

Notes on Unifund's Motion for Summary Judgment (Cleveland)

This is a perfectly typical example of a motion for summary judgment by a debt collector: heavy on generic statements and bluff, extremely light on crucial detail and evidence.

It is not clear until an examination of Exhibit B of the Motion that this debt has been (if at all) transferred several times from debt collector to debt collector. I say it has been transferred “if at all” because each bill of sale refers to an attached exhibit of accounts, but that Exhibit is either not attached, not labeled, or is incorrectly labeled (it isn't clear from the original). And several bills of sale relate to the same Exhibit. It is unclear whether they actually relate to the same page – or whether each bill of sale includes its own list of accounts called “Exhibit 1”

In any event, with so many debt collectors involved, the total lack of evidence of what happened from the time the original creditor owned the debt and transferred it the first time, to the time the second to last debt collector transferred the debt to Unifund is very striking. It is the debt collector's legal obligation to prove the debt, and that includes the fact that the debt was initially incurred *as well as that it was never paid*. Because there is no evidence of payment (or lack of payment), it has completely failed in this task.

It also has completely failed in its duty to prove that the debt was incurred in the first place. The affiant, some anonymous guy with Unifund, does not testify to any knowledge of how the debt was originally incurred, how the records were kept by either the original creditor or any debt collector. Look carefully at your rules of civil procedure for motions for summary judgment – they usually say that an affiant must show the basis for knowledge of the facts to which he is testifying. This fails to do that completely. Indeed, the affiant did not even think to attempt to authenticate the records.

Notice how the motion (by the lawyer) assumes all the crucial facts have been proved “by admission or operation of law.” There was no admission made at all, and operation of law does not establish any of the facts claimed by the debt collector.

Even Unifund's ownership of the debt is not proven, given the maze of assignments without any real reference to account numbers.

Unifund brings its action as a breach of contract – but does not attach a contract or provide its terms, much less prove that defendant signed it.

It brings a claim for “unjust enrichment” without any real proof that defendant did anything, got anything, accepted anything, or failed to pay anything.

It brings a claim for account stated without proving defendant was on the account or accepted it, used or derived any benefit from it, or agreed to the amount supposedly “stated” in any way.

And, again, Unifund has not really established its right to sue for the debt.

Any sort of denial: “I deny ever owing plaintiff anything at all or ever owing Citibank the amount of X” (if you can truthfully swear to it) would strongly support the response to the motion for summary judgment. A case where you actually deny the debt is much stronger even though this motion should be denied even without that.