

MAXIMIZING RECEIVABLES - HOW TO GET MORE CASH OUT OF YOUR COLLECTION EFFORTS

MARK P. BLENDE

DAVID W. ROTH

The Blenden Law Firm

P.O. Box 560326

Dallas, TX 75356

888-799-4000

mark@blendenlawfirm.com

david@blendenlawfirm.com

ADVISING BUSINESSES IN A TROUBLED ECONOMY UNIVERSITY OF HOUSTON LAW FOUNDATION

January 15-16, 2009 (Houston)

January 22-23, 2009 (Dallas)

Copyright 2008, all rights
reserved except as to forms.

TABLE OF CONTENTS

I.	SCOPE OF ARTICLE.	1
II.	CREDIT EXTENSION PROCESS.	1
	A. Golden Rule: He Who Has the Gold Makes The Rules.	1
	B. Credit Application.	1
	C. Credit Terms.	2
	1. Disputed Invoices.	2
	2. Accepted Invoices.	2
III.	RESPOND TO DEBTOR STALLS.	2
	A. Common Debtor Responses.	2
	B. The Unresponsive Debtor.	2
	C. The Stalling Debtor.	2
IV.	GET WRITTEN ACKNOWLEDGEMENT OF DEBT.	3
	A. No Confession of Judgment	3
	B. Sample Letter Confirming Balance	3
	C. Verification of Issue	3
	D. Collectors' Distinct Objectives	3
V.	FORWARD ACCOUNT FOR COLLECTION.	4
	A. Forwarding Information.	4
	B. Collection Litigation	
	C. Creditor's Burden of Proof - Suit on Account.	4
	D. Affidavits	4
VI.	LITIGATION PROCESS.	5
VII.	SWORN ACCOUNTS.	6
	A. Broad Rule.	6
	B. Allows Judgment on the Pleadings.	6
	C. Elements.	7
	D. Proof.	7
	1. Business Records Affidavit.	7
	2. Services Affidavit.	7
	3. Discovery With Petition.	7
VIII.	ACCOUNT STATED.	8
	A. Definition of Account Stated.	8
	B. Elements.	8
	C. Pleading.	8
	D. Proof.	9

IX.	MONEY HAD AND RECEIVED.	9
	A. Definitions and Elements.	9
	B. Pleading.	10
X.	GUARANTY.	10
	A. Strict Construction.	10
	B. Elements.	11
	C. Statute of Frauds.	11
	D. Change of Obligor.	11
	E. Agency Signature.	11
	F. Guaranty of Payment Versus Collection.	12
	OTHER SOURCES	13
	APPENDICES	14

APPENDICES

- I. Collection Worksheet
(Aids transition to collection attorney or collection agency)
- II. Sworn Account Suit Affidavit
(Rule 185 Sworn Account)
- III. Creditor’s Affidavit
(Affidavit proving business records, Rule 902(10)(b), T.Rule Evi.; and affirming balance due for possible use with summary judgment motion or default judgment motion)
- IV. Rule 902, Tex. R. Evi.
(Rule as to business records)
- V. Affidavit Concerning Cost and Necessity of Services, §18.001 CPRC
(Proving cost and delivery of services, which may include proof of attorney’s fees)
- VI. Form discovery including interrogatories, requests for admission, document requests, requests for disclosure, may be served with petition.
- VII. Fallacies as to scope and specificity of Rule 185, Sworn Account

I. SCOPE OF ARTICLE.

This article considers the spectrum of the collection process, from extension of credit to judgment on the debt. Tactics, such as responding to debtor stalls and acknowledgement of debt are discussed.

Networking aids are included to assist counsel in locating a creditor's attorney near the debtor. Also considered are methods of efficiently proving creditor's claims. For example, business records affidavit, Appendices III, IV; services affidavit, Appendix V. The article strives to succinctly present practical suggestions to aid in collecting commercial receivables. The article does not deal with consumer debt, which is subject to the federal Fair Debt Collection Practices Act.

This article is intended for Texas attorneys, is not legal advice, and does not create an attorney-client relationship. The reader, if not an attorney, should consult an attorney before acting on any information herein. Suggestions and forms cannot be implemented, in every case. Use the article and forms as a guide, reading the rules and cases. Unless otherwise indicated, references to Rules are to the Texas Rules of Civil Procedure.

II. CREDIT EXTENSION PROCESS.

A. Golden Rule: He Who Has The Gold Makes The Rules.

The golden rule of the creditor-debtor relationship is, "He who has the gold (at that time) makes the rules." (Anonymous). The natural corollary is: "Get all you need, while you have the gold." The creditor is in its best negotiating position, prior to granting credit. Once credit is extended, the debtor "holds the gold" and the creditor is in the position of requesting action from the debtor. Therefore, it is essential that the creditor get all it wants, before extending credit. This may include: an extensive credit application; agreement to credit terms.

B. Credit Application.

Its most important function is to educate the creditor and, if necessary, creditor's attorney, with all essential information regarding the debtor. A common error is for creditors to extend credit to assumed names, with no knowledge of the precise name of the debtor-entity which does business under the assumed name. For example, AB, Inc. may do business as CD Company. Often a credit application is completed in the name of CD Company, and when a lawsuit is about to be filed, it may be difficult to determine the name of the debtor. Though a debtor can be sued in its assumed name, Rule 28, it is important to know specifically to whom creditor extended credit. Creditor should confirm through brief on-line research, or other information, the exact name of the legal entity which is obtaining credit. Alternatively, the name of individual, if debtor is, for example, John Doe doing business as CD Company.

C. Credit Terms.

A credit terms sheet may be attached to the credit application. When the debtor is applying for credit, the creditor can require that the debtor approve the credit terms sheet. Suggested credit terms include:

1. Disputed Invoices. All objections to invoices shall be made in writing to creditor's credit department by fax and mail within 14 days of invoice. Unless such objection is timely made, invoices shall be deemed accepted and payable by the debtor.

2. Accepted Invoices. As to invoices accepted, or to which timely objection is not made as required, it shall be presumed: that the invoice is accurate, that the goods or services referenced on the invoice were ordered by debtor; that the goods or services were received by debtor; that the prices charged are agreed and reasonable prices; that the invoice total is payable to the creditor; that debtor agrees to pay the invoices within 30 days of invoice date.

III. RESPOND TO DEBTOR STALLS.

A. Common Debtor Responses.

Two common responses to demands for payment are:

1. No response, debtor avoids and ignores
2. Debtor requests additional time, sometimes apparently with good reason.

B. The Unresponsive Debtor.

A debtor who ignores demands, communicates his intention – to avoid the debt. Creditor must simply decide to sue or close, generally.

C. The Stalling Debtor.

The stalling debtor may be harder to deal with. Is the debtor acting in good faith? Does he need only to obtain payment from his customers in 21 days? Or, will he then need an additional 14 days? Are you properly protecting the creditor if you grant these additional extensions without action? Probably not. Make the debtor declare. Even if he cannot pay, he can confirm the debt, in writing. At least get him to make a written admission of the debt. If he refuses or delays confirmation of the debt, the creditor should generally take prompt action. The creditor has then saved 21 to 35 days, in this example.

IV. GET WRITTEN ACKNOWLEDGEMENT OF DEBT.

A. No Confession of Judgment

Only after a suit is filed, can the parties sign an agreed judgment. See Rule 314. But, prior to suit, it is important to obtain a written agreement as to the account balance. Generally, a written admission expedites judgment after a lawsuit is filed.

B. Sample letter confirming balance

Re: Debtor, Inc., debt to Creditor, Inc. \$34,212;

Mr. Jones,

Confirming our telephone conversation, you indicated that Debtor, Inc. needs to collect receivables from its customers and expects to fully pay the account by February 1, 2009. We agree there are no offsets, credits or claims against the account and the account balance is \$34,212. Please promptly sign and return via fax to 214-340-1111.

Very truly yours,

Agreed for Debtor, Inc.

Creditor, Inc.

By: _____
(Signature)

Its: _____
(Print name and title)

If the foregoing letter is ignored, try an e-mail to debtor requesting either a signed faxed response, or at least debtor's e-mail confirmation, confirming the balance due. An email admission can often be as effective as a letter.

C. Verification of Issue

If a debtor refuses the admission of debt because of a claimed credit, get debtor's admission, subject to a specific credit. For example, "Debtor, Inc. claims a single credit of \$10,000 for defective material. There are no other issues as to the account. Debtor, Inc. states that it owes Creditor, Inc. \$34,212, subject to the claimed credit of \$10,000."

D. Collectors' Distinct Objectives:

1. Get full or partial payment;
2. Get written admission of the debt;
3. Get written proposal to pay debt.

It is often best to pursue the objectives separately. Avoid getting an admission of the debt with an offer to pay. A court may hold that to be a privileged offer to compromise, Tex. R. Evi. 408. In that event, the written admission would be of no help.

V. FORWARD ACCOUNT FOR COLLECTION.

A. Forwarding Information

Consider use of the Collection Worksheet, Appendix I, to convey important information to a collection attorney or agency:

1. The exact name of the debtor or debtor entity and all contact information. Include credit applications, credit terms, and all signed contracts, if any, between creditor and debtor.
2. Name and contact information for all guarantors, and copy of guaranties.
3. Statement of account showing calculation of principal balance due; and invoices, unless voluminous
4. Results of communication with debtor.

Many collection agencies and collection law firms are members of a national organization, Commercial Law League of America, www.cllalist.org. Members also includes various law lists that publish lists of creditors' lawyers throughout the nation. To locate collection attorneys, also consider www.Martindale.com and www.Lawyers.com, entering city, state and "debtor and creditor."

B. Collection Litigation.

Collection lawsuits are often undisputed. If a written admission of debt is obtained, a dispute is rare. These lawsuits are often concluded by default or summary judgment.

C. Creditor's Burden of Proof - Suit on Account.

If the account is properly prepared, proof of the elements should be easily made through creditor's file. For example:

1. **Name of Debtor:** Credit application, and statement of account, or invoices
2. **Order:** Purchase orders or other business records; also often admitted in response to interrogatories or requests for admission.
3. **Delivery:** Receipts, or written communication between the parties; often admitted in discovery.
4. **Price:** Purchase orders, other business records, written communication between the parties, often admitted in discovery.
5. **Balance Due:** Invoices, statement of account, written communication between the parties; rarely admitted in discovery responses

D. Affidavits

A collection case is generally a documents case. Therefore, creditors' proof is often easily proven through a business records affidavit, see Tex. R. Evi. 902 and Appendix III, IV; services affidavit, CPRC 18.001 and Appendix V.

No proof of a Rule 185 Sworn Account is required unless debtor files a verified denial of account. See VII, Sworn Accounts.

VI. LITIGATION PROCESS.

- 1) Place account with law firm for collection;
- 2) Firm makes demand and reports results to creditor;
- 3) Suit requirements - firm advises client, before or after demand, amount of costs and fixed fee, if any, to sue;
- 4). Firm receives cost/fee advancement and any additional required documents. These generally include the suit affidavit and current statement of account;
- 5) File suit;
- 6) Monitor service of process, submit default judgment if no answer filed;
- 7) If answer filed, evaluate and:
 - a) review discovery responses (discovery generally served with petition);
 - b) file and set summary judgment motion;
 - c) schedule mediation (generally required by court);
 - d) schedule trial;
 - e) take debtor's deposition as to claimed defenses.
- 8) Obtain judgment;
- 9) Post judgment:
 - a) abstract judgment in all counties in which debtor may own realty
 - b) serve asset discovery;
 - c) investigate - attempt to identify bank relationships and debtor's debtors;
 - d) file and serve motion for receivership or obtain writ of execution
 - e) if receiver appointed, monitor receivership and relay all available asset, banking and accounts receivable information to receiver, to encourage levies. (See Turnover/Receivership, CPRC § 31.002)

VII. SWORN ACCOUNTS.

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 Rule 185; *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. These are detailed in Appendix VII. Sworn Account remains creditor's primary cause of action.

C. Elements.

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).

D. Proof.

1. 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)

2. Services Affidavit.

Civil Practice and Remedies Code, §18.001 provides for an affidavit concerning costs and necessity of services. Routinely used by personal injury attorneys, it is rarely employed by commercial litigators. For causes of action commenced before September 1, 2007, if one files and serves the affidavit on the other parties at least 30 days before trial, its contents are incontrovertible, unless a counter-affidavit is timely filed and served. For causes of action commenced on or after September 1, 2007, the filing requirement is omitted. *See* Act of June 15, 2007, 80th Leg., R.S., Ch. 978, CPRC 18.001, and O'CONNOR'S CPRC Plus (2007-2008), pages 99-100. The services affidavit 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 services affidavit cannot be used in sworn account actions.** However, after a verified answer to a sworn account, one could amend, abandon the sworn account action, and proceed to trial on alternate claims.

3. Discovery With Petition.

Standard discovery, including requests for admission, should generally be served with the citation. 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.

VIII. ACCOUNT STATED.

A. Definitions of Account Stated.

An account stated is an agreement between the parties who have had previous transactions of a monetary character that all the items of the account representing such transactions, and the balance struck, are correct, together with a promise, express or implied, for the payment of such balance. *Griffith v. Geffen & Jacobsen, P.C.* 693 S.W.2d 724, 726 (Tex. App.–Dallas 1985, no writ), citing *Eastern Dev. & Inv. Corp. v. City of San Antonio*, 557 S.W.2d 823, 824-25 (Tex. Civ. App.–San Antonio 1977, writ ref’d n.r.e.).

B. Elements.

The elements of an account stated are:

[1]. . . transactions between the parties which give rise to an indebtedness of one to the other; [2] an agreement, express or implied, between the parties fixing the amount due; and [3] a promise, express or implied, by the one to be charged, to pay such indebtedness. *Arnold D. Kamen & Co. v. Young*, 466 S.W.2d 381, 388 (Tex. Civ. App.–Dallas 1971, writ ref’d n.r.e.); *Central Nat. Bank of San Angelo v. Cox* 96 S.W.2d 746 (Tex. Civ. App.–Austin 1936 writ dism’d); citing *Glasco v. Frazer* 225 S.W.2d 633,635 (Tex. App.–Dallas 1949, writ dism’d).

C. Pleading.

Pleading account stated should include an allegation of each element. “To bring an action on an account stated, it would be incumbent on plaintiff to allege in his petition that the defendant admitted the correctness of the account and that he expressly or impliedly assented to it. *Unit Inc. v. 10 Eych-Shaw, Inc.*, 524 S.W.2d 330, 334 (Tex. App.–Dallas writ ref’d n.r.e.)(Allegation that “defendants have failed to pay the total sum of money due as shown by the attached exhibits” was insufficient); citing *Reed v. Harris* 37 Tex. 167, 169)(Tex. 1872).

D. Proof.

Creditor must prove the elements of account stated. A letter from debtor to creditor stated, “In answer to your letter of February 17 regarding our balance as of beginning of 1950, our books show a balance of \$12,532.83, which agrees with your books.” This constituted undisputed evidence establishing account stated, *Dozier v. Jarman* 254 S.W.2d 569, 570 (Tex. Civ. App.–Amarillo 1952 no writ).

In *Magic Carpet Co. v. Pharr*, 508 S.W.2d 696 (Tex. App.–Dallas 1974, no writ), introduction of receipt together with “payment stopped” check, were sufficient as acknowledgment of the amount due considering decision holding that an implied acknowledgment of the amount due is sufficient, citing *Graham v. San Antonio Machine & Supply Corp.*, 418 S.W.2d, 303,312 (Tex. Civ. App.–San Antonio 1967, writ ref’d n.r.e.).

Debtor’s letter admitting debt of \$252.77 did not constitute account stated, when creditor contended over \$700 was due; there was no agreement as to amount due. *H.G. Berning, Inc. v. Waggoner*, 247 S.W.2d 570,571 (Tex. Civ. App.–Beaumont 1952, no writ).

A letter which did not contain a specific amount of the debt was insufficient as account stated in *Paine v. Moore*, 464 S.W.2d 477, 480 (Tex. Civ. App.–Tyler 1971). An account stated requires an absolute acknowledgment or admission of a sum certain by the debtor to the creditor, *Id.*, citing *Dodson v. Watson*, 220 S.W. 771 (Tex. 1920).

Evidence of monthly credit card statements, coupled with debtor’s payment history involving a pattern of minimum monthly payments, was held factually insufficient to support the second element of account stated, “an agreement, express or implied, between the parties fixing an amount due.” *Morrison v. Citibank (S.D.) N.A.*, No. 2-07-130-CV (Tex. App.–Fort Worth February 28, 2008, n.p.h.)(2008 Tex. App. Lexis 1692)(mem. op.).

IX. MONEY HAD AND RECEIVED.

A. Definition and Elements.

Money had and received is an equitable action that may be maintained to prevent unjust enrichment when one person obtains money, which in equity and good conscience belongs to another. *Everett v. TK-Taito, L.L.C.*, 178 S.W.3d 844, 860 (Tex. App.–Fort Worth 2005, no pet.); *Finish Line Pshp. v. Kasmir & Drage, L.L.P.*, No. 05-97-01931-CV (Tex. App.–Dallas November 15, 2000, no pet.)(unpublished, 2000 Tex. App. Lexis 7744), citing *Miller-Rogaska, Inc. v. Bank One, N.A.*, 931 S.W.2d 655, 662 (Tex. App.–Dallas 1996, no writ). Many courts use the term “money had and received” interchangeably with other terms, such as restitution, unjust enrichment, and assumpsit. *Edwards v. Mid-Continent Office Distribs., L.P.*, 252 S.W.3d 833, 837 (Tex. App.–Dallas 2008, pet. filed).

“All plaintiff need show is that defendant holds money which in equity and good conscience belongs to him.” *Staats v. Miller*, 243 S.W.2d 686, 687 (Tex. 1951). The court explains:

A cause of action for money had and received is less restricted and fettered by technical rules and formalities than any other form of action. It aims at the abstract justice of the case, and looks solely to the inquiry whether the defendant holds money which belongs to the plaintiff, citing *United States v. Jefferson Elec. Mfg. Co.*, 291 U.S. 386, 78 L. Ed. 859, 54 Sup. Ct. 443; *Staats*, 243 S.W.2d at 687-688.

See also Leier v. Purnell, No. 2-04-039-CV (Tex. App.–Fort Worth, December 9, 2004, pet. denied) (unpublished, 2004 Tex. App. Lexis 11127). citing 64 Tex. Jur. 3d, Restitution and Constructive Trusts, §6:

An action for money had and received will lie where (1) a person has obtained money from another by fraud, duress or undue advantage; (2) a person has paid money in consideration of an act to be done by another, and the act is not performed, whether the defendant is unwilling or unable to perform; (3) the action is to recover money received on consideration that has failed in whole or in part; or (4) there is a surplus arising on the sale of the security for a debt.

B. Pleading.

An allegation that debtor received money belonging to creditor which should be returned is an allegation of money had and received. *Zwank v. Kemper*, No. 07-01-0400-CV (Tex. App.–Amarillo, August 29, 2002, no pet.)(unpublished, 2002 Tex. App. Lexis 6508). Alleging facts of the transaction sufficiently informed debtor that he was alleged to hold money belonging to creditor. *Staats* 243 S.W.2d 686, 688. In defending against such a claim, a defendant may present any facts and raise any defenses that would deny the claimant's right or show that the claimant should not recover. *Best Buy Co. v. Barrera*, 248 S.W.3d 160, 162 (Tex. 2007)(per curiam), citing *Stonebridge Life Insurance Co. v. Pitts*, 236 S.W.3d 201 (Tex. 2007)(per curiam).

X. GUARANTY.

A. Strict Construction.

The Texas Supreme Court discussed strict construction of guaranties in *McKnight v. Virginia Mirror Co., Inc.*, 463 S.W.2d 428, 430 (Tex. 1971):

It is well settled in Texas that a guarantor may rely and insist upon the terms and conditions of his guarantyship being strictly followed, and if the creditor and principal debtor vary in any material degree the terms of their contract, then a new contract has been formed, upon which the guarantor is not obligated or bound. *Jarecki Mfg. Co. v. Hinds*, 295 S.W. 274 (Tex. Civ. App.–Eastland 1927, writ dism'd.); Tex.Com.App., 6 S.W. 2d 343; *Ryan v. Morton*, 65 Tex. 258. In *Jarecki*, supra, the late Chief Justice Hickman, while a member of the Eastland Court of Civil Appeals, stated the rule as follows:

When one person assumes to answer for the debt, default, or miscarriage of another, whether such assumption constitutes him a surety or a guarantor within the technical meaning of the two terms, his liability upon such undertaking can be fixed and preserved only by a strict compliance with the terms of the guaranty. It has been often said that he is a favorite of the law. His obligation does not extend one jot or tittle beyond what is 'nominated in the bond', citing *Smith v. Montgomery*, 3 Tex. 199 (Tex. 1848).

After the terms of a guaranty agreement have been ascertained, the rule of strictissimi juris applies, meaning that the guarantor is entitled to have his agreement strictly construed and that it may not be extended by construction or implication beyond the precise terms of his contract.

B. Elements.

Elements of a guaranty claim include: 1) the existence and ownership of the guaranty, 2) performance of the underlying contract by the holder, 3) the occurrence of the conditions upon which liability is based, and 4) the failure or refusal to perform the promise by the guarantor. See *Corona v. Pilgrim's Pride Corp.*, 245 S.W.3d 75, 80 (Tex. App.–Texarkana 2008, pet. denied); *Rivero v. Blue Keel Funding, L.L.C.*, 127 S.W.3d 421, 424 (Tex. App.–Dallas 2004, no pet.), citing *Wiman v. Tomaszewicz*, 877 S.W.2d 1,8 (Tex. App.–Dallas 1994, no writ); *Barclay v. Waxahachie Bank and Trust Co.*, 568 S.W.2d 721, 723 (Tex. Civ. App.–Waco 1978, no writ).

C. Statute of Frauds.

A promise to pay the debt of another is unenforceable unless it is in writing and signed by the person to be charged or someone lawfully authorized to sign for him. Tex. Bus. & Com. Code § 26.01.

D. Change of Obligor.

If the obligor changes its name, it is creditor's burden to prove that fact. A guaranty of the debt of Shanbrooke does not guaranty the debt of SEI, unless creditor proves that they are the same entity. *SEI Business Systems Inc. et al v. Bank One Texas*, 803 S.W.2d 838, 841 (Tex. App.–Dallas 1991, no writ).

E. Agency Signature.

An important guaranty case with a creditor's result is *Material Partnerships, Inc. v. Ventura*, 102 S.W.3d 252 (Tex. App.–Houston [14th Dist.] 2003, pet. denied). The letter guaranty stated "I personally, guaranty all outstandings [sic] and liabilities of [obligor]...as well as future shipments". Guarantor signed the guaranty over the designation "Jorge Lopez Ventura, General Manager." Guarantor claimed the signature block made the document ambiguous. The court reversed and rendered judgment against the guarantor,

finding the guaranty unambiguous and enforceable. “The fact that parties provide conflicting interpretations does not create an ambiguity...For an ambiguity to exist, both interpretations must be reasonable.” *Id.* at 258. The court found that the guaranty clearly bound guarantor personally. *See also Smith v. Patrick W.Y. Tam Trust*, 235 S.W.3d 819, 823-824 (Tex. App.–Dallas 2007, pet. granted)(guarantor individually liable though she placed her corporate title after her signature; guaranty named her as guarantor); *Austin Hardwoods v. Vanden Berghe*, 917 S.W.2d 320 (Tex. App.–El Paso 1995, writ denied) (individual guarantor liable, though guaranty signed as vice-president).

F. Guaranty of Payment Versus Collection.

Creditors prefer a guaranty of payment because it provides primary liability against the guarantor.

“Under a guaranty of collection, the guarantor agrees to pay if the debt cannot be collected from the maker by the use of reasonable diligence. *Ford v. Darwin*, 767 S.W.2d 851, 854 (Tex. App.–Dallas 1989, writ denied). In contrast, under a guaranty of payment, guarantor is primarily liable and waives any requirement that the holder of the note take action against the maker as a condition precedent to the guarantor's liability. *Hopkins v. First Nat'l Bank*, 551 S.W.2d 343,345 (Tex. 1977)(per curiam).”

Dirt Arresters, Inc. v. H.C. Rental Properties, Inc., No. 05-98-00030-CV (Tex. App.–Dallas 2000, no writ) (unpublished, 2000 Tex. App. Lexis 968)(judgment against guarantor reversed and rendered; guaranty of collection with no proof of action against obligor). *See Lavender v. Bunch*, 216 S.W.3d 548, 552 (Tex. App.–Texarkana 2007, n.p.h.)(under guaranty of payment, holder properly sued guarantors without joining maker of note). *See also* Tex. Bus. & Com. Code § 3.419 as to guaranty of collection versus guaranty of payment.

OTHER SOURCES

Texas Collections Manual, State Bar of Texas

University of Houston Law Foundation, Collecting Debts and Judgments Seminar (September 2008)

State Bar of Texas, Collections and Creditors' Rights Course (May 2008)

Mark P. Blenden & David W. Roth, *Creditors' Causes of Action*; University of Houston Law Foundation, Collecting Debts and Judgments Seminar (2008); at www.blendenlawfirm.com, Publications

Mark P. Blenden, *Service of Process and Default Judgments; Article and Forms*; State Bar of Texas, Collections and Creditors' Rights Course (2008); at www.blendenlawfirm.com, Publications

O'Connor's Annotated CPRC Plus (2008-2009)

O'Connor's Business Organizations Code Plus (2008-2009)

O'Connor's Texas Civil Forms (2008)

O'Connor's Texas Rules - Civil Trials (2009)

O'Connor's Texas Causes of Action (2009)

www.clla.org Commercial Law League of America (National organization of collection professionals including law list publishers which publish national list of bonded collection attorneys, and collection agencies.)

www.martindale.com (locate collection attorneys -- "Debtor and Creditor" and city, state)

www.lawyers.com (locate collection attorneys -- "Debtor and Creditor" or "Collections" and city, state)

www.statutes.legis.state.tx.us (Texas Constitution and Statutes)

<http://www.supreme.courts.state.tx.us/rules> (Texas Supreme Court - Rules and Standards)

<https://direct.sos.state.tx.us/acct/acct-login.asp> (Texas Secretary of State)

<http://ecpa.cpa.state.tx.us/coa/Index.html> (Texas Comptroller of Public Accounts)

www.dallascad.org (Dallas Central Appraisal District)

APPENDICES

- I. Collection Worksheet
(Aids transition to collection attorney or collection agency)
- II. Sworn Account Suit Affidavit
(Rule 185 Sworn Account)
- III. Creditor's Affidavit
(Affidavit proving business records, Rule 902(10)(b), Tex. R. Evi.; and affirming balance due for possible use with summary judgment motion or default judgment motion)
- IV. Tex. R. Evi. 902,
(Rule as to business records)
- V. Affidavit Concerning Cost and Necessity of Services, §18.001 CPRC
(Proving cost and delivery of services, which may include proof of attorney's fees)
- VI. Form discovery including interrogatories, requests for admission, document requests, requests for disclosure, may be served with petition.
- VII. Fallacies as to scope and specificity of Rule 185, Sworn Account

COLLECTION WORKSHEET

I. DEBT

A) Principal Balance: _____

B) Is debt less than 24 months old?
Yes No

C) Date of last charge: _____
(Optional if statement forwarded)

D) Date of last payment: _____
(Optional if statement forwarded)

E) If debt over 24 months old or previously
forwarded for collection, please explain:

II. DEBTOR

A) Trade Name

(Name invoiced)

B) Exact name of person or entity doing business
in the trade
name: _____

III. DEBTOR'S INFORMATION

A) Contact Person/Title

B) Phone

C) Fax

D) E-Mail

IV. RESPONSE TO PAYMENT DEMANDS

_____ ignores; _____ claims poverty;
_____ admits debt; _____ disputes debt

V. GUARANTORS/OTHERS

A) Other persons/entities, if any, which may also
be indebted:
Guarantors:

B) Others
(Explain) _____

C) Contact information for above

VI. PLEASE FORWARD

- 1) Credit Application and Credit Terms
- 2) Contracts and guaranties, if any
- 3) Current Statement of Account, without interest
- 4) Invoices, unless voluminous

Completion of this form and the forwarding of
requested documents aids the transition to legal
counsel. It enables a prompt lawsuit, if requested.
We will report results of initial demands, and sue
only if authorized.

This debt is assigned for collection, pursuant to
existing fee agreement.

SWORN ACCOUNT SUIT AFFIDAVIT

STATE OF TEXAS)

COUNTY OF DALLAS)

BEFORE ME, the undersigned authority, on this day personally appeared the undersigned affiant, who

swore on oath that the following facts are true:

- 1. My name is: William Smith
- 2. My position is: President
- 3. "Creditor" refers to: All American Company
- 4. "Debtor" refers to: ABC, Inc.
- 5. Debtor is indebted to Creditor in the principal amount of \$25,000 (Debt Amount)
- 6. I am over the age of eighteen years, of sound mind, have never been convicted of a crime, am competent to testify and personally acquainted with the matters stated. I am employed by and authorized to make this affidavit for creditor, have personal knowledge of this account and the matters stated herein are true.
- 7. This claim is, within my personal knowledge just and true. The claim is due creditor by debtor, and all just and lawful offsets, payments, and credits have been allowed.

AFFIANT

SIGNED AND SWORN TO before me on _____, 2008.

NOTARY PUBLIC

L661

APPENDIX II.

(Rule 185 Sworn Account)

CREDITOR'S AFFIDAVIT

STATE OF TEXAS)

COUNTY OF DALLAS)

BEFORE ME, the undersigned authority, on this day personally appeared the undersigned affiant, who swore on oath that the following facts are true:

- 1. My name is: William Smith
- 2. My position is: President
- 3. "Creditor" refers to: All American Company
- 4. "Debtor" refers to: ABC, Inc.
- 5. Debtor is indebted to Creditor in the principal amount of \$25,000 (Debt Amount)
- 6. I am over the age of eighteen years, of sound mind, competent to testify and personally acquainted with the matters stated. I am employed by and authorized to make this affidavit for Creditor, have personal knowledge of this account and the facts stated herein are true.
- 7. I am Creditor's custodian of records. Attached hereto are records from Creditor. The attached records are kept by Creditor in the regular course of business and it was the regular course of business of Creditor for an employee or representative of Creditor, with knowledge of the act, event, condition, or opinion, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached are the original or exact duplicates of the original.
- 8. The attached records are incorporated by reference and are accurate. As stated in the records, Debtor is indebted to Creditor on account. Creditor fully performed in the transaction with Debtor, but Debtor failed to pay as promised. As stated in the attached records, Debtor is indebted to Creditor. The debt to plaintiff represented on the attached records is due; all just and lawful offsets, payments and credits have been allowed. The account balance is the Debt Amount, above stated.

AFFIANT

SIGNED AND SWORN TO before me on _____, 2008.

NOTARY PUBLIC

APPENDIX III.

Affidavit proving business records, Rule 902(10)(b), Tex. R. Evi.; and affirming balance due for possible use with summary judgment motion or default judgment motion. See also CPRC §18.001, Affidavit Concerning Cost and Necessity of Services, Appendix V.

RULE 902. SELF-AUTHENTICATION

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(10) Business Records Accompanied by Affidavit.

(a) Records or photocopies; admissibility; affidavit; filing. Any record or set of records or photographically reproduced copies of such records, which would be admissible under Rule 803(6) or (7) shall be admissible in evidence in any court in this state upon the affidavit of the person who would otherwise provide the prerequisites of Rule 803(6) or (7), that such records attached to such affidavit were in fact so kept as required by Rule 803(6) or (7), provided further, that such record or records along with such affidavit are filed with the clerk of the court for inclusion with the papers in the cause in which the record or records are sought to be used as evidence at least fourteen days prior to the day upon which trial of said cause commences, and provided the other parties to said cause are given prompt notice by the party filing same of the filing of such record or records and affidavit, which notice shall identify the name and employer, if any, of the person making the affidavit and such records shall be made available to the counsel for other parties to the action or litigation for inspection and copying. The expense for copying shall be borne by the party, parties or persons who desire copies and not by the party or parties who file the records and serve notice of said filing, in compliance with this rule. Notice shall be deemed to have been promptly given if it is served in the manner contemplated by Rule of Civil Procedure 21a fourteen days prior to commencement of trial in said cause.

(b) Form of affidavit. A form for the affidavit of such person as shall make such affidavit as is permitted in paragraph (a) above shall be sufficient if it follows this form though this form shall not be exclusive, and an affidavit which substantially complies with the provisions of this rule shall suffice, to-wit:

AFFIDAVIT

Before me, the undersigned authority, personally appeared _____, who, being by me duly sworn, deposed as follows:

My name is _____, I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am the custodian of the records of _____. Attached hereto are _____ pages of records from _____. These said _____ pages of records are kept by _____ in the regular course of business, and it was the regular course of business of _____ for an employee or representative of _____, with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original.

(jurat form omitted)

APPENDIX IV.

(Rule as to business records, Tex. R. Evi. 902)

CPRC § 18.001. AFFIDAVIT CONCERNING COST AND NECESSITY OF SERVICES.

- (a) This section applies to civil actions only, but not to an action on a sworn account.
- (b) Unless a controverting affidavit is filed as provided by this section, an affidavit that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable or that the service was necessary.
- (c) The affidavit must:
- (1) be taken before an officer with authority to administer oaths;
 - (2) be made by:
 - (A) the person who provided the service; or
 - (B) the person in charge of records showing the service provided and charge made; and
 - (3) include an itemized statement of the service and charge.
- (d) The party offering the affidavit in evidence or the party's attorney must serve a copy of the affidavit on each other party to the case at least 30 days before the day on which evidence is first presented at the trial of the case.
- (e) A party intending to controvert a claim reflected by the affidavit must serve a copy of the counteraffidavit on each other party or the party's attorney of record:
- (1) not later than:
 - (A) 30 days after the day the party receives a copy of the affidavit; and
 - (B) at least 14 days before the day on which evidence is first presented at at trial of the case; or
 - (2) with leave of the court, at any time before the commencement of evidence at trial.
- (f) The counteraffidavit must give reasonable notice of the basis on which the party serving it intends at trial to controvert the claim reflected by the initial affidavit and must be taken before a person authorized to administer oaths. The counteraffidavit must be made by a person who is qualified, by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 167, § 3.04(a), eff. Sept. 1, 1987; Civil Practice and Remedies Code. Amended by: Acts 2007, 80th Leg., R.S., Ch. 978, § 1, eff. September 1, 2007.

[Use to prove cost and delivery of services at trial or with summary judgment motion to prove attorney's fees; do not use as to sworn account action, see paragraph (a). Beware if served on you, as it may be issue preclusive]

APPENDIX V.

(Proving cost and delivery of services, which may include proof of attorney's fees; but don't use to prove sworn account, see paragraph (a))

January 5, 2009

TO: ABC, INC. defendant

All American Company vs. ABC, Inc.
Dallas County Court at Law Number 1
Cause Number: CC-09-0000-A
Our File: 12345

RE: PLAINTIFF'S ACCOUNT INTERROGATORIES; REQUESTS FOR
ADMISSION; DOCUMENT REQUESTS; and REQUESTS FOR DISCLOSURE

Plaintiff serves the attached discovery on defendant.

DEFINITIONS: For clarity, "plaintiff" means ALL AMERICAN COMPANY and "defendant" means ABC, Inc. and includes all of defendant's agents and employees. "Goods", "goods or services", "debt", "invoices", and "account" refer to goods or services and the resulting debt in the amount of \$25,000 sued upon herein. "Petition" refers to Plaintiff's Original Petition filed in this cause. "Identify" as to a person means to state the person's name, address, telephone number, employer and position. "Identify" as to a document means to describe the document, and identify its author, recipient, and custodian.

"Documents" include records, correspondence, memoranda, photographs, film, recordings and data compilation in any form. Where defendant possesses more than one copy of an item, production of all copies are requested unless all copies are, in all respects, identical.

SERVICE CERTIFICATE AND SIGNATURE

The attached Interrogatories, Requests for Admission, Document Requests, and Requests for Disclosure are served on defendant. All discovery accompanied the citation and petition at the time of service upon defendant.

THE BLENDEN LAW FIRM
Plaintiff's Attorney



By: _____

MARK P. BLENDEN
State Bar No. 02486300
ATTORNEY FOR PLAINTIFF

APPENDIX VI.

(Form discovery including interrogatories, requests for admission, document requests, requests for disclosure; may be served with petition. These admissions, as deemed, discussed and supported default judgment in Continental Carbon Co. v. Sea-Land Serv., Inc. 27 S.W.3d 184, 190 (Tex. App.-Dallas 2000, pet. denied)

References to rules are to the Texas Rules of Civil Procedure. Responses must be supplemented pursuant to Rule 193.5.

INTERROGATORIES: Pursuant to Rule 197, plaintiff requests answers to the attached interrogatories. The responding party must serve a written response on the requesting party within 30 days after service of the interrogatories, except that a defendant served with interrogatories before the defendant's answer is due need not respond until 50 days after service of the interrogatories.

REQUESTS FOR ADMISSION: Pursuant to Rule 198, plaintiff requests that you make the following admissions for the purpose of this action only. The responding party must serve a written response on the requesting party within 30 days after service of the request, except that a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request. If a response is not timely served, the request is considered admitted without the necessity of a court order.

REQUEST FOR PRODUCTION: Pursuant to Rule 196, plaintiff requests that the defendant produce the requested documents; or copies pursuant to Rule 196.3(b). Plaintiff agrees to pay reasonable copying costs, to \$50. The requested documents, or true copies thereof, should be provided to the undersigned by 2:00 p.m. on the next weekday following the expiration of 31 days after service of the request, except that if the request accompanies citation a defendant need not respond until 50 days after service of the request upon the defendant. Production shall be at The Blenden Law Firm, 2217 Harwood Road, Bedford, Texas 76021-3607. Because plaintiff will accept copies and agrees to pay reasonable copying costs up to \$50, plaintiff objects to the tender of documents at an alternate location. Unless otherwise specified the requested documents are for the period January 1, 1996 to the present date.

REQUESTS FOR DISCLOSURE: Pursuant to Rule 194, you are requested to disclose, within 30 days of service of this request, the information and material described in Rule 194.2: **a)** the correct names of the parties to the lawsuit; **b)** the name, address, and telephone number of any potential parties; **c)** the legal theories and, in general, the factual bases of the responding party's claims or defenses; **d)** the amount and any method of calculating economic damages; **e)** the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case; **f)** all expert information described in Rule 194.2(f) including but not limited to 1) the expert's name, address, and telephone number; 2) the subject matter on which the expert will testify; 3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them; ("g" and "h" intentionally omitted) **i)** any written statements described in Rule 192.3(h)("j" and "k" intentionally omitted); **l)** the name, address, and telephone number of any person who may be designated as a responsible third party. Please respond and produce documents to The Blenden Law Firm, 2217 Harwood Road, Bedford, Texas 76021, within 30 days of service of this request. A defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request. There are no attachments pertaining to these Requests for Disclosure.

PLAINTIFF'S ACCOUNT INTERROGATORIES

NOTE: Please read cover letter before proceeding.

1. State the amount, if any, which defendant owes plaintiff and the calculation used to determine the amount.
2. State specifically all goods and services which defendant ordered from plaintiff.
3. Did defendant receive the goods or services? If your answer is other than an unqualified "yes", state what was received, and specifically how the goods or services received differed from those ordered.
4. Did defendant agree to the prices charged; were these prices reasonable?
5. State specifically every reason why the defendant does not owe the debt.
6. State the legal theories and describe in general the factual basis for all asserted defenses.
7. Identify all documents that support defendant's contention that the debt is not owed.
8. Identify all business records which relate to plaintiff, including defendant's accounts payable records. Include the balance due plaintiff as indicated by your accounts payable records.
9. Explain fully defendant's knowledge of the goods or services and the accounts.
10. Describe the business transactions between plaintiff and defendant, including date of first and last transaction; total dollar amount of the transactions, and general explanation of the transactions.
11. State the approximate date of every demand for payment from plaintiff or plaintiff's representatives. (Including invoices, statements, letters.)
12. Did defendant notify plaintiff of any reason why defendant should not pay the debt? If so, fully describe all such communication, including the date, place, content and parties thereto.
13. If another is or may be liable on this account, identify the individual or entity, and state all facts supporting their liability.
14. Does defendant still have the goods? If not, explain all transfers or sales of the goods by defendant, including approximate date, names, and addresses of recipients, and consideration received.
15. If defendant claims the goods or services were defective, fully describe all facts supporting said contention, and the specific items suffering from said defect.
16. State the amount and specific facts for every alleged credit, offset or claim against plaintiff.
17. State defendant's full name, together with all variations, assumed names, and trade names.
18. State defendant's driver's license number and state of issuance; social security number and defendant's name as it appears on each. If defendant is a corporation, instead state date and state of incorporation, and charter number.
19. Identify all persons who either answered or provided information used in responding to these interrogatories.
20. Identify any person who is expected to be called to testify at trial. See rule 192.3(d).

PLAINTIFF'S ACCOUNT REQUESTS FOR ADMISSION

Answer:

- _____ 1. The account is just and true.
- _____ 2. Payment of the debt is due from defendant to plaintiff.
- _____ 3. The account states the balance due plaintiff after all offsets, payments, claims and credits have been allowed.
- _____ 4. On the dates shown in the account, defendant purchased the items or services.
- _____ 5. On or about the dates shown on the account, defendant received the items billed.
- _____ 6. All prices charged by plaintiff were agreed to by defendant.
- _____ 7. All prices charged defendant are reasonable.
- _____ 8. Defendant promised to pay plaintiff for the account.
- _____ 9. Defendant failed to pay the account.
- _____ 10. Plaintiff made written demand upon defendant for payment of the account more than 30 days prior to filing suit.
- _____ 11. Defendant timely received monthly account invoices.
- _____ 12. Defendant received accurate account invoices which total the principal amount sued for.
- _____ 13. Defendant made no objection or complaint after receiving the account invoices.
- _____ 14. Defendant did not reply to written demands for payment of the account.
- _____ 15. Defendant never rejected or made complaint regarding the goods or services.
- _____ 16. Plaintiff has fully performed, to defendant's satisfaction, in all transactions between plaintiff and defendant.
- _____ 17. The petition is entirely accurate and plaintiff is entitled to the requested relief.
- _____ 18. Plaintiff should recover judgment as requested in the petition.
- _____ 19. There are no documents which support any defense in this cause.
- _____ 20. All documents attached to the petition are true copies of the original.
- _____ 21. All signatures on attachments to the petition are genuine.
- _____ 22. Matters stated in the documents attached to the petition are accurate.
- _____ 23. Defendant has no offset, credit or claim against plaintiff.
- _____ 24. The court should render judgment against defendant for the relief requested in plaintiff's most recently filed petition.
- _____ 25. Venue is proper in this court.
- _____ 26. Defendant was properly served with the petition and Plaintiff's Requests For Admission on the date indicated in the return of citation.
- _____ 27. Defendant consents to this court's jurisdiction.
- _____ 28. The court has jurisdiction over defendant and the subject matter of this suit.

DOCUMENT REQUEST

1. All invoices and statements of account received by defendant from plaintiff.
2. Defendant's accounts payable records relating to defendant's account with plaintiff.
3. Defendant's books and records as they relate to plaintiff.
4. Letters and faxes received by defendant, requesting payment of the debt.
5. Defendant's letters and faxes responding to requests for payment.
6. All correspondence relating to the transaction referenced in plaintiff's petition.
7. All communication between defendant and any other party to this suit.
8. All memoranda of any telephone conversation relating directly or indirectly to the matters alleged in plaintiff's petition or any defense thereto.
9. All documents upon which defendant relies in denying any matters alleged in plaintiff's petition.
10. All reports of experts which may be called to testify in this cause.
11. All assumed name certificates filed by defendant during the preceding ten years.
12. All documents requesting or constituting a name change of the defendant or any other defendant in this action.
13. All balance sheets and income statements submitted to any creditor or prospective creditor within one year of commencement of this account.
14. All credit applications submitted to any creditor or prospective creditor within one year of commencement of this account.
15. All applications for any license, permit, or certificate together with all licenses, permits or certificates held, or owned by defendant, or any agent thereof.

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

1. Fallacy One: That Sale of Personal Property is Required.

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, n.p.h. (2008 Tex. App. Lexis 931)(credit card debt not basis of sworn account because no title to personal property transferred, citing *Meaders*, supra); *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 dissent 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).

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).

APPENDIX VII.

(Fallacies, Scope of Rule 185)

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

b. Oil and Gas

Vance v. Holloway, 689 S.W.2d 403 (Tex. 1985)(sworn account suit to recover expenses on oil lease); *Harmes v. Arklatex Corp.*, 615 S.W.2d 177 (Tex.1981)(debtor liable in suit on sworn account to recover for goods and services in drilling gas well);

c. Insurance Premiums

Liberty Mut. Ins. Co. v. Garrison Contrs. 966 S.W.2d 482 (Tex.1998); *Rizk v. Financial Guardian Ins. Agency, Inc.*, 584 S.W.2d 860 (Tex. 1979); *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. 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).

e. 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).

f. Pharmaceuticals

Powells v. Nova Factor, Inc., No. 14-05-00912-CV (Tex. App.–Houston [14th Dist.], March 27, 2007, n.p.h.)(2007 Tex. App. Lexis 2331)(mem. op.)(pharmaceuticals sold to physician).

g. 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).

h. 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.).

i. 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, n.p.h.)(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).

j. 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, n.p.h.)(2008 Tex. App. Lexis 5018)(mem. op.)(Rule 185 does not apply to a suit to recover credit card debt); *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, n.p.h.) (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. dismissed by agreement) (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); *Powers v. Adams*, 2 S.W.3d 496, 499 (Tex. App.–Houston [14th Dist.] 1999, no pet.) (creditor’s petition “complied with the requirements of the rule [185],” as it included itemized monthly statements of legal services rendered).

APPENDIX I.

(Aids transition to collection attorney or collection agency)