01-00035-CV (Tex. App.–Texarkana, October 26, 2001, no pet.) (unpublished, 2001 Tex. App. Lexis 7217)(credit card debt involving advance of money by financial institution not sworn account); *Bird v. First Deposit Nat'l Bank*, 994 S.W.2d 280 (Tex. App.–El Paso 1999, pet. denied)(same).

**3. Fallacy Two: Sworn Account Requires Specific Account Description**

It was once required that a sworn account show the nature of each item, the date, and charge. *Williamsburg Nursing Home v. Paramedics, Inc.*, 460 S.W.2d 168, 169 (Tex. Civ. App.–Houston [1st Dist.] 1970, no writ).; *Hassler v. Texas Gypsum Co.* 525 S.W.2d 53, 55 (Tex. Civ. App.–Dallas 1975 no writ).

4. 1984 Amendment to Rule 185 Negating Specificity

Rule 185 was revised in 1984 to include, "No particularization or description of the nature of the account or claim is necessary unless the trial court sustains special exceptions to the pleadings." *Huddleston v. Case Power & Equip. Co.,* 748 S.W.2d 102, 103 (Tex. App.–Dallas 1988, no writ)(no particularization required); *Enernational Corp. v. Exploitation Eng'rs, Inc.* 705 S.W.2d 749, 750 (Tex. App.–Houston [1st dist.] 1986, writ ref'd n.r.e.)(discusses 1984 "no particularization" change to Rule 185); *Culp v. Hawkins*, 711 S.W.2d 726, 727 (Tex. App.–Corpus Christi 1986, writ ref'd n.r.e.)(waiver of complaint as to sufficiency of sworn account affidavit by failing to specially except pursuant to Rules 185, 90); *Parra v. AT & T*, No. 05-97-01038-CV (Tex. App.–Dallas, November

2, 1999, no pet.)(unpublished, 1999 Tex. App. Lexis 8177)(relying on *Culp,* court holds that debtor waived issue as to sufficiency of sworn account affidavit by failing to specially except, citing "no particularization" portion of Rule 185, Rule 90).

5. Troublesome Cases Ignoring "No Particularization" Amendment

Some courts ignore the "no particularization" language of the 1984 revision to Rule 185 and mistakenly continue to require an itemized statement of the account. Homeowner's association's sworn account action to collect unpaid assessments held not proper Rule 185 action because the petition did not include an explanation of how the assessments were calculated. *Pine Trail Shores Owners' Ass'n v. Aiken*, 160 S.W.3d 139 (Tex. App.–Tyler 2005, no pet.). The court reasoned that the action was not a claim for a liquidated amount and was therefore not suit on sworn account as a matter of law. The court ignores the "no particularization" language of Rule 185, citing a case that pre-dates the 1984 rule change.

Other cases ignoring the "no particularization" language of Rule 185 include: *Panditi v. Apostle*, 180 S.W.3d 924, 926 (Tex. App.–Dallas 2006, no pet.)("account must show with reasonable certainty the name, date, and charge for each item, and provide specifics or details as to how the figures were arrived at."); *Cespedes v. Am. Express-CA*, No. 13-05-385-CV (Tex. App.–Corpus Christi, May 10, 2007, no pet.)(2007 Tex. App. Lexis 3555)(mem. op.)("account must contain systematic, itemized statement of goods or services sold"); *Wimberly v. Fritz, Byrne & Head, L.L.P.*, No. 03-00-00500-CV (Tex. App.–Austin, July 26, 2001, pet. dism'd by agr.) (unpublished, 2001 Tex. App. Lexis 4993)(same); *Foley v. Sears Roebuck & Co.*, No. 14-92-00932-CV(Tex. App.–Houston [14th Dist.] 1993, no writ)(unpublished, 1993 Tex. App. Lexis 1885) (account must identify nature of items, date of sale, and related charges); *Dibco Underground, Inc. v. JCF Bridge & Concrete, Inc.*, No. 03-09-00255-CV (Tex. App.–Austin, April 8, 2010, n.p.h.)(2010 Tex. App. Lexis 2531)(mem. op.)("general statements contained in an affidavit without description of specific items are insufficient to comply with Rule 185"), *citing Powers v. Adams*, 2 S.W.3d 496, 499 (Tex. App.–Houston [14th Dist.] 1999, no pet.)(itemized monthly statements of services rendered listing offsets, payments, and credits sufficient).

## II. PLEADINGS

### A. Petition

1. Form of Pleading

The following form was used in *Continental Carbon v Sea-Land Serv., Inc.*, 27 S.W.3d 184 (Tex. App.–Dallas 2000, pet. denied)(default judgment was affirmed, with no attack on the petition):

> Business Dealings Account: Plaintiff sues on an account founded on business dealings between the parties and for which a systematic record has been kept. Defendant failed to pay as promised, to plaintiff's damage in the principal amount stated herein. All conditions precedent to plaintiff's recovery have occurred. The account is verified in the attached affidavit and itemized in Exhibit A. Alternatively, defendant is liable

based on other grounds, for example, breach of contract and quantum meruit.

**B. The Affidavit**

Rule 185 requires language that "such claim is within the knowledge of affiant, just and true, that it is due, and that all just and lawful offsets, payments and credits have been allowed." Our form affidavit is attached as appendix A. The Rule 185 language should be used verbatim.

If the affidavit does not contain the required language, there is no sworn account. *Griswold v. Carlson*, 249 S.W.2d 58 (Tex. 1952)(sworn account affidavit signed by creditor's attorney fatally defective because it failed to state "within the knowledge of affiant the cause of action is just and true. . ."). The opposite result was reached in *Parra v. AT & T*, No. 05-97-01038-CV (Tex. App.–Dallas, November 2, 1999, no pet.)(unpublished, 1999 Tex. App. Lexis 8177). The court reasoned that the 1984 amendment to Rule 185 made the affidavit's knowledge requirement a waivable defect of form.

**C. Attachments to Petition (Caution)**

Normally, the sworn account suit affidavit, Appendix A, and the statement or invoices are attached to the petition. But review them from a defense perspective. Do they raise issues as to whether debtor is the proper party? Do they raise usury issues? Are the documents accurate and consistent with the petition? We occasionally sue without attaching invoices or a statement. This appears authorized under the "no-particularization" language discussed in the preceding section. Alternatively, creditor or its counsel can prepare and attach a summary of invoices, as long as they are not wrongfully alleged to be records made in the ordinary course of business.

Records attached to the petition may themselves create issues. *See Sundance Oil Co. v. Aztec Pipe & Supply Co.*, 576 S.W.2d 780 (Tex. 1978)(summary judgment reversed because invoice contained name of debtor and a third party creating a fact issue as to responsible party); *Smith v. CDI Rental Equip., Ltd.*, 310 S.W.3d 559 (Tex. App.–Tyler 2010, n.p.h.)(variance between name of plaintiff and name of creditor; held, plaintiff's lack of standing is jurisdictional, reversed and rendered); *Lakhani v. Switzer Petroleum Prods.*, No. 05-97-01621-CV (Tex. App.–Dallas, July 26, 2001, no pet.)(unpublished, 2001 Tex. App. Lexis 5019)(evidence at trial established seller was not plaintiff but a third party; reversed and rendered against creditor because of material variance between evidence and pleadings); *Kiva, Inc. v. Cent. Tex. Barricades*, No. 03-07-000684-CV (Tex. App.–Austin, Jan. 8, 2010, n.p.h.)(2010 Tex. App. Lexis 89)(mem. op.)(invoices, statements, and reports attached to creditor's affidavit and petition did not establish a liquidated claim; held, not a sworn account, reversed and rendered against creditor). Attachments should clearly and accurately reflect the amount claimed on creditor's affidavit.

**D. The Answer**

1. Requirements of Sworn Denial

Rule 185 states that creditor's sworn account claim, ". . . shall be taken as prima facie evidence thereof, unless the party resisting such claim shall file a written denial, under oath. A party

resisting such a sworn claim shall comply with the rules of pleading as are required in any other kind of suit, provided, however, that if he does not timely file a written denial, under oath, he shall not be permitted to deny the claim, or any item therein, as the case may be . . . ."

Early cases required debtor to precisely plead, "each and every item is not just or true or that some specified item is not just and true." *See Red Top Products, Inc. v. T & R Chemicals, Inc.*, 619 S.W.2d 562, 563 (Tex. Civ. App. - - San Antonio, 1981, no writ). However, Rule 185 was amended in 1984 to allow pleading as required in any other suit. Butterworth, Texas Rules of Civil Procedure 70 (1984). Nearly any sworn denial is now sufficient. However, a sworn general denial is insufficient to satisfy the requirements of Rule 185 or 93(10); *Huddleston v. Case Power & Equip. Co.*, 748 S.W. 2d 102, 103 (Tex. App.–Dallas 1985, no writ). A sworn response to a creditor's summary judgment motion is insufficient. A sworn answer is required. *Rush v. Montgomery Ward*, 757 S.W.2d 521, 523 (Tex. App.–Houston [14th Dist.] 1988, writ denied). *See also Sundance Res., Inc. v. Dialog Wireline Servs., L.L.C.*, No. 06-08-00137-CV (Tex. App.–Texarkana, April 8, 2009, no pet.)(2009 Tex. App. Lexis 2345)(mem. op.)(summary judgment on sworn account affirmed because defendant's affiant did not aver personal knowledge of facts stated in defendant's answer).

If plaintiff filed a proper sworn account, defendant must file a sworn denial satisfying Rules 93(10) and 185, or defendant may not dispute the receipt of the items or services, correctness of charges or ownership of account. Rules 93(10), 185; *Vance v. Holloway*, 689 S.W.2d 403, 404 (Tex. 1985). But plaintiff's failure to object to defendant's defective verification constituted trial by consent in *Rasa Floors, L.P. v. Spring Vill. Partners, Ltd.*, No. 01-08-00918-CV (Tex. App.–Houston [1st Dist.] Nov. 18, 2010, n.p.h.)(2010 Tex. App. Lexis 9253)(mem. op.).

2. Affirmative Defenses - - Allowed Without Sworn Denial

Without a Rule 185 sworn denial of account, debtor may present defenses not inconsistent with accuracy of the account. These defenses are often referred to as affirmative defenses and most are referenced in Rule 93, Verified Pleas; Rule 94, Affirmative Defenses; and Rule 95, Payment. In *Rizk v. Financial Guardian Ins. Agency, Inc.*, 584 S.W.2d 860, 863 (Tex. 1979), the court noted that defenses of failure of consideration and statute of limitations could be raised in the absence of a verified denial. *See also Schneider v. A-K Tex. Venture Capital, L.C.*, No. 14-00-00377-CV (Tex. App.–Houston [14th Dist.], April 12, 2001, no pet.)(unpublished, 2001 Tex. App. Lexis 2439) (defenses of confession and avoidance available, in absence of proper denial of sworn account). The safest debtor practice is to file a verified denial and to plead affirmative defenses, if the facts allow.

## III. ELEMENTS

### A. Generally

If a defendant files a verified denial, plaintiff must present evidence proving: 1) sale and delivery of merchandise or performance of services; 2) that the amount of the account is just, agreed, or in the absence of agreement, that charges are usual, customary or reasonable, and 3) the amount remains unpaid. *Burch v. Hancock*, 56 S.W.3d 257, 264 (Tex. App.–Tyler 2001, no pet.); *Superior*

*Derrick Servs., Inc. v. Anderson,* 831 S.W.2d 868, 872 (Tex. App.–Houston [14th dist.] 1992, writ denied). *See also Ton's Remodeling v. Fung's Kitchen, Inc.*, No. 01-05-01077-CV (Tex. App.–Houston [1st Dist.] June 21, 2007, pet. denied)(2007 Tex. App. Lexis 4812)(mem. op.).

**B. Order as Additional Element**

The court apparently adds an element in *Wright v. Christian & Smith,* 950 S.W.2d 411, 413 (Tex. App.–Houston [1st Dist.]1997, no writ). In this attorney fee case, the court recognizes the three familiar elements, above, citing *Thorp v. Adair & Meyers,* 809 S.W.2d 306, 307 (Tex. App.–Houston [14th Dist.] 1991, no writ). But the court adds an element, ". . . we conclude that proof of an agreement to pay for services rendered is implicit in the requirement that [creditor] prove their performance of services." Proof of debtor's order has also been required by other cases.

> Essential elements of proof of a claim on a sworn account are, generally, the [1] order for merchandise and [2] its delivery, [3] the justness of the account, that is, that the prices charged were agreed upon by the parties, or, in absence of an agreement, the prices were usual, customary or reasonable, and [4] the amount that is due and unpaid on the account. *Arndt v. National Supply Company, Et Al,* 633 S.W.2d 919, 922 (Tex. Civ. App.–Houston [14th Dist.] 1982 writ ref'd n.r.e.), *citing Brooks v. Eaton Yale and Towne, Inc.,* 474 S.W.2d 321, 323 (Tex. Civ. App.–Waco 1971, no writ)

**C. Price**

Proof of a suit on a sworn account does not require an express agreement; in the absence of an agreement, the plaintiff can meet the second requirement by showing that the charges were usual, customary, or reasonable. *Lopez v. M. G. Bldg. Materials, Ltd.*, No. 04-08-00550-CV (Tex. App.–San Antonio, June 3, 2009, no pet.)(2009 Tex. App. Lexis 3815)(mem. op.); *Arrellano v. J&K Garment Restoration Co.* (Tex. App.–Houston [14th Dist.] December 28, 2006, no pet.)(2006 Tex. App. Lexis 11072)(mem. op.)(no evidence that prices charged were usual, customary, and reasonable; judgment reversed and rendered that creditor take nothing on its suit on account).

Evidence as to usual, customary or reasonable prices is not relevant when there is a contract and the contract price should be proven. If the account is for insurance premiums, the policies should be admitted in evidence. *Bluebonnet Express, Inc. v. Employers Ins. Of Wausau*, 651 S.W.2d 345, 354 (Tex. App.–Houston [14th Dist.] 1983, writ ref'd n.r.e.)(reversed and rendered against creditor; no proof that premiums charged were in accord with the express contracts of insurance)(disapproved on other grounds *Horrocks v. Texas Dept. of Transp.*, 852 S.W.2d 498, 499 (Tex. 1993). Likewise, if a tariff is relevant to the transaction, prove the tariff, as it generally supercedes prior contractual arrangements under the "filed rate doctrine." *See, e.g., Kanuco Tech. Corp. v. Worldcom Network Servs.* 979 S.W.2d 368 (Tex. App.–Houston [14th Dist.] 1998, no pet.)(telephone service; charges subject to tariff); *Mincron SBC Corp. v. Worldcom Inc.*, 994 S.W.2d 785 (Tex. App.–Houston [1st Dist.] 1999, no pet.)(telephone service).

### D. Amount Due

*See Prompt Prof'l Real Estate, Inc. v. RSC Equip. Rental, Inc.*, No. 05-08-00398-CV (Tex. App.–Dallas May 5, 2009, no pet.)(2009 Tex. App. Lexis 3099)(mem. op.)(the fact that creditor made a pre-suit demand for less than amount sued did not create a genuine issue of material fact precluding summary judgment on uncontroverted summary-judgment evidence establishing the amount due).

## IV. PROOF

### A. Business Records Affidavit

Creditor's cases are based on business records. Summary judgment motions and trial preparation should customarily include a business records affidavit, Texas Rules of Evidence 902(10). The affidavit allows the nearly automatic admission of documents, which usually includes the statement of account (account summary), and invoices. Such records may satisfy creditor's burden of proof, *Morgan v. O'Beirne*, 429 S.W.2d 569, 572 (Tex. Civ. App.–Dallas 1968, no writ)(audit billing, invoices, ledger sheets and policy admitted as business records, though third party-auditor did not testify). Failure to prove the invoices are business records may be fatal to a sworn account claim. *Siegler v. Williams*, 658 S.W.2d 236 (Tex. App.–Houston [1st Dist.] 1983, no writ). Computer print-outs may be admitted as business records. *Voss v. Southwestern Bell Tel. Co.*. 610 S.W.2d 537 (Tex. Civ. App.–Houston [1st Dist.] 1980 writ ref'd n.r.e.). A 1975 statement of account for insurance premiums, prepared at credit manager's request, which accrued in 1972 and 1973 was not an admissible business record. *Carr Well Service, Inc. v. Liberty Mut. Ins. Co.*, 587 S.W.2d 62 (Tex. Civ. App.–El Paso, 1979, no writ)

### B. Services Affidavit

Civil Practice & Remedies Code, §18.001 provides for an affidavit concerning costs and necessity of services. Though routinely used by personal injury attorneys, it is rarely employed by commercial litigators. If one serves the affidavit on the other parties at least 30 days before trial, its contents are incontrovertible, unless a counter-affidavit is served at least 14 days before trial. It presumably could be used to prove a debt based on services rendered; or attorney's fees in virtually any case except a sworn account action. The affidavit cannot be used in sworn account actions. However, one could amend, abandon the sworn account action, and proceed to trial on breach of contract, common law account, quantum meruit and other claims, employing this device. The statute, amended in 2007 to delete filing requirement, arguably still requires filing of controverting affidavit; see 18.001(b).

### C. Discovery With Petition

Standard discovery, including requests for admission, should generally be served with the citation, see form, appendix B. Debtor has 50 days after service to answer such discovery, see Rules 197.2(a), Rule 198.2(a). Responses to discovery are generally more substantiative if a statement of account or the invoices are attached to the petition.

A default judgment may be bolstered by a motion for default judgment, with an attached affidavit establishing service and lack of response to attached admissions. Without such a motion, the deemed admissions are not part of the court file or subsequent record. Deemed admissions provide alternate proof of the claim, in the event the judgment is attacked. *See Continental Carbon Co. v. Sea-Land Serv., Inc.*, 27 S.W.3d 184, 190 (Tex. App.–Dallas 2000, pet. denied)(default judgment attack; deemed admissions established debt).

The attached form discovery also aids creditor in proving its case through summary judgment or trial. The debtor sometimes ignores the discovery resulting in deemed admissions. Many of the attached admissions were discussed and enforced as deemed admissions in *Continental Carbon.* The discovery, when answered, generally results in admission of some of creditor's elements.

## V. DEFENSES

### A. Negating Elements

A debtor's first defense is to negate one of the sworn account elements (see "Elements"). Assuming a proper verified answer is filed, debtor prevails if creditor fails to prove a required element. Debtor's counsel should carefully review the petition. Is the sworn account affidavit proper? Is the account consistent with the petition? Is the seller on the attached invoice or statement the same as the plaintiff? Is the debtor's name identical on the invoices, statement, and petition? Any variance could open the account to attack under the stranger to the transaction defense, next section.

### B. Stranger to the Transaction

If debtor is not named on the invoice or statement as he is named in the petition, the suit may be subject to the stranger to the transaction defense. *Sundance Oil Co. v. Aztec Pipe & Supply Co.*, 576 S.W.2d 780 (Tex. 1978); *Hassler v. Texas Gypsum Co.*, 525 S.W. 2d 53 (Tex. App.–Dallas 1975, no writ)(invoices named corporation, not individual defendant); *Sanders v. Total Heat & Air, Inc.*, 248 S.W.3d 907, 914 (Tex. App.–Dallas 2008, no pet.)(invoices named general contractor, not the defendant homeowner). To avoid this defense plaintiff should plead that John Doe does business as Doe Co. if the invoices bill Doe Co., and it is John Doe's proprietorship. Plaintiff should also consider suit against multiple defendants under a partnership theory, if the facts allow.

### C. Payment

Payment: If the account was paid, or credits are due, debtor should plead payment pursuant to Rule 95. Surprisingly, payment is one of the most difficult matters to plead.

> When a defendant shall desire to prove payment, he shall file with his plea an account stating distinctly the nature of such payment, and the several items thereof; **failing to do so, he shall not be allowed to prove the same**, unless it be so plainly and particularly described in the plea as to give the plaintiff full notice of the character thereof (emphasis added). Rule 95.

Absence of a proper plea renders payment evidence inadmissable. *Garner v. Fidelity Bank, N.A.*, 244 S.W.3d 855, 861 (Tex. App.–Dallas 2008, no pet.)(creditor's objections to debtor's unpleaded evidence of payment properly sustained; summary judgment on note affirmed); *De La Calzada v. Am. First Nat'l Bank*, No. 14-07-00022-CV (Tex. App.–Houston [14th Dist.], February 7, 2008, n.p.h)(2008 Tex. App. Lexis 880)(mem. op.)(guaranty); *Rea v. Sunbelt Savings, FSB, Dallas*, 822 S.W.2d 370, 372-373 (Tex. App.–Dallas 1991, no writ)(promissory note); *Mays v. Bank One, N.A.*, 150 S.W.3d 897 (Tex. App.–Dallas 2004, no pet.)(real estate note); *Obasi v. Univ. of Okla. Health Sci. Ctr.*, No. 04-04-00016-CV (Tex. App.–San Antonio, October 27, 2004, pet. denied)(mem. op.)(2004 Tex. App. Lexis 9435)(student loan-promissory note); *Capers v. Citibank (South Dakota)*, N.A., No. 05-05-01230-CV (Tex. App.–Dallas, October 25, 2006, no pet.)(2006 Tex. App. Lexis 9175)(mem. op.)(credit card contract).

## VI. MOTIONS FOR SUMMARY JUDGMENT

### A. Generally

Many sworn account claims are resolved through a motion for summary judgment ("Motion"). The reader is referred to other articles on the subject, including Summary Judgments in Collection Cases, *Collecting Debts & Judgments*, University of Houston Law Foundation; and *Summary Judgments in Texas*, Hittner and Liberato, 54 Baylor L. Rev. 1, Winter 2002.

### B. Specificity of Motion

"The motion for summary judgment shall state the specific grounds therefor." Rule 166a(c). A Motion based on debtor's insufficient answer must be specific. *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 339 (Tex. 1993). The *McConnell* court specifically disapproved of an earlier case which allowed a vague allegation as to the insufficiency of debtor's answer, *Bado Equip. Co. v. Ryder Truck Lines, Inc.*, 612 S.W2d 81-82 (Tex. Civ. App.–Houston [14th Dist.] 1981, writ ref'd n.r.e.). *Bado* held that a Motion stating that "defendant's answer is insufficient in law to constitute a defense," was sufficient. *See also Robinson v. Texas Timberjack, Inc.*, 175 S.W.3d 528 (Tex. App.–Texarkana 2005, no pet.)(plaintiff's Motion failed to mention defendant's insufficient answer to sworn account; plaintiff could not rely on insufficient answer to support summary judgment). Creditor's Motion should include:

> "This is a suit on a sworn account. Plaintiff's affidavit attached to the petition establishes the account balance and is prima facie evidence of Plaintiff's claim. Defendant's insufficient answer renders Defendant unable to deny the claim, and Plaintiff is entitled to judgment as a matter of law."

### C. Obtain Ruling on Objections

Objections to summary judgment evidence should be ruled upon prior to consideration of the motion, or they are waived. Consider requesting a record, but at least obtain entry of an order, which states the court's ruling on each objection. *Grant-Brooks v. Transamerica Bank, N.A.*, No. 05-02-00754-CV (Tex. App.–Dallas, January 31, 2003, no pet.)(unpublished, 2003 Tex. App. Lexis 990)(debtor waived objections by obtaining no ruling).

## D. Affidavits As Summary Judgment Evidence

1. Personal Knowledge Requirement

Rule 166a(f) states: Supporting and opposing affidavits shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An affidavit which does not positively and unqualifiedly represent the facts as disclosed in the affidavit to be true and within the affiant's personal knowledge is legally insufficient. *Humphreys v. Caldwell*, 888 S.W. 2d 469, 470 (Tex. 1994).

In *Robinson v. Texas Timberjack, Inc.*, 175 S.W.3d 528 (Tex. App.–Texarkana 2005, no pet.), the court held that plaintiff's affidavit was insufficient because it failed to show how the agent acquired personal knowledge of the facts. To be sufficient, the affidavit must affirmatively show how the affiant became personally familiar with the facts. *Id.* at 531, *citing Fair Woman, Inc. v. Transland Mgmt. Corp.*, 766 S.W.2d 323 (Tex. App.–Dallas 1989, no writ). *But see Requipco, Inc. v. Am-Tex Tank & Equip.*, 738 S.W.2d 299, 301 (Tex. App.–Houston [14th Dist.] 1987, writ ref'd n.r.e.)(affidavit of plaintiff's president stating, "I have personal knowledge of all facts," held sufficient).

2. Readily Controverted Requirement

Summary judgment affidavits in creditor's cases invariably involve affidavits of creditor and debtor, which are affidavits of interested witnesses. As such, they may be subject to objection. Rule 166a(c) states:

> A summary judgment may be based on uncontroverted testimonial evidence of an interested witness. . . if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.

In *Thomas N. Heap, D.D.S., Inc. v. Val-Pak*, No. 01-00-00756-CV, (Tex. App.–Houston [1st Dist.] June 21, 2001, pet. denied)(unpublished, 2001 Tex. App. Lexis 4147), the court applied Rule 166a(c) to respondent's summary judgment evidence. Respondent - debtor's affidavit was an affidavit of an interested witness and described an agreement between himself personally and himself as president of his corporation. The court held that the affidavit was not capable of being readily controverted and was not competent summary judgment evidence.

3. Avoid Conclusory Statements

In *Life Ins. Co. of Virginia v. Gar-Dal, Inc.* 570 S.W.2d 378 (Tex. 1978) the court considered a vague affidavit of respondent - debtor, asserting unspecified offsets and payments. The court held such was insufficient to raise a fact issue. The court quoted with approval from *Smith v. Crockett*